



“A NATION OF MINORITIES”:  
RACE, ETHNICITY, AND REACTIONARY  
COLORBLINDNESS

Ian F. Haney López

# “A NATION OF MINORITIES”: RACE, ETHNICITY, AND REACTIONARY COLORBLINDNESS

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*Justice Clarence Thomas insists upon “a ‘moral and constitutional equivalence’ between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality.” This asserted congruence between Jim Crow laws and affirmative action seems intellectually indefensible—but it is now a constitutional commonplace, as it underlies the contemporary rise of an anticlassification understanding of the Equal Protection Clause that accords race-conscious remedies and racial subjugation the same level of legal hostility. This Article lays out the intellectual history of “reactionary colorblindness,” meaning the current form of race blindness that principally targets affirmative action. Measuring debates among legal elites against a background of evolving racial ideas, this Article traces the use of colorblindness to attack Jim Crow in the years before *Brown v. Board of Education*, and as a tactic to forestall integration in that decision’s immediate wake. It then locates the proximate origins of contemporary colorblindness in the effort by neoconservatives beginning in the 1960s to respond to an emerging structural understanding of racism by positing instead an ethnic reconceptualization of race. The ethnic analysis replaced the notion of dominant and subordinate races with a narrative of culturally defined groups in pluralistic competition, where culture rather than systemic racial advantaging or disadvantaging explained disparate group success. This Article demonstrates the foundational role ethnicity played in Justice Lewis Powell’s 1978 *Bakke* opinion, and also shows how his analysis subsequently served as the cornerstone for contemporary colorblind reasoning, evident for instance in *Richmond v. Croson*. Finally, this Article argues that the liberal legal defenders of affirmative action,*

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*by remaining wedded to mid-century racial orthodoxies, not only failed in the 1970s to respond effectively to the emergence of reactionary colorblindness but contributed to its intellectual legitimacy.*

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*I believe that there is a moral [and] constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. . . . In each instance, it is racial discrimination, plain and simple.*

—Justice Clarence Thomas<sup>†</sup>

## INTRODUCTION

Justice Clarence Thomas's equation of laws designed to subjugate with those intended to foster equality is laughably absurd. "Laws designed to subjugate a race": surely this must include slave law, black codes, and Jim Crow regulations; the doctrine of discovery and the trail of broken treaties; the Chinese exclusion acts, naturalization limited to "white persons," alien land laws, and Japanese internment; and the legal instantiation of Manifest Destiny imposed on the northern half of Mexico, Puerto Rico, and Hawaii. Can Thomas really believe that the limited use of race-conscious means to promote integration constitutes instead another, equivalent instance of racial oppression? This claim merits only derision—but for the fact that it underlies contemporary constitutional antidiscrimination law.

Drawing on decisions and reasoning from the 1970s, the Supreme Court in the last three decades has moved ever closer to a full embrace of an anticlassification or colorblind conception of the Equal Protection Clause.<sup>1</sup> Under this approach, much criticized by legal scholars, the Fourteenth Amendment demands the highest level of justification whenever the state employs a racial distinction, irrespective of whether such race-conscious means are advanced to enforce or to ameliorate racial inequality.<sup>2</sup> Contemporary constitutional race law insists on a stark congruence between hostile racial practices on the one hand and efforts to respond to societal discrimination on the other. But when this risible equivalence is stated so baldly, the intellectual problem with contemporary colorblindness is immediately manifest: what

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<sup>†</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240-41 (1995) (Thomas, J., concurring in part and concurring in the judgment) (internal quotation omitted).

1. See, e.g., *Johnson v. California*, 543 U.S. 499 (2005); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Rice v. Cayetano*, 528 U.S. 495 (2000); *Adarand*, 515 U.S. 200; *Shaw v. Reno*, 509 U.S. 630 (1993); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

2. See, e.g., *Adarand*, 515 U.S. at 226-27. Many critics of the anticlassification approach argue instead that, properly understood, the Equal Protection Clause targets only those racial practices that contribute to racial hierarchy. The proponents of this antistatutory approach prominently include the following: J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994).

justifies the strict moral and constitutional equation of affirmative action and Jim Crow?

This Article probes the conceptions of race and racism used to legitimize the rise of “reactionary colorblindness.” By reactionary colorblindness I mean an anticlassification understanding of the Equal Protection Clause that accords race-conscious remedies and racial subjugation the same level of constitutional hostility.<sup>3</sup> I use this term to distinguish the current doctrine from colorblindness generally.

Given the long and sorry history of racial subordination in the United States, there is tremendous rhetorical appeal to Justice John Marshall Harlan’s famous dissent in *Plessy v. Ferguson* that “[o]ur constitution is colorblind, and neither knows nor tolerates classes among citizens.”<sup>4</sup> At first blush, it seems difficult to argue against the insistence that the state should finally eschew all racial distinctions. But as it stands now, this appeal depends almost entirely on the conflation of colorblindness as an ideal vision of a future society, and as a means to achieve this end.<sup>5</sup> In evaluating colorblindness as an actual mechanism for racial change, even Justice Sandra Day O’Connor—herself the author of many of the decisions shifting the Court toward reactionary colorblindness—belatedly recognized that context matters.<sup>6</sup> With cursory attention to context, one can trace a general shift over the twentieth century from colorblindness as a progressive demand to a reactionary one.

This metamorphosis in the political register of colorblindness is reflected in the arguments made by Thurgood Marshall the lawyer and Thurgood Marshall the Supreme Court Justice. As counsel for the NAACP in the late 1940s and early 1950s, Marshall repeatedly encouraged his colleagues to cite Harlan’s famous injunction, seeking thereby to wield colorblindness against the racial degradation given constitutional sanction by *Plessy*.<sup>7</sup> Yet as the Court

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3. As applied, reactionary colorblindness almost invariably strikes down race-conscious remediation, making it “strict in theory, but fatal in fact,” the one Supreme Court exception being *Grutter*. Frankly, I do not expect *Grutter* to much survive Justice O’Connor’s departure from the swing position on racial issues on the Court. Of course, lower federal courts have been less aggressive in striking down all racial remedies. See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 834-43 (2006). As Winkler notes, though, over the last decade strict scrutiny “is apparently becoming *more fatal*,” *id.* at 825 (emphasis added), a trend I expect will accelerate in race cases under the tutelage of the Roberts Court.

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

5. See *infra* Part I.A. (discussing the Court’s use of colorblind reasoning to support racial subjugation during Reconstruction); Part III.B (discussing Alexander Bickel’s oft-quoted defense of colorblindness).

6. *Grutter*, 539 U.S. at 327 (“Context matters when reviewing race-based governmental action under the Equal Protection Clause.”).

7. U.S. District Judge Constance Baker Motley recalled that when she and Marshall were colleagues at the NAACP, Harlan’s dissent was Marshall’s “‘Bible’ to which he turned during his most depressed moments. . . . Marshall would read aloud passages from Harlan’s amazing dissent. I do not believe we ever filed a major brief in the pre-*Brown* days in which

struck down Jim Crow laws and Congress proscribed major forms of private discrimination over the course of the 1950s and 1960s, civil rights activists increasingly recognized the need for state and public actors to use race-conscious means to target the edifices of inequality. In this new context, the call for colorblindness came instead from those opposing racial integration: the language of colorblindness, enshrouded with the moral raiment of the civil rights movement, provided cover for reactionary opposition to race-conscious remedies. By 1978, Justice Marshall found himself urging the Court in its first full affirmative action case to reject colorblindness. “It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America,” Marshall inveighed.<sup>8</sup> As the nation’s racial commitments swung from defending to dismantling formal white supremacy, the practical import of colorblindness shifted from promoting to defeating integration, and its valence slipped from progressive to reactionary.

Marshall did not prevail in his colorblind arguments, either for it as a lawyer or against it as a Justice. Today, colorblindness as a presumptive bar on affirmative action—that is, reactionary colorblindness—has been firmly read into the Fourteenth Amendment. The most striking feature of contemporary colorblindness lies not in the mere fact of its opposition to race-conscious remedies, however, but in the strict doctrinal equation of affirmative action and Jim Crow racism. Supporters of affirmative action, such as Justice William Brennan, conceded that race-conscious preferences raise troubling issues, for instance undermining liberal notions of individual merit and potentially fueling racially divisive politics as well as stigmatic notions of minority inability.<sup>9</sup> Indeed, Brennan’s concerns led him to favor heightened, though not strict, constitutional scrutiny of affirmative action.<sup>10</sup> Yet the underlying premise of reactionary colorblindness is not simply that race-conscious remedies raise moral and political and even constitutional problems, but that benign and invidious discrimination are indistinguishable and equally pernicious. This Article’s purpose is to carefully historicize this foundational assertion of noxious congruence.

In the 1960s, a broad consensus began to emerge that racism reflected more than the prejudice of discrete individuals but represented instead a deeply

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a portion of that opinion was not quoted. Marshall’s favorite quotation was, ‘Our Constitution is color-blind.’ . . . It became our basic creed.” TINSLEY E. YARBROUGH, *JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN* 229 (1995) (quoting Judge Baker Motley, Address at a Memorial Ceremony for Justice Marshall (Nov. 15, 1993)).

8. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 401 (1978) (Marshall, J., concurring in the judgment in part and dissenting in part).

9. *United Jewish Orgs. of Williamsburgh, Inc., v. Carey*, 430 U.S. 144, 172-74 (1977) (Brennan, J., concurring in part), discussed *infra* at note 301.

10. *Id.* at 169-71; see also *Bakke*, 438 U.S. at 358-62 (citation omitted) (Brennan, J., concurring in the judgment in part and dissenting in part); *infra* Part VII.A.

entrenched aspect of U.S. society.<sup>11</sup> This conceptualization implied a national obligation to undertake sweeping structural reform. Simultaneously, however, a countervailing racial theory developed in the 1960s and early 1970s, drawing on notions of ethnicity elaborated early in the twentieth century to celebrate pluralism among whites. This competing narrative suggested that racial subordination was largely past and that social inequalities, if any, reflected the cultural failings of minorities themselves, while further postulating that there existed no dominant white race as such, but instead only a welter of competing cultural groups defined in national origin terms, for instance, Irish- or Italian-Americans. Under this conception, not only did the supposed absence of entrenched disadvantage strip affirmative action of its primary rationale, but preferential treatment for non-whites amounted to invidious discrimination against other “minorities”—that is, the discrete national origin groups into which whites had been disaggregated.

As arguments for reactionary colorblindness developed in the 1970s, its proponents confronted the task of explaining why the command of equality proscribed efforts to undo the legacy of centuries of racial oppression. These arguments could not be made solely in legal terms, but required as well the elaboration of a legitimating account regarding the nature of race and racism in the United States. Placing developments in equal protection law in the larger context of evolving racial ideas, my primary aim in this Article is to demonstrate that race-as-ethnicity provided the first coherent intellectual justification for reactionary colorblindness. My secondary aim is to critique this impoverished account of race, as well as reactionary colorblindness generally.

I start from the premise that race constitutes a socially and legally produced hierarchical system structurally embedded in U.S. society.<sup>12</sup> I insist on this irrefragable point not because my argument depends on a specific conception of racial subjugation, but because it requires the recognition that a general dynamic of systemic group subordination lies at the core of race in the United States.<sup>13</sup> Charles Black wrote in 1960 that the many forms of racial

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11. See *infra* Part III.A.

12. See Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994); see also IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996) [hereinafter HANEY LÓPEZ, *WHITE BY LAW*]; IAN F. HANEY LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* (2003) [hereinafter HANEY LÓPEZ, *RACISM ON TRIAL*].

13. For a small sampling of the leading contemporary scholarship emphasizing the structural nature of racial oppression in the United States, see MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (2003); GEORGE M. FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY* (1981); THOMAS C. HOLT, *THE PROBLEM OF RACE IN THE TWENTY-FIRST CENTURY* (2000); MANNING MARABLE, *RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945-1990* (2d ed. 1991); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993); MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1995); MICHAEL OMI & HOWARD

oppression were “matters of common notoriety, matters not so much for judicial notice as for the background knowledge of educated men who live in the world.”<sup>14</sup> I write in a similar vein (though admittedly at somewhat greater length). I will not spend time establishing the fact of racial hierarchy, but will note where legal thinkers have failed to grapple with it, as it forms the basis of my critique of both ethnicity theory and reactionary colorblindness.

Part I reviews the changing understandings of race in the United States to the mid-twentieth century, while also briefly tracing colorblindness during and since Reconstruction. After discussing postbellum efforts to use colorblindness against racial caste laws, it focuses on the attempt to use colorblindness as a shield against integration in the 1950s and 1960s, a tactic emphatically rejected by the Supreme Court. Part II notes the emergence of a structural understanding of racial domination in the 1960s, and details the countervailing effort to recast race relations in ethnic terms, reflected for instance in the work of leading neoconservatives such as Patrick Moynihan and Nathan Glazer. Part III explores early attempts by legal scholars to justify a regime of reactionary colorblindness, interrogating the impassioned rhetoric of Alexander Bickel as well as the first fully elaborated demand for a constitutional ban on affirmative action, authored by Richard Posner in 1974. Building on these background sections, Part IV highlights Glazer’s seminal contribution to arguments against affirmative action made in a 1975 book entitled *Affirmative Discrimination*, where he wove together ethnicity and colorblindness.<sup>15</sup> Part V identifies *Regents of University of California v. Bakke* as a critical juncture when the Supreme Court fully engaged the debate over reactionary colorblindness, showing how Justice Lewis Powell’s opinion constitutionalized Glazer’s ethnic framework. Part VI adumbrates the first adoption of conservative colorblindness by a Supreme Court majority in *Richmond v. Croson*, demonstrating the justificatory power of Powell and Glazer’s ethnic analysis. Finally, Part VII critiques the inability of affirmative action’s liberal defenders, including Justice Brennan, John Hart Ely, and Paul Brest, to respond effectively either to the ethnicity model or to the equation of affirmative action with racial discrimination.

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WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S* (1986); AUDREY SMEDLEY, *RACE IN NORTH AMERICA: ORIGIN AND EVOLUTION OF A WORLDVIEW* (2d ed. 1999); DAVID T. WELLMAN, *PORTRAITS OF WHITE RACISM* (2d ed. 1993). Conceptions of race as social hierarchy undergird critical race theory in the legal academy. See generally DERRICK A. BELL, JR., *RACE, RACISM, AND AMERICAN LAW* (4th ed. 2000); *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw et al. eds., 1995); LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2002).

14. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 426 (1960).

15. NATHAN GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* (1975).

I do not propose to assess here the constituent components of colorblindness, either as legal doctrine or as racial ideology. While I hope eventually to turn to that work, such a project would focus principally on the 1980s and 1990s and, in any event, excellent work on this topic already exists.<sup>16</sup> This is a history of the ideas about race and racism in the United States used in the 1970s by legal elites, meaning leading constitutional scholars and Supreme Court Justices, to justify the claim that under our Constitution race-conscious remedies and racial subordination are equal evils.

### I. COLORBLINDNESS: RADICAL, REACTIONARY, REJECTED

Contemporary colorblindness arises out of both the doctrinal flow of Supreme Court cases that washed away Jim Crow and the larger flood of changing racial ideas over the twentieth century. This Part briefly surveys those mingled elements by focusing on the period from Reconstruction to *Brown v. Board of Education*,<sup>17</sup> during which time colorblindness was often advanced as a method to attack racial hierarchy; and then from *Brown* to the *Swann* decisions in 1971,<sup>18</sup> when multiple jurisdictions developed a sudden tropism toward the colorblind Constitution, only to have the Supreme Court firmly reject colorblindness as a limitation on racial reform.

#### A. *The First Reconstruction*

Contemporary proponents of reactionary colorblindness almost invariably draw a straight line from Harlan's 1896 *Plessy* dissent to their own impassioned advocacy for race blindness in all circumstances today. Andrew Kull, for example, on the first page of his 1992 book, *The Color-Blind Constitution*, quotes Harlan's invocation of colorblindness before baldly asserting: "The comfortable metaphor stands for an austere proposition: that

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16. The following works have been especially helpful in fathoming the contemporary Court's racial jurisprudence: Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) [hereinafter Freeman, *Legitimizing Racial Discrimination*]; Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1 (1991); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758; and Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77 (2000). Siegel, Freeman, and Gotanda have all previously noted the importance of ethnicity in the emergence of colorblind reasoning, though without offering a sustained analysis of this phenomenon. Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407, 1433 (1990) [hereinafter Freeman, *The View from 1989*]; Gotanda, *supra*, at 61-62; Siegel, *supra*, at 103-05; see also Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753, 1772-74 (2001) (noting that Powell's opinion in *Bakke* treats race as ethnicity).

17. 347 U.S. 483 (1954).

18. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971).

American government is, or ought to be, denied the power to distinguish between its citizens on the basis of race.”<sup>19</sup> Like virtually every other modern fan, however, Kull elides Harlan’s acknowledgement of white superiority in the very paragraph in which he proclaimed fealty to colorblindness. That paragraph began: “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 . . . .”<sup>20</sup> As this statement makes immediately manifest, the earliest battles over colorblindness took place in terms and with implications we scarcely understand today.

The debate in *Plessy* over the state’s use of race did not turn on affirmative action, as it does now—indeed, the Congress which drafted the Fourteenth Amendment also enacted numerous laws specifically benefiting blacks.<sup>21</sup> Rather, the central question concerned where to place limits on the state’s participation in fostering the separation of racial groups understood—by all members of the Court—to be unequal by nature (hence Harlan’s comfortable endorsement of white superiority). Harlan and the majority agreed on the basic premise that the state could enforce racial separation in the social but not in the civic or political arenas; they differed on where to draw the line between those spheres.<sup>22</sup> For Harlan, the segregated train cars at issue in *Plessy* implicated the capacity of blacks to participate as full citizens in civil life, whereas the majority saw such segregation only as a regulation of social relations sanctioned by long usage and custom. Two years later, Harlan would write for a unanimous Court in supporting a whites-only high school, finding no “clear and unmistakable disregard of rights secured by the supreme law of the land”—education, Harlan concluded, lay within the social sphere in which the state could mandate racial separation.<sup>23</sup>

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19. ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 1 (1992); see also William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 781-82 (1979) (“[Harlan] believed the enactment of the Civil War amendments should therefore be construed by the Court as altogether disallowing [the assignment of legal rights] by race at all[.]”).

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

21. Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430-31 (1997); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 789 (1985). Kull concedes that the debate about colorblindness is now centrally about affirmative action, and as such differs fundamentally from its original contours. KULL, *supra* note 19, at 6. Despite this concession, his analysis largely proceeds as if colorblindness describes a timeless principle rather than a policy prescription tied necessarily to contemporary racial politics.

22. Cf. Mark Tushnet, *The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston*, 74 J. AM. HIST. 884, 886 (1987) (offering definitions of social, civil, and political rights in Reconstruction jurisprudence).

23. *Cumming v. County Bd. of Educ.*, 175 U.S. 528, 545 (1899); see Earl M. Maltz, *Only Partially Color-Blind: John Marshall Harlan’s View of Race and the Constitution*, 12 GA. ST. U. L. REV. 973, 989 (1996).

Harlan simply never meant to proscribe all governmental uses of race through his evocative call for colorblindness. Indeed, a fairer read (albeit one that also suffers from historical presentism) would link Harlan's effort to craft a broad conception of the civil sphere to opposition to state involvement in racial oppression, or more generally to an antisubordination stance. The civil arena mattered so greatly because state exclusions from public life threatened to reduce the newly emancipated once again to an inferior social status sanctified by law. Thus, immediately before his invocation of colorblindness, Harlan stated that "in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here."<sup>24</sup> And in another, more compelling portion of his dissent, he asked: "What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?"<sup>25</sup> Harlan's central objection to Louisiana's use of race in *Plessy* turned on relations of group domination and subordination, on state-sanctioned superior classes and legally degraded castes. Whether or not one can fairly harness Harlan to a pro-affirmative action interpretation of the Fourteenth Amendment, the call for colorblindness during Reconstruction, as in Harlan's hands, principally aimed at combating racial oppression.<sup>26</sup>

Even during that epoch, though, colorblindness had the potential to impede efforts to break down racial hierarchy. After *Plessy*, explicitly race-based regulations designed to enforce a racial caste system arose across a broad range of "social" arenas, from education to marriage to public facilities. But in the civil and political spheres, involving, for instance, jury duty and voting, the Court barred racial exclusion in cases such as *Strauder v. West Virginia*.<sup>27</sup> In response, in these areas colorblind subordination became the norm, and encountered no constitutional hostility. Thus, in *Williams v. Mississippi*, the Court considered a poll tax and other facially race-neutral limitations on voting which Mississippi boldly admitted were aimed at getting around the

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24. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

25. *Id.* at 560.

26. The metaphor of "colorblindness" should be more properly regarded as having been introduced into our constitutional lexicon not by Harlan but by Homer Plessy's attorney, Albion Tourg e, who stridently insisted on the connection between ending racial categorization and protecting blacks from state-mandated subordination. Brief of Plaintiff in Error at 11-12, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (No. 210), 1893 WL 10660. Tourg e directly linked categorical and subordinating practices in challenging the white supremacist assumptions underlying the rules of racial classification that made any person of visible African descent black: "Why not count everyone as white in whom is visible any trace of white blood? There is but one reason to wit, the domination of the white race." *Id.* at 11, quoted in Cheryl I. Harris, *The Story of Plessy v. Ferguson: The Death and Resurrection of Racial Formalism*, in CONSTITUTIONAL LAW STORIES 181, 210 (Michael C. Dorf ed., 2004).

27. *Strauder v. West Virginia*, 100 U.S. 303 (1880).

constitutional prohibition on racial discrimination: “Restrained by the Federal Constitution from discriminating against the negro race, the convention discriminates against its characteristics, and the offences to which its criminal members are prone.”<sup>28</sup> Responding to this confession of anti-black hostility, the Court nevertheless ruled that “nothing tangible can be deduced from this. . . . [T]he operation of the [Mississippi] constitution and laws is not limited by their language or effects to one race. They reach weak and vicious white men as well as weak and vicious black men . . . .”<sup>29</sup> Even where a state confessed its discriminatory intent, so long as it accomplished its malignant purpose in a manner that did not employ a racial classification, the Court found the Constitution satisfied. Having forbidden states from using race as an explicit basis for subjugation in the civil and political spheres, the Court nonetheless acquiesced to racial oppression in those arenas so long as achieved in a facially colorblind manner.

Colorblindness as a ban against the use of race has no inherent political valence; instead, its emancipatory or repressive implications arise from the racial milieu generally and even more specifically in terms of the racial classifications to be prohibited. Colorblindness is merely a rule or a policy prescription; one must distinguish colorblindness as a means and as an end, for as a method it utterly lacks a transcendent moral quality, and instead takes on political and social significance only by virtue of its instant application.<sup>30</sup> During Reconstruction and especially after *Plessy*, proponents of colorblindness saw in it a potential to undermine the explicitly race-based subordination that formed the core of Jim Crow segregation. But during this period, and in a way that strikingly anticipated our current situation, the Supreme Court instead used colorblind reasoning to preserve racial hierarchy, by upholding facially neutral but nevertheless deeply racially oppressive state action.<sup>31</sup>

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28. *Williams v. Mississippi*, 170 U.S. 213, 222 (1898) (internal quotation omitted).

29. *Id.*

30. Of course, if one defined the colorblind ideal not as a society free from racial hierarchy but as a society in which no racial distinctions are made, then obviously ending racial categorization would promote this goal. This “ideal,” however, depends for its social relevance and moral stature on the unstated assumption that this future society would exist in contradistinction to a present one marred by racial hierarchy. Absent this assumption, we might with equal moral authority call for a society in which persons did not acknowledge differences in eye color or height. Obviously such calls would not carry the weight of demands for colorblindness, for the simple reason that American society is not deeply stratified along these dimensions. To proclaim a colorblind vision is to evoke the dream of a racially egalitarian society; again, however, without demonstrating that colorblindness as a means will likely get us to that promised land.

31. The clearest contemporary analog to *Williams* is *Washington v. Davis*, 426 U.S. 229 (1976). If one understands colorblindness as requiring that *all* racial classifications be considered suspect, *Davis* insists in complementary form that *only* the explicit use of race raises constitutional concerns. For reasons of length, however, this Article focuses on reactionary colorblindness as a sword against race-conscious remedies, rather than as a

B. *Emerging Theories of Race, 1900-1950s*

By the late nineteenth century, the earlier American belief that racial hierarchy reflected a divine order made manifest by the continental separation of races and by their obvious branding with different colors had largely given way to the certainty that racial stratification reflected a natural ordering of myriad human groups measurable through the techniques of scientific empiricism. Under this conception, races reflected natural biological divisions, and racial groups differed not just in terms of physical markers, but more fundamentally in terms of group abilities, temperaments, and destinies. There was, under this world view, no “racism” as such, but instead only social and legal practices that recognized innate differences.

Race science, however, began to break down in the early years of the twentieth century. In part, this reflected increasing categorical instability. The more closely students of race parsed humanity, the more unstable racial categories became, including the “easy” groupings of white and black, red and yellow.<sup>32</sup> In addition, however, by the 1920s a more fundamental attack on race had developed, challenging not just racial categories, but the connection between race and ability. Led by cultural anthropologist Franz Boas, social scientists increasingly rebutted the claim that race explained anything at all about group or individual temperament, intelligence, or potential.<sup>33</sup> Boas began arguing as early as the 1880s that culture, and not human evolution, explained differences between groups. By the 1910s and 1920s, many social scientists insisted that race either did not exist at all (a nod to categorical instability) or amounted to no more than superficial physical differences. In either event, however, the real action lay not in the physical realm but instead within the sphere of culture, understood as the sum total of social organization (rather than as the folkways of particular sub-groups).<sup>34</sup> Thus, in the early part of the twentieth century, a liberal race theory developed that pictured race in terms of

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shield for race-neutral but nevertheless status-enforcing state action, and so gives little attention to *Davis* and its progeny.

32. Compare *Ozawa v. United States*, 260 U.S. 178, 197-98 (1922) (unanimously holding that “white person” under U.S. naturalization law meant persons of the “Caucasian race”), with *United States v. Bhagat Singh Thind*, 261 U.S. 204, 208-13 (1923) (unanimously rejecting the argument that “white person” should be defined principally in terms of membership in the “Caucasian race”). See generally HANEY LÓPEZ, *WHITE BY LAW*, *supra* note 12, at 79-107 (discussing *Ozawa* and *Thind* in terms of the legal construction of race).

33. THOMAS F. GOSSETT, *RACE: THE HISTORY OF AN IDEA IN AMERICA* 418 (new ed. 1997). Gossett adds that “it is possible that Boas did more to combat race prejudice than any other person in history.” *Id.*

34. See MATTHEW FRYE JACOBSON, *BARBARIAN VIRTUES: THE UNITED STATES ENCOUNTERS FOREIGN PEOPLES AT HOME AND ABROAD, 1876-1917*, at 149-151 (2000); SMEDLEY, *supra* note 13, at 297-303. For an insightful reading of antimiscegenation cases against these shifting racial paradigms, see Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of “Race” in Twentieth-Century America*, 83 J. AM. HIST. 44 (1996).

merely superficial physical differences, and that decidedly repudiated the claim that nature placed races in hierarchical relationship to each other. This theory was “liberal” in the sense that it broke from racial theories that sought to justify the status quo of stark racial hierarchy, and also because it rejected the connection between racial group membership and individual ability and worth. It was also liberal in contradistinction to the more radical claim, still on the horizon, that race and racism formed bedrock elements of U.S. society that would necessitate fundamental structural change to achieve racial justice.

Despite the ascendance of this liberal view of race as physiognomic and irrelevant, however, in the 1920s and into the 1930s powerful segments of U.S. society, including the courts and legislatures, remained committed to biological theories of innate and meaningful difference. During this period, the naturalistic conception of race evolved into eugenics, biological race theory’s most virulent expression. Under this ideology, not only did nature place races along a continuum of intelligence, capacity, and worth, but racial mixing inevitably led to racial degeneration, thus warranting aggressive efforts to maintain supposed racial purity. Perhaps no one more successfully proselytized this calumny in the United States than Madison Grant in his 1916 text *The Passing of the Great Race*:

The cross between a white man and an Indian is an Indian; the cross between a white man and a negro is a negro; the cross between a white man and a Hindu is a Hindu; and the cross between any of the three European races and a Jew is a Jew.<sup>35</sup>

These beliefs spawned legislation in the United States closing the border to southern and eastern European immigrants, and also promoting the sterilization of “low-grade” whites (with “grade” supposedly measuring, among other things, intelligence and criminality).<sup>36</sup> In Germany, such views gave rise to the 1935 Nuremberg Laws on Citizenship and Race and soon thereafter to the monstrosity of racial extermination. Experience with this brand of racial extremism during World War II spelled the near death of eugenics in the United States.<sup>37</sup>

The extreme racialization of European groups, in particular the utter dehumanization of Jews, led to the introduction of a new word into the popular vocabulary of the United States: “racism.” George Fredrickson, in his history of that phenomenon, concludes that “[t]he word ‘racism’ first came into common usage in the 1930s when a new word was required to describe the

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35. Quoted in JACOBSON, *supra* note 34, at 161.

36. Immigration Act of 1924, ch. 190, 43 Stat. 153; *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Buck v. Bell*, 274 U.S. 200 (1927).

37. Justice Douglas seemingly drew on the lessons of Nazism when he struck down Oklahoma’s criminal sterilization law on the grounds that “[i]n evil or reckless hands [the power to sterilize] can cause races or types which are inimical to the dominant group to wither and disappear.” *Skinner*, 316 U.S. at 541.

theories on which the Nazis based their persecution of the Jews.”<sup>38</sup> The emergence of “racism” marked a tremendously important intellectual juncture, for it signaled an increasingly robust recognition that notions of racial hierarchy were contestable (and indeed detestable) ideas and not instead acquiescence to natural fact. In the 1940s, undoubtedly drawing on the terrible events in Europe, Justice Frank Murphy became the first Supreme Court Justice to use the word racism in a Court opinion.<sup>39</sup> He used that term in five cases between 1944 and 1948, clearly having in mind the racial horrors of Nazism—as when he condemned efforts to restrict land ownership by persons of Japanese descent as “an unhappy facsimile, a disheartening reminder, of the racial policy pursued by those forces of evil whose destruction recently necessitated a devastating war. It is racism in one of its most malignant forms.”<sup>40</sup> By and large, however, the concept of racism was not applied across the white/non-white divide until the 1960s, instead remaining a term that primarily designated illegitimate and unfounded thinking that racially distinguished among whites.<sup>41</sup> Until the 1960s, for many the color line continued to mark a natural division between superior and inferior races. Murphy’s invocation of racism proved two decades premature, for the Court would not again talk in such stark terms until 1967, when in *Loving v. Virginia* it branded antimiscegenation laws instances of “White Supremacy.”<sup>42</sup>

Nevertheless, the seemingly natural equation of races with socially salient differences had substantially foundered by mid-century, even as applied to blacks and other non-whites. Reflecting but also further catalyzing this break, in 1944 Gunnar Myrdal published *An American Dilemma*, marking a watershed in twentieth century racial thought.<sup>43</sup> Building on the framework advanced by Boas and other liberal race theorists, and with financial support from the Carnegie Foundation to underwrite “a comprehensive study of the Negro in the United States,” Myrdal commissioned dozens of studies by many of the leading social scientists of the day, shaping the whole into a massive indictment of the systemic oppression of blacks in the United States.<sup>44</sup> Myrdal and his colleagues believed that race reflected social rather than biological divisions, or at most amounted to superficial physical differences such as “skin color,” and had little

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38. GEORGE M. FREDRICKSON, *RACISM: A SHORT HISTORY* 5 (2002).

39. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 209 (1944) (Murphy, J., concurring); *Korematsu v. United States*, 323 U.S. 214, 233 (1944) (Murphy, J., dissenting); *Ex parte Endo*, 323 U.S. 283, 307 (1944) (Murphy, J., concurring); *Duncan v. Kahanamoku*, 327 U.S. 304, 334 (1946) (Murphy, J., concurring); *Oyama v. California*, 332 U.S. 633, 664 (1948) (Murphy, J., concurring).

40. *Oyama*, 332 U.S. at 673 (Murphy, J., concurring).

41. FREDRICKSON, *supra* note 38, at 156, 167.

42. 388 U.S. 1, 7 (1967).

43. GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (20th anniversary ed. 1962).

44. *Id.* at li, liv-lvi.

or nothing to do with intelligence, morals, temperament, or character.<sup>45</sup> Instead, they laid social differences between races directly at the feet of culture and environment, or more specifically, the power of whites over blacks: “[P]ractically all the economic, social, and political power is held by whites. . . . It is thus the white majority group that naturally determines the Negro’s ‘place.’ All our attempts to reach scientific explanations of why the Negroes are what they are and why they live as they do have regularly led to determinants on the white side of the race line.”<sup>46</sup> Myrdal’s tome solidified the demise of biological racism among progressive thinkers and established a new paradigm in which social differences between races that previously served as evidence of innate superiority and inferiority now came to be understood as the result of illegitimate racial practices.<sup>47</sup>

This new racial analysis was simultaneously radical and palliative: radical, because it laid the blame for inequality squarely on a dominant culture wedded to racial hierarchy, but palliative because it assured America that triumph over its race problems lay readily within reach. Although the compendious studies assembled in *An American Dilemma* demonstrated the deep structural and functional dynamics of racial subordination, Myrdal’s analysis relegated this material to the background, instead emphasizing discrimination as a matter of individual attitudes. Building on the view that race reduced to phenotype and nothing more, Myrdal attributed racially harmful actions to the persistence of the irrational belief that race said something meaningful about individual capacity. Thus, in his introduction Myrdal offered this prescription for change, using italics for emphasis:

*The American Negro problem is a problem in the heart of the American. . . . It is there that the decisive struggle goes on. This is the central viewpoint of this treatise. Though our study includes economic, social, and political race relations, at bottom our problem is the moral dilemma of the American. . . .*<sup>48</sup>

The core problem of race, Myrdal asserted, lay in misguided attitudes: the “dilemma” to which his title pointed was the need for Americans to choose between their vaunted ideals and their embrace of irrational prejudice. Its resolution, Myrdal assured his readers, was already settled. For Myrdal, the telos of American history pointed to a fast-approaching end to the injurious mythology of race. “What America is constantly reaching for is democracy at home and abroad,” he wrote in his concluding chapter; “[t]he main trend in its history is the gradual realization of the American Creed.”<sup>49</sup> The insurgent liberal race theory of the early twentieth century—in which race comprised

45. *Id.* at 115-16.

46. *Id.* at lxxv; *see also id.* at 75 (“White prejudice and discrimination keep the Negro low in standards of living, health, education, manners and morals.”).

47. STEPHEN STEINBERG, *TURNING BACK: THE RETREAT FROM RACIAL JUSTICE IN AMERICAN THOUGHT AND POLICY* 50 (1995).

48. MYRDAL, *supra* note 43, at lxxi.

49. *Id.* at 1021.

only irrelevant somatic difference—became common wisdom among liberals by mid-century, but now further refined to include the beliefs that racial discrimination stemmed from individual maldisposition rather than structural dynamics, and that racial harmony required little more than convincing bigots to mend their irrational ways.<sup>50</sup>

### C. *The Liberal Argument for Colorblindness in Brown*

In its campaign against segregation, the NAACP Legal Defense Fund continued the Reconstruction era pattern of attacking the use of racial classifications as a subordinating practice, and also began to draw on Myrdal's groundbreaking work. In 1947 Thurgood Marshall argued before the Supreme Court in *Sipuel v. Board of Regents of University of Oklahoma*, a precursor to *Brown*, that "[c]lassifications and distinctions based on race or color have no moral or legal validity in our society. They are contrary to our constitution and laws . . . ."<sup>51</sup> Marshall attacked not classification *per se*, but rather segregation, and more particularly the oppression attendant to Jim Crow. In *Plessy*, the Court had rejected the idea that segregation harmed blacks, infamously writing: "If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."<sup>52</sup> In turn, for the next five decades the Court continued to reason as if no subordination resulted from segregation, making the question of harm a central element in the challenge to *Plessy* and its progeny. To prove this victimization in *Sipuel*, Marshall turned for support to Myrdal, extensively citing *An American Dilemma*.<sup>53</sup> He used the same strategy combining an anticlassification argument with an emphasis on segregation's deleterious consequences in *Brown*, arguing that "[d]istinctions drawn by state authorities on the basis of color or race violate the Fourteenth Amendment,"<sup>54</sup> and invoking *An American Dilemma* to support the contention that segregation necessarily caused racial degradation.<sup>55</sup> During oral argument in *Brown*, Marshall insisted that "Gunnar Myrdal's whole book is against the argument [for segregation]. . . . I know of no scientist that has made any study, whether he be anthropologist or sociologist, who does not admit that segregation harms the child."<sup>56</sup>

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50. Proselytizing a similar message, Ashley Montagu also contributed to the new liberal consensus on race. M.F. ASHLEY MONTAGU, *MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE* (Harper 1952) (1942).

51. Brief for Petitioner at 27, *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948) (No. 369).

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

53. See, e.g., Brief for Petitioner, *supra* note 51, at 28-29, 46, 51.

54. Brief for Appellants at 16, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (No. 1), 1953 WL 48699.

55. *Id.* at 203.

56. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 574-75 (1976) (quoting the oral

The Supreme Court in *Brown* seemingly adopted Myrdal's framing of racial dynamics as irrational prejudice. In striking down school segregation, Chief Justice Earl Warren identified the principal harm of segregation as the "feeling of inferiority as to their status in the community" generated in black children by state-mandated racial separation.<sup>57</sup> This allusion to stigma invoked the prejudice model's emphasis on psychological injury, even as Warren's failure to note any of segregation's material harms implied an exclusive concern with individual bad actors and victims. That Warren said nothing about the gross inequalities attendant to segregation no doubt reflected other factors besides simply a subscription to liberal race theory. As many commentators have noted, Warren crafted his opinion to disparage as little as possible Southern racial institutions, the better to secure cooperation from other Justices as well as targeted school districts. In addition, the posture of the cases consolidated in *Brown* constrained a focus on material inequality, because the goal there was to finally attack the "separate" rather than merely the "equal" component of *Plessy*'s "separate but equal" formulation.<sup>58</sup> Nevertheless, Myrdal's analysis set the terms of the debate in *Brown* about the nature of racism. A striking illustration of this comes from a memo on the case written by William Rehnquist in 1952, when he served as a clerk to Justice Robert Jackson. It concluded: "I think *Plessy v. Ferguson* was right and should be re-affirmed. If the Fourteenth Amendment did not enact Spencer's *Social Statics*, it just as surely did not enact Myrddahl's [sic] *American Dilemma* [sic]."<sup>59</sup> The debate in *Brown* over the wrong of segregation was conducted in terms of liberal race theory. When Warren declared segregation inherently unequal, he adopted Myrdal's approach, leaving no doubt of his intellectual sources in his famous footnote eleven, which ended with "And see generally Myrdal, *An American Dilemma*."<sup>60</sup>

#### D. *The Use and Rejection of Colorblindness as a Limit on Racial Reform*

Even a decade after *Brown*, however, virtually no southern school systems had actually desegregated.<sup>61</sup> White support for Jim Crow segregation ran the

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argument in *Brown*); see also MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950*, at 119 (1987).

57. *Brown*, 347 U.S. at 494.

58. The parties stipulated that the targeted school districts had "been equalized, or [were] being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors." *Id.* at 492.

59. Memorandum from William H. Rehnquist to Justice Robert Jackson, *A Random Thought on the Segregation Cases* (1952), reprinted in 117 CONG. REC. 45, 440-45, 441 (1971).

60. *Brown*, 347 U.S. at 495 n.11. On the controversy sparked by Warren's citation to Myrdal in particular, see KLUGER, *supra* note 56, at 706-07.

61. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 52 (1991).

gamut from endless litigation on the part of local school boards, to bold intransigence by state officials, to violence by angry mobs.<sup>62</sup> In addition, beginning almost immediately in the wake of *Brown*, various jurisdictions, many but not all of them in the South, declared that the Constitution barred discrimination but did not require actual integration.<sup>63</sup> From there, it was but a short step to the contention that the Constitution affirmatively prohibited the pursuit of integration through race-conscious means. Thus, in 1964 a district court in Ohio declared:

The law is color-blind and . . . that principle, which was designed to insure equal protection to all citizens, is both a shield and a sword. While protecting them in their right to be free from racial discrimination, it at the same time denies them the right to consideration on a racial basis when there has been no discrimination.<sup>64</sup>

The following year, the federal district court in South Carolina quoted approvingly the conclusion that “[t]he Constitution is color-blind; it should no more be violated to attempt integration than to preserve segregation.”<sup>65</sup> By 1965, reactionary colorblindness had emerged: according to the new friends of colorblindness, the Constitution forbade any state use of race, whether to segregate or—much more pertinently—to integrate.

But the effort to fashion a colorblind constraint on racial reform was also opposed at the lower court level, and eventually resoundingly rejected by the Supreme Court. Judge John Minor Wisdom of the Fifth Circuit offered the most comprehensive rebuttal:

The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose.<sup>66</sup>

Wisdom recognized the necessity of measuring the constitutional significance of colorblindness against the uses of race ostensibly proscribed. Where the goal was integration, he concluded, color-conscious means were both constitutional and necessary: “[D]isestablishing segregation among students, distributing the

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62. See, e.g., *Griffin v. County Sch. Bd.*, 377 U.S. 218, 231, 233-34 (1964) (holding that the county could not shut down its public schools to avoid complying with *Brown*).

63. On remand from *Brown*, the district court in *Briggs v. Elliott* insisted in 1955 that the Constitution “does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation.” 132 F. Supp. 776, 777 (E.D.S.C. 1955).

64. *Lynch v. Kenston Sch. Dist. Bd. of Educ.*, 229 F. Supp. 740, 744 (N.D. Ohio 1964).

65. *Randall v. Sumter Sch. Dist. No. 2*, 241 F. Supp. 787, 789 (E.D.S.C. 1965) (citation omitted).

66. *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 876 (5th Cir. 1966).

better teachers equitably, equalizing facilities, selecting appropriate locations for schools, and avoiding resegregation must necessarily be based on race.”<sup>67</sup>

The Supreme Court added its voice to the rejection of colorblindness in 1968 in *Green v. County School Board*, and again twice in the 1971 *Swann* cases. In *Green*, a unanimous Court rejected as inadequate a “voluntary” integration plan, emphatically insisting that *Brown* did not simply prohibit discrimination: school boards were “clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.”<sup>68</sup> In 1971, in *Swann v. Charlotte-Mecklenburg Board of Education*, the Court unanimously reiterated its conclusion that the Constitution required the actual dismantling of inequality, through race-conscious means if necessary, and explicitly repudiated the school board’s contention that the Constitution permitted only “color blind” measures.<sup>69</sup> Then, in a related case, the Court, again unanimously, rejected North Carolina’s legislative effort to craft a “color blind” limit on the state use of race to remedy segregation:

[T]he statute exploits an apparently neutral form to control school assignment plans by directing that they be “color blind”; that requirement, against the background of segregation, would render illusory the promise of *Brown v. Board of Education*. Just 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. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems.<sup>70</sup>

The unanimous Court could not have more clearly rejected an anticlassification reading of the Constitution.

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67. *Id.* at 877; *cf.* *Wanner v. County Sch. Bd.*, 357 F.2d 452, 454 (4th Cir. 1966) (holding that the Constitution allows school boards to use race to end racial discrimination); *Offermann v. Nitkowski*, 248 F. Supp. 129, 131 (W.D.N.Y. 1965) (“[T]he Fourteenth Amendment, while prohibiting any form of invidious discrimination, does not bar cognizance of race in a proper effort to eliminate racial imbalance in a school system.”); *Taylor v. Bd. of Educ.*, 191 F. Supp. 181, 196 (S.D.N.Y. 1961) (“[T]he Constitution is not this color-blind.”). See generally Robert L. Carter, *De Facto School Segregation: An Examination of the Legal and Constitutional Questions Presented*, 16 W. RES. L. REV. 502, 524 (1965) (race-conscious legislation that protects racial minorities does not offend equal protection); J. Skelly Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation*, 40 N.Y.U. L. REV. 285, 298 (1965) (“Voluntary action by school authorities seeking to reduce racial imbalance is easily supported once the ‘the Constitution is color-blind’ argument is analyzed and answered. In fact, it is difficult to understand how a court could actually hold that a state may not act to relieve the inequality caused by de facto segregation . . .”).

68. 391 U.S. 430, 437-38 (1968).

69. 402 U.S. 1, 19 (1971).

70. *N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43, 45-46 (1971) (citation omitted); see also *McDaniel v. Barresi*, 402 U.S. 39, 41-42 (1971) (unanimously holding that a school board could properly take race into account in attempting to achieve racial balance).

By the end of the 1960s, colorblindness had become a favored argument among those attempting to protect segregation. Simultaneously, it had lost much of its attractiveness to those striving for racial progress. Partly, the colorblindness argument pushed by Marshall in *Sipuel* and after had proved unnecessary to the defeat of Jim Crow laws. Meanwhile, by the mid-1960s Congress had taken up the challenge of racial stratification, culminating in a series of civil rights acts addressing a range of social spheres, from the housing market to the workplace to education. More importantly, racial activists increasingly perceived a need for race-conscious means to respond effectively to racial inequality, and also saw the reactionary potential of colorblindness. By the mid-1960s, the proponents of racial justice had largely dropped objections to racial classification per se and instead focused on the core fact of racial hierarchy, while those who sought to preserve the racial status quo increasingly proclaimed a new fealty to colorblindness. To restate: the most recent antecedent to contemporary colorblindness is not the anticlassification advocacy of Thurgood Marshall and the civil rights movement, but reactionary strategizing by the dedicated defenders of white supremacy.

## II. FROM RACE TO ETHNICITY

Myrdal's thesis that individual prejudice formed the heart of American race relations came under sustained attack in the 1960s. The pronounced hostilities and profound inequalities that burdened blacks and other minorities hardly seemed explicable as merely a matter of prejudice, and reforming attitudes seemingly promised at best only a partial salve to subordination. Race-conscious, results-oriented efforts to undo the legacy of centuries of racial hierarchy struck many as obvious necessities, and in the mid- to late-1960s, the nation's political leadership began to pass numerous laws intended to end racial domination, ranging from antidiscrimination statutes to social welfare legislation. In retrospect, however, the window for fundamental change opened just slightly before blowing shut again in the face of a quickly gathering backlash. That backlash took multiple forms, including angry opposition to affirmative action and busing, and involved not just persons with commitments to old style supremacist politics, but also those who counted themselves as staunch liberal supporters of civil rights. Among these neoconservatives—liberal defenders of formal rights who nevertheless broke with the civil rights movement over race-conscious remedies—Nathan Glazer and Patrick Moynihan proved early leaders. Contemporary colorblindness has its origins in this era, not so much in its brash use by the recalcitrant South, but in the efforts by northern opponents of affirmative action to craft a conception of racial dynamics in the United States that simultaneously embraced the moral necessity of ending de jure discrimination and yet rejected race-conscious remedies.

*A. Structural Racism*

In 1967, the same year that the Supreme Court in *Loving* described Virginia's antimiscegenation statute as "obviously an endorsement of the doctrine of White Supremacy,"<sup>71</sup> the term "institutional racism" entered the national vocabulary. In *Black Power*, Stokely Carmichael and Charles Hamilton took square aim at the notion that racism in the United States reduced solely to the action of individuals. Instead, they insisted, racism also formed part of the daily operation of "established and respected forces in the society,"<sup>72</sup> providing a tragic example to drive their meaning home:

When white terrorists bomb a black church and kill five black children, that is an act of *individual racism*, widely deplored by most segments of the society. But when in that same city—Birmingham, Alabama—five hundred black babies die each year because of the lack of proper food, shelter and medical facilities, and thousands more are destroyed and maimed physically, emotionally and intellectually because of conditions of poverty and discrimination in the black community, that is a function of *institutional racism*.<sup>73</sup>

One did not need to read *Black Power*, however, to hear echoes of the emerging structural view of race. Indeed, in 1968 one could scarcely avoid that developing perspective, for in that year the National Advisory Commission on Civil Disorders published what became popularly known as the Kerner Report.<sup>74</sup> Seeking to explain the devastating riots marching across the country, from Los Angeles in 1965, to Chicago in 1966, to Newark in 1967, the report famously warned that the United States was "moving toward two societies, one black, one white—separate and unequal."<sup>75</sup> Butressing this claim, the report detailed the punishing reality confronting African Americans, compiling over five hundred pages of evidence on the extreme material hardships of overt discrimination, segregated and inferior schooling, inadequate housing, lack of access to healthcare, systemic police violence, and labor market exclusion.<sup>76</sup> More than simply painting the tenebrous circumstances confronting blacks, however, the report identified its root cause not in blacks themselves but in American racial dynamics. Focusing particularly on the ghetto, the report stated on its first page that "[s]egregation and poverty have created in the racial ghetto a destructive environment totally unknown to most white Americans. . . . White institutions created it, white institutions maintain it, and white society condones

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71. *Loving v. Virginia*, 388 U.S. 1, 7 (1967).

72. STOKELY CARMICHAEL & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 4 (1967).

73. *Id.* (emphasis added).

74. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, *REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS* (1968) [hereinafter *KERNER COMMISSION*].

75. *Id.* at 1.

76. *See id.* at 11-13 (summarizing the Commission's findings).

it.”<sup>77</sup> Regarding the riots, the Kerner Report concluded that they reflected deep anger and frustration with the grinding injustices imposed on minorities in America, laying the blame for racial unrest squarely at the feet of white society: “White racism,” the Report insisted, “is essentially responsible for the explosive mixture which has been accumulating in our cities since the end of World War II.”<sup>78</sup>

The commission that issued this report was no radical group, nor did the report disappear into obscurity. Instead, it rose to first place on the *New York Times* paperback best-seller list, selling some two million copies.<sup>79</sup> The nation’s elites, let alone the country as a whole, hardly embraced collective responsibility for white racism, but a dramatic shift in racial understandings was nonetheless developing. The liberal conception of racism, tied to a vocabulary of “prejudice,” “race relations,” and “discrimination,” began to give way in the 1960s to a more structural understanding marked by such words as “subordination,” “white supremacy,” and “institutional racism.” This shift tracked the emergence of a new literature on race, some radical, some scholarly, and some mainstream, but all of it focused on the pervasive and calamitous nature of racial oppression in the United States.<sup>80</sup> Arguably, one could also measure this evolution in terms of legal doctrine: cases like *Green* and *Swann* in the educational context, *Griggs* in the employment arena, and the 1965 Voting Rights Act, seemed to stand for the proposition that results mattered.<sup>81</sup> They also signaled a growing recognition that achieving equality demanded going beyond proscribing openly discriminatory practices and required in addition race-conscious efforts capable of transforming embedded patterns and entrenched oppressions.

### B. Race as Ethnicity

In the face of the ascendant structural critique, liberal race theory did not collapse but evolved in a portentous fashion. Beginning in the early 1960s,

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77. *Id.* at 1.

78. *Id.* at 91.

79. STEINBERG, *supra* note 47, at 77.

80. For a sampling of the literature from this era focused on racial domination, see RODOLFO ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* (1972); ROBERT L. ALLEN, *BLACK AWAKENING IN CAPITALIST AMERICA* (1970); ROBERT BLAUNER, *RACIAL OPPRESSION IN AMERICA* (1972); CARMICHAEL & HAMILTON, *supra* note 72; FRANTZ FANON, *THE WRETCHED OF THE EARTH* (Constance Farrington trans., Grove Press 1966); WILLIAM H. GRIER & PRICE M. COBBS, *BLACK RAGE* (1968); ALEX HALEY & MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* (1964); WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812* (1968); KERNER COMMISSION, *supra* note 74; MARTIN LUTHER KING, JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* (1967).

81. *Green v. County Sch. Bd.*, 391 U.S. 430 (1968); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

some liberals began developing a theory of race as ethnic differences that could compete with, and indeed has largely come to supplant, the focus on structural racism. The sociologists Nathan Glazer and Patrick Moynihan stand out among the pioneers of this racial retooling. In 1963, they published a history of New York City, *Beyond the Melting Pot: The Negroes, Puerto Ricans, Jews, Italians, and Irish of New York City*, that effectively laid the groundwork for contemporary reactionary conceptions of race relations in the United States.<sup>82</sup>

“Ethnicity” is now firmly ensconced in the American social vocabulary, but like liberal race theory and “racism” its origins lie in the early twentieth century.<sup>83</sup> In the hands of cultural anthropologists like Franz Boas, liberal race theory sought to break the connection between race and identity, arguing that human differences reflected culture, not biology. In making this argument, anthropologists had in mind a broad definition of culture, something akin to social environment. More or less simultaneously, however, others searched for a nomenclature by which to counteract increasingly virulent hierarchies among whites while still preserving the notion that groups differed in important and normatively positive ways. Ethnicity offered a helpful rhetoric, particularly to members of the nascent Zionist movement, who sought at once to preserve a notion of a distinct culture and at the same time to repudiate claims of innate Jewish racial inferiority.<sup>84</sup> Yet even as ethnicity ostensibly offered an alternative to the vocabulary of race, it remained closely tied to the complex of racial ideas. First, ethnicity sought to preserve the notion that descent powerfully shaped individual and group identity; it did so by emphasizing cultures closely associated with and indeed handed down generation by generation within distinct groups. Because ethnic culture depended on familial and kinship ties, ethnicity was not primarily a matter of volition but, like race, of blood.<sup>85</sup> Second, ethnicity sought to repudiate not all racial hierarchies but

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82. NATHAN GLAZER & DANIEL PATRICK MOYNIHAN, *BEYOND THE MELTING POT: THE NEGROES, PUERTO RICANS, JEWS, ITALIANS, AND IRISH OF NEW YORK CITY* (1963).

83. OMI & WINANT, *supra* note 13, at 14.

84. David Roediger describes the effort to fashion ideas that explained Jewish solidarity but avoided racial terms linked to notions of innate Jewish inferiority:

Anti-Semitic pogroms internationally, Klan organization in the United States, and assimilative pressures on immigrants seemed to threaten Jewish survival. In such crosscurrents, claiming white racial status was axiomatic for Zionist intellectuals, but such a claim was insufficient to define what made Jewishness distinctive and viable. New terms and new meanings for old terms seemed required . . . ethnic group, ethnic faction, and ethnic type, for example.

DAVID R. ROEDIGER, *WORKING TOWARD WHITENESS: HOW AMERICA'S IMMIGRANTS BECAME WHITE: THE STRANGE JOURNEY FROM ELLIS ISLAND TO THE SUBURBS* 22 (2005); *see also* Victoria Hattam, *Ethnicity: An American Genealogy*, in *NOT JUST BLACK AND WHITE: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON IMMIGRATION, RACE, AND ETHNICITY IN THE UNITED STATES* 42, 45-50 (Nancy Foner & George M. Fredrickson eds., 2004) (discussing the early elaboration of ethnic ideas in the context of a long-running discussion in the *Menorah Journal* over the nature of Jewish solidarity).

85. Stephen Cornell & Douglas Hartmann, *Conceptual Confusions and Divides: Race, Ethnicity, and the Study of Immigration*, in *NOT JUST BLACK AND WHITE*, *supra* note 84, at

only those putatively dividing whites; proponents of ethnicity very much endeavored to maintain the color line, and more particularly their status on that line's white side. As Nancy Foner and George Fredrickson remark, "Very much aware of the American color line, Jewish thinkers like the philosopher Horace Kallen and the educator Isaac Berkson strove to legitimize difference without running the risk of being put on the wrong side of the great racial divide."<sup>86</sup> In its initial elaboration, claiming an "ethnic" identity concomitantly involved asserting that one was white.<sup>87</sup>

Ethnicity depicted group cultures as static and relatively immune from broader social pressures: folkways came down more or less intact across generations. But it also drew on a dynamic and somewhat contradictory conception of group culture, one focused on stories of immigrant incorporation into the American polity. During the 1920s, University of Chicago sociologist Robert Park used the concept of cultural difference to promote a version of liberal race theory that stressed the gradual assimilation of diverse groups under the rubric of a "race relations cycle."<sup>88</sup> Under this view, immigrant groups followed a similar trajectory from exclusion, clannishness, and poverty, to eventual full inclusion, assimilation, and material success.<sup>89</sup> The influence of Park's theories reached well beyond the sociology of group relations, strongly informing popular theories of cultural pluralism and group change. When World War II demonstrated the horrors of supremacist reasoning, it helped encourage the adoption in the United States of an ethnic vocabulary that sharply distinguished between race as biology and ethnicity as culture. By this time, though, ethnicity was leavened with a dynamic conception of gradual assimilation.<sup>90</sup> In the 1950s, notions of merely ethnic rather than racial divisions helped consolidate whites into a monolithic, racially undifferentiated people ostensibly composed of increasingly irrelevant ethnic sub-groups sharing similar histories of struggle and success on America's shores.

Glazer and Moynihan innovated in *Beyond the Melting Pot* by insisting on the persistent power of ethnic identities, and by pushing ethnicity across the color line. Ethnicity would explain not only the New York histories and contemporary positions of Jews, Italians, and the Irish, but also blacks and Puerto Ricans.<sup>91</sup> This development had the potential to extend to racial

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23, 28.

86. Nancy Foner & George M. Fredrickson, *Immigration, Race, and Ethnicity in the United States: Social Constructions and Social Relations in Historical and Contemporary Perspective*, in NOT JUST BLACK AND WHITE, *supra* note 84, at 1, 4.

87. ROEDIGER, *supra* note 84, at 22-23.

88. STEPHEN STEINBERG, THE ETHNIC MYTH: RACE, ETHNICITY, AND CLASS IN AMERICA 47-48 (1981).

89. *Id.*

90. ROEDIGER, *supra* note 84, at 25; *see also* Werner Sollors, *Foreword: Theories of American Ethnicity*, in THEORIES OF ETHNICITY: A CLASSICAL READER xxix (Werner Sollors ed., 1996).

91. My analysis draws on the thorough critique of Glazer and Moynihan's work

minorities the presumption that they possessed valuable cultural traditions. But in the actual case, Glazer and Moynihan used ethnicity not to celebrate black and Latino life but to locate in their cultures the ultimate source of those groups' social failure. Consider their explanation for why minority children (unlike earlier white immigrant students) failed to learn in New York's schools:

There is little question where the major part of the answer must be found: in the home and family and community. . . . It is there that the heritage of two hundred years of slavery and a hundred years of discrimination is concentrated; and it is there that we find the serious obstacles to the ability to make use of a free educational system to advance into higher occupations and to eliminate the massive social problems that afflict colored Americans and the city.<sup>92</sup>

Continued structural impediments did not figure in their analysis.<sup>93</sup> Rather, they directed attention to "the home and family and community" for the root causes of the inferior educational, social, and material position of racial minorities. According to Glazer and Moynihan, blacks and Puerto Ricans lacked valuable folkways and artistic traditions: "[T]he Negro is only an American, and nothing else. He has no values and culture to guard and protect."<sup>94</sup> Puerto Rican culture "was sadly defective. It was weak in folk arts, unsure of its cultural traditions, without a powerful faith."<sup>95</sup> Instead, both black and Puerto Rican cultures were exclusively produced by subordination and mistreatment, and in turn incapacitated those communities, unfitting them to pursue the path of assimilation blazed by earlier ethnic groups. As applied to blacks and Puerto Ricans, ethnicity erased the enormous differences in historical experience between white immigrants and racial minorities, and gave new legitimacy to the belief that not structural disadvantage but inability, now cultural rather than innate, explained the social and material marginalization of racial minorities in the United States.

The substantive impact of reconceptualizing race as ethnicity came immediately in the rising debates over welfare and the war on poverty. Two years after publishing *Beyond the Melting Pot*, Moynihan in his capacity as Assistant Secretary of Labor in the Johnson Administration drew on ethnicity theory when he published a major paper on blacks and welfare policy that would become known as the Moynihan Report.<sup>96</sup> Moynihan framed the report around the civil rights movement's increasing demands for equality. These

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offered by Stephen Steinberg. See STEINBERG, *supra* note 47.

92. GLAZER & MOYNIHAN, *supra* note 82, at 49-50.

93. In contrast, Robert Blauner in 1972 would offer an ethnic analysis of blacks and Latinos (though Chicanos rather than Puerto Ricans) that stressed continued structural racism. See BLAUNER, *supra* note 80, especially chapters four and five.

94. GLAZER & MOYNIHAN, *supra* note 82, at 53.

95. *Id.* at 88.

96. U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965) [hereinafter MOYNIHAN REPORT], reprinted in THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY 41 (Lee Rainwater & William L. Yancey eds., 1967).

demands, he warned, could *not* be met—because of failings in the black community itself.<sup>97</sup> Moynihan’s deepest concern was the black family. It was the “Negro family,” Moynihan asserted, that “is the fundamental source of the weakness of the Negro community at the present time.”<sup>98</sup> Dysfunction in the black family originated in racism and structural subordination, Moynihan conceded, but he argued that group dynamics within the black community perpetuated black misery without any external help from white racism.<sup>99</sup> “At this point,” Moynihan concluded, “the present tangle of pathology is capable of perpetuating itself without assistance from the white world.”<sup>100</sup> Moynihan’s report helped derail attention from the structural components of racism into a bitter, poisonous fight over the health of black family life. It also helped sidetrack the Johnson Administration’s War on Poverty, shifting it from a broadly redistributive effort to one focused on minority pathologies.<sup>101</sup>

It was not that Moynihan, whether in his scholarship with Glazer or in his work as a policymaker, completely erred in the basic claim that slavery and Jim Crow damaged the structures of black family life. Indeed, black social scientists such as E. Franklin Frazier and Kenneth Clark had already said as much, Frazier decades before.<sup>102</sup> And prominent civil rights leaders such as Martin Luther King, Jr., also lamented the harm done to black families.<sup>103</sup> The problem lay in the efforts of ethnicity theorists to install cultural pathology as the root cause of continued minority failure, to the complete exclusion of structural factors. To see this most clearly, compare Moynihan’s conclusion that social legislation could not succeed with the analysis of Martin Luther King, Jr. After offering a despairing portrait of the “shattering blows on the Negro family [that] have made it fragile, deprived and often psychopathic,”<sup>104</sup> a description fully as negative as Moynihan’s, King offered this prescription:

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97. *Id.* at 43.

98. *Id.* at 51. This analysis was anticipated in *Beyond the Melting Pot*, where Glazer and Moynihan emphasized the destructive social consequences that flow from “broken homes,” as when

the mother is forced to work (as the Negro mother so often is), when the father is incapable of contributing support (as the Negro father so often is), when fathers and mothers refuse to accept responsibility for and resent their children, as Negro parents, overwhelmed by difficulties, so often do, and when the family situation, instead of being clear-cut and with defined roles and responsibility, is left vague and ambiguous (as it so often is in Negro families).

GLAZER & MOYNIHAN, *supra* note 82, at 50.

99. MOYNIHAN REPORT, *supra* note 96, at 61-63, 93.

100. *Id.* at 93.

101. See JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* 28-31 (1994).

102. KENNETH B. CLARK, *DARK GHETTO: DILEMMAS OF SOCIAL POWER* 67-74 (1965); E. FRANKLIN FRAZIER, *THE NEGRO FAMILY IN THE UNITED STATES* (1939).

103. Martin Luther King Jr., Address at Abbott House, Westchester County, New York (Oct. 29, 1965), reprinted in *THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY*, *supra* note 96, at 402.

104. *Id.* at 407.

The most optimistic element revealed in this review of the Negro family's experience is that the causes for its present crisis are culturally and socially induced. What man has torn down, he can rebuild. At the root of the difficulty in Negro life is pervasive and persistent want. To grow from within the Negro needs only fair opportunity for jobs, education, housing and access to culture. To be strengthened from the outside requires protection from the grim exploitation that has haunted [the community] for 300 years.<sup>105</sup>

King's solution, offered in the winter of 1965, was access to jobs, education, and housing, coupled with freedom from further exploitation. King saw hope only in addressing the structural components of white racism, not in terms of placing a national spotlight on the damaged black family. Ethnicity evolved as a reactionary ideology of group difference not because it sought to emphasize group cultures, but because it did so in order to utterly displace any attention to the on-going dynamic of status subordination and the continued necessity of social reconstruction.<sup>106</sup>

### C. Ethnicity and Early Critiques of Affirmative Action

Ethnicity also factored almost immediately in the rising debates over affirmative action. Writing separately, Glazer and Moynihan used an ethnic conception of black identity to attack preferential treatment. In 1964, Glazer sounded the alarm about race-conscious remedies in a leading liberal journal, *Commentary*.<sup>107</sup> His reliance on ethnicity comes through in his implicit comparison of blacks with white ethnic groups and in his disaggregation of whites into "a series of communities."<sup>108</sup> But ethnicity operated most powerfully in Glazer's depiction of affirmative action, not as a needed national response to racial subordination, but instead as the sort of group rent-seeking one would expect in the context of ethnic group competition. "The Negroes

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105. *Id.* at 408. King's comments find resonance in William Forbath's argument for a notion of social citizenship that focuses first and foremost on adequate work. See William E. Forbath, *supra* note 2, at 18-23.

106. To reiterate, I do not object to ethnicity as such. Groups socially demarcated in descent-based terms often possess distinctive cultures; the dynamic story of gradual acculturation no doubt holds important insights as applied to racial minorities; and an ethnic lens helpfully encourages a more fine-grained appreciation of group heterogeneity among whites as well as non-whites. I object not to ethnicity in general but to the following: First, to the transmutation of racial stereotypes about minority failings into the more serviceable but no less inaccurate or pernicious language of pathological group cultures. And second, to the use of ethnicity as a complete substitute for a racial analysis in a manner that occludes inquiry into the operation of racial hierarchy in the United States. Cf. Ian Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143, 1153-54 (1997) (suggesting that ethnicity may be a useful means of conceptualizing Latino identity, so long as not used to the exclusion of a racial analysis).

107. Nathan Glazer, *Negroes and Jews: The New Challenge to Pluralism*, COMMENT., Dec. 1964, at 29.

108. *Id.* at 33.

press these new demands because they see that the abstract color-blind policies do not lead rapidly enough to the entry of large numbers of Negroes into good jobs, good neighborhoods, good schools. It is, in other words, a group interest they wish to further.”<sup>109</sup> Extending Glazer’s arguments in a 1968 *Atlantic Monthly* article entitled *The New Racialism*, Moynihan repeated the claim that blacks constituted only another ethnic group, and that interest group politics motivated the demand for affirmative action.<sup>110</sup> By dropping structural inequality and entrenched racial hierarchy from the ethnic account, Glazer and Moynihan stripped the clarity of history from claims for race-conscious remedies. Such demands no longer seemed to call on the nation to repair gross injustice; instead, they sounded like special pleading by yet another pressure group, effectively shifting the moral register of affirmative action from an impassioned appeal to political puling.

Glazer and Moynihan also depicted affirmative action as a dangerous deviation from a supposed national commitment to a rule of colorblindness. Glazer explicitly placed the “new demands” in contrast to “color-blind policies”; Moynihan bemoaned a perceived departure from supposed federal efforts pioneered during the New Deal “forbidding acknowledgment even of the existence of [racial] categories.”<sup>111</sup> Glazer and Moynihan simultaneously deployed ethnicity and an incipient understanding of antidiscrimination law as more properly an anticlassification regime. These two ideas were not logically connected to each other at this point, but from the beginning they appeared together in ethnicity-based critiques of structural reform.

### III. EARLY LEGAL ARGUMENTS FOR COLORBLINDNESS

The civil rights movement reached its apogee in the mid-to-late 1960s, but barely survived that decade. Elected to the presidency in 1968, Richard Nixon did little to implement the myriad structural reforms advocated by the Kerner Report, instead railing against “forced integration.” Nixon’s campaigns depended upon, and energized, opposition to civil rights reforms; his reelection in 1972 by a crushing margin signaled the dramatic swing in the national mood against a continued effort to deal with America’s racial legacy.<sup>112</sup> Opposition to affirmative action had been percolating since the early 1960s, including within law school hallways. The mid-1970s, however, would see sustained efforts to craft arguments capable of supporting a legal ban on race-conscious remedies.

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109. *Id.* at 32.

110. Daniel P. Moynihan, *The New Racialism*, *ATLANTIC MONTHLY*, Aug. 1968, at 35, 37-38.

111. *Id.* at 36-37.

112. See THOMAS BRYNE EDSALL WITH MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* 95-97 (1991) (describing how Nixon capitalized on white opposition to the civil rights revolution of the 1960s).

*A. Incipient Critiques of Affirmative Action in the Legal Academy*

In the 1960s and early 1970s, a few law review articles began inching toward reactionary colorblindness, though none unequivocally concluded that the Fourteenth Amendment prohibited race-conscious remedies. Among the most prominent were pieces by Boris Bittker, John Kaplan, and Lino Graglia, professors respectively at Yale, Stanford, and the University of Texas law schools. In a famous 1962 article entitled *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, Bittker structured the debate over the preferential use of race as a fractured opinion by three judges resolving a hypothetical case in which a local ordinance imposed racial restrictions on the transfer of property in order to produce an integrated residential “checker-board.”<sup>113</sup> One judge voted to strike the ordinance, reasoning that *Brown* and other cases flatly prohibited the use of racial classifications; another sought to uphold the restrictions because they amounted to general social legislation.<sup>114</sup> Bittker perhaps most nearly reproduced his own views in those of the third judge who sought to hew a middle course, not adopting a colorblind approach wholesale, but nevertheless trending in that direction due to the dangers associated with treating racial discrimination as ordinary legislation.<sup>115</sup> Presaging arguments that would come to the forefront in the 1970s, Bittker’s third judge identified potential harms as including the threat of paternalistic reasoning, the difficulty of distinguishing benign from malignant uses of race, and problems of racial classification.<sup>116</sup>

In *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, another article that would receive wide play, including citation in two Supreme Court opinions, John Kaplan in 1966 acknowledged that the moral claims of blacks for special treatment rendered overbroad any simple call for a single principle of colorblindness.<sup>117</sup> But he also argued that the negative practical ramifications of affirmative action—which he supposed included exacerbating racial divisions, dampening black motivation, and involving the state in racial classifications—militated against

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113. Boris I. Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387, 1387-88 (1962).

114. *Id.* at 1389-92, 1396-1401, 1403-04.

115. *Id.* at 1423. In 1973, Bittker would warn against adopting a strict color-blind approach. BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* 120 (1973) (“[W]e can have a color-blind society in the long run only if we refuse to be color-blind in the short run.”).

116. Bittker, *supra* note 113, at 1419-23.

117. John Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U. L. REV. 363, 364-67, 410 (1966), cited in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 n.25 (1978) (Powell, J., announcing the judgment of the court) and *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 173 (1977) (Brennan, J., concurring).

such efforts.<sup>118</sup> The ethnicity/cultural pathology literature strongly influenced Kaplan's analysis. He wrote, for instance, that "the damaged Negro family structure [is] one of the most serious and fundamental obstacles to equality for the Negro"; that "many of us still believe . . . that the damage done to many Negro children occurs before they enter school"; that "[o]ne of the words most often used to describe the condition to which our history has reduced many Negroes is 'apathy'"; and also, that "insofar as we are willing to admit that the Negro has a culture, and that it has something to contribute to American life, we must recognize that the more efforts we undertake to compel integration, the more difficult it will be for this culture to survive."<sup>119</sup>

Among legal academicians, one of the most strident opponents of affirmative action remains Lino Graglia, who in 1970 began his campaign against, as the title of his essay put it, "Special Admission of the 'Culturally Deprived' to Law School."<sup>120</sup> In this initial foray, Graglia criticized affirmative action on policy rather than legal grounds, attacking as well the liberal law school milieu which acquiesced to preferential admissions. He worried at length about "the admission of unqualified or unprepared students," caviled about the tendency of affirmative action to "reinforce stereotypes of incompetence," complained of the "general debasement of academic standards" occurring in law schools, and protested "intimidation and extortion" by proponents of increased minority representation in law schools.<sup>121</sup> He also embraced race blindness as a general moral principle: "True and complete elimination of racial discrimination is as close as I had hoped to see the approach of the millennium. Societally approved racial discrimination, even as a temporary expedient to rectify past racial discrimination, dilutes the purity of that goal . . ."<sup>122</sup> Nevertheless, Graglia did not address the legal parameters of affirmative action, failing to offer any discussion of the constitutionality (rather than the advisability) of race-conscious remedies.<sup>123</sup> Despite the early critiques of affirmative action recorded in the articles by Bittker, Kaplan, and Graglia, none of these authors fully endorsed, let alone developed a robust justification for, constitutional colorblindness.

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118. *Id.* at 375, 378-79, 383-84.

119. *Id.* at 373, 402, 386, 398 (citations omitted).

120. Lino A. Graglia, *Special Admission of the "Culturally Deprived" to Law School*, 119 U. PA. L. REV. 351 (1970).

121. *Id.* at 353, 355-56, 360-61.

122. *Id.* at 352.

123. In 1976, Graglia would savage the constitutional law governing school desegregation remedies, in particular court-ordered busing, as "unprincipled and unscrupulous," "heedless of both fact and reason," and "ultimately [lacking] a moral foundation." LINO A. GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS* 16 (1976).

B. *Alexander Bickel*

In 1974, the Court for the first time confronted a higher education affirmative action case in *DeFunis v. Odegaard*, but elected to avoid the constitutional issues as moot.<sup>124</sup> Alexander Bickel, a preeminent Supreme Court scholar on the Yale Law School faculty and a public intellectual who commented frequently on civil rights in the pages of *The New Republic*, co-authored an amicus brief in *DeFunis* arguing against affirmative action.<sup>125</sup> The brief itself mashed together various rationales, railing against “quotas,” extensively excerpting a black scholar’s recently published rant about being stigmatized by race-based admissions, and characterizing decisions from *Slaughter House* to *Loving* as requiring a showing of compelling state interest in affirmative action cases.<sup>126</sup> The direct influence of this brief is open to question, but significantly Bickel extracted a couple of key paragraphs from his amicus, recombining them in an essay ultimately published posthumously in 1975 in his *The Morality of Consent*.<sup>127</sup> These paragraphs (with an article by Richard Posner to be discussed next) represent the first prominent endorsement of constitutional colorblindness in the legal academy.

Though largely resting on elisions and absent arguments, Bickel’s hollow, sonorous words have become a staple among those extolling an anticlassification Fourteenth Amendment.<sup>128</sup> His key argument follows:

The 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. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution.<sup>129</sup>

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124. 416 U.S. 312, 318-20 (1974).

125. Brief for Anti-Defamation League of B’nai B’rith as Amicus Curiae Supporting Petitioners, *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (No. 73-235) [hereinafter *ADL DeFunis Brief*].

126. *Id.* at 25 (quoting THOMAS SOWELL, BLACK EDUCATION, MYTHS AND TRAGEDIES 292 (1972)); see also *id.* at 17, 28.

127. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 132-33 (1975) (quoting without attribution from *ADL DeFunis Brief*, *supra* note 125, at 16-17, 31).

128. See, e.g., *Adarand Constructors, Inc., v. Peña*, 515 U.S. 200, 241 n.\* (1995) (Thomas, J., concurring); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring); *Fullilove v. Klutznick*, 448 U.S. 448, 547 n.21 (1980) (Stevens, J., dissenting); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 295 n.35 (1978) (Powell, J.); Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1319 (1986); Van Alstyne, *supra* note 19, at 779, 792, 803.

129. BICKEL, *supra* note 127, at 133.

The normative power of this paragraph lay in its resounding opposition to racism—the condemnatory crescendo describing “discrimination” as “illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.” But as a critique of race-conscious remedies, it traded on the strength of its anti-racist pretensions to elide the missing argument that affirmative action somehow constituted racism. This slippage stood at the rhetorical heart of Bickel’s prose, for the crux of the debate centered exactly on the relationship between race-conscious programs and malignant oppression: did affirmative action respond to or instead itself constitute invidious treatment? Bickel simply implied, without explanation, that the key term “discrimination” meant the same thing when used to describe the social practices at issue in segregation and affirmative action.<sup>130</sup>

Needless to say, declaring the opposition to discrimination a “fundamental principle” in the second sentence added no clarity as to why constitutional hostility toward racial discrimination should be understood to encompass affirmative action. In turn, the assertion that the matter reduced to “whose ox is gored” amounted only to a restatement of Herbert Wechsler’s view that the Court lacked a principled way to distinguish integration from segregation, even as it provided no response to Charles Black’s effective refutation of that worn charge.<sup>131</sup> Just as Wechsler created an equivalence between the massive harms inflicted by segregation and the unpleasantness purportedly engendered by integration, Bickel implied a moral and historical equivalence between the fate of minorities victimized by racial oppression and the experience of whites not directly benefited by affirmative action, despite the patently asymmetrical reality of racial hierarchy in the United States that Black insisted all must recognize.<sup>132</sup>

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130. In their germinal article on the modern Equal Protection Clause, Tussman and tenBroek emphasized the necessity of distinguishing “two senses of the term ‘discrimination’[:] recognizing differences [versus] action which is biased, prejudiced, unfair.” Joseph Tussman & Jacob tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 358 n.35 (1949). “It should be clear,” they continued, “that legislators . . . must discern and recognize relevant distinctions and differences, they must draw lines, they must, in short, classify—and classify reasonably. What is forbidden as discriminatory is . . . bias and prejudice . . .” *Id.*

131. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32-34 (1959); Charles L. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 423-30 (1960).

132. Bickel in 1962 had moved toward adopting Black’s retort to Wechsler. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 57 (2d ed. 1986) (1962). There, Bickel had refused to embrace an anticlassification reading of the Fourteenth Amendment, describing such a rule as “rigidly doctrinaire.” *Id.* at 63-64. Instead, Bickel concluded that “the problem of the association of the black and white races will not always yield to principled resolution, that it must proceed through phases of compromise and expedient muddling-through.” *Id.* at 65. Apparently, the time for muddling through had expired by 1974.

Postulating that proponents of equality now “demanded” that they be made “more equal than others” then suddenly turned the table, alleging that if a hierarchy existed, the beneficiaries of affirmative action now stood at the apex. But Bickel failed to defend this pretension too—no surprise, since a serious case that racial minorities comprised the truly advantaged would seem difficult to mount. Finally, insinuating that those supporting affirmative action “claim support for inequality” took Bickel back to where he began, again erasing the difference between segregation and the reparative use of race-conscious remedies (ostensibly the “inequality” now hypocritically sought by those supporting affirmative action).

Bickel inserted this turgid passage in the context of a chapter otherwise devoted to challenges to university intellectuals during the tumultuous 1970s, including an extended lament on the travails engendered by the “dilution of standards in the university as a whole” and “loose talk about the obsolescence and rottenness of our society and all our institutions.”<sup>133</sup> On the constitutionality of preferential treatment, *The Morality of Consent* offered no elaboration on the confused arguments initially marshaled in the amicus brief, instead contenting itself with reprinting borrowed paragraphs within a tired jeremiad. It did not attempt, let alone provide, a full argument for why preferential treatment and invidious discrimination should be punished by the same constitutional hostility. But for all of that, Bickel had crafted and disseminated a rhetorically powerful critique of race consciousness.

### C. Richard Posner

Then a young professor at the University of Chicago, Richard Posner broke new ground in 1974 by offering a complete defense of colorblindness, one based explicitly on a theory of race and racism. Posner had just published the first edition of his law and economics treatise—a book one of his earliest critics described as a picaresque novel wherein “[t]he world presents itself as a series of problems; to each problem [Posner applies an economic analysis] as a form of solution; and the problem having been dispatched, our hero passes on to the next adventure.”<sup>134</sup> In 1974, that next adventure was race-conscious remediation. In a *Supreme Court Review* article entitled *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, Posner argued that affirmative action should be unconstitutional.<sup>135</sup> This article marks the first effort in the legal academy to fully develop a racial narrative under which affirmative action and invidious discrimination appeared equally

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133. BICKEL, *supra* note 127, at 132, 137.

134. Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 451 (1974) (reviewing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1973)).

135. Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 25.

troubling. In effect, Posner attempted a re-description of racial dynamics that would support reactionary colorblindness. He did so by combining ethnicity and rational choice theory.

Race in Posner's conception, as in the mid-century liberal estimation, amounted to a superficial characteristic: "[B]lack people (and Chicanos, Filipinos, etc.) . . . differ only in the most superficial physical characteristics from whites."<sup>136</sup> Incorporating an ethnic approach, though, Posner also understood racial groups to be strongly linked to certain characteristics—not as a matter of biology, but as a function of culture. Consider Posner's speculation about "a particular racial or ethnic identity [that] is correlated with characteristics that are widely disliked."<sup>137</sup> He offered the following to flesh out his thought experiment: "A substantial proportion of the members of the group in question may be loud, or poor, or hostile, or irresponsible, or poorly educated, or dangerously irascible, or ill-mannered, or have different tastes, values, and work habits from our own, or speak an unintelligible patois."<sup>138</sup> Might this group be blacks? Posner coyly did not say—but he did distinguish their culture from "our own," and added to the above sentence a helpful footnote on "black versus white educational achievement."<sup>139</sup> Posner also asked his readers to consider a hypothetical in which "the Post Office [is] able to demonstrate convincingly that blacks had, on average, inferior aptitudes to whites for supervisory positions"<sup>140</sup>; or to imagine an instance where a school district sought to limit the number of Jewish teachers in an urban system because of "a finding that Jews are so able that no merit-based principle of selection could keep them from dominating the school system."<sup>141</sup> This was pure ethnicity theory, not only in stripping race of history and hierarchy while tying races to group cultures, but in giving credence to racial stereotypes in the process: race is empty (pause . . .), but racial minorities display dysfunctional pathologies while white groups exhibit normatively valuable attributes.

Such group differences, under Posner's rational choice approach, ostensibly provided the motivation for most racial discrimination. Certain characteristics associated with race were expensive to measure directly, Posner suggested, but race was easy to observe and act upon, and this cost-effective human sorting, he claimed, explained "most" racial discrimination: "most discrimination in today's America can be explained simply by the cost of information."<sup>142</sup> Posner tied together ethnicity, with its emphasis on groups tightly linked to cultures, and rational choice theory, which stressed the efficiencies involved in using easily observed traits as proxies for

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136. *Id.* at 8 (original parentheses).

137. *Id.*

138. *Id.* at 9-10 (internal citations omitted).

139. *Id.* at 9 n.23, 10.

140. *Id.* at 21.

141. *Id.* at 20.

142. *Id.* at 9 (citation omitted).

characteristics that were more difficult, and hence more costly, to measure directly. To clarify, Posner volunteered the following: “[Discrimination] is a type of economically efficient conduct similar to a consumer’s reluctance to try a new brand . . . .”<sup>143</sup> So there is Posner’s theory of racial subordination in 1974 America: whites refused to associate with African Americans in the same way that the average consumer resisted changing from Tide to Cheer—or, if one accepted Posner’s sense that qualitative differences in culture and behavior ranked racial groups, from a Mercedes to a Ford. Choosing whether to associate with, hire, live near, or send your children to school with minorities involved only efficient sorting: though not every Mercedes had the desirable qualities possessed on average by that brand, and conceivably some Fords transcended the limitations typical of that make, individual determinations were costly and consumers acted rationally in eschewing individualized judgments and instead in relying on hood ornaments (or skin color) in making their selections.

Reframing racism from a dynamic rooted in white dominance to one based on rational efforts at efficient sorting formed no incidental point, but provided the key to Posner’s defense of colorblindness: this re-description allowed him to equate affirmative action of the sort practiced in *DeFunis* with supremacist segregation. Posner described the preferential admission of minorities as motivated by administrative convenience: in the context of admissions, “[r]ace . . . is simply a proxy for a set of other attributes—relevant to the educational process—with which race, itself irrelevant to the process, happens to be correlated.”<sup>144</sup> Pursuant to this understanding, affirmative action that favored minorities differed not at all from the hostile discrimination that excluded them: both were “rooted in the same habit of mind—that of using race or ethnic origin to establish a presumption, in the case of a racially preferential admissions program a conclusive one, that the individual possesses some other attribute as well.”<sup>145</sup> Accentuating the link between preferential and invidious discrimination, Posner argued that “[t]he characteristics that university admissions officers associate with ‘black’ . . . are the same characteristics that the white bigot ascribes to every black, although he uses a different terminology (*e.g.* ‘lazy’ rather than ‘unmotivated.’).”<sup>146</sup> Apparently Posner thought that university officials sought to enroll African Americans because they were “unmotivated”—but do not be detained by this claim. “My point is,”

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143. *Id.* at 10. Posner had advanced this theory of statistical discrimination the year before in his text on law and economics. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 294-97 (1973). For a critique of rational choice theories of discrimination, see Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 *YALE L.J.* 1717, 1761-69 (2000); see also JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* 8 (1997) (stating that “rational discrimination” is unreasonable and racist).

144. Posner, *supra* note 135, at 9.

145. *Id.* at 11.

146. *Id.* at 11-12.

Posner continued, “the use of a racial characteristic to establish a presumption that the individual also possesses other, and socially relevant, characteristics exemplifies, encourages, and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America.”<sup>147</sup> In referring to “prejudice and bigotry in modern America,” Posner wed affirmative action to the injurious racism that he otherwise insisted largely did not exist. But set this aside too, for what matters most here is his claim that affirmative action and racial discrimination reduced to the same basic dynamic: the use of “black” as a synecdoche for something else. In another iteration of this claim, Posner asked rhetorically, “[I]s not the law school’s action [in favoring an individual because he is black] fundamentally similar to the decision of a country club to deny this individual membership on the sole ground that it does not admit blacks?”<sup>148</sup>

In order to argue that the Constitution should regard with equal hostility affirmative action and invidious discrimination, Posner adopted the tactic of arguing that the same racial dynamic explained both phenomena, offering a grand theory of racial discrimination. But two central problems plagued his analysis. First, his meta-theory of racial discrimination was simply implausible. Chicago in 1974, like much of the country, suffered pervasive segregation and shuddered under contending armies seeking to remake or protect entrenched racial patterns, for instance in battles over school integration, affirmative action, and busing. Yet Posner supposed that racial dynamics in his city and in America generally reflected not long-standing practices of racial subordination powerfully challenged and powerfully defended, but the efforts of rational actors like him to keep information costs down. Second, and more importantly for our purposes, the resulting depiction of race relations seemed remarkably benign, raising the question of why racial discrimination should be unconstitutional at all. Of Posner we might ask, if discrimination is simply a matter of efficient sorting, why ban it?

Posner ignored the first problem, but attempted to address the second. He argued that race as a system of efficient sorting should be constitutionally banned because “[t]o permit discrimination to be justified on efficiency grounds . . . [would] thwart the purpose of the Equal Protection Clause by allowing much, perhaps most discrimination to continue.”<sup>149</sup> Posner acknowledged, however, that this prohibition would treat race differently from other characteristics used for statistical discrimination: “[I]t does not explain why only race and ethnic origin, and not all immutable or involuntary

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147. *Id.* at 12.

148. *Id.* at 14.

149. *Id.* at 22-23. Of course, this seems a bit circular. If, for instance, the “purpose” of the clause is to prevent subordination, then why not allow efficient discrimination? Posner would not allow that this is, in fact, the purpose of the clause—which is my point: at stake here is what the clause means, a question that cannot be answered by reference to what the clause means.

characteristics which are used as proxies for other characteristics, are subject to the principle.”<sup>150</sup> Why, in short, prohibit all discrimination on the basis of race, but not also on the basis of, say, “[a]lienage, nonresidence, height, homosexuality, youth, poverty, and low IQ,” all examples Posner provided of “immutable or involuntary characteristics used as criteria for government regulation[]”?<sup>151</sup> Posner offered two answers: first, courts need some rule, otherwise it “would give judges . . . carte blanche to pick and choose among groups defined in accordance with one of the involuntary characteristics.” Fine, but why *this* rule? Merely asserting that the judges need *some* rule hardly answered that question. So Posner tried again: “Second, the grouping of people by an ancestral characteristic is *surely* not the same phenomenon as, say, grouping by sex or age.”<sup>152</sup> He did not, however, offer anything more about what that difference might be. “Surely,” Posner said—the very invocation of the term, in the absence of further evidence or argument, strong evidence that Posner had backed himself into a corner.

We might answer that the Constitution should view discrimination on the basis of race with particular concern because our country’s history of extreme and pervasive racial subjugation necessitates special efforts at group protection and social reconstruction. But this is exactly the answer Posner could not countenance, for this answer would allow, indeed require, a distinction between Jim Crow and affirmative action. Having sought a way to equate all discrimination, he offered a particularly jejune conception of racism as information sorting, a conception that in turn could not justify heightened review. If in fact racism amounted only to statistical discrimination, then discrimination on the basis of race and youth and poverty were indistinguishable, none different, none worse, none better—and none deserving special judicial solicitude.

#### IV. ETHNICITY AND REACTIONARY COLORBLINDNESS

Richard Posner’s effort to advance a racial theory that would justify a constitutional ban on affirmative action encountered two principal difficulties: it was implausible, and by picturing racism as innocuous it rendered more difficult the case for constitutional suspicion. Writing from outside the legal academy, Nathan Glazer in 1975 offered a critique of antidiscrimination law built on ethnicity theory that more successfully negotiated both trip points. First, Glazer’s emphasis on an ethnic conception of race, rather than an ethnic conception filtered through rational choice theory, had greater cultural legitimacy insofar as it drew on nearly six decades of racial discourse. Second, Glazer offered a racial narrative that interpreted the Fourteenth Amendment to

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150. *Id.* at 23.

151. *Id.*

152. *Id.* (emphasis added).

ban affirmative action not as an efficient practice but, like Jim Crow laws, as invidious discrimination—though this time against white ethnic groups.

A. *Ethnicity and Antidiscrimination Law*

In 1975, Glazer published *Affirmative Discrimination: Ethnic Inequality and Public Policy*.<sup>153</sup> Challenging case law in employment, education, and housing, Glazer devoted the vast bulk of *Affirmative Discrimination* to attacking the antidiscrimination law that had developed through the early seventies—which is to say, the jurisprudence of remedy, rather than the jurisprudence of retrenchment that was developing even as Glazer wrote.<sup>154</sup> Reserving special ire for cases such as *Green*, *Swann*, and *Griggs*, Glazer spent the preponderance of his book battling legal opinions, his efforts indicating among other things the importance of law in shaping public debates about race and racism. For Glazer, 1964 marked a shining moment when the nation embraced, in the form of the Civil Rights Act, the anticlassification principle: “[t]he Act could only be read as instituting into law Judge Harlan’s famous dissent in *Plessy v. Ferguson*: ‘Our Constitution is color-blind.’”<sup>155</sup> He lamented that the decade after, however, betrayed that principle. “Having placed into law the dissenting opinion of *Plessy v. Ferguson* that our Constitution is color-blind, we entered into a period of color- and group-consciousness with a vengeance.”<sup>156</sup> The now bastardized civil rights regime, Glazer charged, “assumes that everyone is guilty of discrimination,” puts employers “under siege,” and saddles citizens with a “new plague of legal proceedings.”<sup>157</sup>

For our purposes, Glazer’s extended peregrinations through legal thickets hold less interest than his effort to promote a countervailing theory of race relations. Glazer implicitly grasped that antidiscrimination law rested on particular conceptions of race and racism—and in *Affirmative Discrimination*, he set out to challenge those understandings. Glazer speculated that “courts rule the way they do” because “facts are assumed . . . *that are not true*, but serve as the basis to guide judicial decisions.”<sup>158</sup> Glazer then catalogued what he saw as the courts’ false assumptions: that race-based impediments in the workplace

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153. GLAZER, *supra* note 15.

154. On the periodization of these cases, see Freeman, *Legitimizing Racial Discrimination*, *supra* note 17, at 1079, 1102.

155. GLAZER, *supra* note 15, at 43-44.

156. *Id.* at 31.

157. *Id.* at 58, 36-37, 37. Glazer now supports affirmative action for African Americans, though not for other racial minorities, who remain, to his mind, ethnic groups which do not suffer structural disadvantage. NATHAN GLAZER, WE ARE ALL MULTICULTURALISTS NOW 149 (1998); see also Nathan Glazer, *The Future of Race in the United States*, in RACE IN 21ST CENTURY AMERICA 73, 75-77 (Curtis Stokes et al. eds., 2001).

158. GLAZER, *supra* note 15, at 217, 219 (emphasis added).

substantially impeded minority progress; that racial antipathy strongly contributed to residential segregation; and that racism played a prominent role in spurring resistance to racial remediation.<sup>159</sup> Criticizing the courts' overemphasis on racial animus, Glazer offered ethnicity as another way to view racial dynamics. As in his 1963 volume with Moynihan, Glazer pushed the argument that, whatever the troubled past of overt racial hierarchy, contemporary race relations should be understood as the competition between similarly situated ethnic groups comprised of individuals bound together by shared cultures. Put differently, *Affirmative Discrimination* amounted to an extended complaint that United States race law did not enact ethnicity theory.

Writing in 1975 and so in the context of extraordinary white hostility to the reforms of the civil rights movement, however, Glazer confronted the challenge of showing that ethnic competition rather than racial animosity accurately described American group relations. Glazer acknowledged a high degree of tension between whites and blacks, conceding that “[u]ndoubtedly this arises in large part, out of general racist sentiments.”<sup>160</sup> But what Glazer gave with this single sentence, he took away over the course of the book. Glazer insisted that such hostility more fundamentally reflected not racist sentiments, but disparate group interests, for example “the conflict over jobs.”<sup>161</sup> White ethnics, Glazer explained, predominated in unions, and resented the challenges posed by “affirmative action and quotas for blacks and other groups.”<sup>162</sup> “It is understandable,” he continued, “that there should be this kind of pragmatic, interest-based conflict.”<sup>163</sup> The claim that self-interest among whites ruled out the possibility that racial animosity fueled their opposition to affirmative action depended on a return to liberal race theory, which pictured irrational prejudice—to the exclusion of individual or group self-interest—as the principal source of racism. But the history of race in the United States suggests instead that racial hostility and group interests are deeply intertwined—indeed, that self-regard has been a driving force in the elaboration of racial hierarchy.<sup>164</sup> The “pragmatic, interest based conflict” Glazer identified was not, for being interest based, thereby free of racial taint; instead, it constituted all the more securely a part of structural racism.

Glazer also opined that, in addition to divergent interests, variations in group culture better explained group tensions—“ways of life,” he said, “come

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159. *Id.* at 219.

160. *Id.* at 186.

161. *Id.*

162. *Id.* at 187.

163. *Id.*

164. For explorations of the mutual elaboration of racism and white self-interest in the labor movement, see generally DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1991); ALEXANDER SAXTON, *THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* (1975).

into conflict.”<sup>165</sup> He offered the following characterization of black life: “more black families today are broken; there is a higher rate of illegitimacy, and there is a higher rate of crime among the young”; there is, in addition, “a great deal of prostitution, crime, runaway husbands, broken families, incest.”<sup>166</sup> These differences, Glazer insisted, “are real, and . . . may be taken by white ethnics as a symbol of what they fear—threats to safety, morality, neighborhood stability, and legitimate order and authority.”<sup>167</sup> White neighborhoods, in contrast,

are scenes of a marked social order: stable neighborhoods, with children succeeding parents in the same area, strong organizations centered around the church, formal ethnic associations or patterns of informal ethnic association, the local political organization, the trade union, the local small businesses of members of the group, which serve as much for socialization as for ordinary business.<sup>168</sup>

“These are realities,” Glazer continued, “and it is hardly likely they would not lead to resistance in the white ethnic neighborhoods to the entry of blacks or resistance to having their children sent into the black areas.”<sup>169</sup> Here ethnicity theory operated as a justification for neighborhood and school segregation: black pathology rather than white racism engendered “resistance in the white ethnic neighborhoods to the entry of blacks [and] resistance to having their children sent into the black areas.”<sup>170</sup>

Glazer’s obdurate unwillingness to see racism in the white support of de facto segregation comes through most strongly in a final example. Seeking to demonstrate that white opposition to blacks in the workplace reflected not racial bias but “very different attitude[s]” toward work, Glazer provided the following quote from Milan, a white foreman, describing his frustration with a black worker:

One of these young shines is going to kill a foreman someday soon. You can see it in their eyes, those black bastards. It used to be nice to work here, now with all these young niggers coming into the mill you never know what’s going to happen. You take your life in your hands when you tell them to do something.<sup>171</sup>

Glazer immediately followed this quote with a sentence on the “differences between the Italian and East European neighborhoods and the black neighborhoods expanding into them,”<sup>172</sup> a non-sequitur that switched the topic to neighborhood tensions, as if Milan’s comments finished the conversation on

165. GLAZER, *supra* note 15, at 188.

166. *Id.* Incorporating an anti-statist element, Glazer also opined that some of these attributes of minority culture might represent “the mixed blessings of welfare.” *Id.*

167. *Id.* at 189.

168. *Id.* at 188-89.

169. *Id.* at 189.

170. *Id.*

171. *Id.* at 191-92 (citation omitted).

172. *Id.* at 192.

workplace conflict, or as if supposed dangers of violence at the job site demonstrated too the perils of residential integration. For Glazer, a white foreman who railed against the threatening presence of “shines,” “black bastards,” and “niggers” proved the existence of “cultural” conflict in the workplace and neighborhood. If Glazer could not perceive racism there, it is no surprise he did not see it anywhere.

Glazer set out to respond to the more structural understanding of racial hierarchy implied in cases such as *Green* and *Swann* that used race to combat racism, and in cases such as *Griggs* suggesting a requirement for structural change. He did so by again advancing, as he had in the 1960s, a vision of race rooted in ethnic conflict, where minorities featured as just one among a number of competing cultural groups (though in doing so he ignored the voluminous scholarship that had repudiated his obloquies in *Beyond the Melting Pot*).<sup>173</sup> Glazer sought to convince the courts that they erred in believing that racial discrimination sharply truncated minority lives in the work place, in education, and in residential selection, or fueled widespread hostility to broad racial reform. Instead, he insisted, racial dynamics in the United States reflected nothing more than competition between groups marked by disparate cultures. America had triumphed over racial domination, though admittedly some of its deleterious effects remained manifest in the pathological cultures of minorities. It was time, Glazer insisted, for antidiscrimination law to eschew racially divisive policies and return to the colorblind ideal.

#### B. Whites as Vulnerable Minorities

As with Posner and his rational discrimination model, though, perhaps ethnicity theory proved too much. If racial discrimination merely reflected group competition, why ban it? Put differently, if racial subordination existed only in the past and ethnic competition presently featured as a typical element in American life, why not simply allow such competition to continue, moderated by democratic politics as the normal arena for interest group pluralism? Why have the courts intervene at all? Neither Glazer nor Moynihan offered an answer in the sixties, but in *Affirmative Discrimination* Glazer advanced an influential argument that would figure prominently in the Court’s first full affirmative action case: discriminating in favor of minorities discriminated against whites—not whites as a majority, but rather whites as members of vulnerable minority groups.

In *Beyond the Melting Pot*, Glazer and Moynihan had argued in effect that blacks had become whites, in the sense that racial minorities after the civil rights revolution no longer faced racial impediments, but instead would interact

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173. Alexander Saxton, *Nathan Glazer, Daniel Moynihan and the Cult of Ethnicity*, *AMERASIA J.*, Fall 1977, at 141, 148 (1977) (reviewing GLAZER, *supra* note 15); *see also* BLAUNER, *supra* note 80, at 111-21.

with and eventually integrate into society along the lines pioneered by white ethnic groups. This assertion also figured prominently in *Affirmative Discrimination*. Simultaneously, however, Glazer introduced a new and pivotal argument, the inverse notion that whites were really black. This new assertion depended upon the following moves: first, the disaggregation of whites into ethnic groups. Under affirmative action, Glazer complained, “[a]ll ‘whites’ are consigned to the same category, deserving of no special consideration.” But, he said, “[t]hat is not the way ‘whites’ see themselves, or indeed are, in social reality. Some may be ‘whites,’ pure and simple. But almost all have some specific ethnic or religious identification.”<sup>174</sup> For Glazer, the frequent use of quotes around “whites” added grammatical emphasis to the disaggregation of that dominant group. Second, the insistence that whites too have suffered discrimination: “Most immigrant groups have had periods in which they were discriminated against. For the Irish and the Jews, for example, these periods lasted a long time.”<sup>175</sup> Finally, the claim that whites suffer when they are forced to bear the burdens of remedies for other, preferred minorities: postulating that white immigrants “came to a country which provided them with less benefits than it now provides the protected groups,” Glazer argued that “[t]here is little reason for them to feel they should bear the burden of the redress of a past in which they had no or little part, or to assist those who presently receive more assistance than they did.”<sup>176</sup>

Glazer summed up these three moves in a powerful phrase, one that would be repeated in Powell’s opinion in *Bakke* and which in turn prompts the title of this Article: “We are indeed *a nation of minorities*; to enshrine some minorities as deserving of special benefits means not to defend minority rights against a discriminating majority but to favor some of these minorities over others.”<sup>177</sup>

Where the Kerner Commission saw two Americas, black and white, separate and unequal, Glazer also saw two Americas—but divided now between favored minorities and dispreferred whites. “We have created two racial and ethnic classes in this country,” he wrote, “to replace the disgraceful pattern of the past in which some groups were subjected to an official and open discrimination. The two new classes are those groups that are entitled to statistical parity in certain key areas on the basis of race, color, and national origin, and those groups that are not.”<sup>178</sup> Glazer evoked a nation divided by a new form of domination in which disparate white ethnic groups, many the victims of past discrimination, now additionally suffered from the allocation of “special benefits” to “protected groups.” Glazer warned of ethnic conflict run

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174. GLAZER, *supra* note 15, at 200.

175. *Id.* at 198. As a corollary, Glazer also argued that many racial minorities have *not* suffered discrimination: “Nor is it the case that all the groups that are now recorded as deserving official protection have suffered discrimination, or in the same way.” *Id.*

176. *Id.* at 201.

177. *Id.* (emphasis added).

178. *Id.* at 197.

amok, where race-conscious remedies represented the illegitimate capture of the state by victorious factions who sought to lock in an otherwise temporary advantage over other, no less deserving groups. Affirmative action for minorities did not simply fail to benefit whites, it actually victimized them. If Posner equated affirmative action and racist exclusion by describing both as relatively harmless efforts at efficient group sorting, Glazer took a different tack, defining both as group subordination. Enter now the argument for reactionary colorblindness, justified on the claim that Jim Crow laws and affirmative action comprised equal evils.

I say “evils” not only because Glazer articulated a general model of discrimination stressing the pernicious nature of affirmative action, but because he upped the rhetorical ante by describing all racial distinctions as nightmarish, Orwellian, and reminiscent of Nazism. “Thus the nation is by government action increasingly divided formally into racial and ethnic categories with differential rights. The Orwellian nightmare ‘. . . all animals are equal, but some animals are more equal than others, . . .’ comes closer.”<sup>179</sup> And: “We have not yet reached the degraded condition of the Nuremberg laws, but undoubtedly we will have to create a new law of personal ethnic and racial status to define just who is eligible for these benefits, to replace the laws we have banned to determine who should be subject to discrimination.”<sup>180</sup> In his hyperbole, Glazer paved the way for subsequent Supreme Court reasoning: regarding the putative ills of racial classification per se, Orwell, Nazism, and Apartheid South Africa have all emerged as stock rhetorical tropes.<sup>181</sup>

To be sure, this vision of whites as vulnerable minorities systematically harmed by antidiscrimination law contradicted Glazer’s simultaneous contention that all groups competed more or less equally with each other, none especially advantaged nor burdened. This antecedent claim lay at the heart of the depiction of blacks as white. In moving to the conclusion that whites were black, Glazer began to return ethnicity to a group subordination model—though this time with whites in the subordinate position. Affirmative action became “affirmative discrimination” not just in the sense of relying on a racial classification, but in the sense of constituting an invidious practice. As we shall see, in the logical jujitsu of reactionary colorblindness, proclaiming that

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179. *Id.* at 75.

180. *Id.* at 200.

181. *See, e.g.,* Fullilove v. Klutznick, 448 U.S. 448, 535 n.5 (1980) (Stevens, J., dissenting) (“If the National Government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935 . . . .”); *United Steelworkers v. Weber*, 443 U.S. 193, 219-20 (1979) (Rehnquist, J., dissenting) (discussing Orwell’s *1984*); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 633 n.1 (1990) (Kennedy, J., dissenting) (referencing the “First Regulation to the Reichs Citizenship Law” as well as the “Population Registration Act No. 30 of 1950, Statutes of the Republic of South Africa” (citations omitted)); *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (stating that majority-minority voting districting “bears an uncomfortable resemblance to political apartheid”).

minorities no longer faced race-specific structural impediments was not enough; instead, completely flipping the status of whites and blacks proved the key move.

### C. Formal-Race and Culture-Race

Neil Gotanda, in his groundbreaking 1991 article *A Critique of "Our Constitution Is Color-Blind,"* systematically dissected the shifting conceptions of race employed by the contemporary Supreme Court in moving strongly toward an anticlassification jurisprudence.<sup>182</sup> Gotanda recognized that debates over the nature of equality and the scope of equal protection inescapably turned on competing understandings of race, and he suggested a framework that has since been quite influential for distinguishing four racial models variously deployed by the Court.<sup>183</sup> Two in particular are relevant to this Article: "formal-race," conceptualizing race as "merely 'skin color' or country of ancestral origin";<sup>184</sup> and "culture-race," referring to the "culture, community, and consciousness" of (minority) racial groups.<sup>185</sup>

I have argued that the rise of race-as-ethnicity rested on the following suppositions: First, race as such amounted to nothing more than superficial physical differences. Second, ethnic groups nevertheless possessed distinctive cultures. Third, racial domination lay defeated in the past, and no permanent dominant or subordinate groups remained. Fourth, conflicts over interests and cultures produced and explained relative group success. Fifth, antidiscrimination law dispreferred and even victimized "white" ethnic minorities.

My first and second arguments roughly correspond to Gotanda's notions, respectively, of formal-race and culture-race.<sup>186</sup> But for Gotanda, formal-race

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182. Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 1-5 (1991).

183. See, e.g., PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 835-37 (4th ed. 2000) (summarizing and adopting Gotanda's racial framework).

184. Gotanda, *supra* note 182, at 4, 6-7.

185. *Id.* at 4. Gotanda also suggested attention to "status-race," meaning "the traditional notion of race as an indicator of social status," and "historical-race," which pictures race as embodying "past and continuing racial subordination." *Id.*

186. Note a crucial distinction between culture-race and ethnicity: in Gotanda's original formulation, culture-race referred to the efforts of racial minority communities to respond to their subordination through the elaboration of self-affirming resistance cultures. In this sense, culture-race stood in stark opposition to ethnicity, which tended to deny any positive content to minority cultures. Subsequently, however, Gotanda has implicitly equated culture-race and ethnicity. Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity, and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 1135, 1141, 1149 (1996). Reva Siegel, in adopting Gotanda's matrix, refashioned the concept of "culture-race" into ethnicity—"that mode of talking that treats race as akin to ethnicity, as involving the distinctive forms of life that social groups work out over time." Siegel, *supra*

on the one hand and culture-race on the other reflected distinct understandings of race. In contrast, I argue that formal-race and culture-race are both aspects of the same ethnic reconceptualization. This unity has important explanatory significance: it is not that a skin color conception exists in opposition to a view of race as culturally significant, but that these notions work hand in hand to produce a racial ideology capable of claiming that racism is a thing of the past, that group inequality reflects cultural capacity, and that whites are vulnerable minorities. That is, the ability of race-as-ethnicity to continually shift emphasis between points one and two constitutes a necessary prerequisite for claims three through five. As neologisms, formal-race and culture-race helpfully illustrate the way in which ethnicity combines opposing contentions. Nevertheless, one should not see these elements as distinct understandings of race. Instead, the power of race-as-ethnicity lies in its ability to simultaneously gesture in contradictory directions—making blacks white and whites black.

#### V. BAKKE

In *Regents of University of California v. Bakke*, the Supreme Court split, with four members for an anticlassification rule and four against, and Justice Powell in the middle.<sup>187</sup> Powell's opinion has emerged as the Court's de facto ruling, but not for this reason does it hold the greatest interest here. Rather, Powell's analysis merits attention because, much more than the opinion of the four openly committed to prohibiting the remedial use of race, it laid the ground work for contemporary reactionary colorblindness. Nevertheless, before turning to Powell's watershed opinion, it bears examining the debate as framed by those for and against colorblindness.

##### A. Statutory Colorblindness

The University of California (U.C.) Davis Medical School denied admission to Alan Bakke two years running. He sued, arguing that he had suffered racial discrimination since, being white, the medical school had not considered him for the sixteen seats allegedly set aside for minority students out of an entering class of one hundred.<sup>188</sup> The facts seemed to document a clear case of racial discrimination, *if* one understood discrimination to mean any distinction on the basis of race, a position strenuously urged by four Justices. John Paul Stevens, joined by Warren Burger, William Rehnquist, and Potter Stewart, argued that a supposed statutory prohibition against any state

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note 16, at 91 (citation omitted).

187. 438 U.S. 265 (1978).

188. For a helpful history of the case, see generally JOEL DREYFUSS & CHARLES LAWRENCE III, *THE BAKKE CASE: THE POLITICS OF INEQUALITY* (1979). Dreyfuss and Lawrence note that, as a factual matter, evidence exists that the university considered whites for these seats, but note as well that this point was never argued by the defense. *Id.* at 41, 60.

use of race governed the case, and further suggested that prudential reasons cautioned against prematurely reaching the constitutional question.<sup>189</sup> Stevens likely favored statutory grounds, though, at least partly because in 1978 little space existed to argue that the Constitution prohibited remedial uses of race. From *Brown* to *Swann*, the Supreme Court had consistently rejected the premise that the Fourteenth Amendment barred all governmental use of race, and as recently as the previous year in *United Jewish Organizations of Williamsburgh, Inc. v. Carey (UJO)*, the Court had upheld race-conscious electoral redistricting.<sup>190</sup>

For Stevens, the legislative history of Title VI, which proscribed the use of federal funds to support segregated institutions, provided more favorable terrain on which to campaign for colorblindness. This ground provided some cover, for he selectively culled from the thousands of pages of legislative history various snippets seeming to indicate an intention that all racial classifications be barred. This argument's weakness becomes immediately manifest, however, in the thinness of the evidence marshaled to support it. Stevens argued that "the proponents of the legislation gave repeated assurances that the Act would be 'colorblind' in its application"—and then offered as proof just three quotes from the Act's voluminous debates, only one of which actually adverted to colorblindness.<sup>191</sup> Not to be deterred, Stevens insisted: "the meaning of the Title VI ban . . . is *crystal clear*: Race cannot be the basis of excluding anyone from participation in a federally funded program."<sup>192</sup> Like Posner's deployment of "surely," Stevens's recourse to "crystal clear" in the context of scarce evidence indicates nothing so much as the feebleness of his thesis. Not to be outdone, a year later Rehnquist in *United Steelworkers v. Weber* would employ the same statutory argument, and even more exaggerated rhetoric, in claiming that Title VII prohibited affirmative action in employment.<sup>193</sup>

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189. *Bakke*, 438 U.S. at 408-12 (Stevens, J., concurring in the judgment in part and dissenting in part).

190. 430 U.S. 144, 148, 163, 168 (1977).

191. *Bakke*, 438 U.S. at 415 & n.16 (Stevens, J., concurring in the judgment in part and dissenting in part). Stevens notably conceded that "[n]o doubt, when this legislation was being debated, Congress was not directly concerned with the legality of 'reverse discrimination' or 'affirmative action' programs," *id.* at 413—a concession that one might think would answer whether congressional intent could serve as the basis for asserting an anti-affirmative action meaning for the Act.

192. *Id.* at 418 (emphasis added).

193. *United Steelworkers v. Weber*, 443 U.S. 193, 219-54 (1979) (Rehnquist, J., dissenting). Despite dedicating more than thirty pages to "a thorough examination" of a congressional record that included eighty-three days of debate just in the Senate, Rehnquist could come up with only half a dozen quotes that directly addressed the question of whether race could be used for remedial purposes. He did, however, definitively defeat the contention—neither made nor at issue—that Title VII *required* affirmative action. *Id.* at 222-54. In terms of inflated rhetoric, Rehnquist began his dissent with a new Orwellian analogy, this one drawn from *1984*, in which Brennan, as the author of the majority opinion

Despite their lack of foundation, these opinions are important to the history of conservative colorblindness. They show that by *Bakke* in 1978, four Justices supported reactionary colorblindness as a political matter, but they also confirm that, as late as *Weber* in 1979, no member of the Court argued that the *Constitution* required colorblindness. In neither case did any of the Justices propounding colorblindness identify the Fourteenth Amendment, rather than statutory law, as the source of a ban on racial classification. The Court had been unanimous in the early seventies in rejecting an anticlassification stance when confronted by segregated school districts that sought to manipulate colorblindness to maintain racial hierarchy. In the face of affirmative action, and reflecting the changing composition of the Court, near the close of that decade a strong plurality of Justices embraced colorblindness as the appropriate understanding of antidiscrimination law, but located their support for that stance in feigned deference to supposed congressional intent. Not until the 1980s would any Justices support constitutional colorblindness, and then they would do so by invoking the reasoning offered in *Bakke* not by the anticlassification Justices, but by Powell.

#### B. *Against Colorblindness*

Despite the inanity of Stevens's opinion, the Court's liberal members sensed the rising strength of colorblindness, and in *Bakke* fully joined the debate. Brennan wrote the main opinion for the four Justices who proposed to uphold the Medical School's plan as implemented, devoting the bulk of his opinion to refuting Stevens's legislative history.<sup>194</sup> More importantly for our purposes, however, Brennan book-ended his rebuttal with condemnations of colorblind reasoning. He started by warning against letting "color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens,"<sup>195</sup> and he concluded by reminding his brethren that "the position that [race] must be 'constitutionally an irrelevance' summed up by the shorthand phrase 'our Constitution is color-blind,' has never been adopted by this Court as the proper meaning of the Equal Protection Clause. Indeed, we have expressly rejected this proposition on a number of occasions."<sup>196</sup> Blackmun, too, warned against constitutional colorblindness, offering one of the pithiest responses: "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

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upholding affirmative action, figured as a totalitarian leader manipulating a passive crowd by cynically switching a new "truth" for the opposite, and now discarded, old one. *Id.* at 219-22.

194. *Bakke*, 438 U.S. at 328-56 (Brennan, J., concurring in the judgment in part and dissenting in part).

195. *Id.* at 327.

196. *Id.* at 355-56 (citations omitted).

treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.”<sup>197</sup>

It was Marshall, however, who delivered the most thorough critique of conservative colorblindness. He started by recounting the legal subordination of blacks, drawing heavily on racial scholarship, for example John Hope Franklin’s *From Slavery to Freedom*, Richard Kluger’s *Simple Justice*, and C. van Woodward’s *The Strange Career of Jim Crow*.<sup>198</sup> Marshall emphasized the Constitution’s sacrifice of “those whose skins were the wrong color”;<sup>199</sup> the creation of the legal machinery of slavery; the Court’s acquiescence to that institution in *Dred Scott*; the failure of the Reconstruction Amendments to bring meaningful equality; the betrayal in *Plessy* as the Court “strangled Congress’ efforts to use its power to promote racial equality”; the vast network of Jim Crow laws in the South as well as their northern counterparts; and the fact that “enforced segregation of the races continued into the middle of the 20th century.”<sup>200</sup> Over the course of six pages, Marshall provided the most sustained historical engagement with the social and specifically legal oppression of blacks ever to appear in the pages of a Supreme Court decision.

In his second point, Marshall connected this iniquitous history with contemporary injustice. Writing that “[t]he position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment,” Marshall segued to demonstrating that “[m]easured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.”<sup>201</sup> To drive this home, he summarized a range of government statistics that numerically traced the ongoing legacy of racism across indices documenting health care disparities, wealth inequalities, and persistent segregation in professional fields.<sup>202</sup> “The relationship between those

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197. *Id.* at 407 (Blackmun, J., concurring in the judgment in part and dissenting in part). William Van Alstyne famously retorted that “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.” Van Alstyne, *supra* note 19, at 809. But as did other supporters of colorblindness, Van Alstyne too provided no discussion of why all race-conscious action is equally invidious, simply implying congruence between the “racism” that began his passage and the concluding reference to “the differential treatment of other human beings by race.” Again, the elided distinction lies at the heart of the matter—Van Alstyne, after all, was writing against affirmative action plans using “differential treatment” precisely to combat “racism.”

198. *Bakke*, 438 U.S. at 388 n.1 (Marshall, J., concurring in the judgment in part and dissenting in part) (citing JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM* (4th ed. 1974); KLUGER, *supra* note 56; C. VAN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d ed. 1974)).

199. 438 U.S. at 389.

200. *Id.* at 388-94.

201. *Id.* at 395.

202. *Id.* at 395-96 (citations omitted).

figures and the history of unequal treatment afforded to the Negro cannot be denied," Marshall averred.<sup>203</sup>

Next, Marshall reviewed the thrust of Fourteenth Amendment jurisprudence from its original drafting up through the most recent case law, including *Green*, *Swann*, and *UJO*, all of which had interpreted the Fourteenth Amendment to allow the state use of race.<sup>204</sup> For good measure, Marshall jabbed that when it would have actually helped blacks, the Court had consistently refused to adopt colorblindness. "[H]ad the Court been willing in 1896, in *Plessy v. Ferguson*, to hold that the Equal Protection Clause forbids differences in treatment based on race, we would not be faced with this dilemma in 1978," Marshall admonished his colleagues.<sup>205</sup>

But it is Marshall's final sally against colorblindness that seems most prescient, because it evinces his recognition that the ultimate issue was the Court's conception of race. Marshall directly repudiated the key step that would be used to justify a blanket ban on all racial distinctions—the ethnic analogy:

The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.<sup>206</sup>

Blacks were not another ethnic group, Marshall insisted, but a race, whose historical and persistent subordination made any analogy to the experiences of white groups utterly inapposite. In what surely must have struck Marshall as a bitter turn in racial and constitutional politics, he found himself having to argue defensively what should have been obvious to all—centuries of racial hierarchy had ensured that racial subordination differed drastically from lack of direct benefit under affirmative action, and more fundamentally that blacks were not white.

Marshall's *Bakke* opinion provides the single most developed judicial critique of reactionary colorblindness. His opinion, however, has largely slipped from memory, overshadowed almost entirely by Powell's, which, in the years since *Bakke*, has dominated the Court's—and the academy's—thinking on affirmative action.<sup>207</sup>

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203. *Id.* at 396.

204. *Id.* at 398-99.

205. *Id.* at 401.

206. *Id.* at 400-01.

207. Few major casebooks on constitutional law include substantial excerpts of—or even mention—Marshall's opinion. *See, e.g.*, BREST ET AL., *supra* note 183, at 899-914 (devoting ten pages to Powell's opinion, seven pages to Brennan's, a paragraph to Stevens's, but not excerpting or even mentioning the Marshall opinion).

*C. A Nation of Minorities*

Powell in *Bakke* started by summarily dismissing the contention that Title VI, let alone the Constitution, barred all racial classifications.<sup>208</sup> Nevertheless, Powell's reasoning laid the framework for the subsequent adoption of reactionary colorblindness. Though Powell eschewed an anticlassification stance, he framed the first half of his opinion in terms that anticipated the core debate underlying contemporary colorblindness: whether affirmative action and racial subordination differed in a constitutionally meaningful way. Powell posed this question in considering the appropriate standard of review. The Brennan four insisted that oppression and remediation were constitutionally distinct, with the consequence that race-conscious state action should not be subject to the same stringent review reserved for caste laws.<sup>209</sup> Powell concluded, however, that the government's reasons for using race must in all cases meet "the most exacting judicial examination."<sup>210</sup> In advocating the same standard in all cases, Powell effectively argued that for constitutional purposes preferential treatment and Jim Crow laws amounted to the same thing—the central claim of reactionary colorblindness.

Powell began his heightened review analysis by noting that the Court typically asked first the *Carolene Products* footnote four question, whether the harmed group comprised "a 'discrete and insular minority' requiring extraordinary protection from the majoritarian political process."<sup>211</sup> In *Carolene Products*, Justice Stone famously distinguished between ordinary social legislation that merited judicial deference, and legislation targeting vulnerable minorities that required heightened review.<sup>212</sup> Powell in 1973 in *San Antonio Independent School District v. Rodriguez* had fully embraced this approach, insisting that heightened review depended upon demonstrating that the purportedly harmed group was "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."<sup>213</sup> But in *Bakke*, Powell contended that this inquiry was superfluous in race cases: "Racial and ethnic distinctions of any sort are *inherently suspect* and thus call for the most exacting judicial

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208. *Bakke*, 438 U.S. at 287.

209. *Id.* at 359.

210. *Id.* at 291. Powell's description of strict scrutiny did not match later formulations, leaving open the question of whether affirmative action in fact could meet the strict scrutiny standard as developed in the 1980s. See *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996). *Grutter* answered this question affirmatively. For the purposes of this discussion, the important point is that Powell raised and answered the question of whether the same standard of review applied irrespective of the nature of the government's use of race.

211. *Bakke*, 438 U.S. at 290 (citation omitted).

212. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 & n.4 (1938).

213. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

examination.”<sup>214</sup> He explained that “[t]his perception of racial and ethnic distinctions is rooted in our Nation’s constitutional and demographic history,”<sup>215</sup> invoking as the Fourteenth Amendment’s pervading purpose “the freedom of the slave race . . . and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him.”<sup>216</sup> According to Powell, any state employment of racial criteria rendered an initial inquiry into the social status of the targeted group unnecessary; instead, the application of strict scrutiny followed automatically in such circumstances. But if the state’s use of race deserved the highest level of scrutiny because of slavery and racial oppression, why require that same level of justification for affirmative action?

Ethnicity provided Powell’s answer. Immediately after referencing the nation’s “constitutional and demographic history,” Powell introduced a revised narrative evoking a new “nation of minorities” that supposedly emerged in the twentieth century. Powell observed that after Reconstruction the Equal Protection Clause fell into a period of desuetude, not again attaining vitality until 1938 in *Carolene Products*.<sup>217</sup> “During the dormancy of the Equal Protection Clause,” Powell wrote, the nation had changed:

[T]he 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>218</sup>

Powell buttressed this history with a string of case citations to which he attached parentheticals listing the groups purportedly protected: “Celtic Irishmen,” “Chinese,” “Austrian resident aliens,” “Japanese,” and “Mexican-Americans.”<sup>219</sup> Powell omitted blacks, preferring to reference other non-whites denominated in terms of country of origin. Yet the facts of the race cases Powell cited—*Yick Wo*, overturning an ordinance administered with “an evil eye and an unequal hand” against Chinese residents;<sup>220</sup> *Korematsu*, upholding the mass internment of Japanese Americans in a crusade denounced by Justice Murphy as falling “into the ugly abyss of racism”;<sup>221</sup> and *Hernandez v. Texas*, striking down Jim Crow laws excluding Mexican Americans from Texas

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214. *Bakke*, 438 U.S. at 291 (emphasis added).

215. *Id.*

216. *Id.* (quoting *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1873)).

217. *Id.* at 291-92.

218. *Id.* at 292 (citations omitted).

219. *Id.* (citations omitted).

220. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

221. *Korematsu v. United States*, 323 U.S. 214, 233 (1944) (Murphy, J., dissenting).

juries<sup>222</sup>—do not exhibit the dynamics of ethnic pluralism so much as the virulence of racism targeting groups on the nether side of the color line. In Powell's usage, however, these non-black minorities helped make more plausible the claim that race operated similarly for all ethnic groups—that the experiences of the Irish and Austrians resembled that of the Chinese, Japanese, and Mexicans in the United States, and by extension tracked the fate of blacks as well.

Powell used ethnicity to rewrite the American history of race in the twentieth century. He disaggregated the white "majority" into "various minority groups" who "struggle" against "prejudice," while converting racial minorities into groups that shared an identical American experience with white ethnics. The color-line erased, the United States now progressed harmoniously as a "Nation filled with the stock of many lands," and the Constitution gave equal concern to "all *ethnic groups* seeking protection from official discrimination." "Ethnic groups" in Powell's usage constituted no casual synonym for race, but instead a heavily laden term signifying a conception of group dynamics in the United States in which racial hierarchy had ceased to operate.

Lest the implications of this new history be lost, Powell immediately turned to whether it mattered in *Bakke* that the case involved "discrimination against members of the white 'majority,'" once more with "majority" in quotes.<sup>223</sup> Invoking again the felicitous story of twentieth century ethnic competition, Powell asseverated that "[i]t 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."<sup>224</sup> He buttressed this sentence with a footnote reprinting Alexander Bickel's entire "whose ox is gored" paragraph.<sup>225</sup> Powell's reference to "special wards" oddly echoed the language of Justice Bradley when he chastised blacks for seeking to be the "special favorite of the laws" in *The Civil Rights Cases*, the Reconstruction era decision concocting the state action doctrine to defeat remedial legislation aimed at protecting blacks in the public sphere.<sup>226</sup> This echo intimates that though Powell wrote almost a century after Bradley and in a very different racial context, he not only lacked understanding of or sympathy for the iniquitous reality confronting blacks, but he too may have harbored resentment toward those demanding racial change. In any event, the endorsement of Bickel's sonorous but empty paragraph highlights the extent to which Powell embraced the conclusion that affirmative action was

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222. *Hernandez v. Texas*, 347 U.S. 475, 482 (1954).

223. *Bakke*, 438 U.S. at 294.

224. *Id.* at 295 (emphasis altered).

225. *Id.* at 295 n.35 (quoting BICKEL, *supra* note 127, at 133).

226. *The Civil Rights Cases*, 109 U.S. 3, 25-26 (1883).

constitutionally troubling, even as he labored to work out why this should be so.

Building on the ethnic analogy, Powell professed that no feasible manner existed to decide which groups might merit special solicitude as a subordinate class. “There is no principled basis for deciding which groups would merit ‘heightened judicial solicitude’ and which would not.”<sup>227</sup> Powell fretted that “[c]ourts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups,” forcing courts to calculate “[t]hose whose societal injury is thought to exceed some arbitrary level of tolerability”—only to find that as “the consequences of past discrimination were undone, new judicial rankings would be necessary.”<sup>228</sup> An equality jurisprudence that gave greater scrutiny to efforts to harm African Americans or other racial minorities, Powell worried, would plunge the Court into the untenable position of freezing the shifting kaleidoscope of ethnic politics—which was now simply democratic politics. “Political judgments regarding the necessity for the particular classification . . . are the product of rough compromise struck by contending groups within the democratic process,”<sup>229</sup> Powell concluded, and even “the concepts of ‘majority’ and ‘minority’ necessarily reflect temporary arrangements and political judgments.”<sup>230</sup> Powell deployed ethnicity to locate all groups in the same position, that of temporary minorities similarly engaged in pluralist politics and facing the same levels of societal hostility—and all deserving an identical level of judicial protection. Because the United States contained not dominant and subordinate races but a welter of “ethnically fungible” groups, to paraphrase Alan Freeman’s critique, the Constitution could make no distinction among the beneficiaries or victims of racial classifications.<sup>231</sup>

#### D. *Black Is White, White Is Black*

In making the ethnic argument, Powell confronted the same problem that Posner faced after positing an innocuous conception of racial sorting. If ethnic politics constituted normal politics, perhaps no special judicial scrutiny was warranted. Consider Rehnquist’s 1973 dissent to the extension of heightened review to non-citizens targeted by harmful legislation.<sup>232</sup> Rehnquist objected that “[o]ur society, consisting of over 200 million individuals of multitudinous

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227. *Bakke*, 438 U.S. at 296.

228. *Id.* at 296-97.

229. *Id.* at 299.

230. *Id.* at 295. Although Powell insisted that whites as the dominant race were a heterogeneous group, just the year before he had refused to accept that point regarding Mexican Americans. See *Castaneda v. Partida*, 430 U.S. 482, 515 (1977) (Powell, J., dissenting).

231. Freeman, *The View from 1989*, *supra* note 17, at 433.

232. *Sugarman v. Dougall*, 413 U.S. 634 (1973).

origins, customs, tongues, beliefs, and cultures is, to say the least, diverse. It would hardly take extraordinary ingenuity for a lawyer to find 'insular and discrete' minorities at every turn in the road."<sup>233</sup> Rehnquist expressed what might be termed "pluralist panic," the fear that there existed no practical limitation on the hordes of minority groups that might soon demand, and qualify for, special legal protection. Bittker had expressed a similar concern as early as 1962, claiming that "we are all members of minority groups."<sup>234</sup> Graglia had raised the same specter in his 1970 attack on affirmative action, complaining that "America consists of minorities."<sup>235</sup> Going further, however, Powell conjured not only a dizzying plethora of minority groups, but argued that none stood in a fixed subordinate position relative to any other. To use a shorthand version, blacks were really white. But notice the constitutional thrust of this analysis: if multitudinous ethnic groups stood in relations of shifting competition forming only temporary majorities, no special solicitude for racial groups seemed required. Arguing that blacks were white strongly pushed in the direction of Rehnquist's 1973 dissent, toward the conclusion that special constitutional concern did not avail the myriad minorities now found "at every turn in the road."

This dilemma can be restated in terms of the *Carolene Products* framework Powell had invoked in both *Rodriguez* and *Bakke*. Footnote four identified racial minorities as the quintessential "discrete and insular" groups requiring heightened review because they were typically left vulnerable by "the operation of those political processes ordinarily to be relied upon to protect minorities."<sup>236</sup> In contrast, the text of *Carolene Products* had supposed that the successes and failures of temporary majorities and minorities constituted the ordinary tussle of interest group pluralism and thereby became "a matter for the legislative judgment and not that of courts."<sup>237</sup> Powell's ethnic analysis, it seemed, pulled racial minorities out of the footnote, placing them instead securely in the realm of the text. This is not the claim that under a footnote four analysis whites failed to qualify for strict scrutiny, the argument made by Brennan in *Bakke* and also by John Hart Ely in his elaboration of process defect theory.<sup>238</sup> Rather, Powell's analysis indicated that since all contemporary racial dynamics involved merely interest group politics, *no* government action would merit heightened review simply because it disadvantaged groups on the basis of

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233. *Id.* at 657 (Rehnquist, J., dissenting).

234. Bittker, *supra* note 113, at 1414.

235. Graglia, *supra* note 120, at 352 ("Perhaps discrimination in favor of a minority can be distinguished from discrimination against a minority, but America consists of minorities and I fear the claims that could be made or conditions justified if this distinction should be generally accepted." (citation omitted)).

236. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

237. *Id.* at 151.

238. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 & n.31 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 170-71 (1980).

racial or ethnic classifications. As an expression of pluralist panic, Powell's ethnic theory not only failed to justify heightened review in the affirmative action context, it failed to justify it in every case arising since his "nation of minorities" ostensibly emerged prior to *Carolene Products*, thus drawing into question every modern case from *Korematsu* to *Loving*. Powell's ethnic analysis seemed to convert racial discrimination, both benign and invidious, into ordinary social legislation.<sup>239</sup>

Powell resolved the deep tension between an ethnic tale of interest group pluralism on the one hand, and heightened review on the other, by resorting to ethnicity's Janus-faced quality. One version of ethnicity (blacks-as-white) transmuted racial conflicts into ordinary politics. But another version (whites-as-black) provided the answer to why heightened judicial review nevertheless obtained. Powell employed an ethnic narrative not only to excise subjugation from the story of twentieth century American race relations; he also exploited it to cast whites as vulnerable minorities:

[T]he white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants.<sup>240</sup>

Recall the moves pioneered by Glazer to convert whites into the new subordinated group: disaggregating whites into discrete ethnicities; insisting that many of these groups faced prior discrimination; and implying that the rights and remedies reserved for preferred minorities threatened white ethnic subgroups.<sup>241</sup> Powell performed these dance steps almost flawlessly, converting the "white 'majority'" into "various minority groups," decrying the "prior discrimination" against those groups, and objecting that "the only 'majority' left would be a new minority of white Anglo-Saxon Protestants."<sup>242</sup> Powell magically conjured WASPs as America's most vulnerable potential victim. Even America's elite now turned out to be just another minority. Powell argued that the Constitution did not protect "special wards," if that meant affording racial minorities heightened protection.<sup>243</sup> But in considering the

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239. In a close read of Powell's *Bakke* opinion, Keith Bybee examines at length Powell's engagement with interest group pluralism and agrees that under his ethnic model racial groups apparently should *not* receive special protection. Keith J. Bybee, *The Political Significance of Legal Ambiguity: The Case of Affirmative Action*, 34 LAW & SOC'Y REV. 263, 278 (2000). Bybee resolves the tension by positing that Powell sought to use *Bakke* to lay out a new approach to the problem of judicial review in a democracy marked by pluralist politics, but offers little evidence (other than the otherwise seemingly inexplicable tension) to support this resolution. *Id.* at 285.

240. *Bakke*, 438 U.S. at 295-96.

241. See *supra* notes 174-77 and accompanying text.

242. *Bakke*, 438 U.S. at 296.

243. *Id.* at 295.

position of the “white ‘majority,’” Powell moved back toward a concern with specifically group-based disadvantage. At risk, according to Powell, were white ethnic groups. Powell may have put “majority” into scare-quotes, but he rarely lost sight of the fact that he was discussing whites—as putative victims of general discrimination,<sup>244</sup> and as “innocent” casualties of affirmative action.<sup>245</sup> Echoing the ethnicity theory advanced by Glazer, Powell erased whites as a dominant group and summoned instead whites as potential minorities in the brave new world of civil rights and racial remediation. Not pluralist anxiety but the possibility of group subordination—of whites—justified special solicitude in racial cases.<sup>246</sup>

#### E. *Integration, Societal Discrimination, and Diversity*

In the first half of his opinion, Powell reasoned toward a requirement of strict scrutiny in affirmative action cases. Under this constitutional standard, state efforts to use race to redress social problems would survive only if the government demonstrated it had a “compelling interest” in enacting such remedies. In the second half of his opinion, Powell considered the possible justifications for affirmative action. There, he rejected fostering integration or responding to societal discrimination as compelling interests, but held that encouraging racial diversity satisfied strict scrutiny. Many commentators find these two halves difficult to square. Critics on the right point out that diversity hardly rises to the level of other interests described as “compelling” in race cases, for instance the national security putatively at stake in *Korematsu*.<sup>247</sup>

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244. Notice the groups Powell referenced to support his claim of discrimination against members of the “majority”: “Members of various religious and ethnic groups, primarily but not exclusively of Eastern, Middle, and Southern European ancestry, such as Jews, Catholics, Italians, Greeks, and Slavic groups, continue to be excluded from executive, middle-management, and other job levels because of discrimination based upon their religion and/or national origin.” *Id.* at 293 n.32 (quoting 41 C.F.R. § 60-50.1(b) (1977)).

245. Powell complained of the “inequity in forcing innocent persons in respondent’s position to bear the burdens of redressing grievances not of their making,” *id.* at 298, and described whites dispreferred by affirmative action as “innocent individuals,” *id.* at 307.

246. Powell later employed the logic of pluralist panic in *McCleskey v. Kemp*, where he worried that a statistical challenge to sentencing “on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender.” 481 U.S. 279, 315-17 (1987). In the accompanying note, Powell referenced not only the part of his *Bakke* opinion treating ethnicities as interest groups, but various census documents listing numerous racial, ethnic, and ancestry groups. *Id.* at 316 n.39. Buttressing the point that such panic could not be used to support heightened review, in *McCleskey* Powell invoked the multiplication of minorities in order to ridicule demands for heightened review of group discrimination. *Cf.* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 183 (2006) (“The explosive pluralism of contemporary American society will inexorably push this country away from group-based identity politics—there will be too many groups to keep track of, much less to protect.”).

247. *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., dissenting).

Critics on the left object that if race deserves heightened scrutiny it must be because of past and ongoing racism, drawing into question why remedying the legacy of such practices fails to qualify as a compelling interest.<sup>248</sup> No contradiction divides these two parts of Powell's opinion, however, if one accepts his vision of race as ethnicity.

Powell considered several justifications for U.C. Davis's special admissions program, including "reducing the historic deficit of traditionally disfavored minorities" and "countering the effects of societal discrimination."<sup>249</sup> The first goal was tantamount to seeking integration, the aim of almost every school case to reach the Court in the late 1960s and early 1970s and a central focus of the civil rights movement. But Powell never mentioned "integration." Instead, he claimed that efforts to achieve racial representation in theretofore exclusively white institutions amounted to pursuing "some specified percentage of a particular group merely because of its race or ethnic origin," adding that "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."<sup>250</sup> It's almost impossible to make sense of Powell's claim that U.C. Davis sought to enroll groups "merely because of [their] race or ethnic origin" and "for no reason other than race," except in the context of ethnicity theory. Integration provided the clarion call of the civil rights movement, promising to end entrenched patterns that were deeply immoral in their origins and also guaranteed to perpetuate disadvantage into the future. But in the world of race-as-ethnicity, segregation reflected not a history of racial animus made manifest but normal politics. Racial hierarchy no longer existed; ergo, it not only failed to justify affirmative action, it transformed efforts to integrate into a bizarre pursuit of discrimination "for its own sake." Only in this make-believe world of normalized segregation could one characterize integration as a preference for certain racial groups "for no reason." Powell extended strict scrutiny to affirmative action by using ethnicity to deny the continued salience of racial subordination; he relied on ethnicity again to present efforts to promote integration not as efforts at social repair but instead as baseless acts of irrational racial discrimination.

Similar reasoning supplied Powell's response to the argument that counteracting "societal discrimination" warranted affirmative action. Ameliorating the inertial persistence of longstanding group oppression constituted one of the strongest moral and policy justifications for affirmative action, whether in the workplace or the classroom—but not for Powell. First, Powell argued that the Court's school cases had recognized the propriety of

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248. See, e.g., CHARLES R. LAWRENCE III & MARI J. MATSUDA, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* 51-53 (1997).

249. *Bakke*, 438 U.S. at 306 (citation omitted); cf. *Grutter*, 539 U.S. at 355, 361 (Thomas, J. dissenting) (arguing that affirmative action is explainable perhaps only as "tinkering" or as an effort to achieve proper "racial aesthetics").

250. *Bakke*, 438 U.S. at 307.

race-conscious remedies only in cases of “identified discrimination,”<sup>251</sup> thereby limiting the contradictory thrust of the earlier emphasis on results embodied in cases such as *Griggs* and legislation like the 1965 Voting Rights Act.<sup>252</sup> Next, he ridiculed “societal discrimination” as “an amorphous concept of injury that may be ageless in its reach into the past,”<sup>253</sup> constitutionalizing a vision of race as nebulous rather than concrete in its historical specificity and societal impact. Finally, Powell warned that “[w]ithout . . . findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another.”<sup>254</sup> Powell here sharply bifurcated the operation of the Equal Protection Clause: if one could show explicit racial subordination of the sort associated with Jim Crow, the clause would recognize racial hierarchy as a problem necessitating limited remedies; but absent such a showing, the Fourteenth Amendment would presume that subordination existed only in the past and that the country now thrived as a welter of competing groups, none deserving particular protection. Under race-as-ethnicity, societal discrimination did not afflict racial minorities in a unique way but described equally the experiences of all or none, making it dangerously subjective and therefore constitutionally unacceptable as a justification for affirmative action.

If Powell’s embrace of ethnicity explains the rejection of integration and racial remediation as compelling interests, it also underpins the single sufficiently compelling interest he identified: “the attainment of a diverse student body.”<sup>255</sup> According to Powell, the “nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.”<sup>256</sup> His invocation of a “Nation of many peoples” echoes the “Nation of minorities” language used earlier, but here Powell gestured not toward the absence of a dominant race but instead toward the unique cultures possessed by ethnic groups. Powell favored cultural pluralism (a concept, recall, invented in tandem with ethnicity), not racial equality, as a sufficient justification for affirmative action. He lauded the admissions program at Harvard especially for its effort to pay “some attention to distribution among many types and categories of students,” including “the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year.”<sup>257</sup> The cultures borne by ethnic groups resembled those possessed by musicians and Californians. In the first half of Powell’s *Bakke* opinion, ethnicity stripped race of all meaning as a form of

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251. *Id.*

252. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

253. *Bakke*, 438 U.S. at 307.

254. *Id.* at 308-09.

255. *Id.* at 311.

256. *Id.* at 313 (internal quotation and citation omitted).

257. *Id.* at 316-17 (citation omitted).

super- or subordination. In the second half, ethnicity instead reconstituted race as a vessel for superficial cultural differences. In both halves, the United States was a nation of minorities.

*F. Powell, Glazer, and Ethnic Revival*

Ethnicity did not make its first Supreme Court appearance in *Bakke*. Strains of ethnicity appeared in the Court's jurisprudence as early as 1945, essentially at the same time that the concept first gained widespread national acceptance.<sup>258</sup> Moreover, legal scholars had long since offered a conception of the United States as a conglomeration of minority groups: Bittker in 1962 and Graglia in 1970 had both insisted that the United States was comprised of minorities, though again both had done so to question rather than extend heightened review.<sup>259</sup> Nor was Powell the first Justice to rely on ethnicity in order to oppose a race-conscious remedy; that distinction goes to Burger, who criticized the majority-minority apportionment plan upheld in the 1977 *UJO* decision partly because it assumed a false homogeneity on the part of whites: "The 'whites' category consists of a veritable galaxy of national origins, ethnic backgrounds, and religious denominations. It simply cannot be assumed that the legislative interests of all 'whites' are even substantially identical."<sup>260</sup>

What sets Powell's *Bakke* opinion apart, then, is not the use of ethnic reasoning per se, nor even its use in an affirmative action context, but rather the central role he gave to ethnicity as a justification for strict constitutional hostility toward race-conscious remedies. But what also distinguishes his opinion is the particular understanding of ethnicity that he elevated to constitutional truth. Conceiving of groups in ethnic terms, without more, could serve as grounds for relaxing judicial review in racial cases. To defeat this interpretation, Powell relied on a specific version of ethnicity theory, one that depicted racial subordination as over while simultaneously presenting whites as vulnerable minorities. This was, in short, the conception of ethnicity tentatively developed by Glazer and Moynihan in the early sixties but perfected by Glazer in 1975.

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258. See, e.g., *Akins v. Texas*, 325 U.S. 398, 403 (1945) (stating that grand juries cannot reflect the racial composition of the community because "[t]he number of our races and nationalities stands in the way"); *Hughes v. Superior Court*, 339 U.S. 460, 463 (1950) (rejecting the right of African Americans to picket stores that failed to employ members of their race for fear that otherwise "there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities").

259. See *supra* notes 234-35 and accompanying text.

260. *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 185 (1977) (Burger, C.J., dissenting) (citations omitted).

Did Powell take his lessons about ethnicity directly from Glazer? Although Powell did not cite Glazer's work, his opinion gave pride of place to the reference to a "nation of minorities," a phrase also at the heart of *Affirmative Discrimination*.<sup>261</sup> Even more probative, Powell's reasoning strikingly paralleled Glazer's basic analysis. Powell did not just repeat the shorthand phrase, he adopted the matrix of ideas surrounding the "nation of minorities" claim. Like Glazer, Powell argued in effect both that blacks were white and that whites were black. The complicacy (not to say incoherence) of that position strongly suggests that it was not for Powell a *sui generis* insight. Perhaps Powell read Nathan Glazer's book, or perhaps he (or his clerks) picked up on the "nation of minorities" language in one of the briefs. The self-styled Committee for Academic Nondiscrimination and Integrity, with Nathan Glazer sitting on its steering committee, submitted a brief in *Bakke* that repeatedly cited the arguments in *Affirmative Discrimination*.<sup>262</sup> And the Anti-Defamation League submitted an amicus that prominently included the entire paragraph from *Affirmative Discrimination* in which Glazer disaggregated whites into discrete ethnicities, the paragraph that concluded "We are indeed a nation of minorities."<sup>263</sup> Or maybe Powell simply developed the ethnic analysis on his own, drawing upon the Court's previous invocations of ethnicity as well as on the ethnic revival then sweeping the nation.

If *Bakke* should be located against the backdrop of *Affirmative Discrimination*, it must also be assessed relative to the immense acclaim given to the movie *Rocky* and the new-found devotion among whites to ethnic immigrant identities which that blockbuster simultaneously appealed to and stoked.<sup>264</sup> Released a few weeks after the California Supreme Court ruled against affirmative action in *Bakke* in the summer of 1976, Rocky Balboa (and Alan Bakke) seemed to epitomize the white underdog fighting long social odds to achieve the success now gratuitously reserved for brash and newly powerful

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261. Bybee notes that Powell does not cite Glazer. Bybee, *supra* note 239, at 278 n.19. *But see* LAWRENCE & MATSUDA, *supra* note 248, at 48 (describing Powell as paraphrasing Glazer's key "nation of minorities" paragraph).

262. Brief of Amici Curiae for the Committee on Academic Nondiscrimination and Integrity and the Mid-America Legal Foundation at 2, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 189551. Glazer's academic committee had joined forces with the Mid-America Legal Foundation, one of the legal advocacy groups that formed in the 1970s to promote conservative causes. LEE COKORINOS, *THE ASSAULT ON DIVERSITY: AN ORGANIZED CHALLENGE TO RACIAL AND GENDER JUSTICE* 6-7 (2003).

263. Brief Amici Curiae of Anti-Defamation League of B'nai B'rith et al. at 18, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 189541. *But see* TIMOTHY O'NEILL, *BAKKE AND THE POLITICS OF EQUALITY: FRIENDS AND FOES IN THE CLASSROOM OF LITIGATION* 172 (1985) ("[F]ew briefs in *Bakke* did more than echo the arguments of the parties, and what original contributions were made may have been lost amidst the deluge of fifteen hundred pages of amici briefs.").

264. I draw here on the trenchant analysis developed by Matthew Frye Jacobson. MATTHEW FRYE JACOBSON, *ROOTS TOO: WHITE ETHNIC REVIVAL IN POST-CIVIL RIGHTS AMERICA* 98-108 (2006).

minorities—the “Italian stallion” emerging from the hardship of working-class Philadelphia to challenge the privileged, powerful, trash-talking black champion, Apollo Creed (his very name evoking the other corners of the American triumvirate, race and color).<sup>265</sup> The 1970s witnessed an explosion of interest among whites in ethnic immigrant identities, giving rise to what Mathew Frye Jacobson terms “Ellis Island whiteness.”<sup>266</sup> The more monolithic white identity that had developed in the 1950s and 1960s sharply gave way to resurgence in ancestral pride, with a special emphasis placed by whites on tracing their roots back to European homelands. Jacobson attributes this ethnic revival to various factors, including a sense of working-class exclusion from the halls of power still controlled by WASPs and a search for authenticity during an era of economic dislocation and national malaise.<sup>267</sup> But he also stresses the racial politics of ethnicity: “The pervasive conceit of the nation of immigrants . . . blunted the charges of the Civil Rights and Black Power movements and eased the conscience of a nation that had just barely begun to reckon with the harshest contours of its history forged in white supremacism.”<sup>268</sup> Powell wrote his opinion in a social context marked among whites by a revisionist version of American history in which they were nearly all Ellis Island immigrants or their children—and hence, not implicated in the racial oppression of minorities, but instead minorities themselves unfairly victimized by handouts to favored groups unwilling to follow the route to success blazed by other ethnics.

Whatever the source, Powell’s reconfiguration of the United States from a country of dominant and subordinate races to a nation of minorities provided the foundation to his analysis in *Bakke*. One can hardly exaggerate the centrality of ethnicity to Powell’s evaluation of affirmative action: it justified treating race-conscious remedies as the constitutional equivalent of racial subordination; authorized the quick dismissal of efforts to achieve integration as discrimination for its own sake; recast the reality of widespread racism as amorphous and subjective; and ultimately ratified “diversity” as the sole basis for upholding affirmative action. As we shall see next, when reactionary colorblindness became constitutional law in the 1980s, its proponents initially embraced not only Powell’s equation of affirmative action and racial oppression, but his reliance on ethnicity theory too.

One future Justice, though, would not wait. The year after *Bakke*, then-professor Antonin Scalia published a short essay condemning race-based remedial action. On the one hand, he presented race as just a matter of physical differences or “blood,” stripped entirely of history, context, and power: “I owe no man anything, nor he me,” Scalia wrote, “because of the blood that flows in

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265. *Id.* at 101.

266. *Id.* at 7.

267. *Id.* at 20, 23, 314.

268. *Id.* at 9.

our veins.”<sup>269</sup> On the other hand, races—whether black or white—were in fact ethnicities, all in equal competition with each other:

My father came to this country when he was a teenager. Not only had he never profited from the sweat of any black man’s brow, I don’t think he had ever seen a black man. There are, of course, many white ethnic groups that came to this country in great numbers relatively late in its history—Italians, Jews, Irish, Poles—who not only took no part in, and derived no profit from, the major historic suppression of the currently acknowledged minority groups, but were, in fact, themselves the object of discrimination by the dominant Anglo-Saxon majority. If I can recall in my lifetime the obnoxious “White Trade Only” signs in shops in Washington, D.C., others can recall “Irish Need Not Apply” signs in Boston, three or four decades earlier.<sup>270</sup>

Scalia, the son of an Italian immigrant, vigorously adopted the ethnicity model promoted by Glazer and read into constitutional law by Powell. For Scalia, black exclusion paralleled the oppression of whites, a group he readily recast as the Irish, the Poles, the Jews, and most pointedly the Italians, ethnics all and all equally the victims of discrimination—including invidious discrimination in the form of affirmative action.

## VI. CONSTITUTIONAL COLORBLINDNESS

The Justices arguing for colorblindness in *Bakke* and *Weber* located the source of this command in civil rights statutes because previous case law reiterated time and again that the Constitution did not forbid the use of racial classifications. But as Marshall, Brennan, and Blackmun had feared in *Bakke*, the claim was nigh that the Fourteenth Amendment barred race-conscious remedies. Just a year after *Weber*, the Court in *Fullilove v. Klutznick* considered a federal requirement that at least ten percent of public works money be used to procure services from minority-owned businesses.<sup>271</sup> *Fullilove* reprised the struggle instigated in *Bakke* over colorblindness, but now in terms of the Constitution’s meaning. Burger’s majority opinion stated unequivocally that “[a]s a threshold matter, we reject the contention that in the remedial context the Congress must act in a wholly ‘color-blind’ fashion.”<sup>272</sup> And Marshall, joined by Brennan and Blackmun, continued to warn that equality could not be achieved in a colorblind fashion: “doors cannot be fully opened without the acceptance of race-conscious remedies.”<sup>273</sup> But Stewart, joined by Rehnquist, sought to appropriate Harlan’s famous dissent:

“Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. . . .” Those words were written by a Member of this Court 84

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269. Antonin Scalia, *The Disease as Cure*, 1979 WASH. U. L.Q. 147, 153.

270. *Id.* at 152.

271. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

272. *Id.* at 482.

273. *Id.* at 522 (Marshall, J., concurring) (citation omitted).

years ago [in] *Plessy v. Ferguson*. . . I think today's decision is wrong for the same reason that *Plessy v. Ferguson* was wrong, and I respectfully dissent.<sup>274</sup>

Stewart's dissent marks the first judicial commitment in a Supreme Court case to an anticlassification interpretation of the Constitution itself. It says something profound about contemporary colorblindness on the Court that this first modern embrace of Harlan's ambiguous phrase equated affirmative action with the Jim Crow segregation upheld in *Plessy*.

Debate regarding the meaning of Equal Protection has continued on the Court since *Fullilove*, though the weight of opinion has decidedly shifted to support reactionary colorblindness. By 1989, the Court in *Richmond v. Croson* reversed a set-aside program modeled on the one upheld in *Fullilove*, with a clear majority favoring Stewart's colorblind reading of the Constitution. It lies beyond the scope of this Article to recount the back and forth in the nine years between *Fullilove* and *Croson*, let alone between *Croson* and the Court's 2005 decision in *Johnson v. California*, where the two Justices who most vigorously support colorblindness nevertheless voted to apply relaxed review rather than strict scrutiny to a racial segregation policy in the California prison system.<sup>275</sup> Instead, I seek only to show through a quick review of *Croson* that the ethnic turn so fundamental to Powell's analysis in *Bakke* heavily influenced the colorblind reasoning now dominant on the Court.

#### A. *Richmond v. Croson*

*Richmond* justified its set-aside program directing contracting dollars toward minority-owned businesses as a remedy for extensive racial discrimination in the construction industry.<sup>276</sup> The city relied on research by the federal government that racial nepotism virtually defined the construction sector, and also documented the near total exclusion of minorities from receipt of its contracting dollars and from local trade associations.<sup>277</sup> The former capital of the confederacy, *Richmond's* population was half black, but only two-thirds of one percent of its contracts had gone to minority businesses in the five years before it adopted the challenged plan.<sup>278</sup> Putting a name to the practice evident in those numbers, a former mayor of *Richmond* testified: "I can say without equivocation, that the general conduct in the construction industry in this area . . . is one in which race discrimination and exclusion on the basis of race is widespread."<sup>279</sup>

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274. *Id.* at 522-23 (Stewart, J., dissenting).

275. *Johnson v. California*, 543 U.S. 499, 524 (2005) (Thomas, J., dissenting, joined by Scalia, J.).

276. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477-78 (1989).

277. *Id.* at 530-34 (Marshall, J., dissenting).

278. *Id.* at 479-80 (majority opinion).

279. *Id.* at 534 n.5.

Two central questions confronted the Court in *Croson*, one the standard of review in an affirmative action case and the other whether remedying societal discrimination constituted a sufficient justification for employing a racial classification. To answer both questions, the Court turned to ethnicity. Regarding the standard of review, O'Connor, writing for herself and three other Justices, approvingly cited Powell's conclusion that strict scrutiny applied.<sup>280</sup> In the most striking part of O'Connor's analysis, she justified stringent review by advertent to *Carolene Products*, John Hart Ely, process-defect theory, and the necessity of protecting discrete and insular minorities.<sup>281</sup> Which minority did O'Connor have in mind? Following directly in Powell's race-as-ethnicity footsteps, none other than whites.

Powell's fear in *Bakke* that whites constituted the new minorities reverberated in *Croson*. "In this case," O'Connor reported,

blacks constitute approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case.<sup>282</sup>

One might be tempted to think this a throw-away argument, one made only by O'Connor and only because the specific facts of the case allowed this debater's trick. But the sense that whites suffered as an embattled minority in the Confederacy's former capital pervades the case. Stevens referred to whites as "the disadvantaged class,"<sup>283</sup> while Scalia intoned that one sees in Richmond "the enactment of a set-aside clearly and directly beneficial to the dominant political group, which happens also to be the dominant racial group."<sup>284</sup> What is this so-called affirmative action, these Justices seem to say, but racial rent-seeking by a new dominant race? Racism by whites is over; ethnic self-interest and group politics by blacks and other so-called minorities mark the new day, with not only individual whites but the dream of racial equality at risk. Whites are really black, potential victims as ascendant minority groups seek their turn at the trough.<sup>285</sup>

Having adopted strict scrutiny, O'Connor turned to the constitutionality of employing race-conscious means to respond to "societal discrimination," understood both as a set of contemporary practices and as entrenched

280. *Id.* at 493-94.

281. *Id.* at 495-96.

282. *Id.*

283. *Id.* at 516 (Stevens, J., concurring).

284. *Id.* at 524 (Scalia, J., concurring).

285. *Cf. Fullilove v. Klutznick*, 448 U.S. 448, 541-42 (1980) (Stevens, J., dissenting) ("[T]here is a group of legislators in Congress identified as the 'Black Caucus' and . . . members of that group argued that if the Federal Government was going to provide \$4 billion of new public contract business, their constituents were entitled to 'a piece of the action.'").

disadvantage.<sup>286</sup> To begin with, she reasoned that in the absence of proof of a particular misdeed—something rising to the level of “a prima facie case of a constitutional or statutory violation”<sup>287</sup>—racism no longer availed as an explanation for social action. This analysis paralleled Powell’s bifurcation in which racism either rose to the level of Jim Crow practices or was amorphous; indeed, O’Connor quoted Powell’s assertion in *Bakke* that “‘societal discrimination’ [was] an amorphous concept of injury that may be ageless in its reach into the past.”<sup>288</sup> According to both Powell and O’Connor, in the absence of extreme and explicit racism, racial hierarchy did not operate. “To a large extent,” O’Connor wrote, “the set-aside of subcontracting dollars seems to rest on the unsupported assumption that white prime contractors simply will not hire minority firms.”<sup>289</sup> She cited with approval a lower court’s decision to “decline to assume . . . that male caucasian contractors will award contracts only to other male caucasians.”<sup>290</sup> Stevens in his concurrence expressed even greater outrage at Richmond’s temerity in claiming that racial exclusion continued. He decried the “stereotypical thinking that prompts legislation of this kind,” and condemned the Richmond ordinance because “it stigmatizes the disadvantaged class with the unproven charge of past racial discrimination.”<sup>291</sup> To suspect whites of discrimination now constituted more than error, but actual stereotyping, a veritable racial assault on whites as the new “disadvantaged class.” Mistreatment by whites required specific proof; in its absence, the Court would presume racial neutrality governed Richmond’s social and economic life. *Croson* relegated systemic racial harm to the distant past, even as it transformed charges of bias into the new paradigm of racism.

Turning to explain the vast disparities in group position that Richmond had amply demonstrated, O’Connor again relied on an ethnic model. “It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination,” O’Connor declared.<sup>292</sup> In particular, one could not simply expect that, without discrimination, races would be proportionately represented: “[I]t is completely unrealistic to assume that individuals of one race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination.”<sup>293</sup> Instead, O’Connor conjectured, “[b]lacks may be disproportionately attracted to industries other than construction.”<sup>294</sup> O’Connor here virtually parroted Glazer, who in *Affirmative Discrimination* had used similar logic to explain segregated workplaces: rejecting the argument

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286. *Croson*, 488 U.S. at 498-507.

287. *Id.* at 500.

288. *Id.* at 497 (citations omitted).

289. *Id.* at 502.

290. *Id.* (citation and footnote omitted).

291. *Id.* at 516 (Stevens, J., concurring).

292. *Id.* at 499 (majority opinion).

293. *Id.* at 507-08 (citation omitted).

294. *Id.* at 503.

that “[a]bsent discrimination, one would expect a nearly random distribution of women and minorities in all jobs,” Glazer retorted, “[a]bsent discrimination, of course, one would expect nothing of the sort. . . . Some of the relevant factors are: level of education, quality of education, type of education, location by region . . . taste or, if you will, culture.”<sup>295</sup> Under ethnicity theory, structural disadvantage did not exist, but differences in group culture did. As Glazer put it, “Distinctive histories have channeled ethnic and racial groups into one kind of work or another, and this is the origin of many of the ‘unrepresentative’ work distributions we see.”<sup>296</sup> O’Connor followed Glazer and Powell down the ethnic road and, however implausible the claim, confidently suggested that the virtual absence of blacks from one of the few employment sectors where persons with relatively little formal education nevertheless earned a living wage actually reflected some perverse volition or cultural maldisposition on their part. O’Connor, relying on ethnicity theory, transmogrified Richmond’s evidence of structural exclusion, making it more likely the result of autonomous black preferences, or at best an attenuated claim of societal discrimination further undermined by unwarranted accusations of white racism.

The reality of societal discrimination thus disparaged, the legal question then became whether such vaporous disadvantage, without more, could justify affirmative action. Drawing heavily on Powell’s opinion in *Bakke*, O’Connor repudiated Richmond’s set-aside program in the following terms:

To accept Richmond’s claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for “remedial relief” for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.<sup>297</sup>

Like Powell, O’Connor used the version of ethnicity picturing whites as black to mandate strict scrutiny. Then, just as Powell did, in considering whether structural disadvantage justified affirmative action, O’Connor reverted to the version of ethnicity depicting all groups as the masters of their own destiny, none suffering particular disadvantage. Despite the heavy particularity of Virginia’s history, *Croson* posited a veritable tug of war between various identically situated ethnic groups competing for the spoils of government largess. O’Connor wrapped her opinion in the moral legitimacy afforded by the “dream of a Nation of equal citizens in a society where race is irrelevant.” But by drawing blacks as white, she in effect reasoned as if this end state even now existed: race was ostensibly *already* irrelevant to the life chances of minorities in America. In this context, not only was affirmative action unnecessary, but it threatened the American racial paradise by victimizing whites, making them

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295. GLAZER, *supra* note 15, at 63.

296. *Id.* at 203.

297. *Croson*, 488 U.S. at 505-06 (citation omitted).

the new minority. In its first firm instantiation as Equal Protection law, colorblindness drew heavily on the redescription of race constitutionally pioneered by Powell in *Bakke*, positing whites as black to justify heightened review, but blacks as white to deny the persistence of racial hierarchy and the necessity of racial reconstruction.<sup>298</sup>

#### VII. INEFFECTIVE LIBERAL OPPOSITION TO REACTIONARY COLORBLINDNESS

The ethnic rationale advanced by the Court to justify reactionary colorblindness was initially articulated by persons who had supported the civil rights movement in toppling de jure segregation but who opposed the campaign to challenge through race-conscious means the de facto racial hierarchy that permeated American society. Though I use the term “neoconservatives,” it is important not to lose sight of the liberal credentials of figures such as Glazer and especially Moynihan, who became a stalwart of the Democratic Party renowned for his expertise on issues of welfare and urban poverty. In the rise of ethnicity as a countervailing narrative of American race relations, there’s something of a Nixon-to-China dynamic, for it was liberal northern elites, rather than the post-*Brown* southern converts to colorblindness, who laid the groundwork for the current Court’s embrace of reactionary colorblindness. But what of those liberals who favored affirmative action? After all, the great weight of elite opinion supported race-conscious remedies in the early 1970s.<sup>299</sup> In retrospect, liberal support for remedial uses of race did little to impede the development of reactionary colorblindness. Indeed, the language and logic of some of affirmative action’s most outspoken legal defenders sounded little different than that of affirmative action’s colorblind critics.

##### A. William Brennan

Justice Brennan supported race-conscious remedies, but he did so ambivalently. In *Bakke*, Brennan portrayed preferential treatment as a threat to liberal notions of merit and also warned that race-conscious remedies engendered risks of minority stigmatization and racial separatism: “State programs designed ostensibly to ameliorate the effects of past racial discrimination obviously create the . . . hazard of stigma, since they may

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298. Meanwhile, by the time *Crosby* came down in 1989, a robust majority of whites had come to accept the ethnic frame that positioned them as virtuous immigrants who had overcome discrimination through hard work, while simultaneously denigrating minorities as unsuccessful ethnic groups illegitimately seeking handouts. “According to national survey data . . . 76.1 percent of white Americans either ‘agreed’ or ‘strongly agreed’ with the statement, ‘Irish, Italians, Jewish, and many other minorities overcame prejudice and worked their way up. Blacks should do the same without special favors.’” JACOBSON, *supra* note 264, at 319.

299. Nicholas Lehmann, *Taking Affirmative Action Apart*, N.Y. TIMES, June 11, 1995, § 6 (Magazine), at 36.

promote racial separatism and reinforce the views of those who believe that members of racial minorities are inherently incapable of succeeding on their own.”<sup>300</sup> In these comments, Brennan summarized concerns he had elaborated at length in *UJO*, where he had spent three pages raising various objections to affirmative action, from the fear that plans purportedly favoring minorities might in fact disguise policies aimed at hurting them to the concern that many whites saw preferential treatment as unjust.<sup>301</sup>

But it is Brennan’s defense of affirmative action, rather than his cautions about such programs, that merits criticism. Brennan relied in his defense on conceptions of race and racism that ill equipped him to respond to the equation of affirmative action and noxious discrimination. In *Bakke*, at two junctures Brennan moved toward the recognition that race constituted a system of subordination: at the outset of his opinion, when he detailed the sorry history of black exclusion from legal protection;<sup>302</sup> and near the end, when he recounted how “[f]rom the inception of our national life, Negroes have been subjected to unique legal disabilities impairing access to equal educational opportunity.”<sup>303</sup> Ultimately, however, Brennan did not offer an account of race grounded in subjugation. Instead, he proffered the following assessment: “race, like gender and illegitimacy, is an immutable characteristic which its possessors are powerless to escape or set aside. . . . [S]uch divisions are contrary to our deep belief that ‘legal burdens should bear some relationship to individual responsibility or wrongdoing.’”<sup>304</sup> Set aside the problematic claim that race, gender, and illegitimacy are “immutable” (problematic, that is, given the irreducibly social origins of such categories). Focus instead on Brennan’s reliance on liberal individualism. Brennan described racism’s central harm, as he had the harm of sexism in *Frontiero*, as a derogation of individuality.<sup>305</sup> For Brennan, as late as 1978, to make a distinction on the basis of race or gender harmed the individual by treating him or her differently based on a characteristic over which the individual had no control, thereby impinging upon liberal notions of meritocracy and moral desert. Brennan was surely correct that racism and sexism take into account aspects of identity over which

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300. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 360-61 (1978) (citation omitted) (Brennan, J., concurring in the judgment in part and dissenting in part); *cf. id.* at 403 (Blackmun, J., concurring in the judgment in part and dissenting in part) (“I yield to no one in my earnest hope that the time will come when an ‘affirmative action’ program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most.”).

301. *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 172-74 (1977).

302. *Bakke*, 438 U.S. at 327.

303. *Id.* at 371.

304. *Id.* at 360-61 (citations omitted).

305. *Frontiero v. Richardson*, 411 U.S. 677, 686-87 (1973). In *Frontiero*, too, Brennan began by noting historical patterns of domination, only to shift to an analysis focused on mistreatment on the basis of arbitrary characteristics.

persons exercise little or no volition. Nevertheless, describing this as the central harm wreaked by these illegitimate hierarchies missed their core dynamic. Racism and sexism gain social meaning and destructive power from the ubiquitous deployment of force, violence, degradation, coercion, and dominance, not merely through the tendency to make distinctions on the basis of criteria outside individual control.<sup>306</sup>

Brennan's focus on capricious mistreatment virtually invited an equation of invidious and benign discrimination. Alan Bakke could argue in effect that because of his race, "an immutable characteristic [he was] powerless to escape," to use Brennan's language, U.C. Davis did not consider him for the sixteen seats supposedly reserved for minorities. Brennan might have responded that governments routinely differentiate among persons on the basis of factors beyond individual control—say, age, place of birth, or familial wealth—while affording no heightened constitutional protection. He might have added that arbitrary mistreatment did not rise even remotely to the level of the group subordination the Court had begun to address in its racial jurisprudence, and that by no stretch of the imagination could the costs of affirmative action be equated with the brutality of white supremacy. But Brennan failed to offer these rejoinders. Instead, to distinguish benign from invidious discrimination Brennan resorted to the notion of stigma. He wrote in *Bakke*: "there is absolutely no basis for concluding that Bakke's rejection as a result of Davis's use of racial preference will affect him throughout his life in the same way as the segregation of the Negro schoolchildren in *Brown I* would have affected them."<sup>307</sup> Affirmative action *was* racial discrimination, according to Brennan; the difference lay only in that it did not stigmatize whites.<sup>308</sup>

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306. Cf. Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 591-92 (1977) ("[R]acism and sexism should not be thought of as phenomena that consist simply in taking a person's race or sex into account, or even simply in taking a person's race or sex into account in an arbitrary way. Instead, racism and sexism consist in taking race and sex into account in a certain way, in the context of a specific set of institutional arrangements and a specific ideology which together create or maintain a *system* of unjust institutions and unwarranted beliefs . . . [favoring] those who are white and male.").

307. *Bakke*, 438 U.S. at 375.

308. Brennan was less confident that affirmative action did not stigmatize blacks. "[E]ven preferential treatment may act to stigmatize its recipient groups, for although intended to correct systemic or institutional inequities, such a policy may imply to some the recipients' inferiority and especial need for protection." *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 173-74 (1977). Relying on liberal race theory, Brennan traced stigma to the immediate social practice, in this case affirmative action, but ignored and thereby absolved the larger social dynamics of status subordination which serve as the direct fount for negative beliefs about minority incapacity. Clarence Thomas, in turn, has made the supposed stigmatic tendency of affirmative action one of his principal lines of attack against race-conscious remedies, and even against integrated schooling. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring) ("So-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence.");

Brennan's invocation of *Brown* is no accident, for in 1978 he still drew on the racial model used by Warren in 1954.<sup>309</sup> It is liberal race theory, where race is nothing but skin color that carries no social significance, that pictures distinctions on the basis of race as arbitrary and unrelated to larger practices of oppression, and that conceives of racist harms primarily in the psycho-social terms of individual stigma. That *Brown* should have employed liberal race theory comes as no surprise: it formed the dominant racial ideology of the time; the delicacy of the historical and constitutional moment probably precluded a more thoroughgoing critique of white racism; and the posture of the case required the Court to assume equal facilities, thus pushing toward a psychological rather than material understanding of racial harms. But Brennan could employ a similar understanding only by ignoring the lessons of the sixties and seventies. The South's massive resistance, the white riots over busing and neighborhood integration in the North, the urban uprisings and militancy by minorities across the country, all demonstrated that race in our society allocated and justified privilege and disadvantage; that racism did not reduce to individual prejudice, but rather rose to the level of systemic practice; and that the harms of racial subordination far exceeded stigmatization, encompassing dehumanization and immiseration. These central racial lessons were broadcast over the nightly news, through the analysis of the Kerner Commission report, in the exhortations of Martin Luther King, Jr., and in mainstream and insurgent race scholarship. Yet Brennan in *Bakke* focused on discrimination as a derogation of meritocratic norms. Brennan would move toward a structural theory of racial domination in the 1980s.<sup>310</sup> Nevertheless, his account of racial dynamics in *Bakke* buttressed the claim that affirmative action and invidious discrimination were, stigma aside, the same.

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Missouri v. Jenkins, 515 U.S. 70, 119 (1995) (Thomas, J., concurring) (criticizing efforts to promote school integration as "rest[ing] upon the idea that any school that is black is inferior, and that blacks cannot succeed without the benefit of the company of whites").

309. For a discussion of liberal race theory in *Brown*, see *supra* notes 57-60 and accompanying text.

310. Brennan's majority opinion in *Plyler v. Doe*, 457 U.S. 202 (1982), for example, focused not on race per se but on the social dynamics of ostracism. Rejecting the efforts of Texas to exclude the children of undocumented immigrants from public schools, Brennan correctly framed the issue in terms of "shadow populations" and the creation of "a permanent caste." *Id.* at 218-19. *McCleskey v. Kemp*, 481 U.S. 279 (1987), also moved Brennan toward a more structural understanding of racism. Presented with an exhaustive study showing that Georgia's death penalty machinery gave great weight to the race of the victim and of the defendant, the majority nevertheless insisted on proof of purposeful discrimination by a particular decision-maker. *Id.* at 297. Brennan grounded his impassioned dissent in an extended discussion of Georgia's "dual system of crime and punishment" whose "lineage traced back to the time of slavery," *id.* at 329, and extensively documented the statistical evidence proving the persistence of widespread racial discrimination, *id.* at 325-28. In neither *Plyler* nor *McCleskey* did Brennan posit an understanding of racial discrimination as merely arbitrary treatment; instead, he focused on structural inequalities measured in terms of social practices and racial history.

Perhaps Brennan did not ground his *Bakke* opinion on subordination because such a conception, while available intellectually, seemed unworkable judicially for either doctrinal or political reasons. Maybe, but it is important not to overstate the degree of constraint, especially given *Loving* and its emphasis on white supremacy as a precedent, and the fact that Brennan in *Bakke* failed to assemble a majority at any rate. Note too the heavy emphasis on black oppression in Marshall's opinion, as well as Brennan's own acknowledgement of the unique history of discrimination against African Americans, suggesting that this analysis was available and not illegitimate. Brennan ought not to be criticized for missing a particular theory of racial oppression, or for neglecting to elaborate a complete anti-subordination jurisprudence. But my complaint is much more basic: Brennan failed to explain why affirmative action and pernicious discrimination were, stigma excepted, qualitatively different phenomena. The explanation—at its simplest the insight that racism reflected a dynamic of systemic oppression and affirmative action an effort to undo such subordination—was in 1978 both obvious and readily available.

B. *John Hart Ely and Paul Brest*

Brennan in the 1970s was not alone in sticking to the liberal race theory relied on in 1954: elite liberal law professors kept him intellectual company. They too ignored the evidence that race and racism constituted a structural system. In detailing his concerns about affirmative action in the *UJO* decision, Brennan cited to three law review articles, including John Kaplan's highly equivocal engagement with preferential admissions.<sup>311</sup> In addition, Brennan cited Harvard Law professor John Hart Ely's 1974 article in the *University of Chicago Law Review*, *The Constitutionality of Reverse Discrimination*, and Stanford Law professor Paul Brest's *In Defense of the Antidiscrimination Principle*, published as the foreword to *Harvard Law Review's* prestigious Supreme Court issue in 1976.<sup>312</sup> Ely and Brest had come down solidly for the constitutionality of affirmative action, but in manners that buttressed rather than repudiated the comparison of affirmative action to segregation.

Ely began his constitutional defense of race-conscious efforts by describing such policies negatively—casting affirmative action as “a wrenching moral issue” and troubling insofar as it “hurt[] people precisely because of their color.”<sup>313</sup> He further suggested that to allow preferential treatment “seems to

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311. See *supra* note 117.

312. *United Jewish Orgs.*, 430 U.S. at 178 n.7 (Brennan, J., concurring) (citing Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976)); *id.* at 174 (citing John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974)).

313. Ely, *supra* note 312, at 723-24. Ely included many of these ideas in *Democracy and Distrust*, *supra* note 238. In *Democracy and Distrust*, however, published in 1980, Ely leavened his analysis with the ethnic pluralist reasoning offered in *Bakke*, as in his comment

be countenancing the most flagrant double standards” because such programs “must mean denying opportunities to some people solely because they were born White.”<sup>314</sup> Nevertheless, Ely defended the constitutionality of what he termed “reverse racial discrimination.”<sup>315</sup> He suggested, in a harbinger of process-defect theory, that “it is not ‘suspect’ in a constitutional sense for a majority, any majority, to discriminate against itself.”<sup>316</sup> For Ely, the central issue came down to cognitive accuracy. He speculated that, in general, majorities would be prone both to overvalue their own interests and systematically to miscomprehend the interests of minorities.<sup>317</sup> He supposed, therefore, that whites would be unlikely to slight themselves in designing a program that disadvantaged whites but advantaged minorities.<sup>318</sup> In his pithy summary, “[w]hether or not it is more blessed to give than to receive, it is surely less suspicious.”<sup>319</sup>

This depressingly tepid defense of affirmative action, by nodding toward cognitive error, skewed attention from the reparative and distributive concerns that strongly support race-conscious remedies. But focus instead on the fact that in defending affirmative action, Ely too depicted racism in a way that blurred the line between destructive and remedial discrimination. Ely’s process theory made no distinction between the “discrimination” in Jim Crow laws and in affirmative action, except that in the former a majority targeted a minority and so risked cognitive mistake, whereas in the latter a majority harmed itself and so was less likely to err. No wonder Ely so readily described race-conscious remedies as “reverse racial discrimination,” “quite troubling,” “a wrenching moral issue,” and as “countenancing the most flagrant double standards.” He too equated the racial dynamic in affirmative action and racial caste laws, thereby tainting affirmative action by associating it with vicious uses of race.

It might seem implausible that Ely, writing in 1974, thought that racism resulted from mistaken judgments, but consider the following quote: “racial segregation may have been based on a feeling that Blacks were ‘different,’ and therefore had a different ‘place’ in the proper scheme of things—coupled with an unfeeling assumption that because we aren’t bothered by segregation, they won’t be either.”<sup>320</sup> Ely presented racial segregation as rooted in erroneous judgments about what “we” value and about how “they” feel—which would

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that “[w]e are a nation of minorities and our system thus depends on the ability and willingness of various groups to apprehend those overlapping interests that can bind them into a majority.” ELY, *supra* note 238, at 153.

314. Ely, *supra* note 312, at 723.

315. *Id.* at 727.

316. *Id.*

317. *Id.* at 733.

318. *Id.* at 735.

319. *Id.* at 736.

320. *Id.* at 732 n.41.

have been bad enough if he misunderstood so drastically the segregation still rampant in the 1970s.<sup>321</sup> But Ely was describing pure, old fashioned, straight up Jim Crow racism, for he continued: “In asserting that segregation will hurt only if Blacks choose to let it hurt, the majority in *Plessy v. Ferguson* convicted itself not so much of racial prejudice as of the lesser included offense of gross insensitivity.”<sup>322</sup> Ely treated Jim Crow as troubling because it rested on a mistaken judgment, rather than because it amounted to oppressive hierarchy. A focus on cognitive error makes sense from the point of view of the individual prejudice model prevalent in the 1950s, of course, and Ely explicitly invoked this model.<sup>323</sup> But nothing warranted reliance on this schema in 1974, for by then it was abundantly clear that racism amounted to group subordination. To excuse Jim Crow—and *Plessy* in particular—as resting on “gross insensitivity” fundamentally misunderstood the nature of racial hierarchy in the United States. The Jim Crow era heralded by *Plessy* did not rest on mistakes in judgment, but on the collective decision by whites to enforce a thorough regime of racial hierarchy through severe state and private violence. By erasing subordination as the core racial dynamic, Ely’s reasoning facilitated the emergence of reactionary colorblindness. Adopting a process defect theory centered on judgment errors, Ely hardly offered a compelling response to the claims of Posner and Bickel, or Stevens, Burger, Rehnquist, and Stewart, that affirmative action amounted to racial discrimination.<sup>324</sup> Just the opposite, Ely seemed to add his weight to the claim that “reverse racial discrimination,” as he termed it, differed only marginally from racial discrimination generally.<sup>325</sup>

Paul Brest began his famous article *In Defense of the Antidiscrimination Principle* by proclaiming flatly that “our nation was committed to the antidiscrimination principle,” which he then defined as “the general principle

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321. Ely couched his comments as a response to speculation by Bickel in 1962 that perhaps “decent feelings” motivated proponents of racial segregation. *Id.* (quoting BICKEL, *supra* note 132, at 61-62). In partial defense of Bickel, his point was the difficulty of measuring intent, and he did not claim that such motives in fact obtained. Ely, in contrast, purported to offer a “more plausibl[e]” analysis of the motivation behind Jim Crow laws. *Id.*

322. *Id.* (citation omitted).

323. *Id.* at 731 (describing groups “repeatedly . . . disadvantaged in ways that no one could rationally defend” and referring to “the prejudices that generated the plainly irrational legislation of past eras”).

324. Indeed, Ely would compliment Kaplan’s article, *supra* note 117, for “an unusually sensitive presentation.” Ely, *supra* note 312, at 738 n.54.

325. As late as 1998, Ely did not seem to appreciate the operation of Jim Crow as a form of group oppression. In that year, he sought to defend the correctness of the *Loving* decision against the challenge that “black and white people did indeed seem to be treated equally” by antimiscegenation laws by emphasizing that such discrimination harmed, not “one race more than another,” but Richard Loving and Mildred Jeter as individuals. John Hart Ely, *If at First You Don’t Succeed, Ignore the Question the Next Time? Group Harm in Brown v. Board of Education and Loving v. Virginia*, 15 CONST. COMMENT. 215, 219-20 (1998). The liberty component of *Loving* is no doubt important, but Ely remained entirely blind to the Court’s much more central concern with group oppression exemplified in the twice-repeated condemnation of Virginia’s law as an expression of white supremacy.

*disfavoring classifications* and other decisions and practices that depend on the race (or ethnic origin) of the parties affected.”<sup>326</sup> In short, Brest committed himself at the outset to a colorblind rule—though this lasted in its pure form only through the first page, for by the second Brest explained that “[t]he heart of the antidiscrimination principle is its prohibition of race-dependent decisions that disadvantage the members of minority groups.”<sup>327</sup> Wedding an anticlassification stance to a concern with group harm introduced core instabilities in his article, but also allowed Brest room to declare affirmative action constitutional. To arrive at this conclusion, Brest followed Ely and proceeded on the assumption that racism reflected mistakes in judgment—what Brest referred to as “racially selective sympathy and indifference,” which he defined as “the unconscious failure to extend to a minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one’s own group.”<sup>328</sup> He then tracked Ely in his analysis of affirmative action, not only reprising the argument that whites would largely avoid judgment errors when disadvantaging themselves, but attacking preferential treatment as bad social practice.<sup>329</sup> “Preferential practices may be constitutional,” he wrote, but that “is no more of a compliment than it is to say that [they are] not intolerable.”<sup>330</sup> For support, he referenced John Kaplan’s *Equal Justice in an Unequal World*, lauding its “prescient discussion of the issues.”<sup>331</sup> In addition, he cited to Nathan Glazer’s *Affirmative Discrimination*.<sup>332</sup> Like Ely, even as he defended the constitutionality of race-conscious remedies, Brest relied on liberal race theory in a way that led him to largely equate affirmative action and harmful discrimination.

As his citation to Glazer signals, though, Brest also subscribed to ethnicity theory. Brest’s adoption of race-as-ethnicity comes through particularly in how he conceptualized racism’s harms. In keeping with both the liberal and ethnic model, Brest emphasized primarily psychological damage: he argued that discrimination inflicted “psychological injury by stigmatizing . . . victims as inferior.”<sup>333</sup> Brest struggled, in contrast, to identify racism’s material manifestations. He speculated that often poverty and black culture explained what otherwise might seem to be racial inequalities. “Because cultural, rather than genetic, characteristics of race are salient, and because race and class co-

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326. Brest, *supra* note 312, at 1 (emphasis added) (footnote omitted).

327. *Id.* at 2 (emphasis added); see also *id.* at 6 (“Stated most simply, the antidiscrimination principle disfavors race-dependent decisions and conduct—at least when they selectively disadvantage the members of a minority group.”).

328. *Id.* at 7-8. Brest cited two articles by Ely to support this understanding of racial discrimination, including his *Unconstitutionality of Reverse Discrimination* piece. *Id.* at 8 n.36.

329. *Id.* at 16-18.

330. *Id.* at 17 (internal quotation omitted).

331. *Id.* at 16 n.66.

332. *Id.* at 18 n.78.

333. *Id.* at 8.

vary in so many situations, harms that appear to be race-specific may in fact be class-specific,” Brest speculated, citing Glazer and Moynihan for support.<sup>334</sup> “The independent significance of race, as distinguished from poverty, will likely remain unknown for the immediate future,” Brest opined.<sup>335</sup> Or again, “not all racially disproportionate impact can be attributed to past and remote discrimination: culture and social environment play major roles in shaping people’s motivations, habits, and skills, and the values voluntarily held by different social groups conduce to differing extents to success on tests and jobs in any society.”<sup>336</sup>

But what were those different habits, skill, and values? Unlike Glazer, Brest did not directly claim that cultural pathologies disabled blacks. Instead, more in keeping with the ethnic theorizing of Posner, Brest repeatedly formulated hypotheticals that traded on negative stereotypes about African Americans, especially with respect to their capacity for work. Brest speculated regarding “the unprejudiced employer who would prefer white applicants to blacks solely for reasons of efficiency,” elsewhere concluding that “if black laborers tend to be absent from work more often than their white counterparts—for whatever reason—it is not irrational for an employer to prefer white applicants for the job.”<sup>337</sup> Brest also accepted as plausible the claim that affirmative action might be justified because “minorities regularly employed in lower level occupations may serve as role models for learning industrial discipline and bring needed stability to a socially disorganized culture of poverty.”<sup>338</sup> Writing in the mid-1970s, Brest simply did not know whether significant race-specific harms existed—or whether, instead, minority incapacity explained minority failure. When Brennan read John Hart Ely, he saw affirmative action through a process-oriented version of Myrdal; when he read Brest, he peered through a lens shaped by Glazer, one which occluded any recognition of racial oppression in the present.

The vast weight of 1970s legal scholarship defended affirmative action in the weakest terms.<sup>339</sup> For the most part, 1970s legal scholars stood at the

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334. *Id.* at 46; *see id.* at 32 n.152 (citing Nathan Glazer & Daniel P. Moynihan, *Introduction* to *ETHNICITY: THEORY AND EXPERIENCE* 11-15 (Nathan Glazer & Daniel P. Moynihan eds., 1975)).

335. *Id.* at 47.

336. *Id.* at 32. Indeed, Brest partly favored a focus on stigmatic injury precisely because it applied even “where the material harm seems slight or problematic.” *Id.* at 9.

337. *Id.* at 6, 10.

338. *Id.* at 47. Brest also spoke of the psychic harm associated with “a generalization that is not true as applied to us.” *Id.* at 10. As an example, Brest offered the stereotypes that “blacks are less industrious, trustworthy or clean than whites.” *Id.* Note, however, that Brest referred to these racist bromides not as destructive stereotypes but as “generalizations” that might or might not be accurate. His point was not to highlight the ugliness of such stereotypes across the board, but to posit that “individuals as to whom the generalization is inaccurate” might “justifiably” feel slighted. *Id.* By implication, there existed for Brest individuals as to whom such “generalizations” accurately applied.

339. For another example, see Kent Greenawalt, *Judicial Scrutiny of “Benign” Racial*

cutting edge of 1950s race theory: they understood racism as individual prejudice; decried the mistreatment of persons on the basis of arbitrary, immutable characteristics; and pictured racism's harms in terms of stigma to individuals. It was as if, for legal scholars, the 1960s and the revolution in racial scholarship that it produced simply never happened.<sup>340</sup> After the tumult of that decade, and in the face of entrenched racial patterns of inequality and spreading white backlash, prejudice theory could not have been more out of date. But, to judge by their analyses as much as their footnotes, virtually every law professor remained steeped in the orthodoxy of the fifties—or worse, uncritically accepted the extension of ethnicity to minorities.<sup>341</sup>

By relying on an outmoded theory of race and by ignoring not only recent history but a voluminous scholarship on racial hierarchy, legal defenders of affirmative action did surprisingly little to forestall the rise of conservative colorblindness. Virtually no elite legal scholar declared, clearly and convincingly, that affirmative action and Jim Crow racism were two entirely distinct social phenomena. Instead, by explaining preferential treatment in terms that tended to conflate it with racism, affirmative action's liberal supporters likely contributed to the intellectual and moral legitimacy of an anticlassification approach to equality. The rise of reactionary colorblindness emerges, then, as partly a story about a general turn by the nation's elites, including most liberal legal defenders of affirmative action, away from the structural conceptions of race that emerged in the 1960s. Marshall, in his powerful critique of colorblindness in *Bakke*, may have cited to historians of black subordination in insisting upon the centrality of oppression in race

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*Preference in Law School Admissions*, 75 COLUM. L. REV. 559 (1975) (concluding that “racial preferences for minority groups can be sustained as permissible ways to redress injustice and to promote genuine social equality,” *id.* at 560, but adding that “[i]n the long run, at least, our public institutions should be ‘blind’ to color as well as other irrelevant class characteristics of individual humans,” *id.* at 571, and that affirmative action encourages racial special interest politics, tends to perpetuate thinking in racial terms, leads to the overmatching of students admitted under affirmative action, and engenders “a deprecatory attitude toward minority graduates,” *id.* at 571-72).

340. The few exceptions included work by Derrick Bell, Owen Fiss, Alan Freeman, and Richard Wasserstrom. DERRICK A. BELL, JR., *RACE, RACISM, AND AMERICAN LAW* (1st ed. 1973); Derrick A. Bell, Jr., *In Defense of Minority Admissions Programs: A Response to Professor Graglia*, 119 U. PA. L. REV. 364 (1970); Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. REV. 5 (1976); Fiss, *supra* note 2; Freeman, *Legitimizing Racial Discrimination*, *supra* note 16; Wasserstrom, *supra* note 306.

341. Gary Peller has argued that the liberal conception of race mapped onto larger cultural understandings of the move from status to liberty, thus impelling a transition from race consciousness to race neutrality or colorblindness. Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 774. While Peller neglects the central role that ethnic pluralism played in justifying reactionary colorblindness, he is nevertheless correct that “it would be a mistake to think that today’s conservative discourse is simply a bad faith distortion of a progressive worldview. Serious limits to the [liberal] integrationist vision existed from the beginning.” *Id.* at 762.

relations, but he did not cite to a single law review article. There were, as it happens, almost none to which an opponent of colorblindness might have cited.<sup>342</sup>

#### CONCLUSION

As it currently stands, constitutional race law is a disaster. It approaches the problem of race in our society exactly backwards, almost invariably striking down efforts to respond to racial hierarchy while insulating from more than cursory review state policies that disproportionately harm minorities.<sup>343</sup> It does so now most often not through an ethnic analogy but by deploying a formal approach in which race is recognized as functioning only when explicitly invoked. Perhaps the most striking example arose in *Hernandez v. New York*, a 1991 jury exclusion case.<sup>344</sup> The prosecutor peremptorily struck every Latino, ostensibly because he believed these potential jurors could not defer to the court-appointed interpreter but would rely on their familiarity with Spanish in evaluating the testimony of Spanish-speaking witnesses.<sup>345</sup> Justice O'Connor concurred in the Court's decision upholding the exclusions, writing that the strikes "may have acted like strikes based on race, but they were *not* based on race. *No matter how closely tied or significantly correlated to race* the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race."<sup>346</sup> O'Connor here abandoned talk of ethnicity and group culture (ignoring the correlation between Latino identity and Spanish fluency), and instead propounded a magic word formalism in which race operates only when someone utters a racial term, but not otherwise.

One detects in current Supreme Court equality discourse a renewed penchant for the racial formalism which in an earlier and ignominious version helped defend Jim Crow oppression, as in the *Plessy* Court's insistence that "[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

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342. Writing in the mid-1980s, Richard Delgado took the previous decade's leading Fourteenth Amendment thinkers to task for failing to engage minority scholarship. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984). I criticize liberal legal scholars not for their refusal to read scholarship by minority authors but for their failure to engage almost any scholarship on race at all (one reads most of this work in vain even for an occasional cite to Gunnar Myrdal).

343. *Compare* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), *and* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), *with* *Washington v. Davis*, 426 U.S. 229 (1976), *and* *McCleskey v. Kemp*, 481 U.S. 279 (1987).

344. *Hernandez v. New York*, 500 U.S. 352 (1991).

345. *Id.* at 357 n.1.

346. *Id.* at 375 (O'Connor, J., concurring) (emphasis in second sentence added).

racism.”<sup>347</sup> In this early incarnation, race-as-merely-color stripped the social meaning of group debasement from segregation laws. In its recrudescence, an abstract, empty conception of race insulates patterns of racial exclusion while linking Jim Crow and affirmative action. If race reduces to morphologies entirely disconnected from history and social position, group mistreatment on any basis but one *explicitly* tied to skin color cannot be racism, for axiomatically race is divorced from all other social practices. Colorblindness by this logic protects and validates as “not-racism” the actions of intentional discriminators who exercise the smallest modicum of caution as well as, much more significantly, the inertial persistence of entrenched patterns of racial hierarchy. Simultaneously, no justification can exist for the government’s use of racial classifications, since by definitional fiat race lacks all social relevance. Thus reactionary colorblindness condemns as “racism” race-conscious efforts at social reconstruction.

Yet despite the Court’s reversion to racial formalism, Equal Protection unavoidably depends on a conception of group relations, and more particularly on hostility toward group subordination.<sup>348</sup> This is, of course, the core insight of footnote four analysis, though Justice Brennan failed to grasp this in *Bakke* or *Frontiero*. Meritocratic individualism with its concern for protecting persons from differential treatment on the basis of characteristics over which they exercise little or no control cannot explain the operation of constitutional antidiscrimination law. Heightened review can be justified with respect to protected classifications only insofar as these operate as facets of social hierarchies, not because they involve the government’s use of criteria largely beyond individual effort. Posner in 1974, recall, recognized the need to explain why heightened review obtained in racial cases but not, say, in instances of discrimination on the basis of birthplace or poverty. By itself, a liberal focus on individual rights is insufficient to justify strict scrutiny in race cases, let alone a regime of reactionary colorblindness.

Posner correctly argued that heightened protection applies because race “surely” differed in some constitutionally meaningful way, even if he hesitated to say how. But Justice Powell from the outset acknowledged that race merited stringent review because the Fourteenth Amendment’s pervading purpose was “the freedom of the slave race,”<sup>349</sup> or more generally the protection of groups “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political

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347. *Plessy v. Ferguson*, 163 U.S. 537, 543 (1896).

348. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?* 58 U. MIAMI L. REV. 9, 28 (2003) (arguing that “antisubordination values have often guided application of the anticlassification principle in practice”).

349. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (citation omitted).

process.”<sup>350</sup> If this was so, however, why constitutionally distrust race-conscious remedies designed to break down rather than build up structures of group oppression? Powell answered by using ethnicity to reconceptualize race. Race-as-ethnicity erased subordination from the American story by positing that all groups faced the same dynamic of competition and assimilation, additionally claiming that disparities in social position reflected nothing more than differences located in the cultures and capacities of the ethnic groups themselves. In this step, blacks and other minorities faced the same social conditions as white ethnics, none more or less the victims of group discrimination, but instead all equally members of a “nation of minorities” and all equally entitled to constitutional protection.

This pluralist story, however, militated against rather than for heightened review. The presence of minorities “at every turn in the road” and a social context in which ethnic interaction comprised simply democratic politics suggested that racial discrimination belonged to the text rather than footnote of *Carolene Products*. The question now became why the Constitution should intervene in the swirl of ethnic competition at all. In order, Powell answered, to protect a vulnerable minority—whites. If ethnicity transformed racial minorities into ethnic groups, it also transmuted whites by positing that they carried their own histories of victimization, which antidiscrimination law and affirmative action not only impermissibly ignored but actually exacerbated. A subordinate group did exist, but now in the form of the disaggregated “majority,” making racial distinctions disfavoring whites the invidious equal of segregation laws. Powell’s decision in *Bakke* stands out for first fully justifying the constitutional equation of invidious and remedial discrimination. To do so, he constitutionalized race-as-ethnicity: his opinion equated affirmative action and Jim Crow by depicting blacks as white but whites as black.

Powell’s ethnic reasoning, ineffectively countered and even to some extent buttressed by liberal supporters of affirmative action, provided the foundation for later efforts to read reactionary colorblindness into the Fourteenth Amendment, not least in *Croson*. In turn, *Bakke* and *Croson* now serve as precedent for reactionary colorblindness. The particular rationales for treating affirmative action and Jim Crow alike increasingly matter less and less: it’s now simply our constitutional law, an Equal Protection bromide strenuously asserted but rarely defended—as when Justice Thomas emphatically declares that “laws designed to subjugate a race” and those that “foster some current notion of equality” are, in each instance, “racial discrimination, plain and simple.”<sup>351</sup> Reactionary colorblindness rests on the risible equation of racial subordination and racial remediation. More fundamentally, it rests on an intellectual sham: the depiction of race as ethnicity.

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350. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

351. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240-41 (1995) (Thomas, J., concurring in part and concurring in the judgment).

