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Claremont McKenna College

The Limits of Affirmative Action and  
the Illusion of Whiteness as Property

submitted to  
Professor Paul Hurley

by  
Gino Townsend

for  
Senior Thesis  
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## **Acknowledgement**

To my parents who, in their own way, taught me how to think for myself.

## Abstract

In 1993 Cheryl Harris delivers a scathing review of the effects of American slavery on the socioeconomic status of black Americans in *Whiteness as Property*. In her criticisms of the rulings of *Brown v. Board of Education* and *Regents of the University of California v. Bakke*, Harris uses these cases and others to show how affirmative action is meant to equalize the socioeconomic status of white and black Americans and does not conflict with the Constitution, which Harris observes through the lens of whiteness as property. Harris' goal is to show that affirmative action is the only means to dismantle whiteness as property and restore equality of resources. Harris sufficiently proves that affirmative action as it currently exists does not violate constitutional law but the same cannot be said of the expansive version of affirmative action she wishes to enact. To show this, I first critique Harris' analysis of *Brown v. Board* to show how far the reach of the Supreme Court extends when remedying inequities. Then I demonstrate how, under Ronald Dworkin's robust definition of equality of resources, Harris' affirmative action policy will not achieve its aims. Then, I demonstrate the parallels between Harris' affirmative action policy and Elizabeth Anderson's residential integration policy, which is critiqued by Tommie Shelby in *Dark Ghettos*. I argue that Harris, like Anderson, falls into Shelby's medical model of social policy that fails to properly address the issues at the heart of the problems they aim to solve. From the failures of Harris' policy I argue that whiteness as property as a concept must be dismissed to refocus efforts on addressing the real issues that perpetuate the material inequities that disproportionately affect black Americans.

# 1 The Constitutionality of Affirmative Action

Harris defends of the constitutionality of affirmative action through analyzing the US Supreme Court case of *Regents of the University of California v. Bakke*. In *Bakke*, a white thirty-five year old medical school applicant was denied admission to a state institution in the late 1970s. Bakke then sued the institution, believing that he had been unjustly discriminated against, and was protected from such by the Equal Protection Clause of the Fourteenth Amendment. Of the one hundred admission slots the school had created, sixteen had been sectioned off for an affirmative action program for Black, Latino and Asian students. Bakke argued that his MCAT scores were higher than those of the affirmative action students and he thus was a victim of “reverse discrimination” because he was white. The court ruled in favor of Bakke and forced the institution to accept him. The only court opinion that defended the ruling on constitutional grounds, written by Justice Powell, cited that Bakke’s rejection had infringed upon his settled expectations of acceptance based on his grades and test scores, and that the burden of remedying historic prejudice was being placed on innocent white Americans by instituting this affirmative action program, thus legitimating Bakke’s Fourteenth Amendment violation argument.<sup>1</sup>

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<sup>1</sup> Harris, “Whiteness as Property” 1769.

Harris first argues against Powell's notions of settled expectations in the case of Bakke. She agrees with Powell that grades and test scores are an important part of getting admitted to an institution, but to assume that such things are the only grounds upon which one is admitted is foolish. Admission criteria differentiate between institutions, and a medical school is no different. So to say that Bakke was an innocent victim on those grounds completely disregards the rest of the criteria.<sup>2</sup> Those justices in the majority opinion would continue to try legitimating Bakke's settled expectations on the grounds of protecting neutrality, which generates decisions to admit or reject based on objective merit. This idea of merit introduced by the court only takes grades and test scores into consideration, reflecting Bakke's assertions.<sup>3</sup> This, in my opinion, is an attempt by Harris to generate a stronger position on settled expectations where Powell's failed. In response Harris invokes the opinion of Ronald Dworkin, who calls the grounds on which merit is defined by unsubstantiated since merit means entirely different things in different contexts.<sup>4</sup> She continues by stating that Bakke, along with the majority opinion, have construed a definition of 'universal' merit on which to rest the settled expectations of the plaintiff. Harris calls this definition of merit reductive and, like Dworkin, states that merit is a constructed idea and is not necessarily objective: "Merit criteria are in fact selected in relation to certain 'merit' objectives, and those choices are heavily influenced by subjective factors."<sup>5</sup> By dismantling this idea of objective merit, any notion of settled expectations for Bakke goes along with it.

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<sup>2</sup> Harris, 1770.

<sup>3</sup> Harris, 1771.

<sup>4</sup> Id.

<sup>5</sup> Id.

Harris then takes up the question of whether Bakke not being admitted, supposedly due to affirmative action, in any way violates his rights to equal protection under the Fourteenth Amendment. Harris states that the affirmative action program violated the Fourteenth Amendment only if white Americans can claim that they have the right to compete for all available slots, including those sectioned off for affirmative action. She then says that claiming access to these spots over historically disadvantaged minority candidates reinforces whiteness as status property.<sup>6</sup> Harris reinforces her claim by noting that the university clearly had multiple potentially unfair expectations of candidates that worked into Bakke's admission, such as being marginalized for being an older applicant; Bakke was also denied by twelve other medical schools, some of which stating that his age played a role in his denial. Additionally, at the medical school the dean was allowed to reserve five spots for legacy applicants and the children of important investors.<sup>7</sup> Harris notes that Bakke could have cited either or all of these preferential areas to claim a reasonable equal protection suit, but he instead decided to sue specifically against affirmative action applicants. This leads Harris to conclude that Bakke wants to maintain his property value in whiteness.<sup>8</sup> Harris, in discussing other affirmative action suits, condenses this concept into "extending the protection of the law *in the form of strict scrutiny review* to whites as whites."<sup>9</sup> Strict scrutiny is a judicial review term describing that certain legal cases ought to be examined more carefully than

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<sup>6</sup> Harris, 1772.

<sup>7</sup> Harris, 1773.

<sup>8</sup> Id.

<sup>9</sup> Harris, 1775.



others for relevant reasons. For example, a case that brings forth concerns about freedom of speech or the historical oppression of black Americans ought to be treated with stricter scrutiny than a case on paying a parking ticket. Strict scrutiny for whites as whites indirectly maintains whiteness as property via colorblind principles, while on a structural level there has been no equalization on the grounds of race.<sup>10</sup> Harris states that, by treating whiteness as property as a legitimate ground for equal protection, the status value of whiteness is maintained and thus the racial subordination of minorities and historically oppressed groups is maintained as well.<sup>11</sup> Thus, Harris concludes that Bakke's equal protection claims, and those who support them, are "illegitimate and not immune from interference."<sup>12</sup>

Harris brings forth what she believes to be the real issue brought forth by Powell and others, that being a misunderstanding between whether addressing issues of affirmative action should be classed as issues of corrective justice or distributive justice. She states that affirmative action addresses issues of both corrective and distributive justice, while Bakke and Powell are only viewing affirmative action exclusively in terms of corrective justice.<sup>13</sup> Bakke and Powell are using corrective justice via claiming that affirmative action inadvertently harms whites in an effort to restore blacks; Powell says as much in his court opinion. If this framework is held to be true, then subsequent, innocent generations of white Americans are being unjustly punished by the law to

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<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> Harris, 1773.

<sup>13</sup> Harris, 1781.

compensate black Americans.<sup>14</sup> Harris then presents how a distributive justice framework would treat affirmative action cases. Distributive justice aims to allocate resources to those who have been historically oppressed what they would have received, were racism not a structural factor.<sup>15</sup> Thus, while corrective justice warps affirmative action cases into those of “sin and innocence, distributive justice rightfully frames affirmative action cases in terms of just reallocation. Thus, Bakke’s case cannot claim equal protection on any of the presented grounds.

Next, I will respond to Bakke from a purely legal standpoint, only relying on arguments that directly refute the plaintiff using the facts of the case. The reasons for my doing this will become clear once I begin commenting on Harris’ reliance on affirmative action as an efficacious form of remediating historical injustices toward black Americans. In short, I agree with Harris’ conclusions on Bakke’s case, but the framework of whiteness as property is not necessary to show how faulty Bakke’s case really is. Let’s start by discussing Bakke’s definition of merit.

A simple Google search on “how to get into medical school” will instantly return common criteria and advice for applying to med school within the first page of results. For example, getting a good MCAT score is one criterion while having previous clinical experience is another.<sup>16</sup> This immediate and convenient access to information may not

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<sup>14</sup> Harris, 1782.

<sup>15</sup> Harris, 1783.

<sup>16</sup> <https://www.studentdoctor.net/2018/12/20/how-to-get-into-medical-school/>

have been accessible during the year of Bakke's application to medical school. But had he reached out to prospective medical schools or others working in the medical industry, he would have been told something similar. There is no guessing what application prep Bakke had undertaken other than studying for the MCAT. However, based on his lawsuit being based only on having superior MCAT scores, it's likely he hadn't done much else. This lack of understanding what was required to have the best chances of admission dismisses Bakke's claims of being perfectly qualified for medical school on MCAT scores alone. In short, Bakke's definition of merit is deeply flawed. He assumed that if he worked hard enough, he'd make it into medical school; he believed in the American dream. This is demonstrated by the shot he took to his pride from being rejected, even though he did very well on the MCAT. However, the MCAT was only one in a set of weighted criteria used by the school to determine what applicants to admit. Furthermore, every institution has their own internal criteria which generally reflects a widely used standard criteria for that industry. This phenomenon has not changed in the last fifty years. Thus, this idea of objective merit that Bakke and his proponents appeal to does not exist. Dismantling Bakke's merit argument also swiftly subdues any settled expectations. Bakke's notion of merit is so far removed from the rest of the criteria for admission to any given medical school that he can't even begin to claim settled expectations. In sports, a player who makes a foul is punished. If the player claims that the foul is unfair only because they didn't know the relevant rules that would've led them to avoid such behavior, they would be ridiculed and the foul would stand. The same idea is found in court procedure; if a criminal didn't know they were breaking the law they are still held accountable. The common thread here is that settled expectations are grounded upon a

healthy understanding of the system in which those expectations are couched. Bakke's settled expectations of getting into law school rested on a fraction of what was actually taken into consideration when admitting students to those schools. Thus, those settled expectations are simply irrelevant.

Next to address is Bakke's claims of the violation of his equal protection rights. Bakke states that he is a victim of "reverse discrimination" by the affirmative action program instituted by the medical school. Powell expands this argument, stating that the burden of remedying historic prejudice was being placed on innocent white Americans. I derive two ideas from this argument. First, there is a conflation in Bakke and Powell's statements between equal protection and equal opportunity. And second, Bakke's statement brings up concerns about unjust discrimination. I will primarily focus on refuting the first idea; the second will be addressed briefly and taken up again later in my paper when examining Shelby's thoughts on the topic.

Equal protection and equal opportunity are two ideals that are distinctly treasured in American as well as greater Western society. Equal protection is derived from the Fourteenth Amendment in response to the Civil War era, while equal opportunity can be traced to the Civil Rights movement with the institution of agencies such as the Equal Employment Opportunity Commission. These two principles, each instituted into law as a bulwark against unequal treatment, are closely related. However, they are not the same. Equal protection was cemented in the Constitution to protect American citizens from

unjust treatment based on certain differences, such as race. Equal opportunity however has had no such cementing into law; the EEOC only enforces just treatment in the workplace for the same groups that equal protection and other civil rights law cover. The EEOC does not mention anything about nepotism, for example. Thus, an argument for equal opportunity has no basis within the Constitution. I agree with Harris that Bakke's argument in no way concerns equal protection, which I will expand on later. So, Bakke's argument, through an appeal to merit-based hiring, is attempting to address concerns of equal opportunity. I have already shown that equal opportunity has no legal enshrinement, but it will be worthwhile to take this argument a step further and show that affirmative action can be justified under equal opportunity, which I will do now.

As stated by Harris, merit can be subjective to some degree. For instance, actors must meet certain physical qualities in order to even be interviewed for a role. Sometimes this can even extend to immutable characteristics such as race, but this is justified in certain instances, such as a historical film or a fiction where a character's race is prevalent to their character arc. Of course, these justifications do not work within academia. What does, however, justify affirmative action on the grounds of equal opportunity is that black Americans in particular are a historically marginalized group that have been repeatedly repressed over the course of the last four-hundred years. A wide majority of the legal roadblocks have been removed, but as Harris states there has been a material, and I would argue psychological, detriment to the black community that has yet to be properly addressed and healed. While I will go on to argue against

affirmative action later, it must be stated that even beyond the failures of the constitutional argument affirmative action can be justified on the grounds of equal opportunity, even if only as a temporary measure. Furthermore, when an affirmative action program is made, it does not encompass the entire pool of applicants. In *Bakke*, only sixteen out of a hundred spots, less than a fifth, were set aside for affirmative action. This means that Bakke was never competing against the affirmative action applicants, but instead all of the other applicants competing for the other eighty-four spots. Competitively Bakke never 'lost' to any of the affirmative action applicants because he was never competing with them in the first place. So, Bakke's loss counts as fair grounds in terms of equal opportunity. There is another point worth addressing regarding having an entirely affirmative action focused hiring model, but that is beyond the scope of this paper.

The last point to address regards equal protection itself and why Harris is right to say that affirmative action for black Americans is just under the Equal Protection Clause. To prove affirmative action's justification under equal opportunity, let us return to the concept of strict scrutiny. As stated before, strict scrutiny refers to legal cases that ought to be examined more carefully than others for relevant reasons. One such relevant reason is the historical prejudice against black Americans. Given that a case brought to the attention of the courts that involves a black person has a higher likelihood of having certain racial undertones at play, stricter scrutiny must be used on the details of the case before making a ruling. Conversely, white Americans as a group have suffered no such

injustice, and thus there is no need for employing the same level of scrutiny in order to find any relevant biases to the case. Understanding strict scrutiny in this way helps to highlight what allows affirmative action under equal opportunity. If the American slave trade, which in large part generated the unique conditions for the long-lasting racism afterward, had never happened, then black and white Americans would be on a comparatively equal footing in terms of societal standing. Thus, affirmative action for blacks in particular would not be as prevalent. However, this is not the case. There is still a wide economic and cultural divide between black and white Americans, along with an unspoken tension between the two. This is why race-based affirmative action is still common; that racial rift has not yet been healed. Affirmative action is employed as a means to heal this rift. Equal protection, as a principle, claims that every person should be entering society from the same starting point, and that any unjust inequality must be addressed. By employing strict scrutiny as it pertains to black Americans, it is hard to see why equal protection and affirmative action would contradict. There may be lingering concerns with this argument about any potential negative effects on white Americans. This has already been addressed in part by Harris. Any claims of white Americans being harmed due to affirmative action misrepresent affirmative action programs as a matter of corrective justice instead of distributive justice. If whites were being explicitly turned down for positions due to their whiteness, there would be grounds to claim an undue use of corrective justice, but that isn't happening. Everyone is put into a general pool of applicants, and some spots are withheld from that competition. As a result, white Americans were never competing for those spots in the first place. Thus, there is no issue of corrective justice present. However, I have noticed a red herring often used against

corrective justice arguments. I agree that affirmative action can be explained in terms of distributive justice on the grounds of equal protection. However, stating this implies that affirmative action is still an issue of judicial concern. There is no judicial concern to be found here. Affirmative action is simply a policy used by companies to guarantee more diverse employment that is legally justified on the grounds of equal protection. While there is no legal or constitutional breach present within affirmative action, to speak of it as another form of justice only confuses the conversation. Affirmative action is a matter of distributive justice in principle only, and to speak of it only as a matter of distributive justice distracts the opposition from understanding that affirmative action is not a matter that involves the judiciary.

That concludes my legal counterarguments against the majority opinion in *Bakke*. There are important distinctions between Harris' account and mine. While merit may be subjective, every industry has commonly held standards within their criteria. Merit-based claims fall under equal opportunity, which is not a legal principle. However, equal opportunity still protects affirmative action programs. And lastly, while affirmative action can be explained in terms of distributive justice, this explanation distracts from the goal of proving that affirmative action is neither a matter of corrective justice nor a legal issue at all.



## 2 The Failures of *Brown v. Board* and Harris' Affirmative Action

Harris believes that affirmative action is a means to repair the issues of whiteness as property by raising the education status of blacks. This, according to Harris, will be a means to gradually bring about equality of resources between white and black Americans. She partly couches this argument in a critique of *Brown v. Board*, where she states that the U.S. Supreme Court did not go far enough in repairing the harm that was caused to blacks by the racial segregation of schools. There are several flaws in Harris' argument. First, in regard to *Brown v. Board* Harris does not consider the powers that the Supreme Court do not extend far enough to employ the expansive distributive justice she desires to see done; conversely she does show that the Supreme Court did not exercise the extent of its legal authority in regard to desegregation. Next, Harris does not try to define equality of resources. In her place I will refer to the most robust definition of equality of resources, written by Ronald Dworkin, and argue that the affirmative action as defined by Harris will not lead to equality of resources.<sup>17</sup> Harris reliance on affirmative action to achieve equality of resources mirrors Elizabeth Anderson's reliance on bussing to solve the after-effects of racial segregation in education. Shelby identifies that Anderson's solution suffers from using the medical model to solve a systemic issue. I argue that Harris' argument has similar shortcomings. Lastly, Harris' over-reliance on

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<sup>17</sup> Although I am using Dworkin's understanding of equality of resources, I am not leaving out the possibility that Harris' definition of the term may differ from Dworkin's. However, since Harris does not provide a discrete definition of her own, it is best practices to rely on the most robust definition available instead of running the risk of straw-manning Harris.

affirmative action only serves to further the material inequality that she seeks to end, as she only focuses on secondary education as the nexus for improving the status of black Americans. Without considering the manner in which affirmative action is to be applied, Harris' solution risks perpetuating whiteness as property and stoking racial animus. I argue that this brings the entire framework of whiteness as property into question.

Harris' argument for affirmative action begins partly in her critique of *Brown v. Board of Education*, where she both praises and chastises the Supreme Court its effects on the status property of black Americans. She agrees that the ruling in the case neutralized any further overt educational inequity via racial segregation in public schooling. But the case left a further hole for the perpetuation of racial inequity. The Supreme Court only identified racial separation as the sole source of harm, rather than also addressing the deeper inequities caused by educational segregation. With such a limited scope in terms of addressing the harms of educational segregation, the Supreme Court had established a neutral baseline of equality atop the material inequity of black Americans due to such policies.<sup>18</sup> Harris states that the Court had dismantled any overt whiteness as property but maintained any race-based privilege that existed as a result, thereby enabling a new subversive form of whiteness as property. Thus, the Court refused to grant any claim to equality of resources or a substantively effective education for black Americans.<sup>19</sup> This would, Harris states, later lead the Court to dismiss such a

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<sup>18</sup> Harris, 1753.

<sup>19</sup> Freeman, *Antidiscrimination Law*, in Harris, 1751.

desegregation policy in *Milliken v. Bradley*,<sup>20</sup> where the Supreme Court dismiss a Michigan metropolitan desegregation plan in response to the overt segregated Detroit public school system.<sup>21</sup> The Court found that, despite the obvious enabling of segregation in Detroit at all levels of state government, these facts were to be held as neutral outside of Detroit. Thus, the plan could not justifiably be used in relation to school districts outside of the Detroit public school as the demographic makeup of those districts had not been proven to be the result of educational segregation policies.<sup>22</sup> Harris also mentions another severe failure of court in mandating that the process of enacting desegregation be handled by the lower courts of respective districts “with all deliberate speed.”<sup>23</sup> This statement from the Court would allow local jurisdictions to delay the enactment of desegregation as long as possible. This, according to Robert Carter, former General Counsel of the NAACP, was a complete about-face from constitutional law in that the violation of constitutionally protected rights were to be immediately remedied.<sup>24</sup>

Harris restates the neutral baseline established in cases such as *Brown v. Board* in the build-up to her argument for affirmative action. She states that the inequities between black and white Americans, as a result of the law’s neutral stance on these matters, has been rendered invisible,<sup>25</sup> echoing her statement that the Supreme Court refused to guarantee the dismantling of white privilege or the violated equal protection rights of

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<sup>20</sup> Harris, 1756-7.

<sup>21</sup> <https://www.oyez.org/cases/1973/73-434>

<sup>22</sup> Harris, 1756-7.

<sup>23</sup> Harris, 1754.

<sup>24</sup> Harris, 1755.

<sup>25</sup> Harris, 1777.

black Americans.<sup>26</sup> Harris lays out three axioms for her affirmative action argument. First, affirmative action is a matter of equalizing to restore black Americans and to disrupt and ultimately dismantle whiteness as property. Second, affirmative action is distributive, not corrective by nature. And thirdly, affirmative action is only as effective as it is expansive and equalizing. As the second axiom has already been extensively covered in the first half of this paper, I will only be detailing the other two axioms here. In the first axiom, Harris explains that if white privilege, or the settled expectations of whites, is meant to be understood as being perpetually protected by the law, then equal treatment is not enough to delegitimize white privilege. Instead treatment must be equalized to dismantle such institutional privileges, which affirmative action will work to achieve.<sup>27</sup> The extent of equalization can vary, but the fundamental nature of equalization is enact distributive justice such that the self-realization of the oppressed is facilitated.<sup>28</sup> To explain the third axiom, Harris departs from affirmative action in the United States to look at how it is employed in South Africa. Before doing so, she critiques the American framework for affirmative action. Harris notes that the affirmative action programs in their respective areas for black Americans have respectively failed; the unemployment and underemployment conditions of black Americans did not improve, and wealth across black families continued to decline.<sup>29</sup> Harris states that these programs would never have worked because they were based upon equal treatment with no regard of structural disadvantage.<sup>30</sup> Alternatively, in South Africa affirmative action is applied such that

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<sup>26</sup> Harris, 1751.

<sup>27</sup> Harris, 1779-80.

<sup>28</sup> Harris, 1780.

<sup>29</sup> Harris, 1787-8.

<sup>30</sup> Harris, 1788-9.

distributive justice is the stated goal of the South African government. To that extent, it intends to enact such justice while also respecting property rights, but the latter is not absolute. Property rights, where necessary, will always be considered against the mandate for affirmative action.<sup>31</sup> The aims of South Africa's affirmative action model sufficiently meet Harris' requirement for the focus of such policies to be on equalizing treatment over as many areas as possible, even in conflict with other rights. To summarize, there have been pushes to remedy the historical oppression of black Americans, these efforts have only served to establish a neutral baseline for equal treatment while the material inequities of oppression still remain and have yet to be remedied. The lack of equality of resources serves to maintain a subversive form of whiteness as property that claims societal equality while still protecting the settled expectations of white Americans in regard to socioeconomic status. To properly disrupt and ultimately dismantle whiteness as property, affirmative action is necessary. Affirmative action is meant to equalize the material inequities by redistributing resources such that a substantive equality of resources is achieved. Such policies that enact affirmative action are redistributive in nature, and thus are a matter of distributive justice, not corrective justice. Lastly, affirmative action policies are only as effective as they are focused on equalization; affirmative action policies rooted in equal treatment will only be as effective as they are expansively reallocating resources to the historically oppressed.

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<sup>31</sup> Harris, 1790.

I will begin my critique of Harris with my concerns on her stances about *Brown v. Board*. Harris states that the court did not do enough in remedying the material inequities caused by educational segregation. However, the function of judiciary is to interpret the law and potential infractions of it within the cases that they are hearing. The cases that were presented to them in *Brown v. Board* all directly concerned matters of educational segregation, not the effects of segregation on specific neighborhoods. Were there cases specifically targeting such material inequities then the Supreme Court would have been obligated to respond. For example, if a series of schools had sued their respective districts for withheld funding via segregation policies, they would have a strong case of a Fourteenth Amendment violation after *Brown v. Board*. Harris misunderstands the powers of the judiciary to influence policy. In her critique of *Milliken v. Bradley*, she makes a similar mistake in not understanding why the Supreme Court decided to dismiss the Detroit metropolitan plan. The Court had to because they were not shown any violation on the Fourteenth Amendment in the school districts outside the Detroit public school system. I agree with Harris that the average person can reasonably assume that, if there is segregationist policy being enacted within all forms of the Michigan government, then it has likely affected the surrounding school districts as well as Detroit. However, these facts of segregation in the surrounding school districts were not provided. While the Court can make these assumptions as well, they cannot rule on them. The Court can only rule on the facts presented, and if those facts were missing it is the fault of the respective party's legal representation for not bringing those facts to the attention of the court. As such I argue that the Court was only in its power to establish a neutral baseline of equality for all in response to the constitutional violations presented in *Brown v. Board*. I

do agree with Harris, however, on the weakness of the Court's response to enacting desegregation policies "with all deliberate speed." I might be able to see the Court's concern about the potential destabilizing effects of such policies but acting on such concerns betray the nature of constitutional rights to be immediately remedied upon violation. While I can't establish whether the Court's relative delay in enacting desegregation ultimately did more harm than good, it is clear that the Court in this moment failed their own personally-held standard for constitution and their status as the ultimate interpreters of the Constitution.

Next, I will critique Harris use of the term 'equality of resources.' Harris does, in her defense of affirmative action, use equality of resources synonymously with a substantive redistribution of resources. However, this gets us no closer to a concrete definition. In *What is Equality?* Ronald Dworkin gives his own framework on what equality of resources looks like. Dworkin claims that equality of resources is dependent on the existence of a market for goods to be bought. To prove this, Dworkin comes up with a scenario where a group of shipwreck survivors get washed onto a remote, unpopulated island with plenty of resources. The survivors decide to split these resources equally amongst themselves in a particular way: the resources will be split up such that no survivor prefers another's bundle to their own. Dworkin calls this the envy test.<sup>32</sup> One survivor is assigned to divide these resources into equal, yet somewhat different bundles, which supposedly satisfies the envy test. Dworkin then presents a case where all the

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<sup>32</sup> Dworkin, "What is Equality?" 285.

initial resources are replaced with an equivalent set of other resources, and one of the survivors does not like the contents of the bundle that they have been given. This survivor does not envy anyone else's bundle but would prefer a receiving a bundle made from the initial set of resources. Dworkin uses this example to show that a fair allocation of resources would have to anticipate potential unfairness.<sup>33</sup> In the next example, each bundle still satisfies the envy test. However, based on the different tastes of the survivors, some would prefer a bundle made up of a different set of resources without envying any of the existing bundles. From this Dworkin concludes that a fair allocation of resources would also have to anticipate the arbitrariness of the participants.<sup>34</sup> To meet these conditions of potential unfairness and arbitrariness, an equal allocation of resources would require a more complex process than simply splitting up the available resources into different packs. From this Dworkin concludes that some form of market is required to meet the requirements for equality of resources. However, Dworkin notes that this can only occur if the participants involved in this market are starting from an equal starting point.<sup>35</sup> Using Dworkin's definition of equality of resources, affirmative action has a hard time holding ground. Dworkin agrees that there is an issue that must be addressed if the parties involved in the market are not equal from the start, but restates that a market, despite its flaws, will still be a superior means of achieving equality of resources as opposed a brute-force allocation of resources. With this, Dworkin finds that the equal treatment principle will ultimately supersede the equalization principle, which Harris rests her affirmative action policy upon. Note that Dworkin is not entirely rejecting

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<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> Dworkin, 289.



equalization, as a market established on inequities will be inferior to one established with equality. So, while Dworkin would ultimately disagree with Harris on the extent of how much affirmative action ought to be used to achieve equality of resources, he still leaves room for affirmative action to fix certain inequities that his market cannot.

In comparing Harris' affirmative action and Dworkin's equality of resources, it becomes apparent that Harris might be expanding the reach of affirmative action far beyond what is necessary to achieve equality of resources. I argue that this over-reliance on affirmative action may come from how Harris is framing her argument. To show this, I will compare Harris' affirmative action policy to Elizabeth Anderson's integrationist policy she pushed during the Civil Rights movement. In *Dark Ghettos*, Tommie Shelby details different methods of resolving the plight of the ghetto poor, i.e. the effects of the historical oppression of black Americans. Shelby labels Anderson's integrationist policy as residential integration. Residential integration is ideologically backed by residential diversity: the ideal that the average neighborhood must contain a certain number of people from different ethnicities with respect to the regional racial makeup.<sup>36</sup> Furthermore, residential integrationists see residential diversity as a means of enacting corrective justice since they believe the state has the ability to do such things. To them, by enforcing residential diversity, advantaged white Americans will have to interact more with disadvantaged black Americans.<sup>37</sup> Anderson goes into more detail on how this would work in her social capital argument. The social capital argument first finds that

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<sup>36</sup> Shelby, "Dark Ghettos" 63.

<sup>37</sup> Shelby, 63-4.

social relationships are a form of capital which can be used to further socioeconomic advancement.<sup>38</sup> Next, it finds that social relationships can be managed by means of distributive justice. That is, such relationships can be redistributed by the government in such a way that any socioeconomic inequities within such relationships can be erased.<sup>39</sup> Shelby finds issue with both of these axioms. For the first, while nepotism is generally considered a single unfair aspect of socioeconomic maneuverability that ought to be discouraged, the residential integrationist conversely sees it as the most efficacious form of maneuverability that should be capitalized. Additionally, the residential integrationist ignores how these relationships form in the first place. Such relationships form from genuine associational bonds of family and friendship and from there may evolve into nepotistic advantage, and to develop such bonds only for the potential advantages they bring is seen as detestable. According to the residential integrationist, this process again is inverted, where superficial relationships to promote self-advancement are the norm and that this is found to be morally acceptable.<sup>40</sup> In response to the second axiom, Shelby states that treating social relationships as a matter of distributive justice violates the freedom of association of those individuals. Furthermore, enacting such policies would only serve to generate a series of mixed-income communities instead resolving the stated goal of raising the ghetto poor out of their predicament.<sup>41</sup> The next issue that Shelby finds with the residential integrationist model is that it reinforces white privilege by encouraging affluent white Americans to see their status as something black Americans

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<sup>38</sup> Shelby, 68.

<sup>39</sup> Shelby, 69.

<sup>40</sup> Shelby, 68-9.

<sup>41</sup> Shelby, 69.

can benefit from.<sup>42</sup> From Shelby's breakdown of Anderson's residential integration, it is apparent that the residential integrationist sees normally objectionable behavior as an instrumental good, believes that the government has the right to control such behaviors, and that forcing the ghetto poor to engage in practices where they will also benefit from white privilege is an effective means of dismantling white privilege. Furthermore, to the residential integrationist, this functions as a form of corrective justice albeit that it must use forms of distributive justice to enact such goals. In short, the residential integrationist only sees the plight of the ghetto poor as a problem to be solved and identifies a linchpin (social relationships) that, once resolved, will end the existence of ghettos as a result.<sup>43</sup> Thus, the residential integrationist's policy conforms well with Shelby's medical model. Shelby describes that practitioners of the medical model seek to increase material welfare through targeted interventionist policies and integrate them into the current social system instead of fixing the issues intrinsic to that society that may be causing ghettos to exist, which Shelby calls status quo bias. Practitioners of the medical model see the ghetto poor as passive victims to be saved instead of allies in securing true justice for all, which Shelby defines as the problem of downgraded agency. Finally, practitioners of the medical model, in their efforts to fight poverty, tend to ignore the actual issues that concern the ghetto poor while preserving a stratified social order, which Shelby calls the unjust-advantage blind spot problem.<sup>44</sup> So far, Shelby has shown how Anderson's

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<sup>42</sup> Shelby, 69-70.

<sup>43</sup> Shelby, 3.

<sup>44</sup> *Id.*

residential integrationist policy fails in the same way as the medical model. I will show how Harris' affirmative action makes some significantly similar mistakes.

Before showing how Harris falls into the medical model, I want to point out some important differences between Harris and Anderson. First, Harris does not make the same mistake as Anderson where she mischaracterizes the residential integrationist model as a form of corrective justice. Under the grounds of corrective justice, Anderson would be harming those who, while benefitting from privilege, have not directly harmed the ghetto poor. Harris correctly understands that enacting such a policy is a matter of distributive justice. Next, Harris does not ignore the extensive history of slavery, racial discrimination and segregation have negatively impacted black Americans throughout the history of this country and how it has negatively affected their socioeconomic status.<sup>45</sup> However, this is the end of the differences. I will now go through, in order, Harris' missteps that land her affirmative action policy inside the medical model framework. First, affirmative action affirms status-quo bias by redistributing resources opportunities to disadvantaged black American without addressing the causes for why they largely choose not to participate in these systems despite many of the overt impeders to black socioeconomic maneuverability have been dismantled, such as segregation in education and other institutions. Second, affirmative action suffers from downgraded agency in not treating black Americans as allies in the fight for substantive reform. Third, affirmative action does suffer from the unjust-advantage blind spot problem in that black Americans,

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<sup>45</sup> Harris, 1715-57.

through affirmative action, will be constantly dependent upon the economic status of white Americans to resolve their disadvantage. In America, as Harris admits, substantive equalization would require blatantly violating property rights when deemed appropriate, similar to the South African model. What Harris fails to see is that if constitutional violations are meant to be immediately remedied, that means they should never have been infringed upon to begin with. Americans have constitutionally protected property rights, now for both whites and blacks, so her desired form of equalization is untenable. Affirmative action that preserves equal treatment, however, is actually constitutionally viable, which Harris ironically defends such a version of affirmative action in her critique of *Bakke v. University of California*. So far, Harris' affirmative action meets all of Shelby's criteria for the medical model. But Harris still shares more similarities with Anderson. First, Harris, like Anderson, sees resources as the sole means of socioeconomic maneuverability. I believe similarly to Shelby that access to resources, like nepotistic relations, is an unfair aspect of creating socioeconomic growth. However, this does not mean resources are the sole means. For example, if I use my excess wealth to buy a warehouse of LA Clippers jerseys, and only attempt to sell them in Montana, I will have a lot less wealth and a lot of useless jerseys. Or, if I have a series of properties, and I do not pay for those properties to be cleaned and maintained, then those properties will eventually degrade, and their property value will be worth much less. In both cases, I have mismanaged my wealth and now have less wealth. In a similar fashion, if you redistribute wealth arbitrarily to those who don't know how to generate wealth, you'll watch that wealth disappear while those who have had their wealth taken from them will have a harder time generating more wealth. In summary, everybody loses from such

policies. It has to be noted that those without wealth have also had a harder time learning the means to generate wealth, which is an issue I agree with. However, I'm only proving here that such avenues for education are not improved by sweeping race-based affirmative action on the scale Harris wants to enact. Next, while Harris plans to enact substantive affirmative action by means of the government, she can't without violating the Constitution if she plans to enforce affirmative action outside the bounds of equal treatment. However, there may be a more proactive solution. If the government were to purchase unused properties from owners sitting on it, and sell them at a discount to up-and-coming entrepreneurs in lower-income areas, that might incentivize grassroots growth, new wealth generating avenues and more job opportunities in lower-income areas without subjecting those areas to severe gentrification from incredibly wealthy companies. It is a novel idea, but it could help to resolve the issue of resource inequity and wealth generation while not requiring blatant violations of property rights. Thus, while Harris' affirmative action policy violates the Constitution, there are still more substantive reforms to repair the socioeconomic status of black Americans.

Lastly, Harris puts a lot of weight on her affirmative action policy as being the solution to dismantling whiteness as property. Since her affirmative action policy has been shown to be constitutionally insolvent as well as an ineffective solution to restoring the socioeconomic status of black Americans, this brings Harris' entire framework of whiteness as property into question. If whiteness as property is meant to be dismantled by affirmative action, then it certainly disrupts the settled expectations of white Americans

via resource redistribution, but it does not ultimately solve the material inequities between white and black Americans. And likely, as a result of such sweeping affirmative action policy, affluent white Americans would be more incentivized to either move more of their assets out of the country or leave the country entirely. This would only serve to dilapidate the socioeconomic status of the entire country and black Americans would be no better off. If affirmative action sees resources as the sole lynchpin to resolving socioeconomic inequities, and by the medical model that is a targeted action to solve a narrowly defined problem, then whiteness must be narrowly defined and ultimately not addressing the core issues of American inequity. Harris defines whiteness as property as a property interest in whiteness itself, which is established and protected by the law.<sup>46</sup> However, that is a cynical reading of the Constitution. In fact, the Constitution has time and again been used as the justification for dismantling policies that unjustly affect oppressed groups. While such important changes have not been enacted as those negatively affected by unjustly marginalizing policies would like, the Constitution ultimately keeps protecting those rights no matter who would like to infringe on them. As the Constitution is the United States' foundational legal document which all others must adhere to, it cannot be case that a property interest in whiteness is maintained by the law as opposed to vested interests passing unjust policy to marginalize certain group. Thus, whiteness as property has never existed, and instead it was only the vested interests of affluent white Americans who saw racism as reasonable policy where the Constitution would state otherwise. While socioeconomic conditions have not rapidly improved since the Civil Rights movement, the power of such racists has been gradually dissipating as

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<sup>46</sup> Harris, 1724.

the younger generations gain institutional power. This is not to say that artifacts of those racist policies are all gone, but only that whiteness as property is a highly idealized vision of the receding reach of the racist policy makers of ages past. Thus, while there are still substantive socioeconomic issues plaguing black Americans to the modern day, they will not be resolved by sweeping unconstitutional affirmative action policy and are not enabled by a mythical property interest in whiteness.



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