DISCRIMINATION AND DISTRUST: A CRITICAL LINGUISTIC ANALYSIS OF THE DISCRIMINATION CONCEPT

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INTRODUCTION

This Essay will critique the use of the term “discrimination” to describe and name the practices and harms of racial subordination. It is part of a larger project critically examining the linguistic premises and assumptions in legal discourse. It is important to examine language structure and word choices in court opinions because the way in which we discuss legal issues can deeply affect the substantive development of legal doctrine. For example, this Essay will show how the use of the term “discrimination” in the equal protection school desegregation cases helped to shape and influence the doctrinal debate over the proper remedy for racial segregation in public schools.

In short, this Essay seeks to develop a critical linguistic analysis of law because language matters. Language matters because language is about power; whoever controls the linguistic terms of the debate also controls and frames the debate according to terms more favorable to his or her substantive position. Language also matters because language is related to our perceptions of social reality. We understand and comprehend the world through words. Thus, if we use ineffective, misleading, partial, and uninformed language to make sense of social reality, our sense of social reality will accordingly be ineffective, misleading, partial, and uninformed.

This Essay consists of three parts. Part I will briefly discuss and elaborate on critical linguistic analysis and methodology, and discuss its application to the analysis of law. Part II will examine the role that language has played in shaping substantive legal doctrine by focusing on the use of the term “discrimination” in equal protection law. Spe-

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1 See generally Benjamin Lee Whorf, Language, Thought, and Reality (John B. Carroll ed., 1956) (hypothesizing that human perception of reality is influenced by a person’s language).
cifically, it will focus on the language in the two *Brown v. Board of Education* decisions ("Brown I" and "Brown II"). In *Brown I,* the Supreme Court struck down state-imposed racial segregation in public schools, declaring that racial segregation violates the Equal Protection Clause. In *Brown II,* the case known as the implementation decision, the Court issued its opinion regarding the appropriate remedy for the constitutional violation it had found in *Brown I.* Curiously, in discussing the nature of the remedy, the Court in *Brown II* never once mentioned the word "segregation" in the text of its brief opinion. Instead, the Court discussed the harms of racial segregation and the appropriate remedy for racial segregation using the word "discrimination" and its variations. Part II will argue that the Court made a deliberate decision to change the nature of the harm described in *Brown I* from segregation to discrimination, and will then explore the implications and the consequences of that linguistic shift.

Part III will examine the equal protection doctrinal implications of the linguistic shift, and will also examine the role that language and language structure have played in shaping the evolution of equal protection doctrine.

I. CONSTRUCTING A CRITICAL LINGUISTIC METHODOLOGY: THE MAIN PREMISES OF A CRITICAL LINGUISTIC THEORY OF LAW

Linguist Benjamin Lee Whorf developed the theory of "metalinguistics" to describe a loosely defined field of linguistics concerned with the relationship between language, thought, and the social construction of reality. The fundamental premise underlying a metalinguistic approach to the study of language is that "the structure of a human being's language influences the manner in which he understands reality and behaves with respect to it." Metalinguistics studies how language patterns structure and direct our attention to selective portions of our environment, and how we react to those selected portions of our environment.

Language structure reflects and embodies a view of the world and the nature of reality. Therefore, changing or transforming the struc-

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4 See WHORF, supra note 1, at 23–24 (outlining the aims of operational philosophy).
5 Id. at 23.
6 See ANATOL RAPPOPORT, OPERATIONAL PHILOSOPHY: INTEGRATING KNOWLEDGE AND ACTION 235 (1953) (stating that metalinguistics deals with those aspects of language that reflect a certain worldview).
7 See, e.g., RICHARD BANDLER & JOHN GRINDER, THE STRUCTURE OF MAGIC: A BOOK ABOUT LANGUAGE AND THERAPY 21–22 (1975) (stating that humans use language to represent and model experience); WENDELL JOHNSON, PEOPLE IN QUANDARIES: THE SEMANTICS OF PERSONAL ADJUSTMENT 112–42 (1946) (noting that "[t]he relationship between language and reality is a
ture of language also means changing or transforming the underlying view of reality. The English language structure embodies and reproduces an Aristotelian essentialist understanding of reality, which is the view that things possess an essential or ultimate nature.

Essentialism is a static view of reality and the world. If a thing has an essence or a property by virtue of its essential nature, then under an essentialist view, that thing will always possess that particular property or essence. On the other hand, an anti-essentialist approach to language takes a process-oriented approach to understanding reality. It presumes that there is no "objective or essential" reality as is presumed under an Aristotelian essentialism; instead, it contends that "reality" is socially constructed through an interaction between subject and object. This approach to language presumes that words and categories are not "objective," but rather, are subjective, culturally contingent constructs that reflect, shape, and direct our focus and attention.

There are several key premises to a metalinguistic analysis of language and law. One premise is the principle of non-identity, which can be summed up in the statement, "A is not A." In other words, the premise of non-identity states that there is a fundamental difference between a word and the object that is represented by that word, and that there is a fundamental difference between similar words or statements stated at different levels of abstraction. For example, with respect to the difference between a word and its object, we clearly understand that the word "hamburger" is something entirely different from the object "hamburger." Thus, we do not eat a menu
with the word hamburger printed on it because we know that it would not be the same thing as actually taking a bite of a hamburger.\(^{19}\)

A second premise is that there is a fundamental difference between words and statements at different levels of abstraction.\(^{20}\) As Wendell Johnson notes:

\[\text{[T]ruth is not truth (A is not A), for example, in the sense that what truth refers to on one level of abstraction is not identical with that to which it refers on some other level. To put it in homely terms, a theoretical statement about hamburger is not the same as the label \textit{hamburger}, which in turn is not the same as hamburger you can stick a fork into and put in your mouth, which again is not the same as hamburger acted upon by your digestive juices and assimilated into your body.}\]

In other words, in a debate, when a person uses language to change the level of abstraction upon which debate occurs, that person is in effect \textit{changing the subject matter}, even if we may not realize it.

Another example may help to explain the implications of shifting a discussion from one level to another level of abstraction. Assume two people are discussing a movie, and they are talking about a particular scene. They describe the scene to each other and both state that the scene was humorous. Then, one person asks \textit{why} the other person found the scene funny, and that person goes on to explain that she enjoys physical, slapstick humor due to the way such humor takes a surreal view of reality, which helps her to forget the routines of everyday life. Once the discussion moves from a discussion describing a funny movie scene to a discussion about why that scene was humorous, the discussion moves to a higher level of abstraction. Even though they may still be referring to the same movie scene, they are now having a substantively different conversation, because the two discussants are no longer talking about the humorous movie scene. Instead, they are examining their own general personal tastes regarding humor.

Just as everyday discussions and debates shift constantly between different levels of abstraction,\(^{22}\) it follows that legal discourse shifts as well. A critical linguistic analysis of law is an analysis that is conscious of how courts and lawyers use linguistic techniques to subtly change the subject matter of a legal discussion, and of how such linguistic moves have both substantive and rhetorical effects on shaping legal discourse.

\(^{19}\) \textit{Id.}\n
\(^{20}\) \textit{See id.} (discussing the premise that language, at each higher level of abstraction, perpetuates non-identity with its initial object).\n
\(^{21}\) \textit{Id.}\n
\(^{22}\) \textit{See, e.g., id. at 121–23} (analyzing the language structure of the statement "John is smart").
Metalinguist Wendell Johnson provides two simple ways to determine the level of abstraction on which a discussion is operating. First, "[a] practical test of the relative level of abstraction on which we are speaking at any given moment lies simply in the amount of time (or number of words) required to make reasonably clear what we are talking about." Second, another test of the relative abstraction of a particular discourse is the extent to which the discourse leaves out descriptive details. As discourse moves toward higher levels of generality or abstraction, more and more details are left out.

Thus, a critical linguistic analysis of law is an analysis which focuses on how changes in language structure and word choice can affect the level of abstraction at which discourse occurs. Moreover, as stated above, the structure of our language actually reflects and reinforces epistemological and metaphysical premises and assumptions. A critical linguistic analysis of law, therefore, contends that scholars should analyze the language structure of legal concepts in order to better understand the nature of legal debates and discourse by: (1) being conscious of the process of abstraction; (2) uncovering the underlying epistemology or view of reality embedded within the language structure of a particular doctrine; and (3) understanding how invisible linguistic techniques can be and have been used for rhetorical effect.

A third premise is that a word is functionally meaningful only to the extent that a word or concept has a clear connection with people's experiences. Under this view of language, "the meanings of words are not in the words themselves but in the experiences behind them." If a word fails to connect with experience, then the word is effectively meaningless and lacks any real content.

A fourth premise is that the act of categorizing/classifying is fundamentally a subjective process, and that there are political, psychological, epistemological, sociological, and ideological processes underlying any attempt to categorize or classify a thing or a phenomenon. As Anthony Amsterdam and Jerome Bruner assert, "To put something in a category is to assign it a meaning, to place it in a particular context of ideas."

However, even though the act of classifying is dependent on a subjective frame of reference, the abstract nature of categories or names misleads us into believing that categories or classifications are objec-

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23 Id. at 140.
24 See id. at 128 (describing the abstracting process as the process of leaving out details).
25 See id. at 128–29 (describing limits of language).
26 See id. at 14 (emphasis added) (discussing the concerted effort to connect man's use of language with experience).
27 Id.
tive in nature. The reality is that someone has to classify an experience or object as belonging to some category, and that different people can differ as to how to classify a particular object. Thus, because of the inherently subjective nature of classifying or naming, sociologist Anselm Strauss contends that "[t]he way in which things are classed together reveals, graphically as well as symbolically, the perspectives of the classifier." Similarly, Amsterdam and Bruner assert, "categorization is not only an act of reference, specifying what the thing in question is, but also an act of sense making, specifying how the category that includes this thing fits into our larger picture of the Shape of Things."

To illustrate the subjective nature of classifying or naming, Strauss provides the example of the Laplanders, a Swedish cultural group, who use the same word to describe both "people" and "reindeer." From an "objective" point of view, a person might contend that the Laplanders are mistaken or incorrect to call reindeer "people," since based on objective criteria, reindeer are clearly not human beings. However, Strauss contends that such an argument is pointless:

The life of the Laplander revolves around activities having to do with reindeer. Is a reindeer a human or is a human a reindeer? The question is senseless; the people and reindeer are identified, they go together, and the very fact of their identification in terminology gives the anthropologist one of his best clues to the Laplander's ordering of the world and its objects.

A fifth premise is that a critical linguistic analysis presumes that words direct action and attention. Words shape our intent and expectations towards certain situations and objects. As Strauss asserts, "[t]he naming of an object provides a directive for action." For example, if one were to classify a person as a "liar," then it would mean one would be likely to treat anything uttered by that person with skepticism and wariness. On the other hand, if one were to classify a person as an "honest man," it would mean that one would be likely to treat anything uttered by that person with greater trust and openness.

When we rename an object, a person, or a situation, "[it] amounts to a reassessment of [our] relation to it, and ipso facto [our] behavior becomes changed along the line of [our] reassessment."

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32 Id.
33 See id. at 73 (noting that a proper discussion of action requires a discussion of linguistics).
34 Id. at 75.
35 Id.
II. A CRITICAL LINGUISTIC ANALYSIS OF THE DISCRIMINATION CONCEPT

A. From Brown I to Brown II: From Segregation to Discrimination

A critical linguistic analysis of the Court's school desegregation decisions shows how the Court made a linguistic shift in order to slow down the move toward actual integration of schools. In Brown I, the Court dealt with the constitutionality of the practice of state-imposed racial segregation in public schools. In a unanimous decision, the Court held that laws requiring or permitting racial segregation in public schools violated the Equal Protection Clause of the Fourteenth Amendment. The landmark decision not only overruled the infamous 1896 Plessy v. Ferguson case—which held that state imposed racial segregation was constitutionally permissible state action—but it also was the case that helped to catalyze the civil rights movement. While the Brown I decision today is considered a seminal and foundational equal protection decision, in 1954 the Court's intervention, on behalf of African Americans subjected to oppressive Jim Crow racial segregation laws, sparked enormous legal and political controversy.

The Brown I decision raised very important and difficult questions as to its meaning and effect. Specifically, once the Court had declared that racial segregation in public schools was unconstitutional, the critical question was, what was the appropriate remedy for the constitutional violation. Did Brown require states to racially integrate the public schools in order to remedy the equal protection violation? The question of remedy was so controversial that the Court avoided the question of appropriate remedies in Brown I, deciding the remedy question in an opinion handed down one year later in 1955.

Of course, whether a particular remedy is appropriate or not depends on the nature of the constitutional violation. In Brown I, the Court, in declaring that racial segregation was unconstitutional, focused its attention on the ongoing harms suffered by black children attending racially segregated schools. The Court began its opinion by noting that four cases from different states were consolidated on appeal. The Court then stated the relief sought by the plaintiffs in each of the cases: "[M]inors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to...

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37 Id; see U.S. CONST. amend. XIV ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

38 163 U.S. 537 (1896).

39 347 U.S. at 495 (subordinating the question of appropriate relief due to "the wide applicability of this decision, and because of the great variety of local conditions")

40 Brown II, 349 U.S. 249 (1955)

41 347 U.S. at 493-96 (discussing the far-reaching harmful effects of segregation on black schoolchildren).
the public schools of their community on a nonsegregated basis." The plaintiffs alleged that laws "requiring or permitting segregation according to race" deprived them of equal protection of the laws under the Fourteenth Amendment.

The hurdle for the plaintiffs was the Court's decision in *Plessy v. Ferguson*, which upheld state racial segregation laws as long as they provided for "separate but equal" treatment of the races. Thus, under the *Plessy* "separate but equal" doctrine, racially segregated schools were considered constitutional, as long as physical facilities and other tangible factors were equal for both white and black schools. In *Brown I*, however, the Court rejected the application of the *Plessy* doctrine, stating that

there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

The rest of the Court's decision was then devoted to examining the harmful effects of racial segregation on black schoolchildren. Specifically, the Court linked the effects of racial segregation to the issue of quality education: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?" The Court then answered its own question in the affirmative: "We believe that it does." The Court emphasized the stigmatic and psychological harms of racial segregation. It quoted a lower court's discussion of the detrimental effect of segregation on black schoolchildren, and then, in a famous passage from its decision, the Court asserted that "[t]o separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Based on its analysis of the severe harms that racial segregation inflicted on black schoolchildren, the Court concluded that "in the field of public education

42 Id. at 487.
43 Id. at 488.
44 163 U.S. 537 (1896).
45 347 U.S. at 492.
46 Id. at 493.
47 Id.
48 Id. at 494.
the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal, and, therefore, "segregation is a denial of equal protection of the laws."49

While Brown I declared that segregated schools violated the Equal Protection Clause, the Court deliberately left open the question of the appropriate remedy for the constitutional violation.50 Thus, even after Brown I was decided, the question that still remained was whether school districts were required to immediately racially integrate the public schools. That issue was left for the Court to decide one year later in Brown II,52 the implementation decision.

The Brown II decision is most famous for its language about "all deliberate speed."53 In that decision, the Court held that public schools need not immediately comply with the mandate of Brown I, but that school districts must take "all deliberate speed" in meeting the mandate of Brown I.54 The language of "all deliberate speed" has been criticized as justifying and providing a legal basis for school districts to delay the move towards actual racial integration of the schools.55 After Brown II, school desegregation stalled and it was not until the late 1960s that the federal district courts began to order actual integration of public schools.

What legal scholars have tended to overlook, however, is another curious linguistic aspect of the Brown II decision. In this case, the Court re-characterized the harms of racial segregation by talking, not about the harms of racial segregation and the need for integrated schools, but about the harms of racial discrimination and the need for nondiscriminatory schools.

The Court never mentioned the terms "segregation" or "separate" in the brief text of its decision in Brown II. Chief Justice Warren began his opinion by restating the principal holding of Brown I. His opinion stated that Brown I stands for "the fundamental principle that racial discrimination in public education is unconstitutional."56 A few sentences later, the Court again stated that Brown I was a case about racial discrimination, not about racial segregation: "In view of the nationwide importance of [Brown I], we invited the Attorney General

49 Id. at 495.
50 Id.
51 See id. (declaring segregation unconstitutional).
53 Id. at 301.
54 Id.
55 See Richard Delgado & Jean Stefancic, The Social Construction of Brown v. Board of Education: Law Reform and the Reconstructive Paradox, 36 WM. & MARY L. REV. 547, 554 (1995) (arguing that the language of "with all deliberate speed" was interpreted by lower federal courts to permit "integration that went not too far, not too fast, and that left the school system as intact as possible").
56 349 U.S. at 298 (emphasis added).
of the United States and the Attorneys General of all states requiring or permitting racial discrimination in public education to present their views on [the] question [of relief]."  

The question that immediately arises is whether there is any significance in the change in terms. Was the Court, in re-characterizing racial "segregation" as racial "discrimination," merely making cosmetic changes to its decision? While that question will be addressed later in this Essay, what is absolutely clear is that the change in terms mattered to the Court, as the Court in its opinion continued to conceptualize the issue of remedy in terms of the word "discrimination," not "segregation." Specifically, after having stated that the issue in Brown I concerned racial "discrimination," the Court in Brown II then discussed the nature of the relief sought by the plaintiffs in these terms. In this case, the Court asserted, "[a]t stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis." This statement is fascinating because Brown I contained a virtually identical statement—identical except for one word. Brown I had stated that the plaintiffs sought admission to public schools on a "nonsegregated basis."  

The Brown II Court continued to discuss the appropriate remedy using the term "nondiscrimination" throughout the remainder of its opinion. The Court held that the cases were to be remanded back to the federal district courts for a determination of whether school districts had taken good faith action to implement the mandate of Brown I. It asserted that federal district courts should be guided by equitable principles in determining whether school districts were adequately "effectuat[ing] a transition to a racially nondiscriminatory school system." The Court then concluded that "the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."  

In Brown II, a case asserting the appropriate remedy for school segregation, the Court managed to go through the entire opinion without ever mentioning the word "segregation" itself.

57 Id. at 298–99 (emphasis added).
58 Id.
59 Id. at 300 (emphasis added).
61 See Brown II, 349 U.S. at 299 (listing states from which cases to be remanded originated).
62 Id. at 301.
63 Id. (emphasis added).
This Section will examine the implications of the Court's linguistic move from *Brown I* to *Brown II*. It contends that the linguistic move from "segregation" to "discrimination" was a strategic move in an attempt to deliberately slow down the actual integration of public schools.

The *Brown* decisions have engendered voluminous scholarship attempting to discern their meanings. Scholarly articles on *Brown I* have focused their analyses on the Court's evaluation of the harms of racial segregation in public schools, while scholarly articles on *Brown II* have focused their analyses on the meaning of the "with all deliberate speed" language used in that case. Curiously, however, only a few articles have focused their analyses on the Court's linguistic move from "segregation" to "discrimination" in *Brown II*.

1. Contesting the Meaning of *Brown I*

This Section asserts that the move from "segregation" to "discrimination" rendered the meaning of *Brown I* contested and ambiguous, and in conjunction with the language regarding "with all deliberate speed," the linguistic shift was a move to justify the Court's decision to permit gradual and incremental, rather than immediate, school desegregation. In short, the linguistic shift served to justify and rationalize efforts to slow down the actual integration of schools.

To understand the strategic implications of the linguistic shift, it is necessary to go back to the language and reasoning of the *Brown I* decision. In that case, the Court emphasized that black schoolchildren were being irreparably harmed by the practice of school segregation. Specifically, the Court contended that the systemic practice of separating black children from white children in schools generated in black children "a feeling of inferiority as to their status in the

64 See, e.g., Peter M. Shane, School Desegregation Remedies and the Fair Governance of Schools, 132 U. PA. L. REV. 1041, 1043 (1984) ("Whatever the Supreme Court's original rationale, the Court's conclusion in *Brown I*—that racially separate schooling is inherently unequal—is correct because segregation imposes a system of unfair governance on minority students and parents.").

65 349 U.S. at 301.

66 See, e.g., Louis Lusky, The Stereotype: Hard Core of Racism, 13 BUFF. L. REV. 450, 458 (1964) (arguing that the "deliberate speed" language "left open the possibility that the plaintiffs themselves would be denied any relief... if only steps were taken to protect other Negroes—at some later date—from similar harm").

67 See, e.g., ALBERT P. BLAUSTEIN & CLARENCE CLYDE FERGUSON, JR., DESEGREGATION AND THE LAW: THE MEANING AND EFFECT OF THE SCHOOL SEGREGATION CASES 150-53 (1957) (noting that the word "segregation" is not present in *Brown II* even though "one would have expected to have found [it] repeated many times").

community that may affect their hearts and minds in a way unlikely ever to be undone." Moreover, the Court quoted a passage from a lower court decision that discussed the ways in which racial segregation has a "tendency to (retard) the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system."

Given the Court's emphasis on the continuing and irreparable harms that racial segregation inflicted upon black schoolchildren in Brown I, the Court was faced with a dilemma in Brown II. In Brown II, the Court had to give guidance to federal district courts on how to fashion proper remedies for school segregation, and the question was whether the Court was going to require school districts to act affirmatively to racially integrate the public schools. The Court's decision in Brown II suggests that it wanted to signal to the federal district courts that they should act with caution and flexibility in fashioning appropriate remedies for school segregation. The decision to insert the language regarding "with all deliberate speed" was a clear signal to the lower courts that the Court did not require them to order the immediate and full-scale integration of public schools.

Directly ordering the slow-down of school desegregation would have seemed strikingly at odds with the concerns the Court raised in Brown I about the devastating harms being caused by racial segregation. According to the Court's own reasoning in Brown I, every day that black children were forced to continue attending segregated schools, they were suffering from psychological and cognitive damage. The way the Court described the harm in Brown I suggested that the only logical remedy for school segregation was court orders that the schools be integrated immediately.

In order to side-step this dilemma, the Brown II Court completely omitted the word "segregation," and re-characterized the harm in Brown I as "discrimination." Substituting the term "discrimination," and variations on that term, for the term "segregation" meant that the Court in Brown II, when it needed to discuss remedies, could do so without ever having to use the politically incendiary word integration. Obviously, if the harm is segregation, then the logical remedy is integration. However, if the harm of separating children on the basis of race and requiring them to attend different schools is described as "discrimination," not "segregation," then what is the logical remedy?

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69 Id.
70 Id. (alteration in original).
71 See supra text accompanying notes 54-55 (discussing the implications of the "with all deliberate speed" language).
72 347 U.S. at 494.
73 See id. at 494-95 (describing the severe and lasting harms of segregated schools, and concluding that segregation is unconstitutional).
The logical remedy is no longer integration. Rather, as the Court in *Brown II* asserted, the remedy for discrimination becomes the creation of a "racially nondiscriminatory school system."\(^{74}\)

The question arises: what exactly is a nondiscriminatory school system? In giving federal district courts the directive to guide school districts in effectuating a transition to a racially nondiscriminatory school system, the Court gave very little guidance as to the concrete meanings of the terms "racial discrimination" and "racial nondiscrimination."\(^{75}\)

2. An Early Interpretation of the Court's Linguistic Move from Segregation to Discrimination

Even though the Court made a dramatic change in language between the two *Brown* decisions, curiously, there has been little scholarly discussion about the meaning and implications of the Court's linguistic shift. Professors Albert Blaustein and Clarence Ferguson briefly examined the linguistic move in 1957.\(^{76}\) In their opinion, the shift from "segregation" to "discrimination" was a move that gave greater analytic force to the Court's decision to declare racial segregation unconstitutional.\(^{77}\) They noted:

Strangely absent from the implementation opinion is a word which one would have expected to have found repeated many times. True, it makes two appearances in the footnotes—but those footnotes are merely restatements of questions 4 and 5, originally propounded two years earlier. The word is not conspicuous by its absence. Lawyers have just assumed it was there. And absence cannot be attributed to an error of omission; on the contrary, it was undoubtedly difficult to write the opinion without using that word. The word is "segregation."

Nor did the opinion delivered by Chief Justice Warren employ any verb, noun, or adjective form of the word by way of substitute. There is no "segregate," "segregated," "segregating" or "segregative." "Desegregate" and "desegregation" are also absent.

The authors note that the *Brown II* Court, instead of using the term "segregation," used "a much stronger word in the word discrimination. Five times it was repeated; and on three occasions the Supreme Court said that public schools should be 'nondiscriminatory.'"\(^{78}\) Thus, Blaustein and Ferguson argue that using the word

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\(^{74}\) *Brown II*, 349 U.S. 294, 301 (1955) (emphasis added).

\(^{75}\) See infra Part II.B.4.

\(^{76}\) See BLAUSTEIN & FERGUSON, supra note 67, at 150-53 (noting the importance of the Court's word choice).

\(^{77}\) Id. at 153.

\(^{78}\) Id. at 100.

\(^{79}\) Id.
“discrimination” instead of “segregation” helped to strengthen the Court’s reasoning for striking down racial segregation in public schools.\(^8\) They contend that the Court used the term “discrimination” in *Brown II* in order to invoke prior Court decisions that invalidated legislation motivated out of racial prejudice and bias against racial minorities.\(^81\) Thus, earlier Supreme Court cases such as *Korematsu v. United States*\(^82\) and *Takahashi v. Fish Commission*\(^83\) stand for the sound and fundamental constitutional proposition that discrimination against racial minorities is “unconstitutional per se.”\(^84\)

Blaustein and Ferguson argue that the change in terms was not done merely for aesthetic or “literary purposes,” but was, in fact, a move with a substantive purpose and substantive implications.\(^85\) They argue that through its linguistic move, the Court was in effect changing the rationale for the *Brown I* decision. Instead of basing the constitutional violation on the theory that racial segregation in public schools inflicts stigmatic harm to black schoolchildren, the shift to the term “discrimination” to describe this harm allowed the Court to contend that racial segregation is unconstitutional because laws requiring and enforcing it were “activated by bias and prejudice, and thus for that reason alone . . . violat[ive of] the Constitution.”\(^86\)

3. **Professor Reva Siegel’s Historical Analysis of the Post-Brown School Desegregation Debate**

Professor Reva Siegel’s recent analysis, examining the historical discourse surrounding the desegregation decisions, supports Blaustein and Ferguson’s linguistic analysis of the *Brown* cases.\(^87\) She notes that immediately after the *Brown I* decision, the opinion was strongly criticized for the way it relied on social science to justify its holding.\(^88\) According to Siegel, the specific target of the attack was the *Brown I* decision’s famous “Footnote Eleven,”\(^89\) in which the Court

\(^8\) See *id.* at 151–53 (noting the “legal significance” of word choice).
\(^81\) See *id.* at 151 (noting that the Court “has consistently struck down ‘discriminatory’ legislation as invalid”).
\(^82\) 323 U.S. 214 (1944).
\(^83\) 334 U.S. 410 (1948).
\(^84\) BLAUSTEIN & FERGUSON, supra note 67, at 153.
\(^85\) *Id.* at 152–53.
\(^86\) *Id.* at 153.
\(^87\) See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004) (discussing “how convictions about the principle on which *Brown* rests were forged in conflicts over enforcing *Brown*, and demonstrates how such conflicts have produced indirection and contradiction in doctrines that enforce the equal protection guarantee”).
\(^88\) *Id.* at 1479–80.
\(^89\) 347 U.S. 483, 494 n.11 (1954).
cited social science evidence as proof of the harms of racial segregation on black schoolchildren. Critics of the *Brown* decision derisively called the Court the "nine sociologists" and argued that the Court's use of social science evidence was "indeterminate and partial, and hence an illegitimate ground for a decision that claimed the authority of constitutional law." 

To counter such criticism, scholars sought to provide what they believed was a more principled rationale to justify the *Brown* decision. Such scholars tried to reinterpret *Brown I* as a decision standing for the legal principle that laws drawing distinctions based on race are "inherently arbitrary classifications," and for that reason are unconstitutional. Under this anti-classification principle, racial segregation violates the Equal Protection Clause because it arbitrarily classifies children on the basis of race, not because it inflicts stigmatic harm on black schoolchildren. The psychological effects of racial segregation may have been real, but they are irrelevant for determining the constitutionality of the practice of racial segregation.

The problem with the reinterpretation of *Brown I* according to the anti-classification principle is that the language and reasoning of the decision simply do not strongly support that interpretation. As Professor Siegel notes, the *Brown I* decision conspicuously lacked any clear statement "condemn[ing] racial classification as such; rather, it addressed the harmful consequences of separating school children in a specific institutional context." The Court in *Brown I* did not mention the harms of classification or even of discrimination. It focused primarily on the way in which racial segregation inflicted psychological damage on black schoolchildren.

While the language and reasoning of *Brown I* do not support the anti-classification interpretation of *Brown*, the language of *Brown II* does lend support for viewing the harm of school segregation in terms of the anti-classification principle. Once the Court framed the constitutional harm in terms of discrimination, rather than the harmful effects of segregation, it provided scholars and lawyers with a doctrinal tool to argue that *Brown I* really stands for the principle that

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90 See Siegel, supra note 87, at 1486 ("Southerners singled out for special fury the social science evidence of segregation's harm in the decision's much-maligned Footnote Eleven.").  
91 Id. at 1488.  
92 See id. at 1497–99 (noting efforts to shift "attention from social struggle over the kinds of injury to which equal protection doctrine ought to be responsive").  
93 Id. at 1498 (quoting Owen M. Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 Harv. L. Rev. 564, 591 (1965)).  
94 See id. at 1498–99 (noting opinions finding racial classifications to be invidious, and unconstitutional solely for that reason).  
95 Id. at 1481.
classification on the basis of race constitutes the central harm that is prohibited by the Equal Protection Clause.

4. Discrimination as an Essentially Contested Concept

In stating that the remedy required by Brown I was the implementation of racially nondiscriminatory schools, the Court in Brown II used a linguistic shift to open up and render contestable the question of the appropriate remedy for segregation. The terms "segregation" and "discrimination" do not have the same meaning, although the terms can and are sometimes used interchangeably.96

To better understand why the move from "segregation" to "discrimination" helped to confuse the meaning of Brown, it is necessary to understand the linguistic implications of the shift in terminology. First, the terms "discrimination" and "nondiscrimination" are higher level abstractions than the terms "segregation" and "integration."97 As higher level abstractions, the meaning of the terms are far less clear. In comparing the terms "integration" and "nondiscrimination," the term "integration" is one that has a meaning much less contestable than the term "nondiscrimination." While it is relatively clear what an integrated school system would look like, it is not at all clear exactly what a racially nondiscriminatory school system would look like. The term "nondiscrimination" could be interpreted to mean the same thing as "integration," but it does not have to be interpreted in that way.

The abstract and general quality of the term "discrimination" has led to fierce debates about its true meaning.98 The term "discrimination" is frequently used in legal and political discourse about racial equality, but there is little consensus regarding the operational meaning of the term.99 As Professor Rutherglen contends, "[d]iscrimination is an inherently 'contested concept' whose meaning cannot be exhausted simply by dictionary definitions or arguments based on common usage."100

In shifting school desegregation discourse from a discourse on the harms of segregation to the harms of discrimination, the Court

96 See, e.g., Green v. County Sch. Bd. of New Kent County, 391 U.S. 430 (1968) (referring to system of racially segregated schools as a form of racial discrimination).
97 See JOHNSON, supra note 7, at 140 ("A practical test of the relative level of abstraction on which we are speaking at any given moment lies simply in the amount of time (or number of words) required to make reasonably clear what we are talking about in terms of first-order facts.").
98 See, e.g., George Rutherglen, Discrimination and its Discontents, 81 VA. L. REV. 117, 127 (1995) ("The concept of discrimination has been both oddly neglected and pervasively involved in disputes over the meaning and application of the laws against employment discrimination.").
99 See id. (noting that Title VII failed to define these terms).
100 Id.
opened up a linguistic Pandora's box in terms of creating fierce debate over the "true" meaning of *Brown* and the Equal Protection Clause. The debate over the course of school desegregation can be viewed as a fight over the meaning of the critical term "discrimination." The next Section will examine how the courts have consequently interpreted the term "discrimination" in the context of school desegregation.

C. The Shifting Meaning of Discrimination in Equal Protection Jurisprudence

This Section will examine two important school desegregation decisions that interpret the meaning of "discrimination" in *Brown II*. The federal district court in *Briggs v. Elliott* interpreted the term "discrimination" narrowly as a way to legally justify southern resistance to the integration of public schools. Over a decade later, in *Green v. County School Board of New Kent County*, the Supreme Court interpreted the term "discrimination" broadly, as a justification for imposing an affirmative duty on school districts to racially integrate public schools.

1. Briggs v. Elliott and the Narrow Definition of Discrimination

Following the *Brown II* decision, the District Court for the Eastern District of South Carolina in *Briggs v. Elliott* articulated a very narrow and restrictive reading of the *Brown I* and *Brown II* cases. *Briggs* developed what has become known as the "Parker Doctrine," named after the federal district court judge who authored the *Briggs* opinion, which stood for the proposition that *Brown* did not require public schools to be racially integrated, but only prohibited school districts from engaging in intentional discrimination in the school admissions process. Judge Parker explained:

> [I]t is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. *What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains.*

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103 See 132 F. Supp. at 777 ("What [*Brown*] has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains.").
104 Id.
account of race the right to attend any school that it maintains... Nothing in
the Constitution or in the decision of the Supreme Court takes away from
the people freedom to choose the schools they attend. The Constitution,
in other words, does not require integration. It merely forbids discrimination. It
does not forbid such segregation as occurs as the result of voluntary ac-
tion.105

In the above passage, the Briggs court interpreted the term "discrimination" to refer solely to government decision-making in which race is taken into account. Understanding discrimination as focused on governmental decision-making helps to explain the Briggs court’s distinction between integration and discrimination. According to Briggs, all that Brown I and Brown II stand for is the proposition that the government may not discriminate on the basis of race in making decisions about school admissions.106 On the other hand, the Briggs court contended that Brown I and Brown II say nothing about “segregation as occurs as the result of voluntary action.”107 In other words, the Briggs court contended that schools separated on the basis of race are not in violation of Brown, as long as such segregated schooling patterns are not the result of governmental action taking race into account in admission decisions. Thus, the Briggs reasoning supported the perpetuation of racially segregated schools, as long as racial separation in schools was maintained by racially-neutral state action, rather than by facially discriminatory segregation laws. Moreover, the Briggs court contended that its reasoning was consistent with the reasoning of Brown.

The Briggs court’s reasoning is not supported by the language of Brown I, but rather by the language of Brown II. Briggs seized upon the language of Brown II to contend that Brown I was ultimately concerned about discrimination, not segregation or integration.108 The Briggs court defined the term discrimination to be synonymous with the act of “deny[ing] to any person on account of race the right to at-
tend any school that it maintains.”109 The court conceptually sepa-
rated the act of discrimination—the act of admitting schoolchildren to schools on the basis of race—from the racial segregation resulting from that discrimination. In so doing, the court effectively treated discrimination and segregation as two separate and distinct phenomena.

It would have been much more difficult for the Briggs court to contend that Brown forbids only discrimination, and does not require

105 Id. (emphases added).
106 See id. ("[I]f the schools which [the state] maintains are open to children of all races, no
violation of the Constitution is involved . . . .").
107 Id.
108 See id. (citing the Brown directive to admit students to public schools on a “racially non-
discriminatory basis”).
109 Id.
integration, if the court had to rely solely on the language and reasoning of Brown I. In Brown I, the Court emphasized the harms of racial segregation on schoolchildren, strongly suggesting that the only proper remedy for such harms was to abolish segregated schools by integrating them.\^10 However, the shift in language from "segregation" to "discrimination" in Brown II provided the Briggs court with the precedent necessary to interpret Brown in such a narrow fashion.

2. Green v. County School Board of New Kent County and the Broader Meaning of Discrimination

The "Parker Doctrine," along with the "all deliberate speed" language in Brown II, had the effect of slowing down the actual integration of public schools. For ten years following the Brown II decision, no actual integration of public schools occurred.\^11 From 1954 to 1964, only two percent of black children in the states found to be in violation of Brown I were attending integrated schools.\^12 It was not until its 1968 decision in Green v. County School Board of New Kent County that the Supreme Court gave the clear and unambiguous signal that Brown I and Brown II imposed an affirmative duty on public school districts to actually racially integrate the schools.\^13

In Green, the Court examined whether freedom-of-choice plans implemented by school districts fulfilled the mandate of Brown.\^14 "Freedom-of-choice" plans gave parents the right to choose which school their children would attend.\^15 Many school districts adopted freedom-of-choice plans and contended that such plans fulfilled their responsibilities to remedy the constitutional harm recognized in Brown I.\^16 However, the problem with freedom-of-choice plans was that their implementation did not have the effect of actual racial in-

\^10 See 347 U.S. 483, 494 (1954) ("To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").
\^12 Id.
\^13 See 391 U.S. 430, 437-38 (1968) ("School boards... operating state-compelled dual systems [at the time of Brown II] were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.").
\^14 Id. at 431-32.
\^15 See id. (explaining that such a plan "allows a pupil to choose his own public school").
integration of the schools.\textsuperscript{117} Prior to its freedom-of-choice plan, the New Kent County School District was a rural school district with only two public schools: one all-white school and one all-black school.\textsuperscript{118} Three years after the school district implemented the freedom-of-choice plan, no white children had chosen to attend the all-black school, while only a small percentage of black students had chosen to attend the previously all-white school.\textsuperscript{119} Eighty-five percent of black students still chose to attend the all-black school.\textsuperscript{2}

In defending the freedom-of-choice plan, the New Kent County School District made a clear and powerful argument. The language of \textit{Brown II} seemed to strongly support the argument for the school district: its plan was in full compliance with the \textit{Brown} mandate because the plan was facially race-neutral, and thus the district’s plan was clear proof that it was now admitting students to public schools on a nondiscriminatory and nonracial basis.\textsuperscript{121} Therefore, if the schools were still racially segregated, even after implementation of the plan, that result would no longer be traceable to direct state action, but to the private choices of both white and black parents. In other words, even if black children were still attending an all-black school, and white children were still attending a predominantly white school, the argument could be made that such a school system was nondiscriminatory because the admissions process itself operated in a nonracial and nondiscriminatory manner. As Professor Gewirtz commented, “Giving pupils a choice among schools seems to be neither a system of racial assignment nor a system of ‘determining admission’ on a racial basis; instead, it seems to permit blacks as well as whites to choose the school they want without government interference.”\textsuperscript{122}

The \textit{Green} Court, however, held that freedom-of-choice plans that do not actually desegregate schools are unconstitutional and are not in compliance with the \textit{Brown} mandate.\textsuperscript{123} In striking down the freedom-of-choice plans, the Court re-interpreted \textit{Brown II}, and re-articulated the meaning of “discrimination,” by crafting a broader,
more systemic understanding of the term, and effectively overruling the narrow construction of the term articulated by the Briggs court.\textsuperscript{124}

Justice Brennan, who authored the unanimous opinion in \textit{Green}, framed the issue using the language of \textit{Brown II}. He contended that the issue in \textit{Green} was whether the “School Board’s adoption of a ‘freedom-of-choice’ plan which allows a pupil to choose his own public school constitutes adequate compliance with the Board’s responsibility ‘to achieve a system of determining admission to the public schools on a non-racial basis.’”\textsuperscript{125}

In \textit{Green}, Justice Brennan reasoned that the Commonwealth of Virginia, operating through the local school board and through school officials, “organized and operated a dual system” of schools, “part ‘white’ and part ‘Negro.’”\textsuperscript{126} Justice Brennan then reinterpreted the \textit{Brown I} and \textit{Brown II} decisions, characterizing those decisions as concerned with the abolition of racially-segregated dual school systems: “It was such dual systems that 14 years ago \textit{Brown I} held unconstitutional and a year later \textit{Brown II} held must be abolished; school boards operating such school systems were required by \textit{Brown II} ‘to effectuate a transition to a racially nondiscriminatory school system.”\textsuperscript{127}

The Court gave \textit{Brown II} a broader, more expansive reading than did the Briggs court. Justice Brennan interpreted \textit{Brown II} as “call[ing] for the dismantling of well-entrenched dual systems,” and imposing on school districts an “affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.”\textsuperscript{128}

The language in \textit{Green} is powerful. The Court, by imposing a duty upon school districts to dismantle racial discrimination “root and branch,” clearly viewed racial discrimination as something more than an act of classification on the basis of race. The Court forcefully asserted that the mere implementation of a race-neutral admissions policy did not sufficiently address racial discrimination “root and branch.” The Court suggested that the elimination of racial discrimination requires more than the adoption of facially race-neutral policies. Rather, the Court used the term “racial discrimination” to refer to a system of racial subordination. Throughout the opinion, the Court repeatedly referred to the constitutional requirement of school districts to dismantle dual school systems and to construct uni-

\begin{itemize}
\item \textsuperscript{124} See id. at 441 (holding that school districts must actually dismantle racial segregation and create a “unitary, nonracial system”).
\item \textsuperscript{125} Id. at 431-32 (quoting \textit{Brown II}, 349 U.S. 294, 300-01 (1955)).
\item \textsuperscript{126} Id. at 435.
\item \textsuperscript{127} Id. (quoting \textit{Brown II}, 349 U.S. at 301) (emphasis added).
\item \textsuperscript{128} Id. at 437-38.
\end{itemize}
Thus, while the Court relied on the language of *Brown II* in framing its decision, in actuality, the Court added substance to that decision by fleshing out the meanings of the terms "discrimination" and "nondiscrimination." A "discriminatory" school system was one which perpetuated a dual system of schools, even if its admissions policies were facially neutral, and a "nondiscriminatory" school system was one which was unitary in nature and no longer provided for racially identifiable schools.

For the *Green* Court, the district's freedom-of-choice plan did not meet the mandate of *Brown II* because it failed to disestablish the discriminatory dual system of public schools originally imposed by state segregation statutes. The implementation of race-neutral admissions policy alone was not evidence of the establishment of a unitary school system. Proof of the existence of a unitary school system would be based on the abolition of racially identifiable schools, and the actual creation of a unitary school system for persons of all races.

Furthermore, the *Green* decision represents a major gloss on the original *Brown I* ruling. In *Brown I*, the Court did not discuss "well-entrenched dual systems" or "segregated systems" of racial subordination, but rather focused on the psychological harms that segregation inflicted upon black schoolchildren. In *Green*, however, the Court identified the real problem at issue in *Brown I*. The harm of segregation was not only that it stigmatized black schoolchildren, but that it was also used as an integral part of a larger social system of racial apartheid, in which blacks were separated from whites in order to perpetuate white supremacy and reinforce black inferiority.

The unfortunate aspect of the *Green* decision was that the Court continued to use the language of "discrimination," as utilized in *Brown II*, to describe the system of racial apartheid. This is unfortunate because, while a broader conception of "discrimination" prevailed in *Green*, that victory was temporary and fleeting. Soon after

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129 See, e.g., id. at 438 ("The Constitutional rights of Negro School Children articulated in *Brown I* permit no less than this [conversion to a unitary system]; and it was to this end that *Brown II* commanded school boards to bend their efforts.").

130 See id. at 440–41 (explaining that a unitary school system is a nonracial one, whereas dual systems are in and of themselves, unacceptable systems based upon segregation).

131 See id. at 441–42 ("Rather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents with a responsibility, which *Brown II* placed squarely on the School Board.").

132 See id. at 439 (stating that the school board’s burden is to create a program that will realistically work to disestablish the dual system).

133 See 347 U.S. 483, 494 (1954) (*Brown I*) (stating that the separation of children due to "race generates a feeling of inferiority").

134 The *Green* Court followed the *Brown II* Court’s use of the term "discrimination," rather than use the language of "segmentation." See *Green*, 391 U.S. at 430.
Green was decided, the Court began to scale back the protections provided by the Equal Protection Clause, and reasserted the narrow Briggs definition of "discrimination" for equal protection purposes.15

III. THE PRESENT AND FUTURE OF EQUAL PROTECTION RACE JURISPRUDENCE

This Essay has examined the shifting meaning of the term "discrimination" in Equal Protection Clause case law dealing with school desegregation. This Part examines the meaning of "discrimination" in current equal protection doctrine, and how language has helped to shape the doctrine's substantive evolution.

A. The Concept of Discrimination in Current Equal Protection Doctrine

While an expansive definition of discrimination, as a system of racial subordination, was adopted by the Green Court, that understanding of the term did not have lasting power. Instead, the Court, in subsequent desegregation and affirmative action decisions, has replaced this broad definition with a much narrower conception, consistent with the Briggs definition of discrimination.16 In equal protection doctrine, the term "discrimination" has come to be synonymous with the process of differentiation.17 Accordingly, Brown effectively stands for the fundamental proposition that "government may not classify on the basis of race," but it no longer stands for the proposition that government may not engage in racial subordination.18

The Court's doctrinal move toward an anti-classification understanding of Brown, as it relates to equal protection, occurred gradually in several different areas of equal protection doctrine. In the context of school desegregation, following the Green decision, the Court made a distinction between de jure racial segregation in schools and de facto racial segregation in schools, holding that only de jure segregation violated the Equal Protection Clause.19 De jure segregation is segregation determined to have been caused by racially discriminatory state action, whereas de facto segregation is segrega-

15 See infra Part III.A (discussing in detail the school desegregation cases subsequent to Green).
16 See supra text accompanying notes 104–05 (explaining that Briggs did not require integration, but merely prohibited intentional discrimination by school districts in their admissions processes).
17 See Ruth Colker, Anti-Subordination Above All: Sex, Race, and Equal Protection, 61 N.Y.U. L. REV. 1003, 1005 (1986) ("[T]he anti-differentiation perspective focuses on the specific effect of the alleged discrimination on discrete individuals, rather than on groups.").
18 SIEGEL, supra note 87, at 1470.
19 See Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 208 (1973) (holding that de jure segregation indicates the purpose or intent to segregate).
tion that cannot be traced to racially discriminatory state action.\textsuperscript{140} To put it another way, de jure segregation is considered a "discriminatory" form of segregation, while de facto segregation is considered a "nondiscriminatory" form of segregation. A de jure segregated school system, therefore, is a system that segregates its students on the basis of racial classifications.\textsuperscript{141}

As a general principle, the Court also adopted a narrow definition of the term "discrimination" as the essential concept at the heart of what the Equal Protection Clause condemns and prohibits. In Washington \textit{v.} Davis, the Court declared, "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."\textsuperscript{142} The Court held that facially neutral laws that have a disproportionate impact on certain racial groups do not violate equal protection, unless it can be shown that the law was enacted with a racially discriminatory purpose.\textsuperscript{143} In effect, \textit{Davis} overruled \textit{Green} because the narrow conception of "discrimination" it adopted is substantively different from the broader conception of discrimination found to be violative of equal protection in \textit{Green}.

The narrow Briggs definition of discrimination, confining its meaning to intentional discrimination in school admissions, is also central to understanding the Court's affirmative action decisions under the Equal Protection Clause.\textsuperscript{144} The Court has held that race-conscious affirmative action programs, designed to aid underrepresented racial groups in acquiring equal educational and employment opportunities are constitutionally suspect and subject to the most rigorous judicial scrutiny.\textsuperscript{145} The Court believes that such affirmative action programs, even though "benign," are racially discriminatory in nature.\textsuperscript{146} Specifically, the Court declared that affirmative action pro-

\textsuperscript{140} \textit{Id.}
\textsuperscript{141} \textit{See id.} at 207 (referring to the need to find "a racially discriminatory purpose").
\textsuperscript{142} 426 U.S. 229, 239 (1976).
\textsuperscript{143} \textit{Id.} at 240–41.
\textsuperscript{144} \textit{See, e.g.,} Grutter \textit{v.} Bollinger, 539 U.S. 306, 341 (2003) (allowing the use of race as a "factor in the context of individualized consideration," so long as non-minority applicants are not unduly harmed); Adarand Constructors, Inc. \textit{v.} Pena, 515 U.S. 200, 237–38 (1995) (holding that benign racial classification is permissible only if it survives strict scrutiny); Richmond \textit{v.} J.A. Croston, Co., 488 U.S. 469, 508 (1989) (holding that a racial quota program for contractors is not a narrowly tailored method for remediating past discrimination); Regents of Univ. of Cal. \textit{v.} Bakke, 438 U.S. 265, 317 (1978) (holding that race may be used as a factor in admissions considerations, but that all applicants must still compete with other applicants as individuals in the process).
\textsuperscript{145} \textit{See Adarand,} 515 U.S. at 227 (holding that all classifications based on race must be examined under the highest scrutiny and can only be upheld if they are narrowly tailored measures that further compelling government interests).
\textsuperscript{146} \textit{See id.} at 226 (holding that "benign" racial classifications must be held to the same standard of strict scrutiny applied to other racial classifications).
grams are presumptively unconstitutional because they classify on the basis of race in order to give preferential treatment to members of underrepresented racial groups.\textsuperscript{147}

Again, the Court, in its affirmative action decisions, has narrowly defined "discrimination" solely as the act of classification on the basis of race.\textsuperscript{148} For the Court, it is irrelevant that affirmative action programs use racial classifications to promote equal opportunity and to racially integrate institutions of public education or industry. Instead, the simple fact that affirmative action programs classify on the basis of race render them constitutionally suspect. The Court is effectively asserting that affirmative action amounts to the same type of practice as Jim Crow segregation, at least for purposes of an equal protection analysis.\textsuperscript{149}

Equal protection doctrine has developed from the more complex, systemic understanding of discrimination in \textit{Green},\textsuperscript{150} to the current equal protection doctrine in which discrimination is understood solely in terms of classifications. In other words, under current equal protection doctrine, racial classification is considered inherently arbitrary and invidious, regardless of its purposes or effects. Moreover, the Court now suggests that the mere act of classifying on the basis of race gives rise to a constitutional injury, even if a party cannot show any material harm or disadvantage resulting from the classification.\textsuperscript{151} Thus, in \textit{Adarand}, the Court asserted that simply classifying on the basis of race alone constitutes a constitutional injury.\textsuperscript{152}

\textbf{B. Understanding How Language Has Shaped Equal Protection Doctrine}

Presently, the Court's narrow understanding of "discrimination" has effectively limited the ability of the Equal Protection Clause to adequately address issues of systemic racial inequality and subordination. The questions arise: How did we get to this point? How did the Court shift from the equal protection doctrine of 1954, focused on

\textsuperscript{147} \textit{Id.} at 227.

\textsuperscript{148} \textit{See id.} at 229–30 ("[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection.").

\textsuperscript{149} \textit{See Adarand}, 515 U.S. at 243 (Stevens, J., dissenting) (arguing that there is no difference between a majority group's decision to impose a burden on a minority group and a decision to impose a benefit on a minority group).

\textsuperscript{150} \textit{See supra} Part II.C.2 (describing the \textit{Green} case and its broad interpretation of "discrimination").

\textsuperscript{151} \textit{See Adarand}, 515 U.S. at 230 ("Consistency does recognize that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be.").

\textsuperscript{152} \textit{Id.}
remedying the devastating harms of racial segregation upon blacks, to an equal protection doctrine in 2004 that is focused on remedying the inherently harmful effects that racial classifications supposedly inflict on whites? Why did the definition of discrimination as classification come to so thoroughly pervade our understanding of equal protection doctrine? And, why did the definition of discrimination as a system of racial subordination fail to remain as the central concept of equal protection doctrine?

A linguistic analysis of the term "discrimination" may help to shed some light on the substantive development of equal protection doctrine. Although the analysis I will put forth is tentative and preliminary, it may explain how the structure of language itself shapes and influences the substantive meaning of legal doctrine.

First, it is necessary to discuss the linguistic structure of the term "discrimination." The term "discrimination" is what linguists call a nominalization. A nominalization is defined as a base verb (discriminate) that has been turned into a noun (discrimination), thereby transforming a process into an event or a thing. To talk of "discrimination," then, is a way of talking about the process of discriminating as if it were a tangible thing or a discrete event. As a "thing," we can talk about "discrimination" as though it either exists or does not exist, as if it is something we can observe with our senses. As a discrete event, we may discuss "discrimination" as though it either happened or did not happen.

An examination of case law and scholarly works discussing discrimination would show that analyses of "discrimination" tend to discuss the term in its nominalized form. In other words, lawyers and law professors implicitly treat "discrimination" as if the word represents a discrete event. In trying to determine the essential meaning of the term, the term "discrimination" has had scholars asking the following question: If discrimination is a discrete event, what kind of event is it?

The problem, however, with the search for the essential meaning of the term "discrimination" is that the term is highly abstract, and, accordingly, does not have clear and unambiguous external refer-

153 See Brown I, 347 U.S. 483, 494–95 (1954) (holding that segregation in schools generated a feeling of inferiority among blacks and had to be dismantled under the Fourteenth Amendment).

154 See BANDLER & GRINDER, supra note 7, at 43 (explaining that nominalization is a linguistic mechanism for "turning a process into an event").

155 See id. at 32 (explaining that nominalization results when a verb becomes a noun or an argument).

To say that a word does not have clear external referents, then, is to say that the term “discrimination” does not really describe a real life event or situation.

To further explain the abstract quality of the term “discrimination,” it may be useful to compare the term to “segregation.” The term “segregation” is also a nominalization because it has resulted from a transformation of a base verb (segregate) to a noun. However, “segregation” operates at a lower level of abstraction than the term “discrimination.” While the term “discrimination” is used to refer to a discrete event, the term “segregation” is used to refer to an actual thing. More specifically, “segregation” refers to a condition. For example, “segregation” may be described as the condition of people being physically separated according to their race. As a lower level abstraction, the term “segregation” has much clearer external referents. In other words, when we talk about segregation in public schools, people are likely to have a much clearer understanding of the condition being represented by the term than if we were to discuss discrimination in schools.

In order to show that external referents for the term “discrimination” are less clear than referents for the term “segregation,” a simple question may be asked: How does one go about proving the existence of racially segregated schools? The easiest way is to make an empirical observation by actually visiting schools to see if they are physically divided between the races. Regardless of the distinction between de jure or de facto segregation, the starting point for determining whether a school is racially segregated is both clear and obvious. Therefore, a clear external referent of the term “segregation” would be the actual physical existence of schools that are divided between the races.

On the other hand, how does one go about proving the existence of racially discriminatory schools? As the earlier discussion showed, whether a school is racially discriminatory depends upon how one defines the term “discrimination.” And, even when the term is defined, what exactly counts as proof of racial discrimination remains unclear. For example, if one interprets “racially discriminatory” to mean schools in which students are admitted on the basis of their race, then proof of racial discrimination will necessarily turn to an examination of the admissions process. Or, if schools are segregated under state law, then the issue of proof is even more straightforward;

157 An external referent is "the object or situation in the real world to which the word or label refers." STUART CHASE, THE TYRANNY OF WORDS 9 (1938).

158 See supra note 157 and accompanying text (discussing the difficulty of pairing the term “discrimination” with external referents).
the segregation laws themselves would provide proof of a racially
discriminatory school system.\footnote{Even situations in which laws that require schools to racially discriminate, such does not
necessarily provide clear proof of racial discrimination. For example, imagine a school district
which refuses to comply with racial segregation laws, and instead sets policies to ensure that
students of all races attend the same schools. In such a scenario, is that school district a racially
discriminatory school system or a racially nondiscriminatory school system? It is racially
discriminatory if the definition applied looks solely to the segregation law itself as proof of dis-
crimination. However, if one's definition of racial discrimination looks also to the school's ac-
tual practices, then it could be argued that the school system is racially nondiscriminatory,
despite operating under a regime of state-imposed racial discrimination.}{159}

However, if schools use facially neutral policies to discriminate,
then it becomes less clear what sort of evidence constitutes proof that
such schools are actually engaging in discrimination. For example,
among that a school disciplines a black student, and the student al-
leges that he was singled out according to a covert school disciplinary
policy of racial discrimination against black students. How does one
know if, in fact, the school operated in a racially discriminatory man-
ner in disciplining the black student? What would constitute proof of
discrimination? The mere act of a black student being disciplined
does not prove discrimination since there may have been other le-
gitimate reasons besides race for the action. Thus, the question
arises: what distinguishes racially discriminatory discipline from ra-
cially nondiscriminatory discipline?

According to current equal protection case law, a showing of dis-
criminatory intent would prove that the school engaged in racial dis-
crimination.\footnote{See Washington v. Davis, 426 U.S. 229, 240 (1976) ("The school desegregation cases have
also adhered to the basic equal protection principle that the invidious quality of a law claimed
to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.").}{160}

But, what counts as proof of discriminatory intent? Would racially prejudicial statements made by a school principal to
his or her colleagues constitute proof of discriminatory intent? Would a previous history of the principal disciplining black students
qualify? What about the quality of a principal's justification for the
discipline? Would a weak rationale prove that the nondiscriminatory
reason was mere pretext for his or her actual racially discriminatory
intent? As the Court has recognized, the search for discriminatory
intent is difficult because many actions could be used as proof of dis-
crimination.\footnote{See Sheila Foster, Intent and Incoherence, 72 TUL. L. REV. 1065, 1075–76 (1998) (arguing
that evidentiary requirements for proving discriminatory intent under equal protection law vary
widely in different contexts).}{161} Since it is not clear what is meant by "discrimination,"
just about any action could demonstrate that discrimination had, in
fact, occurred. Hence, scholars contend that discrimination is an es-

tentially contested concept.\footnote{See Rutherglen, supra note 98, at 127 (explaining that discrimination's meaning "cannot
be exhausted simply by dictionary definitions or arguments based on common usage").}{162}
Given that the term "discrimination" is substantively empty, and given that its meaning depends on subjective interpretation, it is ripe for people to pour their own subjective meanings into it in order to give it content. Thus, whether a term’s meaning achieves a consensus at a given historical moment depends upon the epistemological and ideological commitments possessed by those who seek to give it a meaning.

In addition, use of the term "discrimination" not only reflects certain ideological commitments, but it also reinforces those commitments. Words have the effect of directing our attention and focus. The use of the term "discrimination" directs our attention toward issues of intent, causation, and motivation. In other words, to determine if a government actor has covertly classified on the basis of race, an inquiry into the intent of that government actor is typically required. The word "discrimination" has accordingly directed the energy of both courts and scholars, as each seeks to construct analytic and evidentiary frameworks for determining whether a party has proven that the government acted with the requisite intent. When a "discriminatory" act allegedly occurred in the past, scholars and courts have had to determine whether a past act of discrimination could be considered the proximate cause of a present-day discriminatory effect.

However, given the enormous amount of attention in racial discourse paid to issues such as discriminatory intent, motivation, and causation, the concrete material facts of present-day racial subordination and inequality are easily forgotten or ignored. By directing our attention towards metaphysical issues of intent, rather than focusing on evidence of continuing racial inequality, it becomes much easier to believe that racial inequality is all but a thing of the past. Our use of language can actually help to render, in our minds, actual conditions of material reality virtually invisible and non-existent. It is strik-

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165 See Strauss, supra note 29, at 75 (“The naming of an object provides a directive for action, as if the object were forthrightly to announce, 'You say I am this, then act in the appropriate way toward me.'”).

166 See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (creating an analytic framework to ascertain whether a facially neutral law was enacted with racially discriminatory purpose); David Strauss, Discriminatory Intent and the Taming of Brown, 56 U. CHI. L. REV. 935, 938 (1989) (arguing that the discriminatory intent standard is vague and indeterminate, and should not be "rigorously applied").

167 See Eric Schnapper, Perpetuation of Past Discrimination, 96 HARV. L. REV. 828 (1983) (stating that the Supreme Court has had to grapple with the enduring effects of past discrimination).

ing that in Grutter v. Bollinger, in which the Court ambivalently upheld race-conscious affirmative action programs in higher education, the majority opinion never mentioned the continued existence of racially segregated schools in the United States.

CONCLUSION

The use of the term "discrimination" to describe equal protection doctrine and its principles has ultimately shaped the course of the debate over racial segregation. The term has obscured and obfuscated the material reality of racial subordination in the United States. The linguistic nature of the term has shifted our attention away from the actual and continuing harms suffered by members of socioeconomically disadvantaged racial groups and, instead, has focused the debate over racial equality on abstract, symbolic, and aesthetic harms supposedly caused by governmental acts of racial classification. Additionally, the continuing use of the term "discrimination" to describe and theorize about the harms suffered by disadvantaged racial groups focuses our attention on issues that are unrelated to the truly important questions about the continuing existence of racial hierarchy and socioeconomic inequality in this nation.

In short, the term "discrimination" provides us with a terribly misleading map for understanding the new social territory of race, racial apartheid, and racial inequality in the United States. The challenge today is for progressive scholars and lawyers to begin developing a more insightful and transformative language to adequately address the continuing problem of racial subordination in the twenty-first century.

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168 Id.