The "Gutting" of *Grutter*
White Racial Innocence and Post-Racialism in the *Abigail Fisher v. University of Texas Austin* Oral Arguments

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THE ABIGAIL FISHER V. UNIVERSITY OF TEXAS AT AUSTIN is the continuation of the Supreme Court's negotiation of the constitutionality of race-conscious admissions practices in educational settings. In this article, I undertake a Critical Race discourse analysis of the *Fisher* case oral arguments to examine how the Supreme Court constructs discourses on race and affirmative action. I argue that the *Fisher* case oral arguments use a "white racial innocence" discourse that constructs whiteness and white people as unfair victims of race-conscious policies. The white racial innocence discourse corresponds with the Court's emerging use of a post-racial ideology, which decouples race from power. By decoupling race from power I mean that the discourses that interact with these ideologies mask the privileging of Whiteness that exists in the U.S. education system. This works to naturalize the inequities and violent conditions that students of color experience in racist higher education institutions that inherently value Whiteness over people of color. Inequitable conditions are portrayed as natural or as the result of the actions of individual students of color, instead of implicating the racist structures and practices of these institutions. As a result of the emergence of post-racialism in the Court, the discourse and policies on college campuses will be impacted as they attempt to remain compliant and potentially take on the discourses of the Court. Students of color will be negatively impacted if post-racial discourses are more widely taken up on college campuses because of the *Fisher* case.

Although the majority of colleges and universities in the country admit most applicants who meet their minimum requirements, selective institutions of higher learning have become the "guardians" who delegate access to societal influence and power (Guinier, 2003). People of color have attended selective and White institutions of higher education in the United States since the mid nineteenth century, and the courts have played a significant role in discussions about their access to these institutions (Bowen & Bok, 2000).[1] The Supreme Court case *Brown v. Board of Education* (1954) put an end to legally permitted segregation in schools, which applied to the

many segregated universities in the South (Bowen & Bok, 2000). Throughout the late 1950s and early 1960s, students and community activists demanded access to government agencies, universities, and businesses, advocating for a significant nonwhite presence (Lawrence & Matsuda, 1998). As a result, President Lyndon B. Johnson in his 1965 *Executive Order 11246* encouraged employers and other institutions to take an "affirmative action" to increase the numbers of women, disabled, and racial minorities. However, legal opposition to affirmative action quickly arose upon its creation. *University of California v. Bakke* (1978) deemed the use of racial quotas in admissions unconstitutional; *Adarand Constructors v. Pena* (1995) applied strict scrutiny[2] to all court cases concerning race; *Gratz v. Bollinger* (2003) held that a point or ranking system attached to race in admissions was unconstitutional; *Grutter v. Bollinger* (2003) established that race-conscious affirmative action could be used in an effort to attain a critical mass of underrepresented populations to enjoy the "educational benefits of diversity"; *Parents Involved in Community Schools v. Seattle School District No. 1* (2007) decided that voluntary public school integration plans were unconstitutional unless de jure discrimination was proven. These cases provide the foundations for the *Abigail Fisher v. University of Texas Austin* (2013) case and contribute to the data and context of my analysis. The precedents set by these previous cases inform the current language of the Court. In this most recent case heard by the Supreme Court at the start of its 2012-2013 term, Fisher, the plaintiff, questions if race-conscious affirmative action can ever be narrowly tailored enough or effective enough to justify its use. Regardless of the decision of the case, the discourses present within the oral arguments demonstrate a historical moment where the Court is transitioning to a post-racial ideological framework. This post-racial framework influences discourses around race and affirmative action that are deployed by the Court and higher education institutions, which can have a negative impact on pedagogical approaches meant to serve students of color.

Theoretical Conversation

Critical Race Theory (CRT) is a field stemming from Critical Legal Studies (CLS) that looks at the law as an instrument of White supremacy and examines the fundamental role that race and power play in U.S. society (Crenshaw, Gotanda, Peller, & Thomas, 1995). Core tenets of CRT include the normalcy and endemic nature of racism that inhabits our daily lives; the reinterpretation of ineffective Civil Rights law; the challenge to claims of objectivity, neutrality, and meritocracy; and the foundational role of property rights in shaping racist institutions (Crenshaw et al., 1995; Ladson-Billings, 2000; Ladson-Billings & Tate, 2009; Solórzano, 2013). CRT also values the building of communities at the margins where race, gender, and class domination meet and intersect (Cho et al., 2013; Crenshaw, 1991). Gloria Ladson-Billings and William Tate (2009) introduced CRT to the field of education, and it is now used as an analytical tool to understand the intersection of race and power in the education system (Dixson, 2013; Harris, 1993; Ladson-Billings, 2013; Vaught, 2011).

This article builds on the foundation of research done by CRT scholars around affirmative action and diversity in higher education (Anderson, 2007; Brayboy, 2003; Delgado, 1991; Delgado & Stefancic, 2001; Guinier, 2000; Guinier, 2004; Harris, 1993; Harris and Kidder, 2005; Ladson-Billings, 2009b; Lawrence, 2001; Matsuda, 1991; Matsuda & Lawrence, 1998; Matsuda et al., 1993; Morfin et al., 2006; Solórzano et al., 2002; Yosso, Parker, Solórzano, & Lynn, 2004; Wade, 2004). These works have mapped out the legal rationales used to justify or

combat affirmative action; examined and challenged the claim that the U.S. Constitution is color-blind, objective, or neutral; explained the pitfalls of race-neutrality and the need for race-conscious policy; discussed the hate speech and racist conditions that students of color experience regularly in higher education; and outlined the ineffectiveness of diversity rhetoric to address issues of racism and discrimination. With this, these scholars have called for more expansive affirmative action within higher education. In response to the dominant framework of affirmative action, CRT scholars emphasize the outcomes at the legal, institutional, policy, and structural level, framing affirmative action as a tool to work toward expansive equality, or the legal equality that would be reached if racism did not exist. Mari Matsuda & Charles Lawrence (1998), explain how the appeal to meritocracy is the most used weapon against affirmative action. The two scholars assert the need for new questions to distinguish merit. These questions would consider the role that students will play following graduation, and the capacity they have to serve their communities and to serve the needs of those excluded from larger societal power structures. This reframing of affirmative action threatens the admissions structures that currently privilege Whiteness in these institutions because it values the experiential knowledge of students of color. This article uses Sumi Cho's (2009) framework that described post-racialism to add to the CRT and affirmative action discussion.

Post-racialism

Post-racialism is a current ideology that denies the centrality of race and race-based decision-making due to perceived racial progress. The use of a symbolic representation of racial transcendence or a "big event" (such as the election of Barack Obama) to prove the existence of racial equality, differentiates post-racialism from other racial ideologies (e.g. colorblindness). Post-racialism is enacted in specific ways within schooling contexts; emerging research shows that it aids and abets the criminalization of Black and Brown bodies and that there is a need to recognize institutional specificity to engage in praxis that disrupts post-racialism (Vaught & Hernandez, 2013; Vaught, 2013). I add to this conversation by looking at how post-racialism operates in the discourses of the Supreme Court.

Post-racialism has four key features: racial progress and transcendence, race-neutral universalism, moral equivalence, and the distancing move (Cho, 2009). Racial progress and transcendence works on the premise that we have achieved racial equality. As a result, race-based strategies are characterized as inherently inferior to race-neutral mechanisms, promoting a race-neutral universalism for U.S. institutions. Not only are race-based policies seen as inferior, but with moral equivalence, they are characterized as equivalent to discrimination against white people, equalizing the dismantling of white privilege to the systemic racism facing people of color. For this reason, there is a move by practitioners of post-racialism to distance themselves from a historically racialized and oppressive past. Ultimately post-racialism claims a level playing field for individuals of all races. I use the tenets of CRT and Cho's (2009) post-racialism framework to challenge this and to understand the Court's discussion of race and affirmative action within the oral arguments.

Pedagogy and the Supreme Court

Post-racialism is an ideology that impacts the sociopolitical context of pedagogy and curriculum development. If the Supreme Court uses post-racial discourses and employs a post-racial ideology, this can impact the pedagogical practices on college campuses. The discourses and ideology of the Supreme Court, specifically surrounding affirmative action, have already drastically influenced the practices of universities. Justice O'Connor in the *Grutter* decision acknowledges this as she states, "Since *Bakke*, Justice Powell's opinion has been the touchstone for Constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views," (*Grutter v. Bollinger*, 2003).

This statement alludes to the fact that universities use the decisions of the Supreme Court to guide their actions, especially with regard to admissions. However, these post-racial discourses do not remain strictly in the realm of admissions as they contribute to the conditions that students of color experience on college campuses and at times show their face in the classroom working to maintain an oppressive environment.

In response to these oppressive discourses and structures, critical pedagogy is one field of research that works to challenge systems of oppression in education in order to engage with a "liberatory pedagogy" (Freire, 2000). In challenging racism, classism, patriarchy, and heterosexism in education, fields under the umbrella of critical pedagogy like culturally relevant pedagogy, queer pedagogy, Critical Race pedagogy, and feminist pedagogy explore power relations through the intersections of race, class, gender, and sexuality (Jennings & Lynn, 2005; Ladson-Billings, 2009a; McCready, 2010). They explore these intersections in relation to praxis (the merging of pedagogical theory and practice). These pedagogies have worked to disrupt the dominant pedagogical frameworks by challenging problematic approaches to teaching and learning and emphasizing alternative epistemologies and worldviews (Ladson-Billings, 2000). In this vein, my work attempts to map out and deconstruct the discourses that are deployed by the Supreme Court, an institution that produces knowledge, in order to challenge the dominant post-racial ideology that it engages with.

Methodology: A Critical Race Discourse Analysis

With a line-by-line analysis of the oral arguments' transcripts, I looked particularly at how words and phrases constructed meanings. Using the index of the *Fisher* case oral arguments, provided by the Court, I identified the ten most frequently used words directly related to race and affirmative action. In doing so, I connected words that belonged together such as "critical" and "mass" into "critical mass," counting them as one word. I also disregarded identifiers such as the word "Justice" or "Texas" that were used to address persons, places, and court cases. After I created the top-ten list, I pulled out all the quotes that used these words in the text. I analyzed how these quotes, and the use of the words in these quotes built meaning around race and affirmative action by answering Gee's (2011a; 2011b) discourse analysis questions. Themes and discourses were then identified based on the common threads that became apparent in the text.

To do a "Critical Race" discourse analysis, I borrowed from the work of Critical Race scholars (Vaught, 2008; Duncan, 2008). Vaught (2008) discusses the complexity of engaging in a Critical Race methodology. She explores tensions between attending to power inequities with an aim of social transformation, while maintaining an ethnographic responsibility to participants.

This question of responsibility is explored in the context of interviewing racist White participants in a school. Though my research is not an ethnographic endeavor, I take strategies from this work when engaging in my own discourse analysis. To "write against racism" Vaught (2008) emphasizes applying race and racism as a central foci, engaging explicitly with CRT frameworks, using inquiry for radical research, "reclaiming culture" by highlighting liminal positions, and focusing on larger structures and practices that are not strictly situated in individuals. In supplementing Gee's discourse analysis questions with these Critical Race methodological insights, I engage in a Critical Race discourse analysis.

The White Racial Innocence Discourse: Critical Mass and Injury

In my analysis I focus on the "white racial innocence" discourse that develops in the text of the oral arguments. To explain the formulation of this discourse, I provide a close reading of the text in which the words critical mass and injury were used. Among all the words listed in Table 1, the context in which these two terms were used most clearly demonstrates the white racial innocence discourse present in the oral arguments. Critical mass was a term used in the *Grutter* case to work toward more students of color on college campuses, and in the *Fisher* oral arguments the Court uses a post-racial understanding of critical mass. The term injury in past cases was used to describe students of color that were injured by unequal educational opportunities, and in these oral arguments it protects white privilege. These two terms are repurposed by the *Fisher* case to maintain and support dominant discourses like white racial innocence.

Table 1: Most Frequent Terms Related to Race and Affirmative Action

Rank	Word	Frequency of Use
1	Race	86
2	Percent	76
3	Critical mass	49
4	Plan	45
5	Diversity	36
6	Admissions	31
7	Minority	28
8	African American	25
9	Interest	22
10	Injury	20

With a limited portion of my analysis of the white racial innocence discourse in this chapter, I also explain its connection to post-racialism.

Critical Mass

"Critical mass" emerges as an important concept used in *Grutter*. The Court established a compelling governmental interest for public universities to work toward a "critical mass" of

"underrepresented minorities" in order to achieve the "educational benefits of diversity" (*Grutter v. Bollinger*, 2003). This concept of critical mass is reintroduced in the Fisher case oral arguments. Critical mass is mentioned the most by Bert W. Rein, the lawyer representing the petitioner, Abigail Fisher. With the help of Chief Justice John Roberts, Rein constructed a discourse of White racial innocence by describing critical mass as ill-defined, and asserting that without a clear definition of critical mass, individuals, as well as the Court, are victims of the unfair use of race.

> MR. REIN: But what we are concerned about, as you are seeing here, is universities like UT and many others have read it to be green light, use race, no end point, no discernable target, no critical mass written, you know, in circumstances reduced to something that can be reviewed. (*Abigail Fisher v. University of Texas Austin*, 2013, p. 75)
> MR. REIN: If you have nothing to gauge the success of the program, if you can't even say at the beginning we don't have critical mass because we don't know what it is and we refuse to say what it is, there is no judicial supervision, there is no strict scrutiny and there is no end point to what they are doing. (*Abigail Fisher v. University of Texas Austin,* 2013, p. 80)

In these quotes, White individuals like Abigail Fisher are victims of race-conscious policies with "no end point." Mr. Rein characterizes critical mass as an ambiguous goal with no evaluative properties, thus a violation of the Court's decision of meeting strict scrutiny for the use of race. Chief Justice Roberts supplements Mr. Rein's assertions by consistently asking when the end point to the use of race-conscious practices and critical mass would be reached.

> CHIEF JUSTICE ROBERTS: I understand my job, under our precedents, to determine if your use of race is narrowly tailored to a compelling interest. The compelling interest you identify is attaining a critical mass of minority students at the University of Texas, but you won't tell me what the critical mass is. (*Abigail Fisher v. University of Texas Austin,* 2013, p. 46)

> CHIEF JUSTICE ROBERTS: *Grutter* said there has to be a logical end point to your use of race. What is the logical end point? When will I know that you've reached a critical mass? (*Abigail Fisher v. University of Texas Austin,* 2013, p. 46)

In this line of questioning, the Court is also a victim as their judicial supervision is depicted as being disregarded by UT's endless use of race-conscious policies. The Court is a victim because to not abide by the strict scrutiny precedent is to challenge the power of the Court.

This argument employs the post-racial feature of racial progress and transcendence. It characterizes race-conscious policies as unfairly challenging the power of the Court by not establishing an end point to the use of race. Rein's interpretation of critical mass is based on the foundational belief that race is devoid of power. However, racial power is intimately tied to a history of marginalization against people of color that establishes and maintains a racial hierarchy in the U.S. that privileges Whiteness. Rein discussed race with the foundational assumption that there is a point where there will be enough progress to where race will no longer be an important factor to university enrollment. However, to even suggest that an end point for

looking at race can be reached and that the compelling interest (educational benefits of diversity) is the sole goal of affirmative action demonstrates a sort of historical amnesia that disregards the influence of race and racism on our institutions of higher learning. CRT helps us to understand the centrality of race and the endemic nature of racism. So affirmative action as a race-conscious policy can be interpreted not as the unfair privileging of minorities, but as an effort to disrupt the inequitable racial imbalance on college campuses. This is not to assert that affirmative action will always be the tool used to disrupt this racial imbalance or racism overall, especially as CRT scholars have problematized the current dominant framework of affirmative action (Delgado, 1991). However, race-consciousness and race-based policies cannot become obsolete unless the system of racism is reshaped and White privilege is delegitimized (Harris, 1993). The push of CRT scholars to expand affirmative action to meet the needs of other marginalized populations instead of working toward an "end point" is one step toward this process of delegitimizing White privilege.

According to Mr. Rein, the Court is not only made a victim by the lack of an end point, but its power is disregarded by the university's use of race overall. Mr. Rein contributes to the discourse of White racial innocence by questioning the significance of race in establishing a critical mass of "underrepresented" populations, delegitimizing race-conscious practices, and promoting race-neutral universalism.

> MR. REIN: And so to -- to be within *Grutter* framework, the first question is, absent the use of race, would we be generating a critical mass? (*Abigail Fisher v. University of Texas Austin,* 2013, p. 10)

> MR. REIN: Well, we don't believe that demographics are the key to underrepresentation of critical mass. (*Abigail Fisher v. University of Texas Austin,* 2013, p. 14)

> MR. REIN: *Grutter* was intended to say this is an area of great caution; using race itself raises all kinds of red flags, so before you use race make a determination whether really, your interest in critical mass -- that is, in the dialogue and interchange, the educational interest, is that. (*Abigail Fisher v. University of Texas Austin,* 2013, p. 76)

In questioning the relationship between race and critical mass, Mr. Rein clearly states that "demographics," referring to racial demographics, are not the "key" to underrepresentation. This works to disconnect race from underrepresentation and critical mass, inferring that a critical mass of underrepresented populations can incorporate people of all races, including whites. This use of underrepresentation in connection to affirmative action undermines race-conscious practices as it characterizes underrepresentation as a term that is race-neutral. Essentially, Mr. Rein attempts to prove that the educational benefits of diversity ("dialogue and interchange") and a critical mass of underrepresented peoples can exist in a context without race, while at the same time implying that racial difference will occur without considering "demographics."

This disconnection of race and critical mass is elevated by the portrayal of race as contentious or needing "great caution" when used, leading to the conclusion that race should only be used when there is an identifiable end point to its use. This use of moral equivalence to define race as equally morally dangerous to us all, worked to dissociate race from underrepresentation. It incorporated an anticlassification stance that infers that the use of "demographics" to define underrepresentation would unfairly privilege people of color and work

as a form of racial discrimination against Whites. Overall race-neutral universalism is used to depict race-conscious mechanisms as inherently inferior and less equitable to race-neutral methods. As a result, Whiteness is normalized as critical mass is used to develop "dialogue" and "interchange" as opposed to encouraging racial equity, redressing past discrimination, and increasing access for students of color to universities.

Mr. Rein takes the White racial innocence discourse one step further by discussing responsibility and choice. When in conversation with Justice Sotomayor, he describes the use of these two traits as alternatives to the continuing use of race-conscious admissions.

> MR. REIN: And that immediately thrust upon them the responsibility, if they wanted to -- you know, essentially move away from equal treatment, they had to establish, we have a purpose, we are trying to generate a critical mass of minorities that otherwise could not be achieved. (*Abigail Fisher v. University of Texas Austin,* 2013, p. 18)
>
> JUSTICE SOTOMAYOR: You are not suggesting that if every minority student that got into a university got into only the physical education program; and in this particular university that -- that physical education program includes all the star athletes; so every star athlete in the school happens to be Black or Hispanic or Asian or something else, but they have now reached the critical mass of 10, 15, 20 percent -- that the university in that situation couldn't use race? (*Abigail Fisher v. University of Texas Austin,* 2013, p. 76)
>
> JUSTICE SOTOMAYOR: [If] every one of their students who happens to be a minority is going to end up in that program. You don't think the university could consider that it needs a different diversity in its other departments? (*Abigail Fisher v. University of Texas Austin,* 2013, p. 77)
>
> MR. REIN: Well, if that were the case, remember the factor that is causing it, and you are assuming, is choice. You have a critical mass of students. They choose to major in different things, and that's one of the problems with the classroom diversity concept. (*Abigail Fisher v. University of Texas Austin,* 2013, p. 77)

Mr. Rein builds on White racial innocence as he depicts Whites as sacrificing their "equal treatment" for the needs of racial minorities. This sacrifice is made in a way that "saves" students of color or gives them an opportunity that they otherwise could not get on their own. By discussing the need to justify the move away from "equal treatment" he infers that Whites were treated unequally up to this point for this purpose. However, in emphasizing that racial minorities have the ability to choose their own fate, Rein uses this "choice" to establish that White sacrifice is no longer justified in the context of universities. With this assertion, Mr. Rein uses White racial innocence to support his post-racial conception of diversity that disregards historical oppression, making equivalent the experiences of all races. This infers that any imbalance of opportunity within the university context is as a result of student choices or the irresponsibility of university practitioners, instead of acknowledging the role that inequitable conditions may play.

Injury

Mr. Rein characterizes critical mass as oppositional to equal treatment, therefore connecting it to words like damage, harm, and injury that also oppose equal treatment. The use of the term "injury" in the oral argument contributes to the White racial innocence discourse and reinforces a post-racial ideology. In order for a case to reach the Court, there must be an injury claimed by the plaintiff. Justices and lawyers discuss this injury throughout the oral arguments. White racial innocence is first constructed by the foundational assumption that an injury exists. Justice Sotomayor is the only individual throughout the oral argument to question the existence of an injury at all.

> JUSTICE SOTOMAYOR: How do you get past Texas v. Lesage[3] with that injury? -- Which says that mere use of race is not cognizable injury sufficient for standing? (*Abigail Fisher v. University of Texas Austin,* 2013, p. 4)

> JUSTICE SOTOMAYOR: But you have to claim an injury. So what's the injury? (*Abigail Fisher v. University of Texas Austin,* 2013, p. 5)

But regardless of Justice Sotomayor's questions, there is little to no discussion on why an injury exists. The Court enters oral arguments with the foundational assumption that an injury has occurred to Abigail Fisher, casting her as a victim of UT's race-conscious policies. Building on this, Mr. Rein and Chief Justice Roberts connect injury to the Constitution and to previous Court precedents.

> MR. REIN: The denial of her right to equal treatment is a Constitutional injury in and of itself, and we had claimed certain damages on that. (*Abigail Fisher v. University of Texas Austin,* 2013, p. 6)

> CHIEF JUSTICE ROBERTS: What about our Jacksonville[4] case that said it is an injury to be forced to be part of a process in which there is race-conscious evaluation? (*Abigail Fisher v. University of Texas Austin,* 2013, p. 55)

The injury these quotes describe is an injury of unequal treatment, which violates the Equal Protection Clause of the Fourteenth Amendment. In his quote, Chief Justice Roberts directly links this injury to the use of race and race-based practices by referencing *Jacksonville.* To have it as a Constitutional injury communicates that race-conscious practices injure not only Abigail Fisher or White applicants to the University of Texas, but it also injures the State. And to have a practice that injures the State, there must be a large benefit as Justice Kennedy alluded to in this question.

> JUSTICE KENNEDY: Is it -- are you saying that you shouldn't impose this hurt or this injury, generally, for so little benefit; is -- is that the point? (*Abigail Fisher v. University of Texas Austin*, 2013, p. 23)

Justice Kennedy contributes to the White racial innocence discourse as his question implies that Abigail Fisher's and the Court's injury may not equal the "educational benefit"

achieved by the race-conscious laws. This contributes to the idea of White racial innocence as racial equality is depicted as a burden based on the sacrifices made on the part of Whites. Mr. Rein also develops a discourse of White racial innocence by tying the injury to White people's loss of material resources.

> MR. REIN: The reason why the payment of that fee doesn't redress the injury, Your Honor, is that she would have paid it even if Texas didn't consider race at all; and, therefore, the payment of the application fee back doesn't remedy the injury that she is complaining about. (*Abigail Fisher v. University of Texas Austin*, p. 57)

> MR. REIN: Because as -- as in the BIO, what UT pointed out was there are other kinds of financial injuries which were not ascertainable at the time the complaint was filed because we were trying to put her into the university. (*Abigail Fisher v. University of Texas Austin*, p. 75)

By linking the injury to monetary damage, the discourse of White racial innocence is connected to the politics of material distribution. Distributing material resources to students of color with race-conscious practices is depicted as unequal treatment to White applicants, who with an inaccurate zero sum understanding are denied those materials. As a result these applicants, like Abigail Fisher are constructed as deserving material compensation.

The Supreme Court uses White racial innocence to support post-racialism as it operates to "rearticulate subordination as equality" (Cho, 2009, p. 12) by depicting racial remedies as a Constitutional injury that is materially detrimental to White people. However, the existence of an injury is only possible with a post-racial belief that there is a level playing field and that race-conscious policies privilege racial minorities over Whites.

Conclusion: White Racial Innocence, Post-racialism, and Pedagogy

"JUSTICE SOTOMAYOR: So you don't want to overrule Grutter, you just want to gut it." (Fisher v. University of Texas, 2013)

Towards the end of the *Fisher* oral arguments, Justice Sotomayor refers to the actions of the plaintiff as attempting to "gut" the *Grutter* decision. Justice Sotomayor was the most vocal in questioning the claims to injury made by Abigail Fisher. Her appointment as the first Latina woman in the Supreme Court though controversial in nature signaled to many a more liberal shift within the Court that could potentially change how litigation surrounding race occurred. This "gutting" of *Grutter* is the removal of race from power. Post-racialism produces a context where race and racism are no longer seen as impacting the way that society is structured, which naturalizes the racial disparities and inequitable conditions that exist in higher education. Instead of them being attached to systems of oppression, the conditions are characterized as being caused by the specific actions or culture of people of color.

This deficit understanding of students of color impacts how pedagogy is put into practice. Efforts at developing libratory pedagogical projects must now take into account discourses that mask the power dynamics that exist in schooling. This masking of power consistently delegitimizes the need to develop pedagogical approaches and to utilize resources to offset the

negative impacts of systematic oppression. Affirmative action is one tool that has historically been used to provide more resources to students of color, but with discourses like the White racial innocence discourse becoming prevalent in institutions that produce and reinforce knowledge based on dominant ideologies, practitioners must now work to disrupt these discourses and the ideological emphasis on racial progress that prevents the support for marginalized communities of color.

On June, 24, 2013, in a 7 to 1 decision, the Supreme Court ruled on the case *Fisher v. University of Texas* stating that,

> Because the Fifth Circuit did not hold the University to the demanding burden of strict scrutiny articulated in *Grutter* and *Regents of Univ. of Cal. v. Bakke*, 438 U. S. 265, its decision affirming the District Court's grant of summary judgment to the University was incorrect. (*Abigail Fisher v. University of Texas*, 2013)

This ruling reaffirmed the Court's skepticism in the use of race by emphasizing the need to further apply strict scrutiny to the case. In its previous cases, the Supreme Court established the racial quotas (*Bakke*) and racial balancing (*Grutter*) were unconstitutional, and that relabeling racial balancing as racial diversity was also unconstitutional (*Parents Involved*). This begs the question, what is diversity in the eyes of the Court? What constitutes this governmental interest? And who has the power to define what diversity really is? Justice Kennedy, in his decision in *Fisher v. Texas* (2013) emphasizes that in order to remain consistent to the *Grutter* decision, a program must "remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application," (*Abigail Fisher v. University of Texas*, 2013). Though this statement seems well-intentioned as it is attempting to prevent discrimination on the basis of race, this move toward anticlassification works against educational equity as affirmative action is only viewed as a form of discrimination by the Court through its use of a post-racial lens. In this complex use of post-racialism, the Supreme Court signals to universities to find more race-neutral alternatives. Kennedy states, "Although '[n]arrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative,' strict scrutiny does require a court to examine with care, and not defer to, a university's "serious, good faith consideration of workable race-neutral alternatives" (*Abigail Fisher v. University of Texas*, 2013).

With this assertion, "good faith effort" is no longer enough for universities as the Court now has more power to define what diversity is and how race can be incorporated into definitions of diversity. This impacts the work of pedagogues who attempt to incorporate a commitment to racial diversity in the work that they do. The danger lies in universities taking up the skepticism and discourse of the Court in a way that leads to a post-racial definition of diversity because it can result in the cutting of programs and resources that are established to support students of color or that grant access for students of color to selective institutions. Pedagogues have the role of pushing against this post-racial definition of diversity and overall move toward post-racialism. Students of color can be supported if pedagogues work to connect race to power and incorporate an understanding of the impact of race and racism on curriculum, policy, and administrative decision-making.

In looking at the Court as a pedagogical site that constructs meaning around race, the white racial innocence discourse and emerging post-racial ideology has many implications for the future discourses of the Court around affirmative action. This shift to post-racialism redefines

how the Court views terms such as "equal educational opportunities," "critical mass," "injury," and "diversity," continuing to distance them from understandings of historical oppression and power. This process of disregarding the influence race and racism has on academic preparation, admissions standards, and the overall access and retention of students of color in higher education undercuts the potential of affirmative action as a tool to improve the conditions for students of color. With post-racialism affirmative action is transformed from a potential legal tool to ensure equitable resources and opportunities to students of color to a tool for maintaining the disadvantages faced by students of color, contributing to a continued racial hierarchy within higher education.

Notes

[1] When referring to "White institutions" I not only mean predominantly White institutions, but institutions with historical origins for exclusively serving Whiteness and White people.
[2] There are two major tests that the use of race has to pass under the Court's declaration of strict scrutiny. There must be a "compelling interest" for the government and the policy or practice has to be "narrowly tailored" to that interest.
[3] Texas v. Lesage 528 U.S. 18 (1999)
[4] *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972)

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