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The Keyes to Reclaiming the Racial History of the Roberts Court

Tom Romero II

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THE *KEYES* TO RECLAIMING THE RACIAL HISTORY OF THE ROBERTS COURT

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This Article advocates for a fundamental re-understanding about the way that the history of race is understood by the current Supreme Court. Represented by the racial rights opinions of Justice John Roberts that celebrate racial progress, the Supreme Court has equivocated and rendered obsolete the historical experiences of people of color in the United States. This jurisprudence has in turn reified the notion of color-blindness, consigning racial discrimination to a distant and discredited past that has little bearing to how race and inequality is experienced today.

The racial history of the Roberts Court is centrally informed by the context and circumstances surrounding Brown v. Board of Education. For the Court, Brown symbolizes all that is wrong with the history of race in the United States—legal segregation, explicit racial discord, and vicious and random acts of violence. Though Roberts Court opinions suggest that some of those vestiges still exits, the bulk of its jurisprudence indicate the opposite. With Brown's basic factual premises as its point of reference, the Court has consistently argued that the nation has made tremendous strides away from the condition of racial bigotry, intolerance, and inequity.

The Article accordingly argues that the Roberts Court reliance on Brown to understand racial progress is anachronistic. Especially as the nation's focus for racial inequality turned national in scope, the same binaries in Brown that had long served to explain the history of race relations in the United States (such as Black-White, North-South, and Urban-Rural) were giving way to massive multicultural demographic and geographic transformations in the United States in the years and decades after World War II. All of the familiar tropes so clear in Brown and its progeny could no longer accurately describe the current reality of shifting and transforming patterns of race relations in the United States.

In order to reclaim the history of race from the Roberts Court, the Article assesses a case that more accurately symbolizes the recent history and current status

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of race relations today: Keyes v. School District No. 1. This was the first Supreme Court case to confront how the binaries of cases like Brown proved of little probative value in addressing how and in what ways race and racial discrimination was changing in the United States. Thus, understanding Keyes and the history it reflects reveals much about how and in what ways the Roberts Court should rethink its conclusions regarding the history of race relations in the United States for the last 60 years.

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The use and deployment of history has long been a contested and controversial part of judicial decision making, particularly in the Supreme Court.[1] As scholars, particularly legal historians have repeatedly pointed out, "using the past to justify normative legal conclusions readily allows judgments that are subjective, arbitrary, and self-serving."[2] Despite such

1. Much of this contested discourse has revolved around the Supreme Court's attempt to identify "original understanding," or "original intent, or "original meaning" for the drafters of constitutional text. *See, e.g.*, EDWARD JACK M. BALKIN, LIVING ORIGINALISM (2011); EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE (2007), DENNIS J. GOLFORD, THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM (2005), DANIEL A. FARBER AND SUSANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS (2002); H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS (2002). An instructive debate between an "originalist" and a trained historian is found in Gordon S. Wood & Scott D. Gerber, *The Supreme Court and Uses of History*, 39 OHIO NORTHERN L. REV. 435 (2013).

2. A. Purcell, Jr., *Paradoxes of Court-Centered Legal History: Some Values of Historical Understanding for a Practical Legal Education*, 64 J. LEGAL ED. 229, 233 (2014) (citing to the statement by Robert Bork that "History and tradition are very capacious suitcases . . . and a judge may find a good deal pleasing to himself packed into them, if only because he has packed the bags himself."). Bancroft Prize winning American Historian, Gordon S. Wood, argues that "the history that historians write is much too complicated, too unwieldy to be used. As I say, judges have created what has been called 'history lite,' I think it's an essential part of what you do, but let's

criticisms, history continues to play a prominent, if not pre-eminent role in the jurisprudence of the Supreme Court. From its formulation over the constitutional right to "keep and bear arms"[3] to the free speech protections extended to corporations,[4] an inadequate, unreliable, and often celebratory history often plays a determinative role in the Supreme Court's opinions.

Nowhere has this been more evident than in the Roberts Court jurisprudence involving individuals as well as communities of color. Building upon the Burger and Rehnquist Courts severe restriction of "judicial oversight of minority [non-White] claims as it intensified judicial oversight of majority [White] claims,"[5] the Roberts Court has crafted a history of race relations that does three things which I will demonstrate in the first part of this Article. First, it disparages all uses of race. Second, it equates and equivocates the same harm of racial classification to Whites and Non-Whites. And third, it claims dramatic racial progress while ignoring altogether how and in what ways the shape, form, place, and targets of racial discrimination has fundamentally transformed in the last fifty to sixty years. In so doing, the Supreme Court's racial rights jurisprudence has equivocated and rendered obsolete the historical experiences of people of color in the United States.[6] I and others have recently argued elsewhere that this

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not get it confused with real critical history because that can't be used very effectively." Wood, *supra* note 1, at 443-444.

3. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 581 (2008) (citing 1 DICTIONARY OF THE ENGLISH LANGUAGE 106 (4th ed.) (reprinted 1978)) (deploying, for instance, Timothy Cunningham's 1771 legal dictionary to define "arms").

4. Citizens United v. Federal Election Com'n, 558 U.S. 310, 353-354. (2010) (assessing the original meaning of the first amendment as applied to corporate speech); *see also* Leo E Strine & Walter, Nicholas, *Originalist or Original: The Difficulties of Reconciling Citizens United with Corporate Law History* (Feb. 13, 2015), SSRN: http://ssrn.com/abstract=2564708 or http://dx.doi.org/10.2139/ssrn.2564708 (critiquing the Court's use of history in the *Citizens United* case).

5. Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 7 (2013).

6. I explore the origins of this jurisprudence in the context of Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), through Grutter v. Bollinger, 539 U.S. 306 (2003), and Gratz v. Bollinger, 539 U.S. 244 (2003), in Tom I. Romero, II, *¿La Raza Latina?: Multicolor Ambivalence, Color Denial, and the Emergence of a Tri-Ethnic Jurisprudence at the End of the Twentieth Century*, 37 N.M. L. REV. 245, 285-293 (2007). Recent Roberts Court cases include Ricci v. De Stefano, 129 U.S. 2658 (2009) (holding the city of New Haven violated the Title VII rights of White firefighters when it announced a new promotion test designed to respond to previous tests that had resulted in the promotion of virtually all White and no Black firefighters); Arizona v. United States, 132 S. Ct. 2492 (2012) (leaving intact the ability of the state of Arizona the ability for local police to arrest anyone who they believe has committed a crime and whom they think is in the country in an undocumented status); Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (reversing the Fifth Circuit's application of its standard of review of a race-conscious component of its admissions plan); Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612 (2013) (invalidating §5 of the Voting Rights Act of 1965 because it relied on outdated data); and Schuette v. Coalition to Defend Affirmative Action, 572 U.S. __ (2014) (holding that an Amendment to Michigan's constitution that prohibits state universities from considering race as part of its admis-

jurisprudence has paradoxically produced an "end of history" in cases involving race[7] by reifying the notion of color-blindness and thereby consigning all the vestiges of racial thinking, benign or otherwise, to a distant and discredited past.

The racial history project of Justice Roberts[8] was revealed during his first term on the bench in a Texas redistricting case that struck down one congressional district in the state because it diluted the voting power of Latinos. In contesting the majority's opinion on this particular issue, Justice Roberts decried the decision for engaging in the "*sordid* business" of "divvying us up by race."[9] Although the same "sordid" history of Latino vote suppression and a long entrenched patterns of political, social, and economic discrimination against Latinos, as well as Blacks, was barely mentioned by either the majority or dissenting opinions in the case,[10] Justice Roberts's striking statement established the frame by which his Court would evaluate the history of racial progress for cases involving race.

The logic and thereby the problems of the Roberts Court's understanding of the history of race relations were demonstrated most recently

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sion process was not based on unconstitutional racial animus); *see also* Reva B. Siegal, *From Colorblindness to Antibalkinazation: An emerging Ground of Decision in Race Equality Cases,* 120 YALE L. REV. 1278 (2011); Helen Norton, *The Supreme Court's Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197 (2010).

7. *See* Tom I. Romero, II, *The "Tri-Ethnic" Dilemma: Race, Equality, and the Fourteenth Amendment in the American West*, 13 TEMPLE POL. & C.R. L. REV. 817, 854-855; Joel Heller, *Shelby County and the End of History*, 44 U. Memph. L. Rev. 357 (2013). Joel Heller and I have used Francis Fuyukama's influential book, The End of History, to argue that the Supreme Court sees the history of race as one consigned to a long-dead past. In some of the same ways that Fukuyama celebrates the triumph of liberal democracy in the modern world over the messy historical forces of communalism and despotism, *see* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992), both Heller and I argue that the Supreme Court has embraced a history that celebrates racial progress, while ignoring altogether how in and in what ways that history fails to explain substantive changes in the ways in rich racial discrimination is practiced and experienced. Romero, *The Tri-Ethnic Dilemma*, *supra* note 7, at 854-855; Heller, *Shelby County*, *supra* note 7, at 376-385. In another essay, Heller describes all of the ways that "history still matters," in at least Voting Rights litigation. Joel Heller, *Subsequent History Omitted* (2014) THE CIRCUIT. Nov. 2014 Paper 64, at 380-381, *available at* http://scholarship.law.berkeley.edu/clrcircuit/64.

8. A compelling narrative of the role that race and its history has played in the Roberts Court and a broader understanding of this as a "project" to transform constitutional jurisprudence is detailed in MARCIA COYLE, THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION, Part 1, chs. 1-6 (2013).

9. League of United Latin American Citizens v. Perry, 548 U.S. 399, 511 (2006) (Roberts, J., concurring in part and dissenting in part) (emphasis added).

10. This history is documented in Nina Perales, Luis Figueroa & Criselda G. Rivas, *Voting Rights in Texas: 1982-2006*, S. CAL. REV. L. & SOC. JUST. (2006). Data compiled for the report relied on the archival research of noted historians, such as David Montejano, Julie Leininger Pycior, and Guadalupe San Miguel, Jr. *Id.* at 8-13, nn. 12-45. The majority opinion in *Perry* does reference the "sordid history of manipulating the electoral process to perpetuate its stranglehold on political power . . ." 548 U.S. at 449.

in *Shelby County, Alabama v. Holder*.[11] Writing for the majority, Justice Roberts declared aspects of the Voting Rights Act of 1965 unconstitutional because it relied on "decades-old data and eradicated practices," reflecting only "decades-old problems" that have "no logical relation to the present day."[12] The problem, according to Justice Roberts, was that Congress had been using statistics derived from its coverage formula from the mid-1960s and early 1970s as a benchmark for identifying which jurisdictions would be subject to Section 5 of the VRA, a provision requiring the submission of any proposed change in voting policies to the federal government for approval before implementation.[13] The coverage formula was unconstitutional, according to the Court, because it failed to recognize that "things have changed dramatically" in the covered jurisdictions, most of which were located in the South.[14]

In making this argument, Justice Roberts claimed that there was "no denying that . . . our Nation has made great strides" when it came to the issue of racial equality.[15] Justice Roberts referenced particularly the elimination of "[b]latantly discriminatory" acts that included not only a "variety of [requirements and] tests 'specifically designed to prevent' African Americans from voting," but also the elimination of murder and police beatings of civil rights activists.[16] The result was a narrative that described a 21st century United States that has thrown off many, if not all of the shackles of its racial past. As a consequence, the Justice declared that Congress needed to adapt the legislation to address "current needs" and "current conditions."[17]

This Article is designed to re-frame and thereby re-claim the ways that the Roberts Court thinks and subsequently writes about the history of race relations in its decision making. Indeed, it takes seriously his suggestion in *Shelby County* that legislatures, judges, lawyers, and citizens understand better the "current conditions"[18] of racial discrimination in the United States. I argue that the Roberts Court's telling about the history of race in the United States deploys an outdated and myopic binary framework to understand how racial inequality has been and continues to be enforced through both overt and covert means. To be sure, the framework that the Roberts Courts embraces is powerfully rooted in notions of American exceptionalism whereby the United States is a uniquely free na-

11. *Shelby Cnty*, 133 S.Ct. at 2612.

12. *Id*. at 2627, 2629.

13. 42 U.S.C. § 1973c(a) (2012). The coverage formula was found in Section 4(b) of the Act. *Id*. § 1973b(b).

14. *Shelby Cnty*, 133 S.Ct. at 2625.

15. *Id*. at 2626.

16. *Id*. at 2621 (citing N.W. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 202 (2009)); *id*. at 2624 (quoting S.C. v. Katzenback, 383 U.S. 301, 310 (1966)).

17. *Id*. at 2619, 2627-30.

18. *Id*. at 2628-30.

tion committed to liberty, egalitarianism, individualism, populism, and laissez-faire or market based economics.[19] Racial discrimination—particularly its manifestation and conscious codification against Blacks through a violent, brutal and oppressive system of slavery and Jim Crow—however, has been the tragic exception to these principles.[20]

In order to reconcile such dissonance, the Roberts Court in its race cases has told a story of enlightenment whereby Americans, much like the prisoners in Plato's *Allegory of the Cave*, emerge triumphantly out the dark, dank, debilitating, and "*sordid*" cave of racial consciousness.[21] For the Roberts Court, history serves the same rhetorical tool as it did for Plato to describe an upward trajectory from color-consciousness to color-blindness in the United States. Whereas the Roberts Court opinions in race cases, especially those by the Chief himself, have referenced a distain for slavery, Jim Crow, and racial violence, it has done so by decrying race-conscious thinking. By arguing that all racial thinking has created shadows of racial discord and racial hostility, the Roberts Court instead celebrated all of the progress that has been made to lift Americans and its legal system out of its racist past.

For the Roberts Court, the ascent out of the cave of racial consciousness is rooted squarely in *Brown v. Board of Education* in 1954.[22] Indeed, its "history," Justice Roberts tells us in the 2007 case, *Parents Involved in Community Schools v. Seattle School District No. 1*, "will be heard."[23] The history

19. SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD 19, 31 (1996). In 2007, Justice Roberts gave the Keynote Address for The Federalist Society for Law and Public Policy Studies National Lawyers Convention. Displaying his historical sensibility, Justice Roberts' remarks focused on the judicial appointments of James Madison as the "architect of limited government and separated powers" dependent upon an "independent judiciary". Justice John G. Roberts, Keynote Address at the Federalist Society for Law and Public Policy Studies' 2007 National Lawyers Convention (Nov 16, 2007) (transcript *available at* http://fora.tv/fora/fora_transcript_pdf.php?cid=1967) (Broadcast available at https://www.youtube.com/watch?v=CRISpBGsoTOU).

20. The historian Gary Gerstle has described the tension between "civic nationalism" –the American belief in the fundamental equality of all human beings, in every individual's inalienable rights to life, liberty, and the pursuit of happiness, and in a democratic government that derives its legitimacy form the people's consent[;]" and that of "racial nationalism" – that "conceives of America in ethnoracial terms, as a people held together by common blood and skin color and by an inherited fitness for self-government." GARY GERSTLE: AMERICAN CRUCIBLE: RACE AND NATION IN THE TWENTIETH CENTURY 4 (2001). Gerstle notes both of these contradictory ideals are inscribed in the American constitution and as a result, have powerfully shaped the nation. *Id.* at 5. Unlike the ascendant ideology I proscribe to John Roberts and his Court, however, Gerstle sees each of these ideals as a more permanent, and unexceptional part of American culture and life. *Id.* at 373-374.

21. *See* C.J.S. HAYWARD, PLATO'S ALLEGORY OF THE CAVE REVISITED AND OTHER SOCRATIC DIALOGUE (2012).

22. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

23. Parents Involved in Community Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 746 (701).

that *Brown* encapsulates has, for Justice Roberts certain "undeniable" truths.[24] One is the "fact" that racial classifications, whether used to segregate students or advance diversity "promotes notions of racial inferiority," and "lead[s] to a politics of racial hostility."[25] The second truth is that racial consciousness "reinforce[s] the belief, held by too many for too much of *our history*, that individuals should be judged by the color of their skin."[26] And finally, racial consciousness "endorse[s] race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict."[27] *Brown's* history, the Court tells us, "should teach greater humility" about how the shroud of any racial thinking would inevitably lead to harm.[28]

It is critical to point out that the "undeniable" harms associated with race based thinking that the Court cites emerge out of Burger and Rehnquist Court jurisprudence that largely involved white plaintiffs challenging racial classifications. In those cases, history was deployed by each court to make the claim that racial classifications designed to harm non-Whites in the history of the United States are no different than racial classifications designed to benefit non-Whites.[29] Both, according to the Court, effectuate a harm on the "disfavored" group. In other words, the Court was indicating that the history of racial discrimination against Blacks and other non-Whites, though rooted in different contexts, had value only in suggesting that Whites might suffer the same harm. As Justice Roberts made evident in his majority opinion in *Parents Involved*:

> Before *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 cases have not carried the heavy burden of demonstrating that we should allow this once again [against White plaintiffs]—even for very different reasons. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.[30]

It no surprise that *Brown* figures prominently in Roberts Court (as well as its Burger and Rehnquist Court predecessors) race jurisprudence

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24. *Id*. at 745-46.

25. *Id*. at 746 (quoting Richmond v. J.A. Croson, Co., 488 U.S. 469, 493 (1986).

26. *Id*. at 746 (quoting Shaw v. Reno, 509 U.S. 630, 657 (1993) (emphasis added).

27. *Id*. at 746 (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting)).

28. *Id*. at 742 (quoting Metro Broadcasting, 497 U.S. at 609-610 (O'Connor, J., dissenting)).

29. *See* articles cited, *supra* note 6; *see also Regents of the Univ. of Cal.*, 438 U.S. 265 (1978), *Grutter*, 539 U.S. 306 (2003); *Gratz*, 539 U.S. 244 (2003); *Ricci*, 129 U.S. 2658 (2009); *Arizona*, 132 S. Ct. 2492 (2012); *Fisher,* 133 S. Ct. 2411 (2013); *Holder*, 133 S. Ct. 2612 (2013); *Schuette*, 572 U.S. __ (2014).

30. *Parents Involved*, 551 U.S. at 747-48.,

because it marked so clearly the nation's emergence from the cave of racist thinking. As sociologists have repeatedly demonstrated, the era surrounding *Brown* marked a clear divergence in American's racial attitudes towards African Americans; finding that beginning during this time, "fewer whites subscribe to the views associated with Jim Crow," and "except for members of white supremacist organizations, few whites in the United States claim to be 'racist."[31]

Brown also represented unambiguously the harms of racial consciousness. Rooted in "Southern" racial attitudes—from the forced and violent enslavement of Africans and African Americans, to the state-sanctioned Jim Crow segregation of Black children and families in many urban locales, to the massive resistance by many Whites to court ordered integration—*Brown* highlighted for many the fallacies and dangers of racial thinking.[32] To be sure, the racial attitudes of the South have played a decisive role in the racial history of the Roberts Court. In another Voting Rights Act case that would anticipate the Court's direction in *Shelby County*, the Roberts Court had similarly proclaimed that "[t]hings have changed in the South."[33] In this case and *Shelby County*, the discussion surrounding Section 5 made the faulty observation that Section 5 applies only to the South, failing to recognize that coverage extends to jurisdictions in states such as New York, Arizona, and South Dakota.[34] By making this argument, the Roberts Court also strongly suggested that outside of the South, no explosive history of race relations or racial discrimination existed beyond racial thinking only designed to disadvantage Whites.[35] Subsequent "fidelity" of the Roberts Court to the racial history symbolized by *Brown* and all of the "change" that occurred thereafter in the South signified how much Americans had emerged from the cave of racial consciousness[36] to become post-racial in its decision making.[37]

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31. EDUARDO BONILLA SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 1, 4-8 (2d ed. 2006) (summarizing social science scholarship documenting Whites attitudes towards Blacks).

32. Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 92 J. OF AMER. HIST. 92, 99-114 (2004) (assessing how proponents of *Brown* treated the symptoms of racism by stigmatizing racial thinking and not the disease of White Supremacy).

33. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202 (2009).

34. As Heller pointed out, "[t]reating the nine Southern states covered in whole or in part by Section 5, which stretch from the Rio Grande Valley to the Louisiana bayou to the Appalachian Mountains and contain millions of people, as a single entity is fallacious." Heller, *supra* note 7, at 359. n. 4

35. *See* discussion on the use of race in the Seattle School District and discussion of the harms of such racial consciousness by the School Board, *supra* notes 26-31.

36. Siegel, *supra* note 5, at 9-10; *see also* Guinier, *supra* note 32, at 114.

37. *See, e.g.*, Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1594 (2009) (arguing that "post-racialism in its current iteration is a twenty-first-century ideology that reflects a belief that

Within twenty years of the *Brown* decision, however, judicial deployment of history predicated on its basic factual premises had become increasingly anachronistic. Indeed, the same binaries in *Brown* that had long served to explain race relations such as Black-White, North-South, and Urban-Rural were giving way to massive demographic transformations in the United States.[38] This was a nation that in the years and decades after World War II had become multi-cultural and multi-lingual;[39] where people from around the world were moving in unprecedented numbers to the "New West" and "New South;"[40] all of whom would settle to live and work in sprawling and segregated metropolitan spaces.[41] All of the familiar tropes so clear in *Brown* and its progeny—southern Jim Crow segregation, poor Black families living in burnt-out urban communities, separate and altogether unequal treatment in housing, employment, and public accommodations[42]—could no longer accurately describe the post-World War II history nor the current reality of shifting and transforming patterns of race relations in the United States.

In order to reclaim the history of race from the Roberts Court, I advocate for a re-centering of the Court's racial histories around, and greater fidelity to, a case that more accurately represents the recent history and current status of race relations today: *Keyes v. School District No. 1*.[43] As

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due to the significant racial progress that has been made, the state need not engage in race-based decision-making or adopt race-based remedies.").

38. Tom I. Romero, II, *Kelo, Parents and the Spatialization of Color(blindness) in the* Berman-Brown *Metropolitan Heterotopia*, 2008 UTAH L. REV. 947, 960-961 (2008).

39. *See infra* notes 91-99 and accompanying text.

40. *See infra* note 103. The notion of the "New West" and the "New South" as part of a greater whole was explored by the historian Carl Abbott in "New West, New South, new Region: The Discovery of the Sunbelt" in Raymond A. Mohl ed., Searching for the Sunbelt (1990). A defining feature of the Sunbelt has been its racial diversity beyond the Black-White paradigm. *See* Chapters 5, 6, 12 and 13 in SUNBELT RISING: THE POLITICS OF PLACE, SPACE, AND REGION (Michelle Nickerson & Darren Dochuk ed., 2011). Recent evidence of world-wide immigration to the New West and New South is found in Audrey Singer, *The New Geography of Untied Immigration*, BROOKINGS IMMIGRATION SERIES, July 2009, at 4-7.

41. *See infra* notes 75-88, 100-24.

42. For representative examples in the school integration context, see Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. Cnty. Sch. Bd., 391 U.S. 430 (1968); Griffin v. Cnty. Sch. Bd., 377 U.S. 218 (1964); Goss v. Bd. of Educ. of Knoxville, Tenn., 373 U.S. 683 (1963); Cooper v. Aaron, 358 U.S. 1(1958). The same binary logic and tropes continue to be applied by the Supreme Court. In its most recent opinion involving the Fair Housing Act ("FHA") in the summer of 2015, Justice Kennedy described how rapid urbanization and suburbanization, steering by real-estate agents, and racially restrictive covenants "created many predominately *black inner cities* surrounded by *white suburbs*." Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc., No. 13-1371, S. Ct., slip op., June 25, 2015, at 6 (emphasis added). Though the case upheld disparate impact claims under the FHA, Kenney's majority opinion nevertheless indicated a narrow understanding of the full metropolitan and multi-color scope of residential housing segregation described in Part II of this article.

43. Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973).

I have argued elsewhere, *Keyes* addressed both directly and indirectly how the binaries of cases like *Brown* proved of little probative value in addressing how and in what ways race and related acts of discrimination were being transformed in the United States.[44] The case is important because it did not involve a school district in state that had never had Jim Crow type segregation.[45] The factual scenario of *Keyes* arose in a metropolitan area that was neither Southern nor Northern in its physical and political geography.[46] For this reason, the case reflected deep and intractable tensions in a culture that had long struggled with the promises of color-blindness in the face of explicit and latent racism against not only Blacks, but also Latinos, American Indians, and Asian Pacific Americans.[47] For these reasons, *Keyes* was poised to "become the *Brown* case for the rest of the country outside the South."[48] Though the case ostensibly never met this promise, *Keyes* and the United States it reflects reveals much about how and in what ways the Roberts Court should rethink its conclusions regarding the state of race relations in the United States for the last 60 years.

Part II of this Article accordingly examines the many ways that *Keyes* pointed to a new metropolitan geography of color-blind multi-color racial segregation in the United States. As Section A surveys, a broad and diverse array of local, state, and federal government actions reconfigured the ways in which American's experienced and were impacted by race. Through housing and transportation policy, land use laws, and strategic use of local government controls, American's came to live in largely homogenous suburban communities, thereby evading altogether the social mix and inequalities of their sprawling metropolitan regions. This new metropolitan geography spatially reinforced the perception among largely White suburban communities that racial problems defined by Northern and Southern racism were a thing of the past.

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44. *See generally* Tom I. Romero, II, *Foreword: How I Rode the Bus to Become A Professor at the University of Denver Sturm College of Law; Reflections on* Keyes's *Legacy for the Metropolitan, Post-Racial, and Multi-Racial Twenty-First Century*, 90 DEN. U. L. REV. 1023 (2013).

45. *See, e.g.*, *id.* at 1024.

46. *Id.* at 1035-39.

47. *Id.* at 1042-46. In addition to my scholarship on *Keyes*, further analysis and reflection on the case in its Denver context, including reflections from those who participated in the litigation, may be found in *Denver University Law Review: Forty Years Since* Keyes v. School District No. 1; *Equality of Educational Opportunity and the Legal Construction of Metropolitan America*, 90 Denv. U. L. Rev. 1021 (2013). *See also* Sharon Ruth Brown-Bailey, Journey Full Circle: A Historical Analysis of Keyes v. School District No. 1 (1998) (unpublished Ph.D. dissertation, Univ. of Colo. at Denver) (on file with author); Frederick D. Watson, Removing the Barricades from the Northern Schoolhouse Door: School Desegregation in Denver (1993) (unpublished Ph.D. dissertation, University of Colorado at Boulder) (on file with author). Equally valuable for its socio-legal insights is Rachel F. Moran, *Foreword—The Lessons of* Keyes*: How Do You Translate "The American Dream"?*, 1 LA RAZA L.J. 195 (1986), as well as the entire Volume 1, Issue 3 of 1 LA RAZA L.J. 195 (1986), which focuses on the bilingual education aspects of *Keyes*.

48. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 260 (1979).

On the other hand, the fragmentation and isolation of metropolitan America obscured the extent that the nation's traditional geographical and racial sensibilities of North and South, Urban and Suburban, and Black and White were being fundamentally transformed. As Section B explores, this transformation has occurred along two paths. The first has been driven by immigration from Latin America, Asia, and Africa, and the ways that racialized individuals from these groups emerged to claim space and place in these very same metropolitan regions.

The second path revolves around those same suburbs that had effectively prevented integration for decades after World War II. As metropolitan areas grew, suburbs emerged as some of the most integrated areas in the United States, but also revealed a troubling pattern of re-segregation and incidents of racial violence along multiple color lines. In the process, immigration law and criminal law worked together to create legal and social conditions that were remarkably similar to the Jim Crow ordinances that perpetuated racial discrimination and unequal treatment against African Americans after the Civil War.

The history I subsequently tell about race in the post-World War II United States requires the Court to recognize that the nation's racial history was not fully forged in the South, nor was it transformed for the better upon decisions like *Brown* or legislation like the Voting Rights Act of 1965. The myopic racial history of the Court suggests neither color-blindness nor the rise of post-racial idealism. Rather, race relations throughout the United States, particularly after World War II, have been in a state of flux and dramatic transformation. While the Roberts Court has consistently deployed history to describe a United States dissociated from the insidious effects of racial change and transformation, I offer a historical frame that points to race's enduring and malleable condition. History is not about the shadows of then, but the terra firma of now.

II. BEYOND BROWN: UNLOCKING THE DOOR TO A MORE REPRESENTATIVE RACIAL PAST

Keyes v. *School Board No. 1* was the first school desegregation Supreme Court case that did not involve a school district located in the American South. There are two reasons why the case's non-Southern orientation is significant. First, "unlike every school desegregation case heard and decided by the Court since *Brown*, there was not the existence of a state constitutional provision, executive enactment, legislative statute, explicit school board policy, or jurisprudence in the history of the state that mandated the separation of the races in either segregated classrooms or schools."[49] Rather, since Colorado achieved statehood in 1876, the state

49. Romero, *How I Rode the Bus*, *supra* note 44, at 1024.

constitution had specifically prohibited the use of race in the assignment of students to its public schools.[50]

In spite of Colorado's anti-discrimination constitutional provisions, racism ran deep in the state. In the first decade of its founding in the 1860s, for instance, American Indians were massacred and displaced from their native lands.[51] During the 1920s, the Ku Klux Klan had a major influence in Colorado (particularly in Denver).'[52] In the 1930s, explicit anti-Mexican sentiment by the Governor and the state's citizens resulted in the National Guard being deployed against largely Mexican Americans and documented Mexican migrants.[53] And through much of the first seven decades of the 20th century, practices by realtors, parents, school boards, and politicians created widespread residential racial segregation, while actively working to prevent integration in and outside of schools.[54] Coloradoans had long struggled to circumvent equality provisions and civil rights protections under state law.[55]

Second, when eight Black, Latino, and White families filed suit against the Denver public school board and its administration on June 19, 1969 for perpetuating an unconstitutional practice of segregation,[56] "they entered uncharted waters of the nation's post-*Brown* school desegregation

50. COLO. CONST. art. IX, § 8 (amended 1974) ("[N]or shall any distinction or classification of pupils be made on account of race or color . . . ."). Some of the debates regarding racial classification of students in Colorado's history can be found in Tom I. Romero, II, *"Of Greater Value than the Gold of Our Mountains": The Right to Education in Colorado's Nineteenth-Century Constitution*, 83 U. COLO. L. REV. 781, 823–24, 832–33 (2012).

51. *See, e.g.*, RICHARD CLEMMER-SMITH ET AL., REPORT OF THE JOHN EVANS STUDY COMMITTEE, UNIVERSITY OF DENVER 1-10 (2014); *see also* ARI KELMAN, A MISPLACED MASSACRE: STRUGGLING OVER THE MEMORY OF SAND CREEK (2013).

52. During the 1920s, the Ku Klux Klan had a major influence in Denver and Colorado. *See generally* ROBERT ALAN GOLDBERG, HOODED EMPIRE: THE KU KLUX KLAN IN COLORADO 163-82 (1981); KENNETH T. JACKSON, THE KU KLUX KLAN IN THE CITY: 1915-1930, at 215-31 (1967); Gerald Lynn Marriner, *Klan Politics in Colorado*, 15 J.W. 76 (1976); James H. Davis, *Colorado Under the Klan*, 42 COLO. MAG. 1965, at 93.

53. Anti-immigrant sentiment in Denver and in Colorado was heavily directed towards Mexican Americans. *See generally* Tom I. Romero, II, *"A War to Keep Alien Labor out of Colorado": The "Mexican Menace" and the Historical Origins of Local and State Anti-immigration Initiatives*, *in* STRANGE NEIGHBORS: THE ROLE OF STATES IN IMMIGRATION POLICY 64 (G. Jack Chin & Carissa Hessick eds., 2014).

54. Jones v. Newlon, 253 P. 386, 388 (Colo. 1927) (finding unconstitutional the segregation of extra-curricular social functions by the Denver School Board); Chandler v. Ziegler, 291 P. 822, 823 (Colo. 1930) (holding that a person owning real property may insert a racially restrictive covenant to prevent sale of that same property interest to a person from a disfavored race); *see also* Tom I. Romero, II, *Our Selma Is Here: The Political and Legal Struggle for Educational Equality in Denver, Colorado, and Multicolor Conundrums in American Jurisprudence*, 3 SEATTLE J. SOC. JUST. 73, 80–88 (2004).

55. *See, e.g.*, Jackson v. City and Cnty of Denver, 124 P.2d. 240, 241 (Colo. 1942) (upholding the constitutionality of a Colorado statute declaring void all marriages between Blacks and Whites).

56. Keyes v. Sch. Dist. No. 1, 313 F. Supp. 61, 63 (D. Colo. 1970).

jurisprudence. As a result, the Justices were confronted with the challenge of determining how to measure racial segregation and inequity in a public school system where the city's largest and most impoverished group were Mexican Americans."[57] According to Justice Brennan, this posed a challenge because, unlike cities in the American South, "Denver is a tri-ethnic, as distinguished from a bi-racial community."[58] Understanding how discrimination worked in such an environment would require a varied and sophisticated analysis of history, social context, and other factors not evident in the "bi-racial" cases.[59] In a United States that was experiencing a dramatic shift in immigration from Latin America and Asia, *Keyes* highlighted an emerging tri-ethnic, or more accurately, multi-color, order.[60]

The Supreme Court's resolution of such issues promised to change dramatically how the Court would understand and address racial discrimination. As Justice Powell summarized:

> The situation in Denver is generally comparable to that in other large cities across the country in which there is a substantial minority population and where desegregation has not been ordered by the federal courts. There is segregation in the schools of many of these cities fully as pervasive as that in southern cities prior to the desegregation decrees of the past decade and a half. The focus of the school desegregation problem has now shifted from the South to the country as a whole. Unwilling and foot-dragging as the process was in most places, substantial progress toward achieving integration has been made in Southern States. No comparable progress has been made in many nonsouthern cities with large minority populations primarily because of the de facto/de jure distinction nurtured by the courts and accepted complacently by many of the same voices which denounced the evils of segregated schools in the South. But if our national concern is for those who attend such schools, rather than for perpetuating a legalism rooted in *history*

57. Romero, *How I Rode the Bus*, *supra* note 44, at 1026. The only other case involving all three groups that was filed during the same time period was Cisneros v. Corpus Christi Independent School District, 324 F. Supp. 599, 604 (S.D. Tex. 1970). That case, arising in Texas, involved a district that was largely "Mexican-American," but also included "Anglos" and a small number of "Negro" students. Cisneros. 324 F. Supp. at 608 n.37.

58. Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 195 (1973).

59. *Keyes*, 413 U.S. at 195-198. The implications of Justice Brennan's "tri-ethnic" observation in this case and others is found in Romero, *¿La Raza Latina?*, *supra* note 6, at 263-302.

60. *See* Rubén G. Rumbaut, *Origins and Destinies: Immigration to the United States Since World War II*, 9 SOC. F. 583, 600–03 (1994). The distinction between, ethnic, race and color and my decision to deploy the term multi-color is explored Romero, *¿La Raza Latina?*, *supra* note 6, at 249-255 (2007).

> rather than present reality, we must recognize that the evil of operating separate schools is no less in Denver than in Atlanta.[61]

For this reason, Justice Powell saw the case as an opportunity to "formulate constitutional principles of *national rather than merely regional application*."[62]

Finding such constitutional principles, however, would be much easier in theory than in practice. For the first time since it had rendered its decision in *Brown*, the Supreme Court could not find unanimous consensus in its school desegregation jurisprudence.[63] Indeed, the splits on the *Keyes* Court reflected the challenges subsequent courts would have in grappling with how racial discrimination actually worked in non-Southern contexts.[64] For the reasons that will be described in the following sections, the history that *Keyes* reflects tells us much more precisely than *Brown* those "undeniable truths" about the nature, scope, and trajectory of race and racism in the modern United States.

A. *The New Metropolitan Geography and the Rise of Post-Racial Colorblindness*

By the time the Supreme Court rendered its *Keyes* decision in 1973, the United States was in the midst of what urban historian Jon Teaford describes as a "metropolitan revolution" in American Culture and life.[65] Whereas in the years immediately before the *Brown* decision, the United States was an "urban nation, dominated by clearly defined urban places with an anatomy familiar and comprehensible," by the 1970 and 1980s it had become sprawling, decentered, and—spatially as well as culturally—fragmented metropolitan regions.[66]

In the period from *Brown* in 1954 to *Keyes* in 1973, most of the nation's urban centers were losing population to suburbs and "independent" municipalities that initially formed a perimeter around center cities.[67] Indeed, "[i]n 1970, for the first time in the history of the world, a nation-state [the United States] counted more suburbanites than city dwellers or farmers."[68] The suburbanization of the United States was not just the logical extension of densely concentrated city-dwellers moving to

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61. 61. *Keyes*, 413 U.S. at 218-19 (Powell, J., concurring in part and dissenting in part) (emphasis added).

62. *Id*. at 219 (Powell, J., concurring in part and dissenting in part) (emphasis added).

63. Romero, *How I Rode the Bus*, *supra* note 44, at 1028.

64. *See, e.g.*, Romero, *¿La Raza Latina?, supra* note 6, at 269-302.

65. *See generally* JON C. TEAFORD, THE METROPOLITAN REVOLUTION: THE RISE OF POST-URBAN AMERICA *passim* (2006).

66. *Id*. at 1; *see also* MYRON ORFIELD, AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY (2007).

67. KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 284 (1985).

68. *Id*. at 283-84.

low-density suburban lots. Driving much of this change was the fact that many Americans were moving from one region of the country to another, as postwar economic growth spurred demand for capital and labor to sprawling metropolitan areas in the Rocky Mountain West, Southeast, and Pacific Coast.[69] As one contemporary noted at the time, "[A]pproximately seventy million people are not living in the houses which they [had] occupied in 1940. Twelve million have changed their state of residence; this is probably the largest population movement in history."[70] Such trends would continue until the end of the twentieth century,[71] thereby creating unprecedented opportunities to live in the exploding new metropolises of the post-World War II United States.

Of significance is what these new metropolises—especially the new suburban developments in locales like Denver at the heart of the *Keyes* case—would mean for race-relation issues. To be sure, such places seemed a universe away from the "urban crises" tearing "rust belt" cities in the Northeast and Midwest,[72] and also different from the Southern cities and towns with their massive resistance to the African American civil rights.[73] One reason for this is that suburbs emerged from their inception as racially homogenous and politically isolated communities.[74] Almost exclusively White and solidly middle-class, suburbs created what Matthew Lassiter calls the "ascendance of color-blind ideology" that fuses "class-based individualism with color-blind innocence."[75] These suburban residents were not strict segregationists like George Wallace or card-carrying members of the Klu Klux Klan, but instead they fundamentally believed that their pursuit of the "American Dream" was "the product of meritocratic individualism rather than unconstitutional racism."[76]

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69. For a broad historiographical examination of these trends as well as their influence on social, political, and economic life, *see generally* Nickerson & Dochuck, *supra* note 40; David R. Goldfield, *The Rise of the Sunbelt: Urbanization and Industrialization*, *in* A COMPANION TO THE AMERICAN SOUTH 472, 472-93 (John B. Boles ed., 2002).

70. Edwin A. Cottrell, *Problems of Local Governmental Reorganization*, 2 W. POL. Q. 599, 600 (1949).

71. DAVID K. IHRKE & CAROL S. FABER, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, GEOGRAPHICAL MOBILITY: 2005 TO 2010, 2 (2012), http://www.census.gov/prod/2012pubs/p20-567.pdf.

72. The two classic statements of the urban crisis remain ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO 1940–1960 (1998) and THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT (1996).

73. *See, e.g.*, NUMAN BARLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950s (1999); GEORGE LEWIS: MASSIVE RESISTANCE: THE WHITE RESPONSE TO THE CIVIL RIGHTS MOVEMENT (2006).

74. *See* Romero, *The Spatialization of (Color)Blindness*, *supra* note 38, at 957-59.

75. MATTHEW D. LASSITER, THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH 4, 8 (2006).

76. *Id*. at 1-2.

Indeed, in conjunction with decisions such as *Brown* and *Baker v. Carr*[77] in 1962, grand legislative enactments such as the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968 reinforced the belief that subsequent racial and economic segregation in American society was not the product of any overt state-sanctioned racial project.[78] Once formal barriers were removed, so the thinking went, all Americans would be free to act in a color-blind way.[79] As I have argued elsewhere, "[p]ost-racialism and [the ideology of] color-blindness thus became the same side of the same coin that would fund [a racially fragmented metropolitan landscape]. Consumption and meritocratic individualism, not race, would be the only organizing principle determining where one lived, worked, played, raised families, and sent one's children to school."[80]

As historians of the post-World War United States have documented, one's own decisions about where to live, build a home, raise a family, and send one's children to school were not made in isolation.[81] Rather, these cumulative decisions were intricately connected with federal, state, and local housing, municipal and county government, land use laws, and policies that both exacerbated and furthered enduring patterns of racial residential segregation.[82] Lassiter, in his history of the "silent [suburban] majority" argues that these policies naturalized color-blindness because they "did not require individual racism by suburban beneficiaries in order to require White class privilege and maintain barriers of disadvantage fac-

77. Baker v. Carr, 369 U.S. 186 (1962) (enabling federal courts to intervene in state redistricting schemes that diluted and minimized the impact of the African American voter). This case allowed the Court in Reynolds v. Sims, 377 U.S. 533 (1964) to establish the "one man one vote" principle in how representation to state houses and legislatures would be apportioned.

78. LASSITER, *supra* note 75, at 15-16. *See generally* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY *passim* (2002); NANCY MCLEAN, FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE *passim* (2008); Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 *passim* (1980).

79. *See* Mario L. Barnes, *Racial Paradox in a Law and Society Odyssey*, 44 L. & SOC'Y REV. 469, 480 (2010).

80. Romero, *How I Rode the Bus*, *supra* note 44, at 1041. Post-racial refers to the "notion that the United States has reached a point where race is so infrequently salient that it no longer makes sense to organize around it or even acknowledge its presence." Frank Rudy Cooper, *Post-Racialism and Searches Incident to Arrest*, 44 ARIZ. ST. L.J. 113, 114 (2012).

81. *See, e.g.*, LASSITER, *supra* note 75; SUGRUE, *supra* note 72; N.D.B. CONNOLLY, A WORLD MORE CONCRETE: REAL ESTATE AND THE REMAKING OF JIM CROW SOUTH FLORIDA (2014); BERYL SATTER, FAMILY PROPERTIES: HOW THE STRUGGLE OVER RACE AND REAL ESTATE TRANSFORMED CHICAGO AND URBAN AMERICA (2009); DAVID M. P. FREUND, COLORADO PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN SUBURBAN AMERICA (2007); ROBERT O. SELF, AMERICAN BABYLON: RACE AND THE STRUGGLE FOR POSTWAR OAKLAND (2003); THE NEW SUBURBAN HISTORY (Thomas J. Sugrue, eds., 2006).

82. Romero, *The Spatialization of (Color)Blindness*, *supra* note 38, at 968–83.

ing urban minority communities."[83] The aggregate effect of such behavior was to create a metropolitan landscape of profound racial design. One contemporary astutely observed the insidiousness of postracialism: "New municipal buildings, new roads and highways, urban renewal, and public playgrounds and parks . . . seem[ ] to present means by which a segregation-minded community can improve [its] municipal facilities, while achieving the intended elimination of Negroes in certain areas."[84] Part and parcel of a larger system of White supremacy that shifted dramatically by the 1960s, "the unexceptional" and "mundane" acts of local, state, and federal governance—from paving streets to financing suburban tracts homes—remade Jim Crow in innocuous and insidious ways.[85]

Keyes powerfully reflects these metropolitan trends and changes in America's racial history. One of the great assumptions of so-called Northern school desegregation suits was that the state or local governments in those locales never engaged in formal projects of racial discrimination or segregation. Especially in the urban and metropolitan West, cities such as Denver were viewed as relative racial utopias.[86] Nevertheless, the seemingly innocuous revision of attendance boundaries by the Denver school board revealed only one of the many insidious ways that white supremacy was maintained by local and state governments in these ostensibly postracial locales.[87]

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83. LASSITER, *supra* note 75, at 4.

84. Joseph A. Milchen, Note, *Unconstitutional Racial Classification and De Facto Segregation*, 63 MICH. L. REV. 913, 922 (1964).

85. CONNOLLY, *supra* note 81, 4-5; *see also* STEPHEN W. BENDER, TIERRA Y LIBERTAD: LAND, LIBERTY, AND LATINO HOUSING 59–93 (2010) (exploring covert forms of land use planning and local government law to exclude Latina/os from neighborhoods and suburbs); FREUND, *supra* note 81; COLORED PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN SUBURBAN AMERICA *passim* (2010) (examining national and local race-neutral policies that cordoned off sprawling suburbs from central cities to create a form of color-blind racial apartheid in the United States); Charles S. Aiken, *Race as a Factor in Municipal Underbounding*, 77 ANNALS ASS'N AM. GEOGRAPHERS 564, 565 (1987) (documenting the resistance of White-dominated suburban and exurban municipal governments to annex Black communities beyond the municipalities' corporate boundaries).

86. *See, e.g.*, WOODWARD & ARMSTRONG, *supra* note 48, at 260 (noting that Denver was "a city of relative racial harmony").

87. Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 196-203 (1973); s*ee also* Daniel Martinez-HoSang, Racial Liberalism and the Rise of the Sunbelt West: The Defeat of Fair Housing on the 1964 California Ballot, *in* Nickerson & Dochuk, *supra* note 40, at 188-213 (documenting resistance to fair housing and fair employment in California). Two powerful studies of local and statewide resistance to racial equality in California are Mark Brilliant, The Color of America Has Changed: How Racial Diversity Shaped Civil Rights Reform in California, 1941-1978 (2010) and Shana Bernstein, Bridges of Reform: Interracial Civil Rights Activism in Twentieth-Century Los Angeles (2010). The geographic impact of Western growth, illiberalism, and inequality beyond metropolitan boundaries in the West is detailed in ANDREW NEEDHAM, POWER LINES: PHOENIX AND THE MAKING OF THE MODERN SOUTHWEST (2014).

Brown and subsequent cases and legislative acts that struck down obvious and evident forms of racial discrimination was not the end of the nation's troubled history with race. Instead, it was the beginning of a massive restructuring of race relations and oppression that depended on a color-blind metropolitan geography. Because metropolitan areas like the one in *Keyes* were not seemingly burdened with the sins of the biracial South, color-blindness made racial difference for the majority of those living in new, but nevertheless insulated, insular, and unconnected suburban communities a relic of the past. This was a past, however, whose biracial premises could neither contain nor account for the multicolor present that were shaping metropolitan America.

B. *Tri-Ethnic Transformation and the Old Juan Cuervo and New Jim Crow in The Multicolor Metropolitan Landscape*

When the Supreme Court observed in *Keyes* that Denver was tri-ethnic, it recognized that the familiar Black-White binary for understanding the causes and thereby the consequence of race was inadequate for understanding racial segregation in the Denver school district.[88] More than just a case about Denver, however, the Court's observation reflected an emerging multi-color reality that would directly challenge the color-blindness embedded in the metropolitan landscape. A key component of this challenge was the Hart Cellar Immigration Act of 1965.[89] Passed at precisely the same historical moment as the momentous civil rights legislation dismantling Jim Crow, the Act dramatically changed patterns of migration to the United States, and in so doing, cemented the "modif[ication of the nation's] racial map . . . that that been marked principally by the contours of white and black and that had denoted race as a sectional problem."[90] According to the historian Mai Ngai, "[i]mmigration law was part of an emergent race policy that was broader, more comprehensive and national in scope."[91]

For many historians, immigration law has long served to produce racial categories with pernicious racial outcomes.[92] Indeed, from the 1790 Naturalization Act requiring Whiteness as a prerequisite to citizenship[93] to the 1924 Johnson-Reed Act's explicit racial quotas that excluded Chinese, Japanese, and other Asians from immigrating,[94] immigration law and pol-

88. *Id.* at 195.

89. Immigration and Nationality Act, 79 STAT. 911 (1965).

90. MAI NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 8, 227-264 (2004).

91. *Id.* at 8.

92. *Id.* at 8.

93. *See generally* IAN F. HANEY-LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 1-36 (1996).

94. NGAI, *supra* note 90, at 7.

icy has been one of the most powerful tools for creating racial inequity in the United States, especially for Mexicans and Asians.[95] While the impact of immigration law and policy was largely regional prior to 1965, the Hart Cellar Immigration Act fundamentally disrupted the demography of the nation. Whereas prior to passage of the Hart Cellar Immigration Act of 1965, Latinos and Asians together constituted slightly less than 2% of the U.S. population, by 2012 they collectively represented almost a quarter of those counted by the census.[96]

Immigration law and policy had two important impacts on a multicolor geography that would emerge in Metropolitan America. First, beginning in the 1920s,

> American cities witnessed a construction boom that surpassed all previous decades of growth . . . . [S]everal million units of housing were built during the decade [and also in the years following World War II], allowing second generation immigrants to escape the slums. But while these were healthy changes . . . [t]he expansion of the suburbs drew the rich and middle-class out of the city. At the same time, the combination of slowed immigration and economic mobility resulted in increased vacancy rates in working- class districts.[97]

African Americans and Latinos took up residence in those neighborhoods being abandoned by second generation Southern and Eastern European immigrants who saw themselves as White, "a development that accelerated after World War II."[98]

These patterns would remain largely unchanged into the last decades of the 20th century. Yet, beginning around the 1990s, immigrant settlement to the nation's metropolitan area's began to bypass "the inner city

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95. KELLY LYTLE HERNANDEZ, MIGRA: A HISTORY OF THE BORDER PATROL 10 (2010).

96. Seth Motel & Eileen Patten, *Statistical Portrait of Hispanics in the United States*, 2011 PEW RESEARCH CTR. (Feb. 15, 2013), http://www.pewhispanic.org/2013/02/15/statistical-portrait-of-hispanics-inthe-united-states-2011.

97. Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 13-14 (2003).

98. Romero, *The Spatialization of (Color)Blindness*, *supra* note 38, at 959-960; *see* KAREN BRODKIN, HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA (1998) (examining how Jews came to be viewed, by themselves and others, as White in the decades following World War II); DAVID R. ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (rev. ed. 1999) (exploring how European working class immigrants utilized the "wages" of labor power and hierarchy to become considered White); THOMAS A. GUGLIELMO, WHITE ON ARRIVAL: ITALIANS, RACE, COLOR, AND POWER IN CHICAGO, 1890-1945 (2003) (detailing the many ways that Italians benefited in countless ways from their privileged color status as Whites).

and mov[e] directly to the suburbs."[99] As I have noted elsewhere, Latina/os, Asians, Pacific Islanders, and African Americans, as well as African immigrants and their children "began to settle in large numbers in those same suburban communities that had effectively excluded them during the second half of the twentieth century."[100] Finding older but affordable housing stock in the suburbs built between the 1950s and 1980s,[101] more communities of color have come to live in the suburbs than in core cities.[102] Collectively, this has effectuated a profound transformation in how we understand the racial demography of a nation where 85% of the nation's immigrants and 77% of the nation's minority population live in metropolitan regions.[103] The consequence is that "[t]he historically sharp racial and ethnic divisions between cities and suburbs in Metropolitan America are more blurred [now] than ever."[104]

Nevertheless, increasingly multicolor suburbs are experiencing profound racial tensions and dislocations in familiar ways. Nothing demonstrates this more than the recent history of Ferguson, Missouri, the St. Louis suburb at the heart of the shooting death of the African American man Michael Brown by a White police officer, Darrin Wilson.[105] At one time in the 1950s and 1960s, Ferguson represented an escape for many Whites from the racial strife of inner-city St. Louis, where "[s]ingle family home building and redlining by banks [allowed] blue-collar [W]hites [to] live and work amongst each other."[106] As the population became older and poorer over time, non-Whites, particularly young African Americans moved into the suburbs. Whereas Ferguson was 85 percent White in 1980, by 2014, Whites represented less than thirty percent of the city.[107] Although Blacks comprised a clear majority of the population,

99. AUDREY SINGER, SUSAN W. HARDWICK, AND CAROLINE B. BRETTELL, TWENTY-FIRST CENTURY GATEWAYS: IMMIGRANT INCORPORATION IN SUBURBAN AMERICA 14-15 (2008).

100. Romero, *How I Rode the Bus*, *supra* note 44, at 1049.

101. WILLIAM H. FREY, METRO. POLICY PROGRAM, BROOKINGS INST., MELTING POT CITIES AND SUBURBS: RACIAL AND ETHNIC CHANGE IN METRO AMERICA IN THE 2000S, at 10-11 (2011); *see also* MYRON ORFIELD & THOMAS LUCE, INST. ON METRO. OPPORTUNITY, UNIV. OF MINN. L. SCH. AMERICA'S RACIALLY DIVERSE SUBURBS: OPPORTUNITIES AND CHALLENGES 2 (2012).

102. *See* METRO. POLY PROG. BROOKINGS INST., METROPOLICY: SHAPING A NEW FEDERAL PARTNERSHIP FOR A METROPOLITAN NATION 51, 60-62 (2008).

103. *See id.* at 4 (2008).

104. FREY, *supra* note 101, at 13*; see also* Patience A. Crowder, *(Sub)Urban Poverty and Regional Interest Convergence*, 98 MARQUETTE L. REV. (forthcoming 2015).

105. *What Happened in Ferguson*, N.Y. TIMES (last updated Nov. 25, 2015), http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?_r=0.

106. Daniel J. McGraw, *Ferguson: Race and the Inner-Ring Suburb*, BELT MAGAZINE (Aug. 14, 2014), http://beltmag.com/ferguson-race-inner-ring-suburb/.

107. *Id.*

Ferguson's city council, school boards, and police force remained overwhelmingly White.[108]

The changing racial and class demographics and disparate distribution of political power of inner-ring suburbs like Ferguson, moreover, created conditions little different to those in the inner-city: persistent patterns of unequal growth, racial isolation, economic and educational discrimination, social as well as political inequality, and patterns of disparate and unequal policing.[109] Indeed, over-policing of non-Whites represents the racialized logic of a social, cultural, and legal system of the post-racial, metropolitan landscape described in Part IIa. Most people are by now familiar with Michelle Alexander's exploration of "mass incarceration in the age of colorblindness," a system where a "larger web of laws, rules, policies, customs and institutions" effectively stigmatize, control, and oppress Blacks "labeled as criminals both in and out of prison."[110] The result of this "tightly networked" system ensures the "subordinate status of a group defined largely by race," or the New Jim Crow.[111] It is no surprise then that the deaths of Michael Brown, Eric Garner,[112] Tamir Rice,[113] Trayvon Martin,[114] and other young men of color by police officers or others acting in positions of "authority" have so fully exposed the fallacies of colorblindness of the post-racial United States.[115]

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108. *Id; see also* Jordan Weissman, *Ferguson is Mostly Black. Why is its Government So White?*, SLATE (Aug. 14, 2014), http://www.slate.com/blogs/moneybox/2014/08/14/ferguson_missouri_government_why_is_it_so_white.html.

109. Accounts of this are documented extensively in BENDER, *supra* note 85, at 64-70 (examining various ways suburbs have excluded undocumented Latina/o immigrants); MYRON ORFIELD, *supra* note 66, at 28-29, 49-64 (2002); ORFIELD & LUCE, *supra* note 101, at 25-34; and Camille Z. Charles, *The Dynamics of Racial Residential Segregation*, 29 ANN. REV. SOC. 167, 175–76, 197 (2003) ("Patterns of suburban segregation mirror those of the larger metropolitan area of which they are a part . . . ."). Moreover, this is not a new phenomenon, but occurred roughly at the same time that "Jim Crow died and segregation remained" in the 1960s and 1970s. N.B.D. CONNOLLY, A WORLD MORE CONCRETE: REAL ESTATE AND THE MAKING OF JIM CROW SOUTH FLORIDA 16 (2014) (exploring the practices and policies of real estate segregation in pre- and post-Jim Crow metropolitan South Florida).

110. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 13 (2012).

111. *Id*.

112. Joseph Goldstein & Nate Schweber, *Man's Death After Chokehold Raises Old Issue for the Police*, N.Y. TIMES, July 18, 2015, at A1; J. David Goodman & Al Baker, *New York Officer Facing No Charges in Chokehold Case,* N.Y. TIMES, Dec. 3, 2014, at A1.

113. Shaila Dewan & Richard A. Oppel, Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, NY. TIMES, Jan. 22, 2015, at A1; Emma G. Fitzsimmons, *Boy Dies After Police in Cleveland Shoot Him*, N.Y. TIMES, Nov. 23, 2014, at A12.

114. *The Events Leading to the Shooting of Trayvon Martin*, N.Y. TIMES, June. 21, 2012, at A1*; see also* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. Rev. 1555 (2013).

115. For example, in the wake of the events in Ferguson, the United States Department of Justice detailed the disproportionate arrest and ticketing of Blacks in Ferguson as a way to balance the city's budget. CIVIL RIGHTS DIVISION, U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE

Moreover, over policing and mass incarceration has not tracked the familiar Black-White binary of race relations. Latinos in general and Mexicans and Mexican Americans, in particular, have been "demonized as a grave threat to the American culture, society, and the economy; . . . systematically excluded from rights privileges and protections extended to other Americans; and . . . subject to increasingly harsh and repressive enforcement actions that drove them further underground."[116] In the last decade alone, thousands of local municipalities and state governments have taken immigration enforcement into their own hands by deputizing local sheriffs to enforce federal immigration law, penalizing employers, landlords, and almost anyone who has business dealings with an immigrant.[117] Such local and state authorities have also colluded with the federal government to create what legal scholar César Cuauhtémoc García Hernández has dubbed the emblems of crimmigration law; whereby noncitizens and citizens alike, especially those from Latin America, are conceptualized as "criminal deviants and security risks," and "people to be feared."[118]

As with the "color-blind" criminal justice system documented in Alexander's study, once a Latino is labelled "illegal," the "old forms of discrimination—employment discrimination, housing discrimination, denial of the right to vote, denial of educational opportunities, denial of food stamps and other government benefits, and exclusion from jury service—

FERGUSON POLICE DEPARTMENT 9-14 (2015). *See also*, Matt Apuzzo, *Justice Report To Fault Police in Ferguson*, N.Y. TIMES, Mar. 2, 2015, at A1. Similarly, the Justice Department found the Cleveland Police Department to have engaged in a pattern and practice of abuse towards the African American community. Richard A. Oppel, *Cleveland Police Citied for Abuse by Justice Department*. N.Y. TIMES, Dec. 4 2014, at A1. Such actions have led the F.B.I. Director, in a February 2015 speech at Georgetown University, to acknowledge that "some officers scrutinize African Americans more closely using a mental shortcut that 'becomes almost irresistible and maybe even rational by some lights' because black men are arrested at much higher rates than white men." Michael S. Schmidt, *F.B.I. Director Speaks Out on Race and Police Bias*, N.Y. TIMES, Feb. 12, 2015, at A1.

116. DOUGLAS MASSEY, THE NEW LATINO UNDERCLASS 2 (2010).

117. *See, e.g.*, Tom I. Romero, II, *No Brown Towns: Anti-Immigrant Ordinances and Equality of Educational Opportunity of Latina/os*, 12 J. OF GEN. RACE & JUST. 13, 17-34 (2008); Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO L.J. 777, 785-796 (2008); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Rigel C. Oliveri, *Between A Rock and A Hard Place: Landlords, Latinos, Anti-Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 56 (2009); collection of articles *in* CHIN AND HESSICK, *supra* note 53.

118. César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 B.Y.U. L. REV. 1457 (2014). As García Hernández explains: "Convictions for a growing list of offenses results in removal—the technical umbrella term for exclusion and deportation. Sometimes commission—rather than conviction—of such an offense is sufficient. . . . At the same time, immigration law enforcement has increasingly adopted the securitized approach of criminal law enforcement. And criminal investigations involving certain crimes related to immigration activity have borrowed many of the more lax procedures traditionally used in the civil immigration law system." *Id.* at 1458.

are suddenly legal."[119] It is no surprise that this occurs in metropolitan areas where Joe Arpaio in suburban Maricopa County Arizona, Joe Barletta, the Mayor of Hazelton Pennsylvania, and Steve Levy, the Suffolk County Commissioner in Long Island New York became "overnight celebrities" for their virulent and oftentimes vicious crackdown on immigrant communities.[120] To be sure, the spate of anti-immigration legislation passed by local municipalities (especially those in the suburbs)[121] and states since 2005 has led many commentators to label such restrictions—and the racial animus behind it—as Juan or José Crow.[122] As I and others have shown, this is not a new phenomenon, but one directly related to ways that Latinos have been racialized since the early decades of the 20th century.[123] In other words, the new Jim Crow is really the old Juan Crow for Latinos who have long been affected by the racialized tensions inherent when local and state governments exercise their most disciplinary powers of sovereignty (policing) subject to the most minimal standards of judicial review (immigration law).

Suburbs have thus become multi-color flash points. Blacks justifiably rally against racial profiling and disparate targeting.[124] Latinos navigate record numbers of deportations and overt questions about their citizenship, work status, and right to live in the United States.[125] Asian Pacific Islanders

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119. ALEXANDER, *supra* note 110, at 2.

120. JUAN GONZALEZ, HARVEST OF EMPIRE: A HISTORY OF LATINOS IN AMERICA (revised ed. 2011). I explore the phenomenon of these ordinances in relation to their historical relationship to Latinos in Romero, *No Brown Towns*, *supra* note 117, at 17-34.

121. Typical of such ordinances was one passed in the Dallas suburb of Famers Branch where members of the city council stated that the goals of the enactments was to "sen[d] a message to people who aren't in the country legally, [that] Farmers Branch is not the place for you." Villas at Parkside Partners v. City of Farmers Branch, 675 F.3d, 802, 805 n.4 (2012).

122. *See, e.g.*, Diane McWhorter, *The Strange Career of Juan Crow*, N.Y. Times (June 16, 2012), http://www.nytimes.com/2012/06/17/opinion/sunday/no-sweet-home-alabama.html.

123. *See* Tom I. Romero, II *Observations on History, Law, and the Rise of the New Jim Crow in State-Level Immigration Law and Policy for Latinos,* 66 AM. Q. 153 (March 2014). The historian Kelly Lytle Hernández notes that "the increasing number of undocumented immigrants joining African Americans in jails and prisons across the country . . . reveals how the paths of Mexican Browns and black Americans cross." KELLY LYTLE HERNÁNDEZ, MIGRA! A HISTORY OF THE U.S. BORDER PATROL 232-33 (2010). The very intersection of the Black and the Latino policing experience is explicitly made in Bill Conroy, *Is This the Latino Ferguson?*, THE DAILY BEAST (Feb. 26 ,2015), http://www.thedailybeast.com/articles/2015/02/26/is-this-the-latino-ferguson.html.

124. George Yancy & Judith Butler, *What's Wrong With 'All Lives Matter'?*, N.Y. TIMES (Jan. 12, 2015), http://opinionator.blogs.nytimes.com/2015/01/12/whats-wrong-with-all-lives-matter/.

125. Jens Manuel Krogstad, *Americans Split on Deportations as Latinos Press Obama on Issue*, PEW RESEARCH CTR. (Mar. 11, 2014), http://www.pewresearch.org/fact-tank/2014/03/11/americans-split-on-deportations-as-latinos-press-obama-on-issue/ (noting record number of deportations and Latino organizations dubbing President Obama as the "Deporter in Chief").

are decried as being too academically successful,[126] while many others ignore profound social differences in the community.[127] Against this backdrop, many Whites dismiss altogether such concerns and decry non-Whites for "playing the race card."[128]

Keyes anticipated a United States in which its racial landscape as well as its geography was becoming more complicated and harder to define. The Court made the prescient observation that complicated social and demographic factors obscure patterns and practices of racial discrimination "beyond the particular schools that are the subjects of those [equal protection] actions."[129] Indeed, in recognizing that the origins of discrimination for Latinos were different from Black students in the case, it acknowledged that its consequences were nevertheless the same.[130] As a result, the Court suggested a path to a more robust and sophisticated telling about the history of racial discrimination and its impact on a 21st century United States.

III. CONCLUSION: WHAT'S PAST IS ALWAYS RACIAL PROLOGUE

Though *Keyes* failed to displace *Brown* as *the* desegregation case, the case nevertheless provided a powerful alternative "blueprint" for lawyers contesting discrimination in non-Southern contexts.[131] For the reasons described above, the case and the history it represents should similarly

126. FRANK H. WU, YELLOW RACE IN AMERICA BEYOND BLACK AND WHITE 39-78 (2002) (detailing the "model minority" myth and the race based tension stemming from Asian American academic achievement).

127. Jeff Guo, *If Minneapolis is So Great, Why is it So Bad for African Americans?*, WASH. POST (Feb. 17, 2015), http://www.washingtonpost.com/blogs/govbeat/wp/2015/02/17/if-minneapolis-is-so-great-why-is-it-so-bad-for-black-people/ (examining the disconnect between increasing racial segregation and economic inequality in Minneapolis. Minnesota and its own internal and national perception as a city of high employment, prosperity, and affordable housing).

128. . *See generally* GEORGE J SEFA DEI, ET AL., PLAYING THE RACE CARD: EXPOSING WHITE POWER AND PRIVILEGE (2007). The logic of the "race card," "color-blindness," and "post-racial" is perhaps summed up best by Touré, when he explains: "'Post-racial' is just one of several terms that only pervert and distort the discussion of race and give people who wish to disrupt the conversation a place to park their ideas. Others include 'race card' and 'reverse racism' and 'race baiter.' The naïve term 'race card' always refers to a lack person racializing a situation that the person using the term thinks doesn't need to be racialized. It's as if race was not part of the situation, and no one was being black or white, and everybody was being color blind, and whistling sweetly, until a black person came along and ruined everything by pointing out race. But race is like weather—we only talk about it when it's extreme but it's always there." Touré, *No such Place as 'Post-Racial' America,* N.Y. TIMES (Nov. 8, 2011), http://campaign-stops.blogs.nytimes.com/2011/11/08/no-such-place-as-post-racial-america/?_r=1.

129. Keyes v. School District No. 1, 413 U.S. 189, 203 (1973).

130. *Id.* at 195-198.

131. Roger I. Abrams, *Not One Judge's Opinion: Morgan v. Hennigan and the Boston Schools*, 45 HARV. EDUC. REV. 5, 6–7 (1975); *see also* Romero, *How I Rode the Bus*, *supra* note 44, at 1050-1051.

serve as a "blueprint" for today's Court to consider how much has truly changed in the United States.

Writing just a few years ago, the historian Gordon Wood wrote that history imparts "powerful restraints on what we can think and do."[132] Not surprisingly, the Court's narrow vision of racial progress since *Brown* leaves little room to imagine a world structured by deep, enduring, and protean patterns of multi-color inequality. If law is to invoke history in order to understand race relations today, its actors, Professor Wood tells us, have an important responsibility because "a historical sense makes true freedom and moral choice—and wisdom—possible."[133]

Justice Ruth Bader Ginsberg's dissent in the *Shelby County* case is particularly instructive in highlighting the importance of a historical sense.[134] In her dissent, Justice Ginsberg made the following observation:

> There is no question [ ] that the covered jurisdictions have a unique history of problems with racial discrimination in voting. Consideration of this long history, still in living memory, was altogether appropriate. The Court criticizes Congress for failing to recognize that "history did not end in 1965." But the Court ignores that "what's past is prologue." And "[t]hose who cannot remember the past are condemned to repeat it.[135]

As a consequence, Justice Ginsberg instead detailed a history that countered dramatically Chief Justice Roberts's own historical narrative. Whereas Ginsberg conceded that formal legal and political barriers that mandated explicit racial discrimination had largely been eradicated in the years surrounding passage of the Voting Rights Act in 1965, she nevertheless detailed other more covert racisms that created "second generation barriers" for people of color in the exercise of their constitutional rights.[136] Although colorblind on their face, many of these barriers had the practical effect of effectuating wide-spread and substantial racial discrimination no different in consequence from the same practices that prompted the passage of the Voting Rights Act in the first place.[137]

Keyes and the history it reflects more accurately describes the "second generation barriers" perpetuating deep and persistent patterns of discrimination and inequality. The metropolitan, multi-color, and colorblind

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132. GORDON S. WOOD, THE PURPOSE OF THE PAST: REFLECTIONS ON THE USES OF HISTORY 12 (2008).

133. *Id.* at 15.

134. Shelby Cnty., Ala. v. Holder, 133 S. Ct.2612, 2642-2648 (2013) (Ginsburg, J., dissenting).

135. *Id.* at 2642 (quoting W. SHAKESPEARE, THE TEMPEST, act 2, sc. 1 and G. SANTAYANA, THE LIFE OF REASON 284 (1905)) ((internal references omitted)).

136. *Id.* at 2636 (citing §§2(b)(2)-(3), 120 Stat. 577).

137. *Id.* at 2642.

history described in these pages, however, is one that the law has ignored because it does not fit easily within its typical racial narrative designed to show the nation's ascendance from the cave of racial bigotry. Ironically, the same markers used by the Roberts Court to describe this ascendance—*Brown*, the Civil Rights Act of 1964, and the Voting Rights Act—obscures how racism came to be re-configured and re-inscribed at the very same time. Telling, re-telling, and the centering of histories like those in *Keyes* seems like a necessary first-step to break the Roberts Court's fixation on its own racial shadows and in turn, emerge with "wisdom" out of a cave of its own making.