



2020

Anti-Affirmative Action and Historical Whitewashing: To Never Apologize While Committing New Racial Sins

Hoang V. Tran
Florida Atlantic University, tranh@fau.edu

Follow this and additional works at: <https://cedar.wvu.edu/jec>



Part of the [Curriculum and Social Inquiry Commons](#), and the [Social and Philosophical Foundations of Education Commons](#)

Recommended Citation

Tran, Hoang V. (2020) "Anti-Affirmative Action and Historical Whitewashing: To Never Apologize While Committing New Racial Sins," *Journal of Educational Controversy*. Vol. 14 : No. 1 , Article 7.
Available at: <https://cedar.wvu.edu/jec/vol14/iss1/7>

This Article in Response to Controversy is brought to you for free and open access by the Peer-reviewed Journals at Western CEDAR. It has been accepted for inclusion in Journal of Educational Controversy by an authorized editor of Western CEDAR. For more information, please contact westerncedar@wvu.edu.

Anti-Affirmative Action and Historical Whitewashing: To Never Apologize While Committing New Racial Sins

INTRODUCTION

The current special issue, *The Ethics of Memory*, poses a compelling question in the by-line. The editors ask, What does it mean to apologize for historical wrongs? Perhaps this important topic was spurred forward by the University of North Carolina Chapel Hill chancellor Carol Folt when she offered an apology for the history of slavery at Chapel Hill (Fortin, 2018) – this coming after the toppling of the Confederate monument Silent Sam on the University campus (Patel, 2018). UNC Chapel Hill’s apology follows other significant acknowledgments from other important social institutions of its complicity and culpability in past forms of racism and injustice. From Georgetown University’s acknowledging its Catholic founders sold slaves to save the university (Pengelly, 2019), to President Obama’s signing the Native American Apology Resolution (Capriccioso, 2010), or to the US government’s officially apologizing and compensating Japanese American survivors of internment (Qureshi, 2013), these public moments of contriteness are important steps toward acknowledging and possibly healing historical wrongs. However, the focus on the sentimentality and meaning of apologies to historical wrongs establishes the precondition for consideration that an apology, public or otherwise, has been offered. This presents a particularly difficult ethical problem of historical memory. Are we precluded from critiquing, engaging, and revisiting historical wrongs when no apology has been offered? If so, we may be in danger of perpetuating a contemporaneous wrong as a product of our assumptive framework.

This essay seeks to expand the scope of thinking around reconciliation for historical wrongs, as opposed to questioning the underlying ethics of reconciliation or redemptive gestures and policies. Ethical concerns regarding institutional maneuvers of reconciliation commonly revolve around questions of right or wrong, and necessary or unnecessary (Nelson, 2018). In addition, there are important debates regarding whether or not apologies must be accompanied by substantive measures to address the contemporary effects of historical wrongs (Swarns, 2019). Furthermore, when apologies take the form of concrete measures or policies, the political process is intrinsically contentious with oppositional forces arguing against any form of institutional redress if the harm occurred generations before (e.g., slavery and reparations; see Kane, 2003; Coates, 2014). Although these engagements are important and timely, expanding the scope of thinking on reconciliation seeks to identify areas of historical wrongs that may have either escaped our collective consciousness, proved too difficult to conveniently fix, or have been altogether ignored in favor of other clear targets, such as slavery or toppling confederate monuments.

The reconsideration of affirmative action by the Supreme Court has once again revealed an uncomfortable historical wrong that has not only never been reconciled in the form of any apology but has also been continually ignored, only to be callously accepted into our social consciousness (see Bolotnikova, 2019). The continuing historical wrong is the problem of

educational inequality and the perpetuity of racial segregation (Orfield & Frankenberg, 2014). Previously, the public narrative on education and affirmative action centered on relatable White students who were supposedly victims of reverse racism, somehow unable to achieve their educational goals due to the unfairness of affirmative action programs – from quotas to point systems to race-positive holistic admissions (see *Regents of University of California v. Bakke*, 1978; *Gratz v. Bollinger*, 2003; *Fisher v. Univ. of Texas*, 2016). With the Harvard Asian American Anti-Affirmative action case, the public narrative has shifted away from Whites as the so-called victims of affirmative action to now constituting an intra-minority issue pitting those deemed more deserving students of color against those deemed less deserving students of color. However, the anti-affirmative action public narrative, then and now, has never remotely objected to affirmative action because it was the wrong approach to address structural racism, but that affirmative action policies *are* forms of racism against Whites and now against some Asian Americans. Then and now, the racial elephant in the room continues to be ignored. That is, the mechanics of affirmative action policies and practices can be considered only after a critical conversation of whether or not structural racism exists in education. Without a careful engagement of this fundamental question, contemporary affirmative action debates, as represented by the Supreme Court’s reengagement, precludes the possibility of any meaningful apology for previous manifestations of structural racism in education and commits new forms of educational sins. If the current trajectory of the anti-affirmative action discourse is of any indication, we are simultaneously erasing important histories of wrongdoing without critical reflection while acquiescing to a contemporary reality of new racial harms in education.

AFFIRMATIVE ACTION – WITHOUT RACISM

The first affirmative action case in education before the Supreme Court was decided in 1978, when Alan Bakke was denied admissions to the University of California Davis medical school. To justify the use of the school’s affirmative action quota system, where 16 out of 100 seats were reserved for minority admits, the University provided four reasons (*Regents of University of California v. Bakke*, 1978; Tran, 2017):

1. Reducing the historical deficit of traditionally disfavored minorities in medical school
2. Countering the effects of societal discrimination
3. Increasing the number of doctors to underserved communities
4. Diversity in the classroom

The decision was seen as a compromise brokered by Justice Louis Powell between the Court’s liberals and conservatives. First, Powell sided with the conservatives in establishing the constitutional precedent that all affirmative action policies would be reviewed under the Court’s highest standard of review, the standard of *strict scrutiny*. Secondly, Powell also agreed with the conservatives in rejecting the first three justifications for affirmative action in education. The only position where Powell agreed with the liberals was accepting *diversity* in the classroom as a compelling interest to satisfy the Court’s strict scrutiny standard of review. In effect, Powell saved the constitutionality of affirmative action in education by establishing a legal and policy apparatus devoid of direct consideration toward racism and inequality. Of the

four justifications provided by the University, the first three are fundamentally tied to issues of racism and social inequality. Diversity in the classroom is not only different in degree but also in kind, completely unrelated to racism and its social manifestations. Bonilla-Silva's (2003) observation on racism in the colorblind era is appropriate here as the *Bakke* decision affirms the need for affirmative action while denying the existence of racism and inequality, which is peculiar indeed.

The *Bakke* decision should have come as no surprise. Powell also formed the majority in two previous educational decisions less than five years before *Bakke* that continue to impact educational racism and inequality far greater than any impact affirmative action could have done to alleviate it. The two decisions hinged on the constitutionality of inter-district racial segregation (*Milliken v. Bradley*, 1974) and disparate inter-district school funding (*San Antonio Independent School District v. Rodriguez*, 1973). In both decisions, Powell formed a narrow 5-4 conservative majority that decided no equal protection violation existed in terms of racial segregation or school funding so long as the disparity happens across district lines. Less than 20 years after *Brown v. Board of Education of Topeka* (1954), *Milliken* and *Bradley* effectively rendered *Brown* a toothless relic of history and provided constitutional protection to emerging colorblind forms of racism through white flight and residential segregation, what Chief Justice Roberts would later call *benign choice* (see *Parents Involved in Community School v. Seattle School District No. 1*, 2007). As a result, within the span of five years, the Supreme Court's conservative majority decided that any amount of racial segregation or unequal school funding was constitutional under the Constitution's Equal Protection Clause (U.S. Const.), so long as arbitrary district lines separated the disparity. In addition, if any institution of higher education endeavored to minimally alleviate the racial and economic vestiges constitutionalized by *Milliken* and *Bradley* through affirmative action, it could do so only under a nebulous diversity discourse because any considerations of racism, discrimination, and inequality were soundly rejected.

Milliken, *San Antonio*, and *Bakke* should collectively serve as the cornerstones of our affirmative action historical memory. As I noted at the beginning of this section, *Bakke* is popularly remembered as the first affirmative action case in education decided by the Supreme Court. However, its fate was predetermined by two previous cases not specifically about affirmative action, but which nevertheless address the core material conditions that necessitate affirmative action in education: racial segregation and unequal funding. All three cases represent a chronology that, first and foremost, rejected the persistence of racism in education before the Court gave the slightest consideration toward the need for corrective affirmative actions. Even then, corrective actions were determined justifiable only to address an educational diversity interest that was at best, tangentially related, and at worst, far removed from the effects of racism in education. The progeny of affirmative action cases since *Bakke* has never fundamentally addressed this epistemological break between the problem of structural racism in education and the necessity for affirmative action (see *Grutter v. Bollinger*, 2003; *Gratz v. Bollinger*, 2003; *Fisher v. Univ. of Texas*, 2016). Because Powell's opinion in *Bakke* effectively supplanted discussions and impacts of racism with diversity in education, all affirmative action discussions since have largely failed to address the fact of racism and

inequality. As a result, affirmative action without a critical uptake of racism has significant consequences and ethnical problems for our collective memory.

AFFIRMATIVE ACTION – REVERSE RACISM

It is clear that anti-affirmative action campaigners genuinely believe that race-conscious admissions programs discriminate against Whites and high achieving Asian Americans (in terms of metrics such as GPA and SAT). The most recent anti-affirmative action case involving a White petitioner was Abigail Fisher, who challenged the University of Texas at Austin's race-positive holistic admissions plan. In a widely circulated video produced by her legal defense team, she emanated ideals of colorblind meritocracy, not unlike Dr. King's famous "I have a dream speech." Fisher argued:

There were people in my class with lower grades who weren't in all the activities I was in, who were being accepted into UT, and the only other difference between us was the color of our skin. I was taught from the time I was a little girl that any kind of discrimination was wrong. And for an institution of higher learning to act this way makes no sense to me. What kind of example does it set for others? (Hannah-Jones, 2013).

Whether one agrees with Fisher's characterization of her admissions disappointment, her words genuinely convey a perception of racial discrimination perpetrated by the University's affirmative action program. An analysis of her discourse suggests her concern not just against the minutia of the University's complex admissions program, but that the very existence of racial consideration, no matter how minimal, amounts to racism, *par excellence*. Although the anti-affirmative action complaint against Harvard has shifted the alleged victims of racial discrimination from Whites to Asian Americans, the discursive rhetoric of alleged harm has remained the same. An influential Asian American political campaign prominently advocating against Harvard is the 80-20 political action committee (PAC). The 80-20 PAC boasts a substantial email and fundraising reach, with many members from the elite and professional classes of American society. In fundraising communications seeking support for the case against Harvard, the message is clear that the group, and by extension its members, believe Harvard's race-positive admissions program discriminates against Asian Americans. Similar to Fisher's argument emanating ideals of meritocracy and competition, 80-20's numerous messages also reject any consideration of the degree to which Harvard may utilize racial considerations. For instance, the following message from 80-20 captures the totality of its anti-affirmative action discourse.

America operates on a free market system. Though competition exists everywhere – selling products, getting elected, and gaining admissions to elite schools and colleges (80-20 Educational Foundation, 2018).

Together, 80-20's message and Fisher's words convey an anti-affirmative action ethos that firmly believes the modest use of racial considerations in college admissions amounts to an

invidious form of racial discrimination. Anti-affirmative action campaigners equate the singular use of race in the complex college admissions process to previous historical examples of racial debasement, such as White only bathrooms and *de jure* segregated schools in Jim Crow America. This racial ethos has significant support on the Supreme Court. Conservative Justice Clarence Thomas, often joined by other conservatives in dissenting or concurring opinions on affirmative action cases, firmly believes that he sees no difference between the two legally or morally. For instance, as Justice Thomas has written:

I believe that there is a moral and constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. *Government cannot make us equal*; it can only recognize, respect, and protect us as equal before the law (Thomas concurring opinion, *Adarand Constructors, Inc. v. Peña*, 1995, pg. 1).

The epistemological break from the early educational inequality cases has thus been glossed over with an anti-affirmative action vengeance. Remember that with *Milliken v. Bradley*, *San Antonio v. Rodriguez*, and *Regents of the University of California v. Bakke*, the conservatives soundly rejected any consideration of structural racism and accepted diversity only as a nebulous justification for continuing affirmative action programs. In the current iterations of anti-affirmative action cases, conservative justices and anti-affirmative action advocates assert racism *a priori* without ever having to empirically prove that they suffered significant harm based on race-positive admissions. In fact, Liu (2002a; 2002b) has mathematically proved that the percentage difference in admissions for Alan Bakke with or without the medical school's affirmative action quota was statistically minuscule, the reason being that Bakke focused his rejections ire on the wrong group, i.e., the 16 set-a-side slots for minority admits. Even with the 16 minority slots, there were still 84 admissions slots available to Bakke. Liu (2002a) statistically observed that what prevented Bakke from getting one of the 86 slots was the overwhelming number of *White* applicants in the entire admissions pool. Therefore, even if the medical school did not use an affirmative action program, Bakke's admissions chances for 84 seats compared to 100 seats was statistically small due to the large applicant pool.

Like Bakke, Fisher's reverse racism claim was also statistically dubious. As quoted above in a widely circulated video produced by her legal team, she claimed her rejection was a result of being White because she claimed she knew of others with lesser metrics (again, GPA and SAT) who were admitted only because of their minority status. Regardless of whether or not Fisher actually knew of students to support her bombastic reverse-racism claim, the University's admissions data for the application cycle offered damning contrary evidence. Compared to Fisher, 42 White students with worse GPA and SAT scores were admitted, and 147 minority students with better GPA and SAT scores were rejected (Hannah-Jones, 2013). Perhaps in an alternate universe where facts mattered, Bakke and Fisher's claims of racism would have been summarily dismissed for lack of standing, mootness, or just plain idiocy. However, in our contemporary anti-affirmative-action legal and political discourse, not only are the doors of equal protection conducive to arguments of reverse-racism, but they also appear to be more receptive to the Harvard case thanks in large part to a more conservative court.

Consider for a moment the significance of 147 students of color with better SAT and GPA scores who were similarly denied admissions. Under the current legal trajectory on affirmative action, rejected students of color, either at the University of Texas or any other institution in the United States, would be unable to bring any constitutional case protesting their denial of admissions on grounds of *de facto* segregation or inequitable tax funding. This is because the consideration of race in admissions is determined *a priori* beneficial to students of color. These legal parameters demand that when students of color are denied admissions, the denial is non-racial (i.e., merit-related). On the other hand, the same legal parameters allow Whites to believe that admissions rejections are completely and only racial (i.e., unrelated to merit). The critical importance of who is able to access the doors of equal protection cannot be understated. It is widely documented that students of color disproportionately attend segregated and under-resourced schools (Kozol, 2005). The formation of these poor and urban schools is entirely the result of racialized governmental policies and decisions. As mentioned above, the *Milliken* (1974) decision constitutionalized the permissibility of *de facto* segregation across district lines, and *Rodriguez* (1973) did nothing to end inter-district resource inequality. It comes as little surprise that these educational decisions have constructed a continuing Civil Rights era of apartheid schooling in every meaningful educational metric from facilities to teaching to curriculum (Kozol, 1991; Delpit, 2006; Locke & Getachew, 2019). On the other hand, White and Asian American¹ students increasingly attend privileged suburban and specialized schools, thereby further exacerbating the spiraling re-segregation of American public schools. This gross disparity in educational access and experience is only exponentially compounded by a powerful legal regime that further rewards the privileges of Whites and Asian Americans while further subordinating Blacks and other students of color. In other words, reverse-racism narratives are instantiations of white supremacy, *par excellence*.

Our current discourse on affirmative action, coupled with the trope of reverse-racism, has significant historical and contemporary consequences that reach far beyond the modest impact of affirmative action in college admissions (see Bell, 2003). In the next section, I discuss in detail at least three unintended consequences (or perhaps intended under a colorblind guise) that the contemporary discourse on affirmative action has on our collective historical memory on race and inequality. That is, anti-affirmative action explicitly rejects the need for corrective educational policies, thereby implicitly denying the persistence of structural and institutional inequality. Additionally, contemporary anti-affirmative-action legal claims center completely

¹ The ongoing Harvard case brought by Edward Blum representing a consortium of Asian American students is unique in that it does not centrally challenge the constitutionality of affirmative action via race-positive considerations. Rather, the challenge alleges that Harvard is instituting a *de facto* quota against Asian Americans by maintaining a relatively unchanged percentage of admitted students of Asian descent. The group argues that the admitted percentage of Asian students has remained unchanged despite a significant increase in the number of qualified Asian applicants. However, the group narrows its definition of *qualified* to measurable metrics, such as GPA and SAT scores, rather than other expansive evaluative metrics, such as leadership experiences or extracurricular participation.

around students who are aggrieved due to admissions rejections, thereby elevating admissions grievances to the level of past structural and institutional harms. The collective impact of these two consequences essentially precludes contemporary educational problems such as persistent resource inequality and racial segregation from being considered, at least from a legal standpoint, as socially significant.

(UN)INTENDED CONSEQUENCES

First, the current anti-affirmative-action posture against racial considerations in college admissions implicitly denies our historical sins of structural and institutional racism. Here the denial is not a complete historical erasure, but a slow push toward irrelevance to the margins of our contemporary consciousness. A complete erasure would be too sloppy and publicly unsustainable. In bits and pieces, our public consciousness still celebrates Martin Luther King, Jr., Day and yearly Black History Month commemorations that often prominently feature triumphant stories in the face of white supremacy. However, these yearly remembrances of past racial sins are rarely accompanied by a critical engagement of the ways in which contemporary racial problems are direct social consequences of past racial violence. The connective synapses in our historical consciousness have been systematically severed, rendering our public memory unable to connect the dots. While we still have MLK Day and Black History Month, these celebratory events retain more significance as mainstays on our yearly calendar, rather than mainstay opportunities to atone for our racial sins. If the history of modest affirmative-action policies in public policy represents our collective process of atonement, we have been ambivalent at best or have entirely claimed innocence at worst.

The sorry history of affirmative-action policies portrays either the characteristics of ambivalent action or a complete denial of any racial culpability. Although affirmative action in college admissions is still constitutional, its legality hangs by a thread – especially against a more antagonistic conservative Court in the Trump era. What has been historically clear is that affirmative-action practices in education have *never* expanded because the Court has always constricted the permissible race-positive mechanisms for schools to admit more students of color. Therefore, although affirmative action in education is still legal, its legality is one of ambivalence that firmly supports the declining significance of race (cf. Wilson, 1978). In the areas of voting, employment hiring, or business contracting, modest affirmative-action attempts to ameliorate the gross disparity in opportunities between Whites and people of color have all been systematically rejected (see *City of Richmond v. J. A. Croson Co.*, 1989; *Ricci v. DeStefano*, 2009; *Shelby County v. Holder*, 2013). The rejection not only stamps an immediate mark of illegality on the specific affirmative-action policy but also sends a broader message that contemporary collective consciousness can and should do nothing about past racial sins – other than to commemorate MLK and Black History Month periodically. Therefore, it is not a denial of history, but a denial of historical wrongs. Rendering past historical wrongs to the status of asterisks or footnotes on our calendar relegates their importance to be alongside Valentine's Day or St. Patrick's Day.

Secondly, the denial of historical wrongs also elevates contemporary grievances and sentiments of unfairness to the level of significant historical wrongs. This is possible because contemporary anti-affirmative-action claims of reverse racism use the same language and racial tropes. Bakke, Fisher, and the Asian American Harvard litigants all use the same language of reverse racism in making their constitutional equal protection claim. *De jure* segregation in *Brown*, *de facto* segregation in *Milliken*, and school funding disparity in *San Antonio* were likewise all decided as equal protection cases. As a result, contemporary reverse-racism claims against affirmative-action policies discursively view the visceral disappointment of college admissions rejection as no different than that of Blacks who were barred from attending White-only schools. However, anti-affirmative-action claims differ from structural manifestations of racism not only in degree, but also in kind. In terms of frequency, the fact that affirmative action once again has reemerged in our public conversation seems perhaps like the movie *Groundhog Day* (Albert & Ramis, 1993) all over again. From when Fisher first applied to the University of Texas in 2008, it took the Supreme Court eight years before reaching a final verdict. Even before the final *Fisher* decision in 2016, the Harvard anti-affirmative-action case was already filed on behalf of Asian Americans. Additionally, after Donald Trump assumed the office of the presidency in 2017, his education secretary, Betsy DeVos, ordered the department's Office of Civil Rights to begin investigating instances of racial discrimination – not in terms of *de facto* segregation, or unequal school funding, but whether students experienced racial discrimination in college admissions (Jaschik, 2018). The fact that an entity named the Office of Civil Rights was tasked with investigating and litigating against efforts to ameliorate structural racism is as oxymoronic to think about as it is to write. Nevertheless, the degree to which anti-affirmative-action maneuvers continue to reverberate in legal and public policy arenas far outpaces previous attempts to ameliorate structural racism. Whereas affirmative-action programs such as admissions quota set-asides seen in *Bakke* were modest in their attempts to address historical legacies of racism, the vicious degree of anti-affirmative action is the antithesis of modesty. In other words, anti-affirmative-action advocates do not simply want to scale down race-positive admissions but endeavor to destroy root and branch all vestiges of affirmative action – a far cry from endeavoring to destroy root and branch all vestiges of racism.

Perhaps the most striking consequence of our public discourse reengaging in college admissions complaints is that we, wittingly or unwittingly, elevate rejection grievances to the level of structural and material racism. I refuse to label college admissions rejections as racism because they simply do not pass the eye test. It betrays logic to think that anyone is rejected because of their race. Bakke's advanced age – because medical schools were openly practicing age discrimination at the time – and Fisher's mediocre SAT and GPA scores were perhaps more determinative of their admissions failures than any race-positive considerations. Exactly how determinative is impossible to figure because students then and now are admitted under varying circumstances that allow evaluators the ability to look at multiple quantitative and qualitative characteristics (see Steinberg, 2002; Stevens, 2007). Therefore, the variability of the admissions review process certainly produces a lot of anxiety for those who apply, and surely varying levels of grievance and disappointment for those unable to gain admissions. But admissions rejects are not the only ones who are aggrieved or harbor deep feelings of disappointment in our collective educational ecology. Poor families who must send their

children to schools labeled as *drop-out factories* are probably just as disappointed (see Kozol, 2005). Or the daring parents who risk significant fines and criminal prosecution by district hopping are as aggrieved as anyone at the sorry state of their educational choices (Ramírez, 2009). The major difference is that in our current affirmative-action and public discourse, admissions grievances get media attention and government recognition, while disappointments in poor schools are given the cold shoulder.

As a result, the third consequence is that our incessant focus on affirmative action and petty college admissions grievances diminishes public attention from the continuing structural and material realities of widespread educational problems such as segregation and resource inequality. This is not to say that there are no important conversations and actions targeting structural educational problems. However, if affirmative action automatically equates with college admissions grievances at elite schools, then insufficient attention is being paid to real educational problems, no matter the breadth and scope of actions being taken to address inequality. Worse yet, ongoing educational problems such as hyper-segregated schools are viewed as non-racial or not a product of systemic racism. This is because the definition of what constitutes racism in the colorblind era has been narrowed significantly to only affirmative mentions or usage of race, while severing any considerations for structural or material inequality (Haney López, 2005). There are immense ramifications when widespread educational problems are downgraded and treated as historically insignificant.

In terms of governmental reaction and legal recourses, protections from the impacts of deep-rooted social inequality become closed to an ever-growing portion of the community. Simultaneously, those same legal recourses and governmental attention shift toward the wealthy and privileged in their anti-affirmative-action complaints. We need to look no further than the Supreme Court disputes on educational inequality already discussed. *De facto* segregation and funding inequality were last adjudicated in the 1970's, whereas college admissions affirmative-action cases are as enduring and perpetually long-lasting as unequal public schools. The collective result is that the governmental doors of justice are closed to a significant portion of the public because educational problems are localized and severed from any structural considerations, and thus requiring no need for structural response. Thereby spatial and victim-blaming become the logical explanations as a culture of poverty or a function of the ghetto (see Moynihan, 1965). Conversely, the powerful doors of justice and equal protection swing increasingly wider and inviting to a selective group of social and political elites.

For instance, one of the students who joined the class of Asian Americans to sue Harvard to challenge its race-positive admissions practice is Michael Wang (Wang, 2018). Although he was unable to attend Harvard, he attended Williams College instead. In other words, although Michael was denied admissions to one elite Massachusetts school, he was nevertheless admitted by another elite Massachusetts school. Wang's college admissions disappointment and subsequent trajectory quintessentially capture all three consequences of the contemporary reverse racism narrative. First, in making an equal-protection racism claim against Harvard, he equates his sense of admissions grievance with the historical racial harm of White-only schools. Since there are no longer the types of racial practices like White-only schools, previous histories

are consolidated into a potpourri of nebulous racism that marginalizes and effectively erases the specificity of past historical wrongs. Secondly, precisely because these state-sanctioned acts of racism are no longer practiced, college admissions grievances become the only recognizable acts of so-called educational racism worth addressing in law and public policy. Thereby the trope of reverse-racism not only equates itself with past racial sins, but it also elevates admissions grievances above historical wrongs because it is the only game in town. Finally, by sucking all of the oxygen from the public discourse on educational racism onto the narrative of reverse-racism and anti-affirmative action, college admissions grievances and disappointments become the *only* contemporary educational problem – not school segregation (see Orfield & Frankenberg, 2014), resource inequality (see Kozol, 1991), or privatization (see Ravitch, 2010).

To review, the current anti-affirmative-action and reverse-racism narratives

1. erase past historical wrongs;
2. elevate contemporary admissions grievances to the level of significant historical wrongs;
3. downgrade widespread contemporary educational problems as no longer historically significant.

FENCED OUT: TOWARD A RENEWED APPROACH

A silver lining of the Supreme Court reengaging in affirmative action is that our national conversation on race is given another opportunity to recalibrate our collective understanding of racism. If the current colorblind iteration of racism continues its hegemonic stranglehold on our public consciousness, then mostly only the privileged and elite will have a recognized claim to being so-called victims of racism, not unlike the Michael Wang's of the world, who are nevertheless unhappy with their Williams College racial consolation prize. With the conservative court spearheading the national conversation on race and affirmative action, what we regard as racism has been utterly severed from social consequences. In other words, a student going to Williams instead of Harvard is not a social consequence; it is at best, a personal grievance, and at worst, petty elitism. Nevertheless, this petty elitism is given audience through our courts, media, and national conversation on race. In the meantime, our schools continue to re-segregate at rates not seen since before *Brown* (Orfield & Frankenberg, 2014). Petty affirmative-action grievances would not merit much serious attention if our legal system and the Supreme Court *also* adjudicated more systemic educational problems such as hyper-segregation and disparate school funding. Unfortunately, the Supreme Court has refused to look at these structural educational problems for nearly 50 years. As a result, we live in a post-*Brown*, colorblind era where educational inequality is as American as apple pie.

The way out of this racial abyss is to recommit to a conception of race and racism that abandons petty grievances and centers social consequences and community practices. We should be fundamentally guided by asking whether or not social practices subordinate insular groups based upon ideological constructions of racial difference (Haney López, 2005). A key methodological consideration to identify social subordination is to apply the concept of being

fenced out. That is, we must ask, do social practices fence out groups from meaningful civic and democratic participation? Here, racism is evaluated within a specific social context by looking at practices and ramifications. In doing so, racism no longer floats aimlessly and without historical specificity. Our conception of racism must be tethered to a specific process of historical materialism that emphasizes the relationship between social practices and consequences against structurally subordinated groups. The concept of being fenced out, coupled with a critical focus on subordination, enables our public consciousness to meaningfully understand historical wrongs, petty grievances masked as racial problems, and significant contemporary social problems that have too long been ignored.

Historical Wrongs

It should be uncontroversial to regard both the Jim Crow concept of separate but equal and White-only schools as subordinating and fencing out Blacks. Quite literally, there were physical barriers in the form of school buildings and doors reserved for Whites only that fenced out Blacks and non-Whites. These subordinating racial practices were explicit in invoking race. However, the invocation of race was not primarily what made these historical wrongs racially subordinating. It was, rather, the social practice of fencing out blacks, coupled with the invocation of race in policy that made Jim Crow racism particularly vicious and subordinating. In other words, widespread social acceptance and structural enforcement provided the needed horsepower in the engine of racial oppression. Even during this era that we now widely regard as a period of historical wrongs, the invocation of race divorced from social consequences would render racial practices at the time to be considered as equal. This is because the governing legal imperative at the time was *Plessy v. Ferguson's* (1896) *constitutional doctrine of separate but equal*. *Plessy* reasoned that Jim Crow segregation in public accommodations did not violate equal protection simply because the doctrine itself said separate was . . . equal. The self-serving logic is as astonishing as it is simplistic. In other words, focusing solely on the language of race, i.e., invoking race, does not get us far enough toward remembering historical wrongs. Jim Crow racism was wrong and subordinating because social practices fenced Blacks and other non-Whites from meaningful participation in important civil institutions, such as education, employment, and politics. Therefore, even in a period when race was callously invoked, it was the social consequences and subordinating material realities that defined historical wrongs.

Brown and the Civil Rights legislation ended the callous invocation of race as a structural precursor of historical wrongs. However, the Civil Rights legislation did not signal the end to racial subordination. The new legal mandates were not only the institutional forces that gave birth to the colorblind era, but they also produced the bastard child of colorblind racism. The hyper-segregation and disparate funding challenged in *Milliken* (1974) and *Rodriguez* (1973), respectively, were products of educational policies that, each on their face, were race-neutral. That is, no invocation of race could be located in either policy. Nevertheless, the social inequality existed in plain sight. The funding disparity between rich and poor districts in San Antonio was nearly 2:1, with underfunded schools almost exclusively serving Latino students. In urban Detroit, White flight had methodologically turned the district into a factory of hyper-

segregated schools compared to nearby suburban areas so that one could legitimately question whether *Brown* was nothing more than a meaningless footnote of history. Even though these widespread social consequences were not products of any affirmative invocations of race, they nevertheless fenced out insular communities unable to economically break free from the arbitrary barriers of district lines.

Petty Grievances

Petty college admissions grievances clearly do not stand up to the test against historical wrongs. When the focus centers on social consequences and the application of being *fenced out*, college admissions grievances and disappointments simply do not rise to the level of widespread social problems. Indeed, it strains credulity to take elite students seriously when complaints of reverse-racism, i.e., where they are fenced out from meaningful democratic participation, often come from within the fences of other elite schools. It would be as if a student sued Harvard College for racial discrimination while attending Williams College. These students and their anti-affirmative-action supporters would have us believe that the mere invocation of race in race-conscious admissions practices is sufficient for them to kick and scream racism and demand an audience before our nation's highest court. Acquiescence to this racial interpretation would simply be a complete whitewashing of historical wrongs. For every Asian American student who feels genuinely disappointed and aggrieved from a Harvard admissions rejection, there are many more who have been admitted, attended, and graduated (Lam, 2019). This is not counting the infinite number of Asian American, White, Black, Latino, and applicants from other racial categories who will be admitted from future admissions classes. It strains further credulity to think of any way that admissions grievances can rise to the level of social consequence, let alone one that is widespread. However, the law's reengagement of affirmative action with the Harvard suit has revealed an admissions practice that does fence out social groups: giving special consideration to children of significant financial donors.

The legal discovery process of Harvard's admissions practices revealed at least two special donor lists designated for special admissions consideration, which are called the *dean's interested list* and the *director's list* (Hoover, 2018; Franklin & Zwickel, 2018). Year-to-year, the admissions rate for all Harvard undergraduate applicants is consistently below 10%. However, the university allows for increased consideration when students are recruited athletes, children of alumni, or whose names appear on special donors lists like the dean's and director's list. If an applicant falls in the latter category of increased consideration, admissions chances rise above 40%, a significant bump from your run-of-the-mill elite Harvard applicant. The existence of these special donors lists quite literally fences out applicants whose donations, if their parents even make any, are just not that special. Of course, most schools do this. Philanthropic support and alumni donations are a significant income source for all colleges and universities. This becomes even more important when many public schools face antagonistic state legislatures all too eager to cut educational funding during difficult financial times. I do not think preferential admissions for children of significant donors rises to the level of a significant social problem. What this underbelly of admissions represents is the multifaceted dynamic of how universities sustain themselves, from financial considerations that require preferential

treatment of donors to student body composition concerns in the advancement toward a diverse learning and social environment. These two reasons and perhaps many more are legitimate, despite their controversy. However, if fencing out poor students from a special donors list escapes legal scrutiny and public anger, so should a school's desire to utilize modest affirmative-action policies in the name of diversity and social justice.

Contemporary social problems

Most importantly, the analysis of the social consequences of racism rightfully elevates the persistence of widespread contemporary educational problems. Here, the importance of asking whether or not social practices fence out groups is perhaps even more critical. Racial fences and barriers like Jim Crow laws or White-only schools no longer exist, but they have been replaced by administrative and bureaucratic fences designed to similarly keep out the unwanted *other*. In other words, what was once a literal racial cage has been supplanted by a bureaucratic cage with similarly significant racial consequences. Regardless of the form or nature of the cage, our concern should not be with the type of enclosure, but toward those who continue to be caged in metaphoric form. It just so happens that those who continue to be bureaucratically caged still look like those who were historically caged, a consequence of never having atoned in a meaningful way for our historical wrongs. Affirmative action and enforced school integration were perhaps the necessary steps in the long road toward atonement, but the societal push-back indicates that the initial steps were one step too many (Kozol, 2005). Thus, our collective energies in the last half a century since the Civil Rights era have been merely to preserve the integrity of those modest first steps while atonement continues to be as distant today as it was then.

Counterintuitively, a necessary step is to realize we continue to perpetuate widespread educational harms. The major difference here is that it is easier for us to wash our consciousness of any culpability because we have been discursively conditioned to think of educational problems non-rationally. It is the reemergence of *Plessy's* simplistic ethos, which now reasons that our widespread social consequences are non-racial because we say they are. Discursive gymnastics aside, the fencing out of subordinated populations in education is as real as the persistence of anti-affirmative-action grievances that refuse to go away. Our options are limited to changing the composition of the judiciary other than at the ballot box, with the hope that across-the-board legal practices can exhibit a more race-positive interpretation of the equal protection clause. Concurrently, we can recommit to renewing the social context uptake of race and racism (see Omi & Winant, 1986), one that focuses on community context and historical materialism of subordinated groups. Our public consciousness gave up too quickly on this core undertaking of racism and the social constructivist nature of race. A critical analysis of social consequences and inquiring whether or not groups are structurally fenced out promises to meaningfully remember historical wrongs, downgrade petty grievances, and elevate contemporary problems for more discerning attention.

CONCLUSION

To meaningfully apologize for historical wrongs, we must first take account of what we are apologizing for. An apology for past racial wrongs, while simultaneously committing new iterations of the same social problems, denies racial history. Furthermore, we continue to inflict new harms on families and communities who remain subordinated, oppressed, and fenced out. We need not look any further for evidence of these than at the former Trump administration. President Trump's significant maneuvers, such as commanding the Office of Civil Rights to attack affirmative action on college campuses, reshaping the vast federal judiciary, and shifting the ideological balance of the Supreme Court, further underscore the need for vigilance in the fight for affirmative action. The totality of Trump's actions cannot and should not be simplistically compartmentalized as independent actions within our historical consciousness. These seemingly unrelated actions collectively reinforce white supremacy in institutional form. The reemergence of reverse-racism claims in the form of anti-affirmative-action complaints represent a multi-pronged attack on our race-conscious historical memory. The way to wake up from this nightmare is to recapture the dogged commitment that the Civil Rights flag-bearers fought so hard to establish: Race is a social construct of community practices and historical specificity. As a result, for us to continue to combat racism root and branch, we must work not only to change the language or invocation of race, but also to change its existential form in our social practices and material history.

References

- 80-20 Educational Foundation (2018). Beyond a doubt – Harvard discriminates (3) (07/16/2018). <http://mathisaac.org/c/dm/8/bb/b176>
- Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).
- Albert, T. & Ramis, H. (Producers) & Ramis, H. (Director). (1993). *Groundhog day* (Motion Picture). United States: Columbia Pictures.
- Bell, D. (2003). Diversity's distractions. *Columbia Law Review*, 103(6), 1622–1633.
- Bolotnikova, M. (2019). Admissions on trial: The lawsuit that could determine the fate of affirmative action. *Harvard Magazine*, January – February 2019.
- Bonilla-Silva, E. (2003). *Racism without racists*. Lanham, MD: Rowman and Littlefield.
- Brown v. Board of Education of Topeka, 347 US 483 (1954).
- Capriccioso, R. (2010). A sorry saga: Obama signs Native American apology resolution; fails to draw attention to it. *Indian Law Resource Center*. Jan 13, 2010.
- City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).
- Coates, T. (2014). The case for reparations. *The Atlantic* June. <http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>
- Delpit, L. (2006). *Other people's children: Cultural conflict in the classroom*. New York, NY: The New Press.
- Fisher v. University of Texas, 579 U.S. ____ (2016).
- Fortin, J. (2018). U.N.C. Chancellor apologizes for history of slavery at Chapel Hill. *New York Times*, October 13, 2018.

- Franklin, D. & Zwickel, S. (2018). In admissions, Harvard favors those who fund it, internal emails show. *The Harvard Crimson*, October 18, 2018.
- Gratz v. Bollinger, 539 U.S. 244 (2003).
- Grutter v. Bollinger, 539 U.S. 306 (2003).
- Haney López, I. (2005). Race and colorblindness after *Hernandez* and *Brown*. *Chicano-Latino Law Review*, 25, 61-76.
- Hannah-Jones, N. (2013). A colorblind Constitution: What Abigail Fisher's affirmative action case is really about. *ProPublica*. <https://www.propublica.org/article/a-colorblind-constitution-what-abigail-fishers-affirmative-action-case-is-r>.
- Hoover, E. (2018). Dueling economists: Rival analyses of Harvard's admissions process emerge at trial. *The Chronicle of Higher Education*, October 20, 2018.
- Jaschik, S. (2018). Trump administration rescinds guidance on affirmative action. *Inside Higher Ed*. July 5, 2018.
- Kane, G. (2003). Why the reparations movement should fail. *University of Maryland Law Journal of Race, Religion, Gender and Class*, 3(1), 189-208.
- Kozol, J. (1991). *Savage inequalities: Children in America's schools*. New York, NY: Crown.
- Kozol, J. (2005). *The shame of the nation: The restoration of apartheid schooling in America*. New York, NY: Broadway Paperbacks.
- Lam, C. (2019). Harvard announces high admittance of Asian Americans as judge weighs affirmative action. *NBC News*, April 2, 2019.
- Liu, G. (2002a). The causation fallacy: Bakke and the basic arithmetic of selective admissions. *Michigan Law Review*, 100(5), 1045-1107.
- Liu, G. (2002b). The myth and math of affirmative action. *The Washington Post*. <https://www.washingtonpost.com/archive/opinions/2002/04/14/the-myth-and-math-of-affirmative-action/60096413-672b-4a4f-8dd1-8d38a7f282e9/>.
- Locke, L. A. & Getachew, E. (2019). Understanding stubborn inequities: A critical lesson in history. *International Journal of Critical Pedagogy*, 10(2), 127-153.
- Milliken v. Bradley, 418 U.S. 717 (1974).
- Moynihan, D. P. (1965). *The Negro family: The case for national action*. Washington, DC: Government Printing Office.
- Nelson, A. (2018). The social life of DNA: Racial reconciliation and institutional morality after the genome. *The British Journal of Sociology*, 69(3), 522-527.
- Omi, M., & Winant, H. (1986). *Racial formations in the United States*. London: Routledge.
- Orfield, G. & Frankenberg, E. (2014). *Brown at 60: Great progress, a long retreat and an uncertain future*. Los Angeles, CA: Civil Rights Project/Proyecto Derechos Civiles.
- Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007).
- Patel, V. (2018). Silent Sam was toppled, yet he still looms over campus. *The Chronicle of Higher Education*. August 29, 2018.
- Pengelly, M. (2019). Georgetown students vote to pay reparations for slaves sold by university. *The Guardian*, April 15, 2019.
- Plessy v. Ferguson, 163 U.S. 537 (1896).
- Qureshi, B. (2013). From wrong to right: A U.S. apology for Japanese Internment. *National Public Radio*, August 9, 2013.

- Ramírez, E. (2009). Schools crack down on boundary hopping. *U.S. News & World Report*, March 2, 2009.
- Ravitch, D. (2010). *The death and life of the great American school system: How testing and choice are undermining education*. New York, NY: Basic Books.
- Regents of the University of California v. Bakke, 438 U.S. 265 (1978).
- Ricci v. DeStefano, 557 U.S. 557 (2009).
- San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).
- Shelby County v. Holder, 570 U.S. 529 (2013).
- Steinberg, J. (2002). *The Gatekeepers: Inside the admissions process of a premier college*. New York, NY: Viking Penguin.
- Stevens, M. (2007). *Creating a class: College admissions and the education of elites*. Cambridge, MA: Harvard University Press.
- Swarns, R. L. (2019). Is Georgetown's \$400,000-a-year plan to aid slave descendants enough? *New York Times*, Oct. 30, 2019. <https://www.nytimes.com/2019/10/30/us/georgetown-slavery-reparations.html>
- Tran, H. V. (2017). Diversity's twilight zone: How affirmative action in education equals 'discrimination' in the colorblind era. *Race Ethnicity and Education*, 22(6), 821-835.
- U. S. Const. amend 14, § 1.
- Wang, E. (2018). Michael Wang didn't get into Harvard. He thinks it's because he is Asian. *BuzzfeedNews*, October 13, 2018.
- Wilson, W. J. (1978). *The declining significance of race: Blacks and changing American institutions*. Chicago, IL: The University of Chicago Press.