

... Bell, "Brown v. Board of Education and the Interest-  
... Dilemma," 93 *Harv. L. Rev.* 518, 523-24  
... Freeman, "Legitimizing Racial Discrimination  
... Antidiscrimination Law: A Critical Review of  
... Court Doctrine" [in this collection].

## A CRITIQUE OF "OUR CONSTITUTION IS COLOR-BLIND"

Neil Gotanda

### I. INTRODUCTION

THIS article examines the ideological content of the claim that "our Constitution is color-blind"<sup>1</sup> and argues that the U.S. Supreme Court's use of color-blind constitutionalism—a collection of legal themes functioning as a racial ideology—fosters white racial domination. Though aspects of color-blind constitutionalism can be traced to pre-Civil War debates, the modern concept developed after the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, and it matured in 1955, in *Brown v. Board of Education*.<sup>2</sup> A color-blind interpretation of the Constitution legitimates and thereby maintains the social, economic, and political advantages that whites hold over other Americans. . . .

The Supreme Court's color-blind constitutionalism uses race to cover four distinct ideas: status-race, formal-race, historical-race, and culture-race. Status-race is the traditional notion of race as an indicator of social status. While traditional status-race is now largely discredited, it remains important as the racial model for efforts aimed at eradicating intentional forms of racial subordination, with their implication of racial inferiority.

The second use of race, formal-race, refers to socially constructed formal categories. Black and white are seen as neutral, apolitical descriptions, reflecting merely "skin color" or region of ancestral origin. Formal-race is unrelated to ability, disadvantage, or moral culpability. Moreover, formal-race categories are unconnected to social attributes such as culture, education, wealth, or language; this "unconnectedness" is the defining characteristic of formal-race, and no other usage of "race" incorporates the concept.

Historical-race, however, does assign substance to racial categories. Historical-race embodies past and continuing racial subordination, and is the meaning of race which the court

contemplates when it applies "strict scrutiny" to racially disadvantaging government conduct. The state's use of racial categories is regarded as so closely linked to illegitimate racial subordination that it is automatically judicially suspect.

Finally, culture-race uses "black" to refer to African-American culture, community, and consciousness. Culture refers to broadly shared beliefs and social practices; community refers to both the physical and spiritual senses of the term; and African-American consciousness refers to black nationalist and other traditions of self-awareness, as well as to action based on that self-awareness. Culture-race is the basis for the developing concept of cultural diversity. . . .

## II. RACIAL CATEGORIES

**B**OTH in constitutional discourse and in larger society, race is considered a legitimate and proper means of classifying Americans. Its frequent use suggests that there is a consensus about what the "races" are. . . . While the social content of race has varied throughout American history, the practice of using race as a commonly recognized social divider has remained almost constant. In this section, the term "racial category" refers to this distinct, consistent practice of classifying people in a socially determined and socially determinative way. The American racial classification practice has included a particular rule for defining the racial categories black and white. That rule, which has been termed "hypodescent," is the starting point for this analysis.

### *A. American Racial Classification: Hypodescent*

One way to begin a critique of the American system of racial classification is to ask "Who is black?" This question rarely provokes analysis; its answer is seen as so self-evident that challenges are novel and noteworthy. Americans no longer have need of a system of judicial screening to decide a person's race; the rules are simply absorbed without explicit articulation.

#### I. THE RULE OF HYPODESCENT

American racial classifications follow two formal rules: The *rule of recognition* holds that any

person whose black-African ancestry is visible is black. The *rule of descent* holds that any person with a known trace of African ancestry is black, notwithstanding that person's visual appearance, or, stated differently, that the offspring of a black and a white is black.

Historians and social scientists have noted the existence of these rules, often summarized as the "one drop of blood" rule, in their analysis of the American system of racial classification. Anthropologist Marvin Harris has suggested a name for the American system of social reproduction: "hypodescent."

#### 2. ALTERNATIVES TO HYPODESCENT

The American legal system today lacks intermediate or "mixed-race" classifications. While the establishment of self-contained black or white racial categories may seem obvious, an examination of other classification schemes reveals that the American categories are not exhaustive.

Let us posit the two original races—one a "pure black," the other a "pure white." As interracial reproduction occurs, a multiracial society emerges. Four historically documented examples of nonbinary schemes to categorize mixed-race offspring have evolved: mulatto, named fractions, majoritarian, and social continuum. All of these schemes are logically symmetrical, so, at least in theory, neither "pure race" is privileged over the other. Consider each of the schemes in detail:

*a. Mulatto.* All mixed offspring are called mulattoes, irrespective of the percentages or fractions of their black or white ancestry.

*b. Named fractions.* Individuals are assigned labels according to the fractional composition of their racial ancestry. Thus, a mulatto is one-half white and one-half black; a quadroon is one-fourth black and three-fourths white, a sambo one-fourth white and three-fourths black, etc.<sup>3</sup>

*c. Majoritarian.* The higher percentage of either white or black ancestry determines the white or black label.

*d. Social continuum.* This is a variation on the named fractions scheme: labels generally corre-

spond to the proportion of white or black ancestry, but social status is also an important factor in determining which label applies. The result is a much less rigid system of racial classification.<sup>4</sup>

It is worth repeating two observations that apply to all four schemes. First, the use of racial categories presumes that at some time "pure" races existed. Second, because these schemes are symmetrical, nothing in them suggests inequality or subordination between races.

### 3. SUPPORT FOR RACIAL SUBORDINATION

The hypodescent rule, when combined with color-blind constitutionalism, conveys a complex and powerful ideology that supports racial subordination. Briefly, hypodescent imposes racial subordination through its implied validation of white racial purity. Subordination occurs in the very act of a white person recognizing a black person's race. Much of constitutional discourse disguises that subordination by treating racial categories as if they were stable and immutable. Finally, the treatment of racial categories as functionally objective devalues the socioeconomic and political history of those placed within them. Through this complex process of assertion, disguise, and devaluation, racial categorization based on hypodescent advances white interests.

#### *B. Assertion of Racial Subordination*

##### 1. EQUALITY AND THE SOCIAL METAPHOR OF RACIAL PURITY

Looking at the lack of symmetry between racial categories provides a means of further understanding hypodescent. Under hypodescent, black parentage is recognized through the generations. The metaphor is one of purity and contamination: white is unblemished and pure, so one drop of ancestral black blood renders one black. Black ancestry is a contaminant that overwhelms white ancestry.<sup>5</sup> Thus, under the American system of racial classification, claiming a white racial identity is a declaration of racial purity and an implicit assertion of racial domination. The symmetry of racial categorization systems other than hypodescent brings a sense of objectivity and neutrality to these

schemes, and a comparison of hypodescent to symmetrical systems exposes its nonneutral assumptions.

##### 2. SUBORDINATION IN RECOGNITION

Under hypodescent, the moment of racial recognition is the moment in which is *reproduced* the inherent asymmetry of the metaphor of racial contamination and the implicit impossibility of racial equality. The situation that bares most fully the subordinating aspect of the moment of racial classification arises when a black person is at first mistaken for white and then recognized as black.

Before the moment of recognition, white acquaintances may let down their guard, betraying attitudes consistent with racial subordination, but which whites have learned to hide in the presence of nonwhites. Their meeting and initial conversation were based on the unsubordinated equality of a white-white relationship, but at the moment of racial recognition the exchange is transformed into a white-black relationship of subordination. In that moment of recognition lies the hidden assertion of white racial purity. The moment of racial recognition is thus characterized by an unconscious assertion of the racial hierarchy implied by hypodescent.

#### *C. Disguising the Mutability of Racial Categorization*

One persistent dimension of racial categorization is its treatment of race as a fixed trait. This belief in the immutable quality of race flows from two traditions. One tradition studies race as a phenomenon appropriate to the natural sciences. This tradition initially studied race to "prove" primarily the inferiority of the negro race, and is now largely discredited. The second tradition emphasizes physiognomy; it characterizes race as biological, thereby suggesting that race is unchangeable. Both traditions contribute to a societal view of race as a neutral, objective, and apolitical characteristic.

This section argues that race is anything but immutable. Neither tradition can claim true objectivity. Further, the American racial categorization scheme is not only historically contin-

gent, but, to some extent, legislatively determined.

### I. THE SCIENTIFIC LEGITIMATION OF RACE

Historically, scientific discourse has played a central role in legitimating status-based racial classifications. For example, the racial "science" of the eighteenth and nineteenth centuries justified slavery by asserting the inferiority of African-Americans. The work of Blumenbach, a German comparative anatomist of the late eighteenth century, who classified humans into five principal races—Caucasian, Mongolian, Malay, American, and Ethiopian—was particularly influential. While no longer cited in scientific journals, Blumenbach's racial classifications have remained embedded in popular notions of race. Even after a century of efforts to discredit scientific theories asserting the "natural" superiority of the white race, race continues to be accepted as a scientific concept.

The Supreme Court's modern discussions of race purport to be disengaged from the older scientific tradition.<sup>6</sup> In a 1987 case, *Saint Francis College v. Al-Khazraji*,<sup>7</sup> the court examined whether an Arab could seek damages for race discrimination under 42 U.S.C. § 1981. Answering in the affirmative, the court's unanimous opinion disavowed the traditional anthropological categories of race. Justice Byron White wrote, "such discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory."<sup>8</sup> Moreover, in dicta, the court expressed sympathy for the position that race is a sociopolitical rather than scientific characteristic.

However, the court was not ready to back away entirely from the idea that racial categories were based in natural science. Justice White continued, "[t]he Court of Appeals was thus quite right in holding that § 1981, 'at a minimum,' reaches discrimination against an individual 'because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of homo sapiens.'" [...] The court's equivocating in *Saint Francis College* suggests that the justices are not yet comfortable with abandoning entirely the security of immutable racial categories.

### 2. THE TRADITION OF PHYSIOGNOMY

The immutability of racial classifications can be seen in our everyday understanding of the terms "black" and "white." Generally speaking, these classifications are fixed; we cannot change our race to suit a personal preference. One does not arise in the morning and say, "I think that today is my 'white' day and tomorrow will be my 'black' day." These racial classifications are "objective" and "immutable" in the sense that they are external to subjective preferences, and therefore unchanging. The links between racial categorization and skin color, physiognomy, and ancestry reinforce the belief that racial identity is immutable.

By contrast, other societies—including racially stratified Western societies—do not insist that their racial labels are "objective"; accordingly, their definitions of race are much more fluid. For example, "[i]n Brazil one can pass to another racial category regardless of how dark one may be. . . . Brazilians say 'Money whitens,' meaning that the richer a dark man gets the lighter will be the racial category to which he will be assigned by his friends, relatives and business associates."<sup>9</sup> The Brazilian experience highlights the arbitrariness of the American classification system's assertion that race is a fixed and objective feature.

Justice Stewart's dissent in *Fullilove v. Klutznick* illustrates how racial categories are linked to physiognomy or ancestry and then described as immutable: "Under our Constitution, the government may never act to the detriment of a person solely because of that person's race. The color of a person's skin and the country of his origin are immutable facts. . . ." <sup>10</sup> Stewart's reference to skin color invokes "science"; this "scientific fact" is then transferred to the racial category to assert the immutability of the racial classification. This process results in a racial classification that looks like a fact.

Facts are commonly thought to be objective and neutral—devoid of normative social significance. However, a distinction must be drawn between the objectivity of scientific facts and the subjectivity of legal facts. Justice Stewart's qualifier "immutable" suggests a higher level of objectivity than is traditionally accorded legal facts. While Justice Stewart may have been

justified in deeming a person's skin color immutable, the implicit link of skin color to race is a social and legal assertion, not a scientific fact.

A more recent example of the court confusing social classifications with scientific fact occurred during oral argument in *Metro Broadcasting, Inc. v. FCC*.<sup>11</sup> Justice Antonin Scalia engaged in a heatedly reported exchange with counsel defending the FCC's policy of "qualitative enhancement" for minority and women seeking broadcast station licenses. Attacking the argument that minorities and women would encourage diversity in programming, Justice Scalia reportedly asked whether the policy was a matter of "blood," at one point charging that the policy reduced to a question of "blood . . . blood, not background and environment."

The context of Justice Scalia's insistence upon "blood" suggests he was referring metaphorically to ancestry as determining racial classification. "Blood" is a rich metaphor and includes, in this context, the suggestion of biological lines of descent. Justice Scalia's implication is that race, as a category of biology and science, has no relation to "background and environment"; in his view, race and its metaphor, blood, are neutral and without social content and, therefore, inappropriate criteria to be used in granting broadcast licenses.

The modern use of the physiognomic tradition has ironic implications when considered in light of the goals of the scientists who originally studied physiognomy. Nineteenth-century racial scientists hoped to prove that the African race was inherently inferior. The modern tradition links racial categories to science in order to show that race is a neutral and apolitical term without social content. However, both traditions support racial subordination.

### 3. THE HISTORICAL CONTINGENCY OF RACIAL CATEGORIES

Modern ways of thinking about racial categories evolved throughout American history. In the early colonial period, racial classifications were highly fluid. Social status often depended as much on the labor status of the individual as on his or her place of origin. Typically, Africans were brought to the colonies as captives, and Europeans as contractual or indentured ser-

vants. Winthrop Jordan has described the individual political dimensions of labor in seventeenth-century Virginia and Maryland as "states of unfreedom." There was a hierarchy among those who were not slaves but were also not free; the labels for such labor varied. In Virginia and Maryland, where the English colonists were the dominant group, the various "unfree" were also described as "un-English"; the term included French, Africans, and Scots. There were additional labels specific to the African laborers. While the early records are incomplete, there is clear evidence that by the middle of the seventeenth century, English colonists maintained some Africans in a status distinguishable from European indentured labor.

Sources from that century variously describe Africans as "heathen," "infidel," and "negro." These terms were attempts to justify the political status of the Africans. The racial classifications differentiated Europeans from the natives of colonized and imperially exploited parts of the world, but the classifications did not indicate a clearly developed belief that slavery was an appropriate condition for Africans.

English colonists gradually came to prefer enslaved African labor over indentured Europeans. By the end of the seventeenth century, the number of slaves had increased dramatically. As slavery became entrenched as the primary source of agricultural labor, slaveholders developed a complementary ideological structure of racial categories that served to legitimate slavery. The formal legal system was tailored to reflect these categories and enforce slave labor. In 1705, the Virginia Assembly created the first recognizable slave code. Besides codifying punishment for slaves who stole or ran away, the slave code contained specific rules of descent for classifying offspring. Punishments for blacks and mulattoes differed from those for indentured servants. This institutionalization of racial classifications linked to disparate treatment marked the first formal establishment of racial categories in colonial America.

The new racial classifications offered a basis for legitimating subordination which was unlike the justifications previously employed. By keying official rules of descent to national origin, the classification scheme differentiated those

who were "enslaveable" from those who were not. Membership in the new social category of "Negro" became itself sufficient justification for enslavability.

One can, therefore, do more than assert generally that race is not scientific, or that race is socially constructed. One can say that our particular system of classification, with its metaphorical construction of racial purity for whites, has a specific history as a badge of enslavability. As such, the metaphor of purity is not a logical oddity but, rather, an integral part of the construction of the system of racial subordination embedded in American society. Under color-blind constitutionalism, when race is characterized as objective and apolitical, this history is disguised and discounted.

#### 4. LEGISLATIVE DETERMINATION OF RACIAL CATEGORIES

An examination of past American law provides additional support for the assertion that racial classifications are not immutable. Before the Civil War, almost every state had statutes or judicial decisions defining race; indeed, until World War II, such statutes were common and not limited to the South. Likewise, antimiscegenation statutes were widespread, even where Jim Crow segregation was not mandated. These statutes demonstrate the variations possible in a scheme of racial classification; often the race of the offspring of a racially mixed couple was determined by a statutory formula.

A widely publicized example of statutory classification of race occurred in Louisiana in the early eighties. While most jurisdictions had abolished mandatory classifications by the seventies, Louisiana's birth certificate statute required a statutorily defined racial identification. A Louisiana woman, Susie Guillory Phipps, on applying for a passport, was "sick for three days" when she discovered that her birth certificate listed both her parents as colored; she challenged the statute in court. At trial and on appeal, the Louisiana courts upheld the constitutionality of the fractional classification statute, and Phipps's birth certificate was not changed.

The statutory histories of state racial classification schemes emphasize the role of govern-

ment in defining racial categories. Government's role has been less obvious since the civil rights movement's focused attention on the rights of individuals already classified as black. Color-blind constitutionalism implicitly adopts a particular understanding of race as objective and immutable, which may be less obvious than legislative enactments, but is no less significant.

### III. FORMAL-RACE AND UNCONNECTEDNESS

THE Supreme Court has used words such as "race," "black," and "white" without explanation or qualification. In doing so, it has disguised its own role in perpetuating racial subordination. The modern court has moved away from the two notions of race which recognize the diverging historical experiences of black and white Americans—status-race and historical-race. In place of these concepts, the court relies increasingly on the formal-race concept of race, a vision of race as unconnected to the historical reality of black oppression. As this section shows, formal-race is a concept of limited power analytically and politically. By relying on it, the court denies the experience of oppression and limits the range of remedies available for redress.

#### A. Status-Race, Formal-Race, and Historical-Race

##### 1. STATUS-RACE: *DRED SCOTT*

In the antebellum era, the inferior status of blacks was an accepted legal standard. The most famous court decision to embrace this status-race concept was Chief Justice Roger Taney's opinion in *Dred Scott v. Sandford*. Chief Justice Taney wrote that, at the time of the founding of the Republic, the "negro African race" had been "regarded as beings . . . so far inferior, that they had no rights which the white man was bound to respect."<sup>12</sup> For Chief Justice Taney, the distinct, inferior status of blacks was implicit in the Constitution and overrode any congressional pronouncements to the contrary. The court's modern opinions tolerate the legacy of status-race in the private sphere only. Private citizens are free to make contracts, form associations, speak, write, and worship in a manner predicated on the belief that blacks are inher-

ently and biologically inferior to whites. These broad-based individual freedoms protecting status-race beliefs significantly aid the legitimization of racist conduct.

2. FORMAL-RACE: *PLESSY V. FERGUSON*

The well-known "separate but equal" case, *Plessy v. Ferguson*,<sup>13</sup> epitomizes formal-race analysis. In upholding a Louisiana statute requiring separate seating for blacks and whites in public carriers, the *Plessy* court used race in a manner that sharply differed from the older status-race notion in *Dred Scott*. The *Plessy* Court found:

the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. 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>14</sup>

Turning a blind eye to history, the court maintained that the segregation statute said nothing about the status of blacks, indeed, that the statute was racially "neutral." Besides presuming that racial classifications are unconnected to social status or historical experience, the court's formal-race analysis fails to recognize ties between the classification scheme of one statute and the treatment of race in other legislation. The court did not see statutes segregating railroad service, schools, and housing as inherently connected to each other or to a legal and social system that perpetuated the stigma of inferiority based on race.

Formal-race and status-race offer two differing interpretations of Jim Crow segregation. Under the status-race approach, which assumes the subordinated status of blacks, racial segregation by custom or statute reflects a "commonsense" understanding of the "natural" racial hierarchy; in contrast, the formal-race, color-blind approach assumes "equal protection of the law" based on common "citizenship." Given these assumptions, racial segregation is simply a legislative differentiation that must be considered to have no inherent social meaning. Even with formal-race's rejection of the inferior status of blacks, *Plessy* makes clear that formal-race unconnectedness often renders harsh results.

3. HISTORICAL-RACE

In contrast to the majority opinion in *Plessy*, Justice John Harlan's oft-quoted dissent argued vigorously against the neutrality of race-based segregation:

Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. . . . The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while travelling in railroad passenger coaches.<sup>15</sup>

Justice Harlan recognized that segregation based on race is inherently subordinating. By rejecting the majority's view that racial segregation is unconnected to oppression and by refusing to adopt the rigid legalism of formal-race Justice Harlan anticipated by a half century the spirit of *Brown v. Board of Education*.<sup>16</sup>

Justice Harlan was advocating a peculiar mix of historical-race and formal-race. Government acts were required to be genuinely neutral; therefore judicial review of race-based legislation should recognize the historical content of race. However, formal-race dictated Justice Harlan's vision of the private sphere:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.<sup>17</sup>

More recently, Justice Thurgood Marshall used historical-race in his *Bakke v. Regents of University of California* dissent.<sup>18</sup> Marshall argued that:

It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. 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.<sup>19</sup>

Marshall's comments emphasize that in historical-race usage, racial categories describe relations of oppression and unequal power. Historical-race usage of "black" does not have the same meaning as usage of "white": black is the reification of subordination, whereas white is the reification of privilege and superordination. This asymmetry of white and black corresponds to the asymmetry of hypodescent and its metaphor of racial purity and racial contamination.

### B. Formal-Race and Unconnectedness in Racial Discourse

Current Supreme Court cases use race most commonly to mean formal-race. Racial classification has lost its connection to social reality. This trend is demonstrated by the voting rights, affirmative action, and jury selection cases, as well as the works of two prominent academics discussed below. This section reveals the pervasiveness and the dangers of the formal-race approach.

#### I. VOTING RIGHTS

Unconnectedness can be seen in cases concerning the electoral franchise and political power. It appears most clearly in the dissent in *Rome v. United States*,<sup>20</sup> a case upholding the constitutionality of amendments to the Voting Rights Act of 1965.<sup>21</sup> The amendments shifted to local jurisdictions the burden of proving that a proposed change in voting arrangements would not adversely affect black voters. Justices Potter Stewart and William Rehnquist, the dissenters, objected to the premise underlying the amendments: "The need to prevent this disparate impact is premised on the assumption that white candidates will not represent black interests, and that States should devise a system encouraging blacks to vote in a block for black candidates."<sup>22</sup> For Justices Stewart and Rehnquist, the "assumption" that race and voting patterns were or ought to be linked was constitutionally impermissible. They objected also to "the notion that Congress could empower a later generation of blacks to 'get even' for wrongs inflicted on their forebears."<sup>23</sup>

Chief Justice Rehnquist's and Justice Stewart's opposition to Congress's effort to consider the political character of blackness and whiteness stemmed from their belief that "white" and "black" are devoid of political content, an assumption negated by any study of the interplay between voters' decisions and race. This presumption of unconnectedness has led Chief Justice Rehnquist and Justice Stewart to argue in other cases that the evidentiary burden should be on plaintiffs to establish both the unfair results of a redistricting plan, and that the intent of the boundary drawers was to be unfair. These justices would make formal-race unconnectedness an axiom of constitutional interpretation of voting rights, nullifying any present or future congressional attempts to account for the link between race and political power. Their theory would pose a substantial barrier to race-conscious legislative efforts to halt discrimination against black voters.

#### 2. AFFIRMATIVE ACTION

In many discussions of affirmative action, advocates of a color-blind position equate race with formal-race. An example of this is Justice William Douglas's dissent in *DeFunis v. Odegaard*.<sup>24</sup> DeFunis was a white applicant to the University of Washington Law School who charged that less qualified minority applicants had been accepted while he had been denied admission. Justice Douglas stated unequivocally that race is an impermissible consideration in the context of college admissions: "A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner."<sup>25</sup> Consideration of past segregation by the University of Washington—indeed, any consideration of this country's history of oppression at all—is impermissible. Justice Douglas's philosophy remains alive on the court today; Justice Scalia quoted Douglas's dissent with approval in his *City of Richmond v. J. A. Croson Co.* concurrence.<sup>26</sup>



3. JURY SELECTION

In *Batson v. Kentucky*<sup>27</sup> the Supreme Court liberalized the evidentiary requirements for proving that a prosecutor's peremptory jury challenges were racially discriminatory in violation of the Equal Protection Clause. Justice Powell argued that "[c]ompetence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. . . . A person's race simply 'is unrelated to his fitness as a juror.'" <sup>28</sup>

The *Batson* decision redressed the historical-race problem of blacks being barred from serving on juries and, therefore, was a significant step forward. However, Justice Powell's statement that race is "unrelated" invokes that unconnectedness of a juror's formal-race classification to any other personal attributes that might relate to jury duty. This reliance upon unconnectedness was unnecessary and unfortunate: use of unconnectedness separates the decision from the context of Justice Powell's otherwise substantial reliance on historical-race analysis.

4. ECONOMIC ANALYSIS

Richard Posner, in *The Economics of Justice*, uses the term "[r]ace per se—that is, race completely divorced from certain characteristics that may be strongly correlated with . . . it" to analyze "reverse discrimination."<sup>29</sup> Posner would object to the argument that diversity in a student body is a proper basis for preferential treatment of minorities. He argues that "[t]here are black people . . . who have the same tastes, manners, experiences, aptitudes and aspirations as the whites with whom one might compare them."<sup>30</sup> Consequently, if "race per se" may be used as a proxy for those characteristics in the diversity context, then "race per se" may also be legitimately employed in more sinister ways. For example, if race and an undesirable employment characteristic are correlated, then race may be used to justify employment discrimination.

Posner's "race per se" is, of course, identical to formal-race. His analysis, like many formal-race analyses, overlooks social reality: the presence of a black—any black, notwithstanding his

or her correlative factors—will likely alter the reactions of whites in a given setting, so "per se" integration is itself a positive good.

The economist Thomas Sowell provides another example of unconnectedness in his writings on the significance of race.<sup>31</sup> Himself black, Sowell illustrates the multiple uses of the word "discrimination" by discussing the hypothetical treatment of an unnamed "group." For example, one typical usage of discrimination is when "[m]embers of a particular group are accorded fewer and poorer opportunities than members of the general population with the same current capabilities."<sup>32</sup> Racial groups are fungible under all of Sowell's definitions; while he does discuss discrimination against specific minorities, the basis for his discussion is an abstract framework, devoid of historical-race content. There is nothing inherent in "black" or "white" which renders it unamenable to analysis as just any "group."

C. Support for Racial Subordination

I. UNCONNECTEDNESS LIMITS RACISM TO SUBJECTIVE PREJUDICE

Formal-race unconnectedness is linked to a particular conceptualization of racism. Race, as formal-race, is seen as an attribute of individuality unrelated to social relations. Unconnectedness limits the concept of racism and the label "racist" to those individuals who maintain irrational personal prejudices against persons who "happen" to be in the racial category black. Racism is irrational because race is seen as unconnected from social reality, a concept that describes nothing more than a person's physical appearance.

Under this view, racism is thought of only as an individual prejudice. Despite the fact that personal racial prejudices have social origins, racism is considered to be an individual and personal trait. Society's racism is then viewed as merely the collection, or extension, of personal prejudices. In the extreme, racism could come to be defined as a mental illness. These extremely individualized views of racism exclude an understanding of the fact that race has institutional or structural dimensions beyond the formal racial classification. However, individual irrationality and mental illness simply do not

adequately explain racism and racial subordination.

Furthermore, the view that racism is merely an irrational prejudice suggests that the types of remedies available to address racial subordination and oppression are limited. For example, programs providing economic aid would be thought of as an ineffective weapon against racism, because such programs address individual prejudicial attitudes only indirectly. A minority set-aside program such as that proposed by the City of Richmond directly addresses the present effects of past racial exclusion from the building trades as well as the continuing de facto exclusion of nonwhites. Yet such a program attacks prejudicial attitudes only indirectly: by demonstrating the capabilities of black contractors (thus denying the validity of status-race inferiority) and providing common workplace interactions (thus breaking down irrational prejudice).

The Supreme Court's use of formal-race unconnectedness is consistent with its view that the particular manifestations of racial subordination—substandard housing, education, employment, and income for large portions of the black community—are better interpreted as isolated phenomena than as aspects of the broader, more complex phenomenon called "race." This disaggregated treatment veils the continuing oppression of institutional racism. It whittles racism down to the point at which racism can be understood as an attitude problem amenable to formal-race solutions. However, formal-race legalism hinders this country's ability to address the clear correlation between racial minority populations and the concentrations of these various, supposedly distinct problems. Even if one admits that large numbers of the unemployed and undereducated youth in the inner cities are black, unconnectedness hinders the government's ability to use that correlation as a basis for attacking social ills.

This hindrance occurs in two ways. First, because each social problem is considered to be independent of its racial component, any proposed government program is analyzed as though it addresses a nonracial issue. Even in cases where the problems are obviously related

to dysfunctional interracial relations—problems such as housing and employment—the issues are discussed as though they have no history or context at all.

Second, the court often invokes the metaphor of the "equal starting point" when analyzing social problems. This metaphor ignores historical-race and the cumulative disadvantages that are the starting point for so many black citizens. The metaphor implies that if blacks are underrepresented in a particular employment situation, it must be a result of market forces; any statistical correlation is either coincidental or beyond the control of the employer, and is, in any case, unrelated to the employer's past practices.

In short, color-blind constitutionalists live in an ideological world where racial subordination is ubiquitous yet disregarded—unless it takes the form of individual, intended, and irrational prejudice. Perhaps formal-race analysis would be a useful tool for fighting racism if it recognized that racism is complex and systemic. However, as presently used, formal-race unconnectedness helps to maintain white privilege by limiting discussion or consideration of racial subordination.

2. STRICT SCRUTINY AND AFFIRMATIVE ACTION  
Invocation of strict scrutiny, the strongest form of equal protection judicial review, is generally fatal to the race-based government action. The doctrine of strict scrutiny has proved a powerful legal weapon and has regularly been used to strike down Jim Crow segregation throughout public facilities.

The distinction among the different uses of race developed in this article suggests two interpretations of strict scrutiny. The first is the interpretation used in *Brown v. Board of Education*,<sup>33</sup> which considered race a classification that subordinates blacks. This is historical-race, and against this background, the court rightly employed strict scrutiny to review government activity.

The second interpretation of race in strict scrutiny cases is that of *City of Richmond v. J.A. Croson Co.*,<sup>34</sup> in which race is seen as formal-race. In this interpretation, it is the arbitrary

character of racial classifications that requires strict judicial scrutiny. Because formal-race is a misapprehension of the nature of race in America, the appropriateness of analytically combining formal-race with strict scrutiny is open to criticism. Both interpretations of strict scrutiny are further examined below, and used as the basis for a discussion of affirmative action programs.

*Historical-race and strict scrutiny.* The historical-race rationale for strict scrutiny derives from *Brown v. Board of Education*, in which the court ruled that segregated education was inherently unequal. The decision rejected the formal-race doctrine of *Plessy* in favor of the theory that race, as used in the context of education, was both intended to, and had the effect of, subordinating black school children. The cases immediately following *Brown* continued its approach: they recognized that the use of racial classifications to segregate was inherently subordinating and struck down the vast majority of Jim Crow laws as unconstitutional.

Under the *Brown* interpretation of strict scrutiny, heightened judicial review should be applied to all restrictions that curtail the civil rights of a racial group. In the context of the racial subordination of blacks, the implied rationale for such heightened review has been the past and continuing racial subordination of the group as a whole. If one summarizes these cases by stating that "race triggers strict scrutiny," then one is using "race" to mean historical-race.

*Formal-race and strict scrutiny.* A different racial usage is involved if one argues that the government's use of any racial classification triggers strict scrutiny. This strong version of color-blind constitutionalism has not yet been adopted by a majority of the Supreme Court, although Justice O'Connor has provided a clear description of the position: "the Constitution requires that the Court apply a strict standard of scrutiny to evaluate racial classifications. . . . 'Strict scrutiny' requires that, to be upheld, racial classifications must be determined to be necessary and narrowly tailored to achieve a compelling state interest."<sup>35</sup>

This version of racial strict scrutiny—that use of any racial classification is subject to strict scrutiny without reference to historical or social context—is best interpreted as a use of formal-race. Strict scrutiny is triggered whether the classification is designed to remedy the effects of past subordination or designed to further oppress a traditionally subordinated racial group.

This shift from the use of strict scrutiny to review governmental oppression of blacks to review of any use of race has never been explicitly addressed by the court; the underlying justification for the change remains undiscussed.

*Judicial review of affirmative action.* The court's decision in *City of Richmond v. J.A. Croson Co.*<sup>36</sup> demonstrates clearly that formal-race strict scrutiny can severely limit the range of constitutionally permissible governmental remedies for racial subordination. To see how the strong formal-race interpretation of strict scrutiny differs from the historical-race interpretation, consider how the Richmond affirmative action program might be analyzed under both interpretations.

Under the historical-race interpretation, the City of Richmond would explain that its affirmative action program was designed to help blacks by redressing past and continuing racial subordination. Richmond's use of historical-race explicitly considers the legacy of racial discrimination in Richmond: because historical-race includes continuing racial subordination, its use provides a rationale for race-conscious remedial governmental action today. In other words, historical-race usage is the shorthand summary of the historical and social justifications for race-conscious affirmative action programs. Assuming that the program is well designed, there would be a reasonable fit between the use of racial categories and the goals of the remedial program.

Obviously, historical-race is not the same for whites as for blacks. The history of segregation is not the history of blacks creating racial categories to legitimate slavery, nor is it a history of segregated institutions aimed at subordinating whites. Indeed, racial categories themselves, with their metaphorical themes of white racial

urity and nonwhite contamination, have different meanings for blacks and whites. If judicial review is to consider the past and continuing character of racial subordination, then an affirmative action program aimed at alleviating the effects of racial subordination should not automatically be subject to the same standard of review as Jim Crow segregation laws. Judicial review using historical-race should be asymmetric because of the fundamentally different histories of whites and blacks.

Contrast this with the formal-race approach—strict scrutiny to evaluate any racial classification. This symmetrical standard of review cannot be justified by racial history, because racial history is skewed. Nor can it mean that the seriousness of past and continuing racial subordination is no longer important. If racial subordination did not pervade society, then heightened judicial review would be unnecessary, and rational basis review would be appropriate for all formal-race categorizations.

The choice, then, to ignore racial history and existing racial subordination in applying strict scrutiny to all racial classifications is essentially a decision to use only formal-race. But what justifies the court's election of formal-race strict scrutiny? The strict scrutiny that developed originally in an atmosphere of governmental attempts to curtail blacks' civil rights has been transformed into formal-race scrutiny. The result is that government programs designed to assist blacks are being struck down. This is perverse.<sup>37</sup> Historically, racial subordination has been the privileging of whites over nonwhites, and a proper remedial program would work to redress that history. Instead, the use of formal-race strict scrutiny is applied to proposed remedies and results in their being declared unconstitutional, thereby perpetuating societal advantages for whites.

Justice Scalia's cramped argument at the close of his *Croson* concurrence demonstrates how formal-race fails to account for our nation's history of subordination in the context of remedies. Justice Scalia maintains that "a race-neutral remedial program" will be constitutionally permissible and will also provide advantages to blacks. He concedes that there has been a

history of racial subordination, but he nevertheless advocates a remedy aimed only at the advantaged as such." Justice Scalia claims that such a program would have the desirable incidental effect of helping black individuals, but he insists on ignoring any historical connection between harm and race discrimination. The notion of systematic racial subordination—the relevance of the group—is totally absent.

#### IV. COLOR-BLIND CONSTITUTIONALISM AND SOCIAL CHANGE

THIS section critiques color-blind constitutionalism as a means and as an end for American society. As a means, color-blind constitutionalism is meant to educate the American public by demonstrating the "proper" attitude toward race: the end of color-blind constitutionalism is a racially assimilated society in which race is irrelevant. However, taken too far, this goal of a color-blind society has disturbing implications for cultural and racial diversity. Other goals, less drastic than complete racial assimilation, are tolerance and diversity. This section defines tolerance as the view that multiculturalism and multiracialism are necessary evils that should be tolerated within American society. Diversity, on the other hand, is defined as the view that racial and cultural pluralism is a positive good.<sup>38</sup>

##### *A. Means: The Public Nonrecognition Model and Its Limits*

In his *Minnick v. California Department of Corrections* dissent, Justice Stewart explains that government nonrecognition of race is implicitly intended to provide a model for private-sphere behavior. The model functions both negatively and positively. The negative model suggests that social progress is most effectively achieved by judging people according to their ability, and, therefore, that race-based decision-making seduces citizens away from a more legitimate merit-based system.<sup>39</sup>

There are two problems with the negative model. The first is its unquestioned assumption that meritocratic systems are valid; the second is its implicit denial of any possible positive

values to race. In particular, the negative model devalues black culture—culture-race in this article—and unjustifiably assumes the social superiority of mainstream white culture.

The positive behavior model—government nonrecognition serving as an example for private conduct—also has problems. First, there is the practical impossibility of nonrecognition as a standard for either public or private conduct. Second, the implicit social goal of assimilation degrades positive aspects of blackness.

Color-blind constitutionalism not only offers a flawed behavioral model for private citizens, but its effectiveness in promoting social change is limited. Color-blindness strikes down Jim Crow segregation but offers no vision for attacking less overt forms of racial subordination. The color-blind ideal of the future society has been exhausted since the implementation of *Brown v. Board of Education* and its progeny.

One example of how limited the color-blind approach is as a weapon against discrimination can be seen in the area of voting rights, a core area of public life. Color-blind constitutionalists, filing dissents in *Rome v. United States* and *Rogers v. Lodge*, argued that Congress had unconstitutionally abandoned a formal-race, individual-remedy approach in favor of more sweeping, race-conscious remedies for racial discrimination.

As Justice Scalia's concurrence in *City of Richmond v. J. A. Croson Co.* and the dissent in *Metro Broadcasting, Inc. v. FCC* make clear, a strong version of public-sphere nonrecognition would not permit governmental consideration of race, except in an extremely narrow set of court-mandated remedies. Were such a formula adopted, color-blind constitutionalism would limit the abilities of states and Congress to pursue broad remedial legislation aimed at racial disparities.

A final example of color-blind nonrecognition as limiting racial social change inheres in the public/private distinction. The combination of the view that nonrecognition limits government action with the belief that there exists a private-sphere right to discriminate constitutes a seductive and consistent ideology—one declaring that the continuance of white racial

dominance is a constitutionally protected norm. The end result of this combination is that racial social change—remediation for centuries of subordination—must take place outside of legal discourse and the sphere of government action.

#### B. Ends: Assimilation, Tolerance, and Diversity

The examination of color-blind constitutionalism as means leaves open the question of what the color-blind society of the future would look like. This subsection asks that very question. [...]

The color-blind assimilationist ideal seeks homogeneity in society rather than diversity. Such an ideal neglects the positive aspects of race, particularly the cultural components that distinguish us from one another. It may not be a desirable result for those cultural components to be subsumed into a society that recognizes commonalities.

#### I. CULTURE-RACE

The assimilationist color-blind society ignores and thereby devalues culture-race. Culture-race includes all aspects of culture, community, and consciousness. The term includes, for example, the customs, beliefs, and intellectual and artistic traditions of black America, as well as institutions such as black churches and colleges.

With two notable exceptions, the court has devalued or ignored black culture, community, and consciousness. Its opinions use the same categorical name—black—to designate reified systemic subordination (what I have termed historical-race) as well as the cultural richness that defines culture-race. Only by treating culture-race as analytically distinct from other usages of race can one begin to address the link between the cultural practices of blacks and the subordination of blacks—elements that are, in fact, inseparable in the lived experience of race.

The two exceptions, where the court appropriately recognized culture-race, are *Metro Broadcasting, Inc. v. FCC*<sup>40</sup> and *Bakke v. Regents of University of California*.<sup>41</sup> In *Metro Broadcasting*, his last opinion for the court, Justice Brennan applied an intermediate standard of review, arguing that Congress's desire to promote broadcast opportunities for racial minority

viewpoints was a legitimate and important governmental interest. Drawing heavily on *Bakke*, the court's landmark case on affirmative action in university admissions decisions, Justice Brennan wrote:

[E]nhancing broadcast diversity is, at the very least, an important governmental objective and is therefore a sufficient basis for the Commission's minority ownership policies. Just as a "diverse student body" contributing to a "robust exchange of ideas" is a "constitutionally permissible goal" on which a race-conscious university admissions program may be predicated, the diversity of views and information on the airwaves serves important First Amendment values. The benefits of such diversity are not limited to the members of minority groups who gain access to the broadcasting industry by virtue of the ownership policies; rather, the benefits redound to all members of the viewing and listening audience. As Congress found, "the American public will benefit by having access to a wider diversity of information sources."<sup>42</sup>

Justice John Paul Stevens, in his concurrence, distinguished more explicitly the remedial dimension from the diversity consideration:

Today, the Court squarely rejects the proposition that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong. . . . I endorse this focus on the future benefit, rather than the remedial justification, of such decisions.

I remain convinced, of course, that racial or ethnic characteristics provide a relevant basis for disparate treatment only in extremely rare situations and that it is therefore "especially important that the reasons for any such classification be clearly identified and unquestionably legitimate." . . . The public interest in broadcast diversity—like the interest in an integrated police force, diversity in the composition of a public school faculty or diversity in the student body of a professional school—is in my view unquestionably legitimate.<sup>43</sup>

Essentially, Justice Stevens was distinguishing historical-race (remedial justification) and culture-race (future benefit).

*Bakke* and *Metro Broadcasting* notwithstanding, the court usually fails to include the positive aspects of black culture in its deliberations. *Palmore v. Sidoti*<sup>44</sup> is typical. In that case, the court unanimously rejected a Florida trial court's

decision to modify a white mother's custody of her child after the mother married a black man. The court acknowledged that there was "a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin,"<sup>45</sup> but nevertheless concluded that a court could not constitutionally consider such private biases.

What the court (and most of the subsequent commentary on the decision) failed to consider was the possibility that a black stepfather might offer a positive value to the child beyond a caring home.<sup>46</sup> The child was to be raised in a bicultural environment. In that environment, the child had the possibility of being exposed not only to her mother's background but also to black culture in a way that the child could never have experienced in her biological father's home—within her family environment. The child would have access to a rich life experience, one completely inaccessible in her father's household. The court simply lacked the imagination to consider and separate the subordination dimension of race—the historical-race element that accounted for prejudice outside the home—from the positive concept of culture-race. Such analysis is a difficult social enterprise and deserves case-by-case review, not a blanket rule that a court may never consider the effects of racism. . . .

2. ASSIMILATION AND CULTURAL GENOCIDE  
Implicit in the color-blind assimilationist vision is a belief that, ultimately, race should have no real significance; instead, it should be limited to the formal categories of white and black, unconnected to any social, economic, or cultural practice. However, if the underlying social reality of race is understood as encompassing one's social being, then an assimilationist goal that would abolish the significance of minority social categories has far-reaching repercussions. The successful abolition of "black" as a meaningful concept would require abolishing the distinctiveness that we attribute to black community, culture, and consciousness.

The abolition of a people's culture is, by

definition, cultural genocide. In short, assimilation as a societal goal has grave potential consequences for blacks and other nonwhites. However utopian it appears, the color-blind assimilationist program implies the hegemony of white culture.

### 5. COLOR-BLIND TOLERANCE AND DIVERSITY

As a social ideal, tolerance is the acceptance of race as a necessary evil. Diversity, on the other hand, considers race to be a positive good. Tolerance seems closest to the approach of color-blind advocates such as Justice Scalia. However, Justice Scalia's comments seem more limited in scope and cynical in tone: he strongly asserts the constitutional limitations on those seeking an end to racism but offers nothing substantive as an alternative. In his *City of Richmond v. J. A. Croson Co.* concurrence, Justice Scalia suggests that one should address the specifics of past discrimination in nonracial terms. He proposes the use of "race-neutral remedial programs" but offers no explanation as to how such a program would avoid the very problem to which it is addressed—the concentrations of black poverty and political powerlessness. Such programs either would be doomed to be ineffective solutions for blacks, or else would violate the intent standard of *Washington v. Davis*.<sup>47</sup>

In short, as a goal, tolerance fails to suggest a better society or improved social relations. Under the goal of racial diversity, racial distinctions would be maintained, but would lose their negative connotations: each group would make a positive and unique contribution to the overall social good.

The vision of diversity has significant, subtle limits. As normally articulated, diversity is premised on the existence of race as it now exists, as a conflation of subordination, black culture, and color-blind unconnectedness. Without more, diversity accepts the prevailing limits and social practices of race, including the hypodescent rule. The assumption that it is possible to identify racial classifications of black and white, to consider them apart from their social setting, and then to make those same racial categories the basis for positive social

practice is unfounded. Without a clear social commitment to rethink the nature of racial categories and abolish their underlying structure of subordination, the politics of diversity will remain incomplete.

The difficulty of transforming traditional racial categories into a positive construct can be seen in the construct of whiteness. A crucial dimension of whiteness is white racial privilege. Whiteness becomes a political issue where an entrenched position of dominance is challenged.

A different dimension of "whiteness" is ethnic or national heritage. The immigrant origins of ethnic white European-Americans are accepted and often embraced, though not always denominated as racial; whiteness as racial dominance substantially overlaps, and sometimes supersedes, the ethnic experience. Indeed, some of the most deeply embedded explicit racial violence and assertions of racial inferiority have come from "white ethnic" enclaves. European ethnicity has a social existence apart from racial domination, but the separation of racial subordination from such ethnicity can be a complex political and social enterprise.

Aside from European ethnicity, there are other cultural aspects of whiteness as racial domination. The Confederate flag is a complex symbol, but whiteness as domination is clearly a significant aspect of its symbolism. As representative of a southern culture, the Confederate flag has provided a point of symbolic controversy as it flies over southern statehouses or is worn in schools or displayed in public.

An unstated problem in these debates is that of cultural self-identification when one does not claim a particular ethnic identity. If one identifies oneself simply as a "white American" without any particular ethnic or racial identity, my suggested model of whiteness as reified racial privilege does not make available any particularized identity.

A goal of public-sphere diversity has its social price. Diversity in its narrow sense does not truly challenge existing racial practice but, rather, seeks to accommodate present racial divisions by casting them in a positive light. All too often, discussions of diversity do not address its central problem, the transformation of ex-

isting categories of domination into an altogether different, positive social formation.

## V. AN ALTERNATIVE TO COLOR-BLIND CONSTITUTIONALISM

### *A. Minimal Requirements for a Revised Approach to Race*

This article's central claim is that modern color-blind constitutionalism supports the supremacy of white interests and must therefore be regarded as racist. There is no legitimate rationale for the automatic rejection of all governmental consideration of race. However, strict scrutiny should not be abandoned altogether, given its efficacy as a weapon against segregation in years past. In particular, we shall see that a rhetoric of rights remains vital to the antiracist struggle. This section, therefore, suggests some minimal requirements for an alternative constitutional approach to race.

First, any revised approach to race and the Constitution must explicitly recognize that race is not a simple, unitary phenomenon. Rather, as discussed above, race is a unique social formation with its own meanings, understandings, discourses, and interpretive frameworks. As a socially constructed category with multiple meanings, race cannot be easily isolated from lived social experience. Moreover, race cannot legitimately be described and understood according to legal discourse. Any effort to understand its nature must go beyond legal formalism.

Second, constitutional jurisprudence on race must accommodate legitimate governmental efforts to address white racial privilege. The Supreme Court must not only acknowledge the multiple dimensions of race in the abstract but also expressly permit the different aspects of race to be considered in judicial and legislative decisions. Further, any constitutional program must recognize the cultural genocide implicit in the development of a color-blind society and acknowledge the importance of black culture, community, and consciousness.

Because of a genuine concern that any change in doctrine may weaken the struggle against racial oppression, the court must maintain all

existing constitutional protection for racial minorities against a resurgence of the white supremacist movement. Equal protection and due political barriers against Jim Crow and segregationist variations of white supremacy rather than transformed into barriers against legitimate government efforts to address racial subordination.

Finally, a revised approach to race must recognize the systemic nature of subordination in American society. The Supreme Court's efforts to interpret the equal protection and due process clauses have addressed race, gender, sexuality, and class. To date, the court has regarded these phenomena as distinct, but racial subordination is inherently connected to other forms of subordination. The deep social context in which they are interwoven has begun to draw increasing attention. . . .

### I. THE FREE EXERCISE AND ANTI-ESTABLISHMENT OF RELIGION: RELIGION-BLINDNESS AND COLOR-BLINDNESS

There is a body of constitutional doctrine that suggests a more subtle approach to constitutional review. The First Amendment religion clauses—the free exercise and establishment clauses—provide a possible analogy accommodating some of the criteria outlined above when applied to race. The court's recent decisions on religion betray a qualitative difference between the court's attitudes toward religion and toward race.

In church-state questions, the court has rejected a "religion-blind" standard for governmental activity. That is, the court recognizes the importance of religious affiliation to many Americans and does not see its goal as diminishing or eradicating the institution of religion in American life. While some have argued that religion-blindness is the appropriate role for government, their arguments have not prevailed either in the public imagination or with the court.

The court has instead proceeded along the two related lines dictated by the Constitution—promoting the free exercise of religion and preventing the establishment of any one religion.



These two approaches, while doctrinally distinct and separately discussed in judicial opinions, are logically linked as theoretical opposites. For example, where religious "establishment" is alleged, such as when Christian prayers are said in public schools, a corresponding "free exercise" problem exists—students of other religions are prevented from exercising their own faiths during prayer time.<sup>48</sup> Similarly, a free exercise issue such as the use of peyote in ceremonies of the Native American Church, involves the "establishment" of traditional religion, where the use of peyote warrants criminal penalties.

The free exercise cases are informed by the attitude that religion and religious practice are important and valuable aspects of human experience.

### *B. Religion Jurisprudence as a Model for Race Jurisprudence*

The free exercise and establishment clause decisions provide a model for constitutional adjudication in the area of race to supplant the color-blind model. The race jurisprudence of the Supreme Court contains only an inkling of the deference found in its religion jurisprudence. Once we appreciate the complex and socially embedded character of race, however, we may view the concerns and considerations involved in judicial review of racial decision-making as being similar to those involved in interpreting the religion clauses. If the religion cases are intellectually or emotionally unsatisfying, they at least represent a serious effort by the court to address a complex of social issues with nuanced, historically grounded legal distinctions.

Once the historical context of racial subordination has been acknowledged, remedies that explicitly consider race become constitutionally possible. Instead of a constricted discourse on the legitimacy of the use of "race," a more measured discussion of the proper standard of review becomes possible. Issues of racial remedies, like decisions about the relationship between church and state, can then be discussed as policy decisions rather than as complex studies of judicial review of the democratic process. Culture-race, with its wide range of social

and cultural references, makes possible a form of free exercise of the positive aspects of race—recognizing black and white cultures as legitimate aspects of the American social fabric. Further, free exercise of race would allow, within appropriate limits, open discussion and implementation of governmental remedies to address the historical legacy of racial discrimination. Also protected will be the culture, community, and consciousness of American racial minorities. European-American cultures would also be recognized and respected, of course, even though their existence has not been challenged in the same manner as black culture. Just as permitting the free exercise of religion is, in theory, not an endorsement of any one religion but, rather, only a recognition of respect for the practice of religion, so the free exercise of culture-race would not be an endorsement of racism.

There is also an "establishment" analog for race. What is impermissible—what the government may not "establish"—is racial subordination and white supremacy: the use of either status-race or formal-race to establish domination, hierarchy, and exploitation.

The paired considerations of racial establishment and free exercise are mixed in our social existence. The free exercise of some aspects of a white culture may overlap or coincide with racial domination, as with the attachment of many white southerners to the Confederate flag. Efforts to abolish domination will, therefore, interfere with the free exercise of race in such instances. The suggestion from the religion cases about how to approach this conflict is that the two discussions—of racial subordination and of black culture—can be considered together. Any problem should be addressed in its particular context, without the doctrinal compulsion to satisfy all aspects of either racial subordination or respect for racial-ethnic culture.

## VI. CONCLUSION

BY returning to strict scrutiny as the sole equal protection principle for racial judicial review, the color-blind constitutionalists

would have the Supreme Court risk perpetuating racism and undermining its own legitimacy. This article invokes a parallel between the modern civil rights movement and the "first" Reconstruction; the Supreme Court's civil rights decisions of 1989 are the equivalent of the Compromise of 1877, which ended the first Reconstruction. By fixating on formal-race and ignoring the reality of racial subordination, the court, in this second post-Reconstruction era, risks establishing a new equivalent of *Plessy v. Ferguson*.<sup>49</sup> There is, however, a second parallel for the court. The greater danger for the current court is that it will face the loss of legitimacy which confronted the Taney Court after *Dred Scott*.

The United States is entering a period of cultural diversity more extensive than any in its history. In the past, white racial hegemony went essentially unchallenged. The court today faces a far more complex set of issues. Whatever the validity in 1896 of Justice Harlan's comment in *Plessy*—that "our Constitution is . . . color-blind"—the concept is inadequate to deal with today's racially stratified, culturally diverse, and economically divided nation. The court must either develop new perspectives on race and culture, or run the risk of losing legitimacy and relevance in a crucial arena of social concern.

## NOTES

1. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
2. 349 U.S. 294 (1955).
3. This type of classification arrangement evolved in parts of the West Indies and Latin America, with additional labels for those with Indian blood. One classification scheme proceeded thus: mulatto (Negro and white); quadroon (mulatto and white); octoroon (quadroon and white); cascós (mulatto and mulatto); sambo (mulatto and Negro); mango (sambo and Negro); mustifée (octoroon and white); and mustifino (mustifée and white); C. B. Davenport, *Heredity of Skin Color in Negro-White Crosses*, 27 (1913).
4. This is the prevailing classification scheme in several Latin American societies; Brazil's system is probably the most widely described. At least one well-known author has claimed that Brazilian society is largely free of racial prejudice; G. Freyre, *The Masters and the Slaves: A Study in the Development of Brazilian Civilization*, at xii-xiv (2nd ed. 1956). Others have contested that claim; see, for example, C. N. Degler, *Neither Black Nor White: Slavery and Race Relations in Brazil and the United States*, 110-11 (1971) (distinguishing the "color prejudice" found in Brazil from genetically based "racial prejudice" in the U.S.). [ . . . ]
5. Writer and poet Langston Hughes observed in 1953: "It's powerful," [Simple] said . . . "That one drop of Negro blood—because just one drop of black blood makes a man colored. One drop—you are a Negro! Now, why is that? Why is Negro blood so much more powerful than any other kind of blood in the world? If a man has Irish blood in him, people will say, "He's part Irish." If he has a little Jewish blood, they'll say, "He's half Jewish." But if he has just a small bit of colored blood in him bam!—"He's a Negro!" Not, "He's part Negro." No, be it ever so little, if that blood is black, "He's a Negro!" Now, that is what I do not understand—why our one drop is so powerful. . . . Black is powerful. You can have ninety-nine drops of white blood in your veins down South—but if that other one drop is black, shame on you! Even if you look white, you're black. That drop is powerful!"; L. Hughes, *Simple Takes a Wife*, 85 (1953).
6. *U.S. v. Thind*, 261 U.S. 204 (1922), was an early attempt by the Supreme Court to distance itself from the scientific discourse. . . .
7. 481 U.S. 604 (1987).
8. *Id.* at 613.
9. M. Harris, *Patterns of Race in the Americas*, 59 (1964).
10. *Fullilove v. Klutznick*, 448 U.S. 448, 524 (1980) (Stewart, J., dissenting).
11. *Metro Broadcasting v. FCC*, 110 S. Ct. 2997 (1990).
12. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857).
13. 163 U.S. 537 (1896).
14. *Plessy*, 163 U.S. at 551.
15. *Id.* at 556-57 (Harlan, J., dissenting).
16. 347 U.S. 483 (1954).
17. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).
18. 438 U.S. 265 (1977).
19. *Id.* at 400 (Marshall, J., dissenting).
20. 446 U.S. 156 (1980).
21. 42 U.S.C. § 1973 (1988).
22. *Rome*, 446 U.S. at 218 (Rehnquist, J., dissenting).
23. *Id.*
24. *DeFunis v. Odegaard*, 416 U.S. 312, 320 (1974) (Douglas, J., dissenting).
25. *Id.* at 337.
26. 488 U.S. 469, 527 (1988) (Scalia, J., concurring).

27. 476 U.S. 79 (1986).  
 28. *Id.* at 87 (citation omitted).  
 29. R. A. Posner, *The Economics of Justice*, 367 (1981); see also *id.* at 351-401; R. A. Posner, *Economic Analysis of Law*, 615-25 (3d ed. 1986).  
 30. Posner, *The Economics of Justice*, *supra* note 29, at 367.  
 31. T. Sowell, *Race and Economics*, 159 (1975).  
 32. *Id.* at 160.  
 33. 347 U.S. 483 (1954).  
 34. 488 U.S. 469 (1988).  
 35. *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3029 (1990) (O'Connor, J., dissenting).  
 36. 488 U.S. 469 (1989).

37. As Justice Scalia explains formal-race strict scrutiny: "The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a Nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin. A solution to the first problem that aggravates the second is no solution at all"; *Crosby*, 488 U.S. at 520-21 (Scalia, J., concurring).

Scalia's analysis misses entirely the character of racial subordination. It is not racial classification in the abstract that is problematic. Rather, it is the assymetry of the American classification scheme that is the starting point for understanding racial subordination. Furthermore, even after having adopted hypodescent's metaphorical assertion of racial purity, Scalia would deny that the content of American hypodescent is white racial purity. In his view, it is the subordination of blacks and other nonwhites by whites which underlies racism, not the abstract nature of classification. Even his suggestion of how to "judge men and women" makes no differentiation between white and black. The problem has not historically been black judgment of whites. It has been white judgment of blacks.

38. These definitions are from Robert Paul Wolff's discussion of democratic pluralism: "The first defense of pluralism views it as a distasteful but unavoidable evil; the second portrays it as a useful means for preserving some measure of democracy under the unpromising conditions of mass industrial society. The last defense goes far beyond these in its enthusiasm for pluralism; it holds that a pluralistic society is natural and good and an end to be sought in itself." R. P. Wolff, "Beyond Tolerance," in R. P. Wolff, B. Moore, Jr., and H. Marcuse, eds., *A Critique of Pure Tolerance*, 4, 17 (1965).

39. *Minnick v. California Department of Corrections*, 452 U.S. 105, 129 (1981) (Stewart, J., dissenting). . . .

40. 110 S. Ct. 2997 (1990).

41. 438 U.S. 265 (1978).

42. 110 S. Ct. at 3010-11 (citations omitted).

43. *Id.* at 3028 (Stevens, J., concurring).

44. 466 U.S. 429 (1984).

45. *Id.* at 433.

46. David Strauss has argued that the Court was telling the trial judge that his custody decision was incorrect *because* he did *not* take race into account, thus holding, "in an important sense, that race-conscious action was constitutionally required"; D. Strauss, "The Myth of Colorblindness," 1986 *Sup. Ct. Rev.*, 99, 105.

47. 426 U.S. 229 (1975).

48. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

49. 163 U.S. 537 (1896).

# *Critical Race Theory*

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## THE KEY WRITINGS *That Formed the Movement*

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*Edited by*

KIMBERLÉ CRENSHAW,  
NEIL GOTANDA, GARY PELLER, AND  
KENDALL THOMAS



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contemplates when it applies "strict scrutiny" to racially disadvantaging government conduct. The state's use of racial categories is regarded as so closely linked to illegitimate racial subordination that it is automatically judicially suspect.

Finally, culture-race uses "black" to refer to African-American culture, community, and consciousness. Culture refers to broadly shared beliefs and social practices; community refers to both the physical and spiritual senses of the term; and African-American consciousness refers to black nationalist and other traditions of self-awareness, as well as to action based on that self-awareness. Culture-race is the basis for the developing concept of cultural diversity.

## II. RACIAL CATEGORIES

**B**OTH in constitutional discourse and in larger society, race is considered a legitimate and proper means of classifying Americans. Its frequent use suggests that there is a consensus about what the "races" are.

While the social content of race has varied throughout American history, the practice of using race as a commonly recognized social divider has remained almost constant. In this section, the term "racial category" refers to this distinct, consistent practice of classifying people in a socially determined and socially determinative way. The American racial classification practice has included a particular rule for defining the racial categories black and white. That rule, which has been termed "hypodescent," is the starting point for this analysis.

### *1. American Racial Classification: Hypodescent*

One way to begin a critique of the American system of racial classification is to ask "Who is black?" This question rarely provokes analysis; its answer is seen as so self-evident that challenges are novel and noteworthy. Americans no longer have need of a system of judicial screening to decide a person's race; the rules are simply absorbed without explicit articulation.

### *1. THE RULE OF HYPODESCENT*

American racial classifications follow two formal rules. The *rule of hypodescent* holds that any

person whose black-African ancestry is visible is black. The *rule of ascription* holds that any person with a known trace of African ancestry is black, notwithstanding that person's usual appearance, or, stated differently, that the offspring of a black and a white is black.

Historians and social scientists have noted the existence of these rules, often summarized as the "one drop of blood" rule, in their analyses of the American system of racial classification. Anthropologist Marvin Harris has suggested a name for the American system of social reproduction: "hypodescent."

### *2. ALTERNATIVES TO HYPODESCENT*

The American legal system today lacks intermediate or "mixed-race" classifications. While the establishment of self-contained black or white racial categories may seem obvious, an examination of other classification schemes reveals that the American categories are not exhaustive.

Let us posit the two original races—*loci*—"pure black," the other a "pure white." As inter-racial reproduction occurs, a multiracial society emerges. Four historically documented examples of nonbinary schemes to categorize mixed-race offspring have evolved: *mulatto*, *named fractions*, *majoritarian*, and *social continuum*. All of these schemes are logically symmetrical, so, at least in theory, neither "pure race" is privileged over the other. Consider each of the schemes in detail.

*a. Mulatto.* All mixed offspring are called *mulattoes*, irrespective of the percentages or proportions of their black or white ancestry.

*b. Named fractions.* Individuals are assigned labels according to the fractional composition of their racial ancestry. Thus, a *mulatto* is one half white and one half black, a *quadroon* is one fourth black and three fourths white, a *seabee* is one fourth white and three fourths black, etc.

*c. Majoritarian.* The higher percentage of either white or black ancestry determines the white or black label.

*d. Social continuum.* This is a variation of the named fractions scheme; labels generally vary