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The American 'Legal' Dilemma: Colorblind I/ Colorblind II--The Rules Have Changed Again: A Semantic Apothegmatic Permutation

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THE AMERICAN 'LEGAL' DILEMMA: COLORBLIND I/COLORBLIND II—THE RULES HAVE CHANGED AGAIN: A SEMANTIC APOTHEGMATIC PERMUTATION

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INTRODUCTION

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. *Our Constitution is color-blind*, and neither knows nor tolerates classes among citizens. In respect to civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.[1]

Justice John Marshall Harlan's dissent to the "ridiculous and shameful,"[2] "racist and repressive,"[3] and "catastroph[ic]"[4] majority opinion in *Plessy v. Ferguson* created, in one sense, the "most powerful maxim in American law,"[5] but the result in 1896 could have been anything but true.[6] It stood for 58 years until the "second [e]mancipation"[7] of African Americans in *Brown v. Board of*

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1 Plessy v. Ferguson, 163 U.S. 537, 559 (Harlan, J., dissenting) (emphasis added).

2 See Michael J. Perry, The Constitution in the Courts: Law or Politics? 145 (1994).

3 See Judith A. Baer, Equality Under the Constitution: Reclaiming the Fourteenth Amendment 112 (1983).

4 See Paul Oberst, The Strange Career of *Plessy v. Ferguson*, 15 Ariz. L. Rev. 389, 417 (1973).

5 John Minor Wisdom, *Plessy v. Ferguson*—100 Years Later, 53 Wash & Lee L. Rev. 9, 10 (1996) (noting that counsel to *Plessy* supplied Justice John Marshall Harlan with the phrase "Our Constitution is color-blind"). See also infra notes 266-76 and accompanying text.

6 But see Michael J. Klarman, Race and the Court in the Progressive Era, 51 Vand. L. Rev. 881, 895 (1998) ("The Court's decision [in *Plessy*] was, indeed, so fully congruent with the dominant racial norms of the period that it elicited little more than a collective yawn of indifference from the nation."); Benno C. Schmidt, Jr., Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow, 82 Colum. L. Rev. 444, 459 (1982).

7 Roger Wilkins, Dream Deferred but Not Defeated, *in Brown v. Board of Education*: The Challenge for Today's Schools 14, 15 (Ellen Condliffe Lagemann & Lamar P.

Education [*Brown I*].[8] The maxim "Our Constitution is Colorblind" has since transformed from a protective assertion against racial discrimination of minorities into a weapon used to combat affirmative action programs which seek to remedy past discrimination and assure equal opportunity in government action.[9] This transformation has culminated in an announced "victory" of sorts for "defenders" of the newly-understood colorblind[10] Constitution, with the Supreme Court and various federal Courts of Appeals striking down affirmative action as unconstitutional.[11] The word "colorblind" in the law has become an apothegm of sorts. Just as "apothegm" can be defined as a short, pithy or terse, pointed saying,[12] the term "colorblind" is a short instructive term derived from past legal writings such as Justice Harlan's dissent in *Plessy*. To be colorblind in the law is to not recognize the differences of race, or to not be influenced by considerations of race.[13] As Justice Harlan

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Miller eds., 1996) ("*Brown* proved to be a second Emancipation Day.").

8 347 U.S. 483 (1954).

9 This Article presupposes that affirmative action has some social benefits, but does not undertake to defend wide-spread affirmative action programs, nor does it take the position that those programs should be attacked. Instead, this Article discusses the use of the maxim "Our Constitution is Color-Blind" in efforts both to attack racial discrimination in government action, and as an attack on affirmative action. *The Oxford Companion to the Supreme Court* defines affirmative action as

> a term of general application referring to government policies that directly or indirectly award jobs, admission to universities and professional schools, and other social goods and resources to individuals based on the membership in designated protected groups, in order to compensate those groups for past discrimination caused by society as a whole.

The Oxford Companion to the Supreme Court of the United States 18 (Kermit L. Hall et al. eds., 1992) [hereinafter Oxford Companion].

10 See Webster's New World Dictionary 281 (1984).

11 See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 204 (1995) (striking down federal government's requirement that general contractors give preference to subcontractors controlled by "socially and economically disadvantaged individuals"); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (striking down state's use of a set-aside program, where state required minority subcontractors to comprise a fixed percentage of contracts for city projects); Hopwood v. Texas, 78 F.3d 932 (5th Cir.), cert. denied, 518 U.S. 1033 (1996) (striking down University of Texas Law School's affirmative action program in admissions). Justice Sandra Day O'Connor's opinions in *Croson* and *Adarand* have been praised for "her adherence to the concept of a colorblind Constitution." See, e.g., Jennifer R. Bryne, Toward a Colorblind Constitution: Justice O'Connor's Narrowing of Affirmative Action, 42 St. Louis U. L.J. 619 (1998).

12 See Webster's New World Dictionary, supra note 10, at 65.

13 See id. at 281. See also Webster's New Collegiate Dictionary 220 (1979).

would most likely agree, an early interpretation of colorblind was "free from racial prejudice."[14] Yet the use of colorblind has now come to mean, especially to many black Americans, first and foremost, a non-recognition of the historical effects of racial discrimination and all that remains of that legacy. Recently, the apothegm "colorblind" has changed its semantic DNA code from positive to negative to those for which the application of the term "colorblind" applies.

Forgotten, at least in terms of precepts and rhetoric, was the context in which Harlan expatiated his dissent in 1896. Most pressing is the first sentence of the paragraph which leads to the conclusion that the Constitution is indeed "colorblind:" "The white race deems itself to be the dominant race in this country."[15] To a casual observer today, this statement is perhaps inane. Modern government action does not expressly reflect the concept that majority class is the dominant class. This much may be true.[16] Yet this model must incorporate with it an ideal that society itself—including the preferences attached by majority and minority classes identified on a social level—seeks to be colorblind. The assumption that the Constitution is colorblind relies not on the concept of "colorblind" to eliminate all racial consciousness,[17] but the concept of "colorblind" as a vehicle to end race-based oppression:[18]

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14 Webster's New World Dictionary, supra note 10, at 65.

15 Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

16 The statement that majority class preference does not indicate blatant discrimination in favor of one race and disfavor of a minority race is true, for it is clearly unconstitutional. Nevertheless, majority class preference arguably does not result in colorblindness, as members of that majority hold as a truism. As discussed in Part I, Section B, infra, criteria seemingly "objective" to values attached by the majority indicate to the majority that those criteria are indeed blind of the class. But if different values are attached to those "objective' criteria by the minority class, the preferences of the minority and the majority stand as opposites. Government action which tends to reflect—rather than react to—a majority preference which is not equivalent to the minority preference is the basis for the argument that use of the concept of "colorblind," with respect to discrimination against a minority, is not the equivalent as the concept of "colorblind" when it is used with respect to reaction by government to incorporate minority preferences into the dominant majority preferences.

17 See, e.g., Bryne, supra note 11, at 652 (stating that Justice O'Connor "maintains that the Constitution is colorblind, not society," and accordingly, "the Constitution requires a colorblind application").

18 See Jerome McCristal Culp, Jr., Colorblind Remedies and the Intersectionality of

> One of the myths we tell children and law students is that the law is or can be colorblind. This myth posits colorblindness, or inattention to race, as a moral requirement of all "right" thinking people and all good law. The truth, however, is that racial justice and colorblindness are not the same thing. Race-neutral policies are only as good or bad as the results they produce. No one thinks that economic efficiency or the labor theory of value are moral requirements independent of their impact on the components of justice. In like manner, to assume that ignoring race in making social policy will bring about justice or achieve morality is legal fantasy.[19]

Modern "colorblind jurisprudence" dictates that race-consciousness and colorblindness must serve as competing slogans of government action and equality.[20] Advocates against affirma-

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Oppression: Policy Arguments Masquerading as Moral Claims, 69 N.Y.U. L. Rev. 162, 171 (1994) ("The genuine moral goal associated with race is to end race-based oppression. Colorblindness may sometimes accomplish this moral goal, but it is not the goal itself. Therefore, the colorblind principle in modern constitutional discourse must be seen as a policy argument and not a moral precept.").

19 Id. at 162-63 (citing Richard A. Posner, The Economics of Justice (2d ed. 1983)).

20 See Francis J. Mootz III, Rhetorical Knowledge in Legal Practice and Theory, 7 S. Cal. Interdisc. L.J. 491, 561 (1998)

> ("The competing slogans of equality ('color-blind' treatment of all citizens in all respects) and fairness ('leveling the playing field' for historically disadvantage [sic] groups) are deployed in rhetorical exchanges that can produce rhetorical knowledge. It is obvious that these slogans are wielded for a variety of strategic, even bad faith, reasons in some instances, but even the worst abuse of rhetorical practices proves the case for rhetorical knowledge. Those seeking to segregate and denigrate disadvantaged minorities could use the physical coercion of an apartheid regime to secure their goal, just as those seeking to mitigate the economic power of the majority could incite a violent revolution in furtherance of their aims. However, the debate about affirmative action continues, even if suboptimally, by traversing the many discourses within society in order to align points of shared agreement into new constellations of meaning. These shifts in meaning represent modifications of arguments designed to secure the adherence of the body politic which prove to be enlightening (or not) only in the continued discourse about affirmative action. The reality of rhetorical knowledge is proved not because the participants have found the 'answer' to the question posed, but because they continue to develop the public discussion of affirmative action along new lines of argumentation. The ongoing struggle to come to terms

tive action would not recognize co-existence, wherein the goal of colorblindness on a societal level may not be achieved without first utilizing race-consciousness in order to prepare society—that is, react to and influence majority class preferences—for the ultimate ideal of a "colorblind society." This necessarily means that society, at present, is not colorblind, and protection of a "colorblind" Constitution seeks to make insignificant the fact that white racism caused blackness to become a relevant category not only in history but also in present society.[21] It may also be said that although the Constitution attaches rights only to individuals,[22] the institution of judicial review itself attaches and establishes rights of a class through a means of determination of the constitutionality of government action intended to benefit or burden that group.[23] Through this process, the judiciary determines individual rights—or on another plane, the legitimacy of legislative action to grant governmental benefits or burdens to that class—only through the determination of that class status. Thus, the search for a "compelling government interest"[24] to determine the legitimacy of a

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with affirmative action does not disprove the ability to have knowledge of such matters, but rather it reaffirms that such knowledge holds only for discrete historical situations and is tested constantly and revised as these situations evolve.").

21 See T. Alexander Aleinikoff, A Case for Race-Consciousness, 91 Colum. L. Rev. 1060, 1087 (1991)

> ("[R]ecognizing race validates the lives and experiences of those who have been burdened because of their race. White racism has made 'blackness' a relevant category in our society. Yet colorblindness seeks to deny the continued social significance of the category, to tell blacks that they are not different from whites, even though blacks as blacks are persistently made to feel that difference.").

22 By the terms of the 14th Amendment, "no state shall . . . deny to any *person* within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV (emphasis added). The Supreme Court has embraced and firmly established that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual." Shelley v. Kraemer, 334 U.S. 1, 22 (1948).

23 The concept that the constitutionality of a government action hinges on the appropriate allocation of government burdens and benefits relates primarily to an economic view of the law. For discussion of an economic view of the law as it relates to the Equal Protection Clause, see infra notes 36, 228 and accompanying text.

24 This refers obviously to the strict scrutiny requirement that a legislative classification is justified only if it is a narrowly tailored measure intended to further a compelling government interest. In terms of colorblindness, this Article regards many of the judicially-created paradigms as mere rhetoric and explains how the theory of colorblindness may support minorities in modern jurisprudence as it did in past jurisprudence.

legislative action which confers a benefit on a minority is a class determination, and one that may be deemed a race-conscious determination.

Part I of this Article discusses the ideal of the colorblind society, and the implications that majority and minority public values and preferences have to prevent society from being truly "colorblind." Part II discusses what this Article deems as Colorblind I, which begins with the enactment of the Reconstruction Amendments and ends generally with the Court's decision in *Brown I.* Part II also discusses the concept of Colorblind II, which essentially begins with the Supreme Court's opinion in *Brown II.* Finally, this Part discusses how the evolution of affirmative action programs led to opposition based on principles anti-affirmative action advocates deem inequitable, based on correlations in reasoning from the advocates of the original meaning of colorblind. Part III, in a reflective discussion of a particularly American *racial* dilemma, places each colorblind argument in perspective, and seeks to illustrate that the concept of colorblindness could be an ideal, but has rather become meaningless rhetoric in an endless racial struggle that has defined this country. Throughout the text, there are anecdotal comments that serve not only to support understanding of the text of the Article, but to portray the human realities of the very subject matter under discussion.[25] Part IV serves as a summary of the Article highlighting the common feeling that the legal rules reflecting society's attitude on racism have changed again.

Gunnar Myrdal, in his 1944 two-volume tome was right. There is *An American Dilemma.*[26] This Article goes further by pointing out that racism and the apothegm "colorblind" is an American "Legal" Dilemma *too.* Part V brings the reader full-circle to the semantic apothegmatic permutation of "colorblind" and asks if we

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[25] Often, personal experiences or happenings relay messages in humorous, or at least, more concrete language than narrative text, therefore I have chosen to include such anecdotal comments throughout the Article. These stories stem primarily from personal experiences of the author but are hardly assumed to be peculiar to the author. See infra notes 263, 576.

[26] For further explanation and discussion concerning Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy (1944), see infra notes 235-36 and accompanying text and note 484.

are telling white lies when we ignore racism. In short, this conclusion extends the metaphor "black ice" to describe the persistent, invisible yet highly charged danger of racism and its continuing effects on American society.

I. A LEGAL, PHILOSOPHICAL, AND ANALYTICAL LOOK AT RACISM—THE FOUNDATION FOR COLORBLIND

Professor John A. Powell recognizes that the position of modern colorblind assertions by the new right is both conceptual and pragmatic:[27]

> The conceptual position claims that because race does not have a substantial scientific basis, it is not only an illusion but a problematic illusion. This assertion is based on the assumption that that which cannot be grounded on an objective scientific foundation is not real. This claim, however, suffers from a serious conceptual flaw. While the claim that race is an illusion draws on the work of late- and post-modernists—particularly the work of [Michael] Omi and [Howard] Winant, which purports that race is socially constructed—the conclusion that race is not real does not comport with the deeper implication of this insight. Omi and Winant, for example, do not support the position that race can or simply should be dropped. Omi, citing the Journal of Black Higher Education with approval, notes that while race may not be a scientific reality, it is a social fact.[28]

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[27] See John A. Powell, The Colorblind Multiracial Dilemma: Racial Categories Reconsidered, 31 U.S.F. L. Rev. 789, 791 (1997).

[28] Id. at 791 (citing, inter alia, Michael Omi, Racial Identity and the State: The Dilemmas of Classification, 15 Law & Ineq. 7, 14-21 (1997)). Professor Powell also notes that

> those who would abandon race because the biological or genetic foundation for race proves to be inadequate, fail to engage seriously other possible ways of understanding race. Even the position that race is socially constructed instead of biologically based underestimates the force of the post-modernist claim that everything is socially constructed. Not only are race and the self socially constructed, but biology and science are as well. This does not mean that all

> The second colorblind position is pragmatic and political. This position errs in assuming that the major race problem in our society is race itself, rather than racism. Many of the proponents of moving to a raceless, colorblind society argue that the categories of race are both irrelevant and politically and racially divisive. Many have appropriated the language of Dr. King and the civil rights movement to give force to the call for colorblindness.[29]
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> The language used by the new right of a raceless, colorblind society is viewed by some not simply as an error, but as a strategy or racial project to maintain white supremacy and racial hierarchy. Whether it is intentional or an error, powerful evidence suggests that the colorblind, race-aversive language adopted by the new right has the effect of shoring up racial hierarchy, while masking both the subordination of the racial minority and the enjoyment of white privilege. Indeed, in many respects the focus on race or racelessness not only masks racism but also actively supports it.[30]

The institution of racism proves problematic not only with respect to claims made by promoters of the new-right colorblindness, but also for political theorists as well.[31] This is not limited to those claims involving the Constitution. For example, theories such as pluralism, civic republicanism, and synoptism—each a model, among others, of administrative law—have failed to com-

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> claims are either arbitrary or illusory, but that the way we think of reality as being simply represented by our senses, instead of interactive with our senses and language, is illusionary.

Id. at 792 (footnote omitted).

29 Id. at 793 (footnote omitted). Powell notes that the anti-affirmative action groups used Dr. King's colorblind language in support of their own position. Powell also notes that the King family expressed dismay over the use of this language to support the anti-affirmative action cause. See id. at 793 n. 21.

30 Id. at 793 (footnotes omitted).

31 See Stephen M. Feldman, Whose Common Good? Racism in the Political Community, 80 Geo. L.J. 1835, 1836 (1992). Professor Feldman finds that racism causes a failing among political theorists because "modern racism denies its own existence by insisting that we already have achieved social equality and justice," and "it threatens to shatter the premises of both pluralism and civic republicanism." Id. at 1837.

bat racism in the distribution of government burdens caused by the impact of environmental regulation.[32] With respect to the Constitution, problems associated with race and racism become compounded, particularly because of the applicability of assuring rights to each individual. The social aspects of race create an unfortunate system of group identification, where race itself, to a large extent, determines what group with which an individual will identify based on common personal values. When the aggregate of personal values of one group are at odds with the aggregate personal values of the other, political theorists insist that their formulas for determining a reasoned and rational medium are most applicable to provide a solution in the form of government action.[33] Race proves problematic within these theories because race—in this society—necessarily causes a difference in personal values, rather than causing a rational difference in personal values.[34] But where race does not fit comfortably within these theories, racism "looms . . . ominously" over the theories so as to intimidate the theorists.[35] Whereas Professor Stephen Feldman concentrates upon

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[32] See generally, e.g., Eileen Gauna, The Environmental Justice Misfit: Participation and the Paradigm Paradox, 17 Stan. Envtl. L.J. 3 (1998) (finding that environmental justice preferences fail in the aggregate mix of preferences under "expertise-ism" (synoptism), pluralism, or civic republicanism).

[33] See Feldman, supra note 31, at 1835-36. According to John Rawls,

> [L]ong historical experience suggests, and many plausible reflections confirm, that . . . reasoned and uncoerced agreement is not to be expected . . . . Our individual and associative points of view, intellectual affinities and affective attachments, are too diverse, especially in a free democratic society, to allow of lasting and reasoned agreement. Many conceptions of the world can plausibly be constructed from different standpoints. Diversity naturally arises from our limited powers and distinct perspectives; it is unrealistic to suppose that all our differences are rooted solely in ignorance and perversity, or else in the rivalries that result from scarcity. [The appropriate view of social organization] takes deep and unresolvable differences on matters of fundamental significance as a permanent condition of human life.

John Rawls, Kantian Constructivism in Moral Theory, 77 J. Phil. 515, 542 (1980).

[34] In practical terms, it perhaps does not matter whether differences caused by race are rational differences or differences necessarily caused by society, particularly because the differences in values in this context are personal values. It becomes more problematic when those differences in personal values become irrational class preferences, and those irrational class preferences find their way into legislation.

[35] Feldman, supra note 31, at 1837. Professor Feldman argues that racism threatens to shatter the premises of both pluralism and civic republicanism. See id.

pluralism and civic republicanism, racism may also loom, albeit perhaps not ominously, over the economic theory as well.[36]

A. State Action, The Problem of Selectivity, and Racism[37]

1. Individual and Social Injustice in Government Selectivity

On a definitional level, affirmative action does not bode well with the prohibitive structure that is found in most of the amendments to the Constitution,[38] particularly those clauses that prohibit forms of state action via the Equal Protection, Due Process, and Privileges and Immunities Clauses of the Fourteenth Amendment.[39] It is quite clear that affirmative action "awards" groups

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36 Judge Richard A. Posner contended in 1974 that

> the proper constitutional principle is not, no "invidious" racial or ethnic discrimination, but no use of racial or ethnic criteria to determine the distribution of government benefits and burdens. An appropriate question about this principle is whether racial laws premised on what might be termed the "explosive mixture" rationale are within its scope.

Richard A. Posner, The *DeFunis* Case and the Constitutionality of Preferential Treatment of Racial Minorities, 1974 Sup. Ct. Rev. 1, 25. See also Lynn A. Stout, Strict Scrutiny and Social Change: An Economic Inquiry Into Fundamental Rights and Suspect Classifications, 80 Geo. L.J. 1787, 1812-21 (1992).

37 Much of this Article concentrates on government selection processes, such as those involved in granting contracts, or the selection of students for positions at universities and other institutions. Affirmative action extends beyond these processes of selectivity. Processes such as racial gerrymandering and forced integration must also be viewed as affirmative action programs, if affirmative action as a concept requires government to achieve positive gains through law, rather than merely relying on prohibitive law to achieve a desired result. Several of the cases discussed in this Article will involve the latter government processes, but the Article itself will concentrate on the process of selectivity.

38 Eight of the ten amendments in the Bill of Rights are prohibitive of government action. See U.S. Const. amend. I-X. Only the Sixth Amendment (granting the right to a speedy and fair trial by an impartial jury, etc), and the 10th Amendment (reserving powers to the States where these rights are not delegated to the United States or prohibited by it to the States) afford rights. See U.S. Const. amend. VI and X.

39 The first clause of the Fourteenth Amendment grants citizenship rights to all persons born or naturalized in the United States or in the jurisdictions of the United States. See U.S. Const. amend XIV, § 1. The remainder of that section is prohibitive. Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend XIV, § 5. Congress enacted the first civil rights legislation during the first Reconstruction period, but much of this legislation was struck down later because the Supreme Court determined that section 5 authorized only federal legislation prohibiting states from denying equal protection, rather than federal legislation granting positive rights. See The Civil

based on race, thus benefiting members of minority groups based on membership alone.[40] It is from this standard that affirmative action is considered "antithetical to the principle of equal protection of the laws that is the basis of equality of opportunity."[41] Yet, if the alternative is a process of selectivity that solely benefits one race—namely the "white" race[42]—and completely (or nearly completely) excludes a minority race,[43] whether the theory is process-based or result-based cannot seem to matter.[44] Irrespective of the

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Rights Cases, 109 U.S. 3, 10-12, 23 (1883).

[40] See The Oxford Companion to the Supreme Court of the United States 18-19 (Kermit L. Hall et al. eds., 1992) [hereinafter Oxford Companion]. Even this publication defines affirmative action in a light at odds with the Equal Protection Clause:

> Affirmative Action is a term of general application . . . that directly or indirectly awards jobs, admission to universities and professional schools, and other social goods and resources to individuals on the basis of membership in designated protected groups, in order to compensate those groups for past discrimination caused by society as a whole. For political as well as prudential reasons reflecting racial sensitivities, public justification of affirmative action has tended to describe it as a logical extension of equality of opportunity for individuals. In fact, affirmative action embodies ideas that are philosophically antithetical to the principle of equal protection of the laws that is the basis of equality of opportunity.

Id.

[41] Id. at 19. The *Oxford Companion* also notes that

> [a]ffirmative action focuses on the results of procedures used by public and private organizations measured with respect to racial balance, rather than on the existence of procedures that assure equal treatment of individuals irrespective of race, ethnicity, or sex. It can therefore be described as a civil rights policy premised on the concept of group rather than individual rights, which seeks equality of result rather than equality of opportunity.

Id.

[42] "White" race here refers to the "monolith" or "macro-culture" that is the dominant culture of society; that is, the "white race," even if that race is made up of smaller micro-cultures found within that macro-culture. See James A. Banks, Multi-Ethnic Education 74-75 (1988); James A. Banks, Teaching Strategies for Ethnic Studies 3-8 (1984).

[43] "Minority race" in this Article concentrates on those of African decent, although the themes in this Article certainly are not inapplicable to the Asian-American, Hispanic-American, Native American, or any other minority culture.

[44] See Andrew Koppelman, Antidiscrimination Law and Social Equity 13, 57 (1996). According to Professor Koppelman,

> [m]any and perhaps most Americans readily endorse the following propositions. (1) Part of what defines a free society is that it is none of the government's business what citizens believe and that the shaping of citizen's beliefs is not a legitimate task of a liberal state. (2) Racism, sexism, and similar ideologies are so evil and destructive of the proper workings of a free society that the state should do what-

ultimate outcome, opponents of affirmative action urge that the Constitution demands even a process-based theory of selectivity—one they deem "colorblind"—which effectively eliminates minorities, as opposed to a result-based affirmative action program.[45]

Much of the problem stems from the Equal Protection Clause itself. Commentators have observed that "no content can be found in the Equal Protection Clause without the aid of some kind of interpretive theory:"[46]

> The words—no state shall "deny to any person within its jurisdiction the equal protection of the laws"—do not state an intelligible rule of decision. In that sense the text has no meaning. The Clause contains the word "equal" and thereby gives constitutional status to the ideal of equality, but that ideal is capable of a wide range of meanings. The ambiguity has created a need for a mediating principle.[47]

One solution for the ambiguity that is the Equal Protection Clause has been the recognition that the rights protected under the clause are afforded to the individual.[48] Thus, the concept of "equality" or "equal protection" necessarily relates, it would seem, to individual injustice, rather than group injustice.[49] A state's action of selectiv-

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ever it can to eradicate them.

Id. at 1. Professor Koppelman discusses process-based and result-based anti-discrimination legislation and how it relates and furthers the goal of social equality. See id.

45 If one could consider the Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir), cert. denied, 518 U.S. 1033 (1996), as a "victory" for the colorblind Constitution, it must be questioned as well whether the Constitution must remain so blind that only four black law students out of a total of 468 total students entered the 1997 Fall class at the University of Texas Law School. See Associated Press, Minority Enrollment at UT Law School Is Up, Figures Show, Dallas Morning News, Aug. 28, 1998 (noting that eight black law students entered U.T. Law School in 1998, out of a class roughly the same size as in 1997).

46 Koppelman, supra note 44, at 14 (commenting on an observation by Owen Fiss).

47 Owen Fiss, Groups and the Equal Protection Clause, *in* Equality and Preferential Treatment 84, 85 (Marshall Cowen et al. eds., 1977).

48 See supra note 22 (noting Shelley v. Kraemer, 334 U.S. 1, 22 (1948)).

49 See Thomas W. Simon, Democracy and Social Injustice 29-30 (1995). Simon begins "an approach to injustice" by differentiating between an instance of individual injustice and that of a social, or group, injustice. "An instance of individual injustice involves harm to an individual. A person gets beaten for no appararent reason. Now add the social dimension: a person gets beaten because of her race." Id. at 29. Professor Simon ques-

ity, as "law," places the individuals subject to the selection process in the so-called spotlight of the distinction between social and individual injustice. Consider, for example, the affirmative action program questioned in *Regents of the University of California v. Bakke*,[50] where 16 of 100 positions for admission into the University of California, Davis School of Medicine were reserved for minorities. If one assumes that the university selected 84 white students for the positions not reserved for minorities, the result-based system seemingly leads to no social injustice, if social injustice can be defined as "an infliction of social harm upon relatively powerless individuals because of their negative group identity."[51] By reserving the seats for the group considered "relatively powerless" due to "negative group identity," there is clearly some infliction of social harm to the non-minority. The problem arises because a non-minority who was not included in the 84 positions unrestricted by a group preference, was not considered for the reserved seats. To that person, the system of selection was inherently unjust, since the state inflicted harm upon him for the benefit of a person identified with another group. That system of selection therefore could not be considered "colorblind" because individual injustice occurred based on the group identity of the person or persons selected.

If the Equal Protection Clause protects such individual injustice—and furthers the majority's cause for "colorblindness" in the selection process—then the question must be what state action is appropriate when each of the 100 positions are occupied by members of the majority group.[52] An objective view may not reveal anything inherently unjust about the selection process. Factors considered as criteria may have been seemingly equal. But this process-based system resulted in complete exclusion of one group.

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tions whether the social dimension has added anything to the description of individual injustice; whether "calling the injustice a social injustice" serves as a means to implicate groups; or whether "social injustice says something about the underlying structure of society." Id.

50 438 U.S. 265, 265-66 (1978).

51 Simon, supra note 49, at 30. Professor Simon used this concept as a thesis for analysis.

52 This statement does not even reflect the problems of a selection process which either does or does not consider groups based on gender, religion, or other characteristics of group identity.

The question, then, is whether this process-based system led to, or at least contributed to, social injustice. For an answer, one may consider Professor Thomas Simon's definition, and each of the factors within it. First, was there an "infliction?"[53] Second, was there social harm?[54] Third, were the individuals "powerless?"[55] Fourth, was this process due to a negative group identity?[56]

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53 Professor Simon ponders,

> Does [use of the word infliction] mean that someone must do the inflicting for there to be a social injustice? If so, does the infliction by someone have to be intentional? [As he develops in the analysis,] human agency, intentional or unintentional, holds a key to understanding social injustice. Interpreting social injustice in terms of human agency brings many cases that look like natural disasters and natural diseases under the heading of social injustice.

Simon, supra note 49, at 30.

54 See id. at 30-31

> ("Individual harms make sense intuitively; group harms might not. Those who question the existence of group harm often assume that they have a clear understanding of individual harm when it is the idea of individual harm that poses difficulties. The problem with group harm lies in how to conceive of individual harm. Too often we think of harms as individual responses that can be isolated from context—historical, social, and political. A more realistic look at individual harm will show how physical pain and psychological suffering involve social components. Besides playing a role within the physical and psychological levels, social suffering has its own independent functions. Social suffering involves the lowering of the threshold of vulnerability at the physical and psychological levels, and it constitutes an experience of suffering in its own right.").

55 Id. at 31

> ("Interpretations of social injustice will continue to mislead if they focus on lack of power. The response to social harms involves more than the lack of power of individual victims; it also involves the powerlessness of a social group. . . . [Just as there exist] difficulties with defining injustice as the absence of justice, so we shall see that powerlessness is not simply the absence of power. Powerlessness has its own dynamic. Recognizing powerlessness helps to reorient remedies for social injustice. The remedies not only must address the imbalance of political power but also must deal with the experiential base of powerlessness.").

56 See id.

> ("[S]ocial injustice occurs when an action is done owing to an individual's negative group identity. With this type of wrong, the injustice lies not only in the harm inflicted but also in the unjustified role the classification of an individual as a member of a group plays. The injustice begins earlier than the overt action. It starts with the negative gathering of individuals into certain groups. The negative group identity sets the conditions under which the members of the involun-

Under this approach, if the lack of an affirmative action program results in a nonsymmetrical racial balance, even taking into consideration the majority-minority ratio among the applicants and the particular community involved, one must question whether there was an *infliction* of a harm. Professor Simon concentrates on the fact that often society forgets that it is *someone* that inflicts the harm, and rather concentrates on the fact that *something* was the cause of harm.[57] Social consciousness with respect to a government selection process would not likely suffer from this phenomenon. This does not suggest that the phenomenon would not occur where the blame for the imbalance is placed solely on "government," without respect to a human causal agent behind the government action.[58] In determining the appropriate selection process, where race is not considered a factor, the "system" probably relied upon the knowledge of those more suited to make a determination of criteria for making the selection. In the case of a medical school, the decision was obviously made by a board of regents or similar body. These human agents base their selection on criteria known in that field as the best means of making a determination of those most qualified. Should the persons selected all be of one group (namely, all selected students are white), reflection of inequality on the excluded race is attributed to those human agents who determined the criteria for selection.[59]

Even if it can be assumed that the result of having 100 white medical students fill 100 positions is unjust, this does not answer the question of whether the infliction was intentional or motivated by a discriminatory purpose.[60] With respect to a process of selec-

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tary group might be harmed.").

57 See id. at 33. Professor Simon discusses three instances where society "often forget[s] that someone does the inflicting." Id. Simon identifies three instances where the inflictor is not attributed to a human, but rather to external factors: first, in cases where the infliction is attributed to natural disasters; second, where pain and suffering is attributed to natural causes; and third, where society "pins" responsibility on the system. Id.

58 See id. at 36 ("The spotlight never reveals a single human causal agent behind an episode. Injustices occur even without any readily available human agency".).

59 Professor Simon proposes the use of the term "sociopolitical cause" to distinguish "those cases in which a causal link can be made to social and political institutional structures and rules, which, in turn, have human agency components." Id. at 37. The selection process here most likely is one of those socio-political causes.

60 "Intentional," as used here, should not be inferred to sound in tort. Rather, the intentional infliction of social harm relates to the Supreme Court's requirement of im-

tion such as entrance into a medical school, there most likely does not exist a discriminatory purpose, and the government most likely has a legitimate government interest in determining its criteria for making the selection.[61] On another plane, however, it does reflect an attempt to render judgment of natural assets[62] reflected more favorably in this instance by one group and reflected as lacking in another. It is not a secret either in society or in science that black Americans score lower on standardized tests and intelligent quotient tests than white Americans.[63] With this fact[64] in mind, the judgment of natural assets in a selection process through a means known to be more favorable to one group than the other does lead, at least, to an implication that the selection process inflicts the disfavored group with harm due to reliance on those means of selection.[65] Perhaps better means do not exist to make the selection, but the implication that these means (in this case, the standardized tests) reflect that the minorities have less intelligence and are less suited for selection because of this reflection does tend to show that some degree of infliction of social harm has occurred.[66]

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proper motivation of a racial purpose as a basis for using strict scrutiny to evaluate a non-race-specific classification. See Washington v. Davis, 426 U.S. 229, 242 (1976) ("[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.").

61 John E. Nowak & Ronald D. Rotunda, Constitutional Law 611 (5th ed. 1995). Non-race-specific classifications that lack motivation of a racial purpose are subject to rational basis review, which will most likely uphold the classification.

62 The concept of "natural assets" stems from John Rawls' theory of justice which nullifies the "accidents of natural endowment . . . as counters in quest for political and economic advantage." John Rawls, A Theory of Justice 15 (1971).

63 The concept of natural assets and colorblindness is explored in more detail in infra notes 67-70, 100-105 and accompanying text. A well-known study on "Intelligence and Class Structure in American Life" demonstrated the disparate results of standardized tests with respect to blacks and whites. See Richard J. Herrnstein & Charles Murray, The Bell Curve (1994). See also Leon J. Kamin, The Flynn Effect in IQ Testing: Why It's Important to African-Americans, J. Blacks Higher Educ., Summer 1998, at 112.

64 This "fact" certainly does not mean that blacks are less intelligent as these tests tend to show. The "fact" here is the actual test scores themselves.

65 Admittedly, it would be a stretch to imply that reliance on standardized test scores as a means of judgment for suitability for selection in a process is an intentional infliction of social harm due to the fact that the infliction is done "knowingly."

66 If the lower standardized and intelligent quotient test scores are caused by social factors which inhibit blacks from scoring higher on these tests, the human causal link may be deemed the "sociopolitical cause" that Professor Simon has suggested. See Simon, supra note 49, at 37. See also Kamin, supra note 63, at 112 (discussing a study

The constitutional concept of individual rights protection necessarily leads to a perspective that the harm caused by the infliction discussed above must be attributed to the individual.[67] Group suffering, or group harm, seems only to occur when the collective individual rights of a group have been impeded.[68] "According to the prevalent view, individuals, and not groups, experience suffering, whether the suffering is physical or psychological."[69] A government selection process must take into consideration each individual's worth (again, the judgment of natural assets) to determine which of those individuals are the best qualified to receive selection. If a process for admission to a university selects a white applicant and fails to select a black applicant, the harm suffered is attributed only to the black applicant. The individual harm might or might not be attributed to a racial preference in favor of the white applicant. Without clear evidence that a racial preference existed, the state decision-maker is powerless[70] under the colorblind Con-

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that demonstrates that IQ score differences are attributable to environmental causes rather than inferior genetic inheritance).

67 This should not indicate that the rights afforded under the Equal Protection Clause should not extend to every individual, regardless of background. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 225 (1995). Strict scrutiny under the recent affirmative action programs, however, has led to a requirement that to show "compelling government interest," the Equal Protection Clause requires the state actor to "catalogue adequate findings to prove that past discrimination has impeded minorities from joining or participating fully" in a government program. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 529 (1989) (Marshall, J., dissenting). A state actor seeking to cure the effects of societal discrimination is deemed to have acted beyond justification. See Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) (finding a collective bargaining agreement whereby minority teachers would receive preferential treatment in the event of layoff was unconstitutional).

68 Professor Simon notes that the limits of the individual perspective of harm often omits the social aspect of suffering by overemphasizing the individual. See Simon, supra note 49, at 39. He uses as an example the courts' treatment of damages in sexual harassment cases. See id. "[S]ome courts have demanded proof of psychological harm. The unreasonableness of the demand stems in part from the refusal to accept ways in which groups suffer without even psychological (or physical) manifestations of suffering." Id. Beyond blanket recognition that African-Americans have suffered as a result of the institution of slavery and government-advocated discrimination, the Court today seems to require that each individual African-American show specific acts of past discrimination to allow legislative protection, which would not violate the Equal Protection Clause.

69 Id.

70 It almost seems that the state decision-maker would have the power to make the distinction between whether the applicant is white or black if it necessarily had done so in the past. But where a colorblind policy has omitted blacks in the past, without a clear showing that the selection process intentionally omitted blacks, colorblindness advocates

stitution theory from making the distinction that the process favored the white applicant, since color is not a determinate factor in the process.

Should the selection process repeatedly select a disproportionate mix of races, Professor Simon suggests that it would be a mistake to consider the group suffering of blacks as collective group suffering; that is, that the black "group's" collective individual interests have been harmed:[71]

> The collective approach, leaping over 'groups' in favor of 'meta-groups,' does not fair much better than the individual perspective. Instead of reducing group suffering to the suffering of individuals, the collective approach claims to find commonalities among groups that go beyond narrower notions such as group suffering. Oppression, or a similar concept, does the theoretical work for the collective approach.[72]

Professor Simon rejects this notion because an examination of some forms of suffering does not require "prior knowledge of people's positive interests."[73] Moreover, an appropriate approach to the suffering of groups "does not overly individualize by ignoring the indefeasible social factors, and that does not overly generalize by discounting difference among groups. Groups suffer in different ways."[74]

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claim the Constitution prohibits a state actor from taking action to reverse this type of trend.

71 Simon, supra note 49, at 39.

72 Id. at 39-40. Professor Simon uses as an example the work of Professor Frank Cunningham, who

> describes systemic oppression as "unjustified thwarting of people's aspirations [interests] which is 'systematic'—that is, ongoing and pervasive across categories of people (workers, women, the handicapped, children, and so on) in such a way this this cannot be explained by reference to accident, such as the accident of powerful people happening to be possessed of ill will."

Id. at 40 (quoting Frank Cunningham, Democratic Theory and Socialism 204 (1987)).

73 Id. at 40. For example, "[t]he Nazis thwarted the interests of Jews and Gypsies . . . in the concentration camps. Yet, we do not need a notion of interests to acknowledge their group suffering." Id.

74 Id. at 41.

As opposed to the notion of collective group suffering, a group's social status might set a condition to vulnerability to harm:[75]

> In most cases, people are born into conditions of vulnerability to suffering. People are not born onto a social tabula rasa—a blank slate. Rather, they come into the world with labels already attached to them—a full slate. Society lies in wait for all. People are born with racial, gender and ethnic tags socially attached to them . . . "There is nothing just about a communal identification that one may not leave at will and they may doom one to social inferiority or to an unwarranted social identity."[76]

Colorblindness on one level might seem to remove the label of being born black (and the concept of a "colorblind" Constitution might be viewed as a protection against this labeling).[77] On another level, colorblindness may in reality be an attempt only to ignore race, an attempt that repeatedly only exaggerates its significance.[78] Even a well-intentioned ignorance of race in a selection process could be seen as "aversive racism," where the persons making the selection act in a discriminatory manner without bla-

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75 See id. at 44-46, 50.

76 Id. at 45 (quoting Judith Shklar, The Faces of Injustice 116 (1990)).

77 In this sense, equal protection of the law would seem to protect against unequal labeling based on the group identity. Yet, in another sense, equal protection could also be seen as protection against the ills associated with the negative social identity when these labels are attached.

78 See Ellis Cose, Color-Blind: Seeing Beyond Race in a Race-Obsessed World 189 (1997)

> ("The avoidance of racially sensitive topics even affected the teachers' lessons on ancient Rome; the teachers simply omitted any mention of slavery. Even in noting that George Washington Carver was a great American, they thought it was important not to point out that he was black. 'In the best of worlds, there would be no need to make such mention, because children would have no preconceptions that famous people are generally white,' commented [Jane] Schofield. 'However, in a school where one white child was surprised to learn from a member of our research team that Martin Luther King was black, not white, it would seem reasonable to argue that highlighting the accomplishments of black Americans and making sure that students did not assume famous figures are white is a reasonable practice.'").

tant racism.[79] With aversive racism, discrimination can take place in situations where it can be rationalized on some other basis than mere bigotry.[80] This is perhaps not true in situations such as university selection, where the basis of decision will be more tangible—although not necessarily accurately reflective—forms of evidence with which to make a comparison of applicants. This aversive racism may, however, occur in a situation where a government contractor must make a decision as to which subcontractors to hire.[81] If the decision must be made between a minority firm and a white firm for subcontracting, the prime contractor may decide to hire the white contractor, but for reasons rationalized on grounds other than race. The same minority firm may bid for subcontracting work for another government project, but this bid may too be rejected, on different grounds than the first prime contractor. Even if this pattern is repeated,[82] and the minority firm is excluded from all government contracting work,[83] the prime contrac-

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79 Id. at 190. Professor John Dovidio of Colgate University discusses the existence of a subtle discrimination, practiced by people who do not believe they are prejudiced. See id. (discussing Professor Dovidio's work).

80 See id.

81 Set-aside programs, such as the ones found unconstitutional in *Adarand* and *Croson*, are designed to ensure that an equitable number of contractors and subcontractors on government programs are from minority firms. See generally Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

82 Professor Dovidio, *discussed in* Cose, supra note 78, at 190, uses as an example a black applying for employment where the employers are white. See id. The first employer might make the decision not to hire the black applicant because the applicant's education is not in the desired field. See id. Thus, "that white employer leaves with a clear conscience [certain that] no bias occurred because it was rationalizable." Id. (alteration in original).

> Now that same black person goes for another interview and is competing against a white person with a different employer and what is most likely to happen, according to [Dovidio's] research . . . is that the second employer will make a decision to choose the white person over the black person, but that employer will justify it on the basis of some factor other than race that may be totally different than the first one. So you're groping for reasons to justify behavior that is unconsciously discriminatory. So employer number two says, "Well maybe what we need is someone who is more outgoing, who will interact with our clientele better."

Id.

83 In *Croson*, Richmond (Va.) set aside 30 percent of the city's subcontracting work for minority firms. See *Croson*, 488 U.S. at 477. A study had indicated that only .67 percent of the city's prime contracting work had been awarded to minority firms in a period

tor and the government entity hiring the prime contractor may still be convinced that no discrimination has taken place.[84] Under the Supreme Court's "exceedingly myopic" view[85] of equal protection, insufficient evidence exists to justify counteractive measures to be taken to assure some degree of equality of opportunity,[86] since a compelling government interest involves only remedy for specific instances of past discrimination.[87]

Aversive racism can account for group harm felt by blacks. Continued denial from a government selection process, should it involve the aversive racism described above, relates directly to the social status of African-Americans.[88] Group harm, as opposed to the individual directly harmed through exclusion, is not an easy concept to define.[89] This concept may be explained by viewing the effects of exclusion of an Anglo-American, as opposed to an African-American. Consider again the example from *Bakke*, with one hundred positions available for entrance into the medical school, without any preferential treatment for minorities.[90] If the school fills 99 positions with white applicants, and the remaining position may be filled with one of two applicants, one white and one black, each with equivalent academic credentials, then the system must choose between the applicant based on some other factor. If the black applicant is chosen based on a race factor, the white applicant will most likely feel an injustice has occurred. But can this injustice be attributed as a *group* harm, when 99 other positions are filled by white applicants? The white applicant may turn to the

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between 1978 and 1983. See id. at 479-80. Despite these findings and others, discussed in infra notes 431-36 and accompanying text, the majority (per Justice O'Connor) concluded that "[t]here is nothing approaching a prima facie case of constitutional or statutory violation by *anyone* in the Richmond construction industry." Id. at 500.

84 If the Court cannot find any specific facts indicating past discrimination, then no remedy is appropriate.

85 *Croson*, 488 U.S. at 528 (Marshall, J., dissenting). Justice Thurgood Marshall's dissent is discussed in infra notes 429-31 and accompanying text.

86 A colorblind argument claims that affirmative action denies equality of opportunity. See Oxford Companion, supra note 40, at 18. One must question how this concept relates to aversive racism, which denies the same equality of opportunity.

87 See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 220 (1995); *Croson*, 488 U.S. at 470.

88 See Simon, supra note 49, at 50.

89 Professor Simon notes that group harm seems mysterious. See id. at 47.

90 See generally Regents of the University of California v. Bakke, 438 U.S. 265, 265-66 (1978).

Supreme Court's language that "[c]lassifications based on race carry a stigmatic harm,"[91] but it must be questioned whether this selection has actually stigmatized this one white applicant, since in none of the other selections has race stigmatized that group.[92] This much may be questioned, but it should lead to a conclusion that the harm suffered is attributed to individual injustice, rather than group harm, especially when one considers the alternative. If the black student is excluded, the question must be what factor resulted in exclusion, in the absence of some blatant discrimination. Quite obviously, this will be a case where the black applicant claims aversive racism and the white applicant denies it.[93] Yet where blacks are continuously excluded, blacks have become and often continue to become vulnerable to harm based on the stigma caused by the exclusion.[94]

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91 *Croson*, 488 U.S. at 493.

92 By this statement I mean that it must be questioned whether white applicants as a group feel the stigma of applying as "white applicants," as opposed to the stigma of a black applicant identifying himself or herself as a "black applicant" where the selection process typically excludes them. Those who opposed affirmative action believe that the identification of "black applicant" in an affirmative action program immediately grants a benefit to that black applicant, since nobody knows whether that black applicant has actually felt the effects of discrimination individually. This idea leads some to conclude that the white applicant is denied selection "because he (or she) is white," when in reality the "stigma" of being white does not and cannot compare with the stigma of "being black" when all or a substantial majority of blacks are excluded. I must note that I introduce this concept to illustrate that the harm felt by blacks is attributed to group harm, whereas the harm felt by a white is an individual injustice to the white applicant.

93 According to Professor Dovidio,

> [P]eople of color will have a tendency to see racism in many places, almost everywhere, because you can't trust what somebody says. And white people tend to see it nowhere because they only discriminate when they can justify it on the basis of some other factor other than race. And so the dialogue begins with miscommunication. It starts with different perceptions, but usually quickly escalates to distrust because . . . if a black person says, "What's going on here is racism and discrimination," . . . whites will respond and say, "No it isn't."

Cose, supra note 78, at 190-91 (quoting Professor Dovidio) (alteration in original).

94 Professor Simon identifies vulnerability to harm as a factor for considering the social suffering related to social status. See Simon, supra note 49, at 44, 50. Based on the foregoing discussion, I assume that the harm felt by exclusion is group harm, as opposed to merely instances of individual injustice caused by exclusion.

If it can be established that a selection process of a majority-controlled government actor (a white-dominated one with respect to race), then the latter of Professor Simon's components of social injustice—powerlessness and negative group identity—are not difficult to establish. A critical aspect of group injustice is

> the relative inability of the victim to offset or fight against the harm. The phrase 'innocent victim' does not adequately capture the lack of response characteristic of an injustice. Caught in the entablements of group identity an individual 'victim' cannot always successfully plead innocence. Group injustice is signaled by the fact that group identity always conditions the strengths and weakness of the response to the infliction. Race, gender, and the other group classifications will always temper or in another way affect the response no matter how intense the response might otherwise seem.[95]

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[95] Id. at 54. Professor Simon does not necessarily link powerlessness with political weakness, measured by voting strength.

> The nonelectoral aspects of powerlessness must be kept clearly in mind. Women, African Americans, and gays have different forms of electoral strength. Women have sheer voting numbers; African Americans often exhibit solidarity at the polls; and gays often have strong interest groups. Placing too much emphasis on political power . . . leads to faulty evaluations of social groups. Some theorists . . . try to dismiss a group's claim of powerlessness once groups, such as women, attain a certain degree of political power at the electoral bargaining table. The theorists assume that powerlessness is the absence of power and that they can measure power by voting strength.

Id. at 55. Professor Simon finds that availability of electoral opportunity "cannot completely loosen the tight yet subtle grip of negative group identity," including the procedural dictates in constitutional discrimination cases requiring an "onerous test of showing intent." Id. Simon also recognizes that

> [d]isadvantaged social groups do not have political organizations that speak for the entire group. No one political organization represents the interests, especially those regarding negative group identity, of African Americans, women or gays. Simply because segments of the social group coalesce into interest groups does not offset the overall powerlessness of the group. The political organization of one segment of the group may divide the group, leaving a significant number still powerless while the others attain formal political power.

Id.

Powerlessness is necessarily related to negative group identity.[96] The appropriate question here is whether a government selection process which inflicts social harm by selecting a disproportionate number of whites does so upon a group of relatively powerless individuals because of that group's negative group identity.[97] Aversive racism quite clearly meets this definition and is perhaps the clearest example.[98] A state actor making a selection based on an underlying notion of inferiority of a black applicant for a position necessarily bases his or her decision on the negative group identity associated with race. The feelings and emotions of powerlessness—not necessarily due to a stimulus of power by the person making the decision[99]—are caused by the negative group identity.

Judgments of natural assets, such as those in an academic selection discussed in this Section, may also lead to powerlessness due to a negative group identity, because it fosters feelings of hopelessness.[100] "Powerlessness finds its most parasitic niche internally when entire groups of people think of themselves as unworthy."[101] Publications such as *The Bell Curve*,[102] even if it is be-

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96 See id. at 56 ("The primary molder of powerlessness is the phenomenon [of] negative group identity.").

97 See id. at 53. A repeated exclusion of blacks would almost certainly lead to a notion of powerlessness.

> Powerlessness does not simply manifest itself in a single instance; powerlessness persists over time. Powerlessness persists dialectically over space and through its operation within a network of situations. If found in the education sphere, powerlessness probably will also manifest itself in the employment and housing fields. One reinforces the other, creating an interconnectedness of disadvantaged conditions. If hopelessness and despair predominate within the educational sphere, they often carry over into the employment area.

Id.

98 Professor Simon offers a historical narrative to illustrate his concept of social injustice. See id. at 62-64.

99 See id. at 56.

100 See id. at 53

> ("Hopelessness constitutes an important component of powerlessness. The powerless often direct their outlook toward the present. Others criticize the powerless for their present-time concerns with consumption and indulgence. Yet, 'I want mine right now' can be interpreted as a cry of despair, a direct response to the possibilities of the future as a powerless individual sees them").

101 Id.

> ("An individual or a group acts or does not act according to how members of a group perceive or misconceive themselves. The inter-

coming disregarded,[103] help foster the concept that blacks are somehow inferior in cognitive ability, and thus foster the negative identity which causes the feelings of powerlessness. The Supreme Court does not consider this view, but instead considers the implications of a segregated admissions process as more of an evil than reliance on these tests scores.[104] Thus, as Justice William O. Douglas dissented in the first affirmative action case,

> A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce the result despite its contrary intentions. One other assumption may be clearly disproved: that blacks or browns cannot make it on their individual merit. This is a stamp of inferiority that a State is not permitted to place on any lawyer.[105]

Justice Douglas' characterization is perhaps reflective of the view that affirmative action is in itself a social injustice. Seemingly forgotten in the modern colorblind advocacy is that the process of selection is the social injustice. Affirmative action, in its various forms, is a reaction to the social injustice caused by the selection process. One argument, rigidly refuted by many across the board, is that blacks cannot be racist.[106] The argument that affirmative action cannot be a social injustice is most likely refuted for the same reasons as the concept that blacks cannot be racist. Nevertheless, if social injustice is defined as Professor Simon illustrates—that is, it is the infliction of social harm upon relatively powerless individuals because of their negative group identity—then affirmative action does not seem to fit the definition, beyond some sort of

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> nalization may or may not be conscious. The symbol of power of the big boot stomping on the helpless victim paints a very incomplete and misleading picture of the realities of powerlessness. Internal mechanisms go far beyond the work of the big boot.").

102 Herrnstein & Murray, supra note 63.

103 See The Student White-Out at Yale, J. Blacks Higher Educ., Summer 1998, at 74 (noting a student protest when *The Bell Curve* author Charles Murray lectured at Yale in April, 1998).

104 See DeFunis v. Odegaard, 416 U.S. 312 (1974) (dismissing claim that affirmative action program violated Equal Protection Clause as moot).

105 Id. at 343 (Douglas, J., dissenting).

106 This concept is analyzed in Dinesh D'Souza, The End of Racism 387-429 (1995).

infliction.[107] Whether this sort of infliction is justified is the subject of the next two Subsections, which discuss result-based theories of social equality.

2. Result-Based Theories of Antidiscrimination Law[108]

a. Stigma

The quote above from Justice Douglas' dissent in *DeFunis v. Odegaard* reflects a long-standing view of at least a minority of the Supreme Court and antidiscrimination theorists that the central concern of antidiscrimination law is the stigmatization of certain groups.[109] The context under which the theory has been applied also lies at the heart of the distinction between how the term "colorblind" has been used to mean something completely different than that which it is now used (against the interests of minorities in affirmative action programs). One must consider the context in which the following quotes were originally made: "[The Fourteenth Amendment protects blacks] from legal discriminations, implying inferiority in civil society;"[110] "[segregation law would be unconstitutional if it were true that it] stamps the colored race with a badge of inferiority;"[111] and "[segregation of blacks is unconstitutional because it] 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 done."[112] A blanket rule that the Equal Protection Clause protects against the types of stigma described in the cases above logically leads to the conclusion that the stigma placed via affirmative action is an impermissible "stamp of inferiority" because it implies that minorities cannot

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107 This statement reflects only differences in the white race and the black race. The concept follows that whites either feel no "social" or "group" harm, or—even if some feel they do—the harm is not inflicted upon them as "whites" as powerless individuals due to a negative group identity. This does not illustrate the problem when one considers the implication of group cross-identity, such as the dilemma faced by black females, white homosexuals (regardless of gender), or a similar combination.

108 Professor Koppelman's book, *Antidiscrimination Law and Social Equity,* supra note 44, concentrates on the result-based and process-based theories. This Subsection will reflect much of the content of his chapter on result-based theories.

109 See Koppelman, supra note 44, at 57.

110 Strauder v. West Virginia, 100 U.S. 303 (1880) (striking down law excluding blacks from participation on juries).

111 Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

112 Brown v. Board of Education, 347 U.S. 483, 494 (1954) [Brown I].

succeed based on their own merits compared to those of whites.[113] Beyond the mere logic of the language lies the comparison about the stigma discussed by Justice Douglas in *DeFunis* with the stigma caused by blatant discrimination. Thus,

> when you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim; when you have seen hate-filled policemen curse, kick and even kill your black brothers and sisters; when you see the vast majority of your twenty million Negro brothers smothering in an airtight cage of poverty in the midst of an affluent society; when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year-old daughter why she can't go to the public amusement park that has just been advertised on television, and see tears welling up in her eyes when she is told that Funtown is closed to colored children, and see ominous clouds of inferiority beginning to form in her little mental sky, and see her beginning to distort her personality by developing an unconscious bitterness toward white people; when you have to concoct an answer for a five-year-old son who is asking, "Daddy, why do white people treat colored people so mean?"; when you take a cross-country drive and find it necessary to sleep night after night in the uncomfortable corners of your automobile because no motel will accept you; when you are humiliated day in and day out by nagging signs reading "white" and "colored"; when your first name becomes "nigger," your middle name becomes "boy"... and your last name becomes "John," and your wife and mother are never given the respected title "Mrs."; when you are harried by day and haunted by night by the fact that you are a Negro, living constantly at tiptoe stance, never quite knowing what to expect next, and are plagued

113 DeFunis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting).

> with inner fears and outer resentments; when you are fighting a degenerating sense of "nobodiness". . .[114]

the resulting "stigma" of an affirmative action program on blacks does not seem to follow logically.

It is not difficult to establish that the stigma caused by the racial caste system under Jim Crow laws[115] is not the same type of stigma created by affirmative action law, at least with respect to the stigma put upon black Americans.[116] With Dr. King's perception of stigma as a backdrop, scholars such as Professor Kenneth Karst advocate an antidiscriminatory law that is not "limited to the stigma itself, but includes the whole complex of practices and institutions that are predicated upon it":[117]

> For all its importance, status equality cannot stand by itself. Just as Jim Crow employed a mixture of formal legal disabilities and informal social and economic sanctions, it will take more than the elimination of formal legal inequalities to end the status harm that is the main evil of a system of caste. To speak of equal citizenship as a status goal, then, is to identify an objective that includes a measure of substantive equality along with formal equality before the law. The best evidence of an end to the harms that are black people's legacy from the racial caste system would be for blacks and whites to be ranged along the socioeconomic scale in ap-

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114 Martin Luther King Jr., Letter from Birmingham Jail, *in* Why We Can't Wait 81-82 (1964). This is the classic description of the American system of racism. See Koppelman, supra note 44, at 60 (quoting King, supra, at 81-82).

115 Jim Crow laws were designed to segregate whites and blacks. These segregation statutes served to remind blacks of their inferior status and represented the most elaborate examples of white supremacy. These laws were enforced, like the Black Codes were enforced, and, whether by custom or by law, Jim Crow kept blacks away from whites. See C. Vann Woodward, The Strange Career of Jim Crow 31 (2d rev. ed. 1966).

116 Just as it is difficult to conceptualize affirmative action as creating a social injustice towards whites, as discussed above, it is difficult to conceptualize whether affirmative action creates a stigma on blacks similar to the stigma created by Jim Crow laws.

117 Koppelman, supra note 44, at 75 (discussing Kenneth L. Karst, Belonging to America: Equal Citizenship and the Constitution (1989)).

proximately the same distribution.[118]

The argument that affirmative action furthers the goal of eradicating the effects of stigma, as opposed to the concept that affirmative action creates an equally prohibitive form of stigma, seems to be meritless in light of the Supreme Court's decisions in the last decade.[119] The inability of the Court to find the necessary existence of specific instances of discrimination in affirmative action cases seems to reflect a view held by many whites that the stigma of racism is reflective of "the way we were" rather than "the way we are."[120] The vestige of Jim Crow laws and segregation in general, therefore, is not a compelling reason to grant any special benefits to blacks, because "it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another."[121] Professor Andrew Koppelman concludes that the concept of stigma is incomplete:[122]

> The concept of stigma suggests, but does not fully comprehend, the harm inflicted by racism. 'Stigma' thus appears to be an unduly limited and potentially misleading term for the evil it seeks to describe. The danger created by excessive emphasis on stigma is that it will encourage an empty, symbolic politics, more concerned with gestures of respect for blacks than with concrete measures to improve their lot.[123]

Koppelman suggests that the stigma theory "points away from itself toward a larger and subtler dynamic."[124] That dynamic may only be understood, he concludes, by understanding the "tangible

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118 Karst, supra note 117, at 135.

119 I refer here specifically to the *Adarand* and *Croson* cases, see generally Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), although this does not eliminate the racial gerrymandering cases, see generally Bush v. Vera, 517 U.S. 952 (1996); Shaw v. Hunt, 517 U.S. 899 (1996); Miller v. Johnson, 515 U.S. 900 (1995); United States v. Hays, 515 U.S. 737 (1995); Shaw v. Reno, 509 U.S. 630 (1993).

120 See D'Souza, supra note 106, at 245.

121 Regents of the University of California v. Bakke, 438 U.S. 265, 307 (1978).

122 See Koppelman, supra note 44, at 76.

123 Id.

124 Id.

world that is called into being by the stigmatization of blacks."[125] That tangible world is emphasized by the group-disadvantage theory.[126]

b. Group Disadvantage Theory[127]

Alan Freeman's view of the Court's doctrine of antidiscrimination law perhaps best illustrates the Supreme Court's limited interpretation of the concept of equal protection.[128] Freeman characterizes the Supreme Court's requirements as based on the "perpetrator perspective."[129] Freeman's view of the Court includes

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125 Id.

126 See id.

127 Professor Koppelman explains the group disadvantage theory as follows:

> [It] looks beyond process and significance to the substantive social position of blacks and other disadvantaged groups. Both the process and the stigma theories focus on the ideas in people's heads: either the heads of the people doing the discriminating or those of the people suffering the stigma, or perhaps both. Against all this, some writers object that anti-discrimination law should really be concerned with concrete things that happen in the world. The principal complaint about segregation, after all, was that it massively limited blacks' life chances in a material way. The group disadvantage theorists claim that as soon as anti-discrimination law looks away from material results, it begins to lose its way. Their critiques of the process and stigma theories reveal the incompleteness of those theories, yet their own theories are equally incomplete: they do not explain why the material disadvantaging of groups raises any greater normative concern than inequality between individuals does. Such an explanation must look to what the group-disadvantage theorists deem irrelevant: process and stigma.

Id. at 76.

Professor Koppelman analyzes a number of group disadvantage theories not introduced or discussed in this Article. See id. at 76-115 (citing Shklar, supra note 76; James S. Fishkin, Justice, Equal Opportunity, and the Family (1983); Stephen Macedo, Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?, 105 Ethics 468 (1995); Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 Harv. Civ. Rts.-Civ. Liberties L. Rev. 323 (1987); Paul Gewirtz, Choice in the Transition: School Desegregation and the Corrective Ideal, 86 Colum. L. Rev. 728 (1986); Nathan Glazer, Affirmative Discrimination: Ethnic Inequality and Public Policy (1975); Charles L. Black Jr., Foreword: "State Action," Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 69 (1967); Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959)).

128 See Alan David Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 Minn. L. Rev. 1049, 1052-57 (1978). See also Koppelman, supra note 44, at 76-78 (discussing Freeman's critique of antidiscrimination law).

129 Koppelman, supra note 44, at 77 (quoting Freeman, supra note 128, at 1052-53).

the idea that

> racial discrimination appears to be merely "the misguided conduct of particular actors" in "a world where, but for the conduct of these misguided ones, the system of equality of opportunity would work to provide a distribution of the good things in life without racial disparities and where deprivations that did correlate with race would be 'deserved' by those deprived on grounds of insufficient 'merit.'" By requiring that any civil rights claimant show that she is the individual victim of individual discrimination, the perpetrator perspective allows the Court to say "that Black Americans can be without jobs, have their children in all-black, poorly funded schools, have no opportunities for decent housing, and have very little political power, without any violation of anti-discrimination law."[130]

Similarly, the pioneering theorist of group disadvantage, Owen Fiss, argues that the Constitution should include being read as preemptively prohibiting any state action which "aggravates . . . the subordinate position of a specially disadvantaged group."[131] The Equal Protection Clause should protect this socially disadvantaged group if "the group has been in a position of perpetual subordination; and . . . the political power of the group is severely circumscribed."[132]

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130 Id. (quoting Freeman, supra note 128, at 1054).

131 Fiss, supra note 47, at 134. See also id. at 84, 125, 127-28, 131-32; Koppelman, supra note 44, at 81-82 (discussing Fiss' theory). Fiss identifies two distinct characteristics of being a social group. First, the social group must have some distinct existence separate from its members. One must be able to discuss the group "without reference to the particular individuals who happen to be its members at any one moment." Fiss, supra note 47, at 125. Second, the group must be interdependent, so that "[m]embers of the group identify themselves . . . by reference to their membership in the group; and their well-being or status is in part determined by the well-being or status of the group." Id. With respect to African-Americans, "[they] are viewed as a group; they view themselves as a group; their identity is in large part determined by membership in the group; their social status is linked to the status of the group; and much of our action, institutional and personal, is based on these perspectives." Id.

132 Fiss, supra note 47, at 131-32.

If the Supreme Court's "colorblind" reading of the Equal Protection Clause reflects the majority's belief that racism is overemphasized—more of a "way we were" type of situation—then Fiss' reading of the Equal Protection Clause is clearly at odds with modern jurisprudence. But when does the Court allow a state actor to react and perhaps counteract the majority's belief if the minority's assertion of racism is indeed accurate?[133] Even the arch conservative Dinesh D'Souza offers several comments indicating that racism is not only a thing of the past, but is here today and may be on the rise:[134]

- Civil rights activist Roger Wilkins: "This is a racist society, and it will be for a long time to come."[135]
- African American educator Johnnetta Cole: "[R]acism is alive and doing too well in America. . . . We have a collective sense that we are still not free."[136]
- Coca-Cola executive Charles Morrison: "What does it take to be successful in America? I'll tell you what it takes—being white, that's what."[137]
- Legal scholar Richard Delgado: "[Racism] . . . infect[s] our economic system, our cultural and political institutions, and the daily interactions of individuals."[138]

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133 For a discussion of judgment of natural assets, see supra notes 100-104 and accompanying text.

134 D'Souza, supra note 106, at 246-47. State action does not necessarily reflect that the existence of racism is present in a selection process. Nevertheless, if the state action reflects majority preference, and racism affects majority preference, then it should follow that the state action reflects this majority preference as well.

135 Id. at 246 (quoting Lena Williams, Growing Black Debate on Racism: When Is It Real, When an Excuse?, New York Times, April 5, 1992 at A-1, A-28 (statement of Roger Williams)).

136 Id. at 247 (quoting Johnnetta B. Cole, Conversations: Straight Talk with America's Sister President 54, 57 (1993)).

137 Id. (quoting Audrey Edwards & Craig K. Polite, Children of the Dream: The Psychology of Black Success 222 (1992) (statement of Charles Morrison)).

138 Id. (quoting Richard Delgado, Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling, *in* Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment 89, 90 (Mari J. Matsuda et al., eds. 1993)).

- Henry Louis Gates, Jr.: "[R]acism has become fashionable, once again."[139]
- Legal scholar Kimberlè Crenshaw: "[R]acism is a central ideological underpinning of American society."[140]
- African-American philosopher Cornel West: "This society is chronically racist, sexist and homophobic."[141]

One group disadvantage theory, advocated by Charles Lawrence, calls for a "cultural meaning" test to invoke heightened scrutiny at the judicial level:

> This test would evaluate governmental conduct to see if it conveys a symbolic message to which the culture attaches racial significance. The court would analyze governmental behavior much like a cultural anthropologist might: by considering evidence regarding the historical and social context in which the decision was made and effectuated. If the court determined by a preponderance of the evidence that a significant portion of the population thinks of the governmental action in racial terms, then it would presume that socially shared, unconscious racial attitudes made evident by the action's meaning has influenced the decisionmakers. As a result, it would apply heightened scrutiny.[142]

Comparing Freeman's "perpetrator perspective" view of judicial interpretation of the Equal Protection Clause with Lawrence's "cultural meaning" test demonstrates a substantial gap between the Supreme Court's view of racial equality and that of those seeking

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139 Id. (quoting Henry Louis Gates, Jr., Loose Canons: Notes on the Culture Wars 50 (1992)).

140 Id. (quoting Kimberlè Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1336 (1988)).

141 Id. (quoting Cornel West, Keeping Faith: Philosophy and Race in America 236 (1993)).

142 Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 356 (1987) [hereinafter Lawrence, The Id, the Ego, and Equal Protection]. See also generally Charles R. Lawrence III, Book Review, "Justice" or "Just Us": Racism and the Role of Ideology, 35 Stan. L. Rev. 831 (1983) [hereinafter Lawrence, "Justice" or "Just Us"] (reviewing David L. Kirp, Just Schools, The Idea of Racial Equality in American Education (1982)).

to protect the socially disadvantaged (or to protect against social injustice, as defined by Professor Simon).

Much of the foregoing discussion has concentrated on what a colorblind society is *not*, and offers some commentary on how advocacy of a colorblind Constitution fails to protect genuine minority interests. At the heart of the competing slogans for equal protection—present "colorblindness" and present "race-consciousness"—are two words, disregarded by advocates of the former and attested by advocates of the latter. Racism exists.

When the institution of racism is established, then the concepts of social equality (or inequality) and social discrimination are not the same concepts with respect to white Americans as they are with respect to black Americans. In other words, white domination that seeks to subordinate the black race is not the same concept as legislative attempts to place the races on equal footing, via affirmative action. Should it be true that the Constitution absolutely prohibits both, racism proves peculiarly problematic to the concept of majority rule, examined in the next Section.

B. Majority Rule and the Problem of Racism[143]

An underlying concern of constitutional democracy is to contrive "ways of protecting minorities from majority tyranny that is not a flagrant contradiction of the principle of majority rule."[144] The Section above illustrates that the problems of social inequality and group discrimination weigh heavily on blacks in this society—much more heavily than they do on whites. Majority rule by white Americans exacerbates the dilemma, since white preferences find their way into government activity by the very process of majority rule. The Constitution is designed to protect against such oppression, since "a majority with untrammeled power to set governmental policy is in a position to deal itself benefits at the expense of

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143 Much of this discussion stems from a collection of essays on majorities and minorities in Nomos XXXII: Majorities and Minorities (John W. Chapman & Alan Wertheimer, eds., 1990) [hereinafter Nomos XXXII].

144 Ian Shapiro, Three Falacies Concerning Majorities, Minorities, and Democratic Politics, *in* Nomos XXXII, supra note 143, at 79, 79-80 (quoting John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 7-8 (1980)).

the remaining minority."[145] Until the post-modern era, however, the Constitution provided no such protection. State governments, reflecting white majority preferences, mandated caste systems through as many means as they were permitted by the flexible (and almost meaningless) interpretation of the Constitution. "Colorblindness" in this context quite simply requires a more rigid application of equal protection of the law.[146]

Just as racism has reciprocated from the blatant racism of the past to the aversive racism found today, white majority preferences are also no longer as overtly discriminatory. Still, white Americans are rediscovering a loyalty to their own race, something their ancestors took for granted.[147] New forms of prejudice have created an academic war regarding the validity and exponents of symbolic racism (whites see blacks as violating cherished moral precepts); group conflict (whites equate improving the status of blacks with lowering the status of whites); self-interest (whites see raising the status of blacks as a direct threat to their own well-being); and stratification beliefs (whites believe that, since individual prejudice has declined, blacks now have the same chances as whites to succeed on their own).[148] According to Professors Jennifer L. Hochschild and Monica Herk,

> most whites now say "yes" to racial equality and integration, then add some sort of "but . . ." to their affirmation. It is that phalanx of "but . . . s" that blacks see when they decry white racial hypocrisy,

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145 Id. (quoting Ely, supra note 144, at 7-8). See also Bruce Ackerman, Social Justice in the Liberal State 323 (1980) ("[N]o modern contractarian has succeeded in vindicating majority rule without, at the same time, undermining the foundation of individual rights.").

146 This interpretation of colorblindness, as introduced by Justice Harlan in *Plessy*, is the foundation of "Colorblind I" in infra Part II.

147 See D'Souza, supra note 106, at 388.

148 See generally Jennifer L. Hochschild & Monica Herk, "Yes, But . . .": Principles and Caveats in American Racial Attitudes, *in* Nomos XXXII, supra note 143, at 308. Professors Hochschild and Herk note that some analysts argue that prejudice has declined little and discrimination hardly at all. See id. at 308 (citing Alphonso Pickney, The Myth of Black Progress (1980); Robert B. Hill, The Illusion of Black Progress, 9 Soc. Pol'y, 14 (1978)). The debate over symbolic racism, group conflict, self-interest, and stratification beliefs are associated with the view that biological racism is declining, but that new forms of prejudice have arisen. See id. I present this debate merely as introductory to illustrate potential white preferences reflected in legislative activity.

> and it is the combination of "yes" and "but" that makes American racial politics so difficult to negotiate.[149]

Judicial review of affirmative action seems to reflect this predilection, if one assumes the "yes . . . but" principle and caveat are white majority preferences. The evil rendered unconstitutional since the middle of the last decade by judicial review is the action taken by the legislature, creating somewhat of an antilogy to the fear of the tyranny of majority rule. One may consider the populist's interpretation of voting, where the majority's opinions *must* be right and respected because the liberty of the people stems from the will of the people.[150] Contrasting this limited view is the Constitutionalist's argument that judicial review should be enhanced as an effective democratic remedy against defects in majority rule.[151] The modern colorblind theory circumvents the concept of majority rule, instead creating a mirror argument of the first colorblind theory, where legislative activity was motivated by preferences of white/majority domination and black/minority subordination. Colorblindness now almost seems to paint a mysterious picture that affirmative action by the legislature creates a new domination of sorts, and creates an undue dilemma on whites. Lost in this argument is the fact that the white majority retains power of the vote, and is not restricted from resorting to the polls, rather than the courts. This Subsection reintroduces the theoretical problems[152] associated with the protection of minority rights in a ma-

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149 Id. at 309. Professors Hochschild and Herk note that

> the implications of this view for social scientists and philosophers reach past American race relations. Our argument suggests the need to move beyond aggregating data about individuals to considering the collective impact of different, even contradictory, views. More particularly, it suggests to social scientists a way to use survey research to raise, if not resolve, issues of social structure and policy choice. It also suggests to philosophers ways to think about shifting the unit of analysis from individuals to collectivities without running into the classic problems of methodological reductionism and functionalism.

Id. at 309-10.

150 See Shapiro, supra note 144, at 95.

151 See id.

152 The theories discussed below consist of classic utilitarianism, pluralism, public-choice theory, and civic republicanism. This Section concludes with a comment about the antimajoritarian constitutional restraints. These by no means represent a full state of

jority-ruled democracy. I chose first to discuss the concept of majority rule with respect to utilitarianism, for pluralism is largely based on an antecedent belief in utilitarianism. We will then see how neither pluralism nor assimilationism has been a viable tool for protecting minorities against majority rule.

1. Underlying Utilitarian Concepts

John Stuart Mill's notion of "tyranny of the majority" has been viewed as partial criticism of utilitarianism's "inability to provide an adequate theoretical foundation for securing individual rights and the protection of minorities."[153] Common criticism usually points to the phrase "the greatest happiness in the greatest number" as a "clear declaration of majority ascendancy."[154] Professor Frederick Rosen centers his attention more on the position of Jeremy Bentham, with some discussion on John Stuart Mill (including Mill's "tyranny of the majority" notion).[155] Rosen points to the fact that Bentham was indifferent to the concept of majority rule,[156] noting that with respect to commentary on the first Greek

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political theories. Obviously absent is economic theory, which I have chosen to omit from the discussion.

153 Frederick Rosen, Majorities and Minorities: A Classical Utilitarian View, *in* Nomos XXXII, supra note 143, at 24, 24 (observing the problem of majority rule and minority rights from the "classical utilitarianism" perspective, and suggesting that common criticisms that utilitarianism fails to provide adequate protection for minorities in a system of majority rule).

154 Id.

155 Id. at 37.

156 See id. at 25. Rosen provides commentary from Bentham on the first Greek Constitution (the Constitution of Epidaurus of 1 January 1822), which excluded Jews and Muslims form citizenship and office, as an example of Bentham's indifference to the concept of majority rule:

> The exclusion put on this occasion upon so large a part perhaps the largest part of the existing population is at present it would seem an unavoidable arrangement but it is a highly deplorable one. It entails upon the country the existing division, reversing only the position of the condivdent races. It places the Turks under the Greeks [as] the Helots were in under the Spartans, in the situation that the Protestants in France were in under the Catholics, in Ireland the Catholics under the Protestants, in the Anglo-American United States the Blacks under the Whites. In no country can such schism have place but in point of morality and felicity both races are, in howsoever shapes, sufferers by it: the oppressors as well as the oppressed.
>
> To lessen the opposition of interests—to bring them to coincidence as speedily as is consistent with security should therefore be an object of constant care and endeavour.

Constitution, "Bentham's position does not depend on whether or not those excluded [from citizenship and office] constitute a minority or a majority."[157] Bentham offers examples of both minorities repressed by majorities (American blacks by American whites), and oppressed majorities under minorities (Irish Catholics under Irish Protestants).[158]

Rosen examines Bentham's approach to majority rule through the idea of a utilitarian's "self-regarding prudence," which Rosen says evokes the concept of self-interest:[159]

> For the individual every object of motivation creates an interest so that each person would seem to have an incalculable number of interests. Furthermore, each might be motivated by different goals and desires so that his interests will be not only difficult to calculate but also potentially subjective. Although not denying these difficulties with the concept of an interest, Bentham would have argued that the most important interests are those that individuals share with others, and, for purposes of legislation, these might be reducible to a few essentials, the most important of which is security. Each person has an interest in his own security, which for Bentham is so fundamental that all other interests are subordinate to it.[160]

Id. at 25-26 (quoting Bentham Manuscripts, University College London, cxxvi, at 192, and citing Frederick Rosen, Bentham's Constitutional Theory and the Greek Constitution of 1822, 25 Balkan Stud. 31-54 (1984)) (alteration in original).

157 Id. at 26.

158 See id.

159 The concept of self-interest transcends into the more modern theory of pluralism. See infra notes 188-207 and accompanying text.

160 Id. at 27. Mill also emphasizes the importance of security.

> Nearly all other earthly benefits are needed by one person, not needed by another; and many of them can, if necessary, be cheerfully foregone, or replaced by something else; but security no human being can possibly do without; on it we depend for all our immunity from evil, and for the whole value of all and every good, beyond the passing moment; since nothing but the gratification of the instant could be of any worth to us, if we could be deprived of everything the next instant by whoever was momentarily stronger than ourselves.

The utilitarian concept of security in modern racial relations cannot be emphasized with the same vigor as it would apply in early periods of history. In a political context, the utilitarian's greatest happiness principle means primarily that maximization of security is applied to all members of society equally.[161] The maximization or advancement of security includes protection against invasion, crime, famine, hunger, illness, oppression, and the abuse of power.[162] One may place the notion of security in the context of white majority domination—particularly the caste system of segregation and the frequency of lynchings—to understand Bentham's and Mill's concepts of security:

> Security means, for the most part, protection against pain, and this distribution of pain is the special province of the legislator who, given the varieties and the subjective nature of much pleasure, cannot possibly know what will provide pleasure for each member of society. The province of the legislator is the protection of each individual in society against the pains from which he, together with all other members, wishes most to be protected. This is the realm of security that is the main constituent of the greatest happiness principle.[163]

Although Bentham and Mill concurred regarding the importance of security, Bentham's idea of security against rule meant the protection of the majority from the misrule of the minority.[164] Bentham conceptualized a constitutional democracy placing sovereignty into the hands of the people, so as to protect the subject many from the ruling few.[165] Within this framework, Bentham emphasized the "public opinion tribunal" as the main institution that could represent the public interest and advance reform strategy.[166] By comparison, Mill warned against the "absolute author-

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Id. at 27 (quoting John Stuart Mill, Utilitarianism, *in* 10 Collected Works of John Stuart Mill 251 (J.M. Robson ed., 1969) [hereinafter Collected Works]).

161 See id. at 28.

162 See id.

163 Id. at 30.

164 See id. at 31.

165 See id.

166 Id. at 39 (citing Jeremy Bentham, Constitutional Code, *in* 1 Collected Works of

ity of the majority of themselves" and refers to this authority's influence as extending to the "despotism of Public Opinion."[167] Mill advised all interest must be equally represented, for society cannot be equal unless all interests are to be consulted:[168]

> [S]ociety between human beings, except in the relation of master and slave, is manifestly impossible on any other footing than the interests of all are to be consulted. Society between equals can only exist on the understanding that the interests of all are to be regarded equally. And since in all states of civilization, every person, except an absolute monarch, has equals, everyone is obliged to live on these terms with somebody; and in every age some advance is made toward a state in which it will be impossible to live permanently on other terms with anybody. In this way people grow up unable to conceive as possible to them a state of total disregard of other people's interests. They are under a necessity of conceiving themselves as at least abstaining from all the grosser injuries, and (if only for their own protection) living in a state of constant protest against them. They are also familiar with the fact of co-operating with others and proposing to themselves a collective, not an individual, interest as the aim (at least for the time being) of their actions. So long as they are co-operating, their ends are identified with those of others; there is at least a temporary feeling that the interests of others

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Jeremy Bentham 157-58, 317-21, 329-37 (J.H. Burns et al. eds., 1983) [hereinafter "Collected Works"]). According to Rosen, Bentham seemed to defer to public opinion as embodying the greatest happiness principle. See id.

167 Id. at 37 (quoting John Stuart Mill, Bentham, *in* 10 Collected Works, supra note 160, at 106-07). Rosen notes that Mill makes no direct reference to Bentham when the former introduces "tyranny of the majority" in *On Liberty*. See id. at 38 (citing John Stuart Mill, On Liberty, *in* 18 Collected Works, supra note 160, at 219-20). Rosen disregards conceptualizing Bentham's theory of constitutional democracy as embodying the idea of majority rule, so the concept of "tyranny of the majority," according to Rosen, cannot apply to Bentham's theory. See id.

168 See John Stuart Mill, Utilitarianism 40 (Oskar Piest, ed. 1957).

are their own interests.[169]

One misconception of this passage would be to conclude it condones such actions as allocating a legislative benefit to a minority group, such as the case of an affirmative action program. "[I]t is, by universal admission, inconsistent with justice to be *partial*—to show favor or preference to one person over another in matters to which favor and preference do not apply. . . . Impartiality where rights are concerned is of course obligatory . . . ."[170]

The concepts of equal representation of all interests and impartiality of the government actor have extended beyond utilitarianism and into the more modern theory of pluralism. As this discussion of utilitarianism is merely introductory, it is sufficient to note that the utilitarian theory most likely would not support an affirmative action program.[171] The concept of equal representation of interests finds its way into the pluralist model through a belief that one group's interests are not inherently better than another's.[172] All groups stand on substantially equal footing, relating to the impartiality of the government actor. Neither of these con-

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169 Id. at 40-41.

170 Id. at 56 (emphasis in original). Mill continues,

> Impartiality, however, does not seem to be regarded as a duty in itself, but rather as instrumental to some other duty; for it is admitted that favor and preference are not always censurable, and, indeed, the cases in which they are condemned are rather the exception than the rule. A person would be more likely to be blamed than applauded for giving his family or friends no superiority in good offices over strangers when he could do so without violating any other duty; and no one thinks it is unjust to seek one person in preference to another as a friend, connection, or companion. Impartiality where rights are concerned is of course obligatory, but this is involved in the more general obligation of giving to everyone his right.

Id. at 56.

171 The argument would, I think, center around the greatest happiness in the greatest number. An impartial government, considering all interests equally, would allocate a benefit to the select few (the blacks and other minorities) at the expense of the masses (particularly the whites). This allocation would probably not be considered maximization of security, and the pain felt by the majority would be greater than the happiness felt by the few. See Rosen, supra note 153, at 29.

172 Robert Dahl provides much of the empirical support for pluralism. See generally Robert A. Dahl, Democracy and Its Critics (1989); Robert A. Dahl, Democracy in the United States: Promise and Performance (3d. ed. 1976); Robert A. Dahl, Who Governs? Democracy and Power in an American City (1961); Robert A. Dahl, A Preface to Democratic Theory (1956).

cepts, either in the utilitarian nor the pluralist theories, can be deemed a "colorblind" argument. Pluralism recognizes the diversity of groups in society, making distinctions and formulating principles referring to various religious, ethnic, cultural, or sexual diversity.[173] Nevertheless, since pluralism inherits from utilitarianism the abstraction of self-interest, racism may hinder the effectiveness of the diverse groups to further their own interests, particularly those groups formed through similar interests based on ethnicity or culture. Racism causes Professor Feldman to ask, "How can pluralists argue that individuals should rationally pursue their preexisting private interests if, at the outset, racist attitudes and beliefs shape perceptions of self-interest?"[174] The following Subsection addresses not only this question, but also the predicament caused by government or judicial reflection of majority preferences at the expense of the minority.

2. Pluralist Preference-Pushing or Assimilationist Individualism: Blacks in a Lose-Lose Predicament

Strictly in theory, the modern constitutional polemic between race-consciousness (at a societal, not necessarily a governmental, level) and colorblindness would find its distinction between the competing theories of pluralism and assimilation. As noted above, pluralism recognizes distinctions between interests groups, for in a pluralist structure these private interest groups are the key to understanding the public decision-making process.[175] Private individuals, furthering their own self-interests (corresponding to the utilitarian concept of self-interest), form private interest groups in order to press their interests before government officials:[176]

> One engages in political discussion, consequently, only for purely instrumental reasons: to maximize the satisfaction of one's preexisting self-interest. Discussion between citizens never amounts to more than negotiation—an effort to form coalitions by

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173 See Robert L. Simon, Pluralism and Equality: The Status of Minority Values in a Democracy, *in* Nomos XXXII, supra note 143, at 207, 207-08.

174 Feldman, supra note 31, at 1837.

175 This is perhaps best defined in the administrative context. See generally Steven P. Croley, Theories of Regulation: Incorporating the Administrative Process, 98 Colum. L. Rev. 1 (1998).

176 See id. at 31-32.

> bargaining and exchanging support with others. Political discussion and action, in other words, are neither central to one's existence in a political community nor a means of personal or communal transformation. One does not discuss political issues with others to broaden one's perspective, to question one's assumptions, and potentially to transform one's political viewpoints and interests. Instead, all individuals and groups participate in politics only to fulfill their preexisting self-interest.[177]

Advocates of pluralism recognize the need for external checks in the system of preference-pushing, for "[i]f [the process were] unrestrained by external checks, any given individual or group of individuals will tyrannize over others."[178] Curiously, this statement seems to reflect more of a fear of misrule by the few over the many,[179] rather than the opposite, but yet the term "tyranny" is again used to describe the oppression caused by the preferences of one group over other groups. Placing the pluralists' fear of tyranny (or even the utilitarian's fear) in the modern context of affirmative action, it makes little sense that the external check required to de-

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177 Feldman, supra note 31, at 1841. The political process in a pluralist system is often referred as "preference-pushing." As Professor Feldman notes,

> This self-interested struggle is largely unprincipled since pluralism condones the exercise of raw political power. The political marketplace thus often becomes a battleground: to garner political power, one can compromise, goad and coerce others. Ethical values are relative. At the individual level, the ultimate moral standard is one's personal preferences, while at the communal level, the only legitimate measure for choosing between competing values is the political process itself. In determining the substantive values and goals of the community, no criterion of validity stands higher than acceptance by the people in the political arena.

Id. at 1841-42. Feldman offers another definition by Benjamin Barber: "[P]luralist democracy resolves public conflict in the absence of an independent ground through bargaining and exchange among free and equal individuals and groups, which pursue their private interests in a market setting governed by the social contract." Id. at 1841 n. 24 (quoting Benjamin Barber, Strong Democracy 143 (1984)).

178 Dahl, A Preface to Democratic Theory, supra note 172, at 6. See also Feldman, supra note 31, at 1841 & n. 25 (noting that the political marketplace often becomes a battleground).

179 In other words, "tyranny" reflects more of Bentham's fear of misrule than Mill's fear of tyranny by the majority.

fend against the oppression should be a judicial check.[180] If the "yes . . .but" caveat is a majority preference, in the pluralist system the majority should form its interest group[181] and press to have government action reflect this preference. Instead, the preference reflected benefits the minority group, and the white majority preference is reflected as a judicial check, under the semblance that the external check is a colorblind Constitution.[182]

In a rough historical sketch, it might be argued that when government action reflected a domination by the white majority, the white majority favored (or would have favored) the pluralist theory. The black struggle for equality during this period did not necessarily refute pluralism, but rather urged an external check to the dominant white majority, in order to counteract the tyranny caused by that dominant white majority preference. When government action no longer reflected white majority preference (i.e., government initiated the affirmative action programs), there was no longer a need for external checks in pluralist decision-making, and arguments supporting assimilation by whites strengthened.[183] As-

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180 This statement is reflected in terms of pluralist theory, not constitutional theory.

181 The interest group preferences reflected should not indicate that the interests reflected are necessarily determined by the race of the person. A single African-American preference may reflect disagreement with the institution of affirmative action, while an Anglo-American's preference may support it.

182 One might compare this external check in a pluralist system with an external check required when the dominant majority preference is the subordination of a minority culture. If government action reflects this preference, as it did with mandated segregation of the races, then a judicial check is required because the majority preference creates the feared "tyranny" by the majority.

183 Derrick Bell's interest-convergence thesis argues that blacks gain social justice only when their interests happen to converge with those of the white majority. See Feldman, supra note 31, at 1842 & nn. 27, 29 (quoting Derrick Bell, Race, Racism and American Law 39 (2d ed. 1980); Derrick Bell, *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 526 (1980) [hereinafter Bell, Interest-Convergence Dilemma]). According to Bell, "[T]he degree of progress blacks have made away from slavery and toward equality has depended on whether allowing blacks more or less opportunity best served the interests and aims of white society." Bell, Race, Racism and American Law, supra, at 39. Bell argues, for example, that the Supreme Court ended school segregation in *Brown I*, only because the interests of blacks and middle- to upper-class whites happened to converge. See Bell, Interest-Convergence Dilemma, supra, at 518, 526. Feldman compares this sentiment with that of Malcolm X, who wrote, "Uncle Sam has no conscience. They don't know what morals are. They don't try and eliminate an evil because it's evil, or because it's illegal, or because it's immoral; they eliminated it only when it threatens their existence." See Feldman, supra note 31, at 1842 n. 27 (quoting Malcolm X, The Ballot or the Bullet (April 3, 1964), *in*

similationism denies many pluralist claims.[184] In its strongest form,[185] "normative ethnic assimilationism would deny that ethnic diversity is even permissible within society."[186] One assimilation advocate argues, for example, that in a sexually equal society, no more attention should be paid to sex than society pays to one's eye color.[187] The distinction between assimilationism and pluralism seems to illustrate a potential distinction between the white majority preference of subordination versus the white majority preference of colorblindness, but this distinction is flawed because racism inhibits the theory of pluralism from effectively equalizing the races.

a. Pluralism and the Dilemma of Group Harm

Pluralism's central assumption, "that self-interest is the exclusive causal agent in politics,"[188] creates a serious drawback to the pluralist theory.[189] Professor Feldman observes that extensive research has shown that people are motivated to act on many consid-

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Malcolm X Speaks 23, 40 (George Breitman ed., 1965)).

184 Professor Robert Simon comments that assimilation denies certain pluralistic claims. See Simon, supra note 173, at 209. In its strongest form, Simon claims, assimilation denies even minimal pluralistic claims. See id.

185 Simon considers assimilation in his article primarily with respect to the "strong" claim. Id.

186 Id.

187 See Richard Wasserstrom, Racism and Sexism, *in* Today's Moral Problems 20-21 (Richard Wasserstrom, ed, 1985).

188 Daniel Farber & Phillip Frickey, Law and Public Choice: A Critical Introduction 12, 24 (1991). See also id. at 13-16; infra note 191 and accompanying text.

189 See Feldman, supra note 31, at 1844 (noting that the narrow focus on self-interest represents a dangerous "[m]otivational reductionism," portraying people as "rational fools." (quoting Stephen Holmes, The Secret History of Self-Interest, *in* Beyond Self-Interest 267, 275 (Jane J. Mansbridge ed., 1990) [hereinafter Beyond Self-Interest] (arguing that self-interest represents motivational reductionism); Amartya K. Sen, Rational Fools: A Critique of the Behavioral Foundations of Economic Theory, *in* Beyond Self-Interest, supra, at 25, 37)). Sen refutes (and illustrates the absurdities in) the notion that people act solely from self-interest.

> [The] assumption [is] that when asked a question, the individual gives that answer which will maximize his personal gain. How good is this assumption? I doubt that in general it is very good. ("Where is the railway station?" he asks me. "There," I say, pointing to the post office, "and would you please post this letter for me on the way?" "Yes," he says, determined to open the envelope and check whether it contains something valuable.)

Sen, supra, at 35.

erations other than the rational pursuit of self-interest.[190] Greed does not appear as the worst force in human psyche[191] as a factor often outweighing or overcoming self-interest.[192] Instead, "one of the most ignoble forces is racism":[193]

> The significance of racism in American society renders implausible any appeal to self-interest as a determinative force in achieving social justice for the nonwhite poor. Studies of political issues related to race, such as school busing and affirmative action, suggest that racial intolerance is much stronger than self-interest as an influence on individual preferences. [One social psychologist] writes that individuals "tend to perceive themselves as having similar or identical goals to members of

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190 See Feldman, supra note 31, at 1845

> ("For example, the simple act of voting is irrational from an economic standpoint because the costs in time and effort clearly outweigh any potential benefits that are likely to flow from one's single vote, yet many people nonetheless choose to make this economically futile gesture. Moreover, contrary to what many believe, evidence strongly suggests that members of Congress care about the merits of issues and the public interest, not just reelection.").

See also id. at 1845 n. 53 (citing John Elster, Selfishness and Altruism, *in* Beyond Self-Interest, supra note 189, at 44, 45 (discussing forms of behavior not motivated by self-interest); Robert H. Frank, A Theory of Moral Sentiments, *in* Beyond Self-Interest, supra note 189, at 71, 75 (discussing forms of behavior not motivated by material payoffs)).

191 See Farber & Frickey, supra note 188, at 24. Farber and Frickey are concerned with the public choice theory, which applies the capitalist economic theory to political decision-making. The public choice theory relates to the pluralists view of self interest, because "[t]he heart of the economic approach [to political decision-making] is the assumption that self-interest is the exclusive causal agent in politics." See id. at 23-24; Feldman, supra note 31, at 1840-41 & n. 21 (citing Farber & Frickey, supra note 188, at 7, 13-16).

192 See Feldman, supra note 31, at 1846.

193 Id. Racism is not limited to the self-interest of a white majority consciously and overtly seeking the domination of the black minority. It extends to a form of unconscious racism.

> [R]acism in America is more complex than either the conscious conspiracy of a power elite or the simple delusion of a few ignorant bigots. It is part of our common historical experience and, therefore, a part of our culture. It arises from the assumptions we have learned to make about the world, ourselves, and others as well as from the patterns of our fundamental social activities.

Lawrence, The Id, the Ego, and Equal Protection, supra note 142, at 317, 330. See also generally Lawrence, "Justice" or "Just Us", supra note 142.

> their own group and different or opposed goals to members of other groups."[194] Quite simply, then, racism prevents most whites from recognizing or acknowledging when their interests coincide with African-American interests.[195]

James Fishkin asserts, "I should not be able to enter a hospital ward of healthy newborn babies and, on the basis of class, race, sex or other arbitrary native characteristics, predict the eventual position in society of those children."[196] Fishkin makes the distinction between two components of the idea (or ideal) of equal opportunity: first, the principle of merit ("There should be widespread procedural fairness in the evaluation of qualifications for positions"); and, second, the principle of equality of life chances ("The prospects of children for eventual positions in society should not vary . . . with their arbitrary native characteristics").[197] Professor

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194 John C. Turner, The Experimental Social Psychology of Intergroup Behavior, *in* Intergroup Behavior 66, 97 (John C. Turner & Howard Giles eds., 1981).

195 Feldman, supra note 31, at 1848 (footnote omitted). Professor Feldman continues,

> Pluralistic appeals to self-interest not only are unlikely to overcome the blinders of racism, they are also liable to increase racist beliefs and attitudes. The white majority might occasionally cooperate with the nonwhite poor for instrumental reasons—if cooperation appears necessary to satisfy white interests. When circumstances appear to shift, however, the white majority most likely will continue to follow its self-interest, but now in new directions, which might diverge from the interests of the nonwhite poor. Moreover, when individuals who are generally oriented to self-interest feel threatened, they usually become even more selfish. Any temporary cooperation based on self-interest thus might actually propagate racism and worsen social conditions. Pluralism encourages in-group members to see outsiders as "other."

Id. (footnote omitted).

196 Simon, supra note 173, at 207 (quoting James S. Fishkin, Justice, Equal Opportunity, and the Family 4 (1983)).

197 Joseph H. Carens, Difference and Domination: Reflections on the Relation Between Pluralism and Equality, *in* Nomos XXXII, supra note 143, at 226, 228-29 (quoting Fishkin, supra note 196, at 22, 32). Carens refutes several assertions made by Robert Simon, who rebuts Fishkin's concept that one should not be able to predict the eventual social position of children on the basis of some arbitrary characteristic, such as race or sex. See id. at 227; Simon, supra note 173, at 207-08. Simon defends pluralism, asserting that one may attribute merit to cultural heritage. See Simon, supra note 173, at 207-08. He implies that the success of Asian-Americans in higher education rebuts the notion that cultural heritage is merely an arbitrary characteristic. See Carens, supra, at 227; Simon, supra note 173, at 207-08. Carens characterizes Fishkin's comment that one should not be able to predict social position on the basis of class, race or sex as applying

Joseph Carens urges that the "very concept of equal life chances presupposes a consensus on what is important in life, a consensus that is incompatible with pluralism."[198] He distinguishes between advantaged and disadvantaged groups,[199] and between legitimate inequality and illegitimate inequality,[200] at least insofar as race and sex are arbitrary and illegitimate characteristics for social selection and exclusion.[201]

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to "members of the working class (as opposed to the upper class), blacks (as opposed to whites), and women (as opposed to men)," rather than the comparatively more successful groups such as Asian-Americans in higher education. Carens, supra, at 227. "For each pair, we can predict that members of the first group will do less well on average than members of the second with respect to such things as education and income." Id.

198 Carens, supra note 197, at 229. Carens then suggests that equal life chances is more compatible with assimilationism. "[E]qual life chances would require 'equal developmental conditions,' which could be created only be eliminating all differences among groups, that is, by assimilation." Id. (quoting Fishkin, supra note 196, at 32).

199 Carens uses Asian-Americans and the upper class as examples of advantaged groups. See id.

200 Carens compares the legitimate inequality of the Amish with the illegitimate inequality of the blacks. See id. at 233-39. The former segregate themselves from society, thus creating for themselves an unequal life, at least in terms of materiality. See id. at 233-35. The latter has "less of what most Americans want," but not by their own choice. Id. at 235.

201 Carens recalls a story by Malcolm X, when the latter was an eighth grade student. See id. at 227. He was at the top of an integrated class. See id. A teacher (described as well-meaning and full of advice) asked whether Malcolm had given any thought to a career. See id. Malcolm replied he wanted to be a lawyer. See id. The teacher replied,

> Malcolm, one of life's first needs is for us to be realistic. Don't misunderstand me, now. We all like you here, you know that. But you've got to be realistic about being a nigger. A lawyer—that's no realistic goal for a nigger. You need to think about something you *can* be. You're good with your hands—making things . . . Why don't you plan on carpentry?

Id. at 228 (quoting Malcolm X, The Autobiography of Malcolm X 36 (1966)). Carens responds,

> It is impossible to hear such stories without having the reaction that this sort of thing is so unfair, so arbitrary. It is arbitrary not in the sense that it is random or that we cannot offer social explanations of the phenomenon or that it does not contribute to the preservation of patriarchy and racial domination. Rather it is arbitrary from the moral point of view, arbitrary in the sense that there is no morally legitimate reason for treating people this way. To call race and sex arbitrary characteristics in this context then is not to deny that they may be central to a person's identity and sense of self. It is to say that they are illegitimate criteria of social selection and exclusion. To say "because you are a woman" or "because you are black" is not to offer an adequate reason for denying someone an opportunity to de-

Carens' concentration on illegitimate inequality, similar to Feldman's concentration on rejection of pluralism because of racism, centers on the continued effect of domination by white society.[202] He refers to a suggestion that inequality today is caused not by domination, but by differences between blacks and whites.[203] Some authors, he notes, have suggested that the black culture does not strive for educational achievement, which is an important key to employment and income:[204]

> Why might that be? One plausible answer is that black culture is in important respects a culture of subordination. Socialization is a source of power, and cultural differences between groups may reflect and embody relations of domination and subordination. Children from dominant and subordinate groups receive different sorts of socialization. Children from subordinate groups are taught by schools, but also by their families and peers, not to aspire to positions possessed by members of the dominant groups, not to expect equal treatment from authorities, not to challenge the status quo or to show ini-

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> velop his or her talents to pursue a career. If group differences and inequalities are connected in this way, they are morally wrong.

Id.

202 Carens himself recognizes racism as a "powerful and pervasive force in American life, often openly influential, but even more often covertly and in ways the people involved do not themselves understand." Id. at 235. Carens advocates affirmative action programs because he does "not think it possible in most spheres to create procedures for evaluating merit that are free of racism, at least of the unconscious variety." Id. at 235-36. "In a multitude of ways, American society creates a hostile environment for blacks, one in which it is harder for them than for whites to develop their potential and to flourish." Id. at 236.

203 See id. at 236-37.

204 See Carens, supra note 197, at 236-37. Many of these same authors, Carens argues, believe that racial discrimination is a thing of the past.

> They point out that laws mandating segregation have been replaced by laws prohibiting discrimination in education, housing, and employment. . . . They point to the success of other groups like Jews and Asian-Americans who have also been the victims of discrimination and exclusion and who now do better in many ways than others. They conclude that the lower than average success rate of black Americans must therefore be due to cultural characteristics of black life.

Id. at 236.

> tiative, and so on. In some respects this reflects a prudent recognition of the dangers of excessive ambition, but it also reflects, at least in part, internalization of subordination. A group that has consistently been denied access to things the dominant groups in society value may come to say it does not want these things anyway . . . . A group culture that has been significantly shaped by this sort of adaptation cannot be used to legitimate the inequality of which it is a product.[205]

These arguments against political pluralism asseverate many of the same claims as the psychological and sociological claims that group harm and stigma affect blacks, as a subordinated group in society,[206] differently (and more inequitably) than they do whites. The effect of centuries of group oppression by the white majority has placed the group of black Americans in a position of a subordinated class, which should be a basis for rejecting pluralist ideals, particularly because legislation reflected this white majority preference. At the same time, however, the group struggle to achieve equality has bound blacks together, and created strength in pressing the black Americans' interests in the legislative process, albeit with substantial resistance from the white establishment:

> "Defensive" identification with an ethnic or religious group has always been a major source of cultural pluralism in America; the victims of domination become bound together in a community, a "fraternity of battle." Yet when the members of cultural minorities have intensified their group attachments by living in ethnic neighborhoods, or focusing their economic dealings within the ethnic communities, or founding ethnic social or political organizations, the outside world has been ready to call them "clannish" and unassimilable. Like many another process involving social subordination, this one is circular. The exclusion of members of the cultural minority from full participation in the lar-

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205 Id. at 237-38.

206 See supra notes 198-99 and accompanying text.

> ger society causes them to focus their need to belong on the cultural group itself; and this very solidarity stimulates further outside suspicion and hostility.[207]

The struggle of black American interest groups to press the interests has been and will most likely continue to be an escalating struggle against hostile opposition. Through this struggle, the black interest groups have pressed legislation to counter the white domination preference from being reflected in the legislative action. This does not suggest that political pluralism is the ideal for achieving equality, for racism of the aversive variety could easily hinder the ability of the pluralist system to achieve equality. Moreover, it would be a mistaken assumption that blacks desire to continue this escalating struggle to have their preferences pressed through legislative action. Just as blacks have made gains through the pressing of their interests, interest groups may likewise press legislation in the opposite direction. Black interest groups may be able to withstand the opposition in the political realm, but the opposing forces have chosen a different route—one that circumvents the legislative process altogether and relies on the judicial process that failed the blacks from the drafting of the Equal Protection Clause until midway through this century.

b. Assimilationism on White Terms

The first Section of this Article concentrated on how racial attitudes affect blacks in the United States much differently than whites. The effects of the racial imbalance may be viewed through the pluralist theory, since white society banded together to push its collective interest to subordinate members of the black race. Dat-

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207 Kenneth L. Karst, Paths to Belonging: The Constitution and Cultural Identity, 64 N.C. L. Rev. 303, 326 (1986) (footnotes omitted). See also William Carey McWiliams, The Idea of Fraternity in America 542 (1973); Ronald H. Bayor, Neighbors in Conflict: The Irish, Germans, Jews, and Italians of New York City, 1929-1941 (1978). Professor Karst comments that

> [p]ersonalism and nepotism have been seen as ways of surviving in a hostile environment. Some forms of economic activity are suited for this kind of defensive response to adversity, for they are "located within a particular kind of social network: close quarters, daily routines, local connections, personal service, familial cooperation."

Karst, supra, at 326 n. 149 (quoting Michael Walzer, Spheres of Justice 161 (1983)).

ing beyond Jim Crow laws and the Black Codes, black Americans began to bind together even within the context of slavery. The slaves themselves were culturally diverse, just as the Germans, Italians, English, Irish, Russians, Bosnians, and Serbs are distinct and culturally diverse, yet the common bond of slavery "welded them into one people."[208] Slavery helped shape the diversity of ethnic groups and the pressing of interests in favor or in opposition of those group interests, because "[e]thnic pluralism in America has its origins in conquest, slavery, and exploitation of foreign labor."[209] As slavery evolved into the Black Codes,[210] and the Black Codes evolved into mandated segregation, the caste system continued to remain engrained in society. When the Supreme Court altered its approach to the caste legislation by stressing individual rights, it first recognized *oppression* based on group membership as a violation of equal protection:

> Racial segregation not only stigmatizes its victims; it also excludes them from full participation as members of society, treating them as members of a subordinate caste. An earlier generation of Supreme Court Justices left the matter of segregation to majoritarian politics, which meant, given the disenfranchisement of blacks, the reinforcement of a system of racial subordination in all phases of life. After holding Jim Crow unconstitutional [in *Brown I*], the Supreme Court pronounced the demise of "caste legislation" in America. The attack on caste employed the rhetoric of individualism: henceforth, an individual was not to be treated as less than an equal citizen because of his or her membership in a racial . . . group. This "anti-discrimination principle" is individualistic in outlook: treat each person

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208 See Karst, supra note 207, at 320. See also, e.g., John W. Blassingame, The Slave Community: Plantation Life in the Antebellum South 147 (rev. ed. 1979); Ira Berlin, Time Space, and the Evolution of Afro-American Society on British Mainland North America, 85 Am. Hist. Rev. 44, 66 (1980); Stanley M. Elkins, Slavery: A Problem in American Institutional and Intellectual Life 81-90 (3d ed. 1976); Leon F. Litwack, Been in the Storm So Long: The Aftermath of Slavery 514 (1981).

209 Steven Steinberg, The Ethnic Myth: Race, Ethnicity, and Class in America 5 (1981).

210 See Plessy v. Ferguson, 163 U.S. 537, 542 (1896).

> as an individual, not on the basis of group membership.[211]

Colorblindness today hinges on the individual, and *all* racial classifications are deemed inherently destructive.[212] Justices relying heavily on the concept of a colorblind Constitution seek to replace all racial preferences with equal opportunity for all, as if all citizens have been given an equal opportunity to succeed in the first place.[213] Some critics point to the fact that although affirmative action was initiated as a temporary measure, it has failed to be "temporary,"[214] as if to reverse the effects of slavery, exclusion, forced conformity and subordination will take merely one generation to accomplish.[215] Moreover, critics point out that the young people affected by affirmative action "cannot understand affirmative action's application of different rules to different groups."[216]

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211 Karst, supra note 207, at 323-24 (footnotes omitted). Professor Karst continues,

> Yet stigma, like caste, is a group experience. A characteristic like race, unorthodox religion, or ethnicity is identified as deserving of stigma, and the stigma imposed on the whole group of people who share the characteristic. When we invent a "stigma-theory" to justify the stigma, we incorporate our assumptions about the whole group rather than picking on the particular characteristics of this or that individual.

Id. at 324 (footnotes omitted).

212 See Jennifer R. Byrne, Comment, Toward a Colorblind Constitution: Justice O'Connor's Narrowing of Affirmative Action, 42 St. Louis Univ. L. J. 619, 622 (1998) (citing Mary C. Daly, Some Runs, Some Hits, Some Errors—Keeping Score in the Affirmative Action Ballpark from Weber to Johnson, 30 BC.L. Rev. 1, 47 (1988)).

213 Id. at 622.

214 See id. at 621; Terry Eastland, Support is Fading for Racial, Gender, Ethnic Preferences, The San Diego Union-Tribune, July 7, 1996, at G1, *available in* 1996 WL 2168215.

215 See Karst, supra note 207, at 325

> ("Virtually every cultural minority in America has had to face exclusion, forced conformity, and subordination. All these patterns of nativism are variations of the same theme: those who are different cannot belong as full members of the community. The victims of cultural domination, therefore, face a serious problem: they must necessarily live their lives within the larger society, and in order to define themselves they must satisfy their basic needs for connection. They may choose to turn inward to solidarity of the excluded group, banding together to confront the larger society. Alternatively, individual members of the cultural minority may, as to some aspects of their lives and in varying degrees, be assimilated into the culture of the larger society.").

216 Byrne, supra note 212, at 622 (citing Eastland, supra note 214, at G1).

Individualism in this oblique colorblind argument stresses the "I" in every opinion regarding preferences to help the oppressed and long excluded group enter a society that has never welcomed them (that is, "*I*'ve never participated in the discrimination, so why should *I* have to pay the consequences of it"). White individuals may deny they "belong" in any sense to a white dominant majority, and since the Constitution protects only individual rights, they may at the same time enjoy the benefits of a society that does not require them to conform. Blacks, on the other hand, are better served by forgetting they are black and conforming to white society's terms.

The utilitarian principle of self-regarding prudence may now be considered in another light.[217] Originally, affirmative action threatened white society's "security" in its own domination. The idea that subordinate blacks would infiltrate and become equal members of a dominant white society was deemed the legislative abuse of power that the utilitarians recognized as a fear against a person's sense of security.[218] As the white self-interest evolved, through what this theory inherited from utilitarianism, the overt subordination of the minority class was no longer the prescription for pluralism.[219] Instead, white self-interest overtly blinds itself to the underlying racism and discrimination, and expresses fear of the loss of individual security because the white person's self-interest is not being considered equally with the black American's interest. The utilitarian's answer, much like the judiciary's answer, is to eliminate the cause of the insecurity to the white person's interest. Objectively, blacks will continue to be treated "equally," so their sense of security cannot be said to be violated or cause pain. At the same time, the pain through insecurity felt by whites by affirmative action is relieved, and the greatest happiness is achieved in society.

The conclusion that the end of racial preferences causes a greater happiness (or somehow grants equal opportunity to all) adheres as much to the majority preference as blatantly discriminatory self-interests of white Americans expressed through govern-

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217 See supra notes 159-60 and accompanying text.
218 See supra notes 160-63 and accompanying text.
219 See Karst, supra note 207, at 324-25.

ment action. It ignores the barrier of conformity that is necessary for blacks to succeed in the white society; thus, the greatest happiness achieved is the greatest happiness in white society. Assimilation to blacks is synonymous with conformity to white society.[220] "Anglo-conformity" has long come to "dominate the idea of assimilation and thus to redefine the qualifications for being received in our Alma Mater's lap."[221] At a group level, "unassimilable" historically implied that the group seeking to assimilate to the white American society was "not sufficiently similar to the old stock to adapt themselves to a society defined by the old stock's world view, and, therefore, that they should be excluded from the American community."[222] As Professor Karst notes, "It is no wonder that

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220 Professor Jerome Culp, Jr. introduces his article on the effect of the *Brown I* decision by discussing the misconception that blacks who wish to remain bound to their own culture are now part of the problem since they refuse to assimilate to white society. Jerome M. Culp, Jr., Black People in White Face: Assimilation, Culture and the *Brown* Case, 36 Wm. & Mary L. Rev. 665, 666-67 (1995). As an example, he discusses an incident at the University of North Carolina at Chapel Hill:

> [B]lack students . . . demanded from a recalcitrant administration that the university create, or—after they were able to secure financial support from Michael Jordan's mother—permit the creation of a black cultural center on campus. Paul Hardin, Chancellor of the University of North Carolina and dedicated and principled liberal, appeared to do everything in his power to avoid meeting the students' demand. He said he was afraid of separatism and balkanization among students. Chancellor Hardin, a good and decent man, first argued that the university did not have the resources to undertake such an endeavor. He then argued against locating the cultural center near the center of campus. He resisted the students' demands that the center be placed near the seats of intellectual and institutional power on the central campus. In previous years, a number of black students objected to the portrayal of black students in an art work that has one male blackstudent twirling a basketball and one black female figure carrying books on her head. These and other incidents on campuses across the country prompted Garry Trudeau to create a Doonesbury comic strip in which black students demanded separate water fountains. . . . The Trudeau cartoon illustrated what many people believe: that our desire for the full integration of black Americans has come full circle. Many white liberals, and a few blacks, contend that African Americans are now not part of the solution but instead part of the problem.

Id. (footnotes omitted) (citing Joe Drape, UNC Faces Turmoil over Black Cultural Center, Atlanta Journal, Sept. 13, 1992, at A3, *available in* 1992 WL 4620955; Garry Trudeau, Doonesbury, Wash. Post, Sept. 12, 1993 (Sunday Comics section)).

221 Karst, supra note 207, at 312.

222 Id. at 312. Professor Karst comments that "Congress implemented this policy of

the members of some ethnic groups today bristle at the very word 'assimilation' and take it as an affront."[223] Where pluralism had been white America's prescription for the subordination of racial minorities, forced conformity has been its prescription for assimilation. "These two forms of cultural suppression reinforce each other":[224]

> The pressure to conform carries with it an implication that members of the unorthodox cultural group are inferior. Correspondingly, the subordination of a cultural group, even while it intensifies the group's cohesion, undermines confidence in the group's values and perspectives, with the long-term effect of impairing the perceived worth of the group's ethnic identity and thus of promoting conformity to the dominant cultural norms.[225]

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exclusion by denying members of various racial or cultural groups entry into the country and by denying the benefits of citizenship both to certain classes of aliens and to Americans who were black or Indian." Id. at 312-13 (footnotes omitted).

223 Id. at 313.

224 Id. at 324.

225 Id. at 324-25 (footnote omitted). Professor Karst admits an exact definition of assimilation is nearly impossible, but that "there are some measures of assimilation upon which observers can agree: language usage, educational integration, occupational dispersal, residential dispersal, and intercultural marriage." Id. at 333. "By these tests, it is plain that a common pattern prevails for nearly all the ethnic groups in American history: eventually they become largely integrated into the American cultural mainstream." Id. Karst continues:

> What causes assimilation to take place? The details of the mechanism are not well documented, but three generalizations seem true, even in the absence of hard evidence. First, the commonly assumed assimilating effects of occupational mobility in an open society illustrate a larger truth: assimilation is advanced when the members of a cultural minority take part in the institutions and activities of the larger society. It is often said that assimilation is promoted by such behavior as speaking English, attending the public schools, listening to the national broadcast media, entering the job market, joining a union, moving away from the ethnic neighborhood, and voting in public elections. But a person who engages in a significant number of these kinds of behavior *is* assimilated. No bright line differentiates the measures of assimilation from the mechanisms that produce assimilation. The various forms of behavior that indicate assimilation tend to reinforce each other, accelerating assimilation. The reinforcement takes place in people's minds. It is circular: the more a person engages in "mainstream" behavior, the more that person is apt

Even if the overt preference of whites is not suppression of blacks through conformity, the preference of "Yes, *I* want racial equality and integration, but not at *my* expense,"[226] (or something to that effect) indicates an unwillingness to incur *any* pain on the dominant white culture, regardless of the pain felt by the black culture. If "greatest happiness in the greatest number" is indeed reflective of utilitarianism's representation of majority ascendancy, then this majority preference has in fact become reflected in the law. Needless to say, utility is merely one standard by which to judge this preference. But judged by other standards, the ultimate outcome seems generally to favor the white majority preference, no matter what labels are placed on the preferences or values within the political theory. For example, a civic republican's deliberation for the "common good" most likely will not result in an outcome different from that of one that desires the greatest happiness of all.[227] Similarly, an economic theorist would be unable to base the distribution of government benefits and burdens on some abstract or arbitrary principle as the race of the group to be benefited or burdened.[228]

That many of the political theories fail to consider black American's concerns and reflect a dominant white preference would not be as problematic were it not for the role the Supreme Court has played in race relations. The Court's role in race relations due to *Plessy*, however improper and incorrect, was at least

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> to perceive himself or herself as part of the wider American culture and to be disposed to participate in it still further.

Id. at 333-34 (footnote omitted) (emphasis in original).

226 See Hochschild & Herk, supra note 148, at 309.

227 Professor Feldman, for example, finds that pervasive racism presents enormous pitfalls for both the theories of pluralism and civic republicanism. See Feldman, supra note 31, at 1840. "Political pluralism—because it emphasizes individualism and self-interest—most likely will not lead Americans to any long-term commitments to social justice for the nonwhite poor. On the contrary, pluralism is likely to propagate racism and to weaken efforts made toward social justice." Id. He does, however, suggest that civic republicanism is the strongest approach to reducing racism. See id.

228 Judge Posner summarizes the essence of the economic theory's approach to the Equal Protection Clause in his commentary on *DeFunnis v. Odegaard*: "I contend, in short, that the proper constitutional principle is not, no 'invidious' racial or ethnic discrimination, but no use of racial or ethnic criteria to determine the distribution of government benefits and burdens." Posner, supra note 36, at 25. See also generally Stout, supra note 36 (exploring "some of the implications of social choice for judicial review of statutes that burden fundamental rights or employ suspect classifications").

non-intrusive on the legislative process. Several authors have noted that where the court found constitutional violation in *Brown I*, it delayed the elimination of constitutional harm by requiring desegregation with "all deliberate speed"[229] in *Brown II*.[230] Professor Jerome Culp charges that the Supreme Court did not wish to protect the culture or values of the black community in *Brown II*, but that the Court assumed there were no values worth protecting in the black community.[231] The Court's passive role in the years immediately following *Brown II* led the federal government to step up and assure through national legislation that blacks would be guaranteed the civil rights that the Equal Protection Clause should have afforded them in the first place. In this era of judicial activism in the area of civil rights, on the other hand, it is no longer the legislature that necessarily fails to protect the black interest; instead, the Supreme Court has assumed the new role of reflecting the white majority preference. Under a cloak that "Our Constitution is colorblind," the Supreme Court assumes that blacks seek or should seek assimilation, and the Court has imposed "neutral" rules on the discourse between black and white communities.[232] Under this assumption, the quiddity of new era colorblindness is more to the effect that "yes, blacks may assimilate in society, but not at the expense of the existing dominant culture." The Court's neutral, colorblind position thus enforces the existing power of the white majority to dominate the concerns of black citizens. The reflection of the dominant white majority in the law, either through legislative initiative or through judicial activism, is the essence of "Colorblind I, Colorblind II," a historical journey of black suppression and the Supreme Court's role considered in the next Section.

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229 Brown v. Board of Education [Brown II], 349 U.S. 294, 301 (1955).

230 See Culp, supra note 220, at 678. See also Louis Lusky, The Stereotype: Hard Core of Racism, 13 Buff. L. Rev. 450, 457-59 (1964) (suggesting that *Brown I* was the first time the Court ignored remedying constitutional harm suffered by individual plaintiffs in order to fashion a remedy for an entire class of individuals).

231 See Culp, supra note 220, at 678.

232 See id. Professor Culp's comments refer to the racial gerrymandering cases of the 1990s. Several of his comments will again be considered at infra notes 581, 587 and accompanying text.

C. Does Race Matter

It seems that an increasing number of people have come to believe that race does not matter. Public ideology teaches equality and non-racism, and no one today would bar a black child from receiving an education. Contrary to these claims, America is, and always has been, a color-conscious and not a colorblind society.[233] Race is such a powerful aspect of our lives that overcoming it may well be impossible; however, to claim that race should be ignored simply disregards the American reality.[234] In his classic study of race relations in America, Gunnar Myrdal observed: "The subordinate position of Negroes is perhaps the most glaring conflict in the American conscience and the greatest unsolved task for American democracy."[235] Myrdal claimed that the Negro problem is really a white problem as the United States was truly a white man's country, and therefore the Negro's entire life was in some way or another a reaction to white pressure.[236]

Fifty years after Myrdal, the racial debate continues and the task is yet unsolved. The shift has merely been one of lateral positioning—from subordinate black to non-black black. In public debate about racial issues today, as in the past, many people claim that society must be bound by the same morality that would be suitable to a just society—that morality being reflected in the apothegm "colorblind".[237] This is a natural tendency if one exists in an ideal world. The harsh reality however, is that this is not an ideal society—it is rather a society of racial injustice and preferences. It is a society riddled with disparity and unfairness, where a child's life chances vary with his or her color.[238] Racism today is at once inconsistent with the dominant public ideology and yet embedded

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233 See W.H. Knight and Adrien Wing, An Essay to Our Children About Affirmative Action, *in* African Americans and the Living Constitution 208, 222 (John Hope Franklin & Genna Rae McNeil eds., 1995).

234 See id.

235 Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy. (1944). See also supra note 26 and accompanying text and infra note 484 and accompanying text (discussing Myrdal).

236 See Myrdal, supra note 235, at xiv-lix.

237 See K. Anthony Appiah & Amy Gutman, Color Conscious: The Political Morality of Race 109 (1998).

238 See id. at 110.

(if only unconsciously) in each of us.[239]

While our country respects individual achievements, it also recognizes that what people have achieved often depends on the family they grow up with, the schools they have attended, and the neighborhood they grew up in, besides their own ability. People rightly seek a society in which racial prejudice no longer limits opportunity.[240] However, any observer who looks closely enough at American society will see the many conscious and unconscious ways in which the cultural patterns and teachings of racism interfere with an open and just society. As testimony, when an interviewer interested in nomenclature asked the distinguished social psychologist Kenneth Clark, "What is the best thing for blacks to call themselves," Clark replied: "White."[241] Similarly, Cornel West, in *Keeping Faith: Philosophy and Race in America*, suggests that it takes all that is within him to remain hopeful about the struggle for human dignity and existential democracy, noting that not since the 1920s have so many black folk been disappointed and disillusioned with America.[242]

West also expresses concern that the cultural structures (those created by black foremothers and forefathers out of the antecedent fragments of religious and civic traditions, mostly of the cultures around them) that once sustained black life in America are no longer effective, as evidenced by the fact that until the early seventies black Americans had the lowest suicide rate in the United States, but now young black people lead the nation in the rate of increase in suicides.[243] West has put forth two significant reasons why the threat is more powerful now than ever: (1) the saturation of market forces and market moralities in black life and (2) the present crisis in black leadership.[244] These forces, according to West, have left more and more blacks vulnerable to daily lives endured with little sense of self and fragile existential moorings.[245]

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239 See Lawrence, The Id, the Ego, and Equal Protection, supra note 142, at 322.

240 See Sam Roberts, Conversations/Kenneth B. Clark: An Integrationist to This Day, Believing All Else Has Failed, N. Y. Times, May 7, 1995, § 4, at 7.

241 See id.

242 See Cornel West, Keeping Faith: Philosophy and Race in America xvii (1993).

243 See Cornel West, Race Matters 24 (1993)

244 See id.

245 See id. at 25.

Poverty, after all, has a habit of keeping one occupied with the more mundane aspects of life, rather than the politics or capitalistic tendencies of the free market system.

Henry Louis Gates, Jr. would agree with West concerning a black leadership crisis. Gates expresses that the real crisis in black leadership is that the very idea of black leadership is in crisis—that black America needs politics whose first mission is not the reinforcement of the idea of black America, and a discourse of race that is not centrally concerned with preserving the idea of race and the unanimity of race.[246] Gates writes that blacks need something they do not yet have: a way of speaking about black poverty that does not falsify the reality of black advancement, and a way of speaking about black advancement that does not distort the enduring realities of black poverty.[247] In short, blacks have yet to realize the full impact of their electorate powers and their own voices, or the potential of leadership currently limited by economic and, to a lesser degree, intellectual suppression. Given the brief duration of "antidiscrimination" as compared to the length of "discrimination" practices, this is not surprising. Gates does emphasize the area of black arts, as there are so many black artists and intellectuals that matter to demonstrate what can happen when black potential is realized.

Simply then, it would seem that there is a disproportionate voice in the chorus of the nation's population that has yet to be heard, a voice which should not be heard if the nation as a whole is to prosper from its own resources. Whites need not understand or live in a black world in order to survive, but blacks continue to be forced to live in two worlds, or in a colorblind society, in essence, a white world, to survive.[248] It is this prospect, one of disregard or ignorance of color, that denies race as the constant that it is, that prompts these intellectuals to reiterate that race does matter, and in a rapidly changing demographic picture, it matters all the more.

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246 See Henry Louis Gates, Jr. & Cornel West, The Future of the Race 85-86 (1996).
247 See id.
248 See id.

II. SOME IMPOSSIBLE FEAT:[249] THE TREACHEROUS JOURNEY OF "COLORBLINDNESS;" THE GRAVAMINA

John W. Davis, in the first closing arguments of *Brown I*,[250] grasped a quote from black civic leader W.E.B. Du Bois and struck a blow to the back of the collective heads of black American leaders trying to end the institution of segregation.[251] Du Bois' statement indicated it would be a mistake to allow black children into the same schools as white children, raised by parents who hated black children. Thurgood Marshall, NAACP counsel arguing

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249 See Martin Luther King, Jr., Why We Can't Wait 134 (1964). See also The Misinterpretation of the Words of Martin Luther King Jr., J. Blacks Higher Educ., Summer 1998, at 21. Several opponents of affirmative action have used Martin Luther King's words as an attack on affirmative action programs, with one commenting to the *Wall Street Journal*, "Martin Luther King's legacy was not built upon fighting for racial preference policies, and it's unfortunate that we've reached a point now when we're trying to sweep this history under the rug." Id. (quoting the statement of Gerald A. Reynolds, executive director of the Center for New Black Leadership, to the *Wall Street Journal*).
In 1964, King wrote:

> Whenever this issue of compensatory or preferential treatment for the Negro is raised, some of our friends recoil in horror. The Negro should be granted equality, they agree; but he should ask nothing more. On the surface, this appears reasonable, but it is not realistic. For it is obvious that if a man is entering the starting line of a race three hundred years after another man, the first would have to perform some impossible feat in order to catch up with his fellow runner.

King, supra, at 134.

250 *Brown I* was first argued in December 1952. See Carl T. Rowan, Dream Makers, Dream Breakers: The World of Justice Thurgood Marshall 195-99 (1993). The Court determined it needed more information on the school segregation cases. See id. at 203. The case was reargued in December 1953. See id.

251 See id. at 199. Davis relied on a quote from Du Bois which apparently supported the separate but equal doctrine:

> It is difficult to think of anything more important for the development of a people than proper training for their children; and yet I have repeatedly seen wise and loving parents take infinite pains to force their little children into schools where the white children, white teachers, and white parents despised and resented the dark child, make mock of it, neglected or bullied it, and literally rendered its life a living hell. Such parents want their children to "fight" this thing out—but, dear God, at what a cost!
>
> We shall get a finer, better balance of spirit; an infinitely more capable and rounded personality by putting children in schools where they are wanted, and where they are happy and inspired, than in trusting them into hells where they are ridiculed and hated.

Id. at 199-200.

for desegregation, later recalled, "Here was the Devil quoting phony Scripture . . . ."[252] Some twenty-eight years later, in *Fullilove v. Klutznick*,[253] the Supreme Court upheld a program requiring at least 10 percent of federal funds granted for public works to be used to procure services or supplies from African-American businesses.[254] Justice Potter Stewart dissented on the grounds that a program granting preferences to members of minority classes was essentially inseparable from the type of legislative action that separated the races in *Plessy* in 1896.[255] Not unlike Davis' quote of Du Bois, Justice Stewart utilized a symbolic maxim or apothegm as a vice, which would lead quickly to a judicial dismantling of affirmative action: "Our Constitution is colorblind . . . ."[256]

A short history of constitutional interpretation following *Fullilove* will tell us that the Court altered its standard within 15 years after *Fullilove*, deciding cases such as *Croson* and *Adarand* under the doctrine of strict scrutiny.[257] Yet whether the Court seeks to

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252 Id. at 200. Justice Marshall rebutted,

> The significant factor running through these arguments is that for some reason, which is still unexplained, Negroes are taken out of the mainstream of American life, in these states. There is nothing involved in this case other than race and color. . . . If Ralph Bunche were assigned to South Carolina, his children would go to a Jim Crow school. No matter how great anyone becomes, if he happens to be born a Negro, regardless of his color, he is relegated to that school.

Id.

253 448 U.S. 448 (1980).

254 See id.

255 See id. at 522-23 (Stewart, J., dissenting).

256 Id. at 522. Justice Stewart continued,

> [Justice Harlan's] colleagues disagreed with him, and held that a statute that required the separation of people on the basis of their race was constitutionally valid because it was a 'reasonable' exercise of legislative power and had been 'enacted in good faith for the promotion [of] the public good . . . . I think today's opinion is wrong for the same reasons that *Plessy v. Ferguson* was wrong . . . .

Id. at 523.

257 *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 489 (1989), decided in 1989, struck down a set-aside program patterned after the one in *Fullilove*. A year later, the court upheld a federal set-aside program in *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547 (1990), subjecting it to intermediate scrutiny, rather than strict scrutiny, on the basis that it was a federal action rather than a state action. The Court overturned *Metro Broadcasting* in 1995, declaring in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), that all racial classifications would be subjected to strict scrutiny. This Article does not discuss the racial gerrymandering cases, see Lawyer v. Justice, 521 U.S. 567 (1997);

find an important government interest or a compelling government interest does little to explain what the concept of colorblindness has to do with the burden-shifting of the Court's interpretation.[258] In other words, where between important and compelling government interests does the Constitution become colorblind? If the shift in abstract quality and meaning of colorblindness came into being somewhere between 1980 and 1995, the Constitution is not only colorblind, it is also nearsighted. It also fails to recognize that two justices—both affirmative action beneficiaries of sorts[259]—have penned opinions against affirmative action.[260] It also brings to mind the proverb that "[e]verything is according to the color of the glass with which one views it."[261]

The last Part ended by suggesting the Supreme Court's role in equal protection jurisprudence during the last decade has allowed white majority preferences to be reflected in the law. This Part explores the role the judiciary has played in defining colorblindness

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Abrams v. Johnson, 521 U.S. 14 (1997); Bush v. Vera, 517 U.S. 952 (1996); Shaw v. Hunt, 517 U.S. 899 (1996); Miller v. Johnson, 515 U.S. 900 (1995); United States v. Hays, 515 U.S. 737 (1995); Shaw v. Reno, 509 U.S. 630 (1993). See generally Melissa L. Saunders, Equal Protection, Class Legislation, and Colorblindness, 96 Mich. L. Rev. 245 (1997).

258 Several commentators have explained that the heightened standard of review is nothing more than an evidentiary device, "designed to facilitate judicial identification of instances of special treatment that lack an adequate public purpose justification." Saunders, supra note 257, at 307. See also John Hart Ely, Democracy and Distrust 147 (1980); Robert W. Bennett, "Mere" Rationality of Constitutional Law: Judicial Review and Democratic Theory, 67 Cal. L. Rev. 1049, 1077 (1979); Michael J. Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 Colum. L. Rev. 1023, 1033-36 (1979); Cass R. Sunstein, Public Values, Private Interests and the Equal Protection Clause, 1982 Sup. Ct. Rev. 127, 140-43; Joseph Tussman & Jacobus tenBroek, The Equal Protection of Laws, 37 Cal. L. Rev. 344, 356 (1949).

259 See Jennifer R. Byrne, Comment, Toward a Colorblind Constitution: Justice O'Connor's Narrowing of Affirmative Action, 42 St. Louis Univ. L. J. 619 (1998). President Ronald Reagan nominated Justice O'Connor in 1981 as a fulfillment of a campaign promise to nominate a woman to the Court. See Nancy Maveety, Justice Sandra Day O'Connor: Strategist on the Supreme Court 16-17 (1996). Clarence Thomas was nominated by President George Bush in 1991 as a replacement for Justice Thurgood Marshall, the only other African-American Justice on the Supreme Court. See The Oxford Companion to the Supreme Court 870-71 (Kermit L. Hall et al. eds., 1992) [hereinafter Oxford Companion].

260 Justice O'Connor wrote the plurality opinion in *Croson* and the majority opinion in *Adarand*, as well as several of the racial gerrymandering cases. Justice Thomas concurred in *Adarand*.

261 A Dictionary of American Proverbs 106 (Wolfgang Mieder et al. eds., 1992).

throughout several periods in history. A complete historical outline is not offered here, however, for such an effort would prove futile.[262] This Part concentrates primarily on two distinct uses of "colorblind," through the voices of several justices on the Supreme Court: Justice Harlan in his dissents in *Plessy* and *The Civil Rights Cases*; future Justice Thurgood Marshall as a lawyer for the NAACP in *Brown I*; Chief Justice Earl Warren in his opinions in *Brown I* and *Brown II*; Justice Lewis Powell in *Bakke*; then-Justice Marshall in *Fullilove* and *Croson*; Justice Sandra Day O'Connor in *Croson* and *Adarand*; and Justice Clarence Thomas in *Adarand.*

A. The Etymology of Colorblind en Breve[263]

A brief etymology at this point, although certainly not exhaustive, affords critical understanding of the semantic doublings of the term "colorblind". The power of discourse arises from its ability to construct a public narrative and then obstruct counter-

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262 Admittedly, not only would such an effort be futile, it has also already been done several times over. The *Journal of Blacks in Higher Education* estimates that in the last five years alone, more than 100,000 books and articles have been published on the issue of affirmative action. See The Arrival of the Bowen-Bok Study on Racial Preferences in College Admissions, J. Blacks Higher Educ., Summer 1998, at 120.

263 While the author was a student at The Hague Academy of International Law in The Hague, Holland, during a tour of the International Court of Justice, it was noted that the statue of lady justice did not have a blindfold as we normally see her cloaked. This earthly concept was that justice should not be blind. In time this led the author to a reconsideration and evaluation of the conflicting concepts of the term colorblind. Can justice in America not take color into account in light of color-based discrimination or a documented historical reality of colorblind discrimination as a continuing part of the nation's legacy? Yet, the author believes that the nation is seeking to solve and resolve the "American Dilemma" of racial and social injustice and its effects. As Ellis Cose stated,

> America came into existence as a divided personality—a nation that celebrated freedom and proclaimed the equality of man, yet tolerated race-based slavery and offered naturalization only to persons who were free and white. Even in the aftermath of the Civil War, when the nation finally acknowledged that blacks were fully human, too, Americans struggled to find a way to embrace simultaneously the warring gods of social justice and injustice. Justice Joseph Bradley's insistence that before the Civil War, "free colored people" enjoyed "all the essential rights of life, liberty and property the same as white citizens," is a reflection of the need—both legal and psychological—to locate a justification for inequality within an argument for equality. That has been America's dilemma from the beginning.

Ellis Cose, Color-Blind: Seeing Beyond Race in a Race-Obsessed World 180 (1997).

explanations for social reality.[264] Since "colorblind" is both a historical and "philosophical" term, the derivation of the term is intrinsically intertwined with both of these aspects. Andrew Kull traced the language of colorblindness back to petitions that anti-slavery activists submitted to legislatures of free states in the 1830s.[265] Bonnie Wisdom, Judge John Minor Wisdom's wife, traced Justice Harlan's maxim to a metaphor from Albion Winegar Tourgée, a plaintiff's attorney:[266] "Justice is pictured blind and her daughter, the Law, ought at least to be *colorblind*."[267] Tourgée was employed by a "*Comité des Citoyens* to Test the Constitutionality of the Separate Car Law" in Louisiana, organized in 1891 after the Louisiana legislature passed a separate-car bill required "equal but separate" accommodations on all passenger railways.[268] Tourgée, along with Louis Martinet, a prominent lawyer, doctor and newspaper editor, and New Orleans criminal attorney James C. Walker, sought to find a "nearly white" person as a "test case" for the separate-car act:[269]

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264 See Lisa C. Ikemoto, Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles," 66 Cal. L. Rev. 1581, 1585 (1993) (stating that narratives both filter and construct a reality).

265 See Andrew Kull, The Color-Blind Constitution 22-66 (1992). Kull also argued that historical evidence strongly refutes the argument that the framers intended the Equal Protection Clause to "require color blindness on the part of government . . . ." Id. at vii.

266 John Minor Wisdom, *Plessy v. Ferguson*—100 Years Later, 53 Wash & Lee L. Rev. 9, 10-11 (1996) [hereinafter J. M. Wisdom, 100 Years] (citing Bonnie Wisdom, Crusading Carpetbagger 25 (unpublished manuscript) [hereinafter B. Wisdom, Crusading Carpetbagger]). See also supra note 5 and accompanying text.

267 J. M. Wisdom, 100 Years, supra note 266, at 10-11 (emphasis added) (citing B. Wisdom, Crusading Carpetbagger, supra note 266, at 25 (finding that the quote actually came first from a hero in a novel written by Tourgée)).

268 Id. at 13-14. Louisiana at the time was a prime example of the effect of Jim Crow laws in the South. "In Louisiana there were almost as many black voters as white voters until the Constitution of 1898 disfranchised 98 percent of the African American voters in the state." Id. at 13. In 1890, the Louisiana legislature had enacted a statute requiring "equal but separate accommodations" on railroad trains. Id. As the legislature convened, many citizens organized to oppose the legislation, arguing "Citizenship is national and has no color." Many blacks in New Orleans were "Creole," referring, among others, to African-Americans who were descendants of blacks and whites. See id. Many were well-educated and descendants of free African-Americans. See id. at 13-14. These "Creoles" provided leadership for the blacks of New Orleans. See id. at 13.

269 According to Judge Wisdom, the lawyers were concerned with the complexion of the skin of the person chosen for the first test case. See id. at 14. Martinet, who was a leader among the groups opposing the act, objected that in New Orleans "persons of tolerably fair complexion, even if unmistakably colored, enjoy a large degree of immunity

> Tourgée expected to argue that the unreasonableness of segregating such persons was a deprivation of property and a violation of the due process clause of the Fourteenth Amendment. It was also a stigma of slavery and therefore violated the Thirteenth Amendment. A few blacks, very few, had an additional point in wishing to pass as white.[270]

After the first test case failed,[271] Walker, with the apparent cooperation of the railroads, arranged another suit involving Homer Plessy, a man who was seven-eighths white.[272] In the all-too-familiar story, Plessy was arrested for refusing to remove himself to the "colored persons" section. Judge Wisdom notes that a New Orleans police detective apparently had knowledge of the plan.[273] Tourgée and Walker took the case to the Louisiana Supreme Court after Plessy was convicted.[274] At the time the case was decided in front of the Louisiana Supreme Court, interracial marriage was still legal.[275] In the plaintiff's brief, Tourgée argued,

> A man surely has an absolute right to the companionship and society of his wife; and on the other hand, a wife has claims which cannot be denied on the protection of her husband.... The statute

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from the accursed prejudice." Id. Martinet continued, "but I am one of those whom a fair complexion favors. I go everywhere, in all public places though well-known all over the city, and never is anything said to me." Id.

270 Id. Martinet pointed out that these critics had contributed little to the movement against the separate-car act. See id. Walker, the third attorney, wanted to challenge the separate-car law as a burden on interstate commerce. See id. Tourgée replied, "'What we want is not a verdict of not guilty, not a defect in this law but a decision whether such a law can legally' exist under the Thirteenth and Fourteenth Amendments." Id. (quoting letter from Tourgée to Walker). The first test case involved Daniel Desdunes, who purchased a ticket from New Orleans to Mobile. See id. He was arrested, but Desdunes plea of not guilty was sustained because the Judge determined the law did not apply to interstate travel. See id. at 14-15.

271 Desdunes' case was never brought before the Louisiana Supreme Court. See id. at 15.

272 Desdunes was seven-eighths white as well. See id. at 14, 15. Incidentally, the same judge who sustained Desdunes' plea of not guilty also sat for Plessy's first case. See id. at 15.

273 See id.

274 The Chief Justice of the Louisiana Supreme Court had signed the Separate-Car bill two years earlier while governor of Louisiana. See id.

275 See id.

> [also] actually separates parent and child . . . the bottom rail is on top; the nurse is admitted to a privilege which the wife herself does not enjoy.[276]

The first Section of this Article introduced the problems race causes when one attempts to conceptualize the ideal of "equality" in a modern context. Social inequality and social justice are not the same terms when applied to blacks as when these terms are applied to whites. Similarly, whites do not suffer the stigma and group discrimination from which blacks suffer. In trying to guarantee "equality" to all, theorists have often struggled with a government of majority rule protecting the rights of minorities. Justice Henry Billings Brown's majority decision in *Plessy* at the very least illustrates the problem caused by majority rule protecting minority rights. The *Plessy* decision was so unjust, it is worth but a scarce glance at the blatant racism and white domination that existed at the time. But if "Our Constitution is colorblind" is the antithesis to the race-conscious approach found in the majority opinion, and modern cases such as *Fullilove* were decided on grounds just as wrong as *Plessy*, then it should follow that the reasoning given by the majority in *Plessy* would not at all reflect the "equality" sought by the opposition of affirmative action.

Justice Brown recognized that "[t]he object of the [Fourteenth] [A]mendment was undoubtedly to enforce the absolute equality of the two races before the law . . . ."[277] Yet, "in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either."[278] Though this statement is an affirmation that the Constitu-

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276 Id. at 15-16 (alteration in original). Judge Wisdom notes, "A good deal of the brief is spent attacking the arbitrary, uncontrolled authority delegated to the conductor. A similar argument was successfully made in the 1960s based on the delegation of arbitrary discretion to registrars of voters who tested applications on the understanding of the Constitution." Id. at 16 (citing United States v. Louisiana, 225 F. Supp. 353 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965)).

277 Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

278 Id. Justice Henry Billings Brown supports his race-conscious argument by arguing that

> [l]aws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been gener-

tion is race-conscious (in that sense, flagrantly racist), it is quite clearly not the same argument that state action may overcome social prejudice through legislation that makes distinctions based on race.

Ian F. Haney Lopez's general definition of race "as a vast group of people loosely bound together by historically contingent, socially significant elements of their morphology and/or ancestry" seems applicable in the context of colorblind jurisprudence.[279] Furthermore, American blacks come from many different backgrounds, and have but one common characteristic, that being skin color. Yet colorblind jurisprudence, through the recent body of Supreme Court precedents, promote the ahistorical view that racial classifications have been the cause of the racism.[280] Colorblind jurisprudence then, in reality, disregards actual experiences of racial discrimination in the promotion of white dominance.

Justice Brown made three critical assumptions of Tourgée's argument on behalf of *Plessy*. First, he considered the plaintiff's argument assumed that the separation of the races stamped the colored race with a badge of inferiority (the same stigma argument used in *Brown I*, 58 years later). To this, Justice Brown replied, "[i]f this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[281] As discussed *ante*, the result-based theory concentrating on stigma often concentrates on the "badge of inferiority" caused to blacks as a result of affirmative action on the part of the legislature.[282] The Section above also ponders what effect aversive

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> ally, if not universally, recognized as within the competency of the state legislatures in the exercise of police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

Id.

279 Ian F. Haney Lopez, The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice, 29 Harv. C.R.-C.L. L. Rev. 1, 7 (1994).

280 See Conference, Race, Law, and Justice: The Rehnquist Court and the American Dilemma, 45 Am. U. L. Rev. 567, 586 (1996).

281 *Plessy*, 163 U.S. at 551.

282 See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring) (affirmative action programs, as "benign" discrimination,

racism has on the process of selection. If a process excludes essentially all of one race for positions (e.g. four positions for blacks in a public law school), and the blacks blame it on racism, the government actor essentially by denying racism tells those blacks it is by their own construction that they deem the policy racist.

Second, Justice Brown considers Tourgée's argument to assume that "social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races."[283] Obviously, this assumption was based on a principle of government action assuring equality, rather than according preferences to a class. Nevertheless, in considering Justice Brown's rejection of this assumption, one must consider the implications of assimilationism in today's society compared with the preference-pushing in the pluralist theory: "If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals."[284] In 1896, legislation reflected the dominant majority preference. If social equality were to occur in that era, under Justice Brown's analysis, it could only have occurred if the general sentiment of the community was for blacks and whites to choose to do so mutually.[285] As Professor Karst explains, white America will subordinate a class of persons until that class of persons assimilates with the

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> "teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences.").

283 *Plessy*, 163 U.S. at 551.

284 Id.

285 Justice Brown quoted *King v. Gallagher*, 93 N.Y. 438 (1883):

> This end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designated to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it is organized and performed all of the functions respecting social advantages with which it is endowed.

Plessy, 163 U.S. at 551 (quoting *King*, 93 N.Y. at 448).

dominant society.[286] In the years following *Plessy*, this subordination took the form of Jim Crow laws.[287] History tells us this much. But curiously, it was *the* landmark case declaring the Constitution *is* conscious of race that alluded to assimilation, while the "color-blind" decisions today do essentially the same thing.

Finally, and most importantly, the *Plessy* decision declared the power of the dominant race to enact legislation on its own terms.[288] Justice Brown concentrated on the converse:

> [the plaintiff's argument assumes] that if . . . the colored race should become the dominant power in the state legislature . . . it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption.[289]

Justice Brown's characterization of the power of the legislature paints a peculiarly powerless legislation and Constitution, furthering the notion that white majority preference not only happened to be reflected in government action, but that those preferences were almost necessarily reflected in the action:

> Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.

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286 See Kenneth L. Karst, Paths to Belonging: The Constitution and Cultural Identity, 64 N.C. L. Rev. 303, 320 (1986).

287 See id. ("Jim Crow illustrates the main technique of nativist domination: the enforced separation of members of the subordinate cultural group from a wide range of public and private institutions that, in the aggregate, constitute 'society.'"). See also supra notes 115-16.

288 The majority decided *Plessy* under a standard of review more akin to the modern rational basis standard: "[E]very exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class." *Plessy*, 163 U.S. at 550. Moreover, the court decided the case by giving

> large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.

Id.

289 Id. at 551.

> If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them on the same plane.[290]

Ninety-nine years later, Justice Thomas found a similar passivity of the Constitution and of the powerlessness of government: "I believe that there is a 'moral [and] constitutional equivalence' between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect, and protect us as equal . . . ."[291]

In the same dissent Justice Harlan penned the colorblind aphorism, he also warned against the judicial activity several of the latter-day justices believe is the only appropriate means by which to guarantee equality. The standard of the day in 1896 was merely to judge the reasonableness of the legislative activity, and Harlan believed the courts lacked the puissance to dictate the "policy or expediency of legislation":[292]

> "[T]he courts have no other duty to perform than to execute the legislative will, without any regard to their views as to the wisdom or justice of the particular enactment . . . ." There is a dangerous tendency in these latter days to enlarge the functions of the courts, by means of judicial interference with

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290 Id. at 551-52.

291 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring) (quoting Stevens, J., dissenting). Justice John Paul Stevens, in *Croson*, places the power to fashion remedies solely in the hands of the judiciary:

> Legislatures are primarily policymaking bodies that promulgate rules to govern future conduct. . . . It is the judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed. Thus, in cases involving the review of judicial remedies imposed against persons who have been proven guilty of violations of law, I would allow the courts in racial discrimination cases the same broad discretion that chancellors enjoy in other areas of law.

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 513-14 (1989) (Stevens, J., dissenting).

292 *Plessy*, 163 U.S. at 558 (quoting Sedg. St. & Const. Law 324).

> the will of the people as expressed by the legislature. Our institutions have the distinguishing characteristic that the three departments of government are coordinate and separate. Each must keep within the limits defined by the Constitution. And the courts best discharge their duty by executing the will of the law-making power, constitutionally expressed, leaving the results of the legislation to be dealt with by the people through their representatives. . . . If the power exists to enact a statute, that ends the matter so far as the courts are concerned.[293]

That Harlan discussed the judiciary's role in determining the *power* of the legislature, restricted by the Constitution, immediately before discussing the colorblindness of the Constitution, indicates that Harlan was more concerned with the power of the legislature to require separation of the races. This sentiment can be squared with the modern use of strict scrutiny to strike down legislation, but the famous colorblindness argument centered on the *dominance* of the white race. The legislature was powerless under the Constitution to separate the races, because the Constitution prohibits a superior, dominant class of citizens. The dissent says little in support of the notion of the legislature coming to the aid of the minority, since it is apparent that Harlan was concerned that the mandatory separation of the races would allow the dominant class of citizens to circumvent the Reconstruction amendments and place a badge of slavery on the blacks.[294]

Modern race-blindness indicates that the legislatures are powerless either to eradicate racial differences or to enact laws designed to cause detriment or grant a benefit to a certain class based on membership in a class. To attain this reasoning, one cannot

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293 Id. (quoting Sedg. St. & Const. Law 324).

294 Harlan issued a famous warning, comparing the *Plessy* decision with that of *Dred Scott v. Sanford*, 40 years earlier: "In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case." Id. at 559. Moreover, "[t]he arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds." Id. at 562.

look solely to the dissent of Justice Harlan for the basis of this powerlessness; instead, one may only look to Justce Harlan's dissent for an axiom claiming the prohibitive nature of the Constitution. To assert that the legislature is powerless to eradicate past discrimination is to assert the same passivity indicated by the *Plessy* majority. However the reasoning is attained, Harlan manifested only a disdain for the dominant white class to subordinate a minority class, rather than to advocate a Constitution declaring all race-consciousness is forbidden. Judge Wisdom says he admired Harlan, but that Harlan refused to "go all the way with his strong words":[295]

> The Thirteenth and Fourteenth Amendments are both color-blind and color-conscious. These amendments took cognizance of the Founding Fathers' decision in 1787 not to face up directly to the issue of slavery—in the interest of putting together a viable national government and creating what is, in effect, national citizenship. I see these amendments as reversing *Dred Scott*, bringing the Declaration of Independence into the Constitution, making freed men and their descendants free men and full American citizens. Justice must be color-

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295 J. M. Wisdom, 100 Years, supra note 266, at 19. Judge Wisdom suggested to the Washington and Lee University School of Law Class of 1995 that "[w]hen any person becomes discouraged by what appears to be the failure of African Americans today to recognize the extent of the advances in civil rights since the *Brown I* case in 1954, I suggest that person bear in mind the prophetic words of Albion W. Tourgée in 1890.

> 'It is easy for us to excuse ourselves for the wrongs of slavery, but day by day it is growing harder for a colored man to do so; and it is simply to state a universal fact of human nature to declare that a great and lasting wrong like slavery done to a whole people grows blacker and darker for generations as they go away from it. The educated grandchild of a slave who looks back into the black pit of slavery will find little excuse for the white Christian civilization which forbade marriage, crushed aspiration, and after two centuries and a half offered the world as the fruits of Christian endeavor five millions of bastard sons and daughters—the product of a promiscuity enforced by law and upheld by Christian teachings. Slavery will be a more terrible thing to the Negro a hundred years hence than it was to the calloused consciousness of his nameless father . . . .'

Id. at 19 (quoting Albion W. Tourgée, Address at the First Mohonk Conference on the Negro Question in 1890, at 11 (1880), *quoted in* Arthur Kinoy, The Constitutional Right of Negro Freedom, 21 Rutgers L. Rev. 387, 440-41 (1966)).

> conscious as well as color-blind—color-conscious when it becomes necessary to remedy the evils of past discrimination based on color or to prevent new evils of discrimination based on color.[296]

B. Colorblind I: White Majority Dominance Reflected in Legislative Action

1. The First Reconstruction, Civil Rights, Harlan's 'Dissentery,'[297] and *Plessy*

The history of the Reconstruction following the Civil War reveals that the Fourteenth Amendment was enacted to combat the notorious "Black Codes" of the South following the Civil War:[298]

> The codes were not segregation laws of the kind the South later imposed, though Mississippi, for example, did discourage white persons from assembling or habitually associating with Negroes. Rather, they were an attempt to restrict the Negro's labor and movements in such a way as to continue his economic dependence on the former master class, and to deprive him of the political rights by which he might enlarge his freedom of choice in economic life. These restrictions were favored by the white upper classes, who feared Negro rebellions and disturbance of traditional relations between workers and employers, and by the lower classes, who welcomed the suppression of competition from the freedmen.[299]

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296 Id. at 19-20.

297 According to the *Oxford Companion*, "So frequent and vigorous were Harlan's disagreements with the Supreme Court with the majority on everything from civil rights and due process to the federal income tax and antitrust law that he was joshingly said by his colleagues to suffer from 'dissent-ery.'" Oxford Companion, supra note 259, at 362.

298 Monroe Berger, Equality by Statute 4-5 (1978). The same legislatures that had led the South to rebellion enacted these codes. See id. The southern states established the rights of the newly freed slaves to hold property and regularized their family status, but severely restricted their freedom to work and travel. See id.

299 Id. at 4-5. Berger notes that because of the confusion created by the presence of federal troops in the south, the Southern states were unable to enforce the Black Codes strictly or uniformly. See id. at 5 ("The codes nevertheless attested to the Southern lead-

Several commentators have relied primarily on the concerns of the Black Codes as proof that the Equal Protection Clause was intended to outlaw all race-based laws; thus, according to their view, all race-based state action is preemptively unconstitutional.[300] Professor Melissa Saunders, however, disputes this contention, based on an examination of the record of the 39th Congress, which drafted the Fourteenth Amendment:[301]

> [F]ew of the members who objected to the Black Codes did so on the ground that race had no proper place in governmental decision making. Some found the Codes offensive because they reduced the freedmen to a condition approaching involuntary servitude, thereby undermining the command of the Emancipation Proclamation and the Thirteenth Amendment. Others complained that they denied the freedmen rights that were inherent in their citizenship or belonged to all free men as a matter of natural law. Still others opposed the Codes because they 'discriminated against' the freedmen by singling them out for special disadvantage.[302]

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ers' unwillingness to accept change, which aroused the United States Congress to legislate the political reorganization of the South and the protection of the rights of Negroes.").

300 Saunders supra note 257, at 271. See also William Bradford Reynolds, Individualism vs. Group Rights: The Legacy of *Brown*, 93 Yale L.J. 995, 995-1001 (1984). See also generally William Van Alstyne, Rites of Passage: Race, the Supreme Court, and the Constitution, 46 U. Chi. L. Rev. 775 (1979).

301 See Saunders, supra note 257, at 271.

302 Id. at 271-72 (internal citations omitted). Professor Saunders offers a thorough history of the drafting of the Fourteenth Amendment. She finds that the Equal Protection Clause adopted an antebellum doctrine that prohibited allocating "special benefits or burdens" to certain individuals or classes.

> The general principle that emerged from the [antebellum] cases was something like this: Courts would disfavor laws that singled out certain individuals or classes for special benefits or burdens but would uphold such laws upon a showing that the "discrimination" they worked was designed to further some legitimate "public purpose"—that is, to benefit the citizenry as a whole, as opposed to purely "private" interests of a certain class. Of course, distinguishing "discrimination" that had a legitimate "public purpose" from that which was designed to advance only the special interests of a particular class was enormously difficult. This distinction seems dubious to us today, steeped as we are in modern political theory's teaching that the de-

In addition to the 13th, 14th and 15th Amendments, Congress enacted eleven civil rights laws between 1866 and 1875.[303] The last of these laws, effective March 1, 1875, was intended to resist the tendency of refusal to serve blacks in places of public accommodation.[304] By that time, however, Congress and the Supreme Court had begun to weaken the force of the Reconstruction Acts.[305] In 1883, the Act of March 1, 1875 came before the Supreme Court in *The Civil Rights Cases*, as did the question of the extent of federal power to enforce the equal protection guaranteed by the Fourteenth Amendment.[306] In short, no such federal power existed:

> [T]he legislation which congress is authorized to adopt in this behalf [via section 5 of the Fourteenth Amendment] is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or en-

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> mocratic process is nothing but a struggle between competing interest groups and that all legislation is intended to favor one interest group at the expense of another. But it was a distinction that made sense to lawyers and judges in antebellum America, and it was one with which the framers of the Fourteenth Amendment were intimately familiar.

Id. at 261-62.

303 See Berger, supra note 298, at 6. The eleven acts were of April 9, 1866; May 21, 1866; March 2, 1867; March 23, 1867; July 19, 1867; March 11, 1868; May 31, 1870; February 28, 1871; April 20, 1871; and March 1, 1875.

304 See id. at 7. This law declared that

> all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous conditions of servitude.

Id.

305 See id. at 11. In 1878, Congress attempted to repeal the "enforcement acts" but President Rutherford B. Hayes rejected the effort.

306 The question before the Supreme Court in *The Civil Rights Cases* was essentially one of federal power versus state power. Congress based its power for the 1875 act from section 5 of the Fourteenth Amendment. Under that section, "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. This Section of the Article is concerned more with Justice Harlan's dissent than it is with the constitutionality of the Civil Rights laws.

> force, and which by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which by the amendment, they are prohibited from committing or taking. It is not necessary for us to state, if we could, what legislation would be proper for Congress to adopt. It is sufficient for us to examine whether the law in question is of that character.[307]

Justice Harlan dissented, saying the case proceeded "upon grounds entirely too narrow and artificial,"[308] finding that the Act in question was to prevent racial discrimination.[309] Harlan's opinion itself means less to the idea of colorblindness than the conceptual framework he would set forth in the opinion regarding the blacks' legal right to public accommodations, privileges, and facilities of public conveyances, inns, and places of amusement.[310] Harlan concentrated on restraints of such rights through local laws

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307 The Civil Rights Cases, 109 U.S. 3, 13-14 (1883).

308 Id. at 26 (Harlan, J., dissenting). Justice Harlan continues,

> 'It is not the words of the law but the internal sense of it that makes the law: the letter of the law is body; the sense and reason of the law is the soul.' Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law. By this I do not mean that the determination of these cases should have been materially controlled by considerations of mere expediency or policy. I mean only, in this form, to express an earnest conviction that the court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted.

Id. at 26.

309 See id.

> ("The purpose of the [Act] was to prevent *race* discrimination. It does not assume to define the general conditions and limitations under which inns, public conveyances, and places of public amusement may be conducted, but only declares that such conditions and limitations, whatever they may be, shall not be applied, so as to work discrimination, solely because of race, color, or previous condition of servitude.") (emphasis in original).

310 See id. at 37.

as a "badge of slavery" forbidden by the Thirteenth Amendment:

> [I]t would seem that the right of a colored person to use an improved public highway, upon the terms accorded to freemen of other races, is as fundamental . . . as to be deemed the essence of civil freedom. . . . But of what value is th[e] right of locomotion, if it may be clogged by such burdens as Congress intended by the act of 1875 to remove? They are burdens which lay at the very foundation of the institution of slavery as it once existed. They are not to be sustained, except upon the assumption that there is, in this land of universal liberty, a class which may yet be discriminated against, even in respect of rights of a character so essential and so supreme, that, deprived of their enjoyment in common with others, a freeman is not only branded as one inferior and infected, but, in the competitions of life, is robbed of some of the most necessary means of existence; and all this solely because they belong to a particular race which the nation has liberated. *The Thirteenth Amendment alone obliterated the race line, so far as all rights fundamental in a state of freedom are concerned.*[311]

Justice Harlan quoted William Blackstone's *Commentaries* in both *The Civil Rights Cases* and later in *Plessy*. "Personal liberty consists in the power of locomotion, of changing situation, or removing one's person to whatever places one's own inclination may direct, without restraint, unless by due course of law."[312] More significantly, Harlan began to echo the warnings of the tyranny of the majority class dominating the minority class, something the Court had effectively stripped from the power of the federal government to control:

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311 Id. at 39-40 (emphasis added).

312 Plessy v. Ferguson, 163 U.S. 537, 557 (1896) (quoting 1 William Blackstone, Commentaries *134); *The Civil Rights Cases*, 109 U.S. at 39-40 (quoting 1 William Blackstone, Commentaries *134).

> At every step in this direction the nation has been confronted with class tyranny, which a contemporary English historian says is, of all tyrannies, the most intolerable, 'for it is ubiquitous in its operation and weighs, perhaps, most heavily on those whose obscurity or distance would withdraw them from the notice of a single despot.' Today it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time it may be some other race that will fall under the ban. If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant.[313]

By the time *The Civil Rights Cases* were decided, the subordinate status of blacks was already becoming clear, even allowing for the fact that to an extent that blacks and whites had become accustomed to intimate contact.[314] Interestingly, *Plessy* can also be viewed as a lawsuit concerning a claim to whiteness, in that Homer Adolph Plessy asserted that the refusal to seat him in a white passenger car interfered with his reputation as a white individual.[315] With the 1883 case, conditions worsened, just as Justice Harlan had predicted. Whites resumed total power, disenfranchised the Negro, failed to allow the Negro to become economically independent, and then segregated the Negro not only in places where custom had already done so, but in other places as well.[316] With Congress powerless (and perhaps unwilling as well)

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313 *The Civil Rights Cases*, 109 U.S. at 58.

314 See Berger, supra note 298, at 12.

315 See Charles A. Lofgren, The *Plessy* Case: A Legal-Historical Interpretation 152-73 (1987).

316 See Berger, supra note 298, at 12. Berger explains three reasons why the Reconstruction measures failed. See id. First, Congress impeded the separation of state and federal power, and the Supreme Court was not willing to subject the Southern states to the wrath of the central government completely. See id. Second, interests in civil rights waned, and the changes in the law were not reinforced by changes in the workplace,

to end the white majority dominance, race relations deteriorated, more appreciably in the late 1880s and early 1890s:[317]

> Political, economic, and social unrest were manifested in the rising strength of the Farmers' Alliance and the Populist Party. The growing power of poorer whites did not bode well for blacks, since the former's precarious social and economic status inclined them toward measures highlighting their racial superiority. At the same time, conservative wealthier whites, who traditionally had inclined toward more paternalistic attitudes toward blacks, were now impelled to emphasize racial distinctions in order to disrupt prospective economic and political alliances between poor black and poor white farmers. Whatever the precise political dynamic, the upshot was a dramatic deterioration in southern race relations during the 1890s . . . .[318]

Professor Michael Klarman, in contextualizing the time period in which *Plessy* was decided, found that *Plessy* "was, indeed, so fully congruent with the dominant racial norms of the period that it elicited little more than a collective yawn of indifference from the nation."[319] The press met the decision primarily with apathy, according to Charles Lofgren, a foremost academic authority on

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housing, etc. See id. Third, the reconstruction acts were overly broad and required a special means of enforcement. See id. When the means of enforcement failed, so too did the effectiveness of the Acts. See id. Finally, the blacks lacked economic power, education, organization and leadership to maintain enough of a collective voice to maintain the momentum when other forces failed. See id. at 12-13.

317 See Michael J. Klarman, Race and the Court in the Progressive Era, 51 Vand. L. Rev. 881, 888 (1998).

318 Id. See also C. Vann Woodward, The Strange Career of Jim Crow 31-44 (2d rev. ed., 1974). Woodward paints a different picture of race relations during this period. He has been criticized for painting "too rosy" a portrait of racial segregation in Southern cities during that time period. John Williamson, After Slavery: The Negro in South Carolina During Reconstruction 274-75, 298-99 (1965). See also generally Howard Rabinowitz, Race Relations in the Urban South, 1865-1890 (1978). Professor Klarman describes conditions in northern cities worsening, thus compounding the difficulties in race relations during the 1890s. He writes, "The inclination of southern whites to further subordinate blacks was a necessary, but not a sufficient, condition for the deterioration in American race relations that occurred in the 1890s. Without northern acquiescence, conditions could not have worsened as much as they did." Klarman, supra note 317, at 890.

319 Klarman, supra note 317, at 895.

Plessy.[320] State and lower federal courts had generally construed the Equal Protection Clause and the common law to allow separate but equal facilities; thus the Supreme Court "was not about to rule otherwise as American race relations began a long spiral downwards."[321] Several modern commentators have also argued that the Constitution itself was never intended to be colorblind, but merely a prohibition against unequal treatment of different groups, supporting the reasoning used by the Supreme Court in *Plessy*.[322]

While *Plessy* was the first pronouncement of the colorblind ideal, modern interpretations of Justice Harlan's dissent purport that the ideal was merely a shorthand for the concept that the Fourteenth Amendment prevents our law from enshrining and perpetuating white supremacy.[323] Furthermore, Harlan's discussion regarding colorblindness was connected to his conviction that whites held, and would continue to hold the dominant position in the United States.[324] Therefore, at its very inception, the doctrine of judicial colorblindness was deemed to be perfectly compatible with the perpetuation of white dominance.

2. The Uneasy Task of Counteracting the Dominant Majority Preference

Where *The Civil Rights Cases* left the federal government unable to counteract the dominance of the white majority, *Plessy* left the judiciary (and, hence, the Constitution) unable to counteract it. At the mercy of the southern state governments were the blacks, who were subjected to the informal terrorism of mob lynchings, effectively disenfranchised, and not afforded adequate educational

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320 See Lofgren, supra note 315, at 5, 196-98.

321 Klarman, supra note 317, at 895.

322 Professor Saunders argues that the *Plessy* Court continued the antebellum tradition of the Court's disapproval of granting special burdens and special benefits to a single class of citizens. See Saunders, supra note 257, at 298-99. Judith A. Baer argues that the framers of the Equal Protection Clause "had little concern with race as an abstract category." Judith A. Baer, Equality Under the Constitution: Reclaiming the Fourteenth Amendment 92-93 (1983). Nelson Lund expresses doubt that through the Equal Protection Clause the farmers sought to impose a general rule of colorblindness on the states. Nelson Lund, The Constitution, The Supreme Court, and Racial Politics, 12 Ga. St. U. L. Rev. 1129, 1148-50 (1996).

323 See Laurence H. Tribe, In What Vision of the Constitution Must the Law be Colorblind?, 20 J. Marshall L. Rev. 201, 203 (1986).

324 See id. at 203.

opportunity.[325] Each of the southern states adopted measures intended either to completely disenfranchise the black or substantially curtail the blacks' ability to participate in the government process.[326]

> First of all, the plan[s] set up certain barriers such as property or literacy qualifications for voting, and then cut certain loopholes in the barrier through which only white men could squeeze. The loopholes to appease (though not invariably accommodate) the underprivileged whites were the 'understanding clause,' the 'grandfather clause,' or the 'good character clause.' . . . [I]f the Negroes did learn to read, or acquire sufficient property, and remember to pay the poll tax and to keep the receipt on file, they could even then be tripped by the final hurdle devised for them—the white primary.[327]

The measures taken under mandated segregation were even more bereft of reason. For example, some requirements included that the textbooks of "Negroes and whites be stored separately, and that they never be interchanged" (Florida and North Carolina); separate telephone booths were required "whenever whites demanded such separation" (Oklahoma); "required segregation at the circus" (Louisiana and South Carolina); "forbade anyone to print or circulate printed or written material advocating social equality or interracial marriage . . ." (Mississippi); "prohibited interracial fraternal organizations" (North Carolina and Virginia); "required segregation in hospitals" (fifteen states); required black nurses for black patients "and white nurses for white patients" (Alabama, Mississippi, and South Carolina); forbade chaining together white and black chain-gang prisoners (Alabama, Arkansas, Florida, Georgia, North

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325 See David A. J. Richards, Conscience and the Constitution 163 (1993).

326 See Woodward, supra note 318, at 83-84.

327 Id. at 84. South Carolina (1895), Louisiana (1898), North Carolina (1900), Alabama (1901), Virginia (1902), Georgia (1908), and Oklahoma (1910) each incorporated some variation of this scheme into their Constitutions. Florida, Tennessee, Arkansas and Texas each adopted the poll tax. See id. In Louisiana, for example, there were 130,334 registered Negro voters in 1896. See id. By 1904, there were 1,342. See id. Between these two dates were the adoption of the literacy, property, and poll-tax qualifications. See id. at 85.

Carolina and South Carolina); and "required separation of Negro and white paupers" (West Virginia and Alabama).[328]

In a reaffirmation of the value of whiteness, white racial classification in the United States in effect became a form of property right contingent upon the white racial label.[329] Cheryl Harris outlines this development as follows:

> Following the period of slavery and conquest, white identity became the basis of racialized privilege that was ratified and legitimized in law as a type of status property. After legalized segregation was overturned, whiteness as property evolved into a more modern form through the law's ratification of the settled expectations of relative white privilege as a legitimate and natural baseline.[330]

Whiteness continues to be significantly valued, and for much of our nation's history, whiteness was a condition for citizenship and naturalization.[331]

For its "moral grandeur" in determining that segregation in public schools was unconstitutional, *Brown I* did little to assert the power of any entity to counteract the dominance of the white majority preference.[332] C. Vann Woodward characterizes the decision as the marking point towards the declining years of Jim Crow,[333] but it would be another decade before the federal government embraced the Supreme Court's proclamation that racial discrimination violated national policy.[334] Hugh Davis Graham writes that when Congress and the President in 1964 determined the need for national legislation to protect the civil rights of blacks, the majority coalition supporting the Civil Rights Act shared two assump-

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328 Rowan, supra note 250, at 185-86.

329 See Cheryl I. Harris, Whiteness as Property, 106 Harv. L. Rev. 1707, 1714 (1993).

330 Id.

331 See Dred Scott v. Sandford, 60 U.S. 393, 452 (1856) (holding that free blacks whose ancestors were enslaved could not be considered citizens for federal constitutional protection purposes).

332 See Hugh Davis Graham, The Civil Rights Era: Origins and Development of National Policy 1960-1972 366-370 (1990).

333 See Woodward, supra note 318, at 149.

334 See Graham, supra note 332, at 366-70.

tions about the decisions of *Brown I* and *Brown II*.[335] First, they assumed *Brown I* had overturned the separate-but-equal doctrine in *Plessy*, thus enshrining into law Justice Harlan's colorblind maxim.[336] Second, in a view more commonly held by liberals than conservatives, the Court made a "shameful retreat" from *Brown I* and its proclamation.[337]

If the *Brown I* decision embraced colorblindness as Justice Harlan recognized it in 1896, the *Plessy* dissent was noticeably absent from Chief Justice Warren's opinion. The *Brown I* decision instead hinged on the stigma assumption dismissed by the *Plessy* majority (the "badge of inferiority") and centered on the psychology of separating children on the basis of race.[338] The only direct rejection of the *Plessy* decision was a rejection of any contrary findings of "whatever may have been the extent of psychological knowledge at the time [of the *Plessy* decision]."[339]

> In both *Plessy* and *Brown*, then, the key to violating the equal protection clause appeared to be not racially different treatment or the denial of benefits on racial grounds, or even the intent of the legislatures in framing the segregation laws. Rather, it lay in the subjective, psychological attribute of social "stigma."[340]

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335 See id.

336 See id.

337 Id.

338 See Brown v. Board of Education, 347 U.S. 483, 493-94 (1954) [Brown I]. Graham notes the concentration of Chief Justice Earl Warren on modern social science authorities in the controversial Footnote 11 of the majority opinion, which cited K.B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth 1950); Personality in the Making: The Fact-Finding Report of the Midcentury White House Conference on Children and Youth (Helen Leland Witmer & Ruth Kotinsky eds., 1952); Max Deutscher & Isidor Chein, The Psychological Effects of Enforce Segregation: A Survey of Social Science Opinion, 26 J. Psychol. 259 (1948); Isidor Chein, What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion & Attitude Res. 229 (1949); Theodore Brameld, Educational Costs, *in* Institute for Religious and Social Studies, Discrimination and National Welfare: A Series of Addresses and Discussions 37 (R.M. MacIver ed., 1949); E. Franklin Frazier, The Negro in the United States 674-81 (1949); Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy (1944). See Graham, supra note 332, at 367.

339 *Brown I*, 347 U.S. at 494-95.

340 Graham, supra note 332, at 367 (citing Edward J. Erler, Sowing the Wind: Judicial

The effect of the *Brown I* decision on white majority preference was a curious one. Although *Brown I* reversed the separate but equal doctrine, it did not address the ways in which systems of white privilege could be undone.[341] Harris asserts that by accepting substantial inequality (whiteness) as a baseline, material inequities between blacks and whites were normalized, as were the subordination mechanisms that produced the inequalities.[342] This animosity to connections of blackness, whether individuals were light-skinned like Plessy or had any black ancestry at all, remained at the core of racism squarely in the face of the *Brown* opinions. If the Constitution prohibited the dominant preference of segregation to be reflected in state action, the extent of this prohibition would be unclear for another year. Woodward writes,

> For a time after the decision of 17 May 1954, there appeared to be grounds for optimism. The Court's precedent breaking opinion seemed to destroy all legal foundations for segregation. Yet there were no sensational outbursts of defiance. The restrained tone of the Southern press and Southern leaders was the subject of wide comment and congratulations. The comment of the Nashville *Tennessean* on the day following the decision was not unique: 'It is not going to bring overnight revolution,' said the editorial, 'but the South is and has been for years a land of change. Its people—of both races—have learned to live with change. They can learn to live with this one. Given a reasonable amount of time and understanding, they will.'[343]

Some signs of white resistance to desegregation appeared, especially in Mississippi, the same state that had resisted Reconstruction in 1875 and disenfranchised the Negro in 1890.[344] "Citizen Councils" were started to wage a war in defense of segregation.[345]

Oligarchy and the Legacy of *Brown v. Board of Education*, 8 Harv. J.L. & Pub. Pol'y 399, 409-13 (1985)).

341 See generally Harris, supra note 329.

342 See id. at 1714.

343 Woodward, supra note 318, at 150.

344 See id. at 152.

345 See id.

Nevertheless, there was little hysteria in the year that followed the *Brown I* decision.[346]

With the Jim Crow system shaken,[347] the remaining question was the extent of judicial activism (and discretion) in limiting the unimpeded legislative will of the majority. The celebrated Footnote Four of *United States v. Caroline Products*[348] indicated that while the Court should customarily yield to the legislative will of the majority, there "may be a narrower scope" in judicial reaction to a law that deprives "discrete and insular minorities" of fundamental rights guaranteed by the Bill of Rights.[349] The *Brown I* decision, however, found the "chief offense of segregation lay in *perceptions* of stigma rather than in racially triggered state *behavior* . . . ."[350] This being so, "then the latter was merely instrumental to the former, and only the federal bench could make the finely calibrated judgments about what state behavior was acceptable and when it became unacceptable."[351] Graham notes that at the time *Brown I* was decided, "Harlan's vision of the colorblind Constitution still appeared too radical and sweeping."[352] Correspondingly, the judiciary's prohibition against legislation reflecting white dominance necessarily must have been too radical, which became clear a year later in *Brown II*.

Exemplifying the fact that the twin *Brown* cases did not mark the end of Justice Harlan's colorblindness (in terms of white dominance reflected in state action) is the fact that Linda Brown,

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346 See id.

347 See id. at 151

> ("Surveying all these changes in established Southern practices, changes few thought they would live to see, men of good will began to entertain hopeful expectations about the future. The Jim Crow system still stood, but its foundation had been shaken. Segregation was on the defensive; in some quarters it was in retreat. If all this had been accomplished without bloodshed, reasoned the optimists, perhaps a new day had really dawned. Perhaps the South might eventually take the transition to unsegregated public schools in stride as well.").

348 304 U.S. 144, 152 n. 4 (1938).

349 See id; Graham, supra note 332, at 369 .

350 Graham, supra note 332, at 368 (emphasis in original).

351 Id. ("Such a flexible formula could strategically accommodate quite gradualist and tokenist school policies during *Brown's* first decade, when judicial authority risked concerted defiance.").

352 Id. at 370 ("[C]aution was in order, else all hell might break loose.").

an elementary student in Topeka in 1954, would eventually graduate from all-black schools.[353] The Court in *Brown II* rejected the NAACP's call for "majestic instancy," particularly because of a fear against southern backlash against the Court's decision.[354]

> When the Court's implementation decision was announced on May 31, 1955, the white South responded with a sigh of relief that the NAACP's call for "majestic instancy" had been rejected, and that instead the five cases were remanded to the local federal district courts. In a cautious gesture that was designed in part to forestall a violent southern reaction against the Court's call for a social revolution in *Brown I,* the Court in *Brown II* asked not for admission to public schools on a nondiscriminatory basis, but only for a "prompt and reasonable start toward full compliance." Warren's opinion borrowed the phrase "all deliberate speed" from an obscure opinion by [Justice Oliver Wendell] Holmes. But the enigmatic modifier "deliberate" (if not, indeed, the full oxymoron) was inserted at the instance of Felix Frankfurter, who feared a disastrous southern backlash against a Court that could not enforce its decree. This sealed the bargain between Warren and the more conservative justices, with the unanimous decision in *Brown I* balanced by a constitutionally novel remedy in *Brown II* that would deny Linda Brown her individual relief, but would buy time for a gradual enforcement by local federal judges who would be provided no clear judicial guidelines or deadlines.[355]

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353 See id. at 370.

354 Id. at 371.

355 Id. (footnotes omitted). Graham refers to a comment by Columbia law professor Louis Lusky, who had drafted, while a law clerk to Justice Harlan Fiske Stone, Footnote Four of *Caroline Products*: "Conceptually, the 'deliberate speed' formula is impossible to justify." Id. (quoting Louis Lusky, Racial Discrimination and the Federal Law: A Problem in Nullification, 63 Colum. L. Rev. 1171, n. 37 (1963)). Judicial review is grounded in a duty to give a litigant his or her right under the Constitution, but the Court only guaranteed that at some indefinite time in the future, other people would have the rights that the Court declared the litigants had in *Brown I*. See id.

Southerners expected the federal District Court judges to side with them. Voiced explicitly by the Lieutenant Governor of Georgia, "A 'reasonable time' can be construed as one year or two hundred. . . . Thank God we've got good Federal judges.'"[356] In the summer of 1955, the NAACP filed petitions on behalf of local blacks with 170 school boards in 17 states.[357] The "good Federal judges" would enforce the Supreme Court's decree in 19 school segregation cases through January 1956.[358] A panic, "bred of insecurity and fear," spread through the southern whites, and race relations deteriorated.[359] Whites began to resist, forming Citizens Councils to fight in defense of segregation in the states of Mississippi, Louisiana, Alabama, Texas, Arkansas, Florida and Georgia.[360] One official claimed membership in these Citizens Councils reached 500,000 in 11 states.[361] The preference of the dominant white majority was found in clear acts of defiance, with southern leaders calling for "massive resistance" to segregation[362] and claiming the right of "interposition" of state authority against alleged violations of the Constitution by the Supreme Court.[363]

If one needs an illustration of dominant white majority preferences reflected in state legislation, he or she need not look further than the anti-desegregation provisions enacted by several southern states in 1956. In the first three months of that year, Alabama, Georgia, Mississippi, South Carolina and Virginia adopted no less than 42 pro-segregation measures.[364] In enacting a version of Virginia's interposition plan, Alabama actually used the words "null, void, and of no effect" to describe the *Brown* decisions.[365] South Carolina avoided the word "nullification" but passed a resolution

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356 Woodward, supra note 318, at 153 (quoting statement of Ernest Vandiver, Georgia Lieutenant Governor).

357 See id. at 154.

358 Id. By that time, school segregation laws were toppled in Florida, Arkansas, Tennessee and Texas. See id. at 153-54.

359 Id. at 154-55.

360 See id. at 155.

361 See id.

362 Id. at 156 (noting that "[i]t was Senator Harry F. Byrd [of Virginia] who called upon the South for 'massive resistance' . . . .").

363 Id.

364 See id. Several other measures were pending in 1956. See id. By July 1956, 12 new segregation bills had been approved by the Louisiana legislature. See id.

365 Id. Georgia also adopted the "null and void" approach. See id.

with a defiant "condemnation of and protest against the illegal encroachment of the central government."[366]

> In addition to these more or less rhetorical gestures of defiance, four states bluntly proclaimed a policy of open resistance by imposing sanctions and penalties against compliance with the Supreme Court's decision. The Louisiana legislature would withhold approval and funds from 'any school violating the segregation provisions' of its laws. Georgia made it a 'felony for any school official of the state to spend tax money for public schools in which the races are mixed.' North Carolina would also deny funds to local authorities who integrated their schools, and Mississippi made it unlawful for the races to attend publicly supported schools together a the high school level or below. Both Mississippi and Louisiana amended their constitution to provide that to promote public health and morals their schools be operated separately for white and Negro children.[367]

The Southern defiance would lose continually in the courts between 1954 and 1964,[368] but the result of this defiance was clear in the realm of public education. One decade after *Brown I*, only 2.3 percent of the Southern black schoolchildren attended desegregated schools.[369] Segregation in places of public accommodations was falling, but at an unsatisfactory rate.[370] Despite the Supreme Court's announcement in 1963, that "it is no longer open to question that a State may not constitutionally require segregation in public facilities,"[371] resistance continued. If the courts were declaring some vision of race-blindness in the law, it was met with a fight for pure race-consciousness at every corner. In 1964, it would

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366 Id. at 157.
367 Id. at 157-58.
368 For a discussion of school desegregation cases, see Berger, supra note 298, at 133-142.
369 See Graham, supra note 332, at 372-73.
370 See Berger, supra note 298, at 130.
371 Johnson v. Virginia, 373 US. 61, 62 (1963). See also Berger, supra note 298, at 130-31.

not be the colorblind Constitution that would end the madness. When Congress passed the 1964 Civil Rights Act, colorblindness through federal legislation seemed the answer. In terms of public accommodations, the Act required that "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion or national origin."[372] The Supreme Court upheld these provisions as a proper exercise of power under the commerce clause in *Heart of Atlanta Motel v. United States*[373] and *Katzenbach v. McClung*.[374] Following the passage of the Civil Rights Act of 1964, the patience of the federal courts with respect to segregation grew thin.[375]

White domination reflected in state legislative action was legally dead after the Civil Rights Act of 1964,[376] but did this end the issue of "colorblindness" in government action? In the South, resistance continued to take the form of violence against African-Americans.[377] Schools in the South were not yet integrated. Of the acts passed by Congress in the 1960s that affected civil rights—The Civil Rights Act, the Voting Rights Act of 1965, the Immigration Act of 1965, and the Fair Housing Act of 1968—none referred to a specific class of individuals to which to grant protection. But as the federal government began in the late 1960s and early 1970s to enact race-conscious measures in an effort to help minorities achieve equality, it would be simplistic to assert that we somehow shifted from being color-blind to color-conscious.[378]

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372 The Civil Rights Act of 1964 § 201(a), 42 U.S.C. § 2000a(a) (1994).

373 379 U.S. 241 (1964).

374 379 U.S. 294 (1964).

375 See Graham, supra note 332, at 373.

376 Discrimination and segregation still flourished despite changes in the law, but no longer did either the Constitution or the federal government permit such activities. See Woodward, supra note 318, at 186-87.

377 See id. at 184-186.

378 Nathan Glazer made this assertion in 1983 in Nathan Glazer, Racial Quotas, *in* Racial Preferences and Racial Justice: The New Affirmative Action Controversy 5 (Russell Nieli ed., 1991) [hereinafter Racial Preferences and Racial Justice].

Affirmative action first began as a goal to "try harder"—to do something more than merely prohibit discrimination.[379] The time frame overlaps with the efforts to end discrimination.[380] Colorblindness between the two types of action by the government had some oblique meaning. The first—prohibition of discrimination by the Constitution (protected by the courts) and prohibition by federal law—sufficiently counteracted majority dominance in state action. The second—setting goals to create an equal plane for the long-repressed minorities—was required by the federal government to counteract the effects of the long history of majority dominance. "Colorblindness" in the judiciary, however, would take a furtive turn.

"Colorblindness is the insistence in law that the government should never take race into account, regardless of the context in which race is used."[381]

> Four key dynamics distinguish the development of colorblind jurisprudence: (1) the removal of the historical meaning of race from the analysis of racial discrimination; (2) the removal of societal discrimination from the analysis of racial discrimination; (3) the judicial view of race-conscious, racial justice efforts as harmful stereotyping; and (4) the judicial excision of race from racial discrimination

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379 See id. at 6
("Color consciousness meant, in a term just beginning to come into use in the middle 1960s, 'affirmative action'—doing more than just stopping discrimination. Did blacks and other minorities know that an employer did not discriminate? Seeing very few of their kind among his employees, did they pass him by in their search for employment? Did he recruit in high schools, colleges, neighborhoods where there were very few blacks or other minorities? Did he advertise in media they did not see or hear? Did he make any effort to recruit them into training programs? The employer, the institution, were expected to try harder, and there were government programs making it incumbent on both to try harder.").

380 Glazer sees the first instances of color-consciousness in the acts of the Equal Employment Opportunity Commission (EEOC), requiring employers to report the numbers of minorities employed in different job categories. See id. at 5. This first began in 1964. See id.

381 Tanya Kateri Hernandez, "Multiracial Discourse": Racial Classifications in an Era of Color-Blind Jurisprudence, 57 Md. L. Rev. 97, 139 (1998). See also T. Alexander Aleinikoff, A Case for Race-Consciousness, 91 Colum. L. Rev. 1060, 1063 (1991).

discourse.[382]

Recent cases demonstrate the judicial shift toward a presumption of colorblindness, and as Colorblind II will discuss, this is at best impossible in a society that has established the baseline of colorblindness on a white dominance premise. This "Myth of Colorblindness"[383] serves merely to reinforce race-based privilege, mask racial disparities, and promote white dominance under a simultaneous disavowal of race, or color, in American law.

C. Colorblind II: A Vicious Circle[384]

1. The Contrast of Immediate Effects Versus Cautionary and Deliberate Effects

The Civil Rights Era during the decade of the 1960s ended the four-hundred-year era of treating blacks in this country as subhuman.[385] The same majority action in the federal government that essentially ended state-mandated repression also sought to eradicate the harm caused through steps designed to place blacks in a position for which they should have been but for the four-hundred-year repression. Despite these actions, thirty years later, the annual income of an African-American employed full-time is approximately 60 percent of that of white Americans.[386] The black unemployment rate nearly doubles that of the entire country.[387] The proportion of African-American male high school graduates to ascend to college was lower in 1994 than it was in 1975, with more young black males in prison than in college.[388] Race-blindness requires that government ignore these facts, placing race "beyond

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382 Hernandez, supra note 381, at 141.

383 David A. Strauss, The Myth of Colorblindness, 1986 Sup. Ct. Rev. 99, 119.

384 Bernstein's Reverse Dictionary describes "vicious circle" as "problems pile up; solution of one raises another and leads back to the original one." Theodore M. Bernstein, Bernstein's Reverse Dictionary 135 (1975).

385 Dinesh D'Souza quotes contemporary film producer Spike Lee, "[W]hen you're told every single day for four hundred years that you're subhuman, when you rob people of their self-worth, knowledge and history, there's nothing worse you can do." Dinesh D'Souza, The End of Racism 7 (1995) (quoting Barbara Grizzuti Harrison, Spike Lee Hates Your Cracker Ass, Esquire, Oct. 1992, at 137 (statement of Spike Lee)).

386 See id. at 6 (citing U.S. Bureau of the Census, Statistical Abstract of the United States 1994, Washington D.C. at 48).

387 See id.

388 See id.

the reach of the government."[389]

Has white dominance disappeared to such a degree that no government interest may compel the government—in the eyes of the Court—to eradicate the effects of racial discrimination? The answer must be yes, for the Court's preoccupation with the appropriate standard of review for racial classifications has not led to an alternative answer. One century after *Plessy*, the Fifth Circuit determined that the University of Texas Law School, where "[m]any of these applicants have some of the highest grades and test scores in the country," lacked a compelling interest in granting preferences to minority students.[390] As noted above,[391] four black students entered the law school at the University of Texas at Austin in 1996. The national percentage of blacks in law school in 1997 and 1998 was 6.9 percent, with a total of 9,132 black law students nationally.[392] In 1998, seven of the eight law schools in Texas were below the national average, and the total number of black students at these schools accounted for only 3 percent of the total number of black law students in the United States.[393] Texas Southern University Law School, a traditionally black law school, admitted more than the combined total of the seven other law schools in Texas.[394] The same law firm that argued on behalf of Cheryl

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389 See Heath Foster, Strategies of Civil Rights Movement Now Work Against It, Seattle Post-Intelligencer, Oct. 15, 1998, at P1. According to this article, the Washington D.C. law firm which argued on behalf of the plaintiffs in *Hopwood v. Texas* in 1996 is deliberately using NAACP tactics to end affirmative action. See id. That law firm seeks now to extend the *Hopwood* ruling nationally, hoping to set a firm foundation against affirmative action. See id. According to one civil rights leader, "They're just praying that they get a case that will take them to the Supreme Court. It's obvious." Id.

390 Hopwood v. Texas, 78 F.3d 932, 934-35 (5th Cir.), cert. denied, 518 U.S. 1033 (1996).

391 See supra note 45.

392 See Ranking the Nation's Law Schools According to Percentage of Black Students, in J. Blacks Higher Educ., Summer 1998, at 88-89 [hereinafter Rankings].

393 See id. Of the seven schools, Southern Methodist enrolled 51 blacks (6.6 percent); Texas Wesleyan University enrolled 41 blacks (6.2 percent); South Texas College of Law enrolled 65 blacks (5.4 percent); St. Mary's University enrolled 40 blacks (5.2 percent); University of Texas-Austin enrolled 70 blacks (4.8 percent); Texas Tech University enrolled 11 blacks (1.7 percent); and Baylor University enrolled four blacks (1.0 percent). See id. The combined total of these schools was 282 blacks students, or 3.1 percent of the 9,132 blacks enrolled in law schools nationally. See id.

394 Texas Southern enrolled 327 students in 1997-98. See id. The percentage of black students enrolled was 54.9 percent of the total enrollment. See id. Only Howard University enrolled more black students (362), and only Howard and Southern University (210

Hopwood and her co-plaintiffs in *Hopwood* is now arguing on behalf of a white woman rejected at the University of Washington,[395] where, in 1997-98, only 14 blacks students were enrolled.[396]

Constitutionally, both the federal and state governments are to ignore statistics such as these unless there is a clear showing of intentional discrimination on their own part.[397] Not only are black Americans the unfortunate victims of a long history of oppression, they are the victims of the Supreme Court's enlightenment with respect to racial classifications. First, the Supreme Court's preoccupation with the appropriate standard of review in cases involving a racial classification stems, in part, from the previous failures to *protect* blacks from discrimination. In those previous failures, racism was an obvious constant, with the white dominance reflected in government action. Under today's standard, racism is generally disregarded; whatever meaning those advocates attach to "colorblindness" is, in reality, an intentional ignorance of race. One scholar explains "the colorblind approach" as follows:

> All racial classifications are deemed suspect because racial categories are viewed as inherently racist. . . . Supporters of this response would have us believe that cultural meanings 400 years in the making will disappear if we prohibit reference to those meanings in public law and policy. Although the colorblind approach makes explicit racial categories unlawful, this does not mean they no longer exist, nor does it change their meaning.[398]

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black students) enrolled a higher percentage of blacks at their schools (86.4 percent at Howard; 64.4 percent at Southern University). See id.

395 See Foster, supra note 389, at P1.

396 See Rankings, supra note 392, at 89.

397 Strict scrutiny requires a government actor to demonstrate past discrimination and show that its racial classification is narrowly tailored to further a compelling government interest. See Wygant v. Jackson Board of Education, 476 U.S. 267, 274 (1986).

398 Charles R. Lawrence III, Race, Multiculturalism, and the Jurisprudence of Transformation, Forward to Symposium, Race and Remedy in a Multicultural Society, 47 Stan. L. Rev. 819, 836 (1995) (footnote omitted). See also supra note 143.

Yet, as we saw in the first Part of this Article, racism does mean something different when applied to a black individual and something else when applied to a member of the white majority.[399] Second, history has taught us that, due to racism and white supremacy, the Constitution will either favor blacks *or* whites, not both. *Plessy* and *Brown II* (the latter to an extent) favored the white supremacists, and the effect was immediate. The reason? The dominant majority has the means to see its preferences reflected in state action. The decisions and government measures favorable to blacks[400] have been met with caution and resistance. By comparison, *Brown I* was a decision favoring blacks, but the effect of the case was anything but immediate. The reason? The dominant majority preference of racism counteracted the Supreme Court's decision. The *Hopwood* decision—the latest great victory for "colorblindness"—disfavored blacks, and the effect was again immediate.

2. Standards of Review, Judicial Politics and the Intentional Ignorance of Race

Twenty-four years after *Brown I*, four justices in *Bakke* made the bold assertion that the understanding of a colorblind Constitution was merely an ideal:

> [C]laims that the law must be "color-blind" or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than a description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot . . . let color blindness become myopia which masks the reality that

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399 I say this with reference to Justice Lewis Powell's plurality opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), which held that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." Id. 289-90.

400 This Article has not discussed the higher education cases from the late 1930s to early 1950s, such as *State of Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Board of Regents of University of Oklahoma*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); or *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950). It is enough to say (for the purposes of this Article) that each of these decisions met with extreme resistance from the white supremacists.

> many "created equal" have been treated within our lifetimes as inferior both by the law and by their fellow citizens.[401]

Bakke has been either embraced or criticized for a number of reasons, most particularly for Justice Powell's application of strict scrutiny to racial classifications intended to benefit minorities.[402] The analysis embraced by Justices Marshall, William Brennan, Byron R. White, and Harry Blackmun also began a direct attack on the concept of colorblindness:[403]

> The assertion of human equality is closely associated with the proposition that differences in color or creed, birth or status, are neither significant nor relevant to the way in which persons should be treated. Nonetheless, the position that such factors must be "constitutionally an irrelevance" summed up by the shorthand phrase "[o]ur Constitution is color-blind," has never been adopted by this Court as the proper meaning of the Equal Protection Clause.[404]

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401 *Bakke*, 438 U.S. at 327 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part).

402 See id. at 289-291 (Powell, J., announcing the judgment of the Court). See also Richard B. Sobol, Against *Bakke*, *in* Racial Preferences and Racial Justice, supra note 378, at 167, 169

> ("The fundamental analytical error of the court was its conclusion that the petitioner's special admissions program created a 'suspect' classification, subject to review under a 'strict scrutiny' standard. Thus, the university's voluntary efforts to further racial equality were misjudged by standards developed to protect disadvantaged minorities from majoritarian governmental action that stigmatizes, separates, injures, or discriminates against them on the basis of race.").

See also generally Stanley Mosk, For *Bakke*, *in* Racial Preferences and Racial Justice, supra note 378, at 159 (arguing against classifications that disadvantage a *majority* group).

403 See *Bakke*, 438 U.S. at 355 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part).

404 See id. (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part) (citing Edwards v. California, 314 U.S. 160, 185 (1941 (Jackson, J., concurring); Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

In support,[405] these justices cited a 1971 case, *McDaniel v. Barresi*,[406] where the Court reversed the Georgia Supreme Court because the latter had held a desegregation plan was invalid as it was not colorblind. Similarly, in *Board of Education v. Swann*,[407] the Court held that a statute requiring colorblind school-assignment plans failed as a desegregation remedy since it would "render illusory the promise of" *Brown I*.[408] At the same time, these justices also recognized that government classifications should be subject to strict scrutiny, reiterating "the traditional view that racial classifications are prohibited if they are irrelevant."[409] The important distinction in this concurrence—and one that represents the battle of protecting minority interests in a majoritarian government—is the recognition that whites are not a suspect class: "whites as a class [do not] have any 'traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'"[410] Race-consciousness is required, because "[i]n order to get beyond racism, we must first take account of race. There is no other way."[411] Justice Marshall summarized his position on race-conscious remedies:

> It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions

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405 The concurring justices also noted that "[o]ur cases have implied that an 'overriding statutory purpose' could be found that would justify racial classifications." See id. at 356 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part) (citing McLaughlin v. Florida, 379 U.S. 184 (1964)). See also Loving v. Virginia, 388 U.S. 1 (1967); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United Sates, 320 U.S. 81 (1943).

406 402 U.S. 39 (1971).

407 402 U.S. 43 (1971).

408 Id. at 45-46. See also *Bakke*, 438 U.S. at 356 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part).

409 Fullilove v. Klutznick, 448 U.S. 448, 518 (1980) (Marshall, J., concurring). See also *Bakke*, 438 U.S. at 357 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part).

410 Bakke, 438 U.S. at 357 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part) (quoting San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973)).

411 Id. at 407 (separate opinion of Blackmun, J.).

> about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors.[412]

For a short time, the majoritarian state and federal governments sought to benefit black Americans in an effort to achieve equality, and the judiciary exercised self-restraint in shutting the doors on the compromise.[413] Granting preferences was subject to a heightened scrutiny, but the preferences were sufficiently important. This view was short-lived. Chief Justice Warren Burger, who wrote the majority opinion in *Fullilove*, upholding a federal set-aside program, retired in 1985 and was replaced by Justice William Rehnquist.[414] Justice Rehnquist—who as a Supreme Court clerk for Justice Jackson in 1952-53 wrote a memorandum supporting the "separate but equal" doctrine[415]—had dissented in

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412 Id. at 401-02 (separate opinion of Marshall, J.). Justice Marshall would reiterate his position two years later in *Fullilove*, 448 U.S. at 522 (Marshall, J. concurring).

413 Chief Justice Warren Burger, in his opinion for the Court in *Fullilove*, quoted Justice Robert Jackson, a supporter of judicial restraint:

> The Supreme Court can maintain itself and succeed in its tasks only if the counsels of self-restraint urged most earnestly by members of the Court itself are humbly and faithfully heeded. After the forces of conservatism and liberalism, of radicalism and reaction, of emotion and of self-interest are all caught up in the legislative process and averaged and come to rest in some compromise measure . . . a decision striking it down closes an area of compromise in which conflicts have actually, if only temporarily, been composed. Each such decision takes away from our democratic federalism another of its defenses against domestic disorder and violence. The vice of judicial supremacy, as exerted for ninety years in the field of policy, has been its progressive closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts.

Fullilove, 448 U.S. at 490 (quoting Robert Jackson, The Struggle for Judicial Supremacy 321 (1979)) (alteration added).

Chief Justice Burger's plurality opinion in *Fullilove* rested on the power of Congress to recognize remedies appropriate under the Constitution. See id. at 490. He had joined Justices Stevens, Potter Stewart, and William Rehnquist two years earlier in *Bakke*. See generally *Bakke*, 438 U.S. at 408 (Stevens, J., concurring in part and dissenting in part).

414 See Oxford Companion, supra note 259, at 709.

415 See id. at 715.

Bakke and was at that time the most conservative justice on the Court.[416] Replacing Justice Rehnquist as Associate Justice was Antonin Scalia, whose views are more conservative than even Chief Justice Rehnquist's views.[417] The third of President Ronald Reagan's appointees to the Court, Anthony Kennedy, replaced Justice Powell and concurred in *Croson* one year later.[418]

If the methodical conservative court-packing caused the Equal Protection Clause to render government essentially powerless to eradicate social differences, the appointments of Justices O'Connor and Thomas by Presidents Reagan and Bush, respectively, further solidified the Court's attitude. In fact, a number of commentators view the retrenchment in antidiscrimination law as the result of the 1980s Reagan-led white backlash against institutions perceived as sympathetic to black interests.[419] Justice Thomas' contribution to the affirmative action cases has not been as substantial, but the mere fact that the only black American Justice opposes affirmative action does not bode well for those advocating more government power to help the cause of equality.[420] Justice O'Connor is best known in affirmative action decisions for her adherence to the standard of strict scrutiny for all racial classifications;[421] ironically, she succeeded Justice Stewart, who had dissented in *Fullilove* explicitly on the grounds of colorblindness.[422] O'Connor's adherence to strict scrutiny has been highlighted by a rigid application of the *language* of strict scrutiny, and this can be seen in her concurrence in *Wygant v. Jackson Board of Educa-*

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416 See id. at 709.

417 See id. Not suprisingly, Justice Antonin Scalia concurred in both *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520 (1989) (Scalia, J., concurring) and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1994) (Scalia, J., concurring).

418 In Justice Anthony Kennedy's first term, he voted with Chief Justice Rehnquist in 90 percent of the cases and with Justice Scalia in 89 percent of the cases. See Oxford Companion, supra note 259, at 483.

419 See David Kairys, Unexplainable on Grounds Other Than Race, 45 Am. U. L. Rev. 729, 735 (1996).

420 I say this on the basis of impromptu and informal discussion about affirmative action. More often than I had expected, opponents of affirmative action argued Justice Thomas' position, implying that if the only African-American on the Supreme Court opposes affirmative action, it must be a violation of equal protection. See, e.g., Cose, supra note 263, at 101-02, 210; West, supra note 242, at 35-39.

421 See Byrne, supra note 259, at 619.

422 See Fullilove v. Klutznick, 448 U.S. 448, 522-23 (1980) (Stewart, J., dissenting).

tion.[423] Justice O'Connor rejected the view of Justices Marshall, Brennan, and Blackmun in *Bakke* that strict scrutiny must serve an "important government objective" if it is "substantially related to achievement of those objectives."[424] Although she finds that the distinction between a "compelling" and "important" government interest "may be a negligible one,"[425] Justice O'Connor has never found a compelling government interest in a case involving the allocation of government benefits or preferences.[426] In *Wygant*, O'Connor also rejected the arguments that a government has an interest in remedying "societal discrimination"—"that is, discrimination not traceable to its own actions"—because it is not "sufficiently compelling to pass constitutional muster under strict scrutiny."[427]

Justice Marshall defended the lesser standard in both *Wygant* and *Croson* in dissent. His rejection of the "compelling interest" standard had become a minority view on the Court, but as he noted in *Wygant*, "it should not matter which test the Court applies. What is most important, under any approach to the constitutional analysis, is that a reviewing court genuinely consider[s] the circumstances of the provision at issue."[428] When the Court struck

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423 476 U.S. 267, 284 (1986) (O'Connor, J., concurring). *Wygant* involved a collective bargaining agreement where African-American teachers were given a preference in the event of a layoff over other teachers. See generally id.

424 See id. at 285 (quoting Regents of the University of California v. Bakke, 438 U.S. 265, 359 (1978) (opinion of Brennan, White, Marshall and Blackmun, JJ.)).

425 Id. at 286.

426 This is true of *Wygant*, 476 U.S. 267; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 200 (1995). This is true, to an extent, of the racial gerrymandering cases. See, e.g., Shaw v. Reno, 509 U.S. 630, 658 (1993).

427 *Wygant*, 476 U.S. at 288. See also *Bakke*, 438 U.S. at 307.

428 *Wygant*, 476 U.S. at 303 (Marshall, J., dissenting). Marshall showed the need for preferences for the African-American teachers originating in 1969, when the minority representation of teachers was 3.9 percent in that district. See id. at 297. The board took affirmative steps towards improving the number of minority teachers—by 1971, the percentage had increased to 8.8 percent—but the necessity of faculty layoffs would have reversed the trend since the minority teachers had no seniority. See id. at 298. At least 80 percent of the union was white, but the union nevertheless ratified the collective bargaining agreement six times. See id. at 299. Marshall reframed the issue to the Court:

> The sole question posed by this case is whether the Constitution prohibits a union and a local school board from developing a collective-bargaining agreement that apportions layoffs between two racially determined groups as a means of preserving the effects of an affirma-

down a plan in Richmond, Virginia apportioning 30 percent of its contracting funds to minority businesses, Marshall struck back one last time in rebuttal:

> It is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination it is midst. . . . The essence of the majority's position is that Richmond has failed to catalog adequate findings to prove that past discrimination has impeded minorities from joining or participating fully in Richmond's construction contracting industry. I find deep irony in second-guessing Richmond's judgment on this point. As much as any municipality in the United States, Richmond knows what racial discrimination is; a century of decisions by this and other federal courts has richly documented the city's disgraceful history of public and private racial discrimination.[429]

It almost seems a foregone conclusion that "colorblindness" had assumed a contraposition with affirmative action. No longer was the Court's interpretation merely Equal Protection jurisprudence. It had become, in itself, affirmative action jurisprudence.

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tive hiring policy, the constitutionality of which is unchallenged.

Id. at 300.

[429] *Croson*, 488 U.S. at 528-529 (Marshall, J., dissenting) (footnote omitted). Marshall continues,

> [T]he Richmond City Council *has* supported its determination that minorities have been wrongly excluded from local construction contracting. Its proof includes statistics showing that minority-owned businesses have received virtually no city contracting dollars and rarely if ever belonged to area trade associations; testimony by municipal officials that discrimination has been widespread in the local construction industry; and the same exhaustive and widely publicized federal studies relied on in *Fullilove*, studies which showed that pervasive discrimination in the Nation's tight-knit construction industry had operated to exclude minorities from public contracting. These are precisely the types of statistical and testimonial evidence which, until today, this Court has credited in cases approving of race-conscious measures designed to remedy past discrimination.

Id. at 529 (emphasis in original).

> [T]oday's decision marks a deliberate and giant step backward in this Court's affirmative-action jurisprudence. Cynical of one municipality's attempt to redress the effects of past racial discrimination in a particular industry, the majority launches a grapeshot attack on race-conscious remedies in general. The majority's unnecessary pronouncements will inevitably discourage or prevent governmental entities, particularly States and localities, from acting to rectify the scourge of past discrimination. This is the harsh reality of the majority's decision, but it is not the Constitution's command.[430]

Justice O'Connor rejected Justice Marshall's characterization that she views "racial discrimination as largely a phenomenon of past" or that "government bodies need no longer preoccupy themselves with rectifying racial injustice."[431] She defended her version of strict scrutiny by attacking the lesser standard advocated by Justices Marshall, Brennan, and Blackmun.[432]

> [Justice Marshall's] watered-down version of equal protection review effectively assures that race will always be relevant in American life, and that the "ultimate goal" of "eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as

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430 Id. at 529-530 (Marshall, J., dissenting).

431 Id. at 494. Justice O'Connor explained that "States and their local subdivisions have many legislative weapons as their disposal both to punish and prevent present discrimination and to remove arbitrary barriers to minority advancement." Id.

432 See id. at 494-95.

> ("Under the standard proposed by Justice Marshall's dissent, 'race-conscious classifications designed to further remedial goals,' are forthwith subject to a relaxed standard of review. How the dissent arrives at the legal conclusion that a racial classification is 'designed to further remedial goals,' without first engaging in an examination of the factual basis for its enactment and the nexus between its scope and that factual basis, we are not told. However, once the 'remedial' conclusion is reached, the dissent's standard is singularly deferential, and bears little resemblance to the close examination of legislative purpose we have engaged in when reviewing classifications based on either race or gender.")

(internal citations omitted).

a human being's race" will never be achieved.[433]

Curiously, Justice O'Connor's view seems to indicate that the standard of judicial review will determine the equality of governmental action.[434] She defends judicial inquiry of the remedial action by the fact that Richmond's population at the time *Croson* was decided was 50 percent black, thus refuting the argument that the judiciary should protect these blacks because they are not a "discrete and insular minority."[435] Bad facts indeed lend themselves to bad law. That Richmond's city council was comprised of a black majority "would seem to militate for, not against, the application of heightened judicial scrutiny . . . [,]" thus turning the problem of majority rule dominating a minority on its head.[436] Justice O'Connor twice cited John Hart Ely, a proponent of affirmative action, because his suspect class concern hinges on majority rule.[437] *Croson* presented an unusual case where the white majority had not placed a burden on itself; instead "a law that favors Blacks over Whites [is] suspect if it were enacted by a predominantly Black legislature."[438]

One year later, Justice O'Connor offered an eight-page explanation that strict scrutiny should be the appropriate standard of review of federal government programs.[439] Once again, under her

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433 Id. at 495 (internal citations omitted, first alteration added, second alteration in original).

434 Justice O'Connor would later comment,

> The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs. "Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications . . . ."

Id. at 505-506 (quoting Regents of the University of California v. Bakke, 438 U.S. 265, 296-97 (1978)).

435 Id.

436 Id. at 496.

437 See John Ely, Democracy and Distrust 170 (1980); John Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723, 739 (1974) [hereinafter Ely, The Constitutionality of Reverse Racial Discrimination].

438 *Croson*, 488 U.S. at 496 (quoting Ely, The Constitutionality of Reverse Racial Discrimination, supra note 437, at 739).

439 See Metro Broadcasting v. FCC, 497 U.S. 547, 602-610 (1990) (O'Connor, J., dis-

view, strict scrutiny would have struck down an affirmative action program.[440] She claimed,

> This dispute regarding the appropriate standard of review may strike some as a lawyers' quibble over words, but it is not. The standard of review establishes whether and when the Court and Constitution allow the Government to employ racial classifications. A lower standard signals that the Government may resort to racial distinctions more readily.[441]

Justice O'Connor, and her vision of "colorblindness" won in 1995, as she wrote the majority opinion requiring strict scrutiny for all racial classifications, including those proscribed by the federal government.[442] The *Adarand* decision does little to change the focus of the evolved "colorblind" argument. It merely extended strict scrutiny to the federal government.[443]

A remedy for societal discrimination will not pass under strict scrutiny; that much is certain.[444] What must also be certain is that societal discrimination may exist while every legislative actor, state and federal, is powerless to eradicate it, unless the government actor has sufficient and convincing evidence that the societal discrimination has been reflected in the government action.[445] Does this contradict the erroneous principle that "[i]f one race be inferior to the other socially, the constitution of the United States

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senting).

440 See id. at 602-603.

441 Id. at 610.

442 See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995).

443 See id. at 255-256 (Stevens, J., dissenting). Justice Stevens berated Justice O'Connor's majority opinion for the latter's failure to recognize precedence in the two previous affirmative action cases, *Metro Broadcasting*, 497 U.S. 547, and *Fullilove v. Klutznick*, 448 U.S. 448 (1980). See *Adarand*, 515 U.S. at 256 (Stevens, J., dissenting).

444 See Wygant v. Jackson Board of Education, 476 U.S. 267, 288 (1986) (O'Connor, J., concurring) ("[A] government agency's interest in remedying 'societal' discrimination, that is discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny."). See also Hopwood v. Texas, 78 F.3d 932, 950 (5th Cir.), cert. denied, 518 U.S. 1033 (1996) (noting that the Supreme Court has consistently rejected remedying "societal discrimination" as a basis for affirmative action).

445 See *Wygant*, 476 U.S. at 277. (A government actor "must ensure that . . . it has convincing evidence that remedial action is warranted."). See also *Hopwood*, 78 F.3d at 950.

cannot put them on the same plane"?[446] Unlike the Constitution in 1896, the Constitution today prohibits such dominance to be reflected in government action, but does it also prohibit the government to do anything more? To find a compelling government interest, the government actor must look to its own actions and initiatives to find compelling evidence that the societal discrimination has been reflected in its decisions in order to eradicate the effect of the discrimination. Without such evidence, the government must turn its back on societal discrimination; a government actor who takes notice of the discrimination must intentionally ignore any societal racism or discrimination. "Our Constitution is colorblind" are merely words, and the maxim is another example of the Court treating "some of the language [the Court has] used in explaining [the] decisions as though it were more important than [the] actual holdings."[447]

3. Some Indicia of Colorblind II Jurisprudence

McClesky v. Kemp was one of the early Supreme Court cases to champion the colorblind ideal as more significant than the reality of racial discrimination in the constitutional analysis of the equal protection claim.[448] The *McClesky* court reviewed a habeus corpus petition that claimed the Georgia capital sentencing process was administered in a racially discriminatory manner. McClesky supported his claim with statistics from a study (the "Baldus Study") covering over two thousand Georgia murder cases from the 1970s.[449] Although the study contained reliable data clearly demonstrating that on the basis of race, black defendants were more likely to receive the death penalty than were whites, and that the lives of white victims were seen as more valuable than the lives of the black victims, the Court refused to acknowledge that the process at issue could have been infused with racism.[450] Instead, the court imposed a narrow "intent to discriminate" standard on the defendant, effectively barring any historical data of racism to enter the courtroom discussion.[451] *McClesky,* in what the author

446 Plessy v. Ferguson, 163 U.S. 537, 552 (1896).
447 *Adarand*, 515 U.S. at 255-256 (Stevens, J., dissenting).
448 481 U.S. 279 (1987). See also Strauss, supra note 383, at 140.
449 See *McClesky*, 481 U.S. at 286-287.
450 See id. at 336 (Brennan, J., dissenting).
451 Id. at 293.

considers as the apex of Colorblind II jurisprudence, extended the Court's "myopic" approach to racial discrimination demonstrated in the *Washington v. Davis* case 11 years prior.[452]

The Court stated that historical evidence must be reasonably contemporaneous with the challenged decision; official actions taken long ago is of little probative value to show evidence of current intent.[453] By doing so, the Court disengaged history from claims of racial discrimination for the purpose of pursuing a colorblind aim. The ideal of reaching for a colorblind society was held to be more relevant to the constitutional analysis at issue in *McClesky* than were the realities of racial discrimination in the application of the death penalty.[454] The Court's colorblind ideal is revealed by its desire to ignore the clear systemic indications of racial bias and its preferences for searching for an individual with particularized discriminatory intent.[455] In turn, the great esteem that the Court places on colorblind (jurisprudence) obscures the harms stemming from the status quo existence of race-based privilege in the life-and-death context of *McClesky*.[456]

Affirmative action questions the settled expectations whites have because they are white; therefore, the affirmative action context particularly highlights the link between the jurisprudential preference for colorblindness and its consequent reinforcement of race-based privilege.[457] As discussed previously in Part II(B), *Croson* demonstrated the Court's narrow search for particularized discrimination rather than societal discrimination. This blatant disregard for the harms of societal discrimination is clearly reflected in the race neutral strict scrutiny test applied, which inevitably treats racial discrimination redress as just as discriminatory as the actual racial discrimination itself.

Four years after *Croson,* the Court's colorblind jurisprudence forwarded the premise that forthright considerations of racial difference also are a form of stereotyping that is again just as harmful

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452 426 U.S. 229 (1976).
453 See *McClesky*, 481 U.S. at 321.
454 See id. at 314-19.
455 See id. at 292.
456 See id. at 312.
457 See Harris, supra note 329, at 1779.

as acts of discrimination.[458] *Shaw v. Reno* challenged reapportionment in North Carolina congressional districts that proposed the creation of new districts to strengthen minority votes.[459] White voters challenged the plan. The Court held that racial reapportionment made solely for the purpose of strengthening minority voting was a race-based stigma and served to segregate citizens on the basis of race.[460] This effectively established race-consciousness, not colorblindness as the Court required. In effect, the Supreme Court appeared to demand that racist practices resolve themselves without any affirmative action acknowledgment that racial bias is at work.[461]

In its effort to enforce colorblind jurisprudence, the *Shaw* Court was willing to ignore the facts that there had not been a single black member of Congress from North Carolina since Reconstruction and that white residents persisted in their refusal to vote for black candidates.[462] To state the case in concrete terms, the colorblind approach maintained bloc voting by whites.[463] Aside from doing for whites what the Court says cannot be done for blacks, *Shaw* preserves white privilege in the name of colorblindness and raises the principle of colorblindness to such an apex of negativity that any attempt to redress racial discrimination will be thwarted by the Court.[464] While *McClesky* demonstrated this unparalleled height of irrational jurisprudence in a life-and-death matter, the very same principle today threatens the future of our nation's educational system as exemplified in the colorblind *Hopwood* decision.

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458 See Shaw v. Reno, 509 U.S. 630 (1993).

459 509 U.S. 630.

460 See id. at 657.

461 See id. at 659. (White, J., dissenting).

462 See id.

463 See Theodore Reuter, The Politics of Race: African Americans and the Political System 5, 6 (1995).

464 See Hernandez, supra note 381, at 151

> ("The Court's position conflates the solidarity effects of racial oppression with actual racial bias and obfuscates the actual manifestations of racial discrimination. The MCM [Multicultural Category Movement] also confuses the solidarity effects of racial discrimination with racial stereotyping when it disregards a sociopolitical view of race in favor of a cultural view of race.").

4. Turning a Colorblind Eye in the Fifth Circuit and Elsewhere: The *Hopwood* Decision

The progression in the Supreme Court's development of colorblind jurisprudence laid the groundwork for the radical *Hopwood v. Texas* decision in 1996.[465] This decision is considered radical because it is a departure from Supreme Court precedent established in *Bakke,* and because it is the Fifth Circuit's interpretation of the direction of the colorblind jurisprudence of the Supreme Court.[466] The Fifth Circuit held, ignoring Supreme Court precedent, that race could not be used as even one of a multiplicity of factors in law school admissions, because it was inappropriate to continue elevating some races over others to the "detriment" of whites, even to correct a perceived racial imbalance in the student body.[467]

When the Fifth Circuit extended the strict scrutiny analysis to the University of Texas Law School in rejecting UT's affirmative action admissions process, the staggering result was not merely the statistical drop in students but the immediacy of the decline. Not only was the effect felt at the law school—it enrolled four black students in 1997 and eight in 1998[468]—but it expanded throughout much of the state. In 1997, only one student of 200 entering the medical school at the University of Texas Southwestern Medical Center in Dallas was black, down 90 percent from 1996.[469] Even private universities felt the impact, such as Southern Methodist University in Dallas, which saw its minority enrollment cut in half, to 11 percent in 1997.[470] The trend continued in 1998. Of the 49,000 undergraduates at the University of Texas at Austin, only 3

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465 78 F.3d 932, 944 (5th Cir.), cert. denied, 518 U.S. 1033 (1996).

466 See generally id.

467 Texas v. Hopwood, 518 U.S. 1033, 1033 (1996) (opinion of Ginsburg, J., respecting the denial of the petition for a writ of certiorari.).

468 See supra note 45 (discussing the effects of the *Hopwood* decision on black enrollment at the University of Texas Law School).

469 See Jayne Noble Suhler, Affirmative Action Case Has Ripple Effect: UT Southwestern, SMU Say Black Enrollment Down, Dallas Morning News, Oct. 21, 1997, at 19A. The source indicating the decrease in enrollment was University President Kern Wildenthal. See id.

470 See id. The source indicating the decrease in enrollment was Leon Bennett, legal counsel for SMU. See id.

percent were African-American.[471]

The *Hopwood* Court hinged its rejection of a dual system of admissions on the rejection of two familiar arguments: it rejected diversity as a compelling government interest,[472] and it failed to find that the affirmative action admissions process was designed to remedy the effects of past discrimination.[473] The rejection of diversity also rejected the plurality opinion of Justice Powell in *Bakke*, who said "attainment of a diverse student body. . . . clearly is a constitutionally permissible goal for an institution of higher education. . . . The freedom of a university to make its own judgments as to education includes the selection of its student body."[474] Moreover, it rejected Justice Powell's assertion that race may be a "plus" in admissions, where other criteria are considered equal.[475] According to the Fifth Circuit,

> [w]ithin the general principles of the Fourteenth Amendment, the use of race in admissions for diversity in higher education contradicts, rather than furthers, the aims of equal protection. Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals. It may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fuel-

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471 See Christy Hoppe, Building on the Past: UT's First Black Student Returns as Alumni Leader to Help Draw Blueprint for Future, Dallas Morning News, Oct. 9, 1998, at 1A.

472 See *Hopwood*, 78 F.3d at 944 (noting that "[n]o case since *Bakke* has accepted diversity as a compelling state interest under a strict scrutiny analysis").

473 See id. at 955.

474 Regents of the University of California v. Bakke, 438 U.S. 265, 311-12 (1978) (Powell, J., announcing the judgment of the Court). See also Leslie Yalof Garfield, *Hopwood v. Texas*: Strict in Theory or Fatal in Fact, 34 San Diego L. Rev. 497, 504 (1997).

475 See Garfield, supra note 474, at 504-05.

> For example, assume two applicants, one minority and one non-minority, have the same UGPA and MCAT scores. Under Justice Powell's opinion, an admissions committee can offer admission to the minority applicant before it offers admission to the non-minority applicant since a diversity viewpoint "plus" UGPA and MCAT score is of more value to the school than a non-diversity viewpoint an the same 'objective' test scores.

Id. at 505 n. 36 (citing *Bakke*, 438 U.S. at 317).

ing racial hostility.[476]

The Fifth Circuit's reasoning then indicates that the distinction between blackness and whiteness is no longer a distinction recognized by the courts, regardless of the formation of the beliefs and behavior of persons of different races.[477] "The use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of the applicants."[478] While social science and political theory appreciate that "being black" fosters particularized thoughts and beliefs due to membership in a repressed minority group, "[t]his assumption, however, does not withstand scrutiny."[479]

A rejection of "being black" as an assumption able to justify race-consciousness on the grounds of diversity would not have been so appalling, but the rejection of the school's asserted "present effects of past discrimination" as a compelling reason to implement the affirmative action admissions program renders "color-blindness" into something more of "turning a (color) blind eye" to the problems of race.[480] The District Court acknowledged three present effects of past discrimination as (1) a "lingering reputation in the minority community . . . as a 'white school;'" (2) minority under-representation in the student body; and (3) a perception that the law school was a hostile environment for minorities.[481] None

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476 *Hopwood*, 78 F.3d at 945.

477 See *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) ("Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think."). See also *Hopwood*, 78 F.3d at 946.

478 *Hopwood*, 78 F.3d at 945.

479 See id. at 946. According to the *Hopwood* court, "The assumption is that a certain individual possesses characteristics by virtue of being a member of a certain racial group." Id. This is the assumption the court rejected. See id.

480 Id. at 952. "[T]he relevant governmental discriminator must prove that there are present effects of past discrimination of the type that justify the racial classifications at issue . . . ." Id. The *Hopwood* court quoted a Fourth Circuit case, *Podberesky v. Kirwan*, 38 F.3d 147, 153 (4th Cir. 1994), cert. denied 514 U.S. 1128 (1995): "To have a present effect of past discrimination sufficient to justify the program, the party seeking to implement the program must, at a minimum, prove that the effect it proffers is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program." *Hopwood*, 78 F.3d at 952 (quoting *Podberesky*, 38 F.3d at 153).

481 Hopwood v. Texas, 861 F.Supp. 551, 572 (W.D. Tex. 1994). See also *Hopwood*,

of these garnered recognition of a compelling interest to aid blacks, even if these present effects were reflections of the white dominant majority at the law school.[482]

The statistics show some resulting negative effects of the *Hopwood* decision, and the case itself says little for the future of affirmative action in the courts. The courts seem to be setting up a certiorari "demand" for Supreme Court review, since there is currently a see-saw effect in the district and circuit courts on the issue of diversity as a compelling interest. Perhaps an argument could be framed where racial diversity created a compelling interest, but the argument would most likely be one advocating Justice Powell's argument in *Bakke* and rejecting the Fifth Circuit's analysis.[483] Unless there is a strong indication that a government entity, within a fact pattern before the Supreme Court, can document substantial present effects of past discrimination, affirmative action programs will lose continuously in the judiciary.

Furthermore, *Hopwood* has opened the door in California, Florida, Michigan, Virginia, Georgia, Oklahoma, Ohio, Washington, and New York for attacks on admission policies in higher education and on affirmative action in general. Since *Hopwood*, this "colorblind" movement has reached far beyond the boundaries of Texas and the Fifth Circuit, as discussed in detail in the next

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78 F.3d at 952.

482 See *Hopwood*, 78 F.3d at 952-55.

483 See Garfield, supra note 474, at 512-513 (noting that the District Court in *Hopwood* embraced Justice Powell's vision of diversity while the Fifth Circuit rejected it). In five recent cases, various lower federal courts have rendered conflicting opinions regarding whether student body diversity can be a compelling enough interest to survive strict scrutiny analysis. Compare *Hopwood*, 78 F.3d at 948 (concluding that diversity cannot be a state interest compelling enough to meet the "steep standard of strict scrutiny"), Johnson v. Board of Regents of the University System of Georgia, 106 F. Supp. 2d 1362, 1375 (S.D. Ga. 2000) (ruling in accord with *Hopwood*), and Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (ruling, in accord with *Hopwood*, that diversity is not a compelling state interest for purposes of admission to the University of Michigan Law School, and disagreeing with the earlier ruling in its companion case, *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000), which held that diversity is a compelling state interest for the purposes of admission to the University of Michigan proper), with Smith v. University of Washington Law School, 233 F.3d 1188, 1200, 1201 (9th Cir. 2000) (ruling that diversity can be a compelling state interest, at least until the Supreme Court overrules that part of Justice Powell's opinion in *Bakke* that so recognizes it), and *Gratz*, 122 F. Supp. 2d at 820 (disagreeing with *Hopwood* and ruling, in accord with Justice Powell's plurality opinion in *Bakke*, that diversity is a compelling state interest).

Part. Within Texas, back-and-forth opinions from the Texas Attorney General's office and a pending appeal on the *Hopwood* decision have caused further tension within the higher education admissions framework.[484]

III. THE AMERICAN 'LEGAL' DILEMMA . . .[485] TO BE CONTINUED

A. The Concrete Costs of Diversity

The *Hopwood* case argued affirmative action as a remedial measure, as United States District Court Judge Sam Sparks, in agreement with the law school, put it, to "remedy the legacy of the past which has left residual effects that persist into the present" and which can be seen "in the diminished educational attainment of the present generation" of blacks and Mexican-Americans resi-

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484 Jeffrey Selingo & Stephen Burd, Texas Attorney General Rescinds Opinion Barring Race-Exclusive Scholarships, Chron. Higher Educ., September 17, 1999, at A44. Selingo and Burd discuss Texas Attorney General John Cornyn's rescission of his predecessor Dan Morales' 1997 legal opinion on the *Hopwood* decision's bar on Texas colleges offering race exclusive scholarships. See id. Cornyn, while withdrawing the prior interpretation of *Hopwood* as too broad, has also cautioned colleges not to change their financial-aid policies as yet. See id. Cornyn bases this advice on the absence of clear guidance from the Court at this time. See id.

485 In 1944 Gunnar Myrdal, a Swedish economist, published a massive study he undertook at the request of the Carnegie Corporation. This book, entitled An American Dilemma: The Negro Problem and Modern Democracy (1944), became one of the most influential studies presented at the time on the Negro problem in America. See also supra text accompanying notes 235-36. Myrdal, with the assistance of Richard Sterner and Arnold Rose, compiled an epic tome concerned with one pervasive, unifying theme. This theme asserted that white Americans experienced a troubling dilemma because of the discrepancy between the hallowed "American Creed," whereby they think, act, and talk under the influence of egalitarian and Christian precepts, and the oppressive way they treated Afro-Americans. See David Southern, Gunnar Mrydal and Black-White Relations: The Use and Abuse of An American Dilemma, 1944-1969 xiii (1987). Myrdal hailed this dilemma as America's greatest scandal, and predicted that this moral dilemma would soon force fundamental changes in American race relations. Myrdal was not without credibility, and eventually morality won in the form of Civil Rights legislation. However, passage of this legislation did not ensure compliance by the white majority with the "American Creed," necessitating intervention by the courts. Not surprisingly, Americans were forced by the courts to reconcile its blatant racist practices with the words of equality under the Constitution and subsequent legislative acts through legal channels, creating an ever increasing and complex American legal dilemma. In 2001, the Court and the legislature have run the gamut of civil rights legislation, remedial action, racial preferences, and diversity selectivity, only to find themselves further mired in a continual cycle of racism and an American "legal" dilemma.

dent in the state of Texas, a state which had not only been a slaveholding state but a Jim Crow state, complete with segregated educational systems.[486] This argument could not be sufficiently justified by the law school.

Justice Powell would have argued, as in *Bakke,* that an institution of higher education must have the latitude to select a diverse student body. Justice Powell meant not mere racial diversity, but a broader diversity that results from a class made up of students of different races, geographical and cultural backgrounds, and special talents and abilities—students that can contribute "something that a white person cannot offer."[487] Because diversity was the foundation on which the edifice of affirmative action in admissions had for so long been built, the Fifth Circuit's ruling sent shock waves through the world of higher education.[488] Those officially designated as minorities for purposes of affirmative action have undergone what must feel like an ongoing experiment at the hands of higher education.[489] This experiment has not been without costs, both immediate and far-reaching.

1. Texas Schools following *Hopwood*

While the battle over racial diversity in the courts has centered on the question of a compelling government interest, the real battle in Texas has been for state lawmakers to maintain a minority population at its more prestigious institutions. *Hopwood* began to place Texas schools at a competitive disadvantage for recruiting minority students who could benefit from affirmative action programs in other states.[490] Texas Attorney General Dan Morales, who openly opposes affirmative action, released an Attorney General's opinion interpreting the *Hopwood* decision to bar affirma-

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486 See Terry Eastland, Ending Affirmative Action: The Case for Colorblind Justice 75-76 (1996).

487 Id. at 78. See also Regents of the University of California v. Bakke, 438 U.S. 265, 322-23 (1978) (commenting on Harvard College's admission process).

488 See Tanya Kateri Hernandez, "Multiracial Discourse": Racial Classifications in an Era of Color-Blind Jurisprudence, 57 Md. L. Rev. 97, 107 (1998).

489 See id. at 145-46.

490 See Christy Hoppe, UT Regents Vote To Appeal *Hopwood* Case, Dallas Morning News, May 14, 1998, at 1A (quoting Don Evans, the chairman of the University of Texas System Board of Regents, as saying, "Right now, there's one standard for Texas and a standard for all the other 49 states. We think that's unfair.").

tive action programs in admissions and scholarship programs at all Texas public schools.[491] When the University of Texas regents voted to appeal the *Hopwood* decision, Morales said that the "most compelling argument" that he would approve would be that Texas schools are at a competitive disadvantage because out-of-state schools were in a better position to recruit minority students with their affirmative action programs.[492] Morales' successor as Texas Attorney General, John Cornyn, has since issued a statement rescinding the office's earlier opinion on *Hopwood*.[493] Cornyn agrees with college officials and state legislators in Texas that the previous application of the *Hopwood* decision to include race-based financial aid as well as race preferences in college admissions is too broad an application, absent clear guidance from the Court.[494] Cornyn has advised Texas institutions of higher education to maintain the status quo regarding policies on admissions and financial aid pending further appeal of the issues decided in *Hopwood*.[495]

However, maintaining racial diversity in a "colorblind" system, although not compelling by judicial standards, nevertheless appears to be a costly endeavor. Out-of-state schools not affected by the *Hopwood* decision have won the "bidding wars" for Texas minority students.[496] For example, in response to perceived legal vulnerability, as early as April 1996, privately operated Rice University abandoned its race-sensitive admissions program.[497] As a result, the percentage of blacks in the freshman class dropped from 10 percent in 1995 to 7.7 percent in 1996 and to 4.2 percent in

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491 Op. Tex. Att'y Gen. No. LO 97-001 (1997). See also Hoppe, supra note 490, at 1A (quoting Texas Attorney General Dan Morales as saying, "In my judgment, if minorities are to succeed in the next century, it will not be based on the continued reliance on these artificial crutches."); Jayne Noble Suhler, Affirmative Action Case Has Ripple Effect: UT Southwestern, SMU Say Black Enrollment Down, Dallas Morning News, Oct. 21, 1997, at 19A.

492 Hoppe, supra note 490, at 1A (quoting statement of Texas Attorney General Dan Morales).

493 See Jeffrey Selingo & Stephen Burd, Texas Attorney General Rescinds Opinion Barring Race-Exclusive Scholarships, Chron. Higher Educ., September 17, 1999, at A44.

494 See id.

495 See id.

496 Hoppe, supra note 490, at 1A.

497 See News and Views, J. Blacks Higher Educ., Summer 1999, at 11.

1997.[498] After the 1998 fall term (with lowered minority enrollment) had begun at Texas schools, lawmakers began to realize the key to maintaining a diverse classroom was to offer more scholarship and grant money.[499] Texas A&M University showed an approximately 20 percent decrease in the enrollment of blacks and Hispanics, forcing the university to design an intensive review process to mitigate the loss of scholarship funding and the resulting reduction in the ability to attract students of color.[500]

One commission, the Texas Commission on a Representative Student Body, comprised of educators and business leaders, called for the Texas State Legislature to contribute more than $500 million for financial aid, scholarships and grants for minority students.[501] The Commission recommended "that need- and achievement-based grants go to students from disadvantaged backgrounds, regardless of race or gender. However, because low-income and first-generation college students are disproportionately black or Latino, such a program could also help increase minority enrollment."[502] Law-makers would later claim this amount was too costly, but legislators indicated there would be an increase in funds for aid to students from disadvantaged backgrounds.[503] The commission also recommended building partnerships with private groups not bound by constitutional restraints, simplifying the financial aid process at the state schools, and giving technical college degrees greater recognition in determining admissions stan-

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498 See id.

499 See Renee C. Lee, Funding Called the Key to Minority Enrollment, Fort Worth Star-Telegram, Sept. 30, 1998, at 1.

500 See Bonnie Ortiz, If the Truth Be Cold, Black Issues Higher Educ., August 19, 1999, at 109.

501 See Suhler, supra note 491, at 33A

> ("Money is the main reason minority and low-income students do not enroll in college, according to the commission's report .... Of the students who do enroll, including first-generation students, many leave before they earn a degree .... 'A student from a family with an income above $75,000 a year has an 86 percent chance of entering college before age 24, while a student from a family earning less than $10,000 per year has a 38 percent chance,' the report says.").

502 Id.

503 See Associated Press, College Aid Plan Seeks Too Much, Lawmakers Say, Dallas Morning News, Oct. 16, 1998, at 33A.

dards.[504]

2. Elsewhere

While affirmative action challenges are not limited to the following states, it is these states that have set the precedent both in the past and for the present time. States such as Maryland are simply forbidden to distribute race based financial aid (scholarships) to students, which has left enrollment down, and in the "decree's"[505] wake, a scramble to find alternative methods to boost enrollment and keep minority students. Other states, like California and Michigan have been entangled in litigation and legislative action, which has seized the purse strings of even the most selective admission processor.

"The University of California—which has the distinction of being the nation's leading producer of minority graduates, could soon become the first state university system to have re-segregated voluntarily."[506] In 1995, the University Board of Regents voted to ban affirmative action in the admission process. As a result, enrollment of Latinos and blacks at the university's most selective campuses is lagging far behind where it was before the ban. In just a two-year period following the ban, applications from blacks dropped 25 percent, and from Latinos, 31 percent.[507]

California schools also have Proposition 209 and the Regent's SP-1 action, which mandate "colorblindness" in the admission process, with which to deal.[508] In California, in 1996, more than 54 percent of the voters approved Proposition 209, a constitutional amendment.[509] This amendment basically sought to eliminate preferences from state affirmative action programs. The Proposi-

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504 See id.

505 See Ortiz, supra note 500, at 109.

506 Cheryl D. Fields & Michele N-K Collision, Shameful Occurrences, Black Issues Higher Educ., August 19, 1999, at 106.

507 See Ortiz, supra note 500, at 109.

508 See id. For analysis of Proposition 209, see California Legislative Analyst, Analysis of Proposition 209, *available at* <http://vote96.ss.ca.gov/Vote96/html/BP/209analysis.htm> (visited Feb. 5, 2001). For the text of SP-1, see The Regents of the University of California, Policies Ensuring Equal Treatment Admissions (SP-1), *available at* <http://www.ucop.edu/regents/policies/sp1.html> (visited Feb. 5, 2001).

509 See Corinne E. Anderson, A Current Perspective: The Erosion of Affirmative Action in University Admissions, 32 Akron L. Rev. 181, 209-10 (1999).

tion had a dramatic effect on admissions of minorities. For example, Boalt Hall, the University of California at Berkeley's law school, which had admitted an average of 24 black students per year prior to Proposition 209, admitted only one in 1997.[510] Following this, bills were proposed in thirteen states to eliminate affirmative action programs, though none were enacted.[511]

Proposition 209 has aroused many doubts as to its constitutionality, its potential conflicts with federal law, and its alleged withdrawal from state and local authorities the authority to enact programs that "inure to the benefit" of minorities and women.[512] This "political participation" argument, advanced by the American Civil Liberties Union, stems from a 1982 Supreme Court decision that struck down a Washington state initiative forbidding busing for racial integration (which had been mandated by the Seattle school board), while allowing it for nonracial purposes.[513] The November 1998 Washington initiative was approved by Washington voters and banned any racial preferences by any agency of the state government including state universities.[514] While the situation in Washington included minorities but not women, the fundamental problem with the argument drawn from the case lies in the assumption that preferences in public employment, education, contracting, and busing, really do "injure to the benefit" of minorities and women. The troubling note here is that the voters in California and Washington and the judges on the Fifth Circuit say preferences, hence affirmative action programs, must not. Affirmative action, however, is a term that encompasses both preferential and non-preferential procedures.[515] The colorblind rule that propositions such as Proposition 209 introduced debated whether or not there might be some circumstances in which race should be a fac-

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510 See John E. Morris, Boalt Hall's Affirmative Action Dilemma, Am. Law., Nov. 1997, at 4.

511 See Jodi Miller, Note, "Democracy in a Free Fall": The Use of Ballot Initiatives to Dismantle State-Sponsored Affirmative Action Programs, 1999 Ann. Surv. Am. L. 1, 9.

512 See Anderson, supra note 509, at 212.

513 See Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 467 (1982) ("The Equal Protection Clause of the Fourteenth Amendment guarantees racial minorities the right to full participation in the political life of the community.").

514 See Steven A. Holmes, Victorious Preference Foes Look for New Battlefields, N.Y. Times, Nov. 10, 1998, at A25.

515 See Anderson, supra note 509, at 221-24.

tor in the assignment of public benefits (affirmative action), and in terms of whether, even if there are such circumstances, we are better off with a rule forbidding preferences.[516]

In October 1997, the University of Michigan was privy to its first reverse discrimination suit. The white plaintiffs in the case of *Gratz v. Bollinger*,[517] as in *Hopwood*, alleged racially discriminatory admission processes in the university's undergraduate and law school admission procedures.[518] In August 1999, a three-judge panel overruled two previous decisions and agreed to allow black and Latino students to become defendants in the case.[519] These students were introduced as defendants by defenders of affirmative action to show the grave harm the students may be subjected to if the plaintiffs won the suit, including loss of access to the university system in Michigan. According to attorneys on the case, this would be the first time that these students would have the opportunity to present the truth about racism, bias, and the inequality that continues to saturate higher education.[520] Concerning the possible loss of affirmative action in admissions on the campus, former President Gerald Ford, alumnus of Michigan State, reminded the public that future college students should not suffer the cultural and social impoverishment that afflicted his generation.[521]

The University of Georgia, in October 1999, announced that it would keep its racial-preference policies despite legal advice that they were unconstitutional.[522] Georgia's president, Michael F. Adams, told a campus forum that affirmative action in admissions was needed to overcome the legacy of segregation in the state and that until 1987 the school was under a court order to desegregate.[523] Georgia has been sued in federal court for bonus points it

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516 See id.

517 122 F. Supp. 2d 811 (E.D. Mich. 2000).

518 See id.; Noteworthy: 6th Circuit Court Says Black and Latino Students Can Join Michigan Affirmative Action Cases, Black Issues Higher Educ., August 19, 1999, at 108. See also supra note 483.

519 See Grutter v. Bollinger, 188 F.3d 394 (6th Cir. 1999); Noteworthy, supra note 518. See also supra note 483.

520 See Noteworthy, supra note 518.

521 See id.

522 See Peter Schmidt & Patrick Healy, U. of Va. Poised to Limit Race-Based Admissions; U. of Ga. Keeps Its Preferences, Chron. Higher Educ., October 8, 1999, at A40.

523 See id.

adds in an admission formula for borderline minority applicants.[524] Campus officials expect a federal judge to strike their affirmative action policies.[525] Other elite public universities are reviewing their affirmative action admissions policies to assess the continued feasibility of such programs in the wake of the Court's seeming intolerance of racial preferences and swing towards colorblind admission policies.[526]

Meanwhile, as racial preferences in student admissions have been successfully banished or drastically reduced to hopefully avoid a lawsuit such as the University of Georgia's, racial preference policies in admissions continue to thrive in the nation's private universities. In particular, the use of race as a qualifying factor in student selections is deeply embedded in the policies of the nation's most sought-after private universities such as Yale, Harvard, MIT, Stanford, and Duke.[527] Primarily, this is because suits challenging racial preferences have been brought under the Fourteenth Amendment, referring to state operated universities as instrumentalities of the state.[528] The basis for suit of a private university's affirmative action policies must be found in a statute, government regulation, or judicial precedent.[529] While opponents of affirmative action may imply that private institutions are bound by the Court's recent rulings, in reality, legal advocates of colorblind admissions prefer to target the state schools where their legal case rests on the far more secure terrain of clear constitutional language.[530]

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524 See Johnson v. Board of Regents of the University System of Georgia, 106 F. Supp. 2d 1362 (S.D. Ga. 2000); Schmidt & Healy, supra note 522, at A40.

525 See Schmidt & Healy, supra note 522, at A40.

526 See id. (noting the University of Virginia's consideration of race in admissions and the findings of a committee of the university's Board of Visitors).

527 Theodore Cross, Why the Opponents of Racial Preferences Haven't Taken America's Private Universities to Court, J. Blacks Higher Educ., Summer 1999, at 106.

528 See id. at 107.

529 See id.

530 See id. at 110.

B. Class-Based Affirmative Action[531]

Also in the wake of *Hopwood*, the concerns of educators and lawmakers in Texas to maintain diversity have created a debate over class-based,[532] as opposed to race-based, affirmative action programs designed to provide aid to those economically disadvantaged rather than those disadvantaged on factors such as race, gender, or ethnicity.[533] Such programs shift focus away from race and focus primarily on social economics as a factor in determining the allocation of government benefits and burdens.[534] In a 1996 speech

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[531] The Association of American Law Schools in 1997 held a Workshop on Achieving a Diverse Student Body in a Time of Retrenchment: Rising Controversy and Renewed Commitment. It was held against the backdrop of the *Hopwood* decision, as well as a decision by the University of California regents to prohibit racial preferences in admissions, and California's adoption of Proposition 209, prohibiting race- and gender-based preferences in public education. The papers in the December 1997 issue of the Journal of Legal Education were based on presentations made at the workshop. See Introduction to Symposium, Affirmative Action, 47 J. Legal Educ. 451 (1997).

[532] It has been stated that were it not for racism and heterogeneity in this country we would be more deeply involved in a class war so eminent in many other nations. See Ellis Cose, Color-Blind: Seeing Beyond Race in a Race-Obsessed World 194-98 (1997) (discussing class and race in America as well as in foreign countries, not only from a colorblind perspective, but also from an "apartheid" perspective. For example, Cose discusses Brazil's "race neutral" class system through such comments as "money whitens" and hints at the emerging theme that class can trump race).

[533] See Deborah C. Malamud, Assessing Class-Based Affirmative Action, 47 J. Legal Educ. 452, 458 (1997).

[534] See Richard H. Sander, Experimenting with Class-Based Affirmative Action, 47 J. Legal Educ. 472 (1997). Professor Sander uses the University of California at Los Angeles as an example of studies showing disparities in academic success with low socioeconomic status:

> In 1991 the UCLA law school conducted surveys of its students to estimate the income, education, and occupational status of their parents. The data showed that most students were from relatively elite backgrounds; the median income of students' parents was more than double the national median. A useful, though extreme way of thinking about the data is this: if one considers the national population of people in their twenties, those from families with incomes over $200,000 were about *fifty* times more likely to end up as students at our law school than were those from families below the poverty line. Data from a variety of other sources, including two surveys of a national sample of law schools, suggest that UCLA is not at all atypical. A 1995 survey of nearly 6,000 first-year students at 30 law schools found that 41 percent of the students' fathers and 25 percent of the mothers had earned graduate degrees. These numbers are close to the levels we found at UCLA, but they contrast sharply with comparable populations in the United States as a whole: among Americans aged 45 to 64, 8 percent of men and 4 percent of women have

delivered by then Republican presidential candidate Bob Dole, the candidate added his voice to a growing number of individuals who associate themselves with class-based preferences.[535] A motivating factor has been that the effect will favor minorities, thus allowing a colorblind "substitute" for race-based affirmative action programs.[536] "Whether this is viewed as a dodge around prohibitions on race-based admissions [in education], or as a vital antidote to the discriminatory, disparate impact of test scores, the connection between race and class has undoubtedly been the main source of growing interest in class based affirmative action."[537] Other "advocates include conservatives like Newt Gingrich and Jack Kemp, but the roots of the idea go back to civil right stalwarts like Martin Luther King, Jr. and Bayard Rustin."[538]

Professor Deborah Malamud sees the class-based affirmative action as a "poor tool" both in responding to economic inequality and in achieving racial goals in education.[539] First, she questions the effectiveness of class-based affirmative action as a poverty program because many of the persons in the defined "poverty class" will not meet the minimum standards set by the institutions of education.[540] Of those who do meet the minimum standards, "the least disadvantaged of the poor would tend to displace those members of the next class above the poor—call it the working class or the lower end of the lower middle class—who have barely succeeded in qualifying for admission under standard entry criteria."[541] Similarly, she finds problems with class-based affirmative action aiding the "middle class" since the middle class of citizens

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> graduate degrees. The socioeconomic disparities between American legal education and American society are comparable to the racial disparities that existed in the 1940s.

Id. at 475 (footnotes omitted).

535 See Richard D. Kahlenberg, Need-Based Affirmative Action, The Christian Science Monitor, November 4, 1996, at 20.

536 See Sander, supra note 534, at 475-76.

537 Id. at 476.

538 Kahlenberg, supra note 535, at 20.

539 See Malamud, supra note 533, at 459, 464.

540 See id. at 460 ("In short, poverty disqualifies many students for class-based affirmative action programs by denying them the minimum educational qualifications and the minimum financial means necessary to attend college or graduate school.").

541 Id. at 461.

is so difficult to define:[542]

> Take, for example, a comparison between a higher-paying blue-collar job and a lower-paying white-collar job—say, a union machinist and a bookkeeper. We tend to agree that the machinist is lower in *status* than the bookkeeper; the collar-color line has a categorical place in many Americans' concept of class. But a belief in the sanctity of the white collar is not always enough to overcome a sense that a higher income makes a person better-off than a lower one. One reason Americans tend not to think in terms of a "working class" is that highly skilled blue-collar workers—the aristocracy of labor—view themselves as, and are largely accepted as, members of the middle class.[543]

Professor Malamud believes the same principles that render class-based affirmative action problematic to ensure economic inequality will be even more problematic to achieve racial goals. First, while there may be a general correlation between economic disadvantage and minority status, "not all members of the minority group suffer equal economic disadvantage."[544] Moreover, a race-based program tends to favor minorities who may not have suffered economic disadvantage—saying nothing about racial disadvantage—so the program may tend to disproportionately harm economically disadvantaged whites.[545]

> It is tempting to think that class-based affirmative action could succeed where race-based affirmative action failed—that it *could* significantly aid the minority poor. After all, one often hears, the fact that minorities are disproportionately poor means that class-based affirmative action will disproportionately help minorities. This is a dangerous misconception, for two reasons. First, one must remember that minorities are *minorities*: there are more white

542 See id.
543 Id. at 462-63 (emphasis in original).
544 Id. at 464.
545 See id.

> poor people than black and Latino poor people, even though white poverty *rates* are lower than black and Latino poverty rates. Most of the poverty-based affirmative action slots will go to whites, by simple force of numbers. Second, the basic principles of affirmative action weigh against the use of poverty-based affirmative action as a tool for aiding the minority poor. . . . [I]t will be the best-off people in the eligible group (here, the poor) who will be in the position to benefit from affirmative action. To the extent that minorities are dually disadvantaged by their poverty and by their race/ethnicity, they are the *bottom* of the bottom and are thus likely to be *underrepresented* as beneficiaries of poverty-based affirmative action in comparison with their proportion among the poor. Yes, *some* poor minorities will get through—albeit (according to the principle of the return of the repressed) those whose life experiences are least typical of their group. But the beneficiaries of poverty-based affirmative action will be disproportionately white.[546]

Race also proves problematic for aiding the minority middle class. Professor Malamud's study has shown that the black middle class "is systematically worse off than the white middle class with regard to housing, occupational advancement, income and income security, wealth, educational opportunity, the intergenerational transmission of middle-class status, and the enjoyment of the public dignity that customarily both defines and accompanies membership in the middle class."[547] Moreover, studies have indicated that standardized test scores of of black candidates with the highest socio-economic status are substantially lower than the mean for lower middle-class white students.[548] If the blacks in the higher

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546 Id. at 465 (footnotes omitted) (emphasis in original).

547 Id. at 467. See also Deborah C. Malamud, Affirmative Action, Diversity, and the Black Middle Class, 68 U. Colo. L. Rev. 939, 999-1000 (1997).

548 See Linda F. Wightman, The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions, 72 N.Y.U. L. Rev. 1, 43 (1997) (indicating that the LSAT scores of African-Americans from a higher socio-economic status group were lower than those from whites in a lower status group). See also Malamud, supra note 533, at 467 (discussing

socio-economic level are not benefited from class-based affirmative action, and do not attain the appropriate admissions scores, then they are excluded. At the same time, lower middle class blacks will compete with lower middle class whites for slots in the class-based admissions. For the same statistical reasons, the whites will benefit more from the program than the blacks. While not all minorities will suffer, the system for selection remains disproportionate, and the likeliness of substantial exclusion of minorities from the educational selection process seems more likely.[549]

More problematic than the reasons indicated by Professor Malamud is that her argument addresses class-based affirmative action primarily in educational admissions. It says very little about such a system in other contexts, such as awarding government contracts or employment advancement. For example, assume that there are ten positions open at a government agency, none of which have traditionally been filled by members of a racial minority. The position pays an annual salary of $40,000 per year. In a race-based system, perhaps two positions will be reserved for minorities. If a class-based system replaces the race-based system, how does a government agency determine the appropriate level of socio-economic disadvantage of the applicants to determine who should fill those numbers? Unlike educational opportunity, which offers the potential of future earnings, employment opportunity provides immediate and concrete improvement of the socio-economic level of the person chosen to fill that position. In other words, it takes either a poor person or a person in the lower middle class and puts him or her somewhere higher in the middle class. The person chosen might be black, white, Latino, or otherwise, but the system seems to be more of an extended welfare system than one which allows a member of a minority to be in a position for which he or she would have been but for the long-term discrimination against the class of persons to which he or she belongs.

Professor Wightman's study).

549 Professor Sander's study favors class-based affirmative action as a means to increase minority enrollment, but a large part of his findings are based on statistical abstracts. See Sander, supra note 534, at 480, 483, 485, 488-89, 490, 493, 494, 496-97.

Advocates of class-based preferences seem to make two assumptions. First, they assume that a member of a minority group that has achieved a certain socio-economic level is no longer affected by societal discrimination. This argument is best left to social scientists, but it must be questioned at what socio-economic level discrimination ends. A middle-class African-American can be subjected to discrimination (or, to the extent blatant racism still exists, deemed a "nigger") just as readily as a lower-class black American, but at what point does a middle-class black person move beyond such discrimination? Similarly, class-based preferences seem to assume that a middle-class minority has assimilated with white society to an extent that preferences are no longer warranted. The middle-class minority may or may not face race as a societal barrier, but that minority no longer faces the economic disadvantage associated with a racial barrier. If a minority does face an economic disadvantage due to a racial barrier, the lower-class minority is placed in the same position as a white American who does not face the racial barrier.

C. Strivers: Research Points to Alternative Affirmative Action

Researchers at the Educational Testing Service (ETS) and elsewhere are developing methods that could help admissions offices identify "strivers," those students who score more than 200 points above the average score of students with a similar background.[550] The service is working on a system that would take into account 14 variables, such as family income, parents' education, and the rigor of high school courses pursued by the student,[551] and compares the student's test score with that of the school's average.[552]

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550 Ben Gose, More Points for "Strivers": the New Affirmative Action?, Chron. Higher Educ., September 17, 1999, at A55. Factors included in the system may include race, sex, socioeconomic status of the student's parents, and reporting if the mother works. See id. Variables considered for the school's index include the location of school, whether it is an urban or rural school, what percentage of the last high school class went on to college, etc. See id.

551 See id.

552 See id.

Using these systems, students who earned "striver" status could be given extra considerations in admissions, and the relative value of the Scholastic Aptitude Test (SAT) scores of many minority students will go up.[553] ETS, which administers the SAT, describes the system as having the potential to alleviate some of the problems asociated with standardized test scores.[554] After all, assimilation into the white university of a disadvantaged black is a way to preserve racially diverse classes at a time when affirmative action is under attack.[555] The approach is directed towards rewarding the hard worker, not displaying preferences, as traditional affirmative action was thought to do. A colorblind version of the SAT—one that does not take race or ethnicity into account—has been created, along with one that does consider race and ethnicity.[556]

The proposed system would only help preserve racial diversity when race is included as a factor, and this inclusion may cause the system to fall under judicial scrutiny.[557] ETS officials explain that if you want a student body to reflect the general racial composition of the population, you have to put race in as a factor.[558] The other problem with strivers is that students who have low test scores should not be expected to shine in the classroom, since studies reveal that lower grades, not higher grades as one might expect, are the norm, as the same disadvantages of race or parental income are still not a guarantee of a diploma, or even of a future.

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553 See id.
554 See id.
555 See id.
556 See id.
557 See id.
558 See id. at A56.

D. "Stereotype Threat;"[559] Thin Ice or Black Ice?[560]

Not only does assimilation pose a threat to the compensatory intent of affirmative action, but the "stereotype threat" also places affirmative action on the brink of disaster:

> Over the past four decades black American college students have been more in the spotlight than any other American students. This is because they are not just college students; they are a cutting edge in America's effort to integrate itself in the thirty-five years since the passage of the Civil Rights Act. These students have borne much of the burden for our national experiment in racial integration. And to a significant degree the success of the experiment will be determined by their success.[561]

The 1990s however, have shown that the national college dropout rate for blacks has been 20 to 25 percent higher than that for whites, and the grade-point average of black students is two thirds of a grade below that of whites.[562] Attempts to explain the underperformance of blacks, even though they go on to do just as well in postgraduate work and professional attainment as other students, has moved away from a class-based analysis to a recognition that "something racial is depressing the academic performance of these students."[563] This racial force has been labeled the "stereotype threat," that is, "the threat of being viewed through the lens of a negative stereotype, or the fear of doing something that would inadvertently confirm that stereotype."[564] As W.E.B. Du

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559 Claude Steele, Thin Ice: Stereotype Threat and Black College Students, 44, The Atlantic Monthly, August 1999, at 44.

560 "Black ice" is a colloquial phrase which refers to a hazardous situation found when sidewalks and walkways ice over, but the sheet of ice is utterly transparent, and consequently the danger to the casual passerby is not readily seen. "Black ice" can lead to serious slip and fall injuries for the unwary traveler. It is with this in mind that the metaphor "black ice" seems most appropriate for those black college students on "thin ice" as a result of stereotype threat. Just as with black ice, to the casual observer everything appears in order. However, the real dangers are just below the surface, ready at any moment to break the step of those unaware of its presence.

561 Steele, supra note 559, at 44.

562 See id.

563 Id. at 46.

564 Id.

Bois put it, "It is a strange sensation, this double-consciousness, this sense of always looking at one's self through the eyes of another."[565] These students fall prey to the external force of society's perception and treatment of their group, despite their hard work and potential success in college. This can lead to a self-fulfilling prophecy, or to a choice of disassociation and denial of one's race so as to survive through a psychic adjustment of "disidentification."[566] Disidentification is a high price to pay to fight what others perceive about their abilities, or to perhaps disprove the external stereotype threat. One solution offered has been to create educational niches in which negative stereotypes are thought not to apply, and to use weekly sessions to minimize racial concerns among black and white students.[567]

E. Pluralism and Assimilationism Revisited

Class-based preferences are still in the experimental stage,[568] so only time may tell whether they will be effective. Unfortunately, few offer plausible answers. Minorities found themselves repressed as a result of a system allowing white preferences to be reflected in the law, until the judiciary disavowed those racist preferences. One commentator has noted that "a dominant culture can be relatively unconcerned with a subordinated group's definition of itself."[569] For a time, minorities were able to press their preferences, and sought to achieve proportional representation.[570]

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565 W.E.B. Du Bois, The Souls of Black Folk, 16-17 (Fawcett Publications, 1961) (1903).

566 Steele, supra note 559, at 46.

567 See id. at 51, 54.

568 See Sander, supra note 534, at 476 (noting the worthiness of class-based preferences in achieving racial balance "lies largely in the eye of the beholder.").

569 T. Alexander Aleinikoff, A Case for Race-Consciousness, 91 Colum. L. Rev. 1060, 1083 (1991).

570 See Dinesh D'Souza, The End of Racism 539 (1995)

> ("There are four possible policy remedies for dealing with persistent discrimination . . . . The first approach is to maintain the status quo, perhaps even to expand the logic of proportional representation for all racial groups. The approach . . . is a radical application of cultural relativism, which becomes the basis for an enforced egalitarianism between racial groups. This approach, which necessarily entails racial preferences, was perhaps necessary and inevitable in the late 1960s—it sought to eliminate comprehensive discrimination against blacks in many areas, to kick in a closed door. Now such comprehen-

But just as proportional representation failed in the courts, the inability of African-Americans to assimilate in American society has also caused it to fail.

> Assimilation is not today a popular term. Recently I asked a group of Harvard students taking a class on race and ethnicity in the United States what their attitude was to the term "assimilation." The large majority had a negative reaction to it. Had I asked what they thought of the term "Americanization," the reaction I am sure would have been even more hostile. The "melting pot" is no longer a uniformly praised metaphor for American society, as it once was. It suggests too much a forced conformity and reminds people today not of the welcome in American society to so many groups and races but rather of American society's demands on those it allows to enter. Indeed, in recent years it has been taken for granted that assimilation—as an expectation of how different ethnic and racial groups would respond to their common presence in one society, or as an ideal of how the society should evolve, or as the expected result of a sober social scientific analysis of the ultimate consequence of the meeting of people and races—is to be rejected. Our ethnic and racial reality, we are told, does not exhibit the effects of assimilation; our social science should not expect it; and as an ideal it has become somewhat disreputable, opposed to the reality of both individual and group difference and to the claims that such differences should be recognized and celebrated.[571]

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sive discrimination, which stretches across entire sectors of the work force, is nonexistent, yet we have become used to doing business through the legerdemain of preferences and relaxed standards. Proportional representation also entails administrative benefits: it establishes an enforceable arithmetical standard for implementing civil rights laws.").

571 Nathan Glazer, We Are All Multiculturists Now 96 (1997).

Nathan Glazer claims that "[m]ulticulturalism is the price America is paying for its inability or unwillingness to incorporate into its society African-Americans, in the same way and to the same degree it has incorporated so many groups."[572] Multiculturalism is little more than cultural pluralism, yet the ideal of the former is to educate all races of the different cultures that make up American society.[573] According to Glazer,

> The two nations for our America are the black and the white, and increasingly, as Hispanics and Asians become less different from whites from the point of view of residence, income, occupation, and political attitudes, the two nations become the black and the others. The change that has shaken our expectations for the future of American society is not the rise of women or of gays and lesbians. It is rather the change in our expectations as to how and when the full incorporation of African Americans into American life will take place. Only twenty years ago we could still believe that African Americans would become, in their ways of life, their degree of success, their connection to society, simply Americans of darker skin. I still believe that will happen eventually. But our progress in moving toward that goal, while evident in some respects, shows some serious backsliding, and more than that, a hard institutionalization of differences, one example of which is multiculturalism in American education. It is not easy to see how these institutionalized differences will be overcome soon.[574]

If cultural pluralism and assimilationism stand on contradictory grounds as colorblindness and race-consciousness stand in government action, multiculturalism should face the same analytical difficulties that race-consciousness faces. Yet the fact is neither cultural pluralism nor assimilation has been implemented from a

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572 Id. at 147.

573 See D'Souza, supra note 570, at 546 ("[In the view of multiculturists], what Americans have in common is their ethnic and cultural diversity and we should learn to celebrate that.").

574 Glazer, supra note 571, at 149.

race-blind perspective, and neither offers a viable solution to the end of racism. Cultural pluralism perhaps fosters racism, since it teaches that different cultures and races indeed possess traits that are different, and supremacy can easily permeate the educational process. At the same time, assimilation forces upon both blacks and whites inclusion of the minorities in white society, and the clash of such forced inclusion has resulted in an incompatible combination of assumptions. But is indifference to race in public policy the answer to the race problem in society? The conservative Dinesh D'Souza concludes that

> [t]he black problem can be solved only through a program of cultural reconstruction in which society plays a supporting role but which is carried out primarily by African Americans themselves. Both projects need to be pursued simultaneously; neither can work by itself. If society is race neutral but blacks remain uncompetitive, then equality of rights for individuals will lead to dramatic inequality of result for groups, liberal embarrassment will set in, and we are back on the path to racial preferences. On the other hand, if blacks are going to reform their community, they have a right to expect that they will be treated equally before the law. Although America has a long way to go, many mistakes have been made, and current antagonisms are high, still there are hopeful signs that the nation can move toward a society in which race ceases to matter, a destination we can term "the end of racism."[575]

Until "the end of racism," however, we are stuck in a "wait-and-see" predicament. *Wait* until blacks become competitive, then *wait* to *see* if the change in black competitiveness alters the white preference of dominance. In the interim, where racism is still present, it should seem "colorblindness" is nothing more than an ideal; perhaps even pragmatically meaningless.[576] Racism is still

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575 D'Souza, supra note 570, at 551.

576 In summary, the meaning of many things have changed—at one time, for example, "minority" meant, from this author's point of view, a euphemism for primarily a black

problematic, and the signs of change do not indicate that race will not be problematic in the foreseeable future. The American legal dilemma continues.

IV. SUMMARY: THE RULES HAVE CHANGED AGAIN—A SEMANTIC APOTHEGMATIC PERMUTATION

Like the term "minority," the term "colorblind"[577] has also come to mean something different than it once did. It is an interesting and appropriate note that the term "colorblind," outside of medical and constitutional commentaries, has not been traced to any one source during the course of this project which reveals a definition in this context, yet also during the course of this project, it has revealed many meanings. Those meanings have permeated this project, just as racism permeated the American frontier and society. Gunnar Myrdal called this the "American Dilemma" over fifty years ago.[578] Today, it is still an American *legal* dilemma, and it is still as great a threat to the nation as it was then. As long as the legislature and the judiciary, as well as the electorate grapple with colorblindness, then there will be a continuing American legal dilemma. Furthermore, as long as the dominant white majority continues to change the rules, the game will be played, fair or not.[579]

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person. The term "minority" now can refer to a host of others, including Asians, Hispanics, even women, although in sheer numbers this is a misapplication of the term. While the author was a student at Yale Law School, minority enrollment had a perceived, unwritten limitation of 10 percent. Originally, this percentage applied to blacks, hence the "minority". Debate ensued on this subject as the term minority grew to encompass other groups, but the percentage remained the same. It was often noted that the term, while benefiting many deserving students, actually came to disadvantage those it was originally defined to compensate, because as the meaning of the term expanded, the benefits afforded to the original group became smaller. (This did not mean that black minority students were not supportive of other minorities—that is not the case).

577 The term colorblind in medicine is a defect, "an inability to distinguish between colors [or] some form of deficiency of color vision." Dictionary of Medicine and Nursing 219-220 (W.B. Saunders Company, 1972). In law, however, it appears to connote perfection *a fortiori*.

578 See supra notes 235-36 and accompanying text and note 485 (discussing Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy (1944)).

579 One might argue, and blacks often do, that whenever blacks are "catching up" or at least appearing to do so, then whites change the rules. For example, when the author's Army officer father was stationed at Fort Eustes, Virginia in the early 1960s, his two siblings attended segregated schools in Newport News, Virginia. They were both good in

In summary, Part I attempted to define the foundations for colorblind and the implications in society which prevent this ideal from occurring. In Part II, an analysis of the evolution of the term colorblind was presented through judicial action as noted in Colorblind I and Colorblind II. In Colorblind I, the legislature recognized the white majority dominance while the Court attempted to prohibit a superior, dominant class of citizens on a constitutional basis. Colorblind II showed an evolution of the "colorblind" term to eventually denote a lack of color-consciousness and sensitivity. Ostensibly, this created an even playing field that did not take into account the effects of past and present racism. This definition essentially caused race-blindness, and put a new cloak on racism in America. As expressed by one author,

> The claim made by proponents of colorblindness ultimately becomes an argument about the worth of race relative to other categories of oppression. Those who believe that colorblind policies will be effective are contending that these other categories (class, income, age, status, etc.) are better measures of disadvantage than race. I would argue that this contention generally is not true. If we eliminate poverty, we will not eliminate racism for the precise reason that racism was not the focus of the attack. Indeed, we will not even eliminate the intersections between race and class in such situations, because they are likely to be resistant to purely class-based attacks.[580]

The chief difference between Colorblind I and Colorblind II

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academics and band. As a result, they performed as part of the segregated school band. The various school bands, both white and black, marched in ostensibly non-segregated band contests. It appeared that both black and white bands were competing for the same awards. However, after a long winning streak by the black bands, the white sponsors and judges changed the rules. Thereafter, the black bands did not win overall. Many blacks have stories such as this, but some stories are much worse. The fact that so many blacks over time have similar stories from different parts of the United States should raise questions. These stories occurred long before the internet, and long after slave drumming was outlawed.

580 Jerome McCristal Culp, Jr. Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims, 69 N.Y.U. L. Rev. 162, 180 (1994).

lies in the underlying meaning of the term colorblind: how it was initiated, applied, impliedly redefined, and finally, what it now signifies. This new meaning to the word colorblind is, as shown in Part III, an essential component or factor in the continuing cycle of America's struggle with racism, or now, its non-recognition of race. This Part also emphasizes pluralism and assimilationism as they relate to race and racism, consequences of the re-invigorated struggle, and threats inherent in the system.

CONCLUSION

The cases discussed in this Article demonstrate that one of the most problematic implications of the Court's colorblind theories is their ahistorical demand for racial symmetry in the implementation of remedial measures to promote equality.[581] "The cases show that symmetrical preclusion of race-based factors in legal analysis results in hierarchical allocation of privilege across race."[582] This imposition of a racial symmetry theory upon a white dominated racial caste system furthers asymmetrical treatment of both whites and blacks.[583] One explanation of colorblindness is putting the burden on the black to change—to be seen by whites as white. "Colorblindness is, in essence, not the absence of color, but rather the monochromatism: whites can be colorblind when there is only one race—when blacks become white."[584]

> [H]ere is the perversity of color-blindness—to banish race-words redoubles the hegemony of race by targeting efforts to combat racism while leaving race and its effects unchallenged and embedded in society, seemingly natural rather than the product of social choices. If all mention of race, whether White or Black, remedial or discriminatory, is equally suspect, the reality of racial subordination is obscured and immunized from intervention.[585]

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581 See T. Alexander Aleinikoff, A Case for Race-Consciousness, 91 Colum. L. Rev. 1060, 1105 (1991).

582 Tanya Kateri Hernandez, "Multiracial Discourse": Racial Classifications in an Era of Color-Blind Jurisprudence, 57 Md. L. Rev. 97, 153 (1998).

583 See id.

584 Aleinikoff, supra note 581, at 1081.

585 Ian F. Haney Lopez, White By Law: The Legal Construction of Race 177 (1996).

"Our Constitution is colorblind" initially meant that white majority preferences could not and should not be reflected in government action. The maxim now means race should not be reflected at all in government action. In effect, colorblindness denies that race matters. But while racism continues to shape our views as a society—whether that racism is aversive or blatant, and whether the effects of racism are tangible statistics or competing views of the state of American society—nothing can prevent some form of race-consciousness. Jerome Culp, Jr. ponders,

> The question many of you must be asking is: do we know *how* to use race consciousness to eliminate the status quo? The answer is that it depends on the circumstances. The appropriate race-conscious policy will depend on how deeply entrenched racial subordination is in a particular context. The intersection of race and other issues of oppression, like gender and class, also means that fashioning an appropriate race-conscious policy is more complicated than some have assumed; it requires ultimately that policymakers and judges apply practical policy, instead of simple bright-line rules, to eliminate the consequences of racial subordination.[586]

The answer to racism lies somewhere between well-reasoned "blind" hope and historically-proven skepticism. The compelling government interest is to end racism permanently, so that government need not narrowly tailor a program to fight off the effects racism continues to have throughout society. We can hope that racism will no longer permeate to the governmental level, but the hope is not based upon any indication that it has not and will not permeate to such a level. Race is a constant, and today's colorblindness seeks to disregard it.

Those who tell white lies soon become colorblind . . . .[587]

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586 Culp, supra note 580, at 195.

587 The author would ask if, in truth, are we telling white lies when we ignore racism? Perhaps to ignore racism and to follow a colorblind path is no different than to follow a path covered in "black ice." We need to rethink this apothegm of colorblind, and recognize the hidden dangers it presents.