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On Account of Race or Color: Race as Corporation and the Original Understanding of Race

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ON ACCOUNT OF RACE OR COLOR: RACE AS CORPORATION AND THE ORIGINAL UNDERSTANDING OF RACE

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This Essay is a critique of constitutional and political discourse on "race." I argue that current equal protection doctrine operates under a conception of race that undermines rather than moves forward the goal of achieving racial equality. That understanding defines race solely or primarily as a physical trait or characteristic, and unjustifiably rejects other, more robust notions of race. I argue the notion of race as physical trait is inconsistent with the historical understanding of race that served as the basis for the Reconstruction Amendments. A careful examination of nineteenth and early twentieth century court decisions, decisions which include *Plessy v. Ferguson*[1] and *Strauder v. West Virginia*,[2] suggests that the framers of the Reconstruction Amendments and the Supreme Court Justices of that era thought of race, not as a physical trait, but as an entity with a corporate existence. In other words, they thought of race as corporation.

Part I will critique current equal protection doctrine and argue that it has adopted a narrow and constitutionally problematic definition of race as physical trait. Part II will then examine the original understanding of race and discuss the concept of race as corporation. Part III will then examine the implications of the race as corporation concept for rethinking current equal protection doctrine.

I

Political and legal discourse about race is often confusing and bewildering because we often fail to fully understand that, as an "essentially contested concept[]",[3] "race" has no fixed, essential

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[1] 163 U.S. 537 (1896).

[2] 100 U.S. 303 (1879).

[3] W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y, 167, 167–68 (1956) (describing "essentially contested concepts" as those that intrinsically have no fixed meaning).

meaning and is thus subject to multiple definitions.[4] In the post-*Brown*,[5] late twentieth and early twenty-first century era, the unstated, default assumption in legal discourse was that race refers to a physical trait such as skin color, or an identity based on skin color.[6] But of course, race as skin color or as racial identity is not the only way to think about and conceive of race. Consequently, when we engage in racial discourse, confusion and misunderstanding are inevitable if we forget about the multidimensional nature of the concept of race. Too often, discursive actors assume that they hold the same assumptions about the meaning of race when in actuality, they hold related but different understandings. What's more, an actor will often use multiple definitions of race without being consciously aware that he or she is doing so.

Current equal protection doctrine on race is conceptually and practically incoherent, in large part because there is an illusory consensus regarding the constitutional meaning of race. Thus, in *Richmond v. Croson*, Justices Sandra Day O'Connor and Thurgood Marshall seemed to agree that the Fourteenth Amendment was centrally concerned with the problem of race.[7] In her plurality opinion, O'Connor asserted that, "[t]he Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race."[8] While dissenting from O'Connor's opinion, Marshall nevertheless expressed his agreement with O'Connor's understanding of the Fourteenth Amendment, stating, "[t]he three Reconstruction Amendments undeniably 'worked a dramatic change in the balance between congressional and state power.'"[9]

Yet, despite their agreement regarding the fundamental relationship between the Fourteenth Amendment and "race," Justice O'Connor voted to strike down a local government race-conscious affirmative action program as a form of invidious racial discrimination in violation of the Fourteenth Amendment's Equal Protection Clause,[10] while Justice Marshall voted to uphold the race-conscious set-aside as entirely consistent with the Fourteenth

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[4] *See* Sharona Hoffman, *Is There a Place for "Race" as a Legal Concept?*, 36 ARIZ. ST. L.J. 1093, 1096–97 (2004) (listing various different understandings of race).

[5] Brown v. Bd. of Educ., 349 U.S. 294 (1955).

[6] *See* Hoffman, *supra* note 4, at 1132.

[7] Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

[8] *Id.* at 490.

[9] *Id.* at 560 (Marshall, J., dissenting).

[10] *Id.* at 511.

Amendment Equal Protection Clause.[11]

O'Connor and Marshall's disagreeable agreement over the relationship between "race" and the Fourteenth Amendment beautifully captures the essentially confused state of current equal protection doctrine on race. To understand how the two justices could come to different conclusions despite seemingly agreeing on the centrality of race to equal protection doctrine, it is crucial to understand that they are thinking about and using the term *race* in very different ways. While O'Connor and the Rehnquist Court refer to race solely as a physical trait, Marshall and critics of the Rehnquist Court equal protection doctrine refer to race as a trait and as a social group. The different approaches to race and equal protection have had enormous doctrinal and political consequences.

The central doctrinal premise of current equal protection doctrine is the notion that *all* governmental uses of race are inherently arbitrary and irrational, and therefore laws relying on race must be presumed to be unconstitutional and subject to the most rigorous level of judicial scrutiny.[12] And under strict scrutiny analysis, the government has the heavy burden to demonstrate that its use of race is necessary to serve a compelling government interest.[13] Accordingly, if all uses of race are inherently suspect, then, the argument is that even "benign" uses of race in the context of affirmative action equal opportunity and racial integration plans should be subject to strict scrutiny.

Even well intentioned race-conscious affirmative action programs run afoul of equal protection because they engage in the very practice that the Fourteenth Amendment was designed to eliminate—discrimination on the basis of race (skin color). Government decisions based on race as skin color, even if those decisions are made for legitimate or compelling purposes, would be akin to making irrational decisions to award jobs and contracts based on other morally and legally irrelevant traits like eye color or hair color.[14]

Reading Rehnquist Court decisions on race and equal protection, one would get the clear sense that it is self-evident and inherently correct that all uses of race are constitutionally suspect. As Justice O'Connor explained, all "[c]lassifications based on race carry a danger of stigmatic harm" and "they may in fact promote notions of

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[11] *Id.* at 528 (Marshall, J., dissenting)

[12] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 720–21 (2007).

[13] *Id.*

[14] *See id.* at 726.

racial inferiority and lead to a politics of racial hostility," even if a classification is aimed at promoting racial equality.[15] Echoing Justice O'Connor, Chief Justice Roberts emphasized in a 2007 equal protection race case, "[g]overnment action dividing us by race is inherently suspect because such classifications promote notions of racial inferiority [leading] to a politics of racial hostility, [and] reinforce the belief[] held by too many for too much of our history, that individuals should be judged by the color of their skin."[16]

However, the principle that all racial classifications are inherently suspect is a recent doctrinal development.[17] During the height of the civil rights era, the Court employed strict scrutiny analysis to strike down racially discriminatory Jim Crow laws that maintained and reinforced racial segregation. The Court, however, subjected race-conscious affirmative action programs, to a lower level of judicial scrutiny, as they were considered "benign" racial classifications deserving of greater legislative deference. But, at least formally, that deference disappeared under the Rehnquist Court, as the Court in *Croson* and *Adarand* held that all racial classifications, whether benign in purpose or not, are equally suspect, and *must be subject to the same level of rigorous judicial scrutiny*.[18] The rhetoric and logic of current equal protection doctrine have been extremely effective in undermining the legitimacy and constitutionality of race-conscious equal opportunity and racial integration plans. While there have been many insightful critiques of the various problems with current equal protection doctrine, curiously, very few critiques have noticed or emphasized how the current doctrine's rhetorical power fundamentally depends on a very narrow definition of race solely as skin color for its persuasiveness.

That rhetorical power is evident in the Supreme Court's 2007 decision in *Parents Involved in Community Schools v. Seattle School District Number One*.[19] In that case, the Court held that voluntary race-conscious admissions plans violated equal protection, even if those plans were enacted by school districts to maintain and promote racially integrated student bodies in their schools.[20]

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[15] *Croson*, 488 U.S. at 493.

[16] *Parents Involved*, 551 U.S. at 746 (internal quotations omitted).

[17] *See Croson*, 488 U.S. at 490–91 (holding, for the first by a majority of the Court, that "benign" racial classifications are subject to strict scrutiny).

[18] *Id.*; Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[19] 551 U.S. 701 (2007).

[20] *Id.* at 747–48.

In a plurality decision written by Chief Justice Roberts, the Court held that the school districts failed to demonstrate that its interest in having racially integrated schools was a compelling interest.[21] Moreover, the Court concluded that their actual interest in making race-conscious admissions decisions was not to promote racial integration, but to engage in the patently illegitimate goal of naked "racial balancing," which the Court defines as the goal of wanting a racially proportionate student body purely for its own sake.[22] In other words, the Roberts plurality sought to overrule the racial integration mandate of *Brown v. Board of Education* and hold that the goal of racial integration is an inherently illegitimate interest.

Although the Roberts Court ultimately failed in its attempt to overrule *Brown*, the Court came very close to doing so. Only Justice Kennedy's refusal to join Roberts and three other justices prevented *Brown*'s reversal. It is vital, therefore, to vigorously critique the Court's reasoning in *Parents Involved*. Specifically, it is important to become aware of how the way Roberts defined race to mean only skin color was the basis for much of the rhetorical power of his opinion.

First, one astounding aspect of Roberts' opinion is that, in effectively seeking to overrule *Brown*, Roberts actually contended that Warren Court and the NAACP Legal Defense Fund attorneys who argued the *Brown* case would wholeheartedly support his attempt to overrule *Brown*. And what is even more amazing is that Roberts was able to make such arguments with a straight face and in a persuasive manner.

In asserting that the NAACP attorneys who litigated *Brown v. Board of Education* on behalf of the black plaintiffs would wholeheartedly endorse his opinion, Roberts actually quotes a passage from a brief written by one of the *Brown* lawyers:

> As counsel who appeared before this Court for the plaintiffs in *Brown* put it: "We have one fundamental contention . . . and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use *race* as a factor in affording educational opportunities among its citizens.[23]

And because the school districts in *Parents Involved* are using race (as skin color) as a factor in affording educational

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[21] *Id.* at 730.
[22] *Id.* at 727–31.
[23] *Id.* at 747 (emphasis added).

opportunities, Roberts contends that the NAACP Legal Defense Fund attorneys clearly would support the Court's decision to strike down the discriminatory racial integration plans.[24]

Second, Roberts also very cleverly evoked the moral cause of the Civil Rights Movement by arguing that the white students challenging the voluntary school integration plan in *Parents Involved* were similarly situated to the black schoolchildren who sought integrated schooling in *Brown v. Board of Education*. Roberts reasoned, "[b]efore *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these [current] cases have not carried the heavy burden of demonstrating that we should allow this *once again*."[25] In other words, for Roberts, the white students in *Parents Involved* were facing the very same discriminatory treatment that the black plaintiffs forced to attend segregated schools faced in *Brown*. Drawing Roberts' reasoning to its logical conclusion, the black children in *Parents Involved* must then be equivalent to the white children in Jim Crow south, as both groups, through their parents, sought to protect and maintain racially discriminatory school systems.

Third, Roberts rejects Justice Breyer's argument in dissent that voluntary racial integration programs are constitutionally distinguishable from Jim Crow school segregation laws because racial integration plans seek to promote racial inclusion, while Jim Crow segregation laws promoted the exclusion of particular racial groups from meaningful educational opportunities. Roberts notes, "Justice Breyer speaks of bringing 'the races' together (putting aside the purely black-and-white nature of the plans), as the justification for excluding individuals on the basis of their race."[26] Roberts responds to his articulation of Breyer's position by effectively arguing that any attempt to protect particular racial groups through racial integration of public schools is an approach to race that is "fundamentally at odds with our precedent, which makes clear that the Equal Protection Clause 'protect[s] *persons*, not *groups*.'"[27] In other words, the goal of "bringing 'the races' together" is inconsistent with equal protection, because that goal recognizes and seeks to protect racial groups, and equal protection is not about protecting racial groups. Rather, it is about ensuring that an

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[24] *Id.*

[25] *Id.* (emphasis added).

[26] *Id.* at 742–43.

[27] *Id.* at 743 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)).

individual's dignity and worth are not demeaned by being "'judged by [race] instead of by his or her own merit and essential qualities.'"[28]

The brilliant aspect of Roberts' opinion is that, while it may seem plain and clear that the Warren Court justices and the LDF attorneys would not actually support its holding and reasoning, it is difficult to explain exactly why not, especially given the passages quoted by Roberts. Clearly, Roberts has taken those passages out of context, but, how?

II

The key to critiquing the Roberts opinion in *Parents Involved* is to explicitly point out and critique Robert's narrow use of race as skin color. While the Rehnquist and Roberts Courts may define race to mean solely skin color, the crucial point is that historically, race meant something else entirely. And, only when it is understood that the *Brown* Court and the LDF attorneys thought of race, not just as skin color, but as corporation, does it become clear that that the *Brown* litigants and justices would not support Roberts' opinion.

This Part will contend that current equal protection doctrine, in defining race solely as skin color, is relying on a narrow conception of race that is inconsistent with the original meaning of race as understood by the framers of the Reconstruction Amendments, and inconsistent with the more complex understanding of race held by the *Brown* Court and by the *Brown* attorneys.

Rather, a preliminary examination of historical materials suggest that the historical understanding of race that was the basis for the Reconstruction Amendments was an understanding consistent with the notion of race as social groups. Specifically, the tentative thesis that will be developed and elaborated in future articles is this: the framers of the Reconstruction Amendments and contemporary Supreme Court Justices conceptualized "race" not as a physical trait, but more broadly as a corporate-like entity, an entity with a "corporate personality" separate and distinct from the identities of its individual members.

A.

How did the Reconstruction framers think of and use the term

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[28] *Id.* at 746 (quoting Rice v. Cayetano, 528 U.S. 495, 496 (2000)).

race? In discerning the original meaning of race, it is important to point out that both the Thirteenth and Fourteenth Amendments fail to mention race at all. The Thirteenth Amendment prohibits most forms of slavery and involuntary servitude with no reference to race. Similarly, the Fourteenth Amendment protects the privileges and immunities of all citizens, and the equal protection and due process rights of all persons, but does not provide legal protections specifically on the basis of race. And despite Justices O'Connor and Marshall's belief that the Reconstruction Amendments as a whole and the Fourteenth Amendment in particular dramatically shifted the power to regulate race from states to the federal government, there is no textual provision in the Fourteenth Amendment that mandated that shift of power. Section Five of the Fourteenth Amendment does grant Congress the power to enforce the other four sections of the Amendment. However, none of those other four sections mention race.

The Fifteenth Amendment is the only Reconstruction Amendment that includes a textual reference to race. It states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[29] If the term race has no inherent fixed meaning, the question arises, which particular meaning of "race" constituted the framers' original understanding? To answer this question, it is important to note that the Fifteenth Amendment prohibits the infringement of the right to vote on the basis of both "race" *and* "color." According to blackletter rules of constitutional and statutory construction, each term in the Amendment must be given independent meaning. That begs the question: what is the difference between race and color?

First, beginning with the concept of "color," based on our twenty-first century understanding of the term, one may assume that the term refers generally to the physical trait of skin color. However, an examination of nineteenth and early twentieth century legal sources discussing the meaning of the term color based on state laws suggests that the term color in the Fifteenth Amendment was referring, not to a universal physical trait, but, specifically to the skin color of members of *non-white races only*.

In *Rice v. Gong Lum*,[30] the Supreme Court of Mississippi dealt with the issue of where Chinese-American students fit within its

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[29] U.S. CONST. amend. XV, § 1.

[30] 104 So. 105 (Miss. 1925), *aff'd* 275 U.S. 78 (1927).

racially segregated school system. When *Gong Lum* was decided, the Mississippi State Constitution required that "[s]eparate schools shall be maintained for children of the white and colored races."[31] While the term "colored races" included African-Americans, the question in *Gong Lum* was whether a Chinese-American student should be considered white or colored under the state constitution. The court held that a Chinese student was a member of the "colored race" and therefore had to be assigned to schools attended by African-American students.[32] The court reasoned,

> One of the definitions given to the word "colored," as applied to race, is "of a dark skin or non-Caucasian race." The same definition is practically given by Mr. Webster in his dictionary. The word "white," as applied to race, where not affected by statutory definition, is universally limited to the Caucasian race.[33]

In other words, the court concluded that the term "colored" did not refer generically to skin color, but specifically to a person who belonged to either "a dark skin or non-Caucasian race."[34] The term color, according to the Mississippi Supreme Court, did not and was not meant to include or refer to the skin color of members of the *white* race.

An examination of a mid-nineteenth century California court decision, *People v. Hall*,[35] also suggests that the term color was historically understood to refer to the physical attributes associated with non-white racial groups. In *Hall*, the issue was whether a Chinese person should be categorized as legally white or black for the purposes of testifying as a witness in an action involving a white party. A California statute prohibited blacks or Indians from testifying in an action involving a white person as a party.[36] However, the statute failed to explicitly mention Chinese or other Asian nationalities and whether they were excluded as well. The court held that a Chinese person is, for statutory purposes, a "black" person and therefore excluded from participating as a witness.[37]

The Hall court reasoned that the term "black" has a broader meaning than the term "negro": "The word 'Black' may include all

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[31] *Id.* at 107 (quoting MISS. CONST. art. VIII, § 207 (repealed 1977)).
[32] *Id.* at 110.
[33] *Id.* at 108.
[34] *Id.*
[35] 4 Cal. 399 (1854).
[36] *Id.* at 399.
[37] *Id.* at 404.

Negroes, but the term 'Negro' does not include all Black persons."[38] Thus, a Chinese person could be considered "black" for purposes of the statute. However, because that analysis still did not answer the question whether the Chinese person should be categorized as black or white under the statute, the *Hall* court proceeded to define the statutory meaning of the term "white." The court concluded, "[t]he word "White" has a distinct signification, which *ex vi termini*, excludes black, yellow, and all other colors."[39] In other words, under the statute, while the term black was a broad term that could include racial groups in addition to African-Americans, the term white was a narrow term referring specifically and only to members of the white or Caucasian race. Accordingly, because a Chinese person clearly is not white or Caucasian, by default, the court held that a Chinese person had to be deemed to be a "black person" for purposes of the statute.

What about the term "race"? How was that term generally understood when the Reconstruction Amendments were ratified? The 1887 Webster's Dictionary defines "race" as "descendants of a common ancestor; a family, tribe, people or nation, believed or presumed to belong to the same stock."[40] This definition clearly is defining something that is more than just a physical trait. The definition seems to view race as discrete groups of people, or affinity groups, groups of people connected together by principles, family ties, or biology.

In *Plessy v. Ferguson*[41] the majority of the Court created the "separate but equal" doctrine to justify the Constitutional basis for laws that segregated whites from blacks in various social settings. The Court further equates "race" with discrete racial groups by saying that

> We consider the underlying fallacy of the plaintiff's argument [that segregation is unconstitutional] to consist in the assumption that the enforced separation of the two races stamps the colored *race* with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored *race* chooses to put that construction upon it. . . . If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one *race* be inferior to the other socially, the Constitution

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[38] *Id.* at 403.
[39] *Id.* at 404–05.
[40] *See* Wamget v. State, 67 S.W.3d 851, 855 (Tex. Crim. App. 2001).
[41] 163 U.S. 537 (1896).

of the United States cannot put them upon the same plane.[42]

In this famous passage, when the Court mentioned "race," it was using race to refer to "race of people" or a racial group, and not referring to it as a physical trait or skin color.

Even Justice Harlan in his *Plessy* dissent used the term race to refer to racial groups:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.[43]

In this passage, Justice Harlan, along with the *Plessy* majority, personifies the white and black races, treating them as if they were individual persons with their own identity or personality. Thus, for Harlan, the "white race," like a person, is well-educated, wealthy, and powerful.

In personifying the white and black races, the *Plessy* majority and dissent both seem to understand "race" as corporate-like entity. While an in depth discussion of race as corporation is beyond the scope of this essay, I want to lay out the basic argument for that understanding of race.

Under the well-settled law of corporations, once properly incorporated, a corporation has the legal status of a "person," and has various legal rights and duties as a "natural person" would have.[44] As a legal "person," a corporation has its own corporate identity or personality independent and distinct from the personalities of the individuals who make up the corporation.[45] Similarly, a careful examination of the opinions in *Plessy* suggests that the Justices conceived of "race" in corporation-like terms. Justice Harlan discussed not the achievements of individual white Americans, but the achievements, wealth, and power of the "white race."[46] The *Plessy* majority treated the white and black races as if they were persons capable of holding particular political and civil

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[42] *Id.* at 551–52 (emphasis added).

[43] *Id.* at 559 (Harlan, J. dissenting).

[44] *See generally* David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 203 (1990) ("[T]he corporation, like any other person, should enjoy the freedom to act as a socially responsible citizen."); John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926) (describing the legal treatment of a corporation).

[45] *See* Dewey, *supra* note 44, at 669.

[46] *See Plessy*, 163 U.S. at 559 (Harlan, J. dissenting).

rights, in the same way corporations are legally able to have rights that are qualitatively different than the rights that individual members of the corporation may have.

In *Strauder v. West Virginia*, the Supreme Court analyzed the issue of racial discrimination in jury selection utilizing the notion of race as corporation.[47] In *Strauder,* the Court struck down under equal protection grounds a West Virginia law prohibiting black men from serving on juries. In striking down the law, the Court did not talk in the language of personal rights, nor did it talk about the dangers of discriminating on the basis of a suspect trait such as skin color. Rather, the Court reasoned that the law excluding black men from jury service was a form of invidious discrimination that "impl[ied] [legal] inferiority in civil society, [which] lessen[ed] the security of . . . [the right of the colored *race* and was a] step[] towards reducing them to the condition of a subject race."[48]

In viewing *Strauder* as a decision about race as corporation, the decision becomes less about an individual's right to serve on a jury, and more about the protection of the black race as a corporate entity. The protection of an individual's right to serve on a jury can be understood as a means to prevent the "black race" from being reduced to the status of a "subject race" through racially discriminatory and exclusionary laws aimed at members of the black race. I suggest that this, then, was the original understanding of race and equal protection.

III

I want to conclude this essay by exploring the implications of analyzing "race" in historical-linguistic context. First, if in fact the framers of the Reconstruction Amendments understood race as having corporation-like attributes, then, the Court's assertion that equal protection doctrine protects individuals but not racial groups is inconsistent with a historical understanding of the Reconstruction Amendments. Thus, if "original meaning" is to be given any weight in determining what race means for equal protection purposes, then the current doctrinal focus on protecting individuals but not groups is misplaced.

Second, if the notion of race solely as skin color is not supported by original meaning, then the question arises, what *is* the

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[47] 100 U.S. 303 (1879).

[48] *Id.* at 308.

constitutional justification for defining race in that way? And, what is the constitutional justification for rejecting a conception of race that is more consistent with original meaning? If there is no solid constitutional basis to reduce the meaning of race to a physical trait, then it becomes much easier to argue that the current conception of race in equal protection law arises in large part due to the Justices' naked policy and moral preferences. Reducing race to skin color may have no justification or function other than to restrict and undermine the scope and breadth of affirmative action plans seeking to expand equal opportunity for racial minorities. Arguably, that has been the agenda of the Court from *Bakke*[49] on—from *Bakke* to *Croson*[50] to *Adarand*[51] to *Grutter*[52] and then to *Parents Involved*—which was Roberts' ultimately failed attempt to effectively overrule *Brown v. Board of Education*[53] and its racial integration mandate.[54]

Third, understanding race as corporation helps us to better understand the purpose and function of racial segregation in public schools: segregation operated to protect the "corporate personality" of the white race. In *Rice v. Gong Lum*, the Mississippi Supreme Court explained:

> To all persons acquainted with the social conditions of this state and of the Southern states generally it is well known that it is the earnest desire of the *white race to preserve its racial integrity and purity*, and to maintain the purity of the social relations as far as it can be done by law.[55]

The court then explained that segregation helps maintain the purity of the white race by preventing race amalgamation or the mixing or corrupting of the white race with inferior races.[56] Segregation of school children was vital to preventing race amalgamation, because segregationists feared that if white and

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[49] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

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

[51] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[52] Grutter v. Bollinger, 539 U.S. 306 (2003).

[53] 347 U.S. 483 (1954).

[54] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007). The Roberts opinion failed to gain the necessary fifth vote to make it binding Court precedent. Although Justice Anthony Kennedy concurred in the Court's plurality opinion and voted to strike down the voluntary integration plans at issue in *Parents Involved*, Kennedy did not agree with the plurality's holding that racial diversity is not a compelling interest. He instead struck down the plans on narrow tailoring grounds. *Id.* at 751, 760 (Kennedy, J., concurring).

[55] Rice v. Gong Lum, 104 So. 105, 108 (Miss. 1925) (emphasis added).

[56] *Id.* at 110.

black children attended school together as social equals, interracial relationships and marriages would become normalized and over time, the amalgamation of the races would result in the destruction of the white race and the creation of a mongrel or mixed-race nation. To use the language of corporations, segregation was an essential tool to preserve and maintain the distinct and superior corporate identity of the "white race."

Finally, thinking of race as corporation helps us to more effectively critique Roberts' opinion in *Parents Involved*. Once we understand that the *Brown* Court and the LDF attorneys did not think of race solely as a physical trait, then, it becomes clear that their understanding of race does not support the reasoning and holding in *Parents Involved*. In fact, the entire desegregation case law that followed in wake of *Brown* would not make any sense if the concept of race as corporation was erased from equal protection doctrine and race was understood solely as a physical trait.

IV. CONCLUSION

A central goal of this essay was to clarify the constitutional and political discourse on race. To gain clarity, it is crucial to carefully understand that race is a term with multiple meanings; otherwise, confusion and obfuscation inevitably result if agreement regarding its meaning is assumed. And as this essay has suggested, any project to reconstruct equal protection doctrine on race will benefit from exploring and analyzing the concept of race as corporation.