Introduction

The Civil Rights Story/The American Story

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To pursue the concept of racial entitlement – even for the most admirable and benign of purposes – is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American. – Justice Antonin Scalia

It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior. . . . Because of their 'distinctive histories and traditions,' black schools can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement. – Justice Clarence Thomas

It is widely recognized that the idea of rights is central to America's national identity and its sense of itself.[1] So powerful is our attachment to rights that some scholars see the American story as powerfully intertwined with what they label a "myth of rights."[2] In this myth of rights perhaps nothing plays as important a role as the history of the mid-twentieth-century struggle for civil rights for African Americans. *Brown v. Board of Education* is, of course, the key moment in that struggle, and it has become one of America's "sacred texts," a decision to which almost everyone pays homage even when they act in ways incompatible with its central premises.[3] It is to the spirit of *Brown* that groups seeking recognition continuously appeal, a spirit that today plays a key role in the debate over gay marriage.[4]

Civil Rights in American Law, History, and Politics brings together the work of five distinguished scholars to critically assess the place of civil rights in the American story. This work includes examples of both the "old" and the "new" civil rights histories.[5] It uses the sources and analytics

of both legal and social history. It takes law seriously on its own terms but defines "law" capaciously. It attempts to capture what happens before, after, behind, in front of, and with little relationship to the Supreme Court. It is thus less linear, more multiple. It highlights complexity and contingency. In doing so, it addresses the people, institutions, and legal and nonlegal arenas in which actors and arguments meet.[6]

Civil Rights in American Law, History, and Politics looks backward and forward, connecting the twentieth-century civil rights struggle with new perspectives on the meaning of equality post-*Brown*. It comes on the heels of yet another civil rights decision by the U.S. Supreme Court in which the Court sent a challenge to affirmative action back to the lower court for review on the basis of strict scrutiny and held that under strict scrutiny a university seeking to use affirmative action would have to demonstrate "before turning to racial classifications, that available, workable race neutral alternatives do not suffice."[7]

As this decision demonstrates, even as we celebrate and struggle over the meaning and reach of civil rights post-*Brown*, when it comes to race and racial issues, these are strange times, confused and confusing, for all Americans. This is especially true when the issue of race involves relations between African Americans and Caucasian Americans. It is especially true at a time when we celebrate the triumph of the black middle class[8] while demonizing young black males in our inner cities.[9] Almost seventy years after *Brown* put an end to segregation of the races by law, the question of whether Americans can live with racial differences, and how we can do so, is a very live one. Current debates about affirmative action, multiculturalism, and racial hate speech reveal persistent uncertainty and ambivalence about the place and meaning of race in American culture and the role of law in guaranteeing racial equality. Moreover, all sides in those debates claim to be the true heirs to *Brown*, even as they disagree vehemently about its meaning.[10]

What can we learn about the role of civil rights in the American story, one legitimately might ask, from the fact that two Justices of the Supreme Court, who in many other respects share similar social views, take radically divergent positions about what our country should aspire to in recognizing race and racial difference? One, Justice Scalia, advocates a kind of uniracialist ideal and sees the achievement of that ideal as central to our national identity, whereas the other, Justice Thomas, the only African American on

the Court, speaks in the language of black pride, if not black nationalism. And these differences certainly could be multiplied if we examined a broader array of political views.

American uncertainties and ambivalence about race go at least as far back as Tocqueville's pained observations about the three races in America and their sad inability to live together as equals.[11] In the intervening two centuries they have not been resolved by civil war, legal prescription, mass protest, or inspiring leadership. Today conflict between blacks and whites, and conflict about black-white relations, is as vexing as it has ever been.[12] Race, as Gunner Myrdal reminded us, is the "American Dilemma."[13]

Uncertainty is particularly acute in the legal domain where, over the last six decades, courts and judges have struggled to come to terms with the meaning of the Constitution's guarantee of equal protection of the law. In that period the record of judicial interpretation and understanding of racial equality has taken the form of a back-and-forth movement in which first desegregation, then integration with its accompanying need for busing and affirmative action, and now color-blindness have been the prevailing ideologies.[14] At each turn courts have tried to come to terms with the following issues: Can or should the law see, or see through, the racial mosaic that is America? Is taking race into account to remedy the effects of past racial discrimination a form of racism or a path toward a more racially tolerant society? Can law lead us away from discrimination and racism, or is it hostage to prevailing sentiments and opinions?

Civil Rights in American Law, History, and Politics speaks to these questions. According to the authors whose work is assembled in this book, the significance of the twentieth-century civil rights movement involves more than even its remarkable willingness to say no to one of the great shames of American history. The struggle for civil rights was, in the last century, an occasion for the rebirth of America, a retelling of a story of struggle and liberation. It pointed the way for a new engagement with the problem of difference, of how men and women of different backgrounds and races might live together as equals.

But the idea of civil rights marked a radical departure in the style and substance of our law, and it had a profound impact on the way Americans thought about law's role in promoting social justice.[15] The drama of *Brown*, of an appeal to law to make good on its promises, has in the last six decades been repeatedly reenacted in courtrooms across the United States. And

Brown, even today, provides a powerful template and touchstone through which contemporary racial issues can be seen.

As is now widely recognized, until 1954 the project of establishing the American Constitution was radically incomplete. It was incomplete because, in both chattel slavery and then Jim Crow, the law systematically excluded people from participating fully, freely, and with dignity in America's major social and political institutions on the basis of their race. But *Brown* changed everything. "*Brown*," J. Harvie Wilkinson contends, "may be the most important political, social, and legal event in America's twentieth-century history. Its greatness lay in the enormity of the injustice it condemned, in the entrenched sentiment it challenged, in the immensity of law it both created and overthrew."[16] It stood for the proposition that "race is an impermissible basis for governmental decisions."[17] Yet it did not end the indignities that the law itself had heaped on African Americans. *Brown* was at once a turning point and a source of resistance, a point of pride and an object of vilification. Its legacy, like the legacy of all great historical events, is, even today, contested and uncertain.

Like Lincoln's Gettysburg Address, the text of *Brown* is marked by surprising brevity, but also by startling vision. It was, in Richard Kluger's words, "the turning point in America's willingness to face the consequences of centuries of racial discrimination."[18] It altered the course of constitutional history by sweeping away the legal and philosophical underpinnings of segregation, and, in so doing, took a giant step toward the realization of the vision of respect for persons that, from the beginning, has animated our Constitutional vision. Like Lincoln's Gettysburg Address, *Brown* reminds us, again in Kluger's words, that "[o]f the ideals that animated the American nation at its beginning none was more radiant or honored than the inherent equality of mankind. There was dignity in all human flesh, Americans proclaimed, and all must have a chance to strive and excel."[19]

As the then-editors of *The Yale Law Journal* put it in their celebration of the thirtieth anniversary of *Brown*, "No modern case has had a greater impact either on our day-to-day lives or on the structure of our government."[20] And what was true more than two decades ago is no less true today. Yet ours is a time of revision and mixed views about the civil rights movement and its legacy. Whereas some commentators have noted that it has not resulted in the elimination of racism in American society, others suggest that the civil rights movement in general and *Brown* in

particular have been given too much credit for sparking racial progress. "[F]rom a long-range perspective," Michael Klarman argues, "racial change in America was inevitable owing to a variety of deep-seated social, political and economic forces. These impulses for racial change . . . would have undermined Jim Crow regardless of Supreme Court intervention."[21]

For scholars like Klarman, the victories of the civil rights movement stand not as a monument to law's ability to bring about social change, but instead as a monument to its failure to do so. In their view, whatever racial progress America has achieved cannot be traced back to *Brown*. "[C]ourts," Gerald Rosenberg contends,

> had virtually no effect on ending discrimination in the key fields of education, voting, transportation, accommodation and public places, and housing. Courageous and praiseworthy decisions were rendered, and nothing changed. . . . In terms of judicial effects, then, *Brown* and its progeny stand for the proposition that courts are impotent to produce significant social reform.[22]

And some scholars now say that the integrationist vision, which is most closely associated with *Brown*, is inadequate to deal with the continuing subordination of African Americans in contemporary American society.[23]

All told, the story of civil rights in America is far from a happy one. The legacy of that story is today seen in what Hazel Carby calls "political apartheid"[24] and in Carol Greenhouse's description of the "criminalization" of racial minorities.[25] And as the continuing controversy and confusion surrounding race all too dramatically reveal, the civil rights movement unsettled as much as it resolved; it opened up new avenues for contestation, new ideas about how Americans should think about race, new challenges for law.

While the chapters in this book look back on the civil rights movement to assess its legal and cultural significance, they also examine its contemporary meaning and hold on the future. They do so in a time of turmoil in the American debate about race. As Wilkinson argues, "America stands at a critical juncture with respect to its race relations – a juncture every bit as important as that which confronted the Supreme Court in 1954."[26] Where once the integrationist ideal and equal opportunity were the preeminent ideals of racial justice, today each is seriously contested. Today criticism of affirmative action as well as the development of black

nationalism and multiculturalism undermine, or at least challenge, integration for hegemony in the story of racial progress.

Civil Rights in American Law, History, and Politics charts the ambiguous and contested meanings of civil rights in law and culture and confronts a variety of important questions about race in contemporary America. How important is civil rights in America's story of possibility and change? How has it transformed the very meaning of citizenship and identity in American culture? Why does the subject of race continue to haunt the American imagination and play such a large role in the political and legal debate? Do affirmative action and multiculturalism promise a way out of racial polarization, or do they sharpen and deepen it? Are there new and better ways to frame our commitment to equal justice?

Chapter 1, by Devon W. Carbado and Rachel Moran, considers the place of civil rights in the American story through a survey of major cases in U.S. legal history. They begin by examining the country's history of legalized slavery, rejection of the citizenship rights for black Americans in *Dred Scott*, and the abolition of slavery. They note that blacks were not the only group denied citizenship in American history. Mexicans, Chinese, and others have been viewed as racially inferior and unfit to participate in processes of governance.

Indeed, until relatively recently, the story of civil rights in America's law, history, and politics was as much one of denial as of extension of rights, of exclusion as of inclusion of groups. Law has played a key role in establishing caste-like systems in the United States. Carbado and Moran see this dynamic at work in cases such as *Pace v. Alabama*, which affirmed the constitutionality of laws banning interracial marriage. *Pace* held that policies that maintained "separate but equal" standards between races did not violate the Fourteenth Amendment. This line of argumentation was crucial for the decision in *Plessy v. Ferguson*. In *Plessy* the court ruled that a man who was one-eighth black and seven-eighths white could be denied seating in the whites-only train car because the segregated cars met the "separate but equal" standard.

The story of civil rights that centers on *Plessy* is one in which racialized persons tried to identify themselves as white in order to obtain a privileged position in America's racial caste system. They took up the Supreme Court's invitation to minorities to do what the authors describe as "litigate [their] racial identit[ies]." This invitation was central to the litigation in

Hudgins v. Wrights, in which three women had to prove to a Virginia court that they were descended from free Native Americans as opposed to black slaves. In *Lum v. Rice* Gong Lum refused to self-identify as either white or black and was thus denied entrance to an all-white school. The Supreme Court upheld that denial. Prior to this case, Takao Ozawa had applied for naturalization on the grounds that he could be considered white, because his light skin had allowed him to assimilate into white culture. Nonetheless, the court denied him naturalization rights.

Chapter 1 examines cases in which members of other minorities litigated their racial identities. Those cases involved Arab Americans, Native Americans, and Mexican Americans. Carbado and Moran point out that in some of those instances the social subordination resulted from race-based policies that considered race more openly than today's allegedly color-blind civil rights. Thus, as is now well known, in World War II, Japanese Americans were subject to special curfews and mandatory evacuation to internment camps, both of which actions were found constitutional.

But *Brown v. Board of Education* altered the civil rights story and opened avenues for challenging explicit racial classifications in several areas. For example, plaintiffs in two cases, *Perez v. Sharp* and *Loving v. Virginia*, successfully challenged antimiscegenation laws. Yet, Carbado and Moran argue, these cases were the first of many that advocated color-blindness in law while allowing for the continued existence of segregation in fact. This de jure versus de facto tension can be seen in the recent history of litigation surrounding affirmative action. In *Regents of the University of California v. Bakke*, the Supreme Court struck down universities' racial quota systems but ruled in favor of university affirmative action programs that reviewed candidates holistically and could be justified as contributing to a diverse student body. Yet in *Shaw v. Reno*, the Court ruled that creation of majority-minority districts, a tenet of the 1965 Civil Rights Act, was unconstitutional if the districts were drawn solely along racial lines. Similar to *Bakke*, the Court ruled that race could be taken into account when drawing the district lines, but that it could not be the sole factor in the decision.

In 2000, the Court struck down the voting process for the Office of Hawaiian Affairs, which is responsible for the interests of indigenous Hawaiians. The Court found the electoral process unconstitutional because only those descended from indigenous Hawaiians were allowed

to vote. The case extended the color-blind approach beyond the traditional bounds of race as conceived in *Brown*. Carbado and Moran contend that this case, along with *Bakke* and *Reno*, exemplifies the Court's general trajectory toward color-blindness as the key element in the civil rights struggle.

Carbado and Moran see in the long sweep of American history an incorporation of civil rights into American law, history, and politics. We no longer require people to be white to avoid discrimination, but we live in a society, they note, in which race-based inequality coexists with color-blind policy and in which the Supreme Court's reluctance to consider cases from a race-conscious standpoint has limited its ability to stop the unequal treatment.

A similar point is made in Chapter 2. Here Montré Carodine describes the popular civil rights progress narrative. This narrative tells a story in which America has advanced beyond its years of racism and entered a post-racial, meritocratic society. Carodine argues that this narrative has been used to deny structural racism and avoid repairing a still racist America. Carodine seeks to illustrate the persistence of racial disadvantage in post-racial America by showing how race is used as character evidence in court.

Carodine describes what she calls a "black tax." This term applies to the added costs that come with being black. Sometimes the costs are purely social, but they can also be economic. The counterpart to the black tax is the recognition of whiteness as property, or something that confers value on its possessor. In the case of the 2012 shooting of Trayvon Martin by George Zimmerman, we see the black tax and white privilege at work. Carodine argues that police initially trusted Zimmerman because he was white and that Trayvon Martin's parents had to craft his image with extra care to avoid stories of his disciplinary trouble at school, because of his blackness. The case illustrates that, long after the storied success of the civil rights movement, people must still engage in the litigation of their race.

Carodine examines specific rules of evidence that bring about the litigation of one's race in court. The first rule she discusses is Rule 404. This rule works to prevent prior actions of the defendant from being raised as character evidence. However, the rule makes an exception for bad acts and allowed Zimmerman's defense to present Martin's school disciplinary record as character evidence against him, despite the fact that discipline

in general likely falls unevenly on black children and adults. The uneven application of the law, followed by the further discrediting of defendants through the presentation of past convictions, allows for a cycle that leads to the mass imprisonment of the black (and Latino) populations. As the cycle deepens and the hopes for a fair trial worsen, minorities become more likely to take plea bargains that allow them to avoid the courtroom altogether, resulting in more minorities having criminal records.

Carodine's chapter concludes with an examination of evidence Rule 404(b), which has recently been used "in reverse" to vindicate misidentified minority defendants. In *United States v. Stevens*, a black defendant, who had been identified in an unfair manner, used the rule to show that a different person of similar appearance had committed a similar crime, and thus to shed doubt on his own guilt. Yet Carodine cautions that this rule only legitimizes the use of race in the courtroom. In her view, all racialized applications of evidence rules should be opposed. To make progress in seeing the dangers of racializing trials, Carodine notes that we must first acknowledge what the civil rights story with its emphasis on color-blindness now elides, namely the continuing salience of race and the dilemmas that its salience pose for people of color in the United States.

In Chapter 3, Mark Brilliant offers a different perspective on color-blindness and its place in the civil rights story from the one offered in the first two chapters. Unlike Carbado and Moran, Brilliant argues that the Supreme Court never pursued a wholly color-blind or race-conscious agenda. Brilliant rewrites a common narrative of the American civil rights movement. That narrative describes a shift in the tactics of the civil rights movement from the time of the New Deal and World War II to the more recent Cold War era. It describes a shift from race-conscious to race-blind action. Brilliant's chapter suggests that the distinction between race-conscious and race-blind action is, in reality, quite blurred. He argues that recent civil rights action has not been purely color-blind, and that America's civil rights policy has been both color-blind and color-conscious. He hopes that this recognition will blunt the effort by conservatives to paint all recent progress as resulting from commitment to color-blindness.

Brilliant's chapter examines the position of Thurgood Marshall in two Supreme Court cases. In *Hughes v. Superior Court*, the Progressive Citizens of America (PCA) and the National Association for the Advancement of Colored Persons (NAACP) demanded that Lucky Stores hire black workers

in proportion to black patronage. After the stores refused, the PCA and the NAACP picketed Lucky Stores. A court ordered the picket to end, but the black leaders continued it. Eventually the Supreme Court upheld the lower court's order and found the hiring demanded by the PCA and NAACP to be illegal because hiring decisions could not be made on the basis of race. Marshall joined the decision. In *Bakke*, affirmative action was upheld only to support a diverse student body, as long as the evaluation was holistic and there were no racial quotas. This limited support of affirmative action was attacked by Marshall, who sided with the majority while also arguing that the decision was too limited.

Brilliant argues that Marshall's shift from *Hughes* to *Bakke* can be seen as moving from an embrace of color-blind principles to those of color-consciousness, but he warns against embracing this simplified narrative. He notes that most civil rights efforts mix color-blindness and color-consciousness, and he sees Marshall's change between the two cases as just one example of that mix.

The bulk of the chapter carries this argument forward by discussing California's Fair Employment Practice Act, which was passed in 1959 and established the Fair Employment Practice Commission (FEPC) to enforce the law. This law made discrimination in hiring decisions on the basis of race, religion, ethnicity, or nationality illegal. Brilliant shows that in its enforcement decisions the FEPC did not simply prevent race from being considered in hiring, but it also consistently investigated the racial composition of companies' employees. When the composition was notably unbalanced, the FEPC would require employers to achieve more racial balance. By doing so, the FEPC mixed color-blind and color-conscious civil rights policy.

Brilliant's chapter uses the examples of Marshall and California's FEPC to argue that to really understand the place of civil rights in America's law, history, and politics, we need to go below the surface of macro trends to capture individual and local action. When we do, we see a more complex story than the kind Carbado and Moran or Carodine tells. This more complex story reveals ambiguities and uncertainties in America's understanding and embrace of civil rights.

Susan Sturm in Chapter 4 argues that the current approach to civil rights law, usually involving legal compliance and individual litigants, is an unnecessarily limited one for achieving progress. She offers a broader