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# ARTICLES

## FOREWORD: RETHINKING THE COLORBLINDNESS MODEL

by Bryan K. Fair\*

### INTRODUCTION

The problem of the twenty-first century will be the problem of colorblindness.<sup>1</sup> In constitutional doctrine, this problem will persist because there are at least two different statements of the colorblindness model expressed in the opinions of the United States Supreme Court. Justice John M. Harlan, in his

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I am writing to add a new voice to the many profound voices currently writing about how the color of one's skin permeates every aspect of one's existence in the United States. I have consistently employed the upper case when using the labels "Black" and "White." I believe that racial equality requires that we use proper nouns to designate all racial groups. Also, the term "Black" is frequently used interchangeably with the terms African American and Negro, and the term "White" is frequently used in place of the terms Caucasian and Anglo-European. Finally, the labels seem to have significant meaning beyond chromatic colors.

This article would not have been possible without the generous support of several people. I wish to thank Dean Nathaniel Hansford and the Law Foundation for financial support during the 1991 and 1992 summers. I have also received invaluable criticism from Pat Hermann, Ken Randall, Martha Morgan, Tony Freyer, Susan Randall, Pamela Bucy, Norman Stein, Tim Hoff, and other colleagues who attended my colloquium in October 1992. I owe an even greater debt to Michelle Monse, Wythe Holt, and Patty Lovelady Nelson for their substantial critiques and their willingness to talk about each section of this work. Although I have benefitted tremendously from their ideas, the errors which remain are mine.

1. The writer who has most significantly influenced my thinking regarding race is William Edward Burghardt DuBois (1868-1963). My topic sentence is paraphrased from DuBois' prophetic words published in 1903, that:

The problem of the twentieth century is the problem of the color-line,—the relation of the darker to the lighter races of men in Asia and Africa, in America and the islands of the sea. It was a phase of this problem that caused the Civil War; and however much they who marched South and North in 1861 may have fixed on the technical points of union and local autonomy as a shibboleth, all nevertheless knew, and we know, that the question of Negro slavery was the real cause of the conflict.

See W.E.B. DuBois, *THE SOULS OF BLACK FOLK* 54-55 (New American Library, Inc. 1969) (1903). DuBois was a distinguished teacher and prolific American scholar. For a concise, informative bibliographic essay and selected bibliography on DuBois, see MANNING MARABLE, *W.E.B. DuBois: BLACK RADICAL DEMOCRAT* 267-80 (John Milton Cooper, Jr., ed., Twayne Publishers 1986).

Professor Derrick A. Bell, Jr. is the most influential contemporary writer on race and law. Professor Bell is the author of the only casebook on racism and American law. Bell has taught law at Harvard University, Stanford University, the University of Oregon, and New York University, among others. He is the "Dean" of a new critical race theory movement whose members uniformly point to Bell's scholarship as pathbreaking. See DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* (Little, Brown & Co. 1992); BELL, *CIVIL RIGHTS: LEADING CASES* (Little, Brown & Co. 1980); BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (Basic Books 1987); BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (Basic Books 1992).

revered dissent in *Plessy v. Ferguson*,<sup>2</sup> first wrote that "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."<sup>3</sup> Justice Harlan believed that the Constitution prohibited government-sponsored racial subordination, and, therefore, he concluded that it was unconstitutional for Louisiana to adopt a statute which treated Blacks as inferior to Whites.<sup>4</sup> More recently, Justice Lewis F. Powell, Jr., in his opinion in *Regents of the Univ. of California v. Bakke*,<sup>5</sup> articulated a second statement of the colorblindness principle.<sup>6</sup> Justice Powell believed that constitutional colorblindness prohibited the use of race as the *sole* factor in governmental decisions, absent a compelling justification.<sup>7</sup>

Justices Harlan and Powell each contended that his colorblindness model was derived from the Fourteenth Amendment's Equal Protection Clause.<sup>8</sup> Yet, their opinions in *Plessy* and *Bakke* read diametrically. Justice Harlan argued that the Fourteenth Amendment held special significance for Blacks,<sup>9</sup> while Justice Powell stated that the Fourteenth Amendment meant that Blacks and Whites must receive the same treatment.<sup>10</sup>

The opinions of Justices Harlan and Powell have been cited by jurists and commentators on some occasions to uphold affirmative action designed to eradicate racial subordination,<sup>11</sup> and at other times to invalidate such affirma-

2. 163 U.S. 537, 558 (1896).

3. Justice Harlan was the first member of the Supreme Court to articulate the doctrine of colorblindness. To understand what Justice Harlan meant, it is instructive to note the text preceding his quote. Before writing that "Our Constitution is color-blind," Justice Harlan wrote that:

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 the 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 . . . .

*Id.*

My translation of Justice Harlan's statement is that he believed that if Whites were faithful to their heritage and held fast to constitutional principles, Whites would remain the dominant race because of their numerical majority. Justice Harlan understood that 60 million Whites were in no danger of domination by 8 million Blacks. Similarly, 200 million Whites are in no danger of domination from 30 million Blacks today.

I read Justice Harlan's dissent to mean that the Constitution prohibits Whites from using race as a basis for subordinating Blacks. Justice Harlan could not have meant that it was unconstitutional for government to take race into account because he acknowledged that the Civil War Amendments were in fact adopted to secure for the newly freed Blacks all the civil rights enjoyed by Whites, and, he had written 13 years earlier that:

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.

*The Civil Rights Cases*, 109 U.S. 3, 59-62 (1883) (Harlan, J., dissenting) (emphasis added).

4. *Plessy v. Ferguson*, 163 U.S. 537, 558-61 (1896) (Harlan, J., dissenting). (See also *infra* notes 183-190 and accompanying text.)

5. 438 U.S. 265 (1978).

6. Justice Powell agreed with four other members of the Court that race could be one of many factors considered by admissions officers in their selection among applicants for medical school. *Id.* at 325-26 (opinion of Brennan, J.).

7. See text *infra* pp. 39-43 and accompanying notes.

8. U.S. CONST. amend. XIV, § 1 provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

9. See text *infra* pp. 33-34 and accompanying notes.

10. See text *infra* pp. 39-40 and accompanying notes.

11. See text *infra* pp. 32-73 and accompanying notes.

tive action.<sup>12</sup> When the modern Court cites the colorblindness doctrine, it is unclear whether the Court is invoking the meaning of Justice Harlan, Justice Powell, or yet another meaning of constitutional colorblindness.<sup>13</sup> Thus, the problem for the next century in the Court's race jurisprudence will be to reconcile Justice Harlan's concern for eradicating racial subordination, Justice Powell's concern that government not use race as the sole basis for classifying between persons, and Justice Scalia's concern that racial classifications not be used, except in emergencies.

Numerous scholars writing about racism or affirmative action have critiqued the doctrine of colorblindness.<sup>14</sup> While some find colorblindness essential to equality, others find colorawareness<sup>15</sup> more consistent with constitutional guarantees of equality. Professors John Kaplan and William Van Alstyne, among others,<sup>16</sup> have argued forcefully that race is an improper criterion for classifying or assigning government benefits or burdens under law. Each contends that in nearly all settings, the government should act without reference to the race of any party. On the other hand, Professors John Ely and Paul Brest, among others,<sup>17</sup> have argued that the colorblindness

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12. See text *infra* pp. 32-73 and accompanying notes.

13. The most recent articulation of the colorblindness principle provides that a state may act by race only when it acts to undo the effects of its own discrimination or when it acts in a social emergency, such as a prison race riot. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521-24 (1989) (Scalia, J., concurring in judgment).

14. See, e.g., William Van Alstyne, *Rites of Passage, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809 (1979) (arguing in support of colorblindness); Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 1-2, 16-23 (1978) (arguing against colorblindness standard); John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974) (arguing against use of a strict colorblindness model when a political majority discriminates against itself); John Kaplan, *Equal Justice in an Unequal World: Equality for the Negro/The Problem of Special Treatment*, 61 NW. U.L. REV. 363 (1966) (arguing against use of race as basis for special treatment for Blacks in the employment context). See also *infra* notes 16-18.

15. By that term, I mean the general practice of many public entities and private persons to use race in decision making. I use the term "colorawareness" because it contrasts most effectively with colorblindness. It reflects the reality that most people who have grown up in the U.S. are aware of or want to know the color of others. Many commentators use race-consciousness in place of this term. See, e.g., articles by T. Alexander Aleinikoff and Gary Peller, *infra* note 17.

16. See also Charles Fried, *Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107, 110-11 (1990) (critiquing the group rights conception of equal protection analysis); Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (arguing that recent race-conscious scholarship of authors such as Bell, Matsuda and Delgado lacked merit); Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312 (1986) (arguing against affirmative action); Randall Kennedy, *Persuasion and Distrust: A Comment on The Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986) (arguing in favor of limited affirmative action).

17. See also T. Alexander Aleinikoff, *A Case For Race-Consciousness*, 91 COLUM. L. REV. 1060, 1062-63 (1991) (arguing that America is not a color-blind society, and that race has a deep social significance that continues to disadvantage Blacks and other Americans of color); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 1-3 (1991) (examining the ideological content of the phrase "our constitution is color-blind"); Donald Lively and Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U. L. REV. 1307, 1312-46 (1991) (discussing how equal protection jurisprudence is characterized by patterns of denial and evasion); Alan Freeman, *Antidiscrimination Law: The View From 1989*, 64 TUL. L. REV. 1407, 1408-09 (1990) (arguing that the U.S. Supreme Court has enshrined a vision of America that normalizes existing patterns of inequality and hierarchy); Duncan Kennedy, *A Cultural Pluralist Case For Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 705-12 (discussing the political and cultural arguments for affirmative action in legal academia); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 760 (exploring the ideological roots of the Critical Race Theory movement); Patricia J. Williams, *Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*, 104 HARV. L. REV. 525 (1990)

model is inconsistent with the meaning of equality in the Constitution. They argue that government can use racial classifications when eradicating past and continuing racial subordination.<sup>18</sup>

Most recently, Professors Neil Gotanda and Andrew Kull have written extensively on constitutional colorblindness.<sup>19</sup> Both have made important contributions toward understanding the meaning of colorblindness. Professor Gotanda has explained how the Court uses the colorblindness model and argues for its abandonment.<sup>20</sup> Professor Kull, on the other hand, has demonstrated that colorblindness rhetoric has existed since the 1850's and has been a constitutional alternative since the adoption of the Fourteenth Amendment in 1868.<sup>21</sup> Interestingly, Professor Kull concludes that the colorblindness model should be embraced.<sup>22</sup>

I share many of the concerns articulated by Professor Gotanda. But I am not persuaded that the religion-blind alternative that he proposes to replace colorblindness is very meaningful.<sup>23</sup> First, he does not demonstrate how application of the Court's Free Exercise or Establishment Clause jurisprudence would diminish racial subordination.<sup>24</sup> He comes closest when he writes that under an "establishment" analogy for race "what government may not 'estab-

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(discussing the significance of and necessity for group claims within our legal system and the costs of pitting individual rights against group interests at a moment in history when such categories as race and class intersect so that race defines class); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1334-35 (1988) (criticizing both neo-conservative scholars and Critical Legal Studies scholars for their failure to analyze the significance of race in the legal and political subordination of Blacks); David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 100-13 (discussing the doctrinal consistency between affirmative action and antidiscrimination principles); Laurence H. Tribe, *In What Vision of the Constitution Must the Law Be Color-blind*, 20 J. MARSHALL L. REV. 201, 203 (1986) (discussing Justice Harlan's view that the Fourteenth Amendment prohibited government laws enshrining White supremacy); Suzanna Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust and Deconstruction*, 73 GEO. L.J. 89, 91-99 (1984) (analyzing the implications of replacing the suspect classifications doctrine with a disfavored class doctrine in the contexts of race and gender cases); Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (discussing how antidiscrimination law has, at the same time, outlawed racial discrimination and legitimized the subordinate status of Blacks).

18. In addition to the scholars previously identified, Derrick A. Bell, Jr. and Richard Delgado are two of the clearest thinkers and writers on race, racism, and American law. Both have written extensively on race and law and each in some way deserves special recognition for pioneering scholarship. A comprehensive listing of the writings of Professors Bell and Delgado is beyond the scope of this article. Combined, the two have authored nearly one hundred law review articles since 1980. (An unpublished bibliography is available from the Author.)

19. See Gotanda, *supra* note 17. See also ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (Harvard Univ. Press 1992).

20. See generally Gotanda, *supra* note 17.

21. See KULL, *supra* note 19, at 1-6.

22. *Id.* at 22-52, 112-30, and 151-63. Professor Kull's fine new book contributes substantially to scholarship relating to how the colorblindness doctrine has evolved. He traces the origins of colorblindness rhetoric to the middle of the nineteenth century in the work of abolitionists in Massachusetts and he argues that by the time the Supreme Judicial Court of Massachusetts decided *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1850), the doctrine had been stated fully and eloquently by Charles Sumner in his brief for the plaintiffs in that case. But, I disagree with Kull's conclusion. He asserts that the colorblindness model has been official policy since the 1850's. However, what he demonstrates through excellent research is that the colorblindness model has been consistently rejected by courts because of its inflexibility.

23. See Gotanda, *supra* note 17, at 62-68.

24. *Id.* at 65-67.

lish's racial subordination and white supremacy."<sup>25</sup> The problem today is that the Court seems unwilling to permit government to eliminate existing racial subordination. Thus, I do not think Professor Gotanda goes far enough.

The purpose of this essay is to explain why the Supreme Court should reject the colorblindness model and replace it with an analytical standard that can reduce racial subordination. In Part I, I offer a short personal narrative regarding the racial milieu that has influenced my thinking about racial categories, racism, and colorblindness.<sup>26</sup> In Part II, I investigate the historical origins of antidiscrimination law,<sup>27</sup> which reveal that racial inequality and colorawareness have been dominant themes in the racial history of the United States. I illustrate how, after two centuries of government-sponsored or -sanctioned discrimination against Blacks and others,<sup>28</sup> Congress enacted the first antidiscrimination laws and initiated a federal policy of nondiscrimination. I also show that Congress adopted antidiscrimination laws to eradicate racial subordination, but that its efforts failed. In Part III, I examine the evolution of the antidiscrimination principle and the competing visions of the colorblindness model.<sup>29</sup> I try to demonstrate that some commentators and jurists have transformed the original meaning of colorblindness by removing the term from its historical context. Today, colorblindness appears to permit racial subordination similar to that so prevalent under the separate but equal philosophy of *Plessy*. In Part IV, I critique the doctrine of colorblindness<sup>30</sup> to illustrate that most contemporary commentators reject colorblindness as unrealistic, ahistorical, and antithetical to racial equality in the U.S. In Part V, I set forth a series of modern gender classification cases to demonstrate that the Supreme Court analyzes race and gender classifications differently, and to suggest it is not immediately apparent why analogous race and gender discrimination cases are analyzed so differently by the Court. I examine the reasons offered by the Court for treating race and gender classifications differently and conclude that the distinction is unwarranted. I then argue that the ground of difference jurisprudential standard used in many gender cases could apply effectively in analogous race cases.<sup>31</sup> In Part VI, I propose that the Court apply its ground of difference rationale from gender discrimination jurisprudence to analogous race cases.<sup>32</sup> I apply that standard to the facts of *Croson* to illustrate that such application of that jurisprudential standard to

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25. *Id.* at 67.

26. See text *infra* pp. 6-11 and accompanying notes.

27. See text *infra* pp. 11-31 and accompanying notes.

28. What emerges from a review of the racial history of the U.S. in terms all too clear to ignore is that a constitution that fully protected the property interests of slave owners through positive law subsequently has been interpreted to provide only meager authority to eradicate subordination of former slaves. Justice Harlan pointed out this irony as early as 1883, when he wrote:

With all respect for the opinion of others, I insist that the National Legislature may, without transcending the limits of the Constitution, do for human liberty and the fundamental rights of American citizenship, what it did, with the sanction of this court, for the protection of slavery and the rights of the masters of fugitive slaves.

*The Civil Rights Cases*, 109 U.S. at 50-53 (Harlan, J., dissenting).

29. See text *infra* pp. 31-64 and accompanying notes.

30. See text *infra* pp. 64-73 and accompanying notes.

31. See text *infra* pp. 73-77 and accompanying notes.

32. See text *infra* pp. 77-81 and accompanying notes. Briefly, the Court has held that a gender classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so all persons similarly circumstanced shall be treated alike.

affirmative action race cases would enable the Court to distinguish among "invidious" and "benign" race cases on a principled basis, and would allow governments to eliminate racial subordination arising from past and continuing discrimination against Blacks without running afoul of the Constitution.<sup>33</sup>

## PART I

### A PERSONAL NARRATIVE ON RACIAL CATEGORIES, RACISM, AND COLORBLINDNESS

I was born in Columbus, Ohio, in 1960.<sup>34</sup> My mother is Black,<sup>35</sup> therefore, I am a Black American. I have nine brothers and sisters and my mother has been a single parent for as long as I can remember. Consequently, we were poor.

The Black population in Columbus has been approximately fifteen to twenty percent during the past 30 years. Most Blacks live on either the eastside or northside of Columbus in predominantly Black neighborhoods. My family lived almost exclusively on the eastside of Columbus, in rental housing. We moved frequently in search of better or cheaper housing.

I attended "de facto" segregated schools in Columbus.<sup>36</sup> Columbus followed a neighborhood school assignment policy and I lived in Black neighborhoods; so, with the exception of first grade, I attended elementary and high school with almost all Black classmates. During junior high school I participated in a voluntary busing program, travelling about ten miles to a predominantly White<sup>37</sup> school.

33. See text *infra* pp. 77-82 and accompanying notes.

34. I am persuaded by Richard Delgado's *Storytelling for the Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989), that this brief narrative helps me explain why I reject colorblindness and hopefully aids the reader's understanding of my biases.

35. Professor Neil Gotanda has recently written that American racial classifications follow two formal rules:

- 1) Rule of recognition: Any person whose Black-African ancestry is visible is Black.
- 2) Rule of descent: (a) Any person with a known trace of African ancestry is Black, notwithstanding that person's visual appearance; or, stated differently, (b) the offspring of a Black and a White is Black.

See Gotanda, *supra* note 17, at 24. For a recent study of the "one drop" of blood rule, see F. JAMES DAVIS, WHO IS BLACK? ONE NATION'S DEFINITION (Penn State Univ. Press 1991). For an argument that racial purity is largely myth, see MARVIN HARRIS, PATTERNS OF RACE IN THE AMERICAS (Walker 1964).

36. I started school in 1965. Although that date was a decade after the Supreme Court decided segregated public schools were inherently unequal, I nonetheless attended segregated schools. The segregation in Columbus schools was not required by statute. Instead, as in many school districts outside the South, school officials achieved their goal of segregation through school assignment policies and decisions to open or close schools in strategic locations. This type of school desegregation is called "de facto" segregation. See, e.g., *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189 (1973). After I graduated from high school in 1978, Columbus public schools were ordered to desegregate. See *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464 (1979) (the Court found the district court judge had applied the proper standard in requiring proof that segregated schools existed and that they were brought about by intentional action of school officials).

37. Defining "White" is perplexing. Among the definitions in Webster's Dictionary may be found: "free from color"; "being a member of a group or race characterized by reduced pigmentation and usually specifically distinguished from persons belonging to groups marked by black, brown, yellow, or red skin coloration"; "free from spot or blemish"; or, as "free from moral impurity." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 1017 (G. & C. Merriam Co. 1976) (1961).

Professor Patricia Williams has discussed "whiteness" as follows:

The parallelism of "whiteness" as culture or as any kind of unified experience is not immediately apparent. Although remaining convinced that there is a culture of whiteness in the

I do not recall when I discovered that being Black made me different. It may have been as early as the first grade when I had a fight at school. My "girlfriend" was White. As I recall, her brother did not approve of our friendship. One day after school her brother and I fought. I won the fight, but lost my "girlfriend."

Although most of my classmates were Black, almost all of my teachers were White. In fact, save junior high school, most of my daily contact with White people was through my teachers. Most of them neither lived in nor came from my neighborhood. And, for some, teaching was a second, "part-time" job. Too many teachers in my schools appeared indifferent toward the training of their charges. Occasionally, during annual Black History Month celebrations, my teachers would emphasize the life experiences and contributions of Black Americans. Otherwise, in English, math, science, and history my teachers virtually never mentioned Black folk. A few teachers were, however, especially interested in my education. I attribute my academic progress to their dedication, which often extended beyond regular school hours.

Black schools in Columbus were different from the White schools in other ways. They were usually old and overcrowded, and books and equipment were more obsolete and less abundant than in White schools. Another significant problem in Black schools was the low level of parental involvement in the schools. At my predominantly White junior high school parental involvement was substantial. There seemed to be more pressure on the teachers to work even harder because of that parental oversight. In predominantly Black schools teachers and administrators seemed less accountable.

Therefore, through my public education I learned how being Black made me different. I learned that my public educational opportunity was inferior to the educational opportunity of students at predominantly White schools. Perhaps the most compelling argument for integrated public education is that only when all of us have an equal risk of poor schools will we become serious about equity in all schools.

Although I "excelled" in school, I neither understood nor discussed many fundamental social issues in school. I did not understand why most Black people in Columbus were poor, or why most of the middle-class and upper-class residents of Columbus were White. I did not understand why Whites and Blacks lived in separate parts of Columbus. I did not understand why schools in Black neighborhoods were usually old while schools in White neighborhoods were usually new. I also did not understand how a few Blacks could afford to own houses in White neighborhoods and send their children to private schools and colleges. My teachers rarely discussed race, racism, or racial subordination. When I graduated from high school I was not prepared to fight racism.

I was also not prepared to attend college. My high school was not a college preparatory school. Most of my classmates did not complete algebra, physics, or advanced English. Instead, most completed vocational training and took jobs immediately after high school. I enrolled in several special

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United States, I appreciate the extent to which its contours are vaguely or even negatively discerned, so that its assertion is most clearly delineated as "not other," and most specifically as "not black."

Williams, *supra* note 17, at 530.

classes and after-school programs with a dozen other students. A significant part of my high school education came from those activities.

During my final year of high school, I visited my counselor to discuss colleges. I was interested in four: Harvard University, Duke University, Howard University, and Vanderbilt University. My counselor told me that I should prepare to go to one of the local schools, such as Capital University. He said I would not do well at a school like Duke University. He did not explain why I would not do well. I ignored his advice, and when Duke admitted me, I accepted.

I attended Duke University when its Black enrollment was approximately five percent. Students at Duke came from all fifty states as well as many other countries. Fifteen percent were from North Carolina. Ninety percent were White. All but a couple of my teachers were White. Virtually all the professional administrative staff at Duke were White folk. (And, unfortunately, almost all of the blue collar, "unskilled" workers were Black. All of the Black workers at Duke had skills, but they were not the skills society rewards highly.)

It was not long before I realized that I was not as well trained as my classmates. I knew that I could read and write, but my initial evaluations from teachers were average or below. I learned that there were courses I had not taken and books I had not read that my classmates had covered as early as junior high school. I began to believe that the high school counselor who discouraged me from attending Duke knew that my education was inferior to that received by my prospective classmates. But, he never explained that to me. This realization taught me that I was different from most of my Duke classmates and that I had to work hard just to be an average Duke student.

Teachers introduced me to the work of W.E.B. DuBois and Black history generally. I discovered pride in my culture and history. And at Duke I had my first adult experiences with White folk. As a history major I read about slavery and began to examine the origins of racism in the United States. I studied the Civil War, the promise of Reconstruction laws, and the failure of Populism. I read about the Jim Crow era and the subsequent campaign to end segregation in schools and all areas of public accommodations, such as restaurants, theaters, swimming pools, parks, golf courses, and, of course, restrooms and drinking fountains.

At Duke then, I became educated about how being Black made me different, how my race gave me a different legacy, a different history, a different perspective on the world, not only in comparison with many Whites, but also with some Blacks and other racial minorities. Being Black meant that I had a history of cumulative disadvantage in terms of social, political, and economic opportunities in this society based in significant part on my race—a history of disadvantage that I did not create. I realized that no matter where I went or what I accomplished I would always be Black: a Black Duke student, a Black Duke graduate, a Black law student, a Black lawyer, a Black law professor, perhaps even a Black dean or a Black university president. I learned that despite my racial pride, the term "Black," when used by many Whites and some Blacks, operated as a negative modifier on my personhood and all my achievements. Somehow, my humanity and my accomplishments were diminished by my race.

At bottom, I learned time and again that people were not color-blind. My classmates always noted my race. So did my teachers and the Duke administrators. In each job that I held on campus, I was the only Black or one of very few Blacks working in that department. I was a member of the Black Student Alliance and one of a handful of Black students elected to student government at Duke. I believe people always see me at least in part in terms of my race and I see others the same way. I am not color-blind.

During law school at the University of California, Los Angeles, I met for the first time substantial numbers of Latinos, Mexicans, Asian Pacific Islanders, Japanese, Chinese, and Koreans. UCLA is a remarkably diverse place. Within that diverse community, I existed first as a Black student and then as one of six Black faculty members. Between graduation and my beginning in law teaching in 1987, I was one of six Black lawyers in a large commercial law firm with 300 lawyers headquartered in St. Louis, Missouri. I worked in the Los Angeles branch office where I was the only Black associate until my final year there. In law school and in law practice, my colleagues did not subscribe to colorblindness rhetoric. We acknowledged racial differences and tried to promote awareness of racial differences. We shared food, music, religion, and other cultural differences and we talked about racial subordination. And, both the law school and the law firm accepted the need for affirmative action.

Colorblindness is a fiction that well might apply in a futuristic, make-believe world. But I reject colorblindness<sup>38</sup> either as a legitimate mode of constitutional analysis or as a utopian goal because, despite my best efforts, I am a racist.<sup>39</sup> Indeed, I think all Americans<sup>40</sup> are racists because we live in a culture infused with racism. Moreover, I think the colorblindness model permits us to pretend that we are not racists: to ignore all the racial subordination which we encounter each day of our lives.<sup>41</sup> Constitutional colorblindness ac-

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38. See text *infra* pp. 64-73 and accompanying notes.

39. Racism has been defined as a conscious or unconscious attitude, action, or institutional structure which subordinates a person or group because of his, her, or their color. See ANTHONY DOWNS, U.S. COMM'N ON CIVIL RIGHTS, RACISM IN AMERICA AND HOW TO COMBAT IT 5-6 (U.S. Gov't Printing Office 1970). In the United States the visibility of skin color marked Blacks, among others, as targets of White racism. White majorities have enacted numerous laws that were overtly racist (slave codes), and other laws which appear neutral on their face but that disproportionately disadvantage Blacks (locating new schools in White suburbs, or selecting college entrance criteria that exclude most Black applicants).

I do not think all racial separation is racism, nor do I think recognizing someone's race or even taking it into account when making decisions is always racist. For example, the decision to live in a Black community would not necessarily be racist. However, the exclusion of all Whites from that neighborhood would be racist. Similarly, I do not think it is necessarily racist to take race into account in deciding how to allocate units of public housing; however, I do think it is racist to concentrate all public housing in minority communities.

I am a racist because I live in a society whose fundamental institutions reflect racial subordination. The social, economic, and political relationships among Blacks and Whites in the U.S. illustrate the disproportionately subordinate status of Blacks. The point is not only whether I subordinate White people by my attitudes, actions, or the institutions which I support, but also whether I subordinate any race of people. My argument is that racial subordination is so systemic that all Americans become its agents.

40. I use the term "American" to mean persons who were born or who have grown up or lived primarily in the United States.

41. Hundreds of forms of overt racism and institutional subordination remain throughout the United States. Examples are the deliberate exclusion of Blacks from the best educational opportunities, careers in professions such as law and medicine, all-White neighborhoods, schools, and private business/social clubs. In addition, Blacks and other racial minorities "have been treated as inferiors,

cepts contemporary racial subordination in the United States as normative, even though it is clear that existing racial subordination is neither legitimate, natural, or inevitable.

Like slavery, racial subordination is not inevitable. Kenneth Stampp correctly found that the use of slaves in the United States was a deliberate choice (among several alternatives) made by men who sought greater economic returns than they could obtain from their own labor alone, and who found other forms of labor more expensive.<sup>42</sup> Similarly, overt racism and racial subordination today are at least derivative of past deliberate choices.<sup>43</sup> What is more, they continue to exist because of our failure to eradicate them. We are racists, then, because we live in a country that has been a racist country since its colonial beginnings. Our collective historical experience is littered with racist attitudes, practices, and institutional structures that place Whites over Blacks. The social, political, and economic relationships that exist in the United States today are derived from past and continuing racist practices. We have never eradicated racism or racial inequality in the United States.<sup>44</sup> We have at best aspired to linguistic equality.<sup>45</sup>

We live, play, work, and worship in institutions that have inculcated racial subordination. In my schooling, I frequently learned about the accomplishments of outstanding Whites, but seldom about outstanding Blacks. At home and in my neighborhood, I learned the shame of poverty and the manifestations of self-hate and desperation, such as domestic violence, teenage pregnancy, and crime and drug usage, which are so commonplace in poor Black communities. I saw Black people abused by Whites and by each other, and heard Blacks talk about their hatred for Whites. I lived by race and was aware of my color every day. We are racists because we know our conduct creates racial impressions, both intra- racially and inter- racially, and that knowledge influences our conduct. In the United States too often it seems we join a world, a culture, or a side of the race-line. Sometimes our "place" is determined by the circumstances of our birth. Other times we "choose" a side of the race-line simply by selecting a place to live, a church to attend, or a life-partner. Very few Americans try to live integrated lives by finding a way to protest this seemingly "natural" racial choice pattern.

For most of my adult life I have tried to understand racism in the United

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given inferior jobs and legal rights, compelled to accept inferior schooling, forced to live in inferior housing and neighborhoods, made to use inferior public facilities, and constantly told that they were inferior human beings and had no chance to be otherwise." See DOWNS, *supra* note 39, at 7.

42. KENNETH STAMPP, *THE PECULIAR INSTITUTION* 5-6 (Vintage Books 1956).

43. The conditions of Blacks today are derivative of slavery. Where Blacks live, their aggregate income, their self-image and degree of self-confidence, the nature and stability of their families, their attitudes toward authority, their levels of educational and cultural attainment have been significantly impacted by their historical treatment in the United States. See DOWNS, *supra* note 39, at 7.

44. I think it is fundamentally unfair to compare Whites and Blacks mechanically. For example, in hiring decisions it is unfair to hire Whites over Blacks because Whites have more experience or greater skill levels. Whites, on average, should have greater experience and skill levels than Blacks in light of their historical advantages. Similarly, Whites should have higher test scores on college entrance exams since it was illegal to teach Blacks to read or write, and since Blacks have most often been relegated to inferior schools. Such mechanistic comparisons between Blacks and Whites continue to harm Blacks in a myriad of ways. See DOWNS, *supra* note 39, at 8-10.

45. In short, I contend that despite formal laws mandating equality between Whites and Blacks, racial inequality persists. See text *infra* pp. 25-31 and accompanying notes.

States and to move beyond it. Professor Charles Lawrence is correct when he writes that:

Racism in America is much more complex than either the conscious conspiracy of a power elite or the simple delusion of a few ignorant bigots. It is a 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.<sup>46</sup>

I agree with Professor Lawrence that racism in the United States has a universality that extends to all of us who live here. Thus, to assert that I am a racist is an essential step toward identifying the ways in which my conduct promotes racial subordination. The colorblindness model is incongruous with identifying racial subordination.<sup>47</sup>

Occasionally I meet White people who suggest that they do not “think” of me as Black or that race is not an “issue” between us. I assure them that in the United States race is almost always an issue between Blacks and Whites if not between the individuals themselves, then between them and their families or their peers. Reactions of family and friends are especially problematic when an intimate, interracial, sexual relationship develops.<sup>48</sup>

Similarly, I tell Whites it is an insult for them not to see me as Black, because I am proud to be Black and my race should be recognized and celebrated too, since my ancestors were also integral in building this country into what it is today. Colorblindness permits us to continue to ignore significant Black contributions to the creation of the wealth of this nation and it is anti-thetical to eliminating racial subordination.

The purpose of this narrative is to suggest that if my personal experiences are generalizable, then the colorblindness model is a myth. I am not and do not wish to be color-blind. I also do not believe that other people are color-blind. To the contrary, Americans are intensely color-aware.

## PART II RACIAL CLASSIFICATIONS AND THE ORIGINS OF ANTIDISCRIMINATION LAW

How does a nation overcome an ideology of White supremacy?<sup>49</sup> How do

46. Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 330 (1987).

47. Many of us have tried affirmatively to eliminate overt racism from our lives. We avoid any conduct that we believe is overtly racist. And, many of us become indignant at the claim that we are racists. However, when we examine our most routine affairs more closely, we see that racial subordination and overt racism abound. For example, we bank with institutions that actively discriminate against Blacks, we shop at stores that hire virtually no Blacks, and we send our children to schools that we know are better than those available to Blacks. Fighting racial subordination requires us to identify it and to protest it in all its manifestations. I think the colorblindness doctrine hinders such an attack.

48. Kenneth Lay makes this point persuasively in his Note set out below.

49. Beliefs in the superiority of Whiteness and the inferiority of Blackness pre-existed their application to racial relationships in America and were prevalent in literature even before the sixteenth century. In his seminal work on racial attitudes, Professor Winthrop Jordan wrote:

In England perhaps more than in southern Europe, the concept of blackness was loaded with intense meaning. Long before they found that some men were black, Englishmen found in the idea of blackness a way of expressing some of their most ingrained values. No other color except white conveyed so much emotional impact. As described in the

we overcome our legacy of slavery, racial inequality, and racial discrimination and end the racial hegemony of Whites over Blacks? To what institutions do we turn? What does racial equality<sup>50</sup> mean and how do we achieve it? Must we first take account of race, in the form of remedial racial preferences, in order to move beyond it?<sup>51</sup> Or must government now decide all issues in a racially neutral manner?<sup>52</sup> Answers to these questions have eluded clear consensus among legal commentators and jurists. One obstacle to answering some of these questions is that, too often, academic and judicial writing regarding the meaning of racial equality emerges acontextually. The term racial equality becomes aracial, simply "equality" and the historical subordination of Blacks by Whites becomes distant history, rather than a contemporary, cognizable issue.

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*Oxford English Dictionary*, the meaning of *black* before the sixteenth century included, "Deeply stained with dirt; soiled, dirty, foul. . . . Having dark or deadly purposes, malignant; pertaining to or involving death, deadly; baneful, disastrous, sinister. . . . Foul, iniquitous, atrocious, horrible, wicked. . . . Indicating disgrace, censure, liability to punishment, etc." Black was an emotionally partisan color, the handmaid and symbol of baseness and evil, a sign of danger and repulsion.

Embedded in the concept of blackness was its direct opposite whiteness. No other colors so clearly implied opposition, "beinge coloures utterlye contrary"; no others were so frequently used to denote polarization:

Everye white will have its blacke,  
And everye sweete its sowre.

White and black connoted purity and filthiness, virginity and sin, virtue and baseness, beauty and ugliness, beneficence and evil, God and the devil.

WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550-1812*, at 3-4 (Penguin Books 1968).

50. At times I use the term "equality" in this article as Professor Kenneth Simons used it in *Equality as a Comparative Right*, 65 B.U. L. REV. 387, 389 (1985):

A right to equal treatment is a comparative claim to receive a particular treatment just because another person or class receives it. The claim to that treatment is not absolute, but relative to whether others receive it. And the claim is satisfied by giving the comparatively situated classes the required equal treatment. For example, if men and women have a right to equal treatment in employment, then women have a comparative right to whatever employment benefits otherwise similarly situated men receive. But the claim is not absolute because an employer may, consistent with that claim [of equal treatment], deny benefits to men and women.

At other times I use the term "equality" to invoke the equal citizenship principle articulated by Professor Kenneth Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 247-48 (1983) (arguing that the equal citizenship principle has a substantive component; that is, to be treated by organized society as a respectable, responsible, and participating member who belongs to our national community).

51. Justice Blackmun expressed this view in his separate opinion in *Regents of University of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., separate opinion). Justice Blackmun wrote:

I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetrate racial supremacy.

52. Professor William Van Alstyne wrote:

. . . We shall not now see racism disappear by employing its own ways of classifying people and measuring their rights.

Rather, one gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment never to tolerate in one's own life or in the life or practices of one's government the differential treatment of other human beings by race. Indeed, that is the great lesson for government to teach, in all we do in life, whatever we do in life, to treat any person less well than another or to favor any more than another for being [B]lack or [W]hite or [B]rown or [R]ed, is wrong. Let that be our fundamental law and we shall have a Constitution universally worth expounding.

Van Alstyne, *supra* note 14, at 809-10.

In order to move beyond racism and to create racial equality we must first acknowledge that racial subordination has existed continuously in the English colonies and the United States for almost four centuries and that antidiscrimination laws enacted to eradicate the racial domination of Whites over Blacks and others have never achieved that goal. To understand these facts we need simply to recall our racial history. We cannot understand the meaning of modern antidiscrimination laws if we do not know how such laws evolved.

### 1. *Indentured Servitude and Slavery in the Colonies*

The racial history of Blacks and Whites in the United States begins at least by the early seventeenth century. While some historians would use a date in the sixteenth century,<sup>53</sup> it seems clear that the first Black indentured servants were sold in the Virginia colony around August 1619.<sup>54</sup> Professor Higginbotham has chronicled the Black experience in colonial America in his important book *In the Matter of Color* which contains extensive historical references to the experiences of Blacks in colonial Virginia,<sup>55</sup> Massachusetts,<sup>56</sup> New York,<sup>57</sup> South Carolina,<sup>58</sup> Georgia,<sup>59</sup> and Pennsylvania.<sup>60</sup>

Virginia, the homeland of George Washington, Thomas Jefferson, and James Madison, was a leader not only in shaping the new nation after the American Revolution, but in the debasement of Blacks through its institutionalization of slavery.<sup>61</sup> Higginbotham wrote:

[Virginia] pioneered a legal process that assured blacks a uniquely degraded status—one in which cruelties of slavery and pervasive racial injustice were guaranteed by its law. Just as [other colonies] emulated other aspects of Virginia's policies, many colonies would also follow Virginia's leadership in slavery law.<sup>62</sup>

Thus, the Virginia experience can serve as a window upon the racial history of Blacks and Whites during the colonial period.

The legal status of Blacks in Virginia from 1619 to 1660 is unclear.<sup>63</sup> In 1619, John Rolfe, the Secretary and Recorder of the Virginia colony, wrote that "there came to Virginia a Dutchman of Warre that sold us twenty Negroes."<sup>64</sup> Scholars have been unable to agree whether the first twenty Blacks were slaves or indentured servants.<sup>65</sup> However, scholars do agree that they

53. JORDAN, *supra* note 49, at 3-4. See also JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 46-49 (Vintage Books 1969) (1947), and IRVING J. SLOAN, BLACKS IN AMERICA 1492-1970, at vii-viii (Oceana 1971).

54. A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 19-20 (Oxford Univ. Press 1978). See also RONALD SANDERS, LOST TRIBES AND PROMISED LANDS 353-63 (Little, Brown & Co. 1978); JORDAN, *supra* note 49, at 44-48; and FRANKLIN, *supra* note 53, at 7.

55. HIGGINBOTHAM, *supra* note 54, at 19-60, and FRANKLIN, *supra* note 53, at 71-75.

56. HIGGINBOTHAM, *supra* note 54, at 61-99, and FRANKLIN, *supra* note 53, at 101-11.

57. HIGGINBOTHAM, *supra* note 54, at 100-50, and FRANKLIN, *supra* note 53, at 90-94.

58. HIGGINBOTHAM, *supra* note 54, at 151-215, and FRANKLIN, *supra* note 53, at 78-83.

59. HIGGINBOTHAM, *supra* note 54, at 216-66, and FRANKLIN, *supra* note 53, at 83-85.

60. HIGGINBOTHAM, *supra* note 54, at 267-310, and FRANKLIN, *supra* note 53, at 96-100.

61. HIGGINBOTHAM, at 19.

62. *Id.*

63. *Id.* See also SANDERS, *supra* note 54, at 353-54.

64. HIGGINBOTHAM, *supra* note 54, at 20. See also SANDERS, *supra* note 54, at 353.

65. HIGGINBOTHAM, *supra* note 54, at 21. Higginbotham compares the positions articulated by

were not free in the modern sense of that term.<sup>66</sup>

Although the legal status of Blacks in colonial Virginia is the subject of significant debate,<sup>67</sup> judicial decisions of the time quickly began to reflect a hierarchy among types of servants. Helen Catterall, who compiled a state-by-state summary of judicial decisions on slavery, suggested the following hierarchy in cases adjudicating the rights of Indians, poor Whites, and Blacks:

1. White indentured servants
2. White servants without indentures
3. Christian Black servants
4. Indian servants
5. Mulatto servants
6. Indian slaves
7. Black slaves.<sup>68</sup>

The list is significant because it illustrates the social preference of Whites over colored persons. It also underscores how Black slavery relegated most Blacks to the bottom of the laboring class.

Higginbotham, however, argues that the few surviving judicial opinions from colonial Virginia do not indicate whether the holdings were based on race or on other findings of fact.<sup>69</sup> The first judicial decision in Virginia to make reference to Blacks was *Re Davis* (1630).<sup>70</sup> The case report reads as follows: "Hugh Davis to be soundly whipt before an assembly of negroes & others for abusing himself to the dishonor of God and shame of Christianity by defiling his body in lying with a negro which fault he is to atk Next sabbath day."<sup>71</sup> Higginbotham infers that Davis must have been White since Davis was charged with defiling his body by lying with a Negro. The inference seems reasonable since the charge would be nonsensical if Davis were Black. The opinion also suggests a perception of Black inferiority.<sup>72</sup>

The notion of Black inferiority is more apparent in subsequent cases. For example, in *Re Sweat* (1640),<sup>73</sup> Sweat was charged with impregnating a Negro

Philip A. Bruce (slaves), J.C. Ballagh (servants), John Hope Franklin (servants), and Mary and Oscar Handlin (unfree servants).

66. *Id.* Higginbotham concluded that the weight of the historical evidence suggests that the first Blacks in colonial America were identified and treated as servants rather than slaves.

There is an emerging body of literature regarding the legal status of labor in the seventeenth and eighteenth centuries. Contemporary labor historians contend that almost all workers were unfree. See, e.g., ROBERT STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE 1350-1870* (Univ. North Carolina Press 1991). I am indebted to my colleague Wythe Holt for this observation.

67. And, as Professor Genovese has pointed out, the debate has considerable significance because "it remains possible that for a brief period a less oppressive pattern of race relations had had a chance to develop in the upper South." EUGENE GENOVESE, *ROLL JORDAN ROLL: THE WORLD THE SLAVES MADE* 31 (Vintage Books 1976) (1972). But, Genovese concluded, before the turn of the eighteenth century the issue had been resolved and Blacks condemned to the status of slaves for life. *Id.*

68. 1 HELEN CATTERALL, *JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO* 53-54 (Octagon Book, Inc. 1968). See also HIGGINBOTHAM, *supra* note 54, at 22.

69. HIGGINBOTHAM, *supra* note 54, at 22.

70. *Id.* at 23. See also CATTERALL, *supra* note 68, at 77.

71. HIGGINBOTHAM, *supra* note 54, at 23. Higginbotham argues that *Davis* is significant, despite its ambiguity, assuming Davis was White, because the opinion suggests that his crime violated both the laws of the colony and the laws of the church.

72. *Id.* See also JORDAN, *supra* note 49, at 6-11.

73. HIGGINBOTHAM, *supra* note 54, at 23-24. See also CATTERALL, *supra* note 68, at 78.

woman servant belonging to a third party.<sup>74</sup> The court ruled, “[T]he said negro woman shall be whipt at the whipping post and the said Sweat shall tomorrow in the forenoon do public penance for his offense at James city church in the time of devine service according to the laws of England in that the case provided.”<sup>75</sup> Here, it is interesting to note the differential treatment. Again, assuming that Sweat was White, his punishment appears much less severe than that of the Negro woman. This pattern of disparities between the punishment of Blacks and Whites and men and women became commonplace.<sup>76</sup>

Some evidence suggests that some Blacks exercised basic civil rights in seventeenth century Virginia. For example, early colonial court records illustrate how John Graweere, “a negro servant to William Evans,” petitioned the court for permission to purchase the freedom of his young son.<sup>77</sup> The court granted Graweere’s petition and ordered “that the child shall be free from the said Evans or his assigns and to be and remain at the disposing and education of said Graweere and the child’s godfather—who undertaketh to see it brought up in the christian religion as aforesaid.”<sup>78</sup> Higginbotham argued that Graweere was able to exercise other rights, including those incident to keeping hogs, to purchase his child’s freedom, and to petition the court.<sup>79</sup>

The same legal system that gave privileges to some Black servants simultaneously sanctioned perpetual servitude for other Blacks. In several commercial transactions in the 1640’s, Blacks were sold by contract for life. In one case, Francis Potts sold a Black woman and child to Stephen Carlton, “to the use of him forever.”<sup>80</sup> In another, William Whittington sold a ten-year-old girl “along with any issue she might produce for her and her children’s ‘lifetime and their successors forever.’”<sup>81</sup> What emerged from such contracts was Black slavery.

Once the practice of selling Blacks for life became commonplace, it was not long before the courts began to impose perpetual servitude on Blacks as punishment for their crimes. For example, in *In re Negro John Punch*<sup>82</sup> three runaway servants were captured in Maryland and each was sentenced to be whipped. The court then imposed different sentences as follows:

One called Victor, a dutchman, the other a Scotchman called James Gregory, shall first serve out their times with their master according to their Indentures, and one whole year apiece after the time of their service is Expired . . . and after that service . . . to serve the colony for three whole years apiece, and that the third being a negro named John Punch shall serve his said master or his assigns for the time of his natural life here or elsewhere.<sup>83</sup>

The *Punch* decision illustrates that colonial courts were willing to exercise extreme partiality in favor of Whites and against Blacks. A similar conclusion is apparent from the one-sentence-long opinion in *In re Warwick* decided in

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74. HIGGINBOTHAM, *supra* note 54, at 24.

75. *Id.*

76. *Id.*

77. *Id.* at 25 (citing *In re Graweere* (1641)). See also CATTERALL, *supra* note 68, at 78.

78. HIGGINBOTHAM, *supra* note 54, at 25.

79. *Id.*

80. *Id.* at 26.

81. *Id.*

82. *Id.* at 28. See also CATTERALL, *supra* note 68, at 77.

83. HIGGINBOTHAM, *supra* note 54, at 28.

1669.<sup>84</sup> In *Warwick* the court wrote, "Hannah Warwick's case extenuated because she was overseen by a negro overseer."<sup>85</sup> Assuming Warwick was a White servant, the opinion means nothing less than that a White servant was given more lenient treatment because she had a Negro overseer. More broadly, the decision suggests that Whites, even if wrong, could refuse to submit to the authority of Blacks.<sup>86</sup> Higginbotham said, "Thus, *Warwick* subscribes judicially to the view that the function of Blacks in Virginia was to be ordered, and never to order others."<sup>87</sup>

It was not until 1659 that Virginia legislation referred to Blacks as slaves.<sup>88</sup> The statute provided a tax incentive for merchants bringing slaves into the country, which led directly to an increased supply of slave labor.<sup>89</sup> By 1660 it is likely that Blacks in lifetime bondage had become the primary labor force in colonial Virginia.<sup>90</sup>

By 1669 the Virginia legislature had enacted statutes punishing Whites who conspired to escape service in the company of Negroes,<sup>91</sup> and exempting slave owners from criminal prosecutions for the casual killing of slaves.<sup>92</sup> In addition, the Virginia legislature enacted a statute that baptism did not alter the condition of bondage of Blacks or Indians.<sup>93</sup> In 1670, Virginia enacted a law which divided non-Christian servants into two categories: those imported into the colony by shipping "who shall be slaves for their lives" and those who shall come by land who shall serve until age 30.<sup>94</sup> By 1680, Virginia developed

84. *Id.* at 29-30. See also CATTERALL, *supra* note 68, at 78.

85. HIGGINBOTHAM, *supra* note 54, at 29-30.

86. *Id.* at 30.

87. *Id.*

88. *Id.* at 34. See also FRANKLIN, *supra* note 53, at 72.

89. HIGGINBOTHAM, *supra* note 54, at 34. The 1659 Act provided:

1659. Act XVI. Dutch and all strangers of Christian nations are allowed free trade if they give bond and pay import of ten shillings per hogshead laid upon all tobacco exported to any foreign dominions; always provided that if Dutch or other foreigners shall import any Negro slaves they, the said Dutch or other foreigners, shall for the tobacco really produced by the said Negroes, pay only the impost of two shillings per hogshead, the like being paid by our own nation.

90. HIGGINBOTHAM, *supra* note 54, at 34. See also FRANKLIN, *supra* note 53, at 72.

91. HIGGINBOTHAM, *supra* note 54, at 34. The 1660 Act provided:

1660. Act XXII. It is enacted that in case any English servant shall run away in company with any Negroes who are incapable of making satisfaction by addition of time that the English so running away shall serve for the time of the Negroes' absence as they are to do for their own by a former act.

92. *Id.* at 36. The Act provided:

1669. *An Act about the casual killings of slaves*

Whereas the only law in force for the punishment of refractory servants resisting their master, mistress or overseer, cannot be inflicted on negroes [because the punishment was extension of time], Nor the obstinacy of many of them by other than violent means suppressed. *Be it enacted and declared by this grand assembly*, if any slave resist his master . . . and by the extremity of the correction should chance to die, that his death shall not be accounted Felony, but the master (or that other person appointed by the master to punish him) be acquit from molestation, since it cannot be presumed that propensed malice (which alone makes murther [sic] Felony) should induce any man to destroy his own estate.

93. *Id.* at 36-37. The Act provided:

1667. Act III. Whereas some doubts have arisen whether children that are slaves by birth, and by the charity and pity of their owners made partakers of the blessed sacrament of baptism, should by virtue of their baptism be made free, it is enacted that *baptism does not alter the condition of the person as to his bondage or freedom; masters freed from this doubt may more carefully propagate Christianity by permitting slaves to be admitted to that sacrament.*

94. *Id.* at 37. See also FRANKLIN, *supra* note 53, at 74.

a legal system that denied most Blacks even the limited rights enjoyed by poor Whites.<sup>95</sup>

One 1680 statute provided an excellent illustration of the extent of the debasement of Blacks in Virginia. The Act provided:

Whereas the frequent meetings of considerable numbers of Negro slaves under pretense of feasts and burials is judged of dangerous consequence [it is] enacted that no Negro or slave may carry arms, such as any club, staff, gun, sword, or other weapon, nor go from his owner's plantation without a certificate and then only on necessary occasions; the punishment of twenty lashes on the bare back, well laid on. And further, if any Negro lift up his hand against any Christian he shall receive thirty lashes, and if he absent himself or lie out from his master's service and resist lawful apprehension, he may be killed and this law shall be published every six months.<sup>96</sup>

The 1680 Act became the model of Black repression throughout the South for the next two centuries.<sup>97</sup>

After eliminating the basic civil rights of Blacks, the Virginia legislature codified the status of slaves as a form of property. Thus, in 1705 Virginia enacted the following law:

All Negro, mulatto, and Indian slaves within this dominion shall be held to be real estate and not chattels and shall descend unto heirs and widows according to the custom of land inheritance, and be held in "fee simple." Provided that any merchant bringing slaves into this dominion shall hold such slaves whilst they remain unsold as personal estate. All such slaves may be taken on execution as other chattels; slaves shall not be escheatable.

No person selling any slave shall be obliged to have the sale recorded as upon the alienation of other real estate. Nothing in this act shall be construed to give the owner of a slave not seized of other real estate the right to vote as a freeholder.<sup>98</sup>

The legislature revised the 1705 Act every several years until 1792. But, the essential provisions of the slave code remained virtually the same throughout that period.<sup>99</sup> The Virginia slave code is representative of other colonial slave

95. Professor Kenneth Stampp wrote that "the master class, for its own purposes wrote chattel slavery, the caste system and color prejudice into American custom and law." See *supra* note 42, at 23.

96. HIGGINBOTHAM, *supra* note 54, at 39. The 1680 Act proved unsuccessful so it was followed by additional provisions in 1682. That Act provided:

1682. Act III. Whereas the act of 1680 on Negro insurrection has not had the intended effect, it is enacted that church wardens read this and the other act, twice every year, in the time of divine service, or forfeit each of them six hundred pounds of tobacco, and further to prevent insurrections no master or overseer shall allow a Negro slave of another to remain on his plantation above four hours without leave of the slave's own master.

97. *Id.* Higginbotham proceeded to examine statutes that proscribed interracial sex and marriage, as well as those that restricted the terms by which a master could free a slave. *Id.* at 40-50. The statutes would later serve as the model for the post-war Black codes and Jim Crow laws.

98. *Id.* at 52. Another section of the 1705 law gave the master greater control over the life of his slave. Chapter 34 provided:

And if any slave resist his master, or owner, or other person, by his or her order, correcting such slave, and shall happen to be killed in such correction, it shall not be accounted felony; but the master, owner, and every such other person so giving correction, shall be free and acquit of all punishment and accusation for the same, as if such accident had never happened.

*Id.*

99. *Id.* at 58. According to Higginbotham, some of the more interesting provisions of the Virginia slave code included:

1. A 1723 provision permitting certain free Negro or mulatto house-keepers to keep a gun.

codes which remained in force after the adoption of the Constitution.<sup>100</sup>

## 2. *Slavery and the American Revolution*

By the time the Virginia statesmen prepared their Bill of Rights<sup>101</sup> in 1776, slavery was entrenched in the colonies, especially throughout the South. For nearly 120 years Virginia had sanctioned perpetual servitude for Blacks. Even though the revolutionary language in Virginia's Bill of Rights, in the Declaration of Independence, and in the Constitution of the United States contained many references to rights of the people, as one of my colleagues has recently observed: "'We the People' in the Constitution's preamble really meant "'We the white male [adult] property owners.'"<sup>102</sup>

The Declaration of Independence<sup>103</sup> is the United States' freedom manifesto. It announces the union of the colonies as independent states and the specific reasons for severing allegiance with the British crown. The represent-

2. A 1769 provision banned the dismemberment of Blacks because it was often "disproportioned to the offense and contrary to the principles of humanity." Nevertheless, the statute authorized the castration of any slave who attempted to ravish a White woman, but it contained no comparable provision when White men attempted to ravish or actually ravished a Black woman.

3. In proceedings solely between Blacks, they were allowed to testify in court. But their testimony was admissible only against Blacks. No White person could ever be found guilty of a crime on the word of a Black person.

100. For a comprehensive collection of nineteenth century slave statutes, see *STATUTES ON SLAVERY: THE PAMPHLET LITERATURE* (Paul Finkelman, ed., Garland Publishing, Inc. 1988), and *STATE SLAVERY STATUTES: A GUIDE TO THE MICRO-FICHE COLLECTION* (Paul Finkelman, ed., Garland Publishing, Inc. 1989). See also *GENOVESE*, *supra* note 67, at 33-41.

The Author has also examined nineteenth century legal digests for references to slaves, mulattoes and free Negroes. Most of the relevant provisions are found in statutes at large for each state and are interspersed with other general provisions. The slave codes demonstrate as clearly as any other available evidence that Blacks in the U.S., whether slave, mulatto, or free, did not enjoy equal rights with Whites. The slave codes contained any combination of the following provisions:

1. Blacks could not engage in certain occupations;
2. Blacks could not freely assemble;
3. Blacks could not enter some states;
4. Blacks could not remain in some states if manumitted;
5. Free Blacks could not trade or engage in commerce with slaves;
6. Blacks could not obtain education, vote, or testify in court against a White person;
7. Blacks could not keep certain animals, such as dogs, horses, or some livestock;
8. Blacks could not travel without passes or certificates.

101. *HENRY STEELE COMMAGER, DOCUMENTS OF AMERICAN HISTORY* (Appleton-Century-Crofts 1968). The Virginia Bill of Rights was presented on June 12, 1776. The first section provided:

1. That all men are by nature equally free and independent, and have certain inherited rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, pursuing and obtaining happiness and safety.

*Id.* at 103. See also *HIGGINBOTHAM*, *supra* note 54, at 59.

102. Kenneth C. Randall, *Foreign Affairs in the Next Century*, 91 Colum. L. Rev. 2097, 2100 (1991) (reviewing *LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* (1990)).

Since the adoption of the Declaration of Independence, and the ratification of the Constitution and the Bill of Rights, there has been a contradiction between the language of rights and the reality of rights in the United States. The contradiction arises from several sources including the language selected and the interpretation of that language. Any principle can be construed broadly or narrowly to achieve one's goals. It seems that, time and again, laws have been construed narrowly when they were enacted on behalf of Blacks, but broadly when they were enacted on behalf of Whites.

In addition to the "We the People" slogan, there is the familiar "All men are created equal" language of the Declaration of Independence. The latest slogan in this tradition is "colorblindness."

103. *THE DECLARATION OF INDEPENDENCE* (U.S. 1776).

atives of the colonies complained of tyranny and despotism by King George. They wrote "all MEN are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness. . . ." <sup>104</sup>

Despite references to equality and unalienable rights, the final draft of the Declaration of Independence said nothing about slavery in the colonies. Thomas Jefferson's initial draft of the Declaration criticized the institution of slavery and the King of England for that Government's participation in the slave trade. <sup>105</sup> In the end, the society described by Jefferson and others in America's fundamental legal documents excluded the 500,000 Blacks held in slavery. <sup>106</sup> In order to promote the interests of Whites, our Founding Fathers "involuntarily" sacrificed the rights of Blacks. <sup>107</sup>

Similarly, the Constitution of the United States was largely a compromise between Southern planters and Northern merchants. At the heart of this compromise was slavery. Although the drafters of the original Constitution did not employ the terms "slave" or "slavery," their intent to protect slavery is clear in the several provisions relating to apportionment, importation of slaves, and the fugitive slave.

The representation of Southern states in the House of Representatives would increase because slaves would be included in calculating apportionment. Similarly, Article I, Section 9, prohibited congressional interference with slave migration or importation until 1808. And, Article IV, Section 2, Clause 3 prohibited states from emancipating fugitive slaves and provided that states would deliver fugitive slaves to their owners. <sup>108</sup>

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104. THE DECLARATION OF INDEPENDENCE paras. 1 and 2 (U.S. 1776).

105. BELL, RACE, RACISM AND AMERICAN LAW, *supra* note 1, at 20-21, (quoting Staughton Lynd, *Slavery and the Founding Fathers*, in BLACK HISTORY 119 (M. Drimmer, ed., 1968)). See also JOHN HOPE FRANKLIN, RACIAL EQUALITY IN AMERICA 13-14 (Univ. of Chicago Press 1976), and FRANKLIN, *supra* note 53, at 129-30.

106. See FRANKLIN, *supra* note 53, at 141-47.

107. This concept of involuntary sacrifice is borrowed from Bell's description of racial history in the U.S. See BELL, RACE, RACISM AND AMERICAN LAW, *supra* note 1, at 34-36.

108. *Id.* at 26-30. Bell cites the historian William Wiecek for compiling the following list of direct and indirect accommodations to slavery contained in the Constitution:

1. Article I, Section 2: representatives in the House were apportioned among the states on the basis of population, computed by counting all free persons and three-fifths of the slaves (the "federal number," or "three-fifths," clause);
2. Article I, Section 2, and Article I, Section 9: two clauses requiring, redundantly, that direct taxes (including capitations) be apportioned among the states on the foregoing basis, the purpose being to prevent Congress from laying a head tax on slaves to encourage their emancipation;
3. Article I, Section 9: Congress was prohibited from abolishing the international slave trade to the United States before 1808;
4. Article IV, Section 2: the states were prohibited from emancipating fugitive slaves, who were to be returned on demand of the master;
5. Article I, Section 8: Congress was empowered to provide for calling up the states' militias to suppress insurrections, including slave uprisings;
6. Article IV, Section 4: the federal government was obliged to protect the states against domestic violence, including slave insurrections;
7. Article V: the provisions of Article I, Section 9, clauses 1 and 4 (pertaining to the slave trade and direct taxes) were made unamendable;
8. Article I, Section 9, and Article I, Section 10: these two clauses prohibited the federal government and the states from taxing exports, one purpose being to prevent them from taxing slavery indirectly by taxing the exported product of slave labor.

BELL, AND WE ARE NOT SAVED, *supra* note 1, at 34-35.

One can read the Declaration of Independence and the Constitution of the United States as pro-slavery documents. Their provisions protected slavery by omission or commission and advanced the debasement and dehumanization of all Blacks, whether slave or free. Therefore, it should surprise no one that Frederick Douglass would state in a Fourth of July oration in 1852 that the holiday did not apply to him. He said:

What to the American slave is your Fourth of July? I answer, a day that reveals to him, more than all other days of the year, the gross injustice and cruelty to which he is the constant victim. To him your celebration is a sham; your boasted liberty an unholy license; your national greatness, swelling vanity; your sounds of rejoicing are empty and heartless; your denunciations of tyrants, brass-fronted impudence; your shouts of liberty and equality, hollow mockery; your prayers and hymns, your sermons and thanksgivings, with all your religious parade and solemnity, are to him mere bombast, fraud, deception, impiety, and hypocrisy; a thin veil to cover up crimes which would disgrace a nation of savages. There is not a nation on the earth guilty of practises more shocking and bloody than are the people of these United States at this very hour. . . .<sup>109</sup>

And in a similar vein, the late Supreme Court Justice Thurgood Marshall, on the occasion of the bicentennial of the Constitution, wrote about his reluctance in joining the celebrations:

I cannot accept this invitation, for I do not believe that the meaning of the Constitution was forever "fixed" at the Philadelphia Convention. Nor do I find the wisdom, foresight, and sense of justice exhibited by the framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today. When contemporary Americans cite "The Constitution," they invoke a concept that is vastly different from what the framers barely began to construct two centuries ago.

Thus, in this bicentennial year, we may not all participate in the festivities with flag-waving fervor. Some may more quietly commemorate the suffering, struggle, and sacrifice that has triumphed over much of what was wrong with the original document, and observe the anniversary with hopes not realized and promises not fulfilled. I plan to celebrate the bicentennial of the Constitution as a living document, including the Bill of Rights and the other amendments protecting individual freedoms and human rights.<sup>110</sup>

The revolution that occurred in the United States between 1776 and 1791 did not liberate Blacks in ways that it did many Whites. Most Blacks remained enslaved or, if free, circumscribed by state laws that limited and, in some cases, prohibited their exercise of basic civil rights.

### 3. *Slavery, Sectionalism, and the Prelude to War*

Although our Founding Fathers accepted slavery as a necessary evil in

109. FREDERICK DOUGLASS, *What to the Slave is the Fourth of July*, cited in *MASTERPIECES OF NEGRO ELOQUENCE* 46-48 (Alice Moore Dunbar, ed., Bookery Publishing Co. 1914). For contemporary treatments of the thoughts of Douglass, see WALDO E. MARTIN, JR., *THE MIND OF FREDERICK DOUGLASS* (Univ. North Carolina Press 1984), and WILLIAM S. MCFEELEY, *FREDERICK DOUGLASS* (W.W. Norton & Co. 1991).

110. Thurgood Marshall, *Reflections on the Bicentennial of the U.S. Constitution*, 101 *HARV. L. REV.* 1, 2, 5 (1987).

order to form a national government, the sectional fight over the existence and expansion of slavery in new states and territories continued for the next half century. The sectional conflict was ultimately decided by the Civil War. The prelude to war included passage of the Missouri Compromise of 1820,<sup>111</sup> the Fugitive Slave Act of 1850,<sup>112</sup> the Kansas-Nebraska Act of 1854,<sup>113</sup> and perhaps the most significant race case ever decided by the U.S. Supreme Court, *Dred Scott v. Sandford*.<sup>114</sup> The Missouri Compromise permitted the inhabitants of the Missouri territory to organize into a slave state and it prohibited slavery in the territory north of Missouri's southern boundaries.<sup>115</sup> The Act attempted to accommodate both a policy of nonintervention, as well as a policy of prohibition.

The compromise on the expansion of slavery did not remain settled long. As additional territories lobbied for statehood, the concerns of pro-slavery and anti-slavery advocates mounted regarding the expansion of slavery.<sup>116</sup> For ex-

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111. 3 Stat. 545, 645 (1820). The Missouri Compromise of 1820 provided in pertinent part:

That the inhabitants of that portion of the Missouri territory included within the boundaries hereinafter designated, be, and they are hereby, authorized to form for themselves a constitution and state government, and to assume such name as they shall deem proper; and the said state, when formed, shall be admitted into the Union, upon an equal footing with the original states, in all respects whatsoever.

And be it further enacted, That in all that territory ceded by France to the United States, under the name of Louisiana, which lies north of thirty-six degrees and thirty minutes north latitude, not included within the limits of the state, contemplated by this act, slavery and involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted, shall be, and is hereby, forever prohibited: *Provided always*, That any person escaping into the same, from whom labour or service is lawfully claimed, in any state or territory of the United States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labour or service as aforesaid.

112. 9 Stat. 462 (1850), *repealed by* 13 Stat. 200 (1864). The Fugitive Slave Act of 1850 provided that if a fugitive slave escaped into any state or territory in the United States, the slave could be reclaimed by the slave's owner or the owner's agent. In addition, the Act gave the slave owner a right of action in the circuit courts of the U.S. to reclaim fugitive slaves. Interestingly, Section 5 of the Act commanded good citizens to assist with the slave's recapture. Under Section 6 of the Act, the testimony of the alleged fugitive was inadmissible. Section 7 made it a criminal offense to hinder the arrest of or return of a slave.

113. 10 Stat. 277 (1854). The Kansas-Nebraska Act of 1854 provided that the Territories of Kansas and Nebraska could organize into states and that the issue of slavery was to be decided locally under the doctrine of popular sovereignty.

114. 60 U.S. (19 How.) 691 (1857). First, it was extremely rare for the Court to invalidate federal laws, and *Dred Scott* was a direct challenge to congressional power to regulate territories of the U.S. In that sense, *Dred Scott* compares with the importance of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Second, in *Dred Scott* the Supreme Court defined persons of African ancestry as noncitizens for purposes of suing in federal courts. The Court said for the first time that Blacks, whether slave or free, were not citizens within the meaning of the Constitution. Third, the *Dred Scott* decision reflected the deep division in the country over slavery and prompted the fears of many that slavery would expand throughout the country.

115. See *supra* note 111.

116. A full exposition of the fight to abolish slavery is beyond the scope of this article. However, I should note the efforts of several American heroes who made the abolition of slavery their life work. In addition to Frederick Douglass, others included William Lloyd Garrison, Elijah Lovejoy, Wendell Phillips, Susan B. Anthony, Harriet Tubman, Angelina and Sarah Grimké, Lucretia Mott, Maria Weston Chapman, Charles Sumner, John Brown, Sojourner Truth, and Ida B. Wells. See McFEELEY, *supra* note 109, at 147-47 and 274-75. See also WALTER M. MERRILL, *AGAINST WIND AND TIDE* (Harvard Univ. Press 1963); LAWRENCE LADER, *THE BOLD BRAHMINS* (E.P. Dutton & Co. 1961); BENJAMIN QUARLES, *BLACK ABOLITIONISTS* (Oxford Univ. Press 1969); and DAVID BRION DAVIS, *THE SLAVE POWER CONSPIRACY AND THE PARANOID STYLE* 32-86 (LSU Press 1969).

ample, David Wilmot proposed his famous Proviso designed to prohibit slavery in any territory that might be acquired as a result of the war with Mexico in 1846.<sup>117</sup> What emerged from such pressure was the doctrine of popular sovereignty,<sup>118</sup> which provided that each new state would decide for itself whether it would permit slavery.<sup>119</sup> What seems too clear for dispute is that the first half of the nineteenth century was filled with intense color—awareness. Even some of the most ardent supporters of ending slavery could not envision a perfect equality between Blacks and Whites. So, for example, members of the American Colonization Society thought Black emigration was essential.<sup>120</sup>

The early history of *Dred Scott* provides an excellent vehicle for reviewing the racial history in the United States during the first half of the nineteenth century.<sup>121</sup> Professor Fehrenbacher has traced Dred Scott's movement, as the slave property of Peter Blow, from Virginia in the early 1800's, through Alabama, and on to St. Louis, Missouri, around 1830.<sup>122</sup> Once in St. Louis, Peter Blow sold several of his slaves. Dr. John Emerson, an Army surgeon, purchased Dred Scott.<sup>123</sup> Dr. Emerson travelled to many forts and he frequently took his slave with him.<sup>124</sup> Dred Scott sued for his family's freedom on the grounds that he had been taken to Fort Armstrong, Illinois which, according to the Compromise of 1820, was in a nonslave state, and to Fort Snelling in the Wisconsin Territory which, according to the Ordinance of 1787, was a nonslave territory.<sup>125</sup> Several states, including Missouri, had adopted the common law policy that if a slave was taken into a free state or territory for an indefinite period the slave upon his return to the slave state could sue for his freedom.<sup>126</sup>

The most significant Missouri precedent was *Rachel v. Walker*.<sup>127</sup> Rachel, a slave woman, had accompanied her master, an Army officer, to Fort Snelling and they had remained there for several years. On their return to St. Louis, Rachel sued for her freedom. The Missouri Supreme Court upheld Rachel's claim for freedom and declared that an officer of the U.S. Army who takes his slave to a military post within a territory where slavery is prohibited and retains her there for several years forfeits his property in such slave by virtue of the Ordinance of 1787.<sup>128</sup> Missouri, then, by statute permitted a slave to sue for freedom based on having been taken into a nonslave state or territory.<sup>129</sup>

When Dred Scott filed his complaint in 1846 the law of Missouri appeared quite favorable. However, between 1846 and 1857 two events occurred

117. DON E. FEHRENBACHER, *THE DRED SCOTT CASE 257-58* (Oxford Univ. Press 1978).

118. *See supra* note 113.

119. *Id.* One of the chief proponents of the doctrine of popular sovereignty was Stephen Douglas. His role in the sectionalism dispute is summarized by Fehrenbacher, *supra* note 117, at 150-87.

120. LADER, *supra* note 116, at 45-47 and 117-19.

121. *See FEHRENBACHER, supra* note 117.

122. *Id.* at 239-49.

123. *Id.* at 240.

124. *Id.*

125. *Id.* at 250.

126. *Id.* at 51-56.

127. 4 Mo. 354 (1837).

128. *Id.*

129. *See MO. REV. STAT.*, ch. 69, at 531-34 (1845).

that foreshadowed the now infamous *Dred Scott* opinion. First, in *Strader v. Graham*,<sup>130</sup> the U.S. Supreme Court announced that it would follow the state supreme court's interpretation of slave laws. Second, in 1852 the Missouri Supreme Court ignored its precedent (*Rachel v. Walker*) and held that Missouri was not obliged to give extraterritorial effect to the laws of nonslave states or territories.<sup>131</sup> Thus, by 1857, the law of slavery in Missouri had been construed to protect property interests in slaves, notwithstanding laws such as the Ordinance of 1787 or the Missouri Compromise.

*Dred Scott* presented three issues "that had been much debated in court-rooms, legislative halls and newspapers throughout the country: (1) Negro citizenship; (2) the status of slaves who had been held on free soil; and (3) the constitutionality of federal legislation prohibiting slavery in the territories."<sup>132</sup> Although the U.S. Supreme Court might have decided the case solely on jurisdictional grounds, Chief Justice Taney wrote the pro-slavery diatribe that has become his legacy.<sup>133</sup> He wrote:

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all rights, and privileges, and immunities, guaranteed by that instrument to the citizen? . . .

The words "people of the United States" and "citizens" are synonymous terms, and mean that same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. . . . The question before us is, whether the class of persons described in the plea in abatement comprise a portion of this people and are constituent members of this sovereignty?

We think they are not, and that they are not included, and were not intended to be included under the word "citizens" in the Constitution . . . . On the contrary, they were at the time considered as a *subordinate and inferior class of beings, who had been subjugated by the dominant race*, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power the Government might choose to grant them.<sup>134</sup>

Chief Justice Taney concluded that persons of African ancestry, whether slave

130. 10 How. 82 (1850).

131. See *Emerson v. Scott*, 15 Mo. 576 (1852).

132. FEHRENBACHER, *supra* note 117, at 235.

133. The first question was simply whether *Dred Scott* as a descendant of the African race could meet the diversity of citizenship requirements to sue in federal court. If the Court answered negatively (which in fact it did), it could have ended its discussion of the case for want of subject matter jurisdiction. Instead, Chief Justice Taney went on to write an opinion that reaffirmed the rights of states over slave property and that invalidated federal legislation prohibiting slavery in certain territories. *Id.* at 323.

For an interesting recent treatment of *Dred Scott* in which the author analyzes the legal status of Blacks in Chief Justice Taney's home state, see David Skillen Bogen, *The Maryland Context of Dred Scott: The Decline in the Legal Status of Maryland Free Blacks 1776-1810*, 34 AM. J. OF LEGAL HISTORY 381 (1990) (arguing that the rights of free Blacks in Maryland worsened during the period).

There were several different opinions delivered by the Court. Chief Justice Taney's opinion is the most famous because of its characterization of persons of African descent. Justice Benjamin Curtis of Massachusetts presented the most persuasive challenge to Chief Justice Taney's view. *Dred Scott*, 60 U.S. (19 How.) at 767 (Curtis, J., dissenting).

134. *Dred Scott*, 60 U.S. (19 How.) at 700 (emphasis added).

or free, could not invoke the diversity jurisdiction of the federal courts.<sup>135</sup>

The Chief Justice did not end the opinion with a simple jurisdictional statement. Instead, he recounted in detail the "universal" characterization of persons of African descent. Chief Justice Taney wrote:

They had for more than a century been regarded as beings of an inferior order, and altogether unfit to associate with the White race, either in social or political relations; and so far inferior, that they had no rights which the White man was bound to respect . . . . The opinion was at the time fixed and *universal* in the civilized portion of the White race.<sup>136</sup>

Chief Justice Taney's opinion in *Dred Scott* has been criticized by commentators and jurists.<sup>137</sup> However, Abraham Lincoln expressed a view consistent with Chief Justice Taney in 1858 when he said:

'I will say then that I am not, nor ever have been in favor of bringing about in any way the social and political equality of the white and black races [applause] that I am not nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people, and I will say in addition to this that there is a physical difference between the black and white races which I believe will forever forbid the two races living together on terms of social and political equality. And inasmuch as they cannot so live, while they do remain together there must be the position of superior and inferior, and I as much as any other man am in favor of having the superior position assigned to the white race.'<sup>138</sup>

On the other hand, the post-war "Radical Reconstruction" is evidence that a number of very powerful Whites, such as Thaddeus Stevens<sup>139</sup> and Charles Sumner,<sup>140</sup> sought to invest Blacks with the basic civil rights enjoyed by Whites and with property confiscated during the war.<sup>141</sup> Moreover, shortly after the announcement of the *Dred Scott* decision, Dred Scott and his family were purchased and then freed by Taylor Blow, a grandson of Peter Blow who had acquired Dred Scott in the early 1800's in Virginia.<sup>142</sup> Thus, Chief Justice

135. *Id.* at 703-10. Chief Justice Taney wrote: "The court is of the opinion that, upon the facts stated in the plea of abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; . . . ."

136. *Id.* at 701-02 (emphasis added).

137. Criticism of Chief Justice Taney and the *Dred Scott* decision was swift and extensive. FEHRENBACHER, *supra* note 117, at 417-48. See also WALTER EHRLICH, *THEY HAVE NO RIGHTS* (Greenwood Press 1979). Ehrlich wrote:

The repercussions to the *Dred Scott* decision were of the greatest magnitude. The press and the pulpit, the political stump and the halls of Congress, all reverberated with scathing condemnations as well as vigorous defenses of the Court's pronouncements. Sectional differences, serious enough before March 6, 1857, now became more pronounced and more polarized as the impact of this decision added still more to those divisive forces already leading the nation inexorably toward civil war. Forces intent on ridding the nation of slavery now mounted an unprecedented assault upon the Court, determined to reverse *Dred Scott* before the unthinkable next step could occur the legalizing of slavery everywhere.

*Id.* at 179-80. See also, Bogen, *supra* note 133, at 410-11.

138. 3 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 145-46 (Roy Basler, ed., Rutgers Univ. Press 1953).

139. See EDWARD B. CALLENDER, *THADDEUS STEVENS: COMMONER* (AMS Press, Inc. 1972), and RALPH KORNGOLD, *THADDEUS STEVENS* (Harcourt, Brace & Co. 1955).

140. See MOORFIELD STOREY, *CHARLES SUMNER* (Houghton, Mifflin and Co. 1972), and DAVID DONALD, *CHARLES SUMNER AND THE COMING OF THE CIVIL WAR* (Alfred A. Knopf 1960).

141. See *infra* notes 144 to 171 and accompanying text.

142. EHRLICH, *supra* note 137, at 181-82.

Taney's opinion represented but one of many views regarding the status of Blacks in the middle of the nineteenth century.

Slavery dominated the racial history between Blacks and Whites in the United States between 1619 and 1860.<sup>143</sup> Blacks for the most part could exercise neither the political, economic, nor social rights that most Whites took for granted. Americans were not color-blind.

#### 4. *Slavery and Antidiscrimination Law*

In the decade of reconstruction, between 1865 and 1875, the federal government enacted legislation and constitutional amendments to end slavery, grant citizenship to former slaves, enfranchise them, and accord former slaves all the rights and liberties enjoyed by Whites.<sup>144</sup>

The Thirteenth Amendment abolished slavery and involuntary servitude in the United States, except as punishment for a crime.<sup>145</sup> Pursuant to its new constitutional power, Congress enacted the Freedmen Bureau Act of 1865<sup>146</sup> to assist former slaves with food, clothing, and other necessities. One could describe that Act as an early form of an affirmative action remedy for former slaves. When states attempted to continue slavery in all but its constitutional

143. It is very difficult for us today to comprehend what it meant to be a slave. DuBois described this dilemma effectively when he wrote:

What did it mean to be a slave? It is hard to imagine it today. We think of oppression beyond all conception: cruelty, degradation, whipping and starvation, the absolute negation of human rights; or on the contrary, we may think of the ordinary worker the world over today [1935], slaving ten, twelve, or fourteen hours a day, with not enough to eat, compelled by his physical necessities to do this and not to do that, curtailed in his movements and his possibilities; and we say, here, too, is a slave called a "free worker," and slavery is merely a matter of name.

But there was in 1863 a real meaning to slavery different from that we may apply to the laborer today. It was in part psychological, the enforced personal feeling of inferiority, the calling of another Master; the standing with hat in hand. It was the helplessness. It was the defenselessness of family life. It was the submergence below the arbitrary will of any sort of individual. It was without doubt worse in these vital respects than that which exists today in Europe or America.

See GENOVESE, *supra* note 67, at 68-69, quoting W.E.B. DuBois, *BLACK RECONSTRUCTION: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA 1860-1880*, at 8-9 (Harcourt Brace & Co. 1935).

144. The Reconstruction period extended from approximately 1865 with the adoption of the Freedmen's Bureau Act to 1875 with the passage of the Civil Rights Act.

The Freedmen's Bureau Act created an agency to assist former slaves who after the war were no longer the wards of their former slavemasters. Professor Melvin Urofsky has described the period at the end of the war as most desperate for former slaves who were without shelter or food and other necessities of life. See MELVIN UROFSKY, *A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 436 (Alfred A. Knopf 1988). See also ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877* (Harper & Row 1988), and DuBois, *supra* note 143.

145. U.S. CONST. amend. XIII. The Amendment provides:

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

146. 13 Stat. 507 (1865). Section 2 provided: "That the Secretary of War may direct such issues of provisions, clothing, and fuel, as he may deem needful for the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen and their wives and children, under such rules and regulations as he may direct." For subsequent amendments, see 14 Stat. 173 (1866) and 15 Stat. 83 (1868).

sense,<sup>147</sup> Congress enacted the Civil Rights Act of 1866<sup>148</sup> and amended the Freedmen's Bureau Act to strengthen the power of the national government over civil rights within each state and territory.<sup>149</sup> Both Acts contained identi-

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147. Most Southern states responded to the adoption of the Thirteenth Amendment with predictable indifference. Professor John Hope Franklin has described the enactment of the new Black Codes as follows:

Through 1865 and 1866 the states of the South gradually assumed the responsibility of governing their people. The greatest concern of Southerners was the problem of controlling the Negro. There were all sorts of ugly rumors of a general uprising in which Negroes would take vengeance on whites and dispossess them of their property. Most Southern whites, although willing to concede the end of slavery even to the point of voting for the adoption of the Thirteenth Amendment, were convinced that laws should be speedily enacted to curb the Negroes and to insure their role as a laboring force in the South. These laws bore a remarkable resemblance to the ante-bellum Black Codes and can hardly be described as measures which respected the rights of Negroes as free men. Several of them undertook to limit the areas in which Negroes could purchase or rent property. Vagrancy laws imposed heavy penalties that were designed to force all Negroes to work whether they wanted to or not. The control of the Negro permitted to white employers was about as great as that which slaveholders had exercised. If a Negro quite [sic] his job, he could be arrested and imprisoned for breach of contract. Negroes were not allowed to testify in court except in cases involving their race. Numerous fines were imposed for seditious speeches, insulting gestures or acts, absence from work, violating curfew, and the possession of firearms. There was, of course, no enfranchisement of Negroes and no indication that in the future they could look forward to full citizenship and participation in a democracy.

FRANKLIN, *supra* note 53, at 303. See also UROFSKY, *supra* note 144, at 436-37.

148. 14 Stat. 27 (1866). The Civil Rights Act of 1866 provided in pertinent part:

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every state and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

SEC. 2. *And be it further enacted*, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, . . . , shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

SEC. 3. *And be it further enacted*, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act . . . .

SEC. 10. *And be it further enacted*, That upon all questions of law arising in any cause under the provisions of this act a final appeal may be taken to the Supreme Court of the United States.

The complete Act is collected along with other post-war civil rights statutes in THEODORE EISENBERG, CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW: SELECTED STATUTES AND REGULATIONS (Michie Co. 1991).

149. The history of the Freedmen's Bureau Act of 1866 is summarized in UROFSKY, *supra* note 144, at 437-38. Urofsky wrote that in February of 1866 Congress extended the life of the Bureau indefinitely and placed protection of Black civil rights under direct control of the army. Persons depriving Blacks of their rights could be tried in military courts or Freedmen's Bureau courts.

President Johnson vetoed the first Freedmen's Bill on the grounds that it violated the Fifth Amendment and that Congress had no right to pass any legislation in the absence of almost one-third of the states. After Johnson's veto was sustained, Congress introduced another Freedmen's Bureau

cal lists of the civil rights to be guaranteed by the national government, including:

- a) The right to make and enforce contracts;
- b) The right to buy, sell, and own realty and personalty;
- c) The right to sue, be parties, and give evidence; and
- d) The right to full and equal benefit of all laws and proceedings for the security of persons and property.<sup>150</sup>

When Professor Eugene Gressman analyzed the congressional Reconstruction debates surrounding the passage of the Thirteenth Amendment, the Freedmen's Bills, and the Civil Rights Act of 1866, he found compelling evidence that the proponents of the laws believed:

[That] the opposite of slavery is freedom, that the Thirteenth Amendment established that freedom by abolishing slavery, and that the freedom so established consisted of the rights which had been denied the slaves and which were now spelled out in the two bills. And to them the concept of equal protection of the laws, which was so prominent in their philosophy and in their framing of the proposals, meant an affirmative, full protection of all the laws rather than a mere comparative equality.<sup>151</sup>

On the other hand, opponents of the new laws sought to construe them narrowly to eliminate only the master-slave relationship.<sup>152</sup> However, the words of Senator Lyman Trumbull, the chief sponsor of the Thirteenth Amendment and the Civil Rights Bills are quite clear:

Congress is bound to see that *freedom is in fact secured* to every person throughout the land; he must be fully protected in all his rights of person and property; and any legislation or any public sentiment which deprived any human being in the land of those great rights of liberty will be in defiance of the Constitution; and if the states and local authorities, by legislation or otherwise, deny those rights, it is incumbent on us to see that they are secured.<sup>153</sup>

Congress enacted the Fourteenth Amendment<sup>154</sup> because of lingering doubts about the adequacy of the Thirteenth Amendment and the 1866 Civil Rights Act to secure former slaves their full civil rights. Gressman wrote:

Its proponents, fresh from the legislative battles of the Thirteenth

Bill and easily overrode Johnson's veto. Urofsky wrote that from then on, Reconstruction policy was firmly under congressional control. *Id.* at 438.

150. See Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1326 (1952). Professor Gressman wrote: "Together, these bills effectively nationalized the civil rights of all inhabitants of the United States, white or colored." *Id.* at 1326.

151. *Id.* at 1327.

152. *Id.*

153. *Id.* (emphasis added), citing CONG. GLOBE, 39th Cong., 1st Sess., at 77 (1866). The sponsors of the new legislation saw it clearly as within their power and duty to affirmatively protect the freedom of former slaves. For a comprehensive summary of the Reconstruction debates, see generally ALFRED AVINS, *THE RECONSTRUCTION AMENDMENTS' DEBATES* (Virginia Comm'n on Constitutional Gov't 1967).

154. U.S. CONST. amend. XIV provides in pertinent part:

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment, the 1866 Civil Rights Act and the Freedmen's Bureau Bill, desired to solidify their intentions. They wished, by virtue of a new constitutional provision, to make certain that civil rights would be truly nationalized, that the federal government would inject itself into this realm that had hitherto been exclusively reserved to the states, and that all individuals would be protected in the full and equal enjoyment of the rights of person and property. More specifically, the provisions and implications of the 1866 act were meant to be incorporated into the Fourteenth Amendment.<sup>155</sup>

Section 1 of the Fourteenth Amendment granted state and national citizenship to all persons born or naturalized in the U.S. It also prohibited states from depriving persons due process of law, equal protection of the laws, or from abridging the privileges or immunities of citizens of the United States.<sup>156</sup>

The Fifteenth Amendment<sup>157</sup> was ratified in March 1870. Section 1 extended to citizens of the U.S. the right to vote without regard to race, color, or previous condition of servitude.<sup>158</sup>

After the adoption of the Fifteenth Amendment, Congress exercised its powers to enforce the Civil War amendments by appropriate legislation. First, Congress enacted the Civil Rights Act of 1870.<sup>159</sup> The new Act reenacted the

155. Gressman, *supra* note 150, at 1329.

156. See U.S. CONST. amend. XIV, *supra* note 154. The "intended" meaning of the Fourteenth Amendment has generated a volume of scholarship that has been rarely rivaled in size or disagreement. For part of the story of the legislative developments and debates leading to the adoption of the Fourteenth Amendment, see HORACE E. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908), and Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5 (1949). See also WILLIAM NELSON, *THE FOURTEENTH AMENDMENT* (Harvard Univ. Press 1988).

157. U.S. CONST. amend. XV provided:

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

158. *Id.*

159. 16 Stat. 140 (1870), *as amended by* 16 Stat. 433 (1871). The Civil Rights Act of 1870 contained 23 sections. The complete Act can be found in EISENBERG, *supra* note 148, at 434-41. Sections 1, 2, and 6 are set out in pertinent part below:

. . . That all citizens of the United States who are or shall be otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

SEC. 2. *And be it further enacted*, That if by or under the authority of the constitution or laws of any State, or the laws of any Territory, any act is or shall be required to be done as a prerequisite or qualification for voting, and by such constitution or laws persons or officers are or shall be charged with the performance of duties in furnishing to citizens an opportunity to perform such prerequisite, or to become qualified to vote, it shall be the duty of every such person and officer to give to all citizens of the United States the same and equal opportunity to perform such prerequisite, and to become qualified to vote without distinction of race, color, or previous condition of servitude; and if any such person or officer shall refuse or knowingly omit to give full effect to this section, he shall, for every such offence, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel fees as the court shall deem just, and shall also, for every such offence, be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five hundred dollars, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.

SEC. 6. *And be it further enacted*, That if two or more persons shall band or conspire

Civil Rights Act of 1866, included new provisions for voting rights, and added criminal penalties for depriving or conspiring to deprive anyone of rights under the 1866 or 1870 Acts.<sup>160</sup> Next, Congress enacted the Civil Rights Act of 1871.<sup>161</sup> This Act, known as the Ku Klux Klan Act, was designed to counter the acts of the Klan and others who were committing various atrocities against former slaves and their sympathizers.<sup>162</sup> The core of the Act was section 2, which made it illegal to “conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose . . . of depriving any person or class of persons of the equal protection of the laws. . . .”<sup>163</sup> In addition, the person whose civil rights were violated was given a civil cause of action against any officer who failed to protect him.<sup>164</sup>

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together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court, the fine not to exceed five thousand dollars, and the imprisonment not to exceed ten years, and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States.

160. Gressman, *supra* note 150, at 1333-34.

161. 17 Stat. 13 (1871). The Civil Rights Act of 1871 provided in pertinent part:

That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled “An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication”; and the other remedial laws of the United States which are in their nature applicable in such cases.

SEC. 2. That if two or more persons within any State . . . shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or shall conspire together for the purpose of in any manner impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, or by force, intimidation, or threat to prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy in a lawful manner towards or in favor of the election of any lawfully qualified person as an elector of President or Vice-President of the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy, each and every person so offending shall be deemed guilty of a high crime, and, upon conviction thereof in any district or circuit court of the United States or district or supreme court of any Territory of the United States having jurisdiction of similar offences, shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall determine. . . .

162. Gressman, *supra* note 150, at 1334. The atrocities included various forms of intimidation such as maimings, lynchings, and other mob violence.

163. *Id.*

164. *Id.*

The Civil Rights Act of 1875<sup>165</sup> was the final antidiscrimination law enacted in the nineteenth century. Its authors described it as "an Act to protect all citizens in their civil and legal rights."<sup>166</sup> The Preamble stated that,

it is essential to a just government that . . . we recognize the equality of all men before the law, and hold that it is the duty of government in all its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political . . .<sup>167</sup>

Section 1 required all public accommodations to be open to all persons within the jurisdiction of the U.S., subject only to legal restrictions imposed on Whites and Blacks alike.<sup>168</sup> Section 2 made a violation of section 1 a misdemeanor and gave the injured person a right to recover \$500 for each offense. In addition, the Act gave federal courts exclusive jurisdiction over cases arising under its provisions, with possible review by the U.S. Supreme Court.<sup>169</sup>

The Civil War amendments and Reconstruction civil rights statutes are important because, before their enactment, state and federal laws permitted slavery and all forms of discrimination against Blacks. Also, the new laws reflected the federal government's commitment to a new antidiscrimination principle. However, even while Congress was enacting its legislation to aid Blacks, the U.S. Supreme Court was rapidly construing that legislation as constitutionally redundant or unconstitutional.<sup>170</sup> Congress did not enact its next

165. 18 Stat. 335 (1875). The 1875 Act provided in pertinent part:

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, theaters, 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 condition of servitude.

SEC. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offense, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: *Provided*, That all persons may elect to sue for the penalty aforesaid or to proceed under their rights at common law and by State statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this proviso shall not apply to criminal proceedings, either under this act or the criminal law of any State: *And provided further*, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively.

166. *Id.*

167. *Id.* See also Gressman, *supra* note 150, at 1334-35.

168. See *supra* note 165.

169. *Id.*

170. In the *Slaughter-House* cases, 83 U.S. (16 Wall.) 36 (1873), the U.S. Supreme Court ruled that the Privileges and Immunities Clause of the Fourteenth Amendment applied only to rights of national citizenship and did not comprehend any of the fundamental rights of the individual. Those rights, according to Justice Miller, related only to state citizenship. For Justice Miller, rights of national citizenship included the right to travel to the national seat of government, the right to sue in federal courts, and the right to protection on the high seas or abroad. *Id.* at 79. The Court has never overruled *Slaughter-House*. The decision mocks congressional efforts to nationalize protection of the basic civil rights of former slaves.

Several other opinions of the Court following the rationale of *Slaughter-House* specifically undermined the Civil Rights Acts of 1870, 1871, and 1875. In *U.S. v. Cruikshank*, 92 U.S. 542, 548-55 (1876), the Court applied the theory of *Slaughter-House* to an alleged violation of two Blacks' rights to assemble. The Court held that unless the purpose of the assembly had some connection to the

civil rights laws to redress racial discrimination until the late 1950's and 1960's during the second Reconstruction.<sup>171</sup> The first Reconstruction was not color-blind. Congress enacted a series of laws designed to ensure that Blacks would enjoy the same rights as Whites. The Reconstruction laws defined national rights in terms of those enjoyed by Whites.

### PART III THE EVOLUTION OF THE ANTIDISCRIMINATION PRINCIPLE IN RACE JURISPRUDENCE

Although Congress acted boldly to protect the civil rights of all citizens by placing those rights under national protection, its efforts were thwarted, undermined, and ultimately perverted by interests within Congress, by the United States Supreme Court, and by citizens who refused to obey the Constitution and federal law.<sup>172</sup> Despite the herculean efforts by Congress to eradicate racial inequality, the racial history between Blacks and Whites in the United States after 1877 continued in its familiar pattern. At least one reason

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person's relationship to the federal government, such as to petition the government for redress of grievances, the Civil Rights Act of 1870 provided no relief. Therefore, the Court essentially held that the right to assemble was not one of the privileges and immunities of national citizenship. What the Court had done three years earlier to the Fourteenth Amendment, it had now repeated with the civil rights statutes. The *Cruikshank* opinion went further and held that the Fourteenth Amendment gave the national government power only to see that states did not deny their citizens equality of rights. The Court therefore further restricted the Fourteenth Amendment to "state" action. The Court set out the state action doctrine again three years later in *Virginia v. Rives*, 100 U.S. 313, 318 (1879). By reading a "state" action requirement into the civil rights statutes, the Court made it virtually impossible to use the civil rights acts to prosecute private individuals who most often violated the rights of former slaves. See also *U.S. v. Harris*, 106 U.S. 629 (1882) (where the Court concluded that the conspiracy section of the Ku Klux Klan Act of 1871 was void).

The U.S. Supreme Court delivered its greatest blow to the civil rights laws in *The Civil Rights Cases*, 109 U.S. 3 (1883). There the Court invalidated the first two sections of the Civil Rights Act of 1875, which outlawed discrimination in public accommodations. Again, extending the reasoning of *Slaughter-House*, the Court held that because the provisions were directed at private individuals and not the state or its agents, the provisions were unconstitutional. Essentially, the Court concluded that private discrimination was beyond the reach of the Fourteenth Amendment and therefore also beyond the scope of laws that were derived from the Fourteenth Amendment. The Court specifically concluded that the fifth section of the Fourteenth Amendment gave Congress power to correct the effects of state laws that violated the first section of the amendment. *Id.* at 3, 9-24. Justice John Harlan, presenting the lone dissent, wrote, "I cannot resist the conclusion that the substance and spirit of the recent [Civil War] Amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism." *Id.* at 24-27 (Harlan, J., dissenting).

171. The first Reconstruction ended abruptly after the Hayes-Tilden compromise of 1877. In the presidential election of 1876, Democrat Tilden appeared to win the election by the narrowest of margins. Hayes and the Republicans challenged the election returns in Florida, South Carolina, and Louisiana. Pursuant to the Constitution, the House of Representatives took up the election dispute. The House, unable to resolve the dispute, adopted a special resolution establishing a committee to decide who should become President. There were eight Republicans and seven Democrats on the committee. They voted by party affiliation, so Hayes was selected President. As the *quid pro quo* for the presidency, Hayes and the Republicans agreed to withdraw all remaining federal troops from the South and to restore home rule. For an analysis of the Compromise of 1877, see FONER, *supra* note 144, at 575-85. See also DUBOIS, *supra* note 143.

The second Reconstruction occurred during the late 1950's and 1960's. It included passage of the Civil Rights Acts of 1957, 1960, and 1964, the Voting Rights Acts of 1965 and 1970 and the Fair Housing Act of 1968. For a comprehensive treatment of each statute, see BELL, RACE, RACISM AND AMERICAN LAW, *supra* note 1, at 200-12 and 719-38.

172. Derrick Bell has described the enforcement efforts of Congress and the Court as cyclical, with periods of apparent progress and reform followed by periods of greater repression. BELL, RACE, RACISM AND AMERICAN LAW, *supra* note 1, at 6-7.

for the failure of the Civil War amendments and civil rights legislation enacted in the nineteenth and twentieth centuries is that Blacks had to turn to Whites for protection against White supremacy and racial subordination.<sup>173</sup>

In 1877, Whites running the national government sacrificed the rights of Blacks once again.<sup>174</sup> And, after the Supreme Court decided *The Civil Rights Cases* in 1883, state legislatures had full discretion over the civil rights of Blacks. One after another, most states, both North and South, extended laws<sup>175</sup> designed to control Blacks into a system that required separation of Blacks and Whites in virtually every conceivable aspect of life.<sup>176</sup> The U.S. Supreme Court upheld the constitutionality of state laws mandating racial separation in *Plessy v. Ferguson*.<sup>177</sup> The *Plessy* opinions provided both the doctrine of "separate, but equal" and the doctrine of colorblindness. Therefore, to understand the evolution of the modern antidiscrimination principle, one must examine *Plessy* and its progeny.

173. See GENOVESE, *supra* note 67, at 48-49.

174. See COMER VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (Oxford Univ. Press 1974). He wrote:

The phase that began in 1877 was inaugurated by the withdrawal of federal troops from the South, the abandonment of the Negro as a ward of the nation, the giving up of the attempt to guarantee the freedman his civil and political equality, and the acquiescence of the rest of the country in the South's demand that the whole problem be left to the disposition of the dominant Southern white people. What the new status of the Negro would be was not at once apparent, nor were the Southern white people themselves so united on that subject at first as has been generally assumed. The determination of the Negro's 'place' took shape gradually under the influence of economic and political conflicts among divided white people conflicts that were eventually resolved in part at the expense of the Negro. In the early years of the twentieth century, it was becoming clear that the Negro would be effectively disfranchised throughout the South, that he would be firmly relegated to the lower rungs of the economic ladder, and that neither equality nor aspirations for equality in any department of life were for him.

*Id.* at 6-7.

175. Woodward wrote that the Jim Crow laws enacted in the late nineteenth century: constituted the most elaborate and formal expression of sovereign white opinion upon the subject. In bulk and detail as well as in effectiveness of enforcement the segregation codes were comparable with the black codes of the old regime, though the laxity that mitigated the harshness of the black codes was replaced by a rigidity that was more typical of the segregation code. That code lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking. Whether by law or by custom, that ostracism extended to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons, and asylums, and ultimately to funeral homes, morgues, and cemeteries.

*Id.* at 7. The racial separation was not limited to the South. In the North, Woodward wrote:

. . . [T]he Northern Negro was made painfully and constantly aware that he lived in a society dedicated to the doctrine of white supremacy and Negro inferiority. The major political parties, whatever their position on slavery, vied with each other in their devotion to this doctrine, and extremely few politicians of importance dared question them. Their constituencies firmly believed that the Negroes were incapable of being assimilated politically, socially, or physically into white society. They made sure in numerous ways that the Negro understood his 'place' and that he was severely confined to it. One of these ways was segregation, and with the backing of legal and extra-legal codes, the system permeated all aspects of Negro life in the free states by 1860.

*Id.* at 18. See also LEON LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES 1790-1860* (Univ. of Chicago Press 1961), and FRANKLIN, *supra* note 53, at 324-44.

176. Perhaps the greatest irony in the racial history between Blacks and Whites in the United States is that Blacks have had to turn to Whites for protection against and relief from White supremacy and racial subordination. This fact certainly explains in part why three constitutional amendments and a half dozen federal statutes failed to eradicate White supremacy and racial subordination. See GENOVESE, *supra* note 67, at 48-49.

177. 163 U.S. 537 (1896).

## 1. *The Doctrine of Colorblindness*

In 1896, Homer Plessy challenged the constitutionality of a Louisiana statute requiring separate railway cars for Whites and Blacks on grounds that it violated his rights under the Thirteenth and Fourteenth Amendments.<sup>178</sup> Plessy alleged that he was entitled to every right, privilege, and immunity secured to citizens of the United States of the White race.<sup>179</sup>

The Court rejected both constitutional challenges. Justice Brown wrote that the Thirteenth Amendment prohibited only slavery and involuntary servitude. But, he continued:

A statute which implies merely a legal distinction between the White and colored races a distinction which is founded in the color of the two races, and which must always exist so long as White men are distinguished from the other race by color has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude.<sup>180</sup>

Justice Brown also rejected the Fourteenth Amendment challenge. He noted the existence of separate schools for Blacks and Whites in the District of Columbia and in various states, and state laws forbidding interracial marriage as one form of evidence of his separate but equal philosophy. He concluded:

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but 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.<sup>181</sup>

For the majority then, state segregation laws were within a state legislature's police power. The Court later repudiated the majority opinion.<sup>182</sup> Yet, it remains important for its validation of racial superiority. The Court was aware of color and accepted racial subordination as permissible under the Civil War amendments.

Justice John M. Harlan was the lone dissenter.<sup>183</sup> He argued that the Thirteenth Amendment not only struck down slavery, but also prohibited any burden or disability that constituted a badge of slavery or servitude.<sup>184</sup> He said, when joined with the Fourteenth Amendment's protection of citizenship, "the two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship."<sup>185</sup>

178. Under the Louisiana statute all railway companies had to provide equal but separate accommodations for Whites and Blacks or to partition a single coach. The conductor directed persons to the proper area. Failure to comply with the conductor's order was punishable by a fine of \$25 or imprisonment for not more than 20 days. If the conductor assigned a passenger to the wrong compartment, the conductor could be fined \$25 or imprisoned for 20 days. The conductor could refuse to carry a passenger who refused to follow his order without any risk of liability to the conductor or the railway company. *Id.* at 540-41.

179. Plessy was apparently seven-eighths Caucasian blood and one-eighth African blood. He claimed that his mixture of African blood was not discernible. He therefore took a vacant seat in the coach for Whites. After he refused an order to move, Plessy was forcibly ejected and arrested. *Id.* at 541.

180. *Id.* at 543.

181. *Id.* at 544.

182. *See* *Brown v. Board of Educ.*, 347 U.S. 483 (1954), and *infra* note 206.

183. *Plessy*, 163 U.S. at 552-64 (Harlan, J., dissenting).

184. *Id.* at 555.

185. *Id.* at 555. Justice Harlan continued by saying that the Thirteenth, Fourteenth, and Fifteenth Amendments removed the race line from our government systems. He said:

Justice Harlan argued that while the language of the Fourteenth Amendment was prohibitory, it also contained:

a necessary implication of a positive immunity, or right, most valuable to the colored—race the right to exemption from unfriendly legislation against them distinctively as colored—exemptions from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race.<sup>186</sup>

Justice Harlan next wrote:

[T]he Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government or the states against any citizen because of his race. All citizens are equal before the law.<sup>187</sup>

. . . .

The sure guaranty of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, national and state, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States without regard to race.<sup>188</sup>

Justice Harlan argued that the Constitution mandated that the races be equal before the law. Yet Justice Harlan knew that even after the adoption of the Civil War amendments, Blacks were not the equals of Whites, especially if states such as Louisiana could adopt statutes that subordinated Blacks to Whites. And, under that reading, Justice Harlan's colorblindness principle is inapposite where racial classifications do not promote subordination. Justice Harlan clearly believed that the Louisiana law was unconstitutional because it implied the inferiority of Blacks and the supremacy of Whites. His dissent in *Plessy* should be read in the context within which it was written.<sup>189</sup>

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They had, as this court has said, a common purpose, namely, to secure "to a race recently emancipated, a race that through many generations have [sic] been held in slavery, all the civil rights that the superior race enjoy." They declared, in legal effect, this court has further said, "that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before laws of the states, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color."

*Id.* at 555-56 (citations omitted).

186. *Id.* at 556. The quoted language provides an interesting context for interpreting Justice Harlan's assertion that our Constitution is color-blind. Justice Harlan was concerned about racial subordination and laws which implied inferiority of Blacks. Similar language is quoted in *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1880).

187. *Id.* at 556. In the context of the facts in *Plessy*, Justice Harlan must have meant that Louisiana could not enforce its statute because the statute violated the constitutional rights of Black citizens to occupy the same public conveyance as Whites, if they chose to do so. However, if one removes Justice Harlan's statements from their context, they seem to establish a universal constitutional colorblindness standard. The Author argues that legal commentators and jurists have transformed Justice Harlan's dissent into a broad antidiscrimination principle that prevents the achievement of racial equality.

188. *Id.* at 560.

189. For additional support for the view that Justice Harlan was concerned about racial subordination, see his dissent in *The Civil Rights Cases*, 109 U.S. 3, 35 (1883). Justice Harlan wrote:

But I hold that since slavery, as the Court has repeatedly declared, . . . was the moving or principal cause of the adoption of [the Thirteenth Amendment], and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races. Congress, therefore, under its express power to enforce that amendment, by appropriate legislation, may enact laws to protect that people against the deprivation, because of their

Sixty-five years later<sup>190</sup> Justice Douglas cited Justice Harlan's dissent from *Plessy* in *Garner v. Louisiana*,<sup>191</sup> to argue that Louisiana could not enforce a breach of the peace statute against Blacks who conducted sit-ins to protest their exclusion from lunch counters at local businesses.<sup>192</sup> The majority reversed the convictions on the grounds that they were so devoid of evidentiary support as to render the convictions unconstitutional under the Due Process Clause of the Fourteenth Amendment.<sup>193</sup> The Court found that under Louisiana law, the breach of the peace statute could not be applied constitutionally to the peaceful conduct of the students.<sup>194</sup> Justice Douglas concurred with the majority's reversal of the students' convictions; however, he thought that the Court should have decided the merits of the Fourteenth Amendment constitutional issues.<sup>195</sup>

Justice Douglas summarized the scope of Louisiana's deep-seated pattern of segregation.<sup>196</sup> He wrote:

Louisiana requires that all circuses, shows, and tent exhibitions to which the public is invited have one entrance for Whites and one for Negroes. La. Rev. Stat., 1950, § 4:5. No dancing, social functions, entertainment, athletic training, games, sports, contests "and other such activities involving personal and social contacts" may be open to both races. § 4:451 (1960 Supp). Any public entertainment or athletic contest must provide separate seating arrangements and separate sanitary drinking water and "any other facilities" for the two races. § 4:452 (1960 Supp). Marriage between members of the two races is banned. § 14:79. Segregation by race is required in prisons. § 15:752. *The blind must be segregated.* § 17:10. Teachers in public schools are barred from advocating desegregation of the races in the public school system. §§ 17:443, 17:462. So are other state employees. § 17:523. Segregation on trains is required. §§ 45:528-45:532. Common carriers of passengers must provide separate waiting rooms and reception room facilities for the two races (§ 45:1301 (1960 Supp)) and separate toilets and separate facilities for drinking water as well. § 45:1303 (1960 Supp). Employers must provide separate sanitary facilities for the two races. § 23:971 (1960 Supp.). Employers must also provide eating places in separate rooms and separate eating and drinking utensils for members of the two races. § 23:972 (1960 Supp). Persons of one race may not establish their residence in a community of another race without approval of the majority of the other race. § 33:5066. Court dockets must reveal the race of the parties in divorce actions. § 13:917. And all public parks, recreation centers,

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race, of any civil rights granted to other freemen in the same State, and such legislation may be of a direct and primary character . . . .

190. After the *Plessy* decision upholding the doctrine of separate but equal, the United States became more rigidly segregated. In the South, much of the segregation was mandated by statute. In the North, racial separation was the product of public and private choices to segregate. Professor Woodward has described in detail the extension of racial segregation by statute in the South. See WOODWARD, *supra* note 174, at 67-109. For a recent historical essay on segregation in the North, see DONALD G. NIEMAN, PROMISES TO KEEP: AFRICAN-AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT 114-47 (Oxford Univ. Press 1991).

191. 368 U.S. 157 (1960) (Douglas, J., concurring). *Garner* is also significant because it reflects the extent to which some states mandated racial segregation as late as the 1960's. I set forth the Louisiana statute in full to illustrate how far-reaching segregation was only three decades ago.

192. *Id.* at 176. Justice Douglas noted the irony that Louisiana had restated its policy of segregation of the races as late as 1960, even though *Plessy* had been overruled six years previously.

193. *Id.* at 163.

194. *Id.* at 174.

195. *Id.* at 177.

196. *Id.* at 179-81.

playgrounds, community centers and "other such facilities at which swimming, dancing, golfing, skating or other recreational activities are conducted" must be segregated. § 33:4558.1 (1960 Supp).<sup>197</sup>

Thus in Louisiana in 1960 (and many other states), the race-line was alive and well. Justice Douglas argued that restaurants were businesses "affected with a public interest."<sup>198</sup> He wrote:

Those that license enterprises for public use should not have under our Constitution the power to License it [sic] for the use of only one race. For there is an overriding constitutional requirement that all state power be exercised so as not to deny equal protection to any group. As the first Mr. Justice Harlan stated . . . 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. Our Constitution is color-blind. . . .<sup>199</sup>

Justice Douglas made it clear that he believed racial segregation in public restaurants was unconstitutional because it implied White superiority and caste. State policies could support neither under his view of the Constitution.<sup>200</sup> When Justice Douglas referenced Justice Harlan's colorblindness model, he was following his predecessor's meaning in applying that model to yet another case where the government by statute subordinated the civil rights of Blacks to Whites.

One can infer the same meaning from Justice Goldberg's concurring opinion in *Bell v. Maryland*.<sup>201</sup> Justice Goldberg wrote:

The historical evidence amply supports the conclusion of the Government, stated by the Solicitor General in this court, that: "it is an inescapable inference that Congress, in recommending the Fourteenth Amendment, *expected to remove the disabilities barring Negroes from the public conveyances and places of public accommodation with which they were familiar*, and thus to assure Negroes an equal right to enjoy these aspects of the public life of the community."<sup>202</sup>

Justice Goldberg said that he believed the Constitution guaranteed all Americans the right to be treated as equal members of the community with respect to public accommodations,<sup>203</sup> and denial of access to Blacks solely because of their race did not do justice to a constitution "which is colorblind."<sup>204</sup> Justice Goldberg wrote: "The denial of the constitutional right of Negroes to access to places of public accommodation would perpetuate a caste system in the United States."<sup>205</sup> Justice Goldberg, like Justice Harlan in *Plessy* and Justice Douglas in *Garner*, used the doctrine of colorblindness to mean that Maryland

197. *Id.* (emphasis added).

198. *Id.* at 183.

199. *Id.* at 185.

200. *Id.* Interestingly, Justice Douglas noted that he thought retail stores not licensed by the municipality might stand on different footing.

201. 378 U.S. 226 (1964) (Goldberg, J., concurring). In *Bell*, a dozen Black students refused to leave a restaurant in the City of Baltimore after they were refused service solely on the basis of their color. The students were arrested for violation of a criminal trespass law. They were convicted. While the case was on review to the U.S. Supreme Court, Maryland abolished the criminal trespass statute under which the petitioners had been convicted. Justice Brennan, writing for five members of the Court, reversed the convictions and remanded the case to the state court to determine the effect of the supervening change in state law.

202. *Id.* at 290 (emphasis added).

203. *Id.* at 286.

204. *Id.* at 288.

205. *Id.*

could not perpetuate the racial subordination of Blacks by excluding Blacks from public accommodations. Both *Garner* and *Bell* were analogous to *Plessy* because state laws operated in a manner that implied the inferiority of Blacks, denied them rights that Whites enjoyed, and reduced them to the condition of a subject race.

The same scenario of racial subordination was present in most of the school desegregation cases.<sup>206</sup> A representative case is *Swann v. Charlotte-Mecklenburg Board of Education*.<sup>207</sup> In a unanimous opinion, Chief Justice Burger summarized the duties of school authorities in light of *Brown I*.<sup>208</sup> The Court held that when school authorities did not proffer acceptable remedies to eliminate segregated schools, the district court had broad power to fashion a remedy that would assure a unitary school system.<sup>209</sup> Chief Justice Burger wrote:

In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. *To effectuate this interest may call for elimination of a variety of obstacles* in making the transition to school systems operated

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206. The landmark school desegregation case was *Brown v. Board of Educ.*, 347 U.S. 483 (1954) [hereinafter *Brown I*]. In *Brown I*, the Court had before it the century-old practice of state-mandated segregation in public schools. The Court consolidated cases from Delaware, Kansas, South Carolina, and Virginia in order to determine whether state-sponsored segregation violated the Fourteenth Amendment equal protection rights of Black school children. With the exception of the lower court in Delaware, the other trial courts had ruled that there was no constitutional violation in light of the separate but equal doctrine announced in *Plessy*.

The U.S. Supreme Court overruled *Plessy* and framed the issue as follows:

Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

. . . .

To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

. . . .

Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs [have been] deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

*Id.* at 493-95.

*Brown I* and its progeny can be read to mandate an end to the racial subordination of Blacks and to permit government to take affirmative steps to eliminate racial subordination.

207. 402 U.S. 1 (1971). In *Swann*, the Court addressed the scope of the equitable powers of lower federal courts to eliminate all vestiges of state-sponsored segregation in public schools. Specifically, the Court determined that the lower federal courts had broad remedial powers over student and teacher assignment policies. As for student assignments, the Court said that lower federal courts had the power to use racial balance or racial quotas, to rearrange attendance zones, and to use transportation to correct state-enforced racial segregation. The Court did not say that every school in every community must always reflect the racial composition of the school system as a whole. But it did state that school authorities had an affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. *Id.* at 15. And, if they fail and a constitutional violation is found, "a district court has broad power to fashion a remedy that will assure a unitary system." *Id.* at 12-13 and 17.

208. 347 U.S. 483 (1954). See also *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (describing the equitable powers of the district courts and the duties of the school authorities) [hereinafter *Brown II*].

209. *Swann*, 402 U.S. at 12-13.

in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.<sup>210</sup>

*Swann* stands for the theory expressed in the opinions noted above in *Plessy*, *Brown*, *Garner*, and *Bell*. Segregated schools placed Black school children in a position inferior to Whites. Segregation implied the inferiority of the Black children. The district court had the power and duty to act affirmatively to correct the constitutional violation of school authorities who failed to eliminate state-sponsored segregated schools. To accomplish its duty, the district court could, consistent with this version of the doctrine of colorblindness, use temporary racial quotas in both student and teacher assignments, rearrange attendance zones, and require busing.

That the Supreme Court thought such orders were consistent with the meaning of colorblindness is apparent from the Court's opinion in *Swann*. In *Davis v. School Comm'rs of Mobile County*,<sup>211</sup> the companion case to *Swann*, school authorities had argued that teachers had to be assigned on a "colorblind" basis without regard to race. The Supreme Court rejected this argument and found that the lower court had properly ordered faculty and staff desegregation.<sup>212</sup>

Each type of remedy approved in *Swann* and *Davis* was essentially affirmative action designed to give Black school children the equal educational opportunities that were promised in *Brown I*. *Swann* and *Davis* illustrate that up to 1971 the Court applied the colorblindness model in a fashion which required the state to take steps to eliminate the racial subordination of Blacks caused by segregated public schools.

## 2. *The Transformation of the Doctrine of Colorblindness*

Between 1971 and 1978 the U.S. Supreme Court redefined the meaning of constitutional colorblindness. The Court accomplished that result by shifting its analytical focus away from the racial subordination of Blacks and placing its focus instead on the intent or purpose of the government policy. If the Court had applied the same analytical framework in the initial school desegregation cases such as *Brown* and *Swann*, the plaintiffs would have probably lost because it is extremely difficult to prove an intentional discriminatory purpose.

While it is difficult to point to a single case, *Washington v. Davis*,<sup>213</sup> was a pivotal case in this transformation. After *Washington* plaintiffs had to prove evidence of intent to discriminate in order to prevail in race discrimination

210. *Id.* at 12-13, quoting *Brown II*, 349 U.S. at 299-300 (emphasis added).

211. 402 U.S. 33 (1971).

212. *Swann*, 402 U.S. at 19. See also *Davis*, 402 U.S. at 35.

213. 426 U.S. 229 (1976). In *Washington*, Black applicants for the District of Columbia Police Department challenged the constitutionality of the verbal ability test required of applicants. Blacks failed the test at a rate four times the rate of failure for Whites. The plaintiffs claimed that such a disproportionate or "disparate" impact was unconstitutional. The Court held that only official conduct having a discriminatory purpose violates the Equal Protection Clause. Justice White, writing for the majority, said that standing alone, disparate impact does not trigger the strictest judicial scrutiny. Therefore, the fact that Blacks scored substantially lower on the verbal test than Whites did not make it unconstitutional.

suits. It would no longer be sufficient to show racial subordination from disparate impact alone.<sup>214</sup>

The Court in *Washington* did not explain why, in light of the racial history in the United States, to say nothing of all the prior cases based upon a different assumption, the burden of proving nondiscrimination was *not* placed on the defendant. Instead, the opinion reads as if in 1976 a majority of the Court decided that our history of racial subordination and discrimination was so remote or speculative that Black plaintiffs would have to prove that White defendants actually intended to subordinate them. In sharp contrast, in 1954, the *Brown* Court simply declared that school segregation was inherently unconstitutional because it subordinated Black school children. *Washington v. Davis*, then, can aptly represent the turning point in the Court's race jurisprudence and its use of the colorblindness model.

*Regents of the Univ. of California v. Bakke*<sup>215</sup> was the next decision of the U.S. Supreme Court to expound upon this new doctrine of colorblindness. Historically, the case is remarkable for several reasons. First, in all the Supreme Court's prior colorblindness cases, the plaintiffs were Blacks who protested state-sponsored segregation in railroads, public accommodations, or public schools. *Bakke* was the first Supreme Court decision to apply the doctrine of colorblindness on behalf of a White plaintiff. Second, Allan Bakke did not claim that the University of California-Davis' admissions policies subordinated or stigmatized him, or that they suggested his inferiority. But in *Plessy*, *Garner*, *Bell*, and *Swann* each of the Black plaintiffs had claimed that state-sponsored segregation subordinated Blacks and treated them as the inferiors of Whites. Therefore, in *Bakke* the Court departed from its prior use of the colorblindness model.

Justice Powell announced the judgment of the Court.<sup>216</sup> He then explained that Title VI of the Civil Rights Act of 1964, which prohibited racial discrimination in any program receiving federal funds, proscribed only racial classifications that would violate the Equal Protection Clause of the Four-

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214. *Washington* has been critiqued extensively. See, e.g., Brest, *supra* note 14, at 24-52.

215. 438 U.S. 265 (1978). Bakke, a White male, challenged the Davis Medical School's admissions policy, which set aside 16 of its 100 seats in the entering class for members of certain racial minorities. Anyone could qualify for the other 84 spots. After being denied admission for two consecutive years, Bakke challenged the special admissions program as a violation of his rights under the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court split into two camps with Justice Powell serving as the critical vote for each camp. Justices Brennan, White, Marshall, and Blackmun were on one side. On the other side were Chief Justice Burger and Justices Stewart, Stevens, and Rehnquist. Two 5-4 decisions emerged from the six opinions in *Bakke*: (1) The Davis admissions program was found constitutionally invalid and Bakke was ordered admitted, and (2) race could be considered along with other "diversity" factors in making admissions decisions, but it could not be the sole factor.

216. *Id.* at 271-72. Justice Powell wrote:

For the reasons stated in the following opinion, I believe that so much of the judgment of the California court as holds petitioner's special admissions program unlawful and directs that respondent be admitted to the Medical School must be affirmed. For the reasons expressed in a separate opinion, my Brothers The Chief Justice, Mr. Justice Stewart, Mr. Justice Rehnquist, and Mr. Justice Stevens concur in this judgment.

I also conclude for the reasons stated in the following opinion that the portion of the court's judgment enjoining petitioner from according any consideration to race in its admissions process must be reversed. For reasons expressed in separate opinions, my Brothers Mr. Justice Brennan, Mr. Justice White, Mr. Justice Marshall, and Mr. Justice Blackmun concur in this judgment.

teenth Amendment or the equal protection component of the Due Process Clause of the Fifth Amendment.<sup>217</sup> Justice Powell next discussed the appropriate standard of review for a case like *Bakke*. He wrote, "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."<sup>218</sup> After defining equal protection, Justice Powell wrote, "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."<sup>219</sup>

After reaffirming that any racial classification requires the most exacting judicial scrutiny, Justice Powell explained how the reach of the Equal Protection Clause had been expanded beyond the protection of former slaves to all ethnic groups seeking protection from state-sponsored discrimination. He said:

During the dormancy of the Equal Protection Clause, the United States had become a Nation of minorities. Each had to struggle and to some extent struggles still to overcome the prejudices not of a monolithic majority, but of a "majority" composed of various minority groups of whom it was said perhaps unfairly in many cases that a shared characteristic was a willingness to disadvantage other groups. As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination.<sup>220</sup>

To support his argument, Justice Powell cited language from cases between 1880 and 1954 in which the Court applied the Equal Protection Clause to Irish, Chinese, Austrian, Japanese, and Mexican-Americans. Justice Powell thereby introduced the concept of ethnic fungibility into equal protection jurisprudence. For Justice Powell, Blacks were simply one of many minorities in the U.S. struggling against discrimination.

Justice Powell's view is the now familiar version of the racial history of the United States. It not only minimizes the reality of racial subordination of Blacks by Whites, but it is quite inconsistent with the specific history of racial subordination between Blacks and Whites outlined in Part II of this article. Justice Powell's allusion to immigration in the U.S. seems especially curious in

217. *Id.* at 287.

218. *Id.* at 289-90.

219. *Id.* at 291. To trace the development of the levels of scrutiny reflected in modern race cases one has to go back at least to 1938 when the Court decided *United States v. Carolene Products*, 304 U.S. 144 (1938). In a now famous footnote, *id.* at 152 n.4, Justice Stone wrote that the presumption of constitutionality that applied to legislation adopted to achieve public health concerns might have a narrower scope of operation when legislation appears on its face to be within a specific prohibition of the Constitution or when the legislation is directed at particular religious, national, or racial minorities. *Id.* Justice Stone implied that such legislation may call for a correspondingly more searching judicial inquiry. *Id.*

Six years later in *Korematsu v. United States*, 323 U.S. 214 (1944), Justice Black said for the Court, "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that Courts must subject them to the most rigid scrutiny." *Id.* at 216.

The Court has stated that under the strict scrutiny test a government practice or statute which restricts "fundamental rights" or which contains "suspect classifications" is subject to "strict scrutiny" and can be justified only if no less restrictive alternative is available. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16-17 (1973).

220. *Bakke*, 438 U.S. at 292.

a case such as *Bakke*: It is as if Justice Powell believed that White males such as Bakke had experienced a history of racial discrimination similar to that of Blacks, Native Americans, Asian Pacific Islanders, or Mexican-Americans.

Justice Powell did not stop with his ethnic fungibility theory. He wrote that:

Because the landmark decisions in this area arose in response to the continued exclusion of Negroes from the mainstream of American society, they could be characterized as involving discrimination by the "majority" white race against the Negro minority. But they need not be read as depending upon that characterization for their results. It suffices to say that "[o]ver the years, this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'"<sup>221</sup>

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The clock of our liberties, however, cannot be turned back to 1868.<sup>222</sup> It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. "The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory' that is, based upon differences between 'white' and Negro."<sup>223</sup>

Justice Powell suggested that much racial discrimination against Blacks was too remote to remedy. Although he said the Fourteenth Amendment arose in response to the racial subordination of Blacks by Whites, he said the subsequent landmark decisions interpreting that amendment did not depend on the existence of racial subordination for their results.

Justice Powell ignored the facts of racial subordination in the "landmark" cases to which he referred, and, instead, articulated the new principle that distinctions between citizens solely because of their ancestry were odious to the doctrine of equality. Thus, in a series of curious phrases Justice Powell redefined equality to prohibit distinctions based on ancestry. And, since the colorblindness model is derived from the doctrine of equality, Justice Powell also transformed the meaning of colorblindness.

There is other evidence in Justice Powell's opinion to support my view of his redefinition of equality and colorblindness. He also wrote that the Equal Protection Clause would no longer permit the recognition of "special wards." Powell's language is quite similar to that used by Justice Bradley in *The Civil Rights Cases*,<sup>224</sup> who wrote:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, *and ceases to be the special favorite of the laws*, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.<sup>225</sup>

Justice Powell's return to Justice Bradley's "no special ward" language is surprising, especially since it is apparent that Justice Bradley did not define equality or colorblindness the way Justice Harlan did. (Justice Harlan was the lone

221. *Id.* at 294.

222. *Id.* at 295.

223. *Id.* at 294-95.

224. *The Civil Rights Cases*, 109 U.S. at 24-27.

225. *Id.* (emphasis added).

dissenter in *The Civil Rights Cases* and thought it outrageous for Justice Bradley to refer to Blacks as special wards of the law.)

Justice Powell also undervalued the significance of racial subordination in the Court's prior equal protection decisions. He wrote:

In the view of Mr. Justice Brennan, Mr. Justice White, Mr. Justice Marshall, and Mr. Justice Blackmun, the pliable notion of "stigma" is the crucial element in analyzing racial classifications. . . . The Equal Protection Clause is not framed in terms of "stigma." Certainly the word has no clearly defined constitutional meaning. It reflects a subjective judgment that is standardless. All state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others. One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin. . . .<sup>226</sup>

Again, Justice Powell wrote as if the Court had never decided *Brown*, *Garner*, *Bell*, or *Swann*. In each of those cases the Court focused on racial subordination, stigma, and inferiority. In *Bakke*, Justice Powell wanted us to believe that those cases were different because they involved clear constitutional violations of the rights of Blacks. Justice Powell said there was no history of discrimination by the University of California-Davis other than "societal discrimination."<sup>227</sup>

Justice Powell also introduced the concept of White innocence into the doctrine of colorblindness. But Justice Powell does not explain why White innocence was not an issue in *Brown*, *Swann*, *Garner*, or *Bell*. The White parents and students in the school desegregation cases were arguably "innocent." So were the restaurant patrons in *Bell* and *Garner*. Yet the Court in those cases asserted that equality in educational opportunities and in public accommodations meant that the White political majority could not subordinate the Black political minority.

For Justice Powell, Allan Bakke was an innocent person.<sup>228</sup> Justice Powell wrote, "there is a measure of inequity in forcing innocent persons in re-

226. *Bakke*, 438 U.S. at 295 n.34 (citations omitted).

227. *Id.* at 307. Justice Powell's use of the term "societal discrimination" is peculiar. It is often used to describe past treatment of groups by political majorities. The Supreme Court has used the term to describe how Blacks and women, for example, have been treated historically. For Justice Powell, societal discrimination was an amorphous conception of injury that might be ageless in its reach into the past.

In recent race cases, the Court has concluded that plaintiffs must prove individual discrimination by an identifiable perpetrator in order to prevail. See *infra* notes 263 to 289 and accompanying text.

228. Justice Powell seemed to understand "White innocence" in the most narrow way. The argument sometimes offered is that White people living today did not own slaves. Yet, racial subordination is much more complex than who owned former slaves. It has more today to do with the wages paid to racial minorities, the educational opportunities available to racial minorities, or the ways in which the political majority (most often Whites) allocates public resources for services such as schools, roads, water, or sewage. I reject the concept of innocence because it is clear that political majorities most often act to benefit themselves to the greatest extent, and in the U.S. those majorities are Whites.

spondent's position to bear the burdens of redressing grievances not of their making."<sup>229</sup> A close reading of Powell's opinion suggests that if the University of California had operated a dual system of segregated colleges, his opinion might have been more consistent with *Brown*. But, who in *Bakke* would have made a dual system argument? Certainly neither the University of California nor Allan Bakke would have. That suggests to this Author that cases such as *Bakke* should be decided under a different jurisprudential standard.<sup>230</sup>

Ultimately, one must wonder what Justice Powell believed because he concluded that race "may be deemed a 'plus' in a particular applicant's file."<sup>231</sup> Justice Powell supported diversity admissions programs that would compare all applicants to each other for all available seats. He wrote:

Such [diversity] qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.<sup>232</sup>

For Justice Powell, diversity admissions programs were constitutional because they treated every applicant as an individual with fungible subjective qualities. Therefore, a candidate would never be rejected under a diversity plan solely because of race. And, good faith by the admissions committees would be presumed, absent a showing to the contrary.<sup>233</sup>

Justice Powell did not use the term "colorblindness" in his opinion. Instead, he used the term "equality" and redefined it in a way that would permit government to use race as one of many factors in allocating benefits and burdens.<sup>234</sup>

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229. *Bakke*, 438 U.S. at 298. Justice Powell failed to understand that someone bears the burden of our society's racial subordination. And he did not explain why someone in Bakke's position should be exempt from bearing some portion of the burden. The fact is Bakke did not bear a burden greater than the burden of a Black applicant who under U.C. Davis' admissions policies had virtually zero chance of gaining one of the 84 "open" seats in the first year class. Davis' admissions policies favored Allan Bakke because he had the kind of credentials sought in applicants.

*Bakke* is an excellent example of government's use of race-neutral criteria that clearly subordinates Blacks and other minorities. When selecting its admissions criteria, U.C.-Davis knew or should have known that virtually no Blacks would meet them. The result is that Blacks remain closed out of many professions under the guise of colorblindness.

230. The Author proposes such an alternative jurisprudential standard in Part VI.

231. *Bakke*, 438 U.S. at 317.

232. *Id.* Since 1978, most colleges and universities have operated "diversity" admissions programs.

233. *Id.* at 319.

234. The meaning of equality suggested by Justice Powell is markedly different from the meaning suggested by Justice Harlan in *Plessy*, and by the Court in *Brown I*. For Justice Harlan, equality meant the elimination of racial subordination. For the Court in *Brown I*, it meant the elimination of state-sponsored segregation which generated feelings of inferiority in Black school children. However, for Justice Powell, equality meant not using race as the sole factor in allocating government benefits.

The *Bakke* decision followed the reasoning in *Washington v. Davis* rather than *Brown I* and its progeny. Just as the proof requirements for discrimination were "redefined" in *Washington* to place a higher burden on discrimination-claiming plaintiffs, *Bakke* altered the meaning of equality not simply to require that Blacks, Whites, and others be treated the same, but also to prohibit solely race-based affirmative action designed to benefit Blacks and to eliminate racial subordination.

The Author does not detail here the most salient points of the remaining five opinions in *Bakke*.

### 3. *Modern Race Cases*

Since *Bakke*, the Court has decided several similar cases in which a White plaintiff has challenged an affirmative action program sponsored by a governmental entity. The most significant of those cases are *Fullilove v. Klutznick*,<sup>235</sup> *City of Richmond v. Croson Co.*,<sup>236</sup> and *Metro Broadcasting v. FCC*.<sup>237</sup> Perhaps the clearest conclusion that one can draw from these cases is that the Court remains divided regarding the meaning of the Equal Protection Clause in cases involving racial classifications that benefit racial minorities.<sup>238</sup> This division requires that we examine their holdings. Another equally compelling conclusion is that no Court majority applied a color-blind standard. As in *Brown I*, *Swann*, *Bell*, *Garner*, and *Bakke* the Court was not color-blind in *Fullilove*, *Croson*, or *Metro Broadcasting*.

In *Fullilove*, the Court affirmed both lower federal courts' holdings that the federal minority business enterprise ("MBE") provision of the Public Works Employment Act,<sup>239</sup> which required a 10% set-aside of federal funds for minority-controlled businesses on local public works projects, did not violate the Equal Protection Clause or federal statutes.<sup>240</sup> Six Justices concurred in the judgment of the Court<sup>241</sup> and three dissented.<sup>242</sup>

Chief Justice Burger stated the issue in *Fullilove* was whether Congress had the power to enact the MBE set aside provision of the Public Works Employment Act.<sup>243</sup> The Court first noted its usual deference when passing on the constitutionality of an act of Congress. The Chief Justice said,

A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to "provide for the . . . general Welfare of the United States" and "to enforce, by appropriate legislation" the equal protection guarantees of the Fourteenth Amendment.<sup>244</sup>

Thus, Chief Justice Burger identified two sources of power available to Congress to enact the minority set aside provision: congressional power to spend for the general welfare<sup>245</sup> and Section 5 of the Fourteenth Amendment.<sup>246</sup>

The other opinions merit full exploration to discern how the Court became so divided in *Bakke* given its unanimous decision in *Swann* seven years earlier.

235. 448 U.S. 448 (1980).

236. 488 U.S. 469 (1989).

237. 497 U.S. 547 (1990).

238. There were 15 separate opinions in *Fullilove*, *Croson*, and *Metro Broadcasting*.

239. Pub. L. 95-28, 91 Stat. 116.

240. *Fullilove*, 448 U.S. at 492.

241. Chief Justice Burger announced the judgment in an opinion, joined by Justices White and Powell. Justice Powell also wrote a separate concurrence. And Justice Marshall concurred separately in the judgment, joined by Justices Brennan and Blackmun.

242. Justice Stewart dissented, joined by Justice Rehnquist. Justice Stevens dissented separately.

243. The MBE provision was added to the Act after \$2 billion had previously been distributed and minority applicants raised questions about the fairness of distribution procedures. Presumably a significant portion of the first \$2 billion went to nonminority controlled businesses (either contractors or sub-contractors). The sponsor of the amendment stated that the objective of the amendment was to direct funds into the minority business community which could not be expected to benefit significantly from the public works program as formulated. *Id.* at 459 n.20.

244. *Id.* at 472.

245. Art. I, § 8, cl. 1. Here, the spending power was used to require recipients of funds to set aside 10% of their grants for minority-controlled businesses. The Court has upheld such conditional grants in many contexts. *See, e.g., Lau v. Nichols*, 414 U.S. 563 (1974) (upholding conditional grants

After finding sufficient congressional power to enact the provision, Chief Justice Burger then determined whether the limited use of racial criteria was a constitutional means of achieving congressional objectives. The Chief Justice said:

As a threshold matter, we reject the contention that in the remedial context the Congress must act in a wholly "color-blind" fashion. In *Swann v. Charlotte-Mecklenburg Board of Education*, we rejected this argument in considering a court-formulated school desegregation remedy on the basis that examination of the racial composition of student bodies was an unavoidable starting point and that racially based attendance assignments were permissible so long as no absolute racial balance of each school was required. In *McDaniel v. Barresi*, citing *Swann*, we observed that: "[I]n this remedial process, steps will almost invariably require that students be assigned 'differently because of their race.' Any other approach would freeze the status quo that is the very target of all desegregation processes." And in *North Carolina Board of Education v. Swann*, we invalidated a state law that absolutely forbade assignment of any student on account of race because it foreclosed implementation of desegregation plans that were designed to remedy constitutional violations. We held that "[j]ust as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."<sup>247</sup>

Thus, in *Fullilove* six Justices explicitly rejected the colorblindness model.

The Court next explained that the remedial powers of Congress are greater than those of any other governmental entity. Chief Justice Burger wrote:

Here we deal, as we noted earlier, not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees. Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct.<sup>248</sup>

The clear import of this language is that Congress can force compliance with its antidiscrimination policies by inducing private contractors or state grantees to provide affirmative action set asides to remedy past and continuing discrimination in the construction industry.

Chief Justice Burger also rejected the "White innocence" theory presented in *Bakke*. The Chief Justice wrote (and Justice Powell joined):

It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such "a

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to compel school officials to design language programs for Chinese students). In addition, the Court suggested that had Congress chosen to do so, it could have used its commerce power under Art. I, § 8, cl. 3 to regulate the practices of prime contractors.

246. The text of the Fourteenth Amendment is set out at *supra* note 154. The Court said Congress could have achieved its objectives pursuant to Section 5 of the Fourteenth Amendment. *Id.* at 478.

247. *Id.* at 482 (citations omitted). Recall that Chief Justice Burger wrote the majority opinion in *Swann*.

248. *Id.* at 483 (citation omitted).

sharing of the burden" by innocent parties is not impermissible. The actual "burden" shouldered by nonminority firms is relatively light in this connection when we consider the scope of this public works program as compared with overall construction contracting opportunities. Moreover, although we may assume that the complaining parties are innocent of any discriminatory conduct, it was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities.<sup>249</sup>

Along with the Court's rejection of White innocence, the opinion referred to Congress' ability to employ a limited remedy to cure the effects of "prior discrimination." The Court used the term "prior discrimination" to refer to general discrimination practiced in the contracting profession.<sup>250</sup> The *Fullilove* Court did not require Congress to prove specific identifiable discrimination to justify the minority set aside, as the Court had required in *Bakke*.<sup>251</sup>

*Fullilove* raised many new questions regarding the constitutionality of affirmative action set aside programs. For example, did the Court mean that this set aside was constitutional because it was sponsored by Congress, but that a state could not treat its citizens in the same way? Or, did the Court mean that under any level of judicial scrutiny, the set aside was constitutional? Such confusion sprang from the Chief Justice's assertion that his opinion did not adopt the analysis articulated by any members of the Court in *Bakke*. He added, "Our analysis demonstrates that the MBE provision would survive judicial review under either 'test' articulated in the several *Bakke* opinions."<sup>252</sup>

The dissenters in *Fullilove* used Justice Harlan's dissent from *Plessy* to argue that the MBE provisions were unconstitutional. After recalling Justice Harlan's colorblindness quote, Justice Stewart wrote,

Today, the Court upholds a statute that accords a preference to citizens who are "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts" for much of the same reasons [as were given by the majority in *Plessy*]. I think today's decision is wrong for the same reason that *Plessy* was wrong, and I respectfully dissent.<sup>253</sup>

For Justice Stewart, *Fullilove* was just like *Plessy* and affirmative action was another form of invidious racial subordination. It did not matter that the MBE provision had been enacted by Congress rather than by the State of Louisiana. He said the equal protection standard absolutely prohibited any racially-categorized discrimination by government.<sup>254</sup> Justice Stewart wanted to apply a rule of presumptive invalidity to any racial classification and to scrutinize any racial classification as inherently suspect.<sup>255</sup>

249. *Id.* at 484.

250. *Id.*

251. The Court concluded that given the broad powers of Congress and the means chosen to achieve its objectives, the MBE provision did not violate the Constitution. Chief Justice Burger suggested that the constant administrative review system and the waiver provision that permitted a grantee or contractor to demonstrate a good faith effort to comply with the set aside gave reasonable assurance that the program will operate constitutionally. *Id.* at 490.

252. *Id.* at 492. Chief Justice Burger appeared to apply close scrutiny and appropriate congressional deference in deciding *Fullilove*. However, his language suggests that the issue of which standard of review should apply to affirmative action cases remained unresolved.

253. *Id.* at 523 (Stewart, J., dissenting).

254. *Id.*

255. *Id.*

Justice Stewart's dissent paralleled the language from Justice Powell's opinion in *Bakke*.<sup>256</sup>

[U]nder our Constitution, the government may never act to the detriment of a person solely because of that person's race. The color of a person's skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible interest to government. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." In short, racial discrimination is by definition invidious discrimination.

The rule cannot be any different when the persons injured by a racially biased law are not members of a racial minority. The guarantee of equal protection is "universal in [its] application, to all persons . . . without regard to any differences of race, of color, or of nationality."<sup>257</sup>

In Justice Stewart's view, skin color bore no necessary relation to ability, disadvantage, or moral culpability. Thus, equality meant disregarding all past inequities based on color. Justice Stewart believed that the MBE provision made its beneficiaries more equal than others.<sup>258</sup> And his concern about moral culpability reverts back to the White innocence theory that Justice Powell introduced in *Bakke*. Therefore, he concluded that the MBE provision was an unconstitutional racial classification because it violated the equal protection standard contained in the Fifth Amendment Due Process Clause.<sup>259</sup>

The weakness of Justice Stewart's dissent goes beyond its continuation of Justice Powell's alteration of the meanings of equality and colorblindness suggested by Justice Harlan in *Plessy*. Justice Stewart offered no alternative to the MBE provision. He suggested implicitly that nothing "fair" could be done about the racial subordination of Blacks. In contrast, Justice Powell in *Bakke* accepted the diversity model as an alternative to the racial quota of sixteen seats. Justice Stewart's opinion suggests that he rejected Justice Powell's compromise in *Bakke*, that racial equality to him meant ignoring the past and treating everyone the same in the future. He gave no explanation justifying the fairness of ignoring racial subordination of Blacks.

Justice Stewart suggested that the MBE provision gave its beneficiaries privileges based on birth.<sup>260</sup> And he concluded:

Most importantly, by making race a relevant criterion once again in its own affairs, the Government implicitly teaches the public that the apportionment of rewards and penalties can legitimately be made according to race—rather than according to merit or ability—and that people can, and perhaps should, view themselves and others in terms of their racial characteristics. Notions of "racial entitlement" will be fostered, and private discrimination will necessarily be encouraged.<sup>261</sup>

256. Compare *id.* at 523-26 with *Bakke*, 438 U.S. at 289-90.

257. *Fullilove*, 448 U.S. at 525 (citations omitted).

258. *Id.* at 526.

259. Justice Stewart argued that the MBE provision operated just like the admissions program in *Bakke*. He said that some contractors were excluded from 10% of the federal grants, just as *Bakke* was excluded from competition for 16 of the 100 seats at Davis Medical School. Even if the programs are similar, they are not identical. Most significantly, the MBE provision contained a waiver process that enabled contractors and state grantees to demonstrate good faith efforts to comply. Upon such a showing, the grantees could obtain access to all federal grants.

260. *Fullilove*, 448 U.S. at 531. Thus, according to Justice Stewart, the set aside becomes a privilege rather than a remedy for past and continuing discrimination.

261. *Id.* at 532 (citations omitted).

This classic summary of the parade of horrors that some assert must necessarily follow affirmative action teaches, according to Justice Stewart, that racism and racial discrimination are permissible, merit is irrelevant, and racial polarization is inevitable.<sup>262</sup> Yet what does the government teach when it does nothing to address past and present racial inequality? When the government does nothing to eliminate racial subordination it teaches that the rights of the subordinated group are less important than the rights of the superordinate group. Moreover, when the Court characterizes the remedy to racial discrimination as reverse discrimination, it teaches that the Court will protect the interests of the group it identifies with the most.

In *City of Richmond v. Croson Co.*<sup>263</sup> the Court was more divided than in *Bakke* or *Fullilove*.<sup>264</sup> The facts in *Croson* were very similar to those in *Fullilove*, except that the set aside was sponsored by the City of Richmond and the percent set aside for minority-controlled businesses was 30%. In fact, the MBE provision in *Croson* was modeled on the federal provision in *Fullilove*.<sup>265</sup>

Justice O'Connor announced the judgment of the Court invalidating the Richmond set aside.<sup>266</sup> She distinguished *Fullilove* on the grounds that Congress has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment,<sup>267</sup> Section 5 of that being a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure its guarantees.<sup>268</sup> On the other hand, she found Section 1 of the Fourteenth Amendment to be a constraint on state power and that states could undertake only those efforts to remedy discrimination which were consistent with that section.<sup>269</sup>

In order to meet these constraints Richmond had to identify specifically

262. Justice Stevens also dissented. The thrust of Justice Stevens' dissent was that even if Blacks are entitled to reparations, the MBE provision included other groups who do not have the same claim for reparations. *Id.* at 537-38 (Stevens, J., dissenting).

263. 488 U.S. 469 (1989).

264. In *Croson* there were six separate opinions.

265. *Croson*, 488 U.S. at 477-86. The Richmond City Council (with a Black majority) issued a bid request for plumbing fixtures at the City Jail. *Croson Co.* bid for the job. *Croson* attempted to comply with the set aside by securing the partnership of an MBE. When bids were opened, *Croson* was the only bidder; however, the MBE *Croson* had selected could not obtain the necessary credit approval. Thereafter, *Croson* sought a waiver from the City of the minority set aside provision. After the City refused the waiver request and elected to rebid the project, *Croson* sued. Both lower federal courts applied the reasoning of *Fullilove* and concluded that the same result should follow in *Croson*.

However, since *Fullilove* the Court had decided *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), in which the Court had invalidated a collective bargaining agreement under the Equal Protection Clause. The agreement provided that if layoffs became necessary in the Jackson school district, at no time would a greater percentage of minority teachers be laid off than the percentage of minority teachers employed in the school at the time of the layoff. When layoffs became necessary *Wygant* and others were laid off before minority teachers with less seniority. There was no majority opinion. When the U.S. Supreme Court noted probable jurisdiction in *Croson* it vacated the Fourth Circuit's judgment and ordered reconsideration in light of *Wygant*.

On reconsideration of *Croson*, in light of *Wygant*, the Fourth Circuit invalidated the Richmond set aside program. It was again appealed to the U.S. Supreme Court.

266. *Croson*, 488 U.S. at 486.

267. *Id.* at 490.

268. *Id.* Justice O'Connor said Section 2 of the Fifteenth Amendment had been given a similar reading.

269. *Id.* at 491-92. Justice O'Connor did not argue that a state or local subdivision could not eradicate the effects of private discrimination. In fact, she argued the opposite; but, she wrote that the power must be exercised in a manner consistent with Section 1 of the Fourteenth Amendment.

the private discrimination it sought to remedy.<sup>270</sup>

Thus, if the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.<sup>271</sup>

The opinion suggested that the problem was not affirmative action per se, but rather the poor evidentiary showing of specific private discrimination in the local construction industry.<sup>272</sup>

Justice O'Connor next addressed the proper standard of review. She said strict scrutiny was essential to determining whether a racial classification is benign or, instead, motivated by illegitimate notions of racial inferiority or racial politics.<sup>273</sup> Justice O'Connor's opinion seems to acknowledge a distinction between benign racial classifications and racial classifications based on notions of racial inferiority or racial politics.<sup>274</sup>

Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. That test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.<sup>275</sup>

Justice O'Connor then identified the defects of the Richmond plan. She said that "societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy,"<sup>276</sup> and state and local agencies could not rely on congressional findings of national discrimination.<sup>277</sup> Instead, they had to "establish the presence of discrimination in their own bailiwicks, based either upon their own factfinding processes or upon determinations made by other competent institutions."<sup>278</sup> Justice O'Connor said that the evidence presented by the City did not point to any identified discrimination in the

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270. *Id.* at 492.

271. *Id.* (citations omitted).

272. Justice O'Connor, like Justice Powell in *Bakke*, appeared to accept the *Washington v. Davis* reasoning for what must be proven to establish racial discrimination. Past industry-wide discrimination was not sufficient. Since *Croson*, the government must show that there has been discrimination in the local market against the persons to be benefitted by the set aside. *Id.* at 493-98.

273. *Id.* at 493.

274. This distinction in racial classifications is central to the Author's argument that all racial classifications are not the same. See text *infra* pp. 64-73 and accompanying notes.

275. *Croson*, 488 U.S. at 493. Four of the Justices in *Wygant*, 476 U.S. at 276, had also argued for strict scrutiny.

276. *Croson*, 488 U.S. at 497. The proponents of the Richmond plan had argued that only 0.67% of all prime contracts had gone to minority businesses. Although the minority population was 50%, there were very few minority businesses in the local or state contractors associations. Congress had made substantial findings showing how the effects of past discrimination had stifled minority participation in the construction industry nationally. *Id.* at 504.

277. *Id.* at 504.

278. *Id.* at 502. Since the *Croson* decision, numerous states and city governments have undertaken or commissioned *Croson* disparity studies to determine if there is evidence of local discrimination in the letting of public contracts. Frequently, the studies are performed by accountancy experts who bid on the projects. Justice O'Connor wrote that to prove discrimination one had to focus on the disparity between the number of minority businesses qualified to undertake the task and the percentage of total city construction dollars received by minority firms.

Richmond construction industry.<sup>279</sup>

Justice O'Connor specifically limited the *Croson* analysis to Blacks. She wrote:

The foregoing analysis applies only to the inclusion of blacks within the Richmond set-aside program. There is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry. . . . It may well be that Richmond has never had an Aleut or Eskimo citizen. The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination.<sup>280</sup>

Unlike the *Fullilove* majority, the *Croson* majority said the overinclusiveness of the minority set aside provision was fatal. Justice O'Connor noted that one factor that distinguished *Fullilove* from *Croson* was that in *Fullilove* Congress had carefully examined and rejected race-neutral alternatives before enacting the MBE provision.<sup>281</sup> In *Croson*, the majority said there was no evidence that the Richmond City Council had considered any race-neutral alternatives.<sup>282</sup> Therefore, the Richmond plan failed both prongs of the equal protection analysis.<sup>283</sup>

The *Croson* decision established the constitutional requirements for state and local governments that wish to promote broader distribution of public contracts. In order to use a racial preference, the local government must prove there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform services, and the number of such contractors who actually work for the locality or prime contractors. *Croson* is another decision that places an additional obstacle on minority plaintiffs who are least able to afford the costs of meeting that burden,<sup>284</sup> or on local governments that want to eradicate racial discrimination in the construction industry.

Justice O'Connor did not mention the doctrine of colorblindness. She thought that race-neutral alternatives, such as simplification of bidding and bonding procedures, and public financial aid for all races, were available to the City.<sup>285</sup> Her opinion at least implicitly undermines the colorblindness doctrine because it clearly permits race-based affirmative action upon a proper evidentiary showing.<sup>286</sup> So the extreme hostility to affirmative action articu-

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279. *Id.* at 505-06.

280. *Id.* at 506 (emphasis added).

281. *Id.* at 507.

282. *Id.* It seemed equally significant to the Court that five of the nine city council members in Richmond were Black. The Court suggested several times that the Black political majority was playing racial politics. Yet the Court never quite explained why the percentage of public contracts for Blacks was so small. Also, it seems ironic that the Court would underscore the race of the majority of council members, while espousing the doctrine of colorblindness. The members of the Court, like the rest of us, are simply not color-blind.

283. *Id.* at 511. To justify a racial classification, the government must show that the classification serves a compelling state interest and that the means are narrowly tailored to achieve the state's objective.

284. *Croson* followed a series of cases that had made it more difficult to prove racial discrimination. See *supra* note 213.

285. *Croson*, 488 U.S. at 507.

286. *Id.* at 509.

lated in dissents by Justices Stewart, Stevens, and Rehnquist in *Fullilove*<sup>287</sup> and Justices Stevens, Kennedy, and Scalia in concurrences in *Crosby*<sup>288</sup> is just that: a comment in a dissent or concurrence.<sup>289</sup>

One year later the Supreme Court decided *Metro Broadcasting v. FCC*.<sup>290</sup> The principal issue was whether certain minority preference policies of the Federal Communications Commission (FCC) violated the equal protection component of the Fifth Amendment Due Process Clause.<sup>291</sup> In a 5-4 opinion written by Justice Brennan the Court held that the FCC policies did not violate equal protection principles.<sup>292</sup> Justice Brennan's opinion paralleled the principal opinion of *Fullilove* so far as the earlier opinion had summarized the Court's historical deference to Congress and the various sources of power available to Congress to enact the minority preference policies.<sup>293</sup> However, Justice Brennan then wrote:

A majority of the Court in *Fullilove* did not apply strict scrutiny to the race-based classification at issue. Three Members inquired "whether the objectives of th[e] legislation are within the power of Congress" and "whether the limited use of racial and ethnic criteria . . . is a constitutionally permissible means for achieving the congressional objectives." . . . Three other Members would have upheld benign racial classifications that "serve important governmental objectives and are substantially related to achievement of those objectives." . . . We apply that standard today. We hold that benign race-conscious measures mandated by Congress—even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally per-

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287. 448 U.S. at 522-54. See also *supra* notes 235 to 262 and accompanying text.

288. 488 U.S. at 511-28. Justice Scalia's concurrence provides the clearest evidence of such hostility. He wrote:

At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb for example, a prison race riot, requiring temporary segregation of inmates . . . can justify an exception to the principle embodied in the Fourteenth Amendment that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens."

. . . .  
In my view there is only one circumstance in which the States may act *by race* to "undo the effects of past discrimination": where that is necessary to eliminate their own maintenance of a system of unlawful racial classification. . . .

*Id.* at 521-24 (Scalia, J., concurring).

Again, it appears that Justice Scalia is using Justice Harlan's colorblindness model out of context. *Crosby* was not a case about the racial subordination of Whites. More than 99% of the Richmond public contracts between 1978 and 1983 went to nonminority-controlled businesses. The Court would have us believe that such statistical imbalance is normative and uncontroversial, unless proven otherwise by specific evidence of discrimination.

289. Indeed, Chief Justice Rehnquist made this point forcefully in *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 177 n.10 (1980), in reference to the comments in dissent by Justice Brennan and Justice Marshall.

290. 497 U.S. 547 (1990).

291. *Id.* at 455. The two policies under dispute were (1) a program awarding applicants for new licenses an enhancement for substantial minority ownership, and (2) the minority "distress sale" program, which permits the transfer of a limited category of existing radio and television broadcast stations only to minority-controlled firms. Congress enacted the policies after it found that minorities owned less than 1% of all radio and television stations. *Id.* at 456.

292. *Id.* at 459-62. The plaintiffs in the consolidated cases were Metro Broadcasting of Orlando and Shurberg Broadcasting of Hartford, who had each lost a bid to obtain a television station. Metro Broadcasting challenged the award of a station to a firm that received an enhancement under the first policy because it was 90% Hispanic owned. Shurberg challenged the award of a television station to a minority-controlled entity via a distress sale program under the second policy.

293. *Id.* at 462.

missible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.<sup>294</sup>

Five members of the Court agreed that the standard of review for congressional affirmative action is intermediate scrutiny. Under intermediate scrutiny, such programs are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives.<sup>295</sup>

Justice Brennan also distinguished *Croson* from *Fullilove*.<sup>296</sup> Because *Croson* did not involve a question of congressional action, Justice Brennan said *Croson's* reasoning could not be used to undermine *Fullilove*.<sup>297</sup> In fact, Justice Brennan said most of the language and reasoning of *Croson* reaffirmed the lesson of *Fullilove*: that race conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than similar classifications prescribed by state and local governments.<sup>298</sup>

The majority in *Metro Broadcasting* said that Congress' interest in enhancing broadcast diversity was at the very least an important governmental objective.<sup>299</sup> Specifically, he suggested that diversity on the airwaves served important First Amendment values.<sup>300</sup> Justice Brennan also said that the minority ownership policies were substantially related to achieving diverse programming.<sup>301</sup> He cited studies by the Congressional Research Service (CRS) and the FCC to support that view.<sup>302</sup> He also noted a correlation between minority ownership and minority hiring.

[W]hile we are under no illusion that members of a particular minority group share some cohesive, collective viewpoint, we believe it a legitimate inference for Congress and the Commission to draw that as more minorities gain ownership and policymaking roles in the media, varying perspectives

294. *Id.* at 462-63 (citations omitted).

295. *Id.*

296. *Id.* at 463.

297. *Id.*

298. *Id.* at 463-64. The Court then announced that the FCC policies were constitutional under the intermediate standard of review because they served the important governmental objective of broadcast diversity and the policies were substantially related to that objective.

299. *Id.* at 465. Justice Brennan borrowed from Justice Powell's reasoning in *Bakke*, regarding the benefits of a diverse student body, to argue that both broadcast diversity and student diversity serve important governmental interests.

300. *Id.* Justice Brennan reasoned that the general public benefitted from wider information sources.

301. *Id.* at 465-68. Justice Brennan deferred to congressional findings on the correlation between minority ownership and diverse programming. Regarding that nexus, he wrote:

The judgment that there is a link between expanded minority ownership and broadcast diversity does not rest on impermissible stereotyping. Congressional policy does not assume that in every case minority ownership and management will lead to more minority-oriented programming or to the expression of a discrete "minority viewpoint" on the airwaves. Neither does it pretend that all programming that appeals to minority audiences can be labeled "minority programming" or that programming that might be described as "minority" does not appeal to nonminorities. Rather, both Congress and the FCC maintain simply that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity. A broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogeneous group. . . .

*Id.* at 472.

302. *Id.* at 473 nn.31-32.

will be more fairly represented on the airwaves.<sup>303</sup>

In addition to the absence of stereotyping, Justice Brennan said that the minority preference policies were put in place after race-neutral efforts by Congress and the FCC had failed.<sup>304</sup> He said the policies in dispute were aimed directly at the barriers that minorities face in entering the broadcast industry.<sup>305</sup> The policies were also of appropriate scope and duration.<sup>306</sup> Justice Brennan wrote that Congress and the FCC had also evaluated the policies.<sup>307</sup> And, finally, the burden imposed by the policies was only slight since a small fraction of licenses were affected by the policies.<sup>308</sup>

Justice O'Connor's dissent in *Metro Broadcasting*<sup>309</sup> was far more ominous than her majority opinion in *Croson*. She criticized the majority for departing from fundamental principles under the Equal Protection Clause and the strict scrutiny standard of review.<sup>310</sup> Beyond criticizing the majority, however, Justice O'Connor seemed intent on eliminating the term "benign racial classification" from equal protection jurisprudence. She wrote:

The Court's reliance on "benign racial classifications," . . . is particularly troubling. "Benign" racial classification is a contradiction in terms. Governmental distinctions among citizens based on race or ethnicity, even in the rare circumstances permitted by our cases, exact costs and carry with them substantial dangers. To the person denied an opportunity or right based on race, the classification is hardly benign. . . .

. . . .  
We are a Nation not of black and white alone, but one teeming with divergent communities knitted together by various traditions and carried forth, above all, by individuals. Upon that basis, we are governed by one Constitution, providing a single guarantee of equal protection, one that extends equally to all citizens.<sup>311</sup>

Although Justice O'Connor still seemed to believe that race-based remedial measures could be constitutional in limited situations,<sup>312</sup> she could not accept the term "benign" to mean the same thing as "remedial."<sup>313</sup> She assumed that because the majority had employed a less strict standard of review, it must have intended a different meaning for those terms.<sup>314</sup> She wrote, "A lower standard [of review] signals that the Government may resort to racial distinctions more readily. The Court's departure from our cases is disturbing enough, but more disturbing still is the renewed toleration of racial classifica-

303. *Id.* at 474 (citations omitted).

304. *Id.* at 478.

305. *Id.* at 481.

306. *Id.* at 481-82.

307. *Id.* at 482-83.

308. *Id.* at 483-85.

309. *Id.* at 486 (O'Connor, J., dissenting). Chief Justice Rehnquist and Justices Scalia and Kennedy joined in her dissent.

310. *Id.* at 487. The criticism seems disingenuous. First, the facts of *Metro Broadcasting* are much more like those of *Fullilove* than those of *Croson*. Second, as in *Fullilove*, the majority in *Metro Broadcasting* deferred to congressional sources of power and evidentiary findings. Third, the reasoning presented in *Metro Broadcasting* tracks that presented by the principal opinion in *Fullilove* and meets most of the criticism against the Richmond set aside plan proffered by Justice O'Connor in *Croson*.

311. *Id.* at 491-92.

312. *Id.* at 492-93.

313. *Id.* at 491-92.

314. *Id.* at 492.

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tions that its new standard of review embodies.”<sup>315</sup>

Justice O'Connor referred only once to the colorblindness doctrine.<sup>316</sup> Her dissent, however, referred repeatedly to Justice Powell's opinion in *Bakke* and she made many of the same assumptions that Justice Powell made. For example, she assumed equality means identical treatment and that any connection between our past history of societal discrimination and present statistical disparities is generally too speculative to support a race-conscious affirmative action plan.<sup>317</sup> And, like Justice Powell in *Bakke*, she did not reject all racial classifications, but believed each one must be examined under the most searching scrutiny.<sup>318</sup>

What has emerged from the recent division within the Supreme Court regarding race-conscious affirmative action programs are the same two competing visions of the meaning of racial equality and nondiscrimination under our Constitution that were presented in *Plessy*. For some members of the Court, the Equal Protection Clause permits government to act affirmatively to dismantle the legacy of slavery, discrimination, and racial supremacy in the U.S. These members believe that to treat some persons equally, one must treat them differently, and they do not consider such different treatment to be racial discrimination. Justice Blackmun is the clearest advocate of that view. He wrote:

I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetrate racial supremacy.<sup>319</sup>

For other members of the Court, racial equality and nondiscrimination mean that government should not classify persons by race, except in dire emergencies or when the government itself has caused or permitted identifiable discrimination to occur within its locale. They use the doctrine of colorblindness to support their view. Those members believe that to treat persons equally, one must treat them the same. Justice O'Connor has been an advocate of the latter view. She wrote, “[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.”<sup>320</sup> These two visions of racial equality and nondiscrimination have been the subject of extensive legal commentary and it is there that the Author now turns.

#### 4. *Legal Scholarship and the Antidiscrimination Principle*

Legal scholarship on the evolution of the antidiscrimination principle reflects much of the same philosophical division represented in cases such as *Bakke*, *Fullilove*, *Croson*, and *Metro Broadcasting*. Several law review articles published between 1966 and 1978 addressed the issue in ways that later

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315. *Id.*

316. *Id.* at 503. Actually, Justice O'Connor only referred to the lower court's rejection of the doctrine.

317. *Id.* at 494.

318. *Id.* at 505.

319. *Bakke*, 438 U.S. at 407 (Blackmun, J., separate opinion).

320. *Croson*, 488 U.S. at 494.

proved influential.<sup>321</sup>

The first of these articles was John Kaplan's *Equal Justice in an Unequal World*.<sup>322</sup> Professor Kaplan posed the questions for discussion as follows: "(1) [I]n the name of equality, should we apply the same standards to all men [sic], or does formal equality bear so heavily on some as to result in serious inequality? (2) When should what appears to be formal inequality be regarded as true equality?"<sup>323</sup> The former question is reflected in the gradual demise of *Plessy*, as the Court came to believe that segregation bore so heavily on Blacks as to result in serious inequality. The latter question is exemplified by the call that society compensate for the pervasive economic and social inequality of our society by establishing formally unequal programs that single out Blacks for special—and in some sense better—treatment.<sup>324</sup> Professor Kaplan argued that rather than ground the discussion in terms of the meaning of equality, it was better to ask bluntly what courses of action should be open to government in solving the problems arising from our multi-racial society.

Although Professor Kaplan discussed preferences in housing and education, most of his analysis dealt with employment preferences. He first set forth arguments supporting affirmative action. Even if our society suddenly became color-blind, he concluded, our racial history has left so many Blacks educationally, economically, and psychologically disadvantaged that unless Blacks receive special treatment they will be condemned by colorblindness itself to perpetual deprivation.<sup>325</sup> Moreover, he argued we can achieve true equality only by treating persons according to their needs.<sup>326</sup> Third, since White society enslaved and exploited Blacks, leaving them in far worse condition to compete in and enjoy the benefits of our society, justice requires that each victim be compensated for his injuries whether or not that person is presently in need.<sup>327</sup> Under this argument all Blacks, including Black professionals and others able to climb the ladder despite their handicaps, would be proper objects of compensation since were it not for the immoral practices of White society they would be even further along.<sup>328</sup> A final category of arguments for guaranteeing special preferences to Blacks appeals to self-interest. Bringing Blacks up to full economic equality would increase the gross national product and ease the drain on public resources caused by expenditures on welfare and crime.<sup>329</sup> In addition, Kaplan argued that the Black urban poor are social dynamite and the only way to avoid violent urban conflict is to grant special preferences.<sup>330</sup>

On the other hand, Professor Kaplan suggested myriad problems posed by such special treatment. He noted certain institutional and political con-

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321. See *supra* note 14.

322. Kaplan, *supra* note 14.

323. *Id.* at 363.

324. *Id.*

325. *Id.* at 364. Unfortunately, Kaplan never proposed how to overcome this perpetual deprivation.

326. *Id.* at 365. Kaplan discussed how numerous programs for the poor, physically challenged, or the elderly have been institutionalized by our society.

327. *Id.* at 365.

328. *Id.* at 366.

329. *Id.*

330. *Id.* at 367. Kaplan's article was published in between the 1965 Los Angeles riots and the 1967 Detroit riots.

straints that would limit the scope or effectiveness of any preference.<sup>331</sup> Such constraints would include whether to use a voluntary or mandatory preference, whether to employ a quota and where to set the quota, and whether to use race as a plus factor when two applicants are otherwise similarly qualified.<sup>332</sup> Second, he noted that the brunt of the special preference would fall on other minorities rather than on middle-class Whites.<sup>333</sup> Professor Kaplan argued that status in the underclass was a better proxy for preferential treatment than race, and employment preferences violate the policy of treating people according to individual worth or merit and are extremely divisive.<sup>334</sup>

Kaplan conceded the appropriateness of preferences for the underclass.<sup>335</sup> But he did not connect racial discrimination to the subordination of Blacks. Race operates hegemonically in ways similar to how law does in society. Professor Kimberlé Crenshaw has made this point emphatically. She has criticized legal scholars on both sides of the modern affirmative action debate for their failure to acknowledge race and racism as independent causes of the subordination of Blacks. While Professor Crenshaw understood the nexus among race, class, and gender subordination, she argued most persuasively that neoconservatives and members of Critical Legal Studies ("CLS") have not reflected through their writing any understanding of the independent significance of race in the United States. For Crenshaw, race is an hegemonic force in the U.S. that extends racial domination of Blacks by Whites.<sup>336</sup>

Professor Kaplan argued that other problems arise in determining how and when to cease a temporary preference.<sup>337</sup> He suggested that once preferences for Blacks are institutionalized, a principle will have been established which will encourage other groups to work for the same kind of treatment.<sup>338</sup> Professor Kaplan suggested as well that there is no principled way to distinguish between Blacks and other claimants, that a preference could mean that Blacks who are less competent than their White counterparts will be given the jobs, and preferences posed a consequent risk of self-delusion, lower motivation, and greater damage to Black self-esteem and sense of worth.<sup>339</sup>

Professor Kaplan also argued that employment preferences would involve

331. *Id.* at 369-70.

332. *Id.* at 370-73. Kaplan said that a quota might become a ceiling that limited the opportunities of Blacks in a particular setting.

333. *Id.* at 373. Kaplan offered no evidence to support this argument. It is far from axiomatic that racial preferences favoring Blacks must necessarily fall on other minorities. Indeed, a preference could favor Blacks along with other racial minorities. Therefore, Kaplan at best makes an argument for including other racial minorities who have suffered societal discrimination.

334. *Id.* at 374. The problem with Kaplan's argument is that employment opportunities often are not assigned by merit or individual worth. Instead, people hear about a job from a relative or institutions promote from within their ranks. And, as Kaplan wrote, frequently a job is advertised in the most limited circle. And, since Blacks are frequently outside the less formal employment network they remain unemployed at rates twice or more the rate for Whites.

335. *Id.* at 374-75.

336. See Crenshaw, *supra* note 17, at 1334-35, 1339-40, 1358-60 and 1384-87. See also GENOVESE, *supra* note 67, at 25-49.

337. *Id.* at 376. One answer (alluded to by Kaplan) is to terminate the preference when the average Black reaches the same social, economic, and educational level as the average White person.

338. *Id.* at 377. Kaplan did not argue that Blacks have not been treated differently from other Americans.

339. *Id.* at 378. The irony here is that Kaplan argued the jobs would be taken from other minorities, not by Whites. He offered nothing to support the position that less competent Blacks were replacing Whites, he simply asserted that fact. And finally, Kaplan seemed confused about what has

the government in the administration of racial classifications,<sup>340</sup> and with litigating the race of an individual to determine qualification for preference. Moreover, he contended that the most important objection to governmental racial classifications is that they weaken the government as an educative force.<sup>341</sup> Accordingly, if government uses racial classifications it will influence public opinion and behavior as to the morality of racial discrimination. Professor Kaplan argued that a person is entitled to be judged on his or her own individual merit alone, race is irrelevant to individual worth,<sup>342</sup> and special preferences undermine the antidiscrimination principle and serve as an obstacle to the educational role of government. For Professor Kaplan, constant education in colorblindness is essential.<sup>343</sup>

Finally, Professor Kaplan addressed constitutional objections to special preferences for Blacks.<sup>344</sup> He acknowledged that if preferences are held unconstitutional under the Fourteenth Amendment it would be ironic because that amendment was passed to benefit Blacks, not to harm them.<sup>345</sup> Also, Professor Kaplan sounded now familiar constitutional concerns about how to limit the preference in a principled manner or to distinguish between a benign or hostile preference.<sup>346</sup>

Professor Kaplan's article is important because it summarizes many familiar arguments on both sides of the modern affirmative action debate. The principal weakness of the article is that Professor Kaplan never explained why he concluded that the arguments against special preferences were more compelling. He recognized the competing interests and the need for balancing, but provided no justification for striking it against preferences for Blacks.

Another influential article was John Hart Ely's *The Constitutionality of Reverse Racial Discrimination*.<sup>347</sup> Professor Ely argued that special scrutiny of racial classifications was inappropriate when a political majority decided to favor a political minority at the expense of the political majority. Professor Ely said his principle was neutral: it was not "suspect," in the constitutional sense, for a majority, *any majority*, to discriminate against itself.<sup>348</sup> Professor Ely did argue for "careful" scrutiny of all racial classifications, contending that such was necessary to ensure that the racial classification fell within the limited group to which the more demanding standard was inappropriate.<sup>349</sup>

Professor Ely found two principal reasons for application of strict scrutiny: (1) racial minorities have been subjected to legal disadvantage through-

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caused damage to Black self-esteem. Blacks have always been willing to work. Blacks did not want to be slaves, to work as "free" persons for slave wages, or under slave conditions.

340. *Id.* at 379.

341. *Id.*

342. *Id.* at 380.

343. *Id.*

344. *Id.* at 381-82. Kaplan believed that in most contexts special preferences for Blacks would violate the Equal Protection Clause of the Fourteenth Amendment.

345. *Id.* at 382.

346. *Id.* at 383. Kaplan acknowledged that all racial classifications were not constitutionally improper. He described several cases where the state might employ a racial classification, but in each instance no preference for Blacks was involved.

347. See Ely, *supra* note 14.

348. *Id.* at 727. Therefore, in rare cases where a Black political majority discriminated against itself, under Ely's neutral principle the case would not be the subject to strict scrutiny.

349. *Id.* at n.27. Ely seemed to advocate an intermediate level of scrutiny similar to the standard used in modern gender cases.

out our history; and, (2) race is generally irrelevant to any legitimate public purpose.<sup>350</sup> The type of racial classification requiring the most exacting scrutiny is a "we-they classification."<sup>351</sup> "We-they" racial classifications require strict scrutiny because the White political majority most often has acted to the disadvantage of the Black political minority.<sup>352</sup> Professor Ely reasoned that a White political majority was unlikely to disadvantage itself for reasons of racial prejudice, and, therefore, the reasons for being unusually suspicious and for employing strict scrutiny are lacking.<sup>353</sup> Such a conclusion was corroborated, he argued, by the view that the purpose of the Equal Protection Clause was to prevent political majorities from imposing on minorities laws that provided different rules for the one than for the other.<sup>354</sup> A similar conclusion had been reached in Justice Jackson's *Railway Express* opinion in 1949.<sup>355</sup> Professor Ely concluded that "where there is no reason to suspect that the comparative disadvantage will not be distributed evenly throughout the 'we' class, we/they classifications that favor the 'theys' do not merit special scrutiny."<sup>356</sup>

Professor Ely believed that in order to defeat racial prejudice it was necessary to take race into account for some purposes. He wrote, "Governmental use of benign racial classifications may destroy blinding myths by teaching people that race is indeed a factor of great importance in our society and that many people are now disadvantaged because of past and continuing racial discrimination."<sup>357</sup> Professor Ely stated finally that "it may be that the actual participation of blacks in positions alongside whites will ultimately prove to have the most important and long-lasting educative effect against discrimination."<sup>358</sup>

In 1976, Professor Paul Brest published his *Foreword: In Defense of the Antidiscrimination Principle*.<sup>359</sup> He wrote that a century after the Civil War, the U.S. was committed to the antidiscrimination principle.<sup>360</sup> Congress had read such a principle into the Thirteenth Amendment, the Supreme Court had

350. *Id.* at 730-31.

351. *Id.* at 732. Professor Ely wrote:

Racial classifications that disadvantage minorities are rooted in "we-they" generalizations and balances as opposed to "they-they" generalizations and balances. Few legislators are opticians; but few are optometrists either. Thus, although a decision to distinguish opticians from optometrists incorporates a stereotypical comparison of two classes of people, it is a comparison of two "they" stereotypes, *viz.*, "They [opticians] generally differ from them [optometrists] in certain respects that we find sufficient on balance to justify the decision to classify on this basis." Legislators, however, have traditionally not only not been Black; they have been White. A decision to distinguish Blacks from Whites therefore has its roots in a comparison between a "we" stereotype and a "they" stereotype, *viz.* "They [Blacks] differ from us [Whites] in certain respects that we find sufficient on balance to justify the decision to classify on this basis."

*Id.* (emphasis in original).

352. *Id.* at 733.

353. *Id.* at 735.

354. *Id.* at n.48.

355. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 111-13 (1949) (Jackson, J., concurring).

356. See Ely, *supra* note 14, at 736.

357. *Id.* at 739.

358. *Id.* at n.56. This argument is similar to the view that one is less likely to treat Blacks negatively if one has substantial associations with Blacks, including some close friends who are Black.

359. See Brest, *supra* note 14.

360. *Id.* at 1.

construed the Fourteenth Amendment's Equal Protection Clause to make racial classifications "suspect," and the Fifteenth Amendment expressly embodied the antidiscrimination principle.<sup>361</sup> Professor Brest continued, "the antidiscrimination principle lies at the core of most state and federal civil rights legislation, including the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968."<sup>362</sup>

Professor Brest described the antidiscrimination principle as: "[T]he general principle disfavoring classifications and other decisions and practices that depend on the race (or ethnic origin) of the parties affected. . . . The heart of the antidiscrimination principle is its prohibition of race-dependent decisions that disadvantage the members of minority groups."<sup>363</sup> However, he specifically left open whether the antidiscrimination principle also disfavored "benign" racial classifications designed to advantage the members of traditionally disadvantaged minorities.<sup>364</sup>

Next, Professor Brest described how persons claiming adherence to the antidiscrimination principle fall into at least two camps.

Among those who still profess to adhere to the antidiscrimination principle, many support sweeping measures, including race-conscious ones, designed to prevent ongoing discrimination, to eliminate the effects of past discrimination, and otherwise to benefit racial minorities. Others argue that these measures are excessively costly, that they impose unjust burdens on nonminority persons, and that the antidiscrimination principle forbids race-consciousness even for benign purposes.<sup>365</sup>

He contended that coalitions that had existed in the 1960's fell apart in the 1970's when members began to object to widespread school busing, govern-

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361. *Id.*

362. *Id.* at nn.5-7 and accompanying text.

363. *Id.* at 1-2.

364. *Id.* at n.1.

365. *Id.* at 2. Professor Alan Freeman has more recently developed an analytical model to characterize the two meanings of the antidiscrimination principle. Freeman has written that the commentary on antidiscrimination law is written from one of two perspectives: the victim perspective or the perpetrator perspective.

The victim perspective focuses on concrete historical experience, the consequences of racism against Blacks, including residential segregation, inadequate education, overrepresentation in the lowest-status jobs, disproportionately low political power, and a disproportionate share of the least and worst of everything valued most in our materialistic society. From the victim perspective, when antidiscrimination law announces that racial discrimination has become illegal, that law's promise will be tested by the only relevant measure of success—results. Therefore, if those same conditions exist in virtually identical form after antidiscrimination laws have prohibited racial discrimination, the law has yet to become effective.

From the perpetrator perspective, the goal of antidiscrimination law is to identify and punish racial discrimination as individual acts of badness in an otherwise nondiscriminatory social realm. Therefore, one can find violations of the antidiscrimination principle only in specific actions of individual perpetrators who have purposefully and intentionally caused harm to specific victims who will be offered a compensatory remedy. From the perpetrator perspective, what society must do is identify the villains and place responsibility where it belongs. Freeman said that the perpetrator perspective has become the dominant one in legal culture today.

Freeman contended that the perpetrator perspective denies historical reality—in particular, the fact that we would never have fashioned antidiscrimination law had it not been for the specific historical oppression of particular races. The denial of history allows some commentators to assert that discrimination against Whites should have the same status as discrimination against Blacks, and, therefore, all racial classifications should be struck down on the grounds of colorblindness.

See Freeman, *supra* note 17, at 1409-13.

ment-mandated affirmative action, and special admissions programs.<sup>366</sup> He then reviewed the major cases from the 1975 Supreme Court term, concluding that the Court accepted race-conscious actions to remedy past discrimination.<sup>367</sup>

The purpose of Professor Brest's essay was to explore the propriety of granting racial preferences to traditionally disadvantaged minorities and the operational relevance of the fact that a color-blind policy has a disproportionate impact on members of a racial minority group.<sup>368</sup> The antidiscrimination principle prevents and rectifies racial injustice without subordinating other important values<sup>369</sup> and principles of justice, such as distributive justice and commutative justice.

In order to explore the issues set out above, Professor Brest examined the rationales for the antidiscrimination principle.<sup>370</sup> One rationale was to prevent both irrational and unfair infliction of injury from race-dependent decisions.<sup>371</sup> Brest stated that race-dependent decisions are irrational insofar as they reflect the assumption that members of one race are less worthy than other people.<sup>372</sup> He argued that statistical generalizations were commonplace and essential to the functioning of developed societies.<sup>373</sup> But, he concluded, the antidiscrimination principle filled a special need because race-dependent decisions that are rational and purport to be based solely on legitimate considerations are likely to rest on assumptions of the differential worth of racial groups or on racially selective sympathy or indifference.<sup>374</sup> By the phrase "racially selective sympathy and indifference," Professor Brest meant the failure to extend to a minority the same recognition of humanity, sympathy, and care given as a matter of course to a member of one's own racial group.<sup>375</sup> Brest concluded that race-dependent decisions caused by indifference or hostility were unfair because they would not be made if the disadvantaged person were a member of the dominant group.<sup>376</sup>

A second rationale for the antidiscrimination principle was the prevention of harms which may result from race-dependent decisions.<sup>377</sup> Such harms included the denial of opportunities, stigmatic harm, and cumulative debilitation. Professor Brest explained that a Black person suffered cumulative debilitation because he was not denied only one opportunity, but rather virtually all desirable opportunities solely because of his race.<sup>378</sup>

Professor Brest stated that the Court has forbidden race-dependent decisions (at least those that are not obviously benign) unless they meet the strict

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366. Brest, *supra* note 14, at 2-3.

367. *Id.* at 3. For example, in *Hills v. Gautreaux*, 425 U.S. 284 (1976), the Court affirmed a ruling requiring that governmental agencies remedy their past discriminatory selection of public housing sites by consciously locating future projects in predominantly White neighborhoods.

368. *Id.* at 4-5.

369. *Id.* at 5.

370. *Id.* at 6-11.

371. *Id.* at 6.

372. *Id.*

373. *Id.* at 6-7.

374. *Id.* at 7.

375. *Id.* at 7-8.

376. *Id.* at 8.

377. *Id.*

378. *Id.* at 10.

scrutiny standard of review.<sup>379</sup> The strict scrutiny standard guards against harms of race-dependent decisions by permitting them only in extraordinary circumstances.<sup>380</sup> However, the antidiscrimination principle does not require that race-dependent decisions benefitting minorities be scrutinized in the same way that race-dependent decisions disadvantaging minorities are scrutinized.<sup>381</sup> Brest contended that from the point of view of the White individuals affected, it was highly improbable that decisions disfavoring them were premised on assumptions that Blacks are superior to Whites, no stigmatic injury was likely to accompany the deprivation,<sup>382</sup> and there was not likely to be any cumulative effect on Whites.<sup>383</sup>

Professor Brest acknowledged that even benign race-dependent decisions may actually injure their supposed beneficiaries because they can reflect assumptions about the inferiority of minorities or reinforce feelings of differential worth in children of all races.<sup>384</sup> Nonetheless, he argued that:

... where the objective and immediate effect of the race-dependent decisions are to benefit racial minorities, it seems inappropriate to subject the practice to the demanding criteria of the suspect classification standard. It should suffice for a policy maker to conclude that the probable benefits outweigh the harms, that the benefits cannot readily be gained by other than race-dependent means, and that the program is designed to minimize possible adverse consequences.<sup>385</sup>

Brest proposed a variable standard of judicial review for benign race-dependent decisions.<sup>386</sup> Under that standard, race-dependent decisions would not automatically be subjected to the demands of strict scrutiny. Instead, the Court would assess the extent to which the decision implicated the concerns of the antidiscrimination principle.<sup>387</sup>

William Van Alstyne's *Rites of Passage: Race, the Supreme Court, and the Constitution*<sup>388</sup> pondered the extent to which the Civil War amendments enacted a color-blind restriction on governmental power to regulate or allocate by race, a question that remained unsettled as late as 1979.<sup>389</sup> He argued that the language of the Civil War amendments and their legislative history was amenable to more than one reasonable interpretation.<sup>390</sup> Van Alstyne argued that it was appropriate to treat the Constitution as repudiating the propriety of regulating people by race or allocating among people by race, although that

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379. *Id.* at 15.

380. *Id.*

381. *Id.* at 16.

382. *Id.* at 16-17.

383. *Id.* at 17. Brest argued that even when there is competition among beneficiaries of preferences the antidiscrimination principle is most concerned with the cumulative, pervasive frustration of opportunities, not the isolated lost opportunity. *Id.* at 18.

384. *Id.* at 18.

385. *Id.* at 19. Professor Ely argued this same point. See Ely, *supra* note 14, at 731-36.

386. See Brest, *supra* note 14, at 21.

387. *Id.* The balance of the article analyzed whether the disproportionate impact theory has a constitutional or moral life apart from the antidiscrimination principle. Brest concluded it did not. *Id.* at 52.

388. See Van Alstyne, *supra* note 14.

389. *Id.* at 776.

390. *Id.* Van Alstyne did not explain why his construction of the Civil War amendments and their legislative history was more tenable than Professor Gressman's, for example, discussed *supra* notes 150 to 170 and accompanying text.

result was not compelled.<sup>391</sup> He wrote that, "it is oddly a matter of what we might wish to make of it. It has always been this way."<sup>392</sup>

Professor Van Alstyne contended that the Supreme Court had gone through distinct rites of passage and that in *Fullilove* it was about to consider yet another one.<sup>393</sup> He suggested that race-based laws had so generally tended to produce negative side effects vastly greater than the benefits that were supposed to be forthcoming.<sup>394</sup> He wrote, "if the court yields once again to the Lorelei, racism, racial spoils systems, racial competition and racial odium will be fixtures of government in the United States even into the twenty-first century."<sup>395</sup>

He quoted Alexander M. Bickel to argue that, "[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society."<sup>396</sup> According to Van Alstyne, *all* race-based laws were illegal, immoral, unconstitutional and destructive of democratic society; he made no distinction between cases such as *Plessy* and the *Civil Rights Cases*, on the one hand, and *Bakke* and *Fullilove*, on the other.<sup>397</sup>

Interestingly, Professor Van Alstyne used Justice Harlan's dissent in *Plessy* to support his view,<sup>398</sup> arguing that Justice Harlan believed the Civil War amendments should have been construed to disallow race-based laws.<sup>399</sup> Van Alstyne cited several long passages from Justice Harlan's dissent, yet did not acknowledge that Justice Harlan thought that the Fourteenth Amendment prohibited state-sponsored racial subordination. Instead, Van Alstyne argued that the Civil War amendments condemned the assignment of entitlements by race.<sup>400</sup> Moreover, Van Alstyne contended that cases following *Brown* appeared to embrace completely Justice Harlan's position that the three amendments "removed the race-line from our governmental systems."<sup>401</sup> Professor Van Alstyne concluded that the object of cases decided between 1954 and 1976 was to "disestablish particular, existing uses of race, not to establish new

391. *Id.* at 777.

392. *Id.*

393. *Id.* at 778. Professor Van Alstyne argued that prior to 1976 there had been at least two "rites of passage" regarding race-based laws. The first was symbolized by the Court's modest interpretation of the Civil War amendments between 1873 and 1896. The second was represented by the Court's about-face in 1954 in the *Brown* decision and continued until approximately 1976. *Id.* at 789-84.

394. *Id.* Van Alstyne did not explain why the elimination of racial subordination would not be a vastly greater benefit than the negative effects to which he alluded.

395. *Id.* Van Alstyne continued by suggesting that his views were not shared by the majority of constitutional law professors who had written on the subject. *See id.* at n.11.

Unlike Professor Van Alstyne, this Author thinks that unless we interpret the Constitution to require eradication of racial subordination through public and private benign affirmative action, racism, racial spoils systems, racial segregation, and racial odium that currently operate throughout the U.S. will extend well beyond this century. Van Alstyne wrote as if racial subordination had been eliminated in 1979, implicitly propagating a myth about racial equality in the United States.

396. *Id.* at 779.

397. *Id.* at 779-81.

398. *Id.* at 781.

399. *Id.* The Author has argued earlier for a markedly different reading of Justice Harlan's dissent. *See supra* notes 177 to 190 and accompanying text.

400. *See* Van Alstyne, *supra* note 14, at 782.

401. *Id.* at 783.

ones."<sup>402</sup>

Professor Van Alstyne argued that the second rite of passage was accompanied by consistent interpretations in Congress and the courts regarding a policy of race-blind application of laws.<sup>403</sup> He cited the language of Titles VI and VII of the Civil Rights Act of 1964 to support his race-blind theory.<sup>404</sup> Also, Professor Van Alstyne also noted that the Executive branch issued an order framed in terms of strict nondiscrimination.<sup>405</sup> In addition, Professor Van Alstyne cited Justice Douglas' dissent from *Defunis v. Odegaard*<sup>406</sup> to further support his argument that the Equal Protection Clause did not permit the creation of new race-based preferences. Justice Douglas had written that, "A Defunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color . . ."<sup>407</sup> Professor Van Alstyne concluded Part I of his article by writing that the state could neither use race in its own business nor could it encourage others to take it into account.<sup>408</sup> He wrote, "Laws that divide and index people to measure their civil rights by race are unconstitutional. Laws that encourage others to do so are similarly invalid."<sup>409</sup>

In Part II of his article, Professor Van Alstyne criticized the efficacy of the rebuttable presumption approach to racial classification cases.<sup>410</sup> He found the flexible test easily subject to manipulation and abuse because one must decide other matters, such as:

- (1) what kinds of public purposes are sufficiently compelling to justify explicitly treating some people less well than others on racial grounds; and
- (2) who is to say (and on what basis) that a law, which on its face is

402. *Id.* at 784.

403. *Id.*

404. *Id.* at 784-85. Title VI of that Act (§ 601, 42 U.S.C. § 2000d (1976)) which is applicable to all programs receiving federal financial assistance, states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

Title VII of the Act (§ 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1976)) which is applicable to all large-scale employers, provides:

It shall be an unlawful employment practice for an employer

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin. . . .

405. *Id.* at 785. Here, as elsewhere, Professor Van Alstyne seemed to tell just part of the story. While he accurately presented what the Executive Order provided, he nonetheless ignored the legislative history of the Order; that is, he mentioned that the Order was amended but does not state what necessitated the amendment. Congress had made specific findings regarding discrimination against minorities in federal contracts. (*See* Exec. Order No. 11246, § 202, 3 C.F.R. 339, 340-41 (1964-1965 Compilation), as amended by Exec. Order No. 11375, 3 C.F.R. 684, 685-686 (1966-1970 Compilation), reprinted in 42 U.S.C. § 2000e, at 1233 (1976)). *Id.* at 786, n.35.

406. 416 U.S. 312 (1974) (Douglas, J., dissenting).

407. *Id.* at 337. Professor Van Alstyne also cited cases, such as *Hughes v. Superior Court*, 399 U.S. 460 (1950) (Court upheld state supreme court's injunction forbidding picketing meant to induce race-based hiring in proportion to racial identification of customers), and *Anderson v. Martin*, 375 U.S. 399 (1964) (Court invalidated state statute requiring designation of each candidate's race on each ballot), to further support his position that race-consciousness was unconstitutional.

408. Van Alstyne, *supra* note 14, at 790.

409. *Id.* at 792.

410. *Id.* at 792-94. Van Alstyne said that the value of the strict scrutiny test which had been adopted in *Korematsu v. United States*, 323 U.S. 214, 216 (1944), had not appreciated with the passage of time. *Id.* at 793 n.62.

nominally very well connected with a sufficient public purpose, making its purposive racial discrimination “justifiable” under (1), was indeed enacted solely to promote that objective *rather than to enact some baser interest with which it is equally well connected?*<sup>411</sup>

Thus, Van Alstyne argued that the strict scrutiny standard was not a constitutional standard at all,<sup>412</sup> he and argued that the only sure way to avoid racial discrimination was to abide by a rule prohibiting all racial discrimination as “illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.”<sup>413</sup> He concluded that we get beyond racism by getting beyond it now privately and publicly.<sup>414</sup>

Ely and Brest concluded that benign racial classifications were constitutional. Kaplan argued for a ban on racial classifications, except in emergencies. Van Alstyne articulated an inflexible, absolute prohibition of racial classifications. Thus, the philosophical division reflected in the legal scholarship mirrored the numerous separate positions articulated by members of the U.S. Supreme Court in *Bakke*, *Fullilove*, *Crosby*, and *Metro Broadcasting*. Just as some members of the Supreme Court have transformed the meaning of colorblindness, some legal commentators have transformed the meaning of the antidiscrimination principle into a general prohibition of all or almost all racial classifications. For those members of the Court and those legal commentators, the modern articulation of the antidiscrimination principle is the transformed doctrine of colorblindness.<sup>415</sup> Indeed, the Supreme Court seems poised to use the transformed meaning of colorblindness and nondiscrimination in all but the most egregious instances where there is specific evidence of government-sponsored racial discrimination.

#### PART IV CRITIQUING COLORBLINDNESS

##### 1. *The Colorblindness Model is Confusing*

Colorblindness is a confusing metaphor because of its rhetorical and aspirational value. Rhetorically, the argument goes that if individuals and government would not use race to disadvantage others, the United States could get beyond its history of racial subordination.<sup>416</sup> Aspirationally, it is argued

411. *Id.* at 797 (emphasis in original).

412. *Id.* Van Alstyne continued, “It is, rather—a sieve, a sieve that encourages renewed race-based laws, racial discrimination, racial competition, racial spoils systems, and mere judicial sport.” *Id.*

413. *Id.* at 802-03.

414. *Id.* at 809-10.

415. It is important to understand how the two competing visions of the antidiscrimination principle have been collapsed into one principle—the transformed doctrine of colorblindness. After two centuries of state and federal laws creating or sanctioning racial classifications that disadvantaged Blacks, a body of law evolved prohibiting racial classifications against Blacks *qua* Blacks. The newly enacted laws, however, were drafted in race-neutral terms. While it is clear that the Civil War Amendments and modern civil rights legislation were enacted to eliminate government sponsorship or complicity in the racial subordination of Blacks by Whites, the use of neutral language in the laws has left the laws subject to competing interpretations. And, adherents to the modern colorblindness model have argued that the constitutional amendments and related civil rights laws apply to Blacks and Whites alike. Therefore, colorblindness proponents argue that affirmative action benefitting Blacks violates the same body of law that evolved specifically to benefit Blacks.

416. This is in essence the argument made by Professor Van Alstyne. See Van Alstyne, *supra* note 14, at 809-10.

that government cannot achieve its educative role of teaching that racial discrimination is wrong, while simultaneously permitting the use of racial classifications that benefit a small racial minority.<sup>417</sup> However, these arguments ignore the great lessons of our racial history. These lessons are that (1) since its inception the U.S. has had a policy of racial supremacy that continues to subordinate Blacks and other minorities to Whites; (2) efforts by Congress and later by the U.S. Supreme Court to eradicate the policy of racial supremacy have been obfuscated by members within those institutions and by noncompliance throughout the nation; (3) Americans are intensely color-aware and use race regularly to disadvantage others; (4) most of the Supreme Court's seminal race cases reflect colorawareness, not colorblindness; and (5) the U.S. Supreme Court's application of the colorblindness model will extend the nation's legacy of racial supremacy into the next century.<sup>418</sup> Therefore, when Professor Van Alstyne echoed Professor Bickel to assert that all racial discrimination is illegal and unconstitutional, he proves too much because, if racial discrimination is unconstitutional, then the cumulative racial subordination of Blacks in the United States that has resulted from racial discrimination is also illegal and unconstitutional, and must be affirmatively eradicated.

The colorblindness model is also confusing because no one seems quite sure what it means or how it is to operate. Will the Court apply strict scrutiny or intermediate scrutiny? Will the Court strike down benign racial classifications, unless there are exigent circumstances, such as a prison riot? The Court's recent race jurisprudence is so splintered that it is difficult to predict what the Court will do in the next racial classification case.<sup>419</sup>

Professor Neil Gotanda has argued recently that for the modern Court colorblindness "is a collection of legal themes functioning as a racial ideology."<sup>420</sup> Professor Gotanda concluded that since a color-blind interpretation

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417. This argument was advanced by Professor Kaplan. See Kaplan, *supra* note 14, at 379.

418. The late Professor Alexander Bickel announced other "great" lessons of our history. He wrote that racial discrimination was "illegal, immoral, unconstitutional, inherently wrong, and destructive to a democratic society." See ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (Yale Univ. Press 1975).

What appears to have been a neutral assertion by Professor Bickel is far from it. He like many legal commentators was unwilling to acknowledge White racial supremacy and racial subordination in our society. He wrote as if Blacks had used race to subordinate Whites for four centuries.

Professor Bickel might have written that racial discrimination by Whites against Blacks was illegal, immoral, unconstitutional, inherently wrong and destructive to a democratic society. But he did not. He also did not suggest what we should do about past and continuing racial subordination and discrimination.

419. It is difficult to identify an organizing principle among cases such as *Bakke*, *Fullilove*, *Croson*, and *Metro Broadcasting*. Moreover, it is impossible to predict how the current Court will analyze and resolve the next case presenting a benign racial classification. As a result, lower courts must adopt a wait-and-see approach and meanwhile fashion their own race jurisprudence.

420. See Gotanda, *supra* note 17, at 3. Professor Gotanda argued that the Court's colorblindness jurisprudence contains five themes: (1) the public-private distinction; (2) nonrecognition of race; (3) racial categories; (4) formal-race and unconnectedness; and (5) racial social change. The first theme is perhaps most familiar: the impermissibility of racial discrimination by government, in contrast to the constitutionality of discrimination by private persons in many contexts. The second theme represents situations where members of the Court forbid the use of one's race in assigning benefits or burdens. The third theme is manifested by the Court's use of terms Black and White as immutable facts rather than as malleable socially-constructed categories that are laden with social and political consequences. The fourth theme appears to be an extension of the third: when the Court uses the terms Black or White they are used as mere racial labels, unconnected to the social realities and historical context underlying the constitutional dispute. The fifth theme is illustrated by the Court's

of the Constitution legitimizes, and thereby maintains, the social, economic, and political advantages that Whites hold over other Americans, the Court should abandon the colorblindness model.<sup>421</sup> He proposed as an alternative that the Court borrow an analytical model from its religion jurisprudence.<sup>422</sup> Unfortunately, Professor Gotanda does not explain fully why he proposed that model. The only weakness in his otherwise brilliant article is that its final section does not advance a case for the new analytical model.<sup>423</sup> Thus, while I concur with Professor Gotanda on rejecting the colorblindness model, I propose a different alternative analytical model to replace it.

Another aspect of the confusion surrounding the colorblindness model is its origin. As argued earlier, Justice Harlan's dissent in *Plessy* can reasonably be interpreted to prohibit racial subordination and to require its affirmative eradication.<sup>424</sup> Professor David Strauss argued a similar position in his article *The Myth of Colorblindness*.<sup>425</sup> Professor Strauss contended that the prohibition against discrimination established in *Brown* was not rooted in colorblindness, but "is, like affirmative action, deeply race-conscious; like affirmative action, the prohibition against discrimination reflects a deliberate decision to treat blacks differently from other groups, even at the expense of innocent whites."<sup>426</sup> Yet, recent race jurisprudence demonstrates that the Court and many commentators use the rhetoric of colorblindness differently than intended by Justice Harlan. Because of such confusion and its significant substantive impact of continuing Black racial subordination, the colorblindness doctrine should be abandoned.

## 2. *Colorblindness is Counter-intuitive*

Race operates in the United States as an independent hegemonic force that extends the racial subordination of Blacks from one generation to the next.<sup>427</sup> Americans are trained throughout life to think in terms of racial categories such as Black and White and to believe that these racial categories are natural, pure, and immutable.<sup>428</sup> We learn quickly that racial categories are almost divine and that we should not transgress them. Thus, we learn to carefully decide the race of our life partners, the race of our neighbors, and the race of the other children enrolled at our children's schools. We learn that

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view that racial classifications promote racial blocs and an escalation of racial hostility and conflict. For some members of the Court, the prescription for ending racial problems is for the government to adopt a position of "never" considering race. *Id.* at 5-7. See also Crenshaw, *supra* note 17, at 1369-87.

421. See Gotanda, *supra* note 17, at 2-3.

422. *Id.* at 62-68.

423. *Id.* at 65-67. I am not persuaded that the similarities between race and religion compare as readily as do the similarities between race and gender. The problem in the U.S. today is not so much the "establishment" of racial subordination. The more significant problem is the inability of government to eliminate racial subordination without running afoul of the colorblindness doctrine. What is needed is a jurisprudence that permits the government to eliminate racial subordination root and branch.

424. See *supra* notes 183 to 190 and accompanying text.

425. See Strauss, *supra* note 17, at 100-13.

426. *Id.* at 100-103. Professor Strauss concluded that the failure to engage in race-conscious affirmative action may sometimes be unconstitutional.

427. See Crenshaw, *supra* note 17, at 1358-64; Gotanda, *supra* note 17, at 43-52; and Aleinikoff, *supra* note 17, at 1062-63.

428. Gotanda, *supra* note 17, at 26.

people who challenge racial lines frequently experience reprisals, such as crosses burned in their yards or other anonymous forms of intimidation. Given how race operates in the United States, colorblindness seems pretentious and counter-intuitive. And, as Professor Gotanda wrote, "color-blind constitutionalists live in an ideological world where racial subordination is ubiquitous yet disregarded unless it takes the form of individual, intended, and irrational prejudice."<sup>429</sup>

Americans are intuitively color-aware. One fact that supports this argument is that government statistics and records regarding any significant fact are most often organized and reported by "dubious" racial groupings. Whether one examines statistics on education, income, accumulated wealth, birth, marriage, voting, type of employment, crime, unemployment, or disease, for example, the information is most likely organized by racial groupings.<sup>430</sup> In the United States almost anyone can see that there are still Black neighborhoods, schools, parks, swimming pools, restaurants, churches, social clubs, funeral homes, and cemeteries. And, usually not very far away, but beyond the social, economic, or political reach of most Blacks, there are White neighborhoods, schools, parks, swimming pools, restaurants, churches, social clubs, funeral homes, and cemeteries. How can individuals living and thinking within such a world apply a colorblindness model when they have been trained to think and live in terms of racial categories and to divide by race? The answer is that they cannot.

Colorblindness is counter-intuitive in other ways. Despite arguments to the contrary, Americans not only recognize race and divide by race, we also assign moral worth and culpability based on race. There is an unstated assumption that Black people are poor and unlettered because they lack the capacity and ambition of Whites; "they" have what "they" deserve.<sup>431</sup> The corollary assumption is also obvious, yet unstated: White people are not poor and are lettered because they are more capable and have more ambition than Blacks; "they" have what "they" deserve. It is no wonder that when given a choice some minorities prefer to be classified as White.<sup>432</sup>

Professor Hacker has argued aptly that in the United States there is a value to being classified White.<sup>433</sup> Facts supporting this argument are the all too familiar disparities in life for most Blacks and most Whites. For example, Whites continue to earn higher wages than Blacks for comparable work, while life expectancy for Blacks remains lower than life expectancy for Whites by several years.<sup>434</sup> Also, Whites can obtain commercial loans on more favorable terms than Blacks, and can obtain housing opportunities with fewer obstacles than Blacks. These points were presented to millions of Americans when the

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429. *Id.* at 46.

430. ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL ix (Charles Scribner's Sons 1992). Professor Hacker wrote, "dividing people into races started as convenient categories. However, those divisions have taken on lives of their own, dominating our culture and consciousness, coloring our passions and opinions, contouring facts and fantasies."

431. This argument is now not only made about Blacks, but it has recently been articulated, although dressed up, by Shelby Steele, who has received critical acclaim for his book, *THE CONTENT OF OUR CHARACTER* 57-75 (Harper Perennial 1990) (Steele argues that Blacks make excessive claims to victimization and have not inculcated an ethic of individual responsibility).

432. See HACKER, *supra* note 430, at 6.

433. *Id.*

434. *Id.*

ABC Prime Time Live staff went undercover in St. Louis, Missouri in the fall of 1991. The news agency followed two 28-year-old men, a Black and a White, in search of a new car, housing, and services at a local store. Although the apartment was available for lease to the White applicant, a few minutes later it was unavailable to the Black applicant. The White applicant was given better terms for a car loan and obtained immediate service at local stores.<sup>435</sup>

The St. Louis experiment demonstrates that it remains a privilege to be White in the United States. Professor Brest has argued that one source of this racial privilege is the racial sympathy that Whites afford each other in contrast to the racial indifference, or often hostility, that Whites afford Blacks.<sup>436</sup> The doctrine of colorblindness ignores the role of racial sympathy and racial indifference in decisionmaking.

Similarly, the colorblindness model preserves "White" rule in the United States. Professor Hacker put it this way, "America is inherently a 'white' country: in character, in structure, in culture. Needless to say, black Americans create lives of their own. Yet, as a people, they face boundaries and constrictions set by the white majority."<sup>437</sup> Whites have never had to compete equally with Blacks for access to economic and political power. The Nation's Founding Fathers gave themselves an original advantage which subsequent generations of Whites have inherited. Many Whites ignore this subtle socio-economic history and believe that they have "earned" their economic and political position. They also believe that White racial hegemony is normative. Application of the transformed colorblindness model enshrines the very racial hegemony that Justice Harlan contended was unconstitutional.

Finally, colorblindness is counter-intuitive because the labels "Black" and "White" have symbolism beyond color.<sup>438</sup> When we encounter members of a race, we meet a complex set of racial generalizations and experiences.<sup>439</sup> Racial generalizations are commonplace in America. We use them to label the most perplexing phenomena, such as "White flight" and "Black bloc voting." We even assign points of view based on racial generalizations. Therefore, the colorblindness model discounts the significance of racial generalizations in the United States.

### 3. *Colorblindness Undermines Our Achievement of Racial Equality*

The colorblindness model presupposes equal status by race among Americans. Yet, there has never been equal status between Blacks and Whites in America. Although the Declaration of Independence proclaimed equality among men, it was limited to a small class of White men. Its principal author, Thomas Jefferson, was not sure that his declaration applied to Blacks.<sup>440</sup> Moreover, our Constitution did not contain an explicit provision regarding equality until the adoption of the Fourteenth Amendment in 1868.<sup>441</sup> Twelve decades later we are still debating what that provision of equality means in

435. See Walter Goodman, *Looking Racism in the Face in St. Louis*, N.Y. TIMES, Sept. 26, 1991, at C22.

436. See Brest, *supra* note 14, at 14-15.

437. See HACKER, *supra* note 430, at 4.

438. See Williams, *supra* note 17, at 528-33.

439. See Strauss, *supra* note 17, at 114-15, and HACKER, *supra* note 430, at 19-22.

440. See HACKER, *supra* note 430, at 25.

441. U.S. CONST. amend. XIV, § 1.

relation to racial subordination.<sup>442</sup> If racial equality is to have any rational meaning, its nature and scope must respond to the comparative status of Blacks and Whites. To paraphrase Aristotle, to treat Blacks equally to Whites may sometimes require treating Blacks comparatively better.<sup>443</sup> Therefore, the colorblindness model prematurely concludes our detailing the nature and scope of the concept of racial equality.<sup>444</sup>

There are many additional reasons to reject the doctrine of colorblindness, the most significant of which is that the colorblindness model allows us to continue our avoidance of one of this Nation's most enduring problems—the ideology of racial supremacy. Colorblindness is a myth, and the color-

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442. Equality is an elusive term. Professor Peter Westen has asserted that the study of the meaning of equality must begin with the work of Plato and Aristotle. According to Professor Westen, it was Aristotle, building on the work of Plato, who wrote: "(1) Equality in morals means this: things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unlikeness. (2) Equality and justice are synonymous: to be just is to be equal, to be unjust is to be unequal." See 3 ARISTOTLE, *ETHICA NICOMACHEA* 1131a-1131b (W. Ross trans. 1925), cited in Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 542-43 (1982) (additional citations omitted).

Many other commentators have written about equality. For example, see Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 542 (1982) (arguing that statements of equality logically and necessarily collapse into simpler statements of rights so that the additional step of transforming simple statements of rights into statements of equality not only involves unnecessary work but also engenders profound confusion), and Kenneth Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 247-48 (1983) (arguing that the equal citizenship principle that is the core of the Fourteenth Amendment does have substantive content; that is, to be treated by organized society as a respectable, responsible, and participating member who belongs to our national community). Karst says the principle is violated when the organized society treats someone as an inferior, as part of a dependent caste, or as a nonparticipant. Professor Karst has expanded his discussion of equality in his recent book, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (Yale Univ. Press 1989).

See also Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575, 576 (1983) (arguing that the concept of equality is morally necessary because it compels us to care about how people are treated in relation to one another, is analytically necessary because it creates a presumption that people should be treated alike and puts the burden of proof on those who wish to discriminate, and finally is rhetorically necessary because it is a powerful symbol that helps to persuade people to safeguard rights that otherwise would go unprotected), and Kent Greenawalt, *How Empty is the Idea of Equality?* 83 COLUM. L. REV. 1167, 1168-69 (1983) (arguing that rather than banish the concept of equality from moral and legal argument it is more promising to explicate a fuller understanding of the significance of existing concepts of equality). Professor Westen has replied to some commentators' critiques of his seminal article in Peter Westen, *On "Confusing Ideas": Reply*, 91 YALE L.J. 1153 (1982); Peter Westen, *The Meaning of Equality in Law, Science, Math and Morals: A Reply*, 81 MICH. L. REV. 604 (1983); and Peter Westen, *To Lure The Tarantula From Its Hole: A Response*, 83 COLUM. L. REV. 1186 (1983).

443. I recently visited an elementary school in Tuscaloosa to discuss the Los Angeles riots of 1992 and I asked members of a fourth and fifth grade class what equality means. All the students were Black and ranged in age from 9 to 11 years old. Their answers ranged from fairness or justice to treating people the same. I then asked the students the following question: If one member of the class had chicken-pox and another member had a mild cold, could I give the student with chicken-pox more medicine? After thinking about the relative severity of the illnesses, the students almost uniformly agreed that it would be consistent with their definition of equality to provide more medicine to the student with chicken-pox. The students appeared to intuit that a mild cold did not require the identical treatment as chicken-pox. The students appeared to understand that persons should be treated differently in proportion to their difference.

444. There is an obvious risk of confusion in using Aristotelean philosophy to discuss racial equality since ancient Greece was a slave society. Yet Aristotle seems helpful because under slavery differences were used to subordinate groups. Below, I advocate that we use differences between Blacks and Whites as a basis for treating Blacks preferentially in some contexts. See text *infra* pp. 73-82 and accompanying notes.

blindness model is an easy doctrinal way to ignore the complex, modern manifestations of racial supremacy contained in our laws.<sup>445</sup>

The colorblindness model as used today is in essence a restatement of the doctrine of separate but equal.<sup>446</sup> Both doctrines ignore reality: America remains a divided and unequal nation, racial enmity is again on the rise, and Whites continue to hold economic and political advantages in large part by virtue of their historical control over Blacks.

Justice William Brennan said it best when he wrote about *Plessy* that the Equal Protection Clause was "turned against those whom it was intended to set free, condemning them to a 'separate but equal' status before the law, a status always separate but seldom equal."<sup>447</sup> The disregard of racial inequality about which Justice Brennan wrote suggests to Professor Bell and others that the Court remains a White institution designed to protect the interests and privileges of Whites over Blacks.<sup>448</sup> We must never forget that the *Plessy* Court gave us both the separate but equal doctrine and the colorblindness doctrine; however, the former was articulated in the majority opinion while the latter appeared in the dissent. The transformed colorblindness model seems to mean what the majority wrote in *Plessy* in 1896: mere social distinctions based on color that subordinate Blacks do not violate the Fourteenth Amendment.<sup>449</sup>

Just as the Court ignored differences between the lives and opportunities of Blacks and Whites after *Plessy*, today the Court ignores the substantial differences between Blacks and Whites. Professor Hacker has recently confirmed

445. To confront and eradicate racial supremacy from American law is a formidable task. Initially, we would have to acknowledge our individual and collective racist beliefs. We would have to analyze how race factors into individual and group life experience. We would have to examine how and why Whites and Blacks live differently and die differently.

The principal distinction between racial supremacy and affirmative action is that the latter is designed to remedy past racial supremacy. As a result, affirmative action does not impose on Whites any badge of inferiority or vestige of slavery.

446. *Plessy*, 163 U.S. 537 (1896). Between 1896 and 1954, the U.S. Supreme Court largely ignored the qualitative and quantitative differences between the lives and opportunities of Blacks and Whites. There are some Blacks who have argued that separateness was better than the way we live today because the formal racial separation did not leave Blacks with the huge class stratification that exists today and which permits some Blacks to escape into integrated middle or upper middle class neighborhoods. I reject this view since most Blacks do not live integrated lives and every Black is subject to racism whether in terms of economic subordination or in the form of humiliation, embarrassment, or indignities arising from such incidents as poor services in stores or restaurants or being stopped by police for walking or driving in the wrong neighborhood. In addition, throughout our history there have been rich Blacks with wealth far in excess of most Blacks. Such exceptions then and now cannot be used to explain away the stark inequalities between most Whites and Blacks.

447. *Bakke*, 438 U.S. at 326-27 (opinion of Brennan, White, Marshall, and Blackmun, concurring in part and dissenting in part).

448. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE, *supra* note 1, at 72-73.

449. HACKER, *supra* note 430, at 17-49, 93-106, 134-46 and 179-98. Hacker presents by stark statistical references the reality of racial differences between Blacks and Whites in terms of education, income, mortality, and crime. See also GUNNAR MYRDAL, AN AMERICAN DILEMMA (20th Anniversary, Harper & Row 1962) (1944) (discussing how the Negro problem is intertwined with all other social, economic, political, and cultural problems in America and the author's optimism about future race relations in America), and A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY (Gerald David Jaynes and Robin M. Williams, Jr., eds., National Academy Press 1989) (discussing the unfinished agenda of a nation still struggling to come to terms with the consequences of its history of relations between Blacks and Whites).

the stark disparities in the lives of Blacks and Whites in the United States.<sup>450</sup> For example, Hacker reports that Black children are born to unwed mothers at a percentage 3.5 times more often than White children.<sup>451</sup> Also, he found that 56% of Black families are headed by women, while only 17% of White families are.<sup>452</sup> And, of the families headed by women, 60% of the Black families live in central cities, while only 28% of the White families do.<sup>453</sup>

Professor Hacker also reported significant racial disparities in causes of death.<sup>454</sup> For instance, Blacks die of tuberculosis 7 times more often.<sup>455</sup> Similarly, Blacks die of A.I.D.'s, meningitis, anemias, kidney diseases, alcohol-induced causes, infant deaths, nutritional deficiencies, diabetes, and drug-induced causes at rates between 2 to 3 times the White rates.<sup>456</sup> Blacks also die from homicides at a rate 6.5 times greater than Whites.<sup>457</sup> At the beginning and at the end of life in the United States, Blacks and Whites have significant differences.

Important racial disparities also exist throughout life. Professor Hacker reports that for persons between the ages of 25 to 34, 4.5% of Blacks who completed college are unemployed, while 2.2% of Whites are.<sup>458</sup> For persons in the same age range who did not complete high school, 25% of the Blacks are unemployed, as opposed to 11% of the Whites.<sup>459</sup> Similarly, of the Black and White families below the poverty line in the Northeast, Midwest, South, and West, the rate for Blacks is between 3.8 and 5.1 times greater than for Whites.<sup>460</sup>

Professor Hacker also found differences in educational attainment and employment. For example, for persons between the ages of 25 to 35, 82% of all Blacks completed high school, while 89% of all Whites completed high school.<sup>461</sup> However, only 12.7% of Blacks in that group completed four or more years of college, while 24% of such Whites did.<sup>462</sup> Blacks earned only 5.7% of the Bachelor's degrees conferred in 1989, while Whites earned 84.5%.<sup>463</sup> Blacks also received only 3.5% of the Doctorates conferred in 1989, while Whites received 89.3%.<sup>464</sup> Similarly, Blacks earned 5.1% of the medical degrees and 4.9% of the law degrees conferred in 1989, while Whites earned 86% of the medical degrees and 89.9% of the law degrees.<sup>465</sup>

Professor Hacker found that Black families earned \$580 per \$1,000 earned by White families.<sup>466</sup> So, the 1990 median income for White families

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450. See HACKER, *supra* note 430, at 223-36.

451. *Id.* at 230.

452. *Id.* at 231.

453. *Id.* at 230.

454. *Id.* at 231.

455. *Id.*

456. *Id.*

457. *Id.* Among young Black males, homicide is the leading cause of death. A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY, *supra* note 449, at 23.

458. HACKER, *supra* note 430, at 233.

459. *Id.*

460. *Id.*

461. *Id.* at 234.

462. *Id.*

463. *Id.*

464. *Id.*

465. *Id.*

466. *Id.* at 94.

was \$36,915, for Black families it was only \$21,423.<sup>467</sup> For all men who worked, White men had a median income of \$21,170, Black men \$12,868.<sup>468</sup> White women had a 1990 median income of \$10,317, while the figure for Black women was \$8,328.<sup>469</sup> Professor Hacker found that even when Black men reach the same academic level as White men, their incomes remain several steps behind their White counterparts.<sup>470</sup> Ironically, Black women earn almost the same income as their White female counterparts with 1 to 4 years of college.<sup>471</sup> Hacker suggested that because women are underpaid in comparison to men, it is easier for Black women to gain equity.<sup>472</sup>

A factor related to comparative income is unemployment. In 1990 White unemployment was 4.1%, while Black unemployment was 11.3%.<sup>473</sup> In concluding his chapter on the racial income disparities, Professor Hacker wrote: "To be Black in America is to know that you remain last in line for so basic a requisite as the means for supporting yourself and your family."<sup>474</sup>

His conclusions are consistent with the work of the Committee on the Status of Black Americans, which published its major findings in 1989.<sup>475</sup> The Committee's summary and conclusions<sup>476</sup> begin with a statement about changes in the United States in the lives of Black and White Americans:

[T]he great gulf that existed between black and white Americans in 1939 has only narrowed; it has not been closed. One of three blacks live in households with incomes below the poverty line. Even more blacks live in areas where ineffective schools, high rates of dependence on public assistance, severe problems of crime and drug abuse, and low and declining employment prevail.<sup>477</sup>

The Committee wrote that despite evidence of clear progress since 1940, especially for Blacks who have entered the middle-class, the American dilemma has not been resolved.<sup>478</sup>

Black people still aspire for equal opportunity and some measure of equality in participation in the best the United States affords its citizens in terms of employment, housing, education, and political power.<sup>479</sup> Blacks, then, have the same desire for equality of treatment in governmental policy that Whites have. But, the Committee found, there is a dynamic tension "between many whites' expectations of American institutions [toward them] and their expectations of themselves [toward Blacks]."<sup>480</sup> This divergence between expectations and individual practice means that our institutions (which are mostly run by Whites) do not provide full equality of opportunity. The Committee wrote that foremost among the reasons for the present state of Black-White relations are two continuing consequences of the Nation's long and re-

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467. *Id.*

468. *Id.*

469. *Id.*

470. *Id.* at 96.

471. *Id.*

472. *Id.*

473. *Id.*

474. *Id.* at 104.

475. See A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY, *supra* note 449.

476. *Id.* at 3-32.

477. *Id.* at 3.

478. *Id.* at 4.

479. *Id.* at 5.

480. *Id.*

cent history of racial inequality. One factor is the negative attitudes held toward Blacks, and the other factor is the actual disadvantaged conditions under which many Blacks live.<sup>481</sup>

The Committee concluded:

(1) By almost all aggregate statistical measures—incomes and living standards; health and life expectancy; educational, occupational, and residential opportunities; political and social participation—the well-being of both blacks and whites has advanced greatly over the past five decades.

(2) By almost all the same indicators, blacks remain substantially behind whites.

....

(3) The greatest economic gains for blacks occurred in the 1940s and 1960s. Since the early 1970s, the economic status of blacks relative to whites has, on average, stagnated or deteriorated.<sup>482</sup>

For too long we have shut our eyes, or blinded ourselves, to the racial reality. The statistical disparities in the United States between Blacks and Whites continue to mirror those reported by the Kerner Commission in 1968: we remain a nation of “two societies, one Black, one White— separate and unequal.”<sup>483</sup> And, even though there are myriad causes for the racial disparities between Blacks and Whites today, most experts contend that a central cause is racial discrimination.<sup>484</sup>

Disparities in the lives of Whites and Blacks are real. They are similar to the disparities that exist in the lives of men and women. Interestingly, the Supreme Court has made some progress toward eradicating gender subordination. The Court’s recent gender jurisprudence is therefore instructive on how the Court might similarly make progress toward eradicating racial subordination.

## PART V

### GENDER CLASSIFICATIONS AND THE ANTIDISCRIMINATION PRINCIPLE

#### 1. *Modern Gender Cases and the Ground of Difference Jurisprudential Standard*

In contrast to the doctrinal division within the Court’s race jurisprudence, the Supreme Court’s gender jurisprudence reflects greater consensus regarding how to analyze cases that involve gender classifications. For example, in *Reed v. Reed*<sup>485</sup> the Court invalidated an Idaho statute that preferred males to females in the choice of persons to administer an intestate estate. The Court said that, “A [gender] classification must be reasonable, not arbitrary, and *must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so all persons similarly circumstanced shall be treated alike.*”<sup>486</sup> The Court found that there was no reason to prefer men over women in the administration of an estate other than administrative

481. *Id.*

482. *Id.* at 6.

483. REPORT OF THE NAT’L ADVISORY COMM’N ON CIVIL DISORDERS 1 (1968).

484. HACKER, *supra* note 430, at ix. *See also* A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY, *supra* note 449, at 5.

485. 404 U.S. 71 (1971).

486. *Id.* at 76 (emphasis added).

convenience.<sup>487</sup> The Court concluded that the Idaho statute was inconsistent with the Equal Protection Clause of the Fourteenth Amendment because it provided dissimilar treatment for men and women who were similarly situated.<sup>488</sup>

Three years later the Court decided *Kahn v. Shevin*,<sup>489</sup> and upheld a Florida law which granted a \$500 property tax exemption for widows, but not for widowers. The reasoning of the Court is instructive:

[T]he financial difficulties confronting the single woman in Florida or in any state exceed those facing the man;

The job market is inhospitable to the women seeking any but the lowest paying jobs; [i]n 1972 women working full-time had a median income which was only 57.9 percent of the median income for men and the figure had fallen six percentage points since 1955; and [t]he general economic disparity is likely to be exacerbated for the widow.<sup>490</sup>

The Court concluded that the statute favoring women rested upon a ground of difference having a fair and substantial relation to the object of the legislation, that object being the reduction of the disparity between the economic capabilities of a man and a woman.<sup>491</sup> The Court did not require Florida to prove that Mrs. Kahn had been discriminated against, but merely recounted how society's "male-dominated culture" reduced the opportunities available to women.<sup>492</sup>

In *Craig v. Boren*<sup>493</sup> the Court invalidated an Oklahoma statute which prohibited sale of 3.2% beer to males under the age of 21 and to females under the age of 18. Following its holding in *Reed*, the Court said that classifications based on gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.<sup>494</sup> The Court found that Oklahoma had an important public safety objective. However, the Court said the gender-based distinction did not closely serve to achieve that objective and thus the statute was unconstitutional law.<sup>495</sup>

In *Califano v. Webster*<sup>496</sup> the Court upheld a federal statute which permitted women, in computing retirement benefits under Social Security, to deduct three more lower earning years than a similarly situated male wage earner. In the *per curiam* decision, the Court wrote: "Reduction of the disparity in the economic condition between men and women caused by the long history of discrimination against women has been recognized as an important governmental objective. . . . The only possible purpose for the statute is the

487. *Id.*

488. *Id.* at 77.

489. 416 U.S. 351 (1974).

490. *Id.* at 353-54.

491. *Id.* at 355.

492. *Id.* at 353. The Court also distinguished *Kahn* from *Frontiero v. Richardson*, 411 U.S. 677, 689-91 (1973) (plurality opinion). There the Court had held that administrative convenience was not a sufficient reason to distinguish between a male and female serviceperson's right to claim a spouse as a dependent. *Frontiero* is one of the few gender discrimination cases where the Court divided on the proper standard of review. Four members of the Court (Brennan, Douglas, White, and Marshall) argued for strict scrutiny, while four others (Stewart, Powell, Burger, and Blackmun) argued for intermediate scrutiny.

493. 429 U.S. 190 (1976).

494. *Id.* at 197.

495. *Id.* at 199-202.

496. 430 U.S. 313 (1977).

*permissible one of redressing our society's longstanding disparate treatment of women.*"<sup>497</sup>

In *Michael M. v. Superior Court*<sup>498</sup> the Court upheld a California statutory rape law,<sup>499</sup> under which men alone could be criminally liable for an act of sexual intercourse, as not violative of the Equal Protection Clause of the Fourteenth Amendment. The plaintiff, a 17-year-old male, argued that the statute created an impermissible gender classification in violation of the Fourteenth Amendment.

The U.S. Supreme Court affirmed in part the judgment of the California Supreme Court. However, a majority of the justices, although not agreeing on an opinion for the Court, held that the statutory rape law was constitutional and subject to intermediate scrutiny under *Reed* and *Craig*. The Court wrote, "[it] has consistently upheld statutes where the gender classification is not invidious but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances."<sup>500</sup> The Court found that the California statute was sufficiently related to the State's objective of deterring teenage pregnancies because only women became pregnant, the law would deter males and equalize deterrence between males and females, and a gender neutral statute would frustrate effective enforcement.<sup>501</sup>

## 2. *The Court's Rejection of Genderblindness*

In *Rostker v. Golberg*,<sup>502</sup> the Court had before it a provision of the Military Selective Service Act ("MSSA") authorizing the President to require military registration of males, but not of females. Former President Carter wanted an amendment and appropriations to permit the draft of females. Congress refused to amend the Act and provided funds only for registration of males. The federal district court held this limitation unconstitutional. The U.S. Supreme Court reversed.<sup>503</sup>

The Court applied mid-level scrutiny articulated in *Reed* and *Craig*.<sup>504</sup> Relying on the extensive congressional hearings regarding the draft/combat exclusion of women, the Court held that, "Men and women, because of the

497. *Id.* at 317 (emphasis added). The Court has rejected attempts to justify gender classifications as compensation for past discrimination against women when the classifications in fact penalized women wage earners or when the statute and its legislative history revealed that the classification was not enacted as compensation for past discrimination. *See, e.g., Califano v. Goldfarb*, 430 U.S. 199, 209 n. 9 (1977) (the Court invalidated a statute that paid old-age survivor's benefits on a man's earnings, but did not pay such benefits on a woman's earnings). *But compare Orr v. Orr*, 440 U.S. 268 (1979) (invalidating Alabama statutory scheme imposing alimony obligations on husbands but not wives).

498. 450 U.S. 464 (1981).

499. The California statutory rape law defined the crime as an act of sexual intercourse accomplished with a female not the wife of the perpetrator where the female was under the age of 18 years.

500. *Id.* at 469. In addition, the Court has stated "a legislature may provide for the special problems of women." *Id.*

501. *Id.* at 472-73.

502. 453 U.S. 57 (1981).

503. The Court said that the customary deference to Congress is certainly appropriate where as here Congress specifically considered the question of constitutionality. And, the Court said that this case arises in the context of congressional authority over national defense and military affairs. In addition, the Court suggested that great deference was appropriate because the lack of judicial competence was marked. *Id.* at 64-65.

504. *Id.* at 69-70.

combat restrictions on women are simply not similarly situated for purposes of registration for a draft or a draft generally."<sup>505</sup> Therefore, the Court found that Congress acted within its constitutional authority when it authorized the registration of men under the MSA.<sup>506</sup>

In *Mississippi Univ. for Women v. Hogan*,<sup>507</sup> the Court reviewed the constitutionality of a Mississippi statute that excluded males from enrolling in a state-supported professional nursing school.<sup>508</sup> The Court said that the party seeking to uphold a statute that classifies individuals on the basis of gender must carry the burden of showing an exceedingly persuasive justification for the classification, and the burden will be met only by showing at least that the classification serves important State objectives and that the means employed are substantially related to the achievement of those objectives.<sup>509</sup> Justice O'Connor wrote:

Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.

. . . .  
If the State's objective is legitimate and important, we next determine whether the requisite direct, substantial relationship between objective and means is present. The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.<sup>510</sup>

Applying mid-level scrutiny, the Court held that Mississippi had failed to establish that the alleged objective of its statute (compensation for past discrimination) was the actual purpose underlying the discriminatory classification, or to establish that the gender-based classification was substantially related to its proposed compensatory objective.<sup>511</sup> The Court wrote, "Rather than compensate for discriminatory barriers faced by women, MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job."<sup>512</sup> The Court concluded that the admission policy violated the Equal Protection Clause of the Fourteenth Amendment.<sup>513</sup>

However one might view the correctness of these decisions or their sexist bent, at least the Supreme Court's equal protection gender jurisprudence permits government to treat men and women differently when they are arguably not similarly situated. Women can be treated more favorably so long as the gender classification is based on a ground of difference, serves important governmental objectives, and the statutory means are substantially related to the

505. *Id.* at 78.

506. *Id.* at 82.

507. 458 U.S. 718 (1982).

508. *Id.* at 719.

509. *Id.* at 724. The Court also said that although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. *Id.* at 725.

510. *Id.* at 725-26.

511. *Id.* at 730.

512. *Id.* at 729.

513. *Id.* at 733.

achievement of those objectives.<sup>514</sup> The Court has never held that the Constitution requires "genderblindness." Indeed, the Court has held the opposite—males and females can be treated differently if the classification favoring one sex can be justified because it directly assists members of the sex that are disproportionately burdened.<sup>515</sup>

My proposal is modest in the sense that I do not propose a new analytical standard for all discrimination cases. If I were to propose such a new standard it would have as its chief objective the elimination of subordination. Professor Ruth Colker has expressed the origins of such an equal protection jurisprudence.<sup>516</sup> But, I have written this article to make a different point: even if one thinks gender jurisprudence suffers from its own doctrinal inconsistencies, the Court has been able to reduce gender subordination and to avoid the legal conundrum that has been created in race jurisprudence. Moreover, my proposal is not so modest in the sense that I propose that the Court apply its antisubordination principles from its gender jurisprudence to racial subordination, a subject that it has been reluctant to attack. I propose that the Court apply its ground of difference analysis to cases presenting racial classifications designed to reduce racial subordination.

## PART VI

### APPLICATION OF THE GROUND OF DIFFERENCE MODEL FROM GENDER CASES TO ANALOGOUS RACE CASES

As we have seen, the Court treats gender discrimination differently from race discrimination. For example, when the Court analyzes gender-based discrimination cases it has at times focused on past societal discrimination.<sup>517</sup> However, in recent race-based discrimination cases the Court has focused on specific evidence of individual discrimination against the plaintiff by the defendant.<sup>518</sup> The plaintiff challenging a racial classification must meet a higher evidentiary burden than a person challenging a gender classification. Two questions arise here: (1) Why has the Court applied intermediate scrutiny in gender classification cases and strict scrutiny in race classification cases? (2) Why has the Court not struggled with benign gender classifications to the same extent that it has struggled with benign race classifications?

The Court has occasionally tried to explain why it analyzes race discrimination cases and gender discrimination cases differently.<sup>519</sup> For example, the

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514. *Id.* at 724.

515. See *Hogan*, 458 U.S. at 728; *Schlesinger v. Ballard*, 419 U.S. 498, 508-09 (1975); and *Califano v. Webster*, 430 U.S. at 318. In *Califano*, the Court wrote:

The challenged statute operated directly to compensate women for past economic discrimination. Retirement benefits under the Act are based on past earnings. But as we have recognized: "Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs." Thus, allowing women, who as such have been unfairly hindered from earning as much as men, to eliminate additional low-earning years from the calculation of their retirement benefits works directly to remedy some part of the effect of past discrimination.

*Id.* at 318 (citations omitted).

516. Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 n.12 and 1014-16 (1986).

517. See *Hogan*, 458 U.S. at 729; *Califano*, 430 U.S. at 317; and *Kahn*, 416 U.S. at 355.

518. See *Bakke*, 438 U.S. at 289-90, and *Croson*, 488 U.S. at 492.

519. See, e.g., *Bakke*, 438 U.S. at 302-03.

Court has said that gender-based distinctions are less likely to create the analytical and practical problems present in preferential programs premised on racial criteria.<sup>520</sup>

With respect to gender there are only two possible classifications. The incidence of the burdens imposed by preferential classifications is clear. There are no rival groups who can claim that they, too, are entitled to preferential treatment. Classwide questions as to the group suffering previous injury and groups which fairly can be burdened are relatively manageable for reviewing courts. . . . More importantly, the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share. In sum, the Court has never viewed such classification as inherently suspect, or as comparable to racial or ethnic classifications for the purpose of equal protection analysis.<sup>521</sup>

The Court assumes that in race-based classification cases advantaging Blacks, many rival groups are waiting in the wings to claim that they, too, are entitled to preferential treatment. On closer examination, that assumption appears false. Although many persons in America have suffered discrimination, no other race or ethnic group was enslaved. After slavery was abolished, the rights of Blacks remained subordinate to the rights of Whites. And, even if a group could make a similar historical argument regarding its subordination, that would only provide an argument for including that other group in a remedial program, not for rejecting the legitimacy of remediation for Blacks.

In addition, the Court assumes that class-wide questions about who in the Black group has suffered and which Whites can fairly be burdened are unmanageable for reviewing courts. That assumption also seems false. Why is it easier for the Court to address class issues between women of all races and classes and to determine which men can be fairly burdened by a gender classification? The Court usually does not even make such a close examination of the race or class of beneficiaries of gender-based classifications, and, on the limited occasions that it does, it simply states that when individual hearings are available, the hearings should be utilized to examine such class-wide issues.<sup>522</sup>

Finally, the Court assumes that the history of racial discrimination is more tragic than the history of gender discrimination. If that is true, why would the Court be more willing to permit gender preferences that benefit women than racial preferences that benefit Blacks? It would seem more logical to permit racial preferences too.

One might question whether the histories of race and gender discrimination are markedly different. Both had at their origins stereotypes and notions of innate inferiority or divined destinies. Therefore, race and gender discrimination are both odious and the Court should interpret the Constitution consistently to permit government to eradicate both.

The Fourteenth Amendment mandates that government treat similarly situated persons the same and the Equal Protection Clause is violated only when government invidiously classifies similarly situated people on the basis of

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520. *Id.* Cf. *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality held gender classification subject to strict scrutiny).

521. *Bakke*, 438 U.S. at 302-03.

522. *See Orr v. Orr*, 440 U.S. at 281-82.

an immutable characteristic with which they are born.<sup>523</sup> Therefore, we must ask if people of different races are always similarly situated for constitutional purposes, as Justice Stewart contended.<sup>524</sup> He wrote that "detrimental racial classifications always violate the Constitution, for the simple reason that, so far as the Constitution is concerned, people of different races are always similarly situated."<sup>525</sup> Justice Stewart cited concurring or dissenting opinions to support his argument.<sup>526</sup> But I have found no decision where a majority of the Court adopted his view. Interestingly, Justice Stewart continued:

By contrast, while detrimental gender classifications often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes.

....

When men and women are not in fact similarly situated in an area covered by the legislation in question, the Equal Protection Clause is not violated.<sup>527</sup>

I contend that in light of the racial history in the United States and current racial disparities between the economic, political, and social experiences of Blacks and Whites, Blacks and Whites are not always similarly situated for constitutional purposes. If persons are not similarly situated, the statutory classification should be evaluated under intermediate scrutiny requiring only that the party seeking to uphold the statute must carry the burden of showing that the classification serves important governmental objectives and the discriminatory means employed are substantially related to the achievement of those objectives. Moreover, just as the Court has permitted evidence of societal discrimination against women as an appropriate justification to support benign affirmative action policies designed to eliminate gender subordination, the Court should permit evidence of societal discrimination against Blacks as an appropriate justification to support benign affirmative action policies designed to eliminate racial subordination.

Below, I apply the ground of difference model to the facts of *Croson*<sup>528</sup> to demonstrate that the application of that model would more effectively serve the goal of eradicating racial subordination than does the modern colorblindness model. Under the ground of difference model, if the Richmond City Council adopted a statute treating Blacks more favorably than Whites with respect to public contracts, the first question would be: Are Blacks and Whites similarly situated in relation to the area covered by the legislation—access to and participation in public construction projects?

If Blacks and Whites are similarly situated, the statute would be presumptively invalid because the Equal Protection Clause requires that similarly situated persons be treated substantially the same. However, if Blacks and Whites are not similarly situated in the area covered by the statute, the City Council would have to show that the racial classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.

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523. *Michael M.*, 450 U.S. at 477-78 (Stewart, J., concurring).

524. *Id.* at 478.

525. *Id.*

526. *Id.* (citations omitted).

527. *Id.*

528. 488 U.S. 469 (1989).

a) *Are Blacks and Whites similarly situated?*

The evidence in *Croson* suggested that between 1978-1983 Blacks obtained 0.67% of the Richmond public construction contracts offered for bids.<sup>529</sup> Other evidence illustrated that few contractors' associations in Richmond, or in Virginia generally, had Black members.<sup>530</sup> Additionally, studies of the construction industry showed that the effects of past discrimination had stifled minority participation in the construction industry nationally.<sup>531</sup>

Given such evidence, we must ask: Are Blacks and Whites similarly situated in the area covered by the statute? To answer this question it is helpful to substitute women and men for Blacks and Whites. On the facts in *Croson*, if women had 0.67% of public contracts and were excluded from the industry by past discrimination, the Court would probably conclude that men and women could be treated differently because they are not similarly situated. Likewise, Blacks and Whites are not similarly situated in the area of public construction contracts in Richmond or nationally.

b) *Does the statute serve important governmental objectives?*

The Richmond Plan declared "that it was 'remedial' in nature, and enacted 'for the purpose of promoting wider participation' by minority business enterprises in the construction of public projects."<sup>532</sup> The City Council said it was attempting to remedy various forms of past discrimination, including the exclusion of Blacks from skilled construction trade unions and training programs.

Are these governmental objectives important? Under the ground of difference model, the classification must be free of fixed notions concerning the roles and abilities of the persons classified. The statutory classification itself must not reflect archaic or stereotypical notions that members of one group are presumed to be innately inferior or to suffer from an inherent handicap.<sup>533</sup> The objectives articulated by the Richmond City Council are important. They did not reflect archaic or stereotypical notions about the roles of Blacks or Black inferiority. Instead, they were an appropriate response to the substantial racial disparity in the opportunities of Whites and Blacks to obtain public contracts.

c) *Are the discriminatory means employed by the City Council substantially related to the achievement of the objectives?*

Assuming that the state's objectives are important, we next determine whether the requisite direct, substantial relationship between objective and means is present. The 30% set aside was designed to remedy past discrimination in the construction industry and to promote wider participation by minority businesses in public projects. There is a clear link between the objective and the means selected by Richmond. The question is not whether the Richmond Plan is the least restrictive alternative. The Richmond Plan does not undermine the City's goals, nor does it relate to anything but the achievement

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529. *Id.* at 479-80.

530. *Id.* at 480.

531. *Id.* at 498-500.

532. *Id.* at 478.

533. *Hogan*, 458 U.S. at 725.

of important governmental objectives. The Plan is designed to eliminate disparities in the participation of Blacks and Whites in the construction industry.

Thus, under the ground of difference model, the results in *Croson* would likely have been different. This is true in part because the Court would examine less rigorously the nexus between the objectives and the means. In addition, the Court would only require evidence of past discrimination against Blacks in the construction industry, it would not insist on evidence of identified discrimination in a specific community by an identifiable perpetrator.

I would limit the application of the ground of difference model to racial classifications clearly designed to remedy past discrimination and continuing racial subordination against Blacks. I would not argue for application of that model to racial classifications rooted in notions of Black inferiority, nor would I urge its use to permit racial classifications that further disadvantage or subordinate Blacks.

### CONCLUSION

In *Metro Broadcasting*,<sup>534</sup> as has been seen, five members of the Court held that the congressional/FCC affirmative action scheme was subject to an intermediate standard of review. The majority, however, did not state that it was applying its ground of difference gender model. Indeed, the Court relied on *Fullilove* as the controlling precedent and distinguished *Croson* on the grounds that it involved a state-sponsored affirmative action plan, not a federal plan.<sup>535</sup> I argue that the ground of difference model should apply to a state or federal affirmative action plan designed to eradicate racial subordination. There should be nothing unconstitutional about governmental efforts to eradicate racial subordination. The Court has held as much in terms of the eradication of gender subordination. And, if our Constitution is not required to be gender-blind, I see no reason that it should be required to be color-blind.

I have argued that the Court should abandon the colorblindness model. This position is informed by my personal experiences, a close examination of our racial heritage, a continuing legacy of racial subordination, and by the Supreme Court's multiple interpretations of the meaning of constitutional colorblindness. I have proposed that the Court apply its ground of difference analysis from gender jurisprudence to analogous race cases. That application would permit the government to eradicate racial subordination without violating the Constitution.

### AFTERWORD

The student Notes which follow are the product of a seminar on race, racism, and American law taught at the University of Alabama School of Law in the fall of 1991. Mark Sabel has proposed a separate court system for Blacks. Scott Clark has applied the principles of nonviolent direct action from Dr. Martin Luther King, Jr. to refute a gradualist approach to continuing racial injustice. Twala Grant has asked whether one-race schools are constitutionally legitimate after *Brown*. Valerie Hermann has criticized the National Association of Black Social Workers for its opposition to transracial adoption.

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534. 497 U.S. 547 (1990).

535. *Id.* at 463-64.

Kenneth Lay has argued that the legacy of anti-miscegenation statutes is alive in the United States. David Martin has examined the birth of "Jim Crow" laws in Alabama. Reggie Speegle has critiqued the likely impact of the Civil Rights Act of 1991. Each Note underscores the continuing significance of race in American law.

The seminar was patterned after Derrick Bell's course. Students in the seminar served as co-teachers and undertook roles of teacher, discussion leader, and critic. Each participant wrote two short "Racial Reflections" and conducted research for longer papers. The guiding principle for the seminar was that each voice was important and every participant would listen to the views of others. Again, Professor Bell is to be commended for leading the way in designing an essential course in legal education.