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A Critique of “Our Constitution is Color-Blind”

Neil Gotanda*

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* © 1991 by Neil Gotanda. Associate Professor of Law, Western State University College of Law, Fullerton. B.S., 1967, Stanford; J.D., 1972, Boalt Hall; LL.M., 1980, Harvard. Versions of this article have been circulating for so long, I am sure that I have missed important contributions. I owe special thanks to three people: Harry Chang, with whom I first studied the question of race; Duncan Kennedy, who has kept faith with the critical project; and Kimberlé Crenshaw, organizer of the Workshop on Critical Race Theory, whose support and friendship prevented this article from being abandoned. Thanks also to Alex Aleinikoff, Anita Allen, Linz Audain, Regina Austin, Derrick Bell, Todd Brower, John Calmore, Denise Carty-Bennia, Richard Delgado, Constance DeMartino, Pat Ellerd, Mary Joe Frug, Philip Gotanda, Linda Greene, Angela Harris, JoLani Hironaka, Morton Horwitz, Lillie Hsu, Lisa Ikemoto, Susan Keller, Charles Lawrence, Bruce Ledewitz, Chris Littleton, Mari Matsuda, Phil Merkel, Martha Minow, Phil Nash, John Noyes, Fran Olsen, Yasuaki Onuma, Gary Peller, Steve Perkins, Stephanie Phillips, Judy Scales-Trent, Joseph Singer, Ralph Smith, Patricia Sumi, Robert D. Taylor, Kendall Thomas, Gerald Torres, David Trubek, Mark Tushnet, Patricia Williams, and my editors at the *Stanford Law Review*.

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I. INTRODUCTION

This article examines the ideological content of the metaphor “Our Constitution is color-blind,”¹ and argues that the United States 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 matured in 1955 in *Brown v. Board of Education*.² A color-blind interpretation of the Constitution legitimates, and

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

2. 349 U.S. 294 (1955).

thereby maintains, the social, economic, and political advantages that whites hold over other Americans.³

It should be noted at the outset that this article assumes the existence of American racial subordination. No attempt is made to demonstrate the hierarchy of whites above nonwhites, though such demonstrations can be and have been made.⁴ Nor is this article an exploration of legal history or of the lived experience of race. What this article does examine is how legal ideology legitimates racial inequality and domination. The article focuses upon color-blind constitutionalism as it affects African-Americans, although significant portions of the analysis have broader applications.⁵

This article unpacks the color-blind concept by examining opinions exemplary of the assertion "our Constitution is color-blind." The article focuses especially on the opinions of Chief Justice Rehnquist, and Justices Stewart, O'Connor, and Scalia in *Fullilove v. Klutznick*,⁶ *Minnick v. California Department of Corrections*,⁷ *City of Richmond v. J.A. Croson Co.*,⁸ *Metro Broadcasting v. FCC*,⁹ and *Edmonson v. Leesville Concrete Co.*¹⁰ Five themes emerge: (1) the public-private distinction; (2) nonrecognition of race; (3) racial categories; (4) formal-race and unconnectedness; and (5) racial social change. The remainder of Part I sets out four distinct ways in which the Court uses the word "race," and then briefly describes the five color-blind constitutionalism themes. Parts II, III, IV, V, and VI, respectively, examine these themes in detail, analyzing the manner in which white racial domination is supported, protected, or disguised by the particular theme under discussion. The article concludes, in Part VII, by suggesting an alternate model for constitutional consideration of race, a model derived from current First Amendment doctrine on the free exercise and non-establishment of religion.

Four Meanings of Race. The Supreme Court's color-blind constitutional-

3. It is important to distinguish color-blind constitutionalism from this country's larger legal ideology; this article attacks the ideological subsystem of color-blind constitutionalism, not the legitimacy of American constitutionalism more broadly.

4. As to the existence of racial subordination, I sympathize with Patricia Williams's incredulous reaction to the "proof of discrimination" question in *City of Richmond v. J.A. Croson Co.*: [A]s I think about the *Croson* opinion, I cannot help but marvel at how, against a backdrop of richly textured facts and proof on both local and national scales, in a city where more than 50% of the population is [B]lack and in which fewer than 1% of contracts are awarded to minorities or minority owned businesses, . . . not only was 30% too great a set-aside, but that there was no proof of discrimination.

Patricia Williams, *The Obliging Shell: An Informal Essay On Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2129-30 (1989); see also Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (racial subordination continues despite ostensible civil rights reforms).

5. This article focuses on African-Americans because of the historical importance of slavery and because of their primary role in modern American ideas about race and racial classification. The article does not systematically examine the cultures of European-Americans, Native Americans, or other non-whites. See generally Neil Gotanda, "Other Non-Whites" in *American Legal History* 85 COLUM. L. REV. 1186 (1985) (book review).

6. 448 U.S. 448, 522 (1980) (Stewart, J., dissenting).

7. 452 U.S. 105, 128 (1981) (Stewart, J., dissenting).

8. 488 U.S. 469 (1989).

9. 110 S. Ct. 2997, 3028 (1990) (O'Connor, J., dissenting).

10. 111 S. Ct. 2077 (1991).

ism 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.¹¹ 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 white¹² are seen as neutral, apolitical descriptions, reflecting merely "skin color" or country 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 does assign substance to racial categories. Historical-race embodies past and continuing racial subordination, and is the meaning of race that 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 and to action based on that self-awareness.¹³ Culture-race is the basis for the developing concept of cultural

11. See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

12. A comment on the use of the terms Black, Negro, African-American, and white is in order. Since use of these words has varied historically, choosing between "Negro" and "Black" will generally follow the context of the historical discussion. "African-American" is used to emphasize the present necessity of a self-conscious re-examination of the Black American race, including a recognition of the dimensions of culture and community beyond the formal label. This article does not use "Negro" to connote the subordination dimension of race and "Black" to connote the positive aspects of African-American life.

The word "white" is not capitalized despite its use in this article as the dialectical opposite of Black. The terms "white" and "Black" evolved in the seventeenth century North American colonies as slavery evolved, but their meanings go far beyond that historical moment. To the extent that Black "summarizes" relations of racial subordination, white "summarizes" racial domination. As a term describing racial domination, "white" is better left in lower case, rather than privileged with a capital letter. "Black," on the other hand, has deep political and social meaning as a liberating term, and, therefore, deserves capitalization. I am indebted to Kimberlé Crenshaw for this point.

The term "white culture" also merits explanation: To the extent there is a culture of subordination, there is also a culture of domination, in this case "white culture." For a description of this phenomenon under slavery, see EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE (1976); EUGENE D. GENOVESE, THE WORLD THE SLAVE HOLDERS MADE (1969). "White culture" is notoriously difficult to describe because it does not mean simply European-American culture. Rather, the phrase denotes the subordinating and dominating aspects of American racial culture. See Duncan Kennedy, *Radical Intellectuals in American Culture and Politics, or My Talk at the Gramsci Institute*, RETHINKING MARXISM, Fall 1988, at 100. Thus, "Black" and "white" should not be considered types of ethnicity. "Non-racial" concepts, such as African-American or Italian-American, provide an independent basis for cultural diversity.

13. Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758.

diversity.¹⁴

Public-private distinction. In his dissent in *Minnick v. California Department of Corrections*, Justice Potter Stewart presented a seemingly unremarkable rationale for his opposition to affirmative action:

[T]he California Court of Appeal has wrongly held that the State may consider a person's race in making promotion decisions. So far as the Constitution goes, a private person may engage in any racial discrimination he wants, but under the Equal Protection Clause of the Fourteenth Amendment a sovereign State may never do so.¹⁵

Stewart sounds a recurring theme of color-blind constitutional analysis: that all racial discrimination in the private sphere is constitutionally permissible. Absent legislative action, no barrier exists to private considerations of race or to private action based on such consideration. Race discrimination is unconstitutional only in the realm marked out by the doctrine of state action.

Nonrecognition of race. Justice Stewart identified, in his dissent in *Fullilove v. Klutznick*,¹⁶ why government should not act on the basis of race, regardless of whether minority or majority groups are thereby disadvantaged: "Under our Constitution, the government may never act to the detriment of a person solely because of that person's race."¹⁷ Later in his dissent, Justice Stewart added, "by making race a relevant criterion, . . . the Government implicitly teaches the public that the apportionment of rewards and penalties can legitimately be made according to race—rather than according to merit or ability—and that people can, and perhaps should, view themselves and others in terms of their racial characteristics."¹⁸

Justice Stewart dismissed the notion that it would ever be appropriate to consider race in a decisionmaking process, and offhandedly rejected as "self-evident folly" the suggestion that one might consider race without it being a controlling factor in the decision.¹⁹ However, this view is too simplistic.

14. Justice Powell recognized culture-race in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (plurality opinion), as did Justice Brennan in *Metro Broadcasting v. FCC*, 110 S. Ct. 2997, 3020 (1990).

15. 452 U.S. 105, 128 (1981) (Stewart, J., dissenting).

16. 448 U.S. 448, 522 (1980) (Stewart, J., dissenting).

17. *Id.* at 525 (Stewart, J., dissenting).

Similarly, in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989), Justice Scalia concurred in the decision to hold Richmond, Virginia's race-conscious set-aside programs unconstitutional: "[O]nly a social emergency rising to the level of imminent danger . . . can justify an exception to the principle embodied in the Fourteenth Amendment that [our] constitution is color-blind, and neither knows nor tolerates classes among citizens. . . ." And Justice O'Connor has argued that, "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as individuals, not "as simply components of a racial, religious, sexual or national class.'" Metro Broadcasting v. FCC, 110 S. Ct. 2997, 3028 (1991) (O'Connor, J., dissenting) (quoting *Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1083 (1983)).

18. *Fullilove*, 448 U.S. at 532 (Stewart, J., dissenting).

19. *Minnick*, 452 U.S. at 128 n.2 (Stewart, J., dissenting). Ironically, the Court is perfectly willing to believe defendants when they argue that they did not violate the Equal Protection Clause by considering race, since race was not the controlling factor in their decision:

To establish a violation of the fourteenth amendment in the face of mixed motives, plaintiffs must prove by a preponderance of the evidence that racial discrimination was a substantial or motivating factor in the [defendant's action]. They shall then prevail unless the

Before a private person or a government agent can decide “not to consider race,” he must first recognize it. In other words, we could say that one “noticed race but did not consider it.” Of course, this two-step process arises only when the initial recognition of race takes place, through visual identification or some other form of racial classification.²⁰ This two-part process—recognition of racial affiliation followed by the deliberate suppression of racial considerations—will be called “nonrecognition.”

Racial categories. For Justice Stewart, race is objectively fixed, determined by the “immutable facts” of skin color and country of ancestral origin.²¹ Yet, a deeper analysis of American racial practice shows that while skin color and country of origin are, indeed, factors in racial categorization, America’s system of racial categories is also historically and socially contingent. For example, a stigma has historically attached to persons of mixed African and European ancestry. The “one drop of blood” rule typifies this stigma: Any trace of African ancestry makes one Black. In contrast, the classification white signifies “uncontaminated” European ancestry and corresponding racial purity. The socially constructed racial categories white and Black are not equal in status. They are highly contextualized, with powerful, deeply embedded social and political meanings.

Formal-race and unconnectedness. Under color-blind constitutionalism, references to “race” mean formal-race. Formal-race implies that “Black” and “white” are mere racial classification labels, unconnected to social realities.²² In contrast, calling someone white or Black in ordinary life has obvi-

[defendant] prove[s] by a preponderance of the evidence that the same decision would have resulted had the impermissible purpose not been considered.

Hunter v. Underwood, 471 U.S. 222, 225 (1985) (quoting the Circuit Court’s ruling, 730 F.2d 614, 617 (11th Cir. 1984)); *see also* Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (holding that even if plaintiff’s constitutionally protected conduct was a reason for his firing, defendant could show same decision would have been reached without considering protected conduct); Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252, 270 n.21 (1977) (finding that proof of impermissible racial motivation may be rebutted by defendant’s showing that the same outcome would have resulted without the impermissible purpose).

20. In a blind, written test, it is theoretically possible to avoid noticing, as well as considering, race. However, in the real world very few judgments about people are made without a moment of racial identification. An orchestral audition in which the person plays the instrument behind a screen is an example of a process that attempts to reduce the “noticed” element. Because of the aural nature of the performance, it is possible to eliminate visual recognition. Yet recognition of differences in style and technique may still exist, allowing a judge to differentiate people through their individual playing styles. One can envision scenarios where certain styles would be more welcome in a particular ensemble. If those styles grow out of traditions which are racially linked, such as distinctly African-American traditions in dance and popular music, then the question of whether the decision is racially linked is even more problematic.

21.

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 that bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible interest to government.

Minnick, 452 U.S. at 128-29 (Stewart, J., dissenting) (quoting *Fullilove*, 448 U.S. at 525 (Stewart, J., dissenting)).

22. On formalism in legal thought, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973).

ous social implications. Color-blind constitutional analysis ignores this ordinary lived experience of race as a highly charged concept with complex historical and social implications.²³ Hence, the color-blind mode of constitutional analysis often fails to recognize connections between the race of an individual and the real social conditions underlying a litigation or other constitutional dispute.

A theory of racial social change. Justice O'Connor argues that “[t]he dangers of [racial] classifications are clear. They endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict.”²⁴ Under the color-blind constitutional model, the prescription for racial problems in American society is for the government to adopt a position of “never” considering race.

Similarly, Justice Stewart apparently believes that the government’s non-recognition of race should lead eventually to improved race relations in the private sphere. The exemplary conduct of the government as it pursues non-recognition will be so compelling that ordinary citizens will abandon past patterns of racist behavior. Yet Justice Stewart, himself, seems uncertain about the efficacy of exemplary government conduct as a tool for broader societal change; in his *Minnick* dissent, Justice Stewart counsels persons who are unhappy with the Constitution to move to amend it.²⁵

Moreover, it is far from clear that a race-blind society is necessarily a desirable goal. Indeed, examination of color-blind constitutionalism suggests that extending this notion from the public sphere into a generalized social goal risks further disapproval and repression of African-American culture.

II. COLOR-BLIND CONSTITUTIONALISM AND THE PUBLIC-PRIVATE DISTINCTION

The color-blind mode of constitutional interpretation is part of a broader vision in which legal relations are seen as located either in a public sphere of government action or in a private sphere of individual freedom.²⁶ The class-

23. Of course, these implications are often acknowledged only unconsciously. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

24. Metro Broadcasting v. FCC, 110 S. Ct. 2997, 3029 (1990) (O’Connor, J., dissenting).

25. *Minnick*, 452 U.S. at 129 (Stewart, J., dissenting).

26. See generally Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC. 3 (1980); Symposium, *The Public-Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

The continued vitality of the public-private distinction, after the demise of Lochnerism, has proven troublesome to constitutional scholars. See, for example, Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006, 1007 (1987), arguing that although constitutional law continues to “bound separate public and private spheres,” in the post-Lochner age these are no longer regarded as meaningful categories. The question becomes: how is “constitutional law possible in a post-Lochner world?”

Others examining the public-private distinction in recent years have taken the idea in different directions. In some feminist scholarship, for example, the public-private distinction is analogized to a “family”-society distinction. Similarly, Habermas’s use of public-private in his communication

ical public-private distinction

tried to separate strictly the private sphere of individual contractual freedom from the public sphere of government regulation [and] divided actors into two types: public officials who exercised state power and private citizens who exercised rights. . . . This system attempted to separate rigidly public and private law by adopting the idea of a self-regulating market system. . . . [where] the parties were free to agree on whatever terms they wanted. Freedom of contract meant that the parties were free to make or not make contracts, and that when they made contracts the courts would enforce the terms to which the parties had agreed.²⁷

This section argues that color-blind constitutionalism draws a public-private distinction employing an ideological structure that parallels the classic vision of economic liberty. Under this racial public-private distinction, public officials exercising state powers operate according to the rule that race is *not* to be considered. In the private sphere, however, race *may* be considered.

A. *The Private Right to Discriminate*

Under the color-blind mode of constitutional analysis, freedom of contract, freedom of association and speech, and free exercise of religion protect certain racially based acts when made in the private sphere. A party forming a contract is free to make race an element in the contract's offer, acceptance, or consideration. In private social relationships, business associations, and communal gatherings, one can choose whether to associate with those of another race. Speech intended to promote white domination qualifies as protected speech under First Amendment doctrine. And the Free Exercise Clause protects even those religious tenets which espouse racial subordination and racial inferiority.

The notion that there exists a private sphere in which the due process right to contractual freedom protects economic activity from government regulation is often summarized by reference to *Lochner v. New York*.²⁸ While *Lochner*'s vision of a barrier to state economic regulation based on an individual liberty right to contract is now discredited, we maintain its ideological legacy by protecting subordinating conduct in the private sphere.²⁹ Granted, racially discriminatory contracts are today subject to the limits im-

theory differs from the usage in this article. See generally THOMAS McCARTHY, THE CRITICAL THEORY OF JURGEN HABERMAS (1978).

27. Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 478-79 (1988) (book review); see also Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70 (Gerald L. Geison ed., 1983); Elizabeth Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 18 (David Kairys ed., 1982); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1152 (1985).

28. 198 U.S. 45 (1905). The literature on *Lochner* and *Lochnerism* is extensive. Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987), offers a helpful introduction.

29. See Ira Nerenberg, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory*, 12 HARV. C.R.-C.L. L. REV. 297 (1977) (analyzing the intimate link between civil rights, freedom of contract, and the public-private distinction).

posed by civil rights laws³⁰ and by *Shelley v. Kraemer*,³¹ the landmark state action case that barred enforcement of racially restrictive covenants.³² Nonetheless, the model of a private sphere within which racial discrimination is permissible, which first developed in the freedom of contract cases, continues to influence constitutional doctrine.³³

The constitutional guarantee of freedom of association—the right to choose whether to associate with another person—has also served to protect racially discriminatory conduct in the private sector. The argument was developed most forcefully in scholarly debates following *Brown v. Board of Education*.³⁴ In his famous apologia *Toward Neutral Principles of Constitutional Law*, Herbert Wechsler argued that the right to free association was the crux of the desegregation cases:

For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and its constitu-

30. For lists and descriptions of present-day civil rights laws, see CHARLES F. ABERNATHY, CASES AND MATERIALS ON CIVIL RIGHTS (1980); CHESTER J. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS (2d ed. 1980); THEODORE EISENBERG, CIVIL RIGHTS LEGISLATION (2d ed. 1987).

31. 334 U.S. 1 (1948). For a recent examination of *Shelley*, see Symposium, *On The State Action Doctrine of Shelley v. Kraemer*, 67 WASH. U. L.Q. 673 (1989); *see also* David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 966-79 (1989).

32. Legal scholars who believed in a constitutionally required freedom of contract and private sector right to discriminate (subject to certain restrictions), found the restrictive covenant cases hard to justify. Herbert Wechsler's comment was typical:

Assuming that the Constitution speaks to state discrimination on the ground of race but not to such discrimination by an individual even in the use or distribution of his property, although his freedom may no doubt be limited by common law or statute, why is the enforcement of the private covenant a state discrimination rather than a legal recognition of the freedom of the individual? . . . What is not obvious, and is the crucial step, is that the state may properly be charged with the discrimination when it does no more than give effect to an agreement that the individual involved is, by hypothesis, entirely free to make. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29 (1959).

Wechsler's difficulty stems from his failure to recognize the substantive role racial domination plays in the transactions. Without racial domination, Wechsler sees only the Court's "unprincipled" choice not to enforce a race-based property disposition. *See also* Lino A. Graglia, *State Action: Constitutional Phoenix*, 67 WASH. U. L.Q. 777, 788, 790 (1989) (*Shelley* "illustrates with stark clarity . . . that [the Court] is exempt from any requirement that its opinions make sense" and is a "demonstration of raw judicial power").

33. In fact, the Supreme Court never explicitly relied upon freedom of contract principles to strike down civil rights legislation. The Court rejected the first congressional legislation to regulate consideration of race in private contractual relations on federalism grounds, holding that the Constitution did not authorize Congress to usurp state authority by creating "a code of municipal law for the regulation of private rights." *The Civil Rights Cases*, 109 U.S. 3, 11 (1883). Arguments based on federalism had the same effect in this case as a decision under *Lochner* protecting freedom of contract would have had, but exemplified different ideological principles. This type of federalism argument falls within the broad framework of "classical legal thought" as described by Duncan Kennedy, *supra* note 26. Similarly, in *Hall v. DeCuir*, 95 U.S. 485 (1877), the Court struck down a Louisiana statute requiring equal public accommodations, not on liberty of contract principles, but because the law burdened interstate commerce. In short, while the Supreme Court never rejected nondiscrimination statutes on the basis of Lochnerian freedom of contract, it did use other constitutional grounds to produce the same result. *See generally* MILTON R. KONVITZ & THEODORE LESKES, A CENTURY OF CIVIL RIGHTS (1961) (analyzing the historic and constitutional aspects of the civil rights movement); Nerken *supra* note 29.

The Court most recently addressed the question of race discrimination in contract law in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). *See* notes 46-48 *infra* and accompanying text.

34. 349 U.S. 294 (1954).

tional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved. . . .

But if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimension, not unlike many others that involve the highest freedoms . . .³⁵

Wechsler's article anticipated modern analyses of private sector discrimination. Constitutional protection of an individual's right to limit personal associations requires constitutional protection of that individual's decision to discriminate on the basis of race. Wechsler invoked prohibitions on miscegenation to prove that association was the heart of the issue,³⁶ thereby failing to recognize the crucial role of subordination in racial questions. The effect of focusing exclusively on associational issues is a promotion of white people's freedom to exercise economic and social domination.³⁷

The Court has often indicated in dicta that the First Amendment's guarantee of associational freedom would bar government prohibitions of racial discrimination in the private sphere. Justice Douglas stated the matter most starkly: "The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. . . [A state] may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires."³⁸ The Court has continued to reaffirm this notion of a protected sphere of discriminatory conduct, even as it upholds some state antidiscrimination statutes against freedom of association challenges. The decisions implicitly recognize that the exclusionary associational rights of smaller organizations could protect the organizations' discriminatory conduct from antidiscrimination statutes.³⁹

35. Wechsler, *supra* note 32, at 34. We find in Wechsler a technique often seen in legal discussion of racial issues. He premises his analysis on equal facilities, ignoring that the inequality of facilities is crucial to racial subordination. Where one would expect him to explain, Wechsler instead slides over his elimination of unequal treatment based on race in order to pose segregation and integration as moral equivalents.

36. *Id.* ("Does not the problem of miscegenation show most clearly that it is the freedom of association that at bottom is involved . . .").

37. See generally Crenshaw, *supra* note 4 (discussing society's continuing refusal to acknowledge the role of racial subordination).

38. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-80 (1972) (Douglas, J., dissenting). In *Moose Lodge*, appellee Irvis argued that a private club's racial barrier was unconstitutional because the club obtained a liquor license from the state. Justices Douglas and Marshall agreed with this argument, while Justice Rehnquist's majority opinion found no state action.

39. For example, in *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984), Justice Brennan noted that "[i]n one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to the constitutional scheme." The Court elucidated this point in *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545-46 (1987): "We have not attempted to mark the precise boundaries of this type of constitutional protection. . . . In determining whether a particular association is sufficiently personal or private to warrant constitutional protection, we consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship." And in *New York Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988), the Court noted that "an association might be able to show that it is organized for specific expressive purposes

The First Amendment's Freedom of Speech Clause, too, has been used by the courts to strike down government attempts to prohibit acts of racial domination. For example, alarmed by a resurgence in on-campus racist, sexist, and homophobic speech, university administrators have begun to enact restrictions. In general, their efforts have not survived constitutional review.⁴⁰ In a challenge to the notion that race-hate speech should be protected by the free speech tradition of the First Amendment, Professor Mari Matsuda has proposed that such speech should be removed from that tradition and be subject to direct regulatory prohibitions.⁴¹ Acceptance of Matsuda-style regulation would carve out significant exceptions to the First Amendment barrier to regulation of activity that seeks to promote white domination.⁴²

The Free Exercise of Religion Clause of the First Amendment offers a somewhat weaker private sphere protection. The widely publicized case of *Bob Jones University v. United States*⁴³ held that a parochial school could be denied a favorable federal tax-exempt status because it enforced a sincere belief that the Bible forbids interracial dating and marriage. However, the Court did emphasize that its opinion dealt with "religious schools—not with churches or other purely religious institutions."⁴⁴ In other words, there remains a protected sphere of private belief and activity within which doctrines of racial subordination are protected.

Taken together, constitutional protections for racial discrimination in the private sphere constitute a "private right to discriminate." While the rhetoric of constitutional rights is not traditionally applied to protect discrimina-

and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion." See also City of Dallas v. Stanglin, 490 U.S. 19 (1989) (rejecting freedom of association challenge to an ordinance restricting dance hall admission to persons between the ages of 14 and 18).

40. For example, a district court refused to enforce the University of Michigan's code of student conduct on the basis that the Code violated the First Amendment. Doe v. University of Mich., 721 F. Supp 852 (E.D. Mich. 1989); see also *Recent Cases*, 103 HARV. L. REV. 1397 (1990).

The Supreme Court recently granted certiorari on a freedom of speech challenge to a St. Paul, Minnesota "hate-crime" ordinance. *In re R.A.V.*, 464 N.W.2d 507 (Minn.), cert. granted, 111 S. Ct. 2795 (1991).

41.

This Article suggests that the stories of those who have experienced racism are of special value in defeating racism. It further suggests that we can, and have, chosen as a primary value freedom from racial oppression. Finally, in doing the awkward work of constructing doctrine, this Article suggests a belief in the possibility and the necessity of creating a legal response to racist speech that transcends first amendment absolutism. We can attack racist speech—not because it isn't really speech, not because it falls within a hoped-for neutral exception, but because it is wrong.

Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2380 (1989).

42. A related effort has been made to regulate pornography. Legislation to subject pornography to civil suit in a manner analogous to racial civil rights abuses, has been struck down as an unconstitutional violation of the freedom of speech. *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986). For a recent discussion, see Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297 (1988).

43. 461 U.S. 574 (1982).

44. *Id.* at 604 n.29.

tory conduct, the existence of this private right legitimates private discriminatory actions and haunts attempts to enact antidiscrimination legislation. Granted, certain aspects of the right to discriminate—particularly economic relations—may be constitutionally regulated by legislation, but such regulation depends on the vagaries of majoritarian politics. Given the shifting fortunes of political alliances, a legal barrier to racial domination may appear through legislation, only to disappear when the statute is amended or repealed.

Changes in judicial interpretation can also expand or contract the scope of antidiscrimination legislation. The recent history of 42 U.S.C. § 1981 is an example. After nearly a century of applying the statute only where state action was shown, the Court held in 1976 that Section 1981 applied to private conduct as well.⁴⁵ This reinterpretation allowed Section 1981 to be used in a wide range of private contract situations. However, in its recent decision *Patterson v. McLean Credit Union*,⁴⁶ the Court sharply curtailed the scope of Section 1981. The Court held that the language of Section 1981, that “[a]ll persons . . . shall have the same right . . . to make and enforce contracts, . . . as is enjoyed by white citizens,”⁴⁷ was limited to the formation but not the execution of contracts.⁴⁸ In short, legislative enactments and Court interpretations may adjust the bounds of the right to discriminate, but the right remains at the ideological core of the racial public-private distinction.

B. *The Normative Content of the Public-Private Distinction*

To the extent that distinguishing between public and private realms places some social relations beyond the reach of government regulation, the distinction has normative consequences. Joseph William Singer summarizes the ideological impact of the primacy of the private sphere: “In this core area, people were free to act in a self-interested manner, without regard to the interests, needs, or expectations of others. Social relations were immune from state regulation, and free will prevailed against state power. Classical theorists viewed the remaining, state-imposed obligations as peripheral.”⁴⁹

The classical public-private boundary separates public and private *relations*, as well as public and private *actors*. The doctrine distinguishing public from private in both cases is continually evolving; consequently, the dividing line is a moving target for those who seek to use them as openings for racial social change.

45. *Runyon v. McCrary*, 427 U.S. 160 (1976) (extending *Jones, Mayer*, 392 U.S. 409 (1968)).

46. 491 U.S. 164 (1989).

47. 42 U.S.C. § 1981 (1988).

48. *Patterson*, 491 U.S. at 179. Using this interpretation, the majority held that the plaintiff’s allegations of racial harassment *during* her employment were not actionable under § 1981 since they arose after the formation of her employment contract. Justice Brennan’s dissent criticized the majority’s interpretation of § 1981 as “pinched,” “needlessly cramped,” and “formalistic.” *Id.* at 189 (Brennan, J., dissenting).

49. Singer, *supra* note 27, at 481.

1. *Public and private relations.*

Gradually, the judiciary has designated certain social relations and activities as public or private. Voting and the administration of justice, for example, have been assigned to the public sphere. Note, however, that such assignments are not preordained. Instead, designation of an activity as public or private is a normative process. The familiarity of the public-private distinction obscures the contingent and political character of the initial designation, and subsequent challenges to the subordinating effects of such a “neutral” distinction are then criticized as “political.”⁵⁰

That the designation of a relation as private or public is a normative decision becomes clear when we realize that today’s “common sense” designations were once difficult cases. In 1880, the Supreme Court in *Strauder v. West Virginia*⁵¹ held that a West Virginia statute which provided that “[a]ll white male persons . . . shall be liable to serve as jurors,”⁵² violated the Fourteenth Amendment when used to exclude Blacks from jury duty. In *Strauder* and two companion cases,⁵³ the Court specified the racial criteria to be used in the exercise of a governmental power—trial by jury—in effect beginning a definition of the public sphere.⁵⁴

Similarly, it was not “self-evident”⁵⁵ in 1883 that the common law duty to serve the public, imposed on innkeepers, transportation providers, and places of public amusement, should not require them to serve Black guests. In the *Civil Rights Cases*,⁵⁶ the Court could have justified a decision requiring public accommodations to serve Blacks by portraying it as a mere extension of existing obligations.⁵⁷ Instead, the Court created a protected private sphere, placed innkeepers and guests within it, and thereby made available a right to discriminate. The development of the state action doctrine in the *Civil Rights Cases* provided a rationale for placing particular legal relations into the private sphere, but this rationale both absorbed and hid the normative dimension of the public-private distinction.

The state action framework supports the supremacy of ensconced interests—usually white—by placing the burden on the person challenging the

50. Consider, for example, Wechsler’s objections to the restrictive covenant cases. See note 32 *supra*.

51. 100 U.S. 303 (1880).

52. *Id.* at 305.

53. The companion cases were *Virginia v. Rives*, 100 U.S. 313 (1880), and *Ex parte Virginia*, 100 U.S. 339 (1880).

54. Besides the *Strauder* trilogy, the Fifteenth Amendment prohibited racial barriers to voting in 1870, and in *Yick Wo v. Hopkins*, 110 U.S. 356 (1886), the Court held that a facially neutral law which was administered in a racially discriminatory manner violated equal protection.

55. See similar language, drawing on “common sense,” in *Plessy v. Ferguson*, where Justice Brown argued that “*in the nature of things* [the Fourteenth Amendment] could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.” *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896), *overruled* by *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (emphasis added).

56. 109 U.S. 3 (1883).

57. See *id.* at 26 (Harlan, J., dissenting); see also Note, *The Antidiscrimination Principle in the Common Law*, 102 HARV. L. REV. 1993 (1989).

“common sense” public-private distinctions; explicitly race-conscious enactments in the public sphere (such as voting rights legislation) are inevitably criticized as efforts to introduce “political” criteria into the public sphere.⁵⁸ Such criticisms, however, are premised on the notion that public-private designations are “natural.”

The existence of public and private spheres and the presumption that each has its natural inhabitants render challenges to discrimination subject to ideological resistance on two fronts. Consequently, one can debate the absence or presence of state action and raise charges that a change of boundaries is “political,” without ever reaching the second issue, the subordinating actions themselves.

2. *Public and private actors.*

The government acts through its human agents, such as police officers or legislators.⁵⁹ Many of the Court’s decisions examine the status of the actor to determine whether there has been state action in an act of racial subordination. That examination can be as simple as determining whether the perpetrator is a government employee, or as complex as the functional analyses in *Burton v. Wilmington Parking Authority*⁶⁰ and *Edmonson v. Leesville Concrete Co.*⁶¹ Either way, an agent’s discriminatory actions may be determined to be nongovernmental acts, and therefore protected private conduct.

Determining the public or private status of individual actors has been an area of active doctrinal evolution. In an early case, *Virginia v. Rives*,⁶² the Court found a state jury selection law racially neutral on its face since it mandated racial exclusion. The Court also held that if a county official excluded Blacks from jury duty, the official was guilty of “criminal misuse of State law” and was in violation of federal civil rights statutes, but he did not violate the Fourteenth Amendment. Since the official’s conduct was not within the scope of the federal removal statute, the two Black defendants were remanded to the custody of the state criminal system, where they could

58. See, e.g., *Rome v. United States*, 446 U.S. 156, 218 (1980) (Rehnquist, J., dissenting).

59. As Justice Strong stated:

We have said the prohibitions of the Fourteenth Amendment are addressed to the States. . . . A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State’s power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.

Ex parte Virginia, 100 U.S. 339, 346-47 (1880).

60. 365 U.S. 715 (1961) (holding that segregated restaurant which leased land from municipal parking garage was state actor).

61. 111 S. Ct. 2077 (1991) (finding state action to be present in racially discriminatory use of peremptory jury challenges in civil trial).

62. 100 U.S. 313 (1879).

seek appropriate relief.⁶³

More recently, the decision in *Edmonson v. Leesville Concrete Co.*,⁶⁴ turned on whether, in a federal civil trial, the use by private litigants of racially discriminatory peremptory challenges constituted state action. The Fifth Circuit had declined to apply the procedure specified in *Batson v. Kentucky*⁶⁵ in a civil setting, reasoning that there was no governmental actor present.⁶⁶ The trial judge was not a “state actor” since the court’s action was merely ministerial, and the counsel who exercised the peremptory challenges was a “privately-retained lawyer, serving a private client in a damage suit.” The Fifth Circuit consequently thought it “inconceivable” that “private counsel” could be viewed as a state actor.⁶⁷

The Supreme Court reversed, ruling that private litigants were state actors, at least for purposes of peremptory jury challenges. Justice O’Connor, joined by Chief Justice Rehnquist and Justice Scalia, dissented, arguing that “a peremptory strike by a private litigant is fundamentally a matter of private choice and not state action.”⁶⁸ These opinions illustrate the extraordinarily slippery character of the state actor designation process in state action analysis.

Cases considering race discrimination in jury selection are only one example of the evolution of the public-private distinction.⁶⁹ As applied in state action doctrine, this distinction facilitates judicial desires to invoke or to avoid public sphere nonrecognition of race.⁷⁰ Because this choice is

63. The Supreme Court was no doubt aware that appellants were unlikely to obtain relief in state court, but with that remedy available in theory, the Court was able to avoid ruling directly on the state official’s acts.

64. 111 S. Ct. 2077 (1991).

65. 476 U.S. 79 (1986).

66. *Edmonson v. Leesville Concrete Co.*, 895 F.2d 218, 219-21 (5th Cir. 1990), *rev’d*, 111 S. Ct. 2077 (1991).

67. *Id.* at 222.

68. *Edmonson*, 111 S. Ct. at 2089 (O’Connor, J., dissenting).

69. For example, for many years, a narrow interpretation of whether a government employee’s activities constituted state action allowed states to avoid paying damages to victims of police misconduct. It was not until 1945, in *Screws v. United States*, 325 U.S. 91 (1945), that a plurality of the Court held that if a police officer harms a prisoner in violation of state law, the officer’s conduct is not outside the authorized scope of public authority and, therefore, comes “under color of state law” for purposes of statutory federal civil rights coverage. 18 U.S.C. § 242 (1988); see DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* 214-16 (2d ed. 1980). Regrettably, the spirit of the old police misconduct cases was resurrected in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), in which the Court rejected an injunction barring the use by Los Angeles police of chokeholds. The Court required plaintiffs to demonstrate that the use of such chokeholds was either the express policy of the police department or approved by the department. See KENNETH KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 5 (1989). This reluctance to constitutionally protect the victims of governmental officers can also be seen in such areas as the allowance of broad governmental discretion in the decision whether to prosecute police misconduct directed towards African-Americans. See, e.g., Tanya Katerí Hernández, *Bias Crimes: Unconscious Racism in the Prosecution of “Racially Motivated Violence,”* 99 YALE L.J. 845 (1990).

70. Further mischief would be possible if the Court extended the “market participant exception” of the “dormant” Commerce Clause to its analysis of race. Commerce Clause doctrine recognizes a market participant exception—a distinction between the state as a regulator and the state as a market participant—which is essentially a public-private distinction for government’s commercial endeavors. If this exception were imported into equal protection analysis, a government engaging in

presented as an apolitical decision, rather than as a normative choice supported by specific policies, underlying racial preferences are disguised. To confront this problem, the disguise must be penetrated. Only then can substantive political debate regarding the supported policies take place.

III. NONRECOGNITION

We accept as unremarkable an employer who asserts, "Yes, I noticed that she was Black, but I did not consider her race in making my hiring or promotion decision." This technique of "noticing but not considering race" implicitly involves recognition of the employee's racial category and a transformation or sublimation of that recognition so that the racial label is not "considered" in the employer's decisionmaking process.⁷¹ Advocates of the color-blind model argue that nonrecognition by government is a decision-making technique that is clearly superior to any race-conscious process. Indeed, nonrecognition advocates apparently find the political and moral superiority of this technique so self-evident that they think little or no justification is necessary.⁷²

This section examines the inadequacy of color-blind constitutionalism as a technique for combating racial subordination. I argue that nonrecognition is self-contradictory. Nonrecognition fosters the systematic denial of racial subordination and the psychological repression of an individual's recognition of that subordination, thereby allowing such subordination to continue.⁷³

A. Nonrecognition as Technique

Nonrecognition has three elements. First, there must be something which is cognizable as a racial characteristic or classification. Second, the characteristic must be recognized. Third, the characteristic must not be con-

nontraditional enterprises, could be held a "market participant" and therefore excluded from state action requirements; in other words, the government would be constitutionally free to discriminate on the basis of race. For example, a municipality acting as a building contractor, if deemed a market participant, could discriminate on the basis of race in its post-contract formation behavior so long as there was no applicable state law prohibiting the conduct.

71. This discussion involves our present use and understanding of nonrecognition. Part VI discusses a possible alternative: a color-blind society in which skin-color recognition is a "low-level" cosmetic preference similar to the recognition of eye-color.

72. Justice Stewart, for example, condemns the idea that the government apportion "rewards and penalties" on racial considerations. Yet, the nonrecognition mode that he advocates does, in fact, require some racial balancing. *See Minnick v. California Dept. of Corrections*, 452 U.S. 105, 128 (1981) (Stewart, J., dissenting); *see also Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518-19 (Kennedy, J., concurring) (proclaiming the moral superiority of racial neutrality three times in two pages).

73. Unlike the discussions of the public-private distinction, racial categories, and unconnectedness, there is no historical analysis in this article of the concept of nonrecognition. To a certain extent, the evolution of public-sphere unconnectedness parallels that of nonrecognition, but I suspect that judicial use of nonrecognition really dates from Harlan's dissent in *Plessy*. A search for nonjudicial sources of the concept of nonrecognition would be much more philosophical or literary in nature. See, for example, Carol C. Gould's discussion of gender as an "accidental" from the philosophical perspective of abstract universality. Carol C. Gould, *The Woman Question: Philosophy of Liberation and the Liberation of Philosophy*, in WOMEN AND PHILOSOPHY: TOWARD A THEORY OF LIBERATION 5 (Carol C. Gould & Marx W. Wartofsky eds., 1976).

sidered in a decision. For nonrecognition to make sense, it must be possible to recognize something while not including it in making a decision.

Nonrecognition is a *technique*, not a principle of traditional substantive common law or constitutional interpretation. It addresses the question of race, not by examining the social realities or legal categories of race, but by setting forth an analytical methodology. This technical approach permits a court to describe, to accommodate, and then to ignore issues of subordination. This deflection from the substantive to the methodological is significant. Because the technique appears purely procedural, its normative, substantive impact is hidden.⁷⁴ Color-blind application of the technique is important because it suggests a seemingly neutral and objective method of decisionmaking that avoids any consideration of race.⁷⁵

B. *Self-Contradiction and Repression*

Decisions that use color-blind nonrecognition are often regarded as superior to race-conscious decisions. Proponents of nonrecognition argue that it facilitates meritocratic decisionmaking by preventing the corrupting consideration of race. They regard race as a "political" or "special interest" consideration, detrimental to fair decisionmaking.

This article does not discuss the value or accuracy of meritocratic decisionmaking as such.⁷⁶ Rather, this article argues that, for three reasons,

74. Owen Fiss raised a related objection to the use of "overinclusiveness" and "underinclusiveness" in equal protection analysis:

The antidiscrimination principle seems to respond to an aspiration for a "mechanical jurisprudence"—to use Roscoe Pound's phrase—by making the predicate of intervention look technocratic. The antidiscrimination principle seems to ask no more of the judiciary than that it engage in what might at first seem to be the near mathematical task of determining whether there is . . . "overinclusiveness" or "underinclusiveness," or in the terms of contemporary commentators, characterize this as determining whether there is the right "fit" between means and ends. The terms used have an attractively quantitative ring. They make the task of judicial judgment appear to involve as little discretion as when a salesman advises a customer whether a pair of shoes fit. Moreover, under the antidiscrimination principle, whatever judgment there is would seem to be one about means, not ends, thereby insulating judges from the charge that they have substituted their judgments for that of the legislature.

Owen M. Fiss, *Groups and the Equal Protection Clause*, in EQUALITY & PREFERENTIAL TREATMENT 84, 97-98 (Marshall Cohen, Thomas Nagel & Thomas Scanlon eds., 1977), also in 5 PHIL. & PUB. AFF. 107 (1976) (quoting Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 351-52 (1949)).

75. See generally WILLIAM BARRETT, THE ILLUSION OF TECHNIQUE (1978) (discussing the limits of logic and formal techniques).

76. Others have addressed the limitations of meritocratic systems and, in particular, the questionable relationship of meritocracy to race. A large body of literature exists on the relationship between race and IQ tests. A good introduction to that literature is STEPHEN JAY GOULD, THE MISMEASURE OF MAN (1981) (arguing that IQ tests have created subtle, mistaken, and all-pervading judgments on race, class, and sex). See also Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 362-84 (1988). For a recent critical examination of the use of "general ability" tests to screen potential employees, see Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1158 (1991).

This article does not address meritocracy because in each of the uses of race discussed later the validity of existing meritocratic systems is peripheral or irrelevant. Meritocracy is irrelevant to sta-

consideration of race does not automatically corrupt a fair social decision-making process. First, nonrecognition in the private sphere is self-contradictory. Second, because race is in fact considered, the question of whether nonrecognition is superior to race-based decisionmaking reduces to a quantitative measure of the weight accorded race in the decision, rather than a choice between two qualitatively different approaches. Third, and most important, nonrecognition is a means of avoiding or repressing consideration of the social relations and social context that are associated with race. This repression has psychological, legal, and interpretive dimensions.

1. *The impossibility of private sphere nonrecognition.*

To use color-blind nonrecognition effectively in the private sphere,⁷⁷ we would have to fail to recognize race in our everyday lives. This is impossible. One cannot literally follow a color-blind standard of conduct in ordinary social life.⁷⁸ Moreover, the technique of nonrecognition ultimately supports the supremacy of white interests.

In everyday American life, nonrecognition is self-contradictory because it is impossible to not think about a subject without having first thought about it at least a little. Nonrecognition differs from nonperception. Compare color-blind nonrecognition with medical color-blindness. A medically color-blind person is someone who cannot see what others can. It is a partial nonperception of what is "really" there. To be racially color-blind, on the other hand, is to ignore what one has already noticed. The medically color-blind individual never perceives color in the first place; the racially color-blind individual perceives race and then ignores it. This is not just a semantic distinction. The characteristics of race that are noticed (before being ignored) are situated within an already existing understanding of race. That is, race carries with it a complex social meaning. The proponents of color-

tus-race because status-race presumes the inferiority of nonwhites. Historical-race and culture-race are linked to meritocracy only to the extent that their validity is denied in some meritocratic analysis. Meritocratic analysis uses formal-race and proceeds as if race were unconnected to the social indicia such a test would measure. This article examines the doctrinal and social implications of unconnectedness, not the validity of the education, experiences, skills, or other indicia toward which unconnectedness points us.

77. I do not specifically address public sphere nonrecognition. Section IV examines the racial subordination inherent in our system of racial classification and, to the extent such categories reinforce racial subordination, nonrecognition in the public sphere denies that subordination. In general, my complaint that our system of public sphere racial subordination is "disguised" is a criticism of nonrecognition. Section V develops the notion of unconnectedness as a form of nonrecognition. In the public sphere, nonrecognition is analytically similar to recognizing racial categories and then "unconnecting" social attributes from those racial categories. In other words, "unconnectedness" is a decision that the causal or normative relevance of race is zero.

78. Nonrecognition is not the same as nondiscrimination. This article is not directly concerned with the nature of discrimination, but with the desirability of color-blindness as a social goal and as a means of achieving that goal. Color-blindness as an antidote for discrimination will not succeed because color-blind nonrecognition involves individual conduct. Such conduct goes beyond a government's nonconsideration of race in deciding whether or not someone may register to vote. Inter-personal conduct is not so abstract. See Peller, *supra* note 13; see also Darryl Brown, Note, *Racism and the University*, 76 VA. L. REV. 295, 300 (1990) (discussing "racism and the sociology of knowledge").

blind nonrecognition do not acknowledge this aspect of racial consciousness when they describe their "neutral" decisionmaking processes.⁷⁹

This pre-existing race consciousness makes it impossible for an individual to be truly nonconscious of race. To argue that one did not *really* consider the race of an African-American is to concede that there was an identification of Blackness. Suppressing the recognition of a racial classification in order to act as if a person were not of some cognizable racial class is inherently racially premised.⁸⁰

In a 1989 article, Professor Kimberlé Crenshaw described the racial "perspectivelessness" required of legal analysis:

To assume the air of perspectivelessness that is expected in the classroom, minority students must participate in the discussion as though they were not African-American or Latino, but colorless legal analysts. The consequence of adopting this colorless mode is that when the discussion involves racial minorities, minority students are expected to stand apart from their history, their identity, and sometimes their own immediate circumstances and discuss issues without making reference to the reality that the "they" or "them" being discussed is from their perspective "we" or "us."⁸¹

Crenshaw offers a bizarre example of this enforced nonrecognition when she describes Professor Patricia Williams's struggle with the editors of the *Uni-*

79. Nonconsideration of race would not be improper if race meant only formal-race. However, empirical studies suggest that racial consciousness develops at an early age in American youth.

80. Those who insist that they "never think about a person's race" might offer as evidence the fact that they speak the same way to everyone. But all people adjust their speech for the sex, age, and social standing of their listener. Do people adjust also for the race of their listener? Bear in mind that suppressing consideration of race is an accommodation. The question is whether people seek to maintain their normal conversational mode or whether some change is appropriate, expected, or feared. See THOMAS KOCHMAN, *BLACK AND WHITE STYLES IN CONFLICT* (1981) (discussing cultural conflict with special attention to verbal communication).

81. Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 3 (1989) (citation omitted). Crenshaw offers some classroom examples:

Consider discussions of probable cause where the reasonableness of an officer's suspicion requires students to view the situation through the eyes of the arresting officer. It is not unusual for professors to base a hypothetical on the presence of a Black person in a white neighborhood. When the instructor has not opened the dialogue to allow students to question the potentially discriminatory effects of determining reasonableness from the perspective of the arresting officer, the minority student is essentially required to look back at herself to determine whether her own presence in a white neighborhood would be sufficient cause for her to arrest herself. Similar dilemmas are confronted when the discussion turns to the reasonableness of an Immigration and Naturalization Service agent's detention of a car containing Latino passengers. The tension created by the expectation of objectivity and the reality that a Chicana student might herself be in that situation essentially places her in the awkward position of considering whether from the perspective of the agent, it would be reasonable to detain herself and a car of her friends as suspected undocumented workers. A Japanese-American student considering the reasonableness of the government's World War II internment of Japanese-Americans confronts a similar dilemma. Unless given leave to discuss the internment from a Japanese-American perspective, she has to consider whether from the point of view of some government decision-makers, her parents represented a threat to the national security such that their internment satisfied a compelling state interest.

Id. at 4-5 (citations omitted).

versity of Miami Law Review. In an article published with them, Williams describes her exclusion from a New York store as follows:

Two Saturdays before Christmas, I saw a sweater that I wanted to purchase for my mother. I pressed my brown face to the store window and my finger to the buzzer, seeking admittance. A narrow-eyed white youth who looked barely seventeen, wearing tennis sneakers and feasting on bubble gum, glared at me, evaluating me for signs that would pit me against the limits of his social understanding. After about five seconds, he mouthed, "We're closed," and blew pink rubber at me. It was one o'clock in the afternoon. There were several white people in the store who appeared to be shopping for things for *their* mothers.

I was enraged. At that moment I literally wanted to break all of the windows in the store and *take* lots of sweaters for my mother.⁸²

Crenshaw tells us that "the editors initially deleted all references to [Williams'] racial identity informing her that references to "physiogomy" [sic] were irrelevant. . . . [But] if the racial identity of the speaker is not included, the point of the story is unintelligible."⁸³ Had the editors prevailed, Williams would have appeared irrational for being so angry at a store clerk over a minor incident. The editors sought to suppress the existence of race from a narrative in which race was the center of the incident. Their attempted use of nonrecognition would have produced a misleading "nonracial" narrative.⁸⁴

While the actions of the *University of Miami Law Review* editors appear nonsensical, similar efforts in most other contexts would be regarded as perfectly legitimate. For example, in a recent empirical study, Professor Ian Ayres examined whether race and gender substantively affected automobile showroom sales transactions.⁸⁵ Professor Ayres found that white men purchasing automobiles in the Chicago area were offered substantially lower prices than were women or Blacks and concluded that car salespersons were unwilling to negotiate better prices with Black and female buyers. If a salesperson were to say that he "did not consider race," in his sales transactions, it would not be regarded as a complex assertion. Yet Professor Ayers's study reveals a wide range of socio-economic considerations involved in such a seemingly simple statement.

82. Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 128 (1987).

83. Crenshaw, *supra* note 81, at 5 n.8.

84. Evidence of racial expectations can also be seen in the popular media. For example, in *BLAZING SADDLES* (Warner Bros. 1974), Mel Brooks's well-known satire of Hollywood westerns, a troubled western town calls for a hero to save them. When actor Cleavon Little arrives in town, he is immediately rejected because he is Black. The humor is built around our expectation that western heroes are white. To an individual who claims that she "never considers race," *Blazing Saddles* (and many other films) would be incomprehensible. In turn, the cinematic expectation of white heroes is a Hollywood creation.

85. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991). The study sought to isolate the effects of race and gender by matching all other characteristics of the testers (for example, age, education, dress, economic class, occupation, address, and attractiveness). Testers were also provided a uniform bargaining strategy.

These examples from law school classrooms, law review scholarship, and Chicago car sales illustrate that color-blind nonrecognition in the private sphere is both a logical and a practical impossibility.

2. *The incoherence of discounting "racialness."*

Nonrecognition as a technique resembles, in some ways, utilitarianism. Utilitarianism models society as the aggregation of individuals, each rationally pursuing his or her self-interest.⁸⁶ In a utilitarian model, race, once it has been recognized, must be weighed in some manner. Even if heavily discounted, it must be measured, so that it can be balanced against other factors. For race to be discounted, it must first be counted. To be rationally disregarded, race must be commensurable.⁸⁷

To measure race, then, is to create a standard of "racialness." The central problem for the utilitarian interpretation of color-blind nonconsideration is to define race. Such a definition either will clarify the social elements which comprise our notion of race or will expose a nonsensical comparison.

One cannot satisfactorily claim that the technique of nonrecognition is superior to an explicitly race-conscious mode of evaluation without explaining why nonrecognition is superior. The explanation should define the standard of racialness being measured in this process. Does the proponent of nonrecognition exclude conditions such as education, social status, income, language, and culture from her definition of racialness? If the proponent is using formal-race—a classification unconnected to any social attributes—then that choice too needs to be explained and justified.

3. *Repression and denial of racial subordination.*

Examined next are three interpretations of nonrecognition that illustrate the ways in which nonrecognition suppresses racial subordination. These

86. The notion of individuals rationally pursuing their own self-interest is closely related to the concept of unconnectedness. Atomized individuals are without race, gender, or class; they are totally removed from a social context. Elizabeth Mensch describes John Rawls as postulating "a hypothetical initial position of 'rational' people who are essentially atomized monads with an interest in attaining their own private stock of social goods, but who demonstrate no interest in promoting the welfare of others or in building a society of true participation, equality or shared values." Mensch, *supra* note 27, at 19.

87. The problem of "commensurability" is a standard question in utilitarian jurisprudence. Peter Westen notes that

All comparative statements . . . presuppose external standards of measurement. . . .

The same is also true of equality and inequality. One cannot declare two things to be equal or unequal without first comparing them, and one cannot compare them without first possessing a standard by which they can be jointly measured. A rainbow and a Wordsworth ode, it is said, are "neither equal nor unequal," because "we have no [common] measure or standard for comparing them."

Peter Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604, 608 (1983) (quoting ELIZABETH HANKINS WOLGAST, EQUALITY AND THE RIGHTS OF WOMEN 38-39 (1980)).

Rational decisionmaking in constitutional discourse is often described as "balancing" or "weighing" various considerations against one another. The process of disguised balancing in non-recognition offers no advantages over an explicit use of balancing, beyond the ideological role of disguising and repressing racial subordination.

interpretations show how the technique of nonrecognition, found within constitutional doctrine, is linked to other intellectual disciplines. These interpretations clarify the social costs of denying and repressing subordination—costs that ought to be explicitly considered in debates over the appropriateness of color-blind constitutionalism.⁸⁸

Psychological repression. From a psychological or psychoanalytic perspective, nonrecognition may be considered a mode of repression. The claim that race is not recognized is an attempt to deny the reality of internally recognized social conflicts of race. This internal psychological conflict between recognition and repression of racial identity is reflected in legal discourse.⁸⁹

More concretely, an individual's assertion that he "saw but did not consider race," can be interpreted as a recognition of race and its attendant social implications, followed by suppression of that recognition. The legal mode of racial nonrecognition is, then, the external extension of this psychological mode of denial of race. As explained by Charles Lawrence, "[w]hen an individual experiences conflict between racist ideas and the societal ethic that condemns those ideas, the mind excludes his racism from consciousness."⁹⁰ The impetus for that conflict may be moral, legal, or both. But the suppression does take place, and the external world accommodates it by accepting and institutionalizing the repression rather than attempting to expose and alter the conditions of racial exploitation.

Legal fictions. In an article on immigration law, Ibrahim Wani argued that legal fictions serve a significant ideological function. Says Wani,

Immigration law fictions [e.g. sovereignty, entry, detention/punishment, and national community] range from nebulous abstractions to outright distortions and misrepresentations. They are often used to achieve ends that would be unthinkable in other areas of American law and popular belief. In many respects, immigration law fictions also tend to substitute for the sound, enquiring and searching analysis expected and demanded of judicial decision-making. . . . [T]hese fictions are favored in immigration law primarily because of their expediency in allowing immigration law to achieve purposes that would otherwise be constitutionally and morally impermissible or at least suspect. Fictions allow immigration law to tread a course divergent from the rest of America while appearing to be in perfect harmony with it.⁹¹

88. Daniel Ortiz lists the desire to make social choices explicit as a principal characteristic of post-modern social thought. Daniel Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1150 (1989).

89. Lawrence, *supra* note 23.

90. *Id.* at 323. Lawrence also notes that "[m]uch of one's inability to know racial discrimination when one sees it results from a failure to recognize that racism is both a crime and a disease. . . . Acknowledging and understanding the malignancy are prerequisites to the discovery of an appropriate cure." *Id.* at 321. It seems appropriate to apply Lawrence's interpretation to color-blind constitutionalism. Nonrecognition is not a common-sense solution to racism, but a pathology which prevents recognition of the disease.

91. Ibrahim J. Wani, *Truth, Strangers and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 CARDENZO L. REV. 51, 53-54 (1989). The racial dimension to immigration law is also beginning to be explored in the legal literature. See, e.g., Neil Gotanda, "Other Non-Whites" in *American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186 (book

In the same way, concepts such as race neutrality and nonrecognition can be thought of as legal fictions which serve to legitimate racial subordination. The concept of legal fiction as elaborated by Wani helps to illustrate the unconscious, deeply contextualized character of race in society and in the thinking of the Supreme Court. The subliminal ideology of the Court may be found between the lines of the Court's articulated rationales and policies.

Dialectical logic. The inherent self-contradictions of nonrecognition can be summarized in terms of dialectical logic: A subject is defined by its negation, hence, an assertion of *nonconsideration* necessarily implies *consideration*. The stronger and more defined the character of racial recognition, the clearer and more sharply drawn its dialectical opposite, racial nonrecognition. The assertion "I noticed but did not consider race" divides the dialectic into its two components, consideration and nonconsideration. It then focuses exclusively on the nonconsideration by denying the existence of the consideration component. While this is a complex maneuver surrounded by assertions of moral superiority, the attempt to deny racial consideration is, at its root, an attempt to hide the underlying racial oppression, a reality no amount of wand-waving and obfuscation can eliminate.

IV. RACIAL CATEGORIES

In previous sections, race has been treated as a stable, coherent legal and social concept. This section continues the critique of color-blind constitutionalism by examining the concept of race itself. The implicit understanding of the previous sections—that race is a socially constructed, human category, not a natural or scientific one—is now made explicit.

In both 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. For example, racial nonrecognition implies a common understanding of what, exactly, is not considered. 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?"⁹² This question rarely provokes analysis; its

review); Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615 (1981).

92. For a moving, personal account of a life that confronts this question, see Judy Scales-

answer is seen as so self-evident that challenges are novel and noteworthy.⁹³ 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:

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

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.⁹⁴ Anthropologist Marvin Harris suggested a name for the American system of social reproduction: "hypodescent."⁹⁵

Trent's published journal entries, presenting the experiences of a Black woman who can "pass" as white. Judy Scales-Trent, *Commonalities: On Being Black and White, Different and the Same*, 2 YALE J.L. & FEM. 305 (1990).

93. This was not always true. Before World War II, every serious treatise discussing race included a section on "Who is a Negro?" See, e.g., CHARLES S. MANGUM, JR., THE LEGAL STATUS OF THE NEGRO ch. 1, at 1 (1940); GILBERT THOMAS STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW ch. 2, at 12 (1910); JACOB D. WHEELER, A PRACTICAL TREATISE ON THE LAW OF SLAVERY 4 (New York 1837).

This question has received less attention since the demise of official segregation and antimiscegenation laws. Affirmative action programs, however, may resurrect the question. See Chris Balentine, Note, "Who is a Negro?" Revisited: Determining Individual Racial Status for Purposes of Affirmative Action, 35 U. FLA. L. REV. 683 (1983); John C. Calhoun, Note, Who is a Negro?, 11 U. FLA. L. REV. 235 (1958); see also BLACK'S LAW DICTIONARY 265 (6th ed. 1990) (definition of "colored").

In recent years, legal disputes over a person's race have been rare enough to attract national media coverage. For example, in 1984, a Stockton, California, city council recall election received national attention when candidate Mark Stebbins—who has light brown hair, blue eyes, and white skin—publicly identified himself as "Black" and ran as a Black candidate. His opponent Ralph White, a Black businessman, charged Stebbins with lying about his race to win votes. The story received significant national, as well as local, coverage. See, e.g., City Council Member Survives Recall Vote, WASH. POST, May 15, 1984, at A6; Green-Eyed "Black" Man Wins Recall Election, UPI, May 9, 1984, available in LEXIS, Nexis library, Wires file; It's Not All Black and White . . . Reuters, Dec. 20, 1984, available in LEXIS, Nexis library, Wires file; Richard Haitch, Racial Politics, N.Y. TIMES, Sept. 1, 1985, § 1, at 55.

94. For a recent study of the one drop of blood rule that supports and augments the perspectives advanced in this article, see F. JAMES DAVIS, WHO IS BLACK? ONE NATION'S DEFINITION (1991).

For other examinations of racial classification rules, see VIRGINIA R. DOMÍNGUEZ, WHITE BY DEFINITION: SOCIAL CLASSIFICATIONS IN CREOLE LOUISIANA (1986); WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812 (1968); EDWARD BYRON REUTER, THE MULATTO IN THE UNITED STATES (1918); JOEL WILLIAMSON, NEW PEOPLE: MISCEGENATION AND MULLATOES IN THE UNITED STATES (1980).

For comparative analyses of racial classification, see H. HOETINK, SLAVERY AND RACE RELATIONS IN THE AMERICAS: COMPARATIVE NOTES ON THEIR NATURE AND NEXUS (1973); SLAVERY IN THE NEW WORLD: A READER IN COMPARATIVE HISTORY (Laura Foner & Eugene Genovese eds., 1969); PIERRE L. VAN DEN BERGHE, RACE AND RACISM: A COMPARATIVE PERSPECTIVE (1967).

95. MARVIN HARRIS, PATTERNS OF RACE IN THE AMERICAS 37, 56 (1964). The term refers

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.⁹⁶ 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:

1. *Mulatto*: All mixed offspring are called mulattoes, irrespective of the percentages or fractions of their Black or white ancestry.⁹⁷
2. *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.⁹⁸
3. *Majoritarian*: The higher percentage of either white or Black ancestry determines the white or Black label.⁹⁹
4. *Social Continuum*: This is a variation on the Named Fractions scheme: Labels generally correspond 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.¹⁰⁰

to the practice of assigning the "subordinate" classification to the offspring of one "superordinate" parent and one "subordinate" parent.

96. Attempts since the colonial era to prohibit sexual relations between the races have been notoriously unsuccessful. Moreover, the haphazard enforcement of antimiscegenation statutes suggests that racial subordination—not racial separation—was the true purpose of the statutes. See W. JORDAN, *supra* note 94, at 136-78.

97. Laura Foner suggests that in Louisiana and St. Domingue (colonial Haiti), there were three classifications of race: white, Black (mostly slaves), and free colored (mostly mulatto). Laura Foner, *The Free People of Color in Louisiana and St. Domingue: A Comparative Portrait of Two Three-Caste Slave Societies*, 3 J. SOC. HIST. 406 (1970). Likewise, Eugene Genovese has identified a "three-caste" system in the "Anglo-French Caribbean." E. GENOVESE, *THE WORLD THE SLAVE-HOLDERS MADE*, *supra* note 12, at 107. These arrangements suggest that the mulatto scheme is consistent with racial categorization techniques existing in other parts of the world.

98. 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); cascos (mulatto and mulatto); sambo (mulatto and Negro); mango (sambo and Negro); mustifee (octoroon and white); and mustifino (mustifee and white). CHARLES B. DAVENPORT, *HEREDITY OF SKIN COLOR IN NEGRO-WHITE CROSSES* 27 (1913).

99. Ohio followed a majoritarian rule of racial classification for three decades, beginning with *Gray v. Ohio*, 4 Ohio 353 (1831), and ending with the adoption of the Reconstruction Amendments.

100. 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, GILBERTO FREYRE, *THE MASTERS AND THE SLAVES: A STUDY IN THE DEVELOPMENT OF BRAZILIAN CIVILIZATION* at xii-xiv (2nd ed. 1956), but others have contested that claim, see, e.g., CARL N. DEGLER, *NEITHER BLACK NOR WHITE: SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES* 110-11 (1971) (distinguish-

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.¹⁰¹ Thus, under the American system of

ing the “color prejudice” found in Brazil from genetically based “racial prejudice” in the U.S.); M. HARRIS, *supra* note 95, at 60-61 (describing the interrelation between racial and class prejudice in Brazil). All agree, however, that racial classification in Brazil differs sharply from that in the United States. For other comparative studies, see HERBERT S. KLEIN, *SLAVERY IN THE AMERICAS: A COMPARATIVE STUDY OF VIRGINIA AND CUBA* (1967); FRANK TANNENBAUM, *SLAVE & CITIZEN: THE NEGRO IN THE AMERICAS* (1946).

101. 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.”

LANGSTON HUGHES, *SIMPLE TAKES A WIFE* 85 (1953).

See also F.J. DAVIS, *supra* note 94; Raymond T. Diamond & Robert J. Cottrol, *Codifying Caste: Louisiana’s Racial Classification Scheme and the Fourteenth Amendment*, 29 LOY. L. REV. 255 (1983) (arguing that intent of Louisiana racial classification statute is to publicly include individual in inferior racial caste and, therefore, violates Fourteenth Amendment equal protection); A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1968 (1989) (asserting that the purpose of prohibitions

racial classification, claiming a white racial identity is a declaration of racial purity and an implicit assertion of racial domination.¹⁰² The symmetry of racial categorization systems other than hypodescent brings a sense of objectivity and neutrality to these schemes,¹⁰³ 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 which 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.¹⁰⁴

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.¹⁰⁵ 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.¹⁰⁶

on interracial sex and marriage in colonial and antebellum Virginia was to maintain clear racial boundary lines).

102. At the beginning of the twentieth century, this observation was more than a metaphor, it was the basis for a call to arms. The following lament is typical of statements made at that time; indeed, the source of this particular quote was very well received by the scholarly community:

Whether we like to admit it or not, the result of the mixture of two races, in the long run, gives us a race reverting to the more ancient, generalized and lower type. . . . The cross between a white man and a negro is a negro; . . . and the cross between any of the three European races and a Jew is a Jew.

MARK H. HALLER, EUGENICS: HEREDITARIAN ATTITUDES IN AMERICAN THOUGHT 150 (1963) (quoting MADISON GRANT, THE PASSING OF THE GREAT RACE 15-16 (1916)).

103. This sense of "fairness" probably lies more in the linguistic precision of description than in any social or economic reality.

104. A *Los Angeles Times* article related the story of one young Black woman who was black but looked white. The woman described how people, usually white, would assume she was white and make bigoted statements about Black people in front of her. After discovering that she was not white, they would apologize. Roger Simon, *A Unique Perspective on Racism*, L.A. TIMES, July 10, 1988, pt. VI, at 5.

105. Skeptics may argue that it is possible to imagine a "mirror-image" conversation in which a group of Blacks makes derogatory comments about whites. However, such a situation is not equivalent to the one described in note 104, *supra*, because racially derogatory comments about whites do not rely upon or reinforce a social system of white racial inferiority.

106. This article outlines the oppressive features of racial categories. A more personal exploration of the boundaries between white and Black society can be found in Scales-Trent, *supra* note 92, at 305:

Many in my family are various shades of brown, as is common in most black families. Many others of us, however, look white. . . . In this essay, I struggle to combine two statuses which our society says cannot be combined: black cannot be white, and white cannot be black. . . . In order for me to exist, I must transgress boundaries.

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 natural science phenomenon. 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.¹⁰⁷ Neither tradition can claim true objectivity. Further, the American racial categorization scheme is not only historically contingent, but, to some extent, legislatively determined.

1. The scientific legitimization of race.

Historically, scientific discourse has played a central role in legitimating status-based racial classifications.¹⁰⁸ For example, the racial "science" of the eighteenth and nineteenth centuries justified slavery by asserting the inferiority of African-Americans.¹⁰⁹ 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.¹¹⁰ While no longer cited in scientific journals, Blumenbach's racial classifications have remained embedded in

107. This section does not examine the sense of racial essentialism in which there is a singular Black or white racial experience. For a critique of race and feminist essentialism and argument for multiple consciousness in the feminist movement, see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

108. See generally THE CONCEPT OF RACE (Ashley Montagu ed., 1964); THOMAS F. GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA (1963) (explaining the influence of scientific theories on the development of racial theories); S.J. GOULD, *supra* note 76 (discussing the use of craniometry and intelligence testing to perpetuate beliefs about racial inferiority); RACE AND SCIENCE: THE RACE QUESTION IN MODERN SCIENCE (UNESCO ed., 1961) (a collection of essays discussing race in relation to biology, psychology, and culture); WILLIAM STANTON, THE LEOPARD'S SPOTS: SCIENTIFIC ATTITUDES TOWARD RACE IN AMERICA, 1815-59 (1960) (discussing efforts of nineteenth century scientists to determine whether all the races of man were descended from a common species); GEORGE W. STOCKING, JR., RACE, CULTURE, AND EVOLUTION (1968) (a series of essays on the study of race by scientists and anthropologists between the eighteenth century and the early twentieth century).

109. For a discussion of the scientific discourse in the seventeenth and eighteenth centuries, see W. JORDAN, *supra* note 94, at 216-65, 482-541. On the nineteenth century, see S.J. GOULD, *supra* note 76; W. STANTON, *supra* note 108; G. STOCKING, *supra* note 108. Acknowledging differences in racial status was not the same as condoning slavery. Abraham Lincoln, for example, delivered the Emancipation Proclamation despite his belief in the inferior status of the Negro.

110. T. GOSSETT, *supra* note 108, at 37-38; see also W. STANTON, *supra* note 108, at 31-33. For an example of the use of these categories in the legal literature, see the lengthy article by George W. Gold, *The Racial Prerequisite in the Naturalization Law*, 15 B.U. L. REV. 462 (1935). Gold discusses the "five great races of the world, commonly designated as white, black, brown, yellow and red." *Id.* at 463. Gold cites as authority an U.S. Immigration Commission report that included references to Blumenbach. *Id.* at 474 n.9, 504 n.217. Gold worried over the plight of "half-breeds," urging that "the rule as to half-breeds should be clarified by specifying the percentage of white blood that one of mixed blood must have to be deemed a white person." *Id.* at 505.

popular notions of race.¹¹¹ 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.¹¹²

The Court’s modern discussions of race purport to be disengaged from the older scientific tradition.¹¹³ In a 1987 case, *Saint Francis College v. Al-Khzraji*,¹¹⁴ 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. Said Justice White, “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.”¹¹⁵ Moreover, in dicta, the Court expressed sympathy for the position that race is a sociopolitical rather than scientific characteristic.¹¹⁶

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

111. In 1987, the Supreme Court noted “a common popular understanding that there are three major human races—Caucasoid, Mongoloid, and Negroid.” *Saint Francis College v. Al-Khzraji*, 481 U.S. 604, 610 n.4 (1987).

112. Publicized examples of the popular belief in a racial socio-biology include sports announcer Jimmy “the Greek” Snyder’s assertion that slave breeding explains an outstanding African-American football player, and political commentator Andy Rooney’s alleged statement that “Blacks watered down their genes.” See Dave Anderson, *Greek Loses an Out Bet*, N.Y. TIMES, Jan. 17, 1988, § 5, at 1; Jeremy Gerard, *CBS Gives Rooney a 3-Month Suspension for Remarks*, N.Y. TIMES, Feb. 9 1990, at C30.

113. *U.S. v. Thind*, 261 U.S. 204 (1922), was an early attempt by the Supreme Court to distance itself from the scientific discourse. Bhagat Singh Thind, a “high caste Hindu of full Indian blood,” *id.* at 206, had applied for citizenship on the grounds that, as a “Caucasian,” he qualified as a “white person” under a federal naturalization statute. In denying Thind’s request for naturalization, the Court refused to equate “white person” with “Caucasian” as contemporary anthropology understood the word. The Court held that “common understanding” would exclude a person who looked like Thind: “it may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today . . .” *Id.* at 209. The Court concluded that “the words ‘free white persons’ are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word ‘Caucasian’ only as that word is popularly understood.” *Id.* at 214-15. In short, the Court rejected both the linguistic and anthropological definitions of “Caucasian” in its interpretation of “white persons.” See also *Ballentine*, *supra* note 93, at 694.

114. 481 U.S. 604 (1987).

115. *Id.* at 613.

116. Note the Court’s language:

Many modern biologists and anthropologists, however, criticize racial classifications as arbitrary and of little use in understanding the variability of human beings. It is said that genetically homogeneous populations do not exist and traits are not discontinuous between populations; therefore, a population can only be described in terms of relative frequencies of various traits. Clear-cut categories do not exist. The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. It has been found that differences between individuals of the same race are often greater than the differences between the “average” individuals of different races. These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature. *Id.* at 610 n.4 (citations omitted).

is genetically part of an ethnically and physiognomically distinctive subgrouping of *homo sapiens*.'” Justice White’s references to genetics and a “sub-grouping of *homo sapiens*” have a clear scientific tilt. But in the next sentence, Justice White again turned away from the physical and back towards the social. “It is clear from our holding . . . that a distinctive physiognomy is not essential to qualify for § 1981 protection. If respondent . . . can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab . . . he will have made out a case under § 1981.”¹¹⁷ 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.¹¹⁸

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, those 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.¹¹⁹ The links between racial categorization and skin color, physiognomy, and ancestry reinforce the belief that

117. *Id.* at 613.

118. I do not wish to suggest that the issue of race and science is a simple one. A strong position (I believe too strong) condemning use of “race” has been taken by Anthony Appiah who poses the issue of race and science as one of vulgar biologizing versus a broader notion of culture:

Talk of “race” is particularly distressing for those of us who take culture seriously. For, where race works—in places where “gross differences” of morphology are correlated with “subtle differences” of temperament, belief, and intention—it works as an attempt at a metonym for culture; and it does so only at the price of biologizing what *is* culture, or ideology. To call it “biologizing” is not to consign our concept of race to biology. What is present there is not our concept but our word only. Even the biologists who believe in human races use the term “race,” as they say, “without any social implication.” What exists “out there” in the world—communities of meaning, shading variously into each other in the rich structure of the social world—is the province not of biology but of hermeneutic understanding.

Anthony Appiah, *The Uncompleted Argument: DuBois and the Illusion of Race*, in “RACE,” WRITING AND DIFFERENCE 21, 36 (Henry Louis Gates, Jr. ed., 1986) (citations omitted).

119. The Supreme Court has rejected skin color as a method of defining racial classification. In a trilogy of cases interpreting the Naturalization Act of 1906, 34 Stat. 596, 929, the United States Supreme Court addressed the question, who qualifies as a “white” under the statute. In the first case, *Ozawa v. United States*, 260 U.S. 178 (1922), a unanimous Court found skin color a “[m]anifestly . . . impracticable [test], as [skin color] differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races.” *Id.* at 197.

The decision also rejected anthropological categories and acculturation as standards for “white person.” Ozawa had been a resident of Hawaii and the United States for 20 years, graduated from Berkeley High School in California, attended U.C. Berkeley, worshipped in American churches, and spoke English at home; he was nevertheless denied naturalization. While some commentators vigorously contested the Court’s dicta on racial definition, see, e.g., Charles Gordon, *The Racial Barrier to American Citizenship*, 93 U. PA. L. REV. 237 (1945), the interpretation prevailed until Congress

racial identity is immutable.¹²⁰

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.¹²¹ 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.”¹²² 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* 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 . . .”¹²³ 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 category. 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

removed “white person” from the statute in 1952. Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952).

See also COLOR AND RACE (John Hope Franklin ed., 1968) (collection of articles on race and physical features); H. HOETINK, *supra* note 94, at 192.

120. For example, see Justice Cardozo’s opinion in *Morrison v. California*, 291 U.S. 82 (1933):

In the vast majority of cases the race of a Japanese or a Chinaman will be known to any one who looks at him. There is no practical necessity in such circumstances for shifting the burden to the defendant. Not only is there no necessity; there is only a faint promotion of procedural convenience. The triers of the facts will look upon the defendant sitting in the courtroom and will draw their own conclusions.

Id. at 94. *Contra* Gordon, *supra* note 119, at 245.

121. Marvin Harris, in his book *Patterns of Race in the Americas*, studied racial classification in Brazil by showing nine portrait drawings, with different “racial” features, to a sample of 100 Brazilians. He elicited forty different “racial” terms to describe the drawings, each with a different sense of skin color and social status. Besides demonstrating the variability of racial descriptions, Harris noted that the many terms illustrated the possibility of a person in the Brazilian system changing his or her “racial” classification through economic or educational achievement. Harris contrasted Brazilian variability with the secretive American system of “passing,” which requires those who would change their race from Black to white to abandon their family and friends. M. HARRIS, *supra* note 95, at 58-59.

A further consequence of the absence of [the American rule of descent] in the Brazilian system is that it is possible for people to change their racial identity during their lifetimes. It is known, of course, that a certain number of United States Negroes annually pass into the white group in defiance of our racial rule of descent In Brazil, however, the changing of “race” does not require the secrecy and the agonizing withdrawal from family and friends which are necessary in this country

Id. at 59.

122. *Id.*

123. *Fullilove v. Klutznick*, 448 U.S. 448, 524 (1980) (Stewart, J., dissenting).

traditionally accorded legal facts.¹²⁴ 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 racial classifications with scientific fact occurred during oral argument in *Metro Broadcasting*.¹²⁵ Justice Scalia engaged in a widely 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 repeatedly 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."¹²⁶

The context of Scalia's insistence upon "blood" suggests he was referring metaphorically to ancestry as determining racial classification.¹²⁷ "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. The nineteenth century racial scientist hoped to prove that the African race was inherently inferior. The modern tradition links racial categories to science to show that race is a neutral and apolitical term *without* social content. 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 place of origin.¹²⁸ Typically, Africans were brought to

124. The word "immutable" may also be an indirect reference to what has been called the "immutability doctrine," which requires that a "suspect category" be immutable for purposes of equal protection review. For a review of this concept in the context of gay, lesbian, and bisexual identity, see Janet Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989).

125. *Metro Broadcasting v. FCC*, 110 S. Ct. 2997 (1990).

126. Justice Scalia's comments are reported in Ruth Marcus, *FCC Defends Minority License Policies: Case Before High Court Could Shape Future of Affirmative Action*, WASH. POST, March 29, 1990, at A8. See also Lyle Denniston, *Double-Header: Do Quotas Mean Diverse Programs*, AM. LAWYER, June 1990, at 84; L.A. TIMES, March 29, 1990, at A24; 58 U.S.L.W. 3623 (April 3, 1990).

127. Justice Scalia's emphasis on the "blood" metaphor drew a response from Justice Marshall. In a question addressed to counsel but clearly directed at Justice Scalia, Justice Marshall asked, "[y]ou're constantly talking about blood. What statistics do you have there there is a difference in people's blood?" Marcus, *supra* note 126.

128. Much of this section draws on an earlier unpublished article, Neil Gotanda, *Origins of Racial Categorization In Colonial Virginia: 1619-1705*, (1980) (on file with the *Stanford Law Review*).

the colonies as captives, and Europeans as contractual or indentured servants. Winthrop Jordan has described the individual political dimensions of labor in seventeenth-century Virginia and Maryland as "states of unfreedom."¹²⁹ 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 "un-free" 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 1600s, English colonists maintained some Africans in a status distinguishable from European indentured labor.¹³⁰

Sources from the 1600s variously describe Africans as "heathen," "infidel," and "negro." These terms were attempts to justify the political status of the Africans.¹³¹ 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.¹³²

English colonists gradually came to prefer enslaved African labor over indentured Europeans.¹³³ By the end of the seventeenth century, the number of slaves had increased dramatically.¹³⁴

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.¹³⁵ 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

129. See W. JORDAN, *supra* note 94.

130. Gotanda, *supra* note 128; see WESLEY FRANK CRAVEN, WHITE, RED & BLACK (1971); W. JORDAN, *supra* note 94, at 44-98; Oscar Handlin & Mary F. Handlin, *Origins of the Southern Labor System*, 7 WM. & MARY Q. 199 (1950).

131. W. JORDAN, *supra* note 94, at 91-98. Among the earliest justifications for slavery were "captives taken in just wars" and "those not baptized." These "explanations" achieved varying degrees of importance and effect. They have their origins in the earliest contacts between Europe and the rest of the world. Gotanda, *supra* note 128, at 15-23; see also DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE (1966).

132. Thus, at this period in colonial Virginia and Maryland, no clear rules of classification differentiated those who were enslavable from those who were to be free labor. Nor did a rule of descent predetermine the status of the offspring of an African and a European. Gotanda, *supra* note 128, at 15; cf. W. JORDAN, *supra* note 94, at 71.

133. The reasons for this development remain the subject of historical dispute. In addition to W. JORDAN, *supra* note 94, see DAVID GALENSEN, WHITE SERVITUDE IN COLONIAL AMERICA: AN ECONOMIC ANALYSIS 159-60 (1981).

134. W. JORDAN, *supra* note 94, at 44.

135. *An Act Concerning Servants and Slaves*, 3 STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 447 (William Hening ed., 1812). The code was, in part, a consolidation of earlier enactments on servants and slaves and the Virginia House of Burgesses had apparently not intended it as a slave code; nevertheless, the 1705 Code is regarded as a predecessor to later and more explicit codifications of slave law. See W. JORDAN, *supra* note 94, at 101-35; KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 21-27, 192-236 (1956).

mulattos 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.¹³⁶

The new racial classifications offered a basis for legitimating subordination that 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 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.¹³⁷ Likewise, antimiscegenation statutes were widespread, even where Jim Crow segregation was not mandated.¹³⁸ 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

136. T.H. Breen and Stephen Innes trace a prosperous African immigrant farmer who owned both land and slaves during the middle seventeenth century in Virginia. Records suggest that, while this farmer was not always treated like the English colonists, he was regarded as an able and prosperous farmer with enforceable legal rights. By the turn of the century, the records of his family disappear, and there are no records of comparable farmers of African ancestry. Breen and Innes suggest that social relations between African and European settlers had so deteriorated that African-immigrant success stories were no longer possible. T.H. BREEN & STEPHEN INNES, "MYNE OWNE GROUND": RACE AND FREEDOM ON VIRGINIA'S EASTERN SHORE, 1640-1676 (1980).

137. See, e.g., C. MANGUM, *supra* note 93, at 3-12 (listing the laws of Maine, Massachusetts, Connecticut, Indiana, Arizona, Montana, Nebraska, North Dakota, Oregon, Louisiana, Virginia, Georgia, Texas, Oklahoma, Tennessee, Arkansas, North Carolina, Florida, Maryland, Kentucky, and the District of Columbia); G.T. STEPHENSON, *supra* note 93, at 12-25 (1910) (discussing statutes in Alabama, Kentucky, Maryland, Mississippi, North Carolina, Tennessee, Texas, Florida, Georgia, Indiana, Missouri, South Carolina, Nebraska, Oregon, Virginia, Michigan, and Ohio).

138. At the time of the litigation in *Loving v. Virginia*, 388 U.S. 1 (1967), sixteen states had antimiscegenation laws: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. In the preceding fifteen years, fourteen states had repealed antimiscegenation laws: Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming. *Id.* at 6 n.5.

No U.S. jurisdiction declared an antimiscegenation law unconstitutional until the California Supreme Court finally did so in *Perez v. Sharp*, 32 Cal. 2d 711, 198 P.2d 17 (1948).

in Louisiana in the early 1980s. While most jurisdictions had abolished mandatory classifications by the 1970s, Louisiana's birth certificate statute required a statutorily defined racial identification.¹³⁹ 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.¹⁴⁰ At trial and on appeal, the Louisiana courts upheld the constitutionality of the fractional classification statute, and Phipps's birth certificate was not changed.¹⁴¹

The statutory histories of state racial classification schemes emphasize the role of government 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.

D. *Devaluation and Essentialism*

The argument that racial categories perpetuate racial subordination does not depend solely on historic interpretation. This section explores an essentialist interpretation of racial categories and the American rule of social reproduction of racial categories, hypodescent. It will be argued that this essentialist interpretation contradicts the idea that racial categories are neutral and free of social content. In the previous subsections, the historical narratives were contrasted with the purported neutrality of racial categories. Here, the analysis is reversed. If one assumes that racial categories are neutral, then an essentialist analysis leads to contradictory conclusions.

Under an essentialist analysis, if the categories Black and white have any

139. Racial identification on birth certificates remained widespread. F.J. DAVIS, *supra* note 94, at 9. All except Louisiana's, however, were based on self-identification and were not mandatory. The Louisiana statute, repealed in 1983, provided that "a person having one-thirty-second or less of Negro blood shall not be deemed, described, or designated by any public official in the state of Louisiana as 'colored,' a 'mulatto,' a 'black,' a 'negro,' a 'griffe,' a 'Afro-American,' a 'quadroon,' a 'mestizo,' a 'colored person' or a 'person of color.'" 1970 LA. ACTS 46 § 1, *repealed by*, LA. REV. STAT. ANN. ACTS 1983 no. 441, § 1. Thus a person with one-sixteenth "Negro blood" would be classified as "Negro."

This definition was apparently adopted in 1970 to reform an earlier formulation based on "any traceable amount" of Negro ancestry. Such "one drop of blood" statutes required that a person with *any* known Negro ancestor, no matter how distant, be classified as Negro. See V. DOMÍNGUEZ, *supra* note 94, at 2-5; Ballentine, *supra* note 93; Kenneth A. Davis, *Racial Designation in Louisiana: One Drop of Blood Makes a Negrol*, 3 HASTINGS CONST. L.Q. 199 (1976); Raymond T. Diamond & Robert J. Cottrol, *Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment*, 29 LOY. L. REV. 255, 279 (1983); Calvin Trillin, *American Chronicles: Black or White*, NEW YORKER, April 14, 1986, at 62.

140. Trillin, *supra* note 139, at 62. Ms. Phipps first attempted to change her birth certificate through administrative petition, but was thwarted by state and county clerks, known informally as "race clerks," *id.* at 69, who perpetuated Louisiana's social system of racial classifications.

141. The appellate decision is reported as *Doe v. State Dep't of Health & Human Resources*, 479 So. 2d 369 (La. Ct. App. 1985), *appeal dismissed*, 479 U.S. 1002 (1986). The Louisiana legislature, responding to the unfavorable publicity, amended the statute after the Phipps trial court decision. Trillin, *supra* note 139, at 77.

racial meaning as applied to persons, there must exist some understanding of "Black person" and "white person" prior to usage of the terms. That "Black person" and "white person" are comprehensible implies the existence of the *essential* "Black person" and the *essential* "white person."

There are many possible interpretations of the basis for these essential types, including metaphysical, scientific, and historical variants. If one adopts a metaphysical variant of essentialism, racial labels suggest a search for the earthly manifestation of "pure racial types."¹⁴² With its roots in early European racial thought, this variant was carried to its most extreme conclusion under Nazism.¹⁴³ Outside of consciously white-supremacist circles, this version of the essentialist argument is no longer thought persuasive. Alternatively, the essentialism is viewed by some as an aspect of the physical anthropology of scientific racism. This view suggests that there must have been an evolutionary moment when the racial types first evolved. Finally, under the historical variant of essentialism, racial labels suggest that there was an actual moment in history when the "Black person" or "white person" first became such. That moment could be the moment the concept of race passed into general social usage, or perhaps when the actual word "race" entered daily discourse.

In these and other possible variations, the use of racial categories assumes some prior racial understanding. Whether that understanding leads to a search for pure racial types, to scientific racism, or to a historical reading, there is some specific understanding of the categories which is in opposition to the notion that Black and white can be purely objective, neutral terms. The attempt to use "objective and neutral" formal-race categories denies this contradiction and, thus, seeks to devalue one or the other of these implicit metaphysical, scientific, or historical interpretations of racial categories.

V. FORMAL-RACE AND UNCONNECTEDNESS

The previous sections analyzed the treatment of race under color-blind constitutionalism without full consideration of the different ways the Supreme Court uses the concept of race. This section examines three of these uses: status-race, formal-race, and historical-race. A fourth usage, culture-race, is more closely examined in Part VI.¹⁴⁴

The Court has used words such as "race," "Black," and "white" without explanation or qualification. In doing so, they have disguised their own role

142. See, e.g., G. STOCKING, *supra* note 108, at 57. Stocking discusses Platonic ideals of race in polygenist thought, the nineteenth century theory that different races had different biological origins: "Reduced to its essentials, the polygenist notion of race was built on the idea of racial essence, conceived in almost Platonic terms."

143. See, e.g., JACQUES BARZUN, *RACE: A STUDY IN SUPERSTITION* (1965).

144. While I discern and analyze four functional usages, I am not suggesting that these are the only ways the concept of race can be defined. Many interpretations are possible. However, my central criticism of the Court's addressing race as if it had a single stable meaning remains unchanged.

in perpetuating racial subordination. The modern Court has moved away from the two notions of race that 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*. 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."¹⁴⁵ 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 inherently and biologically inferior to whites. These broad-based individual freedoms protecting status-race beliefs significantly aid the legitimization of racist conduct.¹⁴⁶

145. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857). A longer excerpt of Taney's language better conveys his sentiments:

[T]he legislation and histories of the [late eighteenth century], and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

....
[Blacks] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

Id.

Appeals to legislation and language aside, Taney's belief in the inferior status of Blacks was probably rooted outside of his textual analysis of the Constitution. The precise origin of his beliefs, however, does not affect the analysis.

146. See notes 28-48 *supra* and accompanying text. I am not arguing for the abolition of these individual rights, but highlighting one of the costs of maintaining our individual rights tradition.

2. Formal-race: Plessy v. Ferguson.

The well-known “separate but equal” case, *Plessy v. Ferguson*,¹⁴⁷ 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.¹⁴⁸

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 offers 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 “common sense” 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 which 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.¹⁴⁹

The difficulty posed for judicial review and civil rights legislation is recognizing the problem and then finding a means of reconciling individual liberties with the harm inflicted by their exercise.

147. 163 U.S. 537 (1896). See generally CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION 5 (1987) (analyzing *Plessy* within the “legal-racial matrix of the 1890s”); Stephen J. Riegel, *The Persistent Career of Jim Crow: Lower Federal Courts and the ‘Separate But Equal’ Doctrine, 1865-1896*, 28 AM. J. LEGAL HIST. 17 (1984) (reviewing lower court decisions leading up to *Plessy* and examining *Plessy* from the perspective of the latter third of the nineteenth century).

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

149. For an even earlier example of the harsh results of formal-race analysis, see *Blyew v. United States*, 80 U.S. 581 (1871). That case concerned whether the federal courts had jurisdiction in the trial of two whites accused of the racially motivated axe murders of four members of a Black family. The case was removed from Kentucky state court because the principal testimony against the two defendants was the dying statement of one son and the testimony of a thirteen year old daughter. At the time, a Kentucky statute excluded the testimony of “a slave, negro or Indian” in any action in which a white was a party. KY. REV. STAT. ANN. ch. 107, § 1 (Stanton 1860).

A federal statute granted federal jurisdiction over “all causes, civil and criminal, affecting persons who are denied . . . rights secured . . . by the . . . Act,” including the right to “give evidence” in the same manner “as is enjoyed by white citizens.” *Blyew*, 80 U.S. at 581-82 (emphasis omitted).

1. Historical-race.

In contrast to the majority opinion in *Plessy*, Justice 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.¹⁵⁰

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*.¹⁵¹

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:¹⁵²

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.¹⁵³

More recently Justice Marshall used historical race in his *Bakke v. Re-*

The Supreme Court held that neither the children whose testimony was being offered, nor the murder victims were persons "affected by the cause." *Id.* at 593-94.

A status-race explanation would have argued that Blacks were not persons who could "affect" the cause for purposes of federal jurisdiction. Instead of this theory, the Court adopted a formal-race view of the exclusion of the Black witnesses. The children were said to be not "affected" by the murder because they survived, while the victims' last words could not be repeated because they could not have "testified," regardless of their race, once dead. Racial subordination was not implicated in this view.

For a thorough examination of *Blyew*, see Robert Goldstein, *Blyew: Variations on a Jurisdictional Theme*, 41 STAN. L. REV. 469 (1989).

150. *Plessy*, 163 U.S. at 556-57 (Harlan, J., dissenting) (emphasis added).

151. 347 U.S. 483 (1954). My reading of Justice Harlan's dissent differs from the generally accepted view that he was espousing a color-blind constitution. Cf. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-22, at 1525 n.17 (2d ed. 1988) (criticizing as anachronistic and out of context the use of Harlan's words as a "talisman against all color-consciousness in government action").

152. I argue that *Plessy* fits roughly within the public/private interpretative scheme, but an equally reasonable interpretation regards *Plessy*'s holding as an exceptional violation of the principles of freedom of contract and freedom of association. See, e.g., L. TRIBE, *supra* note 151, § 16-15, at 1478 n.27 (contrasting *Plessy* with the holding in *Coppage v. Kansas*, 236 U.S. 1 (1915), that the "state may not intervene in labor-capital contract negotiations to redress imbalance of bargaining power").

153. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). Note that Justice Harlan believed that a color-blind constitutional posture would result in the continuation of white superiority because whites were the "dominant race" in the country. Modern advocates of color-blind constitutionalism, in contrast, hope that public sphere color-blindness will ultimately reduce racial divisions. See notes 208-251 *infra* and accompanying text.

gents of University of California¹⁵⁴ dissent. 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.¹⁵⁵

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; white is the reification of privilege and superordination.¹⁵⁶ This asymmetry of white and Black corresponds to the asymmetry of hypodescent and its metaphor of racial purity and racial contamination.¹⁵⁷

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.

1. 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*,¹⁵⁸ a case upholding the constitutionality of amendments to the Vot-

154. 438 U.S. 265 (1977).

155. *Id.* at 400 (Marshall, J., dissenting).

156. Consider Tribe's rationale for *Brown v. Board of Education*:

Racial separation by force of law conveys strong social stigma and perpetuates both the stereotypes of racial inferiority and the circumstances on which such stereotypes feed. Its social meaning is that the minority race is inferior. . . . The harm justifying the Court's desegregation ruling, on this view, resided less in apartheid's mutual separation of the races than in its allowing one race to enjoy full communal life in society, while effectively ostracizing members of another race.

L. TRIBE, *supra* note 151, § 16-15, at 1477.

157. Historical-race matches most closely the genealogy of American racial categories. The concept of race as we know it was invented to legitimate slavery, America's most direct and brutal form of racial subordination and exploitation. Racial categories survived the end of slavery to legitimate and justify segregation and intentional racial discrimination. For an effort at developing an analysis of racial categorization through political economy, see Harry Chang, *Toward a Marxist Theory of Racism: Two Essays by Harry Chang*, REV. RADICAL POL. ECON. 34 (1985). For an examination of the modern development of racial categories, see MICHAEL OMI & HOWARD WI-NANT, *RACIAL FORMATION IN THE UNITED STATES FROM THE 1960'S TO THE 1980'S* (1986).

158. 446 U.S. 156 (1980).

ing Rights Act of 1965.¹⁵⁹ The amendments shifted to local jurisdictions the burden of proving that a proposed change in voting arrangements would not adversely affect Black voters. Justices Stewart and 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."¹⁶⁰ 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."¹⁶¹

Chief Justice Rehnquist's and Justice Stewart's opposition to Congress's effort to consider the political character of Blackness and whiteness stems 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.¹⁶² 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.¹⁶³ Chief Justice Rehnquist and Justice Stewart 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 Douglas's dissent in *DeFunis v. Odegaard*.¹⁶⁴ 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.

159. 42 U.S.C. § 1973 (1988).

160. *Rome*, 446 U.S. at 218 (Rehnquist, J., dissenting).

161. *Id.*

162. See, e.g., STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969 (1976); MINORITY VOTE DILUTION (Chandler Davidson ed., 1984); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991).

163. E.g., *Rogers v. Lodge*, 458 U.S. 613, 628 (1982) (Powell, J., dissenting); *Mobile v. Bolden*, 446 U.S. 55 (1980) (plurality opinion) (reversing lower court findings that at-large voting system violated Fourteenth and Fifteenth Amendments).

164. *DeFunis v. Odegaard*, 416 U.S. 312, 320 (1974) (Douglas, J., dissenting).

Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner.¹⁶⁵

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' dissent with approval in his *City of Richmond v. J.A. Croson Co.* concurrence.¹⁶⁶

3. Jury selection.

In *Batson v. Kentucky*¹⁶⁷ 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.'”¹⁶⁸

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 which might relate to jury duty.¹⁶⁹ 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.”¹⁷⁰ 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, apti-

165. *Id.* at 337.

166. 488 U.S. 469, 527 (1988) (Scalia, J., concurring).

167. 476 U.S. 79 (1986).

168. *Id.* at 87 (citation omitted).

169. Frederick Schauer makes the following observation of the Court's decision in *Batson*: [T]he Court made clear that . . . [the] “Equal Protection Clause forbids a prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a [B]lack defendant.” . . . Was *Batson* correct in relying on “unrelatedness,” or would it have been better for the Court to make clear that the equal protection clause prohibits the use of race as a generalization even where the generalization is statistically legitimate?

FREDERICK SCHAUER, 1990 SUPPLEMENT TO GUNTHER, CONSTITUTIONAL LAW 226 (11th ed. 1990) (quoting *Batson*).

170. RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 367 (1981); see also *id.* at 351-401; RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 615-25 (3d ed. 1986).

tudes and aspirations as the whites with whom one might compare them.”¹⁷¹ 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.¹⁷² 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.”¹⁷³ 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

Having seen some examples of “race” unconnected from its social meaning in legal discourse, this section now considers why such unconnectedness is problematic. This section explores how the unconnectedness of formal-race limits the conceptualization of racism to simple, individual-centered prejudice and how it downplays the persistence of systemic racial subordination. Formal-race and the application of strict scrutiny lend themselves to superficial critiques of affirmative action programs, thus legitimizing the continued subordination of the Black community.

1. 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.

171. R. POSNER, THE ECONOMICS OF JUSTICE, *supra* note 170, at 367.

172. THOMAS SOWELL, RACE AND ECONOMICS 159 (1975).

173. *Id.* at 160.

Despite the fact that personal racial prejudices have social origins, racism is considered an individual and personal trait.¹⁷⁴ 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.¹⁷⁵ These extremely individualized views of racism exclude an understanding that race has institutional or structural dimensions beyond the formal racial classification.¹⁷⁶ 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. But 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

174. Consider also the differences in perspective between victim of racism and the "individualized" perpetrator of racism as discussed in Alan Davis Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); see also Crenshaw, *supra* note 4; Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Williams, *supra* note 4.

175. See, e.g., Lawrence, *supra* note 23, at 321, 329 (describing racism as a "crime and a disease," and as a "public health problem"). My difference is not with Professor Lawrence, but with those writers who would turn the metaphor that racism is a disease on its head by making it the exclusive interpretation of racism. If racism is nothing more than an individual mental maladjustment, the disease metaphor becomes an ideological limitation on the remedies for racism. As Professor Lawrence points out, the intent standard, as interpreted by the Supreme Court, inadequately treats the real disease—institutionalized racism. *Id.* at 325; see also GORDON W. ALLPORT, THE NATURE OF PREJUDICE (1954); Brown, *supra* note 78; Halley, *supra* note 124, at 929-32 (discussing John Hart Ely's focus upon "prejudice" as the crucial concept for heightened judicial review).

176. The vision of racism as a personal failing also allows people who do not actively think "bad racial thoughts" to adopt an air of moral innocence: "I'm not a racist." This moral innocence can be seen as another dimension to the separation of race from social context. Adoption of some aspect of color-blindness is seen as a self-evident position of moral superiority. This attitude is exemplified by Justice Scalia in his *Croson* concurrence. After arguing that a municipality or other governmental unit should never consider race, Justice Scalia wrote: "When we depart from this American principle we play with fire, and much more than an occasional DeFunis, Johnson, or Croson burns." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 527 (1989) (Scalia, J., concurring).

Justice Scalia's mode of criticizing race-conscious decisionmaking and, by implication, race-conscious remedies, is an assertion of unconnected formal-race. The assertion of moral superiority is not so much a criticism of "race-conscious affirmative action programs" as the selection of one particular definition of race as the only constitutionally permissible use of race by the public sphere. Justice Scalia supports the application of this particular definition of race as an "American principle," so self-evident that it does not deserve or need explanation. See also Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990) (arguing that the rhetorical invocation of the "innocent white victim" is undermined when one acknowledges the existence of unconscious racism).

with their 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.¹⁷⁷ This disaggregated treatment veils the continuing oppression of institutional racism. It whittles racism down to the point where racism can be understood as an attitude problem amenable to formal-race solutions. But 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.¹⁷⁸ 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.¹⁷⁹

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

177. In *James v. Valtierra*, 402 U.S. 137 (1971), the Court rejected an equal protection challenge to a California requirement that low-rent housing receive prior approval in a local referendum. The Court denied that low-rent housing involved “distinctions based on race,” implicitly denying the intertwined history of race and housing with race and income. *Id.* at 141. The Court’s treatment of the additional burden of a referendum for low-rent housing contrasts with its earlier ruling in *Reitman v. Mulkey*, 387 U.S. 369 (1967). In that case, the Supreme Court agreed with the California Supreme Court that a state-wide initiative repealing fair housing legislation and barring such legislation in the future violated equal protection. Derrick A. Bell, Jr., *The Referendum: Democracy’s Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978); John O. Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201, 237 (1982).

Similarly, the Court in *Arlington Heights v. Metropolitan Hous. Corp.*, 429 U.S. 252 (1977), discounted the racial hostility behind the denial of a rezoning request that would have permitted low- and moderate-income housing to be built in a Chicago suburb.

In *Milliken v. Bradley*, 418 U.S. 717 (1974), the Supreme Court denied the connection between housing, poverty, and school segregation. That case reversed a desegregation order for interdistrict busing of students from Detroit to the surrounding suburbs, finding that an interdistrict remedy was inappropriate when there had been no interdistrict “violation.” The Court considered neither the state of Michigan’s participation in maintaining de jure segregation nor government policies supporting the establishment of white-dominated housing in the suburbs as a basis for inter-district relief.

Finally, in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1972), the Court held that education was not a fundamental right and that wealth disparities in the tax basis between school districts within Texas did not violate Equal Protection Clause.

178. As described by Kimberlé Crenshaw, *supra* note 81, one can now have all-Black desegregated schools, all-white equal opportunity employers and nondiscriminatory housing with no Blacks present. See also Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1761 (1989) (comparing the modes of interpretation used by the Court’s majority (“atomistic”) and the dissenters (“ecological”)).

179. In his *Croson* concurrence, for example, Justice Scalia transforms the contractors into “the dominant political group, which happens also to be the dominant racial group.” *Croson*, 488 U.S. at 524 (Scalia, J., concurring).

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 in any case unrelated to the employer's past practices.¹⁸⁰

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 maintain white privilege by limiting discussion or consideration of racial subordination.¹⁸¹

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.¹⁸² 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.¹⁸³

The distinction among the different uses of race developed in this article suggests two interpretations of strict scrutiny.¹⁸⁴ The first is the interpreta-

180. A variant on the claim that correlations between race and unemployment are coincidental is the assertion that "cultural factors" produce the underrepresentation. Again, the claim is that Blacks are economically disadvantaged not because of their race, but because of these nonracial "cultural factors." This presumes, of course, that "cultural factors" are unconnected to racial categorization. See generally WILLIAM JULIUS WILSON, THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS (1978).

181. Unconnectedness also prevents a reconsideration of racial classifications themselves. See notes 158-173 *supra* and accompanying text. The unconnectedness of formal-race renders difficult, if not impossible, the reconceptualization of race into something more explicitly complex and multifaceted.

182. See Laurence Tribe, *In What Vision of the Constitution Must the Law Be Color-Blind?*, 20 J. MARSHALL L. REV. 201 (1986); see also Rosenfeld, *supra* note 178, at 1748; David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 940 n.11 (1989).

The origin of heightened judicial scrutiny is usually traced to the famous footnote four in *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938). As Laurence Tribe has explained, footnote four establishes a method "to root out any action by government which, in Justice Stone's phrase, is tainted by 'prejudice against discrete and insular minorities,' the sort of prejudice 'which tends . . . to curtail the operation of those political processes ordinarily to be relied upon to protect minorities' in our society." L. TRIBE, *supra* note 151, § 16-13, at 1465. The technique of strict scrutiny was further developed by Justice Black's dictum in *Korematsu*:

[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

Korematsu v. United States, 323 U.S. 214, 216 (1944). The theory was not applied in *Korematsu*, which the Court analyzed as a distinction based on national origin rather than race. *Id.* at 223. *Korematsu's* dictum was, however, implemented in *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

183. On the continuing importance of this constitutional doctrine, see Crenshaw, *supra* note 4, at 1376-81; Symposium, *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297 (1987).

184. This article critiques the particular judicial doctrine of constitutional color-blindness—

tion used in *Brown v. Board of Education*,¹⁸⁵ 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.¹⁸⁶

The second interpretation of race in strict scrutiny cases is that of *City of Richmond v. J.A. Croson Co.*,¹⁸⁷ where race is seen as formal-race. In this interpretation, it is the arbitrary character of racial classifications that requires strict judicial scrutiny.¹⁸⁸ 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*, where the Court ruled that segregated education was inherently unequal. The decision rejected the formal-race doctrine of *Plessy*¹⁸⁹ in favor of the theory that race, as used in the education context, was both intended to, and had the effect of, subordinating Black school children.¹⁹⁰ The cases immediately following *Brown* continued its approach, recognizing that the use of racial classifications to segregate was inherently subordinating, and striking down the vast majority of Jim Crow laws as unconstitutional.¹⁹¹

not broader questions of judicial review such as the "political process" interpretation of footnote four of *Carlene Products*. The political process interpretation is most often associated with the work of John Hart Ely. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495-96 (1988). In the racial context, political process analysis is often based on the view that racial subordination is an "aberration" in the democratic process, a distortion of the "normal" political process. Instead of treating racism as an aberration, this article centers the constitutional discussion of race on racial subordination. Understanding race as systemic subordination in American society is not assisted by regarding racial subordination as exceptional, something to be accommodated by a temporary adjustment in judicial review. Those process analyses of judicial review which regard subordination as episodic simply do not reflect historical or present reality.

185. 347 U.S. 483 (1954).

186. If government action is premised on Black inferiority—status-race—strict scrutiny is, of course, also appropriate.

187. 488 U.S. 469 (1988).

188. See William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775 (1979). Note that this strict scrutiny technique is not the same as nonrecognition. Nonrecognition does not require the governmental use of race to be declared unconstitutional, only that race not be recognized.

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

190. In the words of Chief Justice Warren: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. . . . Separate educational facilities are inherently unequal." *Brown*, 347 U.S. at 493, 495.

191. Even a statute that appeared racially "neutral on its face" was, in the context of racial subordination, suspect. As a result,

Brown technically invalidated the separate but equal doctrine only as applied to education, [however,] a series of Court decisions soon came down which indicated the invalidity of that doctrine in other areas as well: public beaches and bathhouses, municipal golf courses, buses, parks, public parks and golf courses, athletic contests, airport restaurants, court-room seating, and municipal auditoriums.

JOHN E. NOWAK, RONALD D. ROTUNDA & J. NELSON YOUNG, *CONSTITUTIONAL LAW*, § 14.8, at 576 (3d ed. 1986) (footnotes omitted).

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 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.¹⁹²

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."¹⁹³

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.¹⁹⁴

192. Historical-race as the reification of racial subordination includes racial discrimination in education, employment, housing, and government services. The point of this article is not whether any particular affirmative action program is effective, but that the choice of remedy is a political decision. This article analyzes the ideological import of various racial usages in Supreme Court opinions, not the merits of any particular program. Thus, while desegregation has been effective in dismantling public education's system of racial subordination, integration has in practice proven an ineffective guarantor of quality education for all Black youth. Such assessments do not, however, change this article's racial analysis.

193. *Metro Broadcasting v. FCC*, 110 S. Ct. 2997, 3029 (1990) (O'Connor, J., dissenting).

194. Consider Laurence Tribe's view:

[T]he notion that *all* racial classifications—the ostensibly and evidently benign no less than the overtly malign—are *equally* "suspect" is not supported by constitutional text, principle, or history. . . .

. . . Viewing the fourteenth amendment as requiring *all* race distinctions to be condemned as instances of inequality derives less from any genuine analysis of what the fourteenth amendment has ever meant than from the most sweeping and activist reading of . . . *Brown v. Board of Education*. According to that activist reading, *Brown* revises the fourteenth amendment principle at its most basic level by directing the courts . . . to create a general right never to be disadvantaged by law on account of one's race—or perhaps to be so disadvantaged only upon a showing of the strictest national necessity.

L. TRIBE, *supra* note 151, § 16-22, at 1524-26 (footnotes omitted). *But see* William Bradford Reynolds, *Individualism v. Group Rights: The Legacy of Brown*, 93 YALE L.J. 995, 998 (1984) ("Out of the turmoil, bitter debate, and strife of the 1950's there began to emerge in the 1960's a broad recognition—a *consensus*—that official color-blindness and equal opportunity for all individuals were not just legal commandments, but moral imperatives . . ."); Van Alstyne, *supra* note 188, at 790-

Judicial review of affirmative action. The Court's decision in *City of Richmond v. J.A. Croson Co.*¹⁹⁵ 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.¹⁹⁶

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 purity 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 deci-

91 ("In this twenty-year pattern of development, from 1954 to 1974, the Supreme Court's unambiguous 'lesson' thus seemed to be that race was . . . constitutionally withdrawn from the incorrigible temptations of governmental use.").

195. 488 U.S. 469 (1989).

196. In comparison, suppose that Richmond had adopted a white supremacist set aside program to help white contractors maintain their market dominance. Such a program could not be termed remedial because the government's consideration of "race" falls squarely within the historical tradition of racial subordination. The program would thus fail under strict judicial scrutiny.

sion 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.¹⁹⁷ 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 also provide advantages to Blacks. He concedes that there has been a history of racial subordination, but nevertheless advocates a remedy aimed only at the "disadvantaged 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.¹⁹⁸ The notion of systematic racial subordination—of the relevance of the group—is totally absent.¹⁹⁹

197. 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.

Croson, 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 asymmetry 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 non-whites 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.

198. Presumably, under Justice Scalia's standards, disproportionate racial impact cannot be the principal goal of a program since that would be an impermissible racial intent and violate equal protection. Under color-blind neutrality, then, one should never mention racial remediation, lest the potential program be declared unconstitutional because racially motivated. Instead, one should speak only of unconnected "harms," using "harms" as the code word for racial remediation.

To justify this peculiar sequestration of race from remedy, Justice Scalia offers the patriotic assertion that this procedure is in accord with the "letter and the spirit of our Constitution." *Croson*, 488 U.S. at 528 (Scalia, J., concurring). The "letter" and "spirit" to which Justice Scalia is referring is, of course, a total mystery.

199. An appropriate response to Justice Scalia can be found in Charles Black's defense of *Brown*:

[I]f a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated "equally," I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter.

Charles L. Black Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960).

White plaintiffs and affirmative action. Consider a white applicant who is denied some benefit under an affirmative action program—the government contractor in *City of Richmond v. J.A. Croson Co.*, for example. The white contractor ought not, in good faith, be able to argue that because of his whiteness he deserves heightened judicial review. The historical-race meaning of white makes clear that his claim that he is entitled to strict scrutiny review is *itself* an attempt to reproduce white societal advantage.

In the context of gender discrimination, Justice Rehnquist has admitted that regulations which burden historically privileged groups do not automatically warrant enhanced scrutiny. In his dissent from the decision in *Craig v. Boren*,²⁰⁰ which allowed a male plaintiff to challenge Oklahoma's gender-based beer drinking age, Rehnquist argued:

Most obviously unavailable to support any kind of special scrutiny in this case, is a history or pattern of past discrimination. . . . There is no suggestion in the Court's opinion that males in this age group are in any way peculiarly disadvantaged, subject to systematic discriminatory treatment, or otherwise in need of special solicitude from the courts.²⁰¹

Obviously, an analogous line of reasoning could be applied within race discrimination law. In racial affirmative action cases, a white claimant could not reasonably suggest that he has suffered any "peculiar disadvantage," been subjected to "systematic discriminatory treatment," or is otherwise in need of "special solicitude." Chief Justice Rehnquist, of course, has not extended his *Craig v. Boren* reasoning into the racial context, but instead relies on formal-race as his sole understanding of race.

A white claimant could try to argue that his claim merits strict scrutiny because the fact that whites are being denied a government benefit on the basis of race is equivalent to the accepted history of the subordination of Blacks. However, such an argument would be historically, socially, and analytically insupportable. There is no history of subordination of whites by Blacks and there are no social science analyses—sociological, psychological, or linguistic—that suggest continuing subordination of whites by Blacks.

The white claimant could argue also that his claim refers solely to his own situation. On this theory, an individual claim to racial disadvantaging substitutes for systematic subordination of an entire race as sufficient magnitude to justify heightened judicial review. Chief Justice Rehnquist and Jus-

200. 429 U.S. 190 (1976).

201. *Id.* at 219 (Rehnquist, J., dissenting). There are differences in the Court's treatments of gender and race. First, the standard of review for gender bias cases is intermediate scrutiny. Second, Justice Rehnquist's analysis does not go far enough: A more contextualized approach might or might not find the existence of some historical burden upon males or a male plaintiff. Such a finding would only be appropriate, however, in the context of the specific subordination challenged in the litigation. Thus, if the classification is found to burden men, but also implicates the subordination of women, then intermediate scrutiny might be appropriate. If the burden genuinely falls on only men, then the appropriate standard of review might well be rational basis. However, since a categorical denial of benefits to men would raise serious concerns about the government's objective, the best level of scrutiny would be similar to the strict rational basis standard used in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). See also notes 256-258 *infra* and accompanying text (arguing for a sliding scale standard of review).

tices O'Connor, Scalia, Kennedy would likely find the white claimant's argument persuasive.²⁰² This elevation of an individual white claim into a claim for all whites is particularly problematic if the basis for the individual white claimant is a claim of individual intentional discrimination. A claim for intentional discrimination is, by definition, directed specifically at the white claimant, not at his entire race. Nevertheless, his individual claim is transmuted into a group claim about *all* whites. The plaintiff is transformed from, for example, a white contractor competing for construction contracts, into a representative of his race in *all* situations. However, such a transformation—from individual claim to society-wide group identity—makes no sense without the very historical context which formal-race ignores.

Whichever theory he argues to get strict scrutiny, the white claimant would likely ask to be judged on his merits, without consideration of race. He might argue that had he been regarded as raceless, he would have received the contract. The claimant is making a formal-race argument—that his “whiteness” is merely an accidental racial label, which should properly be excluded from the decision-making process. In short, the white claimant would use formal-race to establish his standing to bring a race discrimination claim. He is “raceless” and “renounces” any ties to the historical privileges of his whiteness.

But if affirmative action programs such as Richmond's are thought of in terms of formal-race, then they do not merit heightened scrutiny: If race is simply a description, without subordinating implications, it is a criterion insufficiently important to require strict scrutiny. The City of Richmond could claim, for example, that its use of formal-race categories for contract awards was a useful and convenient tool for broadly dispersing its construction contracts. Since this use of formal-race categories is unconnected from history, the standard of review should not automatically be strict scrutiny. Only if the use of racial categories were to fall below the “rational review” standard would the use of formal-race categories be struck down. So long as there is some slight “fit” between formal-race classification and the desired governmental objective, the category should survive review. In other words, because formal-race categories carry no social meaning, their use in the pursuit of legitimate governmental goals does not merit heightened review. Instead, the concept of formal-race suggests that rational basis is the appropriate standard of review for use of racial categories.²⁰³

202. In Justice Scalia's words, “it was individual men and women, ‘created equal,’ who were discriminated against.” *Croson*, 488 U.S. at 528 (Scalia, J., concurring). And according to Justice O'Connor, in an opinion joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, “[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as ‘individuals, not “as simply components of a racial, religious, sexual or national class.”’” *Metro Broadcasting v. FCC*, 110 S. Ct. 2997, 3028 (1990) (O'Connor, J., dissenting) (quoting *Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1083 (1983)).

203. This position—that judicial scrutiny of racial categories should be a simple review of the fit between race and the traits for which race is the proxy—has been rejected, largely because it leaves open the possibility of using racial categories to exclude minorities. See, e.g., Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*,

VI. COLOR-BLIND CONSTITUTIONALISM AND SOCIAL CHANGE

This section critiques color-blind constitutionalism as a means and as an end for American society.²⁰⁴ As a means, color-blind constitutionalism is meant to educate the American public by demonstrating the "proper" attitude towards race. The end of color-blind constitutionalism is a racially assimilated society in which race is irrelevant.²⁰⁵ 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 which 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.²⁰⁶

A. Means: The Public Nonrecognition Model and Its Limits

In his *Minnick* 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.²⁰⁷

1974 S. Ct. Rev. 1 (rev. ed. reprinted as *The DeFunis Case and Reverse Discrimination*, in THE ECONOMICS OF JUSTICE, *supra* note 170, at 364). Similarly, David Strauss has argued:

If the prohibition against [racial] discrimination were based on the danger that racial generalizations tend to be overgeneralizations, states would be allowed to defend racial generalizations by showing that they are in fact accurate and are not overgeneralizations. . . .

It is quite clear, however, that this is not the way the prohibition against discrimination operates.

David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 119.

204. The means-ends distinction is a familiar tool of constitutional analysis. See Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976), reprinted in EQUALITY AND PREFERENTIAL TREATMENT 84 (Marshall Cohen, Thomas Nagel & Thomas Scanlon eds., 1977); Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 583 (1977).

205. See Strauss, *supra* note 203; Wasserstrom, *supra* note 204, at 603-15.

206. 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.

Robert Paul Wolff, *Beyond Tolerance*, in A CRITIQUE OF PURE TOLERANCE 4, 17 (Robert Paul Wolff, Barrington Moore, Jr. & Herbert Marcuse eds., 1965).

207. *Minnick v. California Dep't of Corrections*, 452 U.S. 105, 129 (1981) (Stewart, J., dissenting) ("[B]y making race a relevant criterion, . . . the Government implicitly teaches the public that the apportionment of rewards and penalties can legitimately be made according to race—rather than according to merit or ability. . . .").

Justice Scalia has made the same point, but with language far more ominous than Stewart's. "When we depart from this American principle [of government never considering race], we play with fire, and much more than an occasional DeFunis, Johnson, or Croson burns." *City of Richmond v. J.A. Croson Co.*, 488 U.S. at 527 (Scalia, J., concurring). Justice Scalia's allusion, with its echoes of urban ghetto rebellions and Ku Klux Klan cross-burnings, has a sharp edge, suggesting that vindictive violence might be an understandable reaction to the violation of an "American princi-

There are two problems with the negative model. The first is its unquestioned assumption that meritocratic systems are valid.²⁰⁸ 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.²⁰⁹

The positive behavior model—government nonrecognition serving as an example for private conduct—also has problems.²¹⁰ First, there is the practical impossibility of nonrecognition as a standard for either public or private conduct.²¹¹ 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.²¹² The color-blind ideal of the future society has been exhausted since the implementation of *Brown v. Board of Education* and its progeny.²¹³

One example of how limited a weapon the color-blind approach is 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*²¹⁴ and *Rogers v. Lodge*,²¹⁵ argued that Congress had unconstitutionally abandoned a formal-race, individual-remedy approach in favor of more sweeping, race-conscious remedies for racial discrimination.²¹⁶

ple.” Note that Justice Scalia is in actuality advancing a particular social policy—that the costs of providing remedies to Blacks and women may be greater than white American men are willing to bear. This judgment is a political position, not a neutral constitutional principle. Justice Scalia’s attempt to elevate a policy debate over racial remedies to the level of constitutional principle by calling it “an American principle,” is bootstrapping. *See also* Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381 (1989) (treating the various opinions in *Croson* as narratives and interpreting Scalia’s “fire” comment as an allusion to slave rebellions).

208. As noted earlier, this article does not discuss the validity of meritocracy, but a substantial literature exists on the subject. *See note 76 supra* and sources listed therein; *see also* Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705.

209. For examinations of a positive significance for race, see T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991); Kennedy, *supra* note 208; Peller, *supra* note 13.

210. The implicit acceptance of public-sphere color-blindness as a positive example contrasts with the Court’s explicit rejection of the adequacy of the “role-model” rationale for affirmative action in *Croson*, 488 U.S. at 497 (plurality opinion), and in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion).

211. *See notes 77-85 supra* and accompanying text.

212. A recent Supreme Court decision suggests that even school desegregation is no longer an especially high priority. *Board of Educ. v. Dowell*, 111 S. Ct. 630, 638 (1991) (stating that once a school board has complied in good faith with a desegregation order and “the vestiges of *de jure* segregation have been eliminated as far as practicable,” a school district should be released from an injunction imposing a desegregation plan).

213. Crenshaw, *supra* note 4, at 1344-45; Peller, *supra* note 13, at 758.

214. 446 U.S. 156, 214 (1980) (Rehnquist, J., dissenting).

215. 458 U.S. 613, 650 (1982) (Powell, J., dissenting).

216. For a discussion of the Voting Rights Act cases, see notes 158-163 *supra* and accompanying text.

The color-blind versus race-conscious approach to voting debate has most recently emerged in political discussions over state reapportionments following the 1990 Census. One group of Republi-

As Justice Scalia, concurring in *City of Richmond v. J.A. Croson Co.*,²¹⁷ and the dissenters in *Metro Broadcasting v. FCC*²¹⁸ 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.²¹⁹ 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 which declares 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.²²⁰

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 what a color-blind society might look like.

can strategists is working with Democrats to design districts with large Black and Hispanic majorities. These pragmatic Republicans are willing to concede those districts to Democrats, so that racial minority votes will be diluted elsewhere. Opponents of the redistricting plan argue that such race-counting is improper under a color-blind approach. Richard L. Berke, *Strategy on Redistricting Divides Top Republicans*, N.Y. TIMES, May 9, 1991, at A9.

217. 488 U.S. 469, 520 (1989) (Scalia, J., concurring).

218. 110 S. Ct. 2997, 3033 (1990) (O'Connor, J., dissenting).

219. Justice Stewart also would have agreed. Indeed, during his tenure on the Court, Justice Stewart took a firm stance on public sphere nonrecognition, arguing that Congress could not constitutionally consider race to remedy or alleviate the effects of discrimination. See *Minnick v. California Dep't of Corrections*, 452 U.S. 105, 128 (1981) (Stewart, J., dissenting); *Fullilove v. Klutznick*, 448 U.S. 448, 525 (1980) (Stewart, J., dissenting). Justice Kennedy's concurrence in *Croson* suggests that he too is sympathetic toward nonrecognition. Justice Scalia would carry the matter further: "In my view there is only one circumstance in which the States may act by race to 'undo the effects of past discrimination': where that is necessary to eliminate their own maintenance of a system of unlawful racial classification." *Croson*, 488 U.S. at 524 (Scalia, J., concurring).

220. While there is no indication that the Court is currently inclined to extend its reasoning in *Croson* that the Commerce Clause bestows upon Congress an unique authority to remedy past discrimination, *Croson*, 488 U.S. at 486-91, it would be a logical extension of *Croson* to argue that state and local civil rights statutes not expressly authorized or consented to by federal statute are presumptively unenforceable unless they adopt the current "intent" standard for discrimination. Under this reasoning, a state antidiscrimination statute which adopted a disparate impact standard would be worthless, since no "race conscious remedy" would be permissible. State legislatures are under an obligation to "identify that discrimination, public or private, with some specificity before they may use race-conscious relief." *Id.* at 504. But that kind of specific finding is rarely made under a general antidiscrimination statute. Normally, only broad findings on societal discrimination are available to state legislatures. Any relief provided under a theory of disparate impact would not be a response to discrimination under the equal protection clause, and would therefore be "race-conscious" relief. Judged under the *Croson* requirements such relief violates equal protection. Since any state action in the discrimination area would be deemed race conscious unless it met these standards, such disparate impact state civil rights statutes would be voided.

Legal scholars have created several terms to describe a totally color-blind society, including “integrationist ideology” and the “assimilationist ideal.”²²¹ In such a society race would cease to be a matter of substantive interest.²²² The assimilationist ideal holds that sometime in the future the physical features associated with race—skin color, hair texture, facial features—would be socially insignificant. Skin color would be no more important than eye color is today.²²³

The color-blind assimilationist ideal seeks homogeneity in society rather than diversity.²²⁴ 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.

1. *Culture-race.*

The assimilationist color-blind society ignores, and thereby devalues, culture-race. Culture-race includes all aspects of culture, community, and consciousness.²²⁵ The term includes, for example, the customs, beliefs, and intellectual and artistic traditions of Black America, and 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.²²⁶ 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.²²⁷

The two exceptions, where the Court appropriately recognized culture-

221. See, e.g., Kennedy, *supra* note 208, at 710; Peller, *supra* note 13, at 759; Wasserstrom, *supra* note 204, at 604.

222. Wasserstrom, *supra* note 204, at 604.

223. Eye color is a noticeable physical feature, but it is not the basis of a comprehensive social hierarchy. Blue-eyed people do not adhere socially to each other, nor are they treated in some distinct, recognizable fashion by others in society. Wasserstrom, *supra* note 204, at 604. The relationship of physical features to race has been examined closely in physical anthropology as well as in other disciplines such as sociology. See, e.g., H. HOETINK, *supra* note 94, at 192-210 (analyzing what he calls “somatic norms”).

224. See, e.g., Peller, *supra* note 13, at 762.

225. See text accompanying note 13 *supra*.

226. The recent popularity of the term “African-American” emphasizes the historical and cultural dimensions of race. See Patricia J. Williams, *Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*, 104 HARV. L. REV. 525, 529 (1990). As a universally applied substitute, however, the change does not assist in making the distinctions discussed in this article.

227. The experience of oppression has often been described as an integral aspect of Black culture and suggested as a source of experiential legitimacy. See, e.g., Aleinikoff, *supra* note 209. There is, in addition, a growing body of literature on the relationship between race, culture, and marginality. E.g., DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL INJUSTICE (1987); MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990); “RACE,” WRITING, AND DIFFERENCE, *supra* note 118; EDWARD W. SAID, ORIENTALISM (1978); PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991).

race, are *Metro Broadcasting v. FCC*²²⁸ and *Regents of University of California v. Bakke*.²²⁹ 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 government 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."²³⁰

Justice 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.²³¹

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*²³² 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 Supreme 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

228. 110 S. Ct. 2997 (1990).

229. 438 U.S. 265 (1978).

230. 110 S. Ct. at 3010-11 (citations omitted).

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

232. 466 U.S. 429 (1984).

living with parents of the same racial or ethnic origin,"²³³ 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.²³⁴ 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 which 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 Supreme Court simply lacked the imagination to consider and separate the subordination dimension of race—the historical-race element which 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.²³⁵

While advocates of constitutional color-blindness would deny the validity of culture-race in the public sphere and implicitly suggest that color-blindness is also a model for the private sphere, there has not been widespread acceptance of such an approach. In other academic disciplines, a substantial literature has developed that recognizes the existence of a distinctly Black culture and its contributions to American life.²³⁶ While the emergence of Black literary criticism has been perhaps the most dramatic example, there has been a corresponding recognition of "minority" critiques in many areas, including legal scholarship.²³⁷ In popular culture as well,

233. *Id.* at 433.

234. 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." Strauss, *supra* note 203, at 105.

235. Race is often an issue in child custody hearings. In the 1970s, while practicing law with the Asian Law Caucus in Oakland, California, I represented in a child custody case an immigrant woman from Japan who had married a white American soldier while he was stationed there. Their child was an infant, and the presiding judge had a reputation for awarding custody of children of tender years to the mother. In hallway conversation, the father's lawyer pressed me as to how I could "really believe" that the child would be better off with the mother. The lawyer, a white, male, former Marine, argued that the father was engaged to marry a white female soldier, and that the mother was poorly educated, a recent immigrant, and a single parent. It would have been impossible to convince the father's lawyer that I really did believe that the mother, as a Japanese-American, offered a cultural background that was at least as beneficial to her daughter as being raised a military child and that a Japanese-American mother would be better able to help an "Amerasian" child deal with prejudice in later years. I did not resort to this high-risk racial argumentation at the custody hearing. The judge was true to his reputation and awarded custody of the infant to its mother.

Cf. Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991) (arguing against the current preference for same-race placement in adoptions).

236. Since this article argues only that the constitutional possibility of recognizing Black culture should be left open, I do not discuss Black culture as an American subculture, or the many interpretations of American national culture. Recognizing the existence of Black culture is sufficient for arguing that taking it into account should not be forbidden by the Constitution.

237. Recently, for example, the University of Wisconsin sponsored a Conference on Critical

there has been a belated recognition of the importance of Black culture. Yet there is no consensus that a color-blind norm, the racial nonrecognition advocated for public sphere constitutional discourse, is the desired social norm for general application in the private sphere. Instead, color-blind neutrality coexists as one of several differing socially acceptable normative racial standards. We use a variety of different norms for racial discourse, depending on which is contextually appropriate. There does not appear in everyday life a "meta-rule" like color-blindness to decide which norms are appropriate. The adoption of a strong version of color-blindness and a refusal to permit culture-race in the public sphere implicitly promote white cultural dominance.

2. Assimilation and cultural genocide.

Implicit in the color-blind assimilationist vision is a belief that, ultimately, race should have no real significance, but instead 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.²³⁸ The successful abolition of "Black" as a meaningful concept would require abolishing the distinctiveness that we attribute to Black community, culture, and consciousness.²³⁹

Race Theory. Speakers included Kimberlé Crenshaw, Kendall Thomas, Patricia Williams, Gerald Torres, Derrick Bell, Charles Lawrence, Richard Delgado, and Mari Matsuda.

238. When fully articulated, the assimilationist ideal has proven controversial. In 1956, Kenneth Stampp responded to the paternalistic apology for slavery of Ulrich B. Phillips and other "standard" historians in his path breaking work, *The Peculiar Institution: Slavery in the Ante-Bellum South*. Included in his preface is the comment, "I have assumed that the slaves were merely ordinary human beings, that innately Negroes *are*, after all, only white men with black skins, nothing more, nothing less." K. STAMPP, *supra* note 135, at vii. Stampp articulated what he mistakenly thought was uncontroversial: that race was simply an arbitrary classification associated with physiognomic characteristics. What he failed to appreciate is that race, like other complex social relations, reaches to the most fundamental level of our individual and group identities. His unusually stark statement expressed a formal-race notion and denied the cultural dimensions of Blackness. Stampp's remark also illustrates that the dominant norm is one of whiteness: Negroes are 'white men with black skins,' not the other way around.

239. Consider the following mental exercise: Ask yourself what you would be if you were to remove your Blackness (if you are Black), your whiteness (if white), or the essence of any other race (if neither Black nor white). The question suggests far more than that one deny skin color. It suggests the loss of some fundamental aspect of one's being. For whites, the question itself is troubling; one cannot deny whiteness most places in America because whiteness is usually invisible. Most white Americans do not have a racial "subset" or particularity to their identity.

By contrast, for nonwhites, the particularity of one's socio-cultural makeup as divisible into majority and minority components gives the question meaning. The large American literature on "racial identity" addresses these components. Particular named cultural identities such as Black, Hispanic, or Asian-American are examples of what would be surrendered under color-blind assimilation. See, e.g., M. MINOW, *supra* note 227, at 49; Crenshaw, *supra* note 81.

Thus, the absence of any apparent solution to the mental exercise for most whites suggests that assimilation for whites in America simply means continuation. Assimilation does not suggest any real change in *their* lives. For nonwhites, however, the proposed change would require the abolition of a significant aspect of their identity. See Peller, *supra* note 13, at 783 (discussing the Black nationalist critique of integrationism).

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.²⁴⁰

3. 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.²⁴¹ Tolerance seems closest to the approach of such color-blind advocates 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.²⁴² 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*.²⁴³

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.²⁴⁴

240. I am not arguing that it is impossible to *imagine* an economic and social resolution that brings together white and nonwhite persons and cultures on equal terms. But that possibility clearly exceeds what is likely to happen, especially given the premises of color-blind assimilation and the existing culture into which nonwhites will be assimilated. If nonwhites must assimilate to white norms, then color-blind assimilation means the demise of nonwhite cultures within America. The suggestion that an end to racial subordination means a change for whites has not yet become a part of the general discussion on racial conflict.

241. Tolerance, strictly speaking, is not a "color-blind" vision of the future society in that it recognizes "races" that are to be tolerated. On tolerance as an abstract proposition, see the essays collected in A CRITIQUE OF PURE TOLERANCE, *supra* note 206. On tolerance in relation to assimilation, see MILTON M. GORDON, ASSIMILATION IN AMERICAN LIFE: THE ROLE OF RACE, RELIGION, AND NATIONAL ORIGINS (1964).

242. See note 198 *supra*.

243. 426 U.S. 229 (1975). If a program were directed towards improving the plight of all small businesses contracting with the city of Richmond, the results would simply reproduce existing imbalances, with white small businesses gaining the bulk of benefits. Were the program directed towards racial surrogates, such as income, residence, and education, then the closer such surrogates approximated the Black community, the more likely a challenge could be made that the program was merely a disguised attempt to help Blacks, thus violating equal protection.

244. A recent dispute between the Middle States Association of Colleges and Schools and the U.S. Secretary of Education illustrates the difference between tolerance and diversity. The Middle States Association is a leading regional accreditation agency. In reviewing two colleges, the Association asserted its recently adopted requirements for affirmative action hiring programs, multicultural curricula and other efforts to promote racial harmony. This position clearly endorses what I have called diversity.

The Education Secretary delayed his approval of the Middle States Association pending review of its new standards, arguing that such standards might interfere with academic and religious free-

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.²⁴⁵ 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.²⁴⁶ Whiteness becomes a political issue where an entrenched position of dominance is challenged.²⁴⁷

A different dimension of "whiteness" is ethnic or national heritage.²⁴⁸ The immigrant origins of ethnic white European-Americans are accepted and often embraced, though not always denominated as racial.²⁴⁹ 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.²⁵⁰ 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.

dom. Samuel Weiss, *Education Chief Assailed on Ratings*, N.Y. TIMES, May 3, 1991, at B8; see also Kenneth J. Cooper, *Alexander Questions College "Diversity Standard,"* WASH. POST, Apr. 13, 1991, at A4; Samuel Weiss, *Education Chief Tests Accreditor on Diversity Rule*, N.Y. TIMES, Apr. 13, 1991, § 1, at 1. The Secretary's position favors those values over multiculturalism, and also suggests a color-blind approach.

245. A further difficulty is that in the existing social and legal context, separation of racial classifications from social settings obscures the fact that racial neutrality maintains inequality.

246. Reified historical white domination may be termed "white historical-race." White historical-race is the converse of Black historical-race, which is the reification of subordination.

247. As an introductory device in presenting portions of this article to racially mixed groups, I have asked all white persons "to raise your hand." Invariably, there is a hesitancy which is, in part, simply the unfamiliarity of whites publicly being asked to self-identify. But I believe there is also the latent sense that to consciously self-identify as white is an assertion of illegitimate power.

248. See, e.g., David McGill & John K. Pearce, *British Families*, in ETHNICITY AND FAMILY THERAPY 457 (Monica McGoldrick, John K. Pearce & Joseph Giordano eds., 1982) (refining the loose notion of WASP—white, anglo-saxon, protestant—and elaborating on a British-American cultural ethnicity).

249. One further issue arises under an extreme assimilationist position which would extend the assimilationist proposal to all ethnicity in favor of some unified culture. Ethnic origin subcultures might be targeted for abolition. Italian-American, Polish-American, Jewish-American, as variations within white culture, would be blended into the future unified culture. Consider, for example, the Court's implicit validation of Congress's choice of race over the claims of a community of Hasidic Jews who challenged a redistricting plan which split their community. *United Jewish Orgs. v. Carey*, 430 U.S. 144, 165 (1977).

250. Racial violence in the New York neighborhood of Bensonhurst received national publicity both in the news and through Spike Lee's cinematic account of an interracial affair between a Black architect and an Italian-American woman from Bensonhurst, JUNGLE FEVER (Universal Pictures 1991). Lee's choice emphasized the social-racial distance between their respective communities. Lee offered no cinematic resolution of that distance.

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.²⁵¹

An unstated problem in these debates is that of cultural self-identification if one does not claim a particular ethnic identity. If one self-identifies 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 the central problem of diversity, the transformation of existing categories of domination into an altogether different, positive social formation.

VII. AN ALTERNATIVE TO COLOR-BLIND CONSTITUTIONALISM

Professor Matsuda has suggested that critical race scholarship is engaged in a project of "reconstruction jurisprudence."²⁵² This article contributes to the developing body of scholarship which rethinks questions of race in an attempt to revitalize this post-reform era.²⁵³ Much of reconstruction jurisprudence assumes a politically active stance, viewing scholarship not simply as intellectual exposition, but as integrally linked to social change.²⁵⁴ In that spirit, this section suggests an alternative, adapted from existing Constitutional doctrine, to the color-blind Constitution.

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

251. See Brown, *supra* note 78, at 311-12. Recently, at a Greenville, South Carolina high school, scores of students were suspended for wearing confederate flags to school in violation of school policy. The school pointed to racial problems sparked by the wearing of the flags while the suspended students asserted they were exercising their right of expression of their pride in their Southern heritage. As part of a settlement, the students were given the right to wear flags the last three days of the school year and instruction in Southern heritage was to be included in the district's multicultural program. *Suspended Students Gain Right to Wear Rebel Flags*, N.Y. TIMES, Apr. 23, 1991, at A12.

252. See author's notes (on file with the *Stanford Law Review*) from the first Workshop on Critical Race Theory, held in Madison, Wisconsin in the summer of 1989, where Professor Matsuda summarized current efforts to address racial subordination in legal scholarship.

253. See Crenshaw, *supra* note 4 (commenting on post-reform repackaging of racism and the need to expose the subordination inherent in neutral norms); Frances Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993 (1989) (civil rights scholars should deal simultaneously with race and class).

254. The presentations at the Wisconsin Critical Race Theory Conference, held November 9, 1990, exemplified this combination of scholarship and activism.

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 anti-racist 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 process should be buttressed as ideological and political barriers against Jim Crow and segregationist variations of white supremacy, rather than be 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.²⁵⁵

B. Strict Scrutiny

Abandoning the color-blind Constitution requires a re-examination of strict scrutiny. A return to a rigid, 2-tiered standard of judicial review in considering questions of race discrimination under the Equal Protection Clause, as advocated by Justices Scalia and Kennedy,²⁵⁶ would be a step backwards. The adoption of middle-tier judicial review in *Metro Broadcast-*

255. See, e.g., Symposium, *Women of Color and the Law*, 43 STAN. L. REV. 1171 (1991).

256. *Metro Broadcasting v. FCC*, 110 S. Ct. 2997, 3045 (1990) (Kennedy, J., dissenting).

ing should be extended towards a broader contextualized standard of review, rather than abandoned.

Justice Marshall advocated a less rigid "spectrum" approach as early as 1973, in his dissent from the Court's decision that a school-financing system disadvantaging children in poor communities did not require strict scrutiny:

The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review. . . . But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.²⁵⁷

Justice Marshall's criticism applies with additional force given the different forms of governmental consideration of race that have since evolved—from affirmative action hiring to multicultural curricular programs. Equating all imaginable forms of governmental consideration of race—maintenance of a Jim Crow school system, racial preference in medical school admissions or government contracting—requires an extraordinary effort of abstraction, social reductionism, and historical contraction.²⁵⁸ Once we abandon this effort as ill-advised and ultimately malicious, it is but a small step to abandon the legitimating authority of the strict color-blind approach.

C. *The Free Exercise and Anti-Establishment of Religion: Religion-Blindness and Color-Blindness*

Apart from the traditional tiers of equal protection review, a body of constitutional doctrine exists which suggests a more subtle approach to constitutional review. The First Amendment religion clauses—the Free Exercise and Establishment Clauses—provide a possible analogy accommodating

257. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting). In reviewing other areas of constitutional concern, the Court has been willing to use a range of standards. Compare, for example, treatment of state regulation under the dormant Commerce Clause. An overtly protectionist state regulation may be found unconstitutional per se. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). If, on the other hand, the regulation is merely an indirect burden on interstate commerce, then the burden will be balanced against the putative state benefit. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The per se approach, a more rigorous standard of review, is appropriate where regulations are designed to be protectionist and therefore have no constitutionally sanctioned legitimacy. But, without the more serious issue of protectionism, the Supreme Court has merely required a balancing of interests.

258. One commentator notes that despite the *Crosson* majority's seeming adoption of a strict scrutiny test for determining the constitutionality of preferential treatment programs, their status remains unclear. Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1761 (1989); see also *Metro Broadcasting*, 110 S. Ct. at 3008 n.12 (Justice Brennan criticizing Justice Kennedy's characterization of "South African apartheid, the 'separate-but-equal' law at issue in *Plessy v. Ferguson* and the internment of American citizens of Japanese ancestry . . . [as] benign race-conscious measures") (citation omitted).

some of the criteria outlined above when applied to race.²⁵⁹ The Court's recent decisions on religion betray a qualitative difference between the Court's attitudes towards religion and towards 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.²⁶⁰ 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.²⁶¹

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.²⁶² 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.²⁶³

The free exercise cases are informed by the attitude that religion and religious practice are important and valuable aspects of human experience.²⁶⁴ There is a voluminous literature on the source and spirit of this

259. See Jonathan E. Neuchterlein, Note, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 YALE L.J. 1127 (1990) (using race jurisprudence of Equal Protection Clause as an analogy to demonstrate how the Free Exercise and Establishment Clauses define each other).

260. Karl Marx critiqued religion-blindness in Karl Marx, *On the Jewish Question*, in 3 KARL MARX & FREDERICK ENGELS COLLECTED WORKS 146 (1975).

261. See, e.g., Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961); Leo Pfeffer, *Religion-Blind Government*, 15 STAN. L. REV. 389 (1963) (reviewing PHILIP B. KURLAND, RELIGION AND THE LAW OF CHURCH AND STATE OF THE SUPREME COURT (1962)); Mark Tushnet, *'Of Church and State and the Supreme Court': Kurland Revisited*, 1989 SUP. CT. REV. 373.

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

263. See Employment Div., Dep't of Human Resources of Or. v. Smith, 110 S. Ct. (1990) (Smith II); Employment Div., Dep't of Human Resources of Or. v. Smith, 485 U.S. 660 (1988) (Smith I).

As Nuechterlein concludes:

The establishment clause principally forbids the state to act with a religious purpose. The free exercise clause requires the state to treat religious people with secular respect. These two commands are not, as popular theory would have it, in conflict. Rather, the free exercise principle defines the limits of the antiestablishment principle. One begins where the other ends.

Neuchterlein, *supra* note 259, at 1146.

264. Consider, for example, Wisconsin v. Yoder, 406 U.S. 205 (1972), in which the Court set aside the convictions of "Old Order Amish" for failing to send their children to school after eighth grade. Without defining religion, Chief Justice Burger spoke in warm and respectful tones of the "Amish religious faith and their mode of life" suggesting that their "way of life" was "virtuous and admirable." *Id.* at 215. Cf. *Smith II*, 110 S. Ct. at 1602 (no balancing of interests required for free

deference which draws on the language of the Constitution as well as historical, philosophical, and religious sources.²⁶⁵ The definition of religion—or, for that matter, the question of whether a definitional approach is even valid—has been a longstanding difficulty.²⁶⁶ Nonetheless, the Free Exercise Clause cases do not challenge the essential validity of traditional religious practice.²⁶⁷

D. 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 decisionmaking 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.²⁶⁸

exercise accommodation of sincerely motivated religious drug use when state has proscribed such drug use).

265. Michael E. Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83; see also *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh*, the Court allowed a government-paid chaplain to open sessions of the state legislature with denominational prayers. The Court justified its decision, not with the “three-part test” of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), but by reference to historical tradition. Such flexible decisionmaking is responsive to the situational difficulties and constitutional principles as the Court’s majority perceives them. Admittedly, the *Marsh* decision has been criticized as erratic, rather than flexible. Regardless, in drawing upon history rather than the *Lemon* test for its decision, the Court demonstrated a willingness to consider additional modes of argument.

266. See, e.g., Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233 (1989) (proposing definition which distinguishes religion and ideology).

267. See, e.g., *Smith II* (denying free exercise protections for legitimate Native American church ritual using criminally proscribed peyote). Mainstream religious practices are, of course, unlikely to be subject to criminal penalties.

Specific denominational practices, undiluted by secular symbols or other religious practices, are frowned upon. *Lynch v. Donnelly*, 465 U.S. 668 (1984) (mixed display of nativity and other holiday symbols no violation of establishment clause); see also *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (creche in county courthouse impermissible while outdoor display of menorah next to Christmas tree and sign was permissible).

268. Consider, for example, the odd sound (at least for Americans) of an examination of “religious affirmative action,” using the political process approach. See note 184 *supra*. If a state were to approve of financial aid to Catholic elementary and secondary schools, a process analysis might examine whether this act involved a “discrete and insular” religious minority. Note that this hypo-

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 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.²⁶⁹ 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.²⁷⁰ 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

theoretical would sound very different in Northern Ireland or in the United States before, say, John F. Kennedy's presidency.

269. For example, in the context of affirmative action programs, a frequent objection is to concede there is merit in such programs, but conclude that they pose intractable political difficulties in implementation. Proponents of this critique claim that once one opens up group claims for social justice, there is no way to differentiate among the various competing interests. According to this theory, while Blacks may merit special treatment, either as a remedy for past discrimination or because the contributions of Black culture are desirable, there are simply too many competing groups within American society to justify group justice. Proponents argue that if affirmative action is granted to one ethnic or racial group, it must be granted to all; otherwise, political chaos will ensue. Thus, it is better to accept doctrinal inconsistencies and social inequities than to invite the judicial chaos that would result if the courts attempted to carve out such equitable relief where the legislatures have been unable to do so.

This objection to affirmative action supports the approach of this article to the extent that it moves the issues surrounding race-conscious affirmative action into the legal and political arena rather than closing them off, as occurs under color-blind constitutionalism. Discussion of appropriate criteria for determining which groups should and should not qualify for affirmative action is beyond this article's scope. See, e.g., Fiss, *supra* note 204, at 132.

It suffices to note here that color-blind policy is not without serious social costs. If the political analog to color-blind constitutionalism is benign neglect, such neglect may explain the development of a separate inner city subculture, built on a subeconomy of drugs, and supported by police and welfare policies whose goal is to contain and isolate rather than to address substantive social issues. Our present urban social dysfunctions are an unanticipated cost of the political implementation of the color-blind ideal. It is not self-evident that a color-aware Constitution will lead to political chaos and that the present situation is clearly preferable to such a future.

270. Consider the multiple symbolologies of the Confederate flag: racial oppression; regional solidarity; regional “ethnicity”—Southern “good ol' boy” culture. Brown, *supra* note 78, at 311-12.

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.

VIII. 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.²⁷¹ 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*.²⁷² 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*.²⁷³

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.

271. This is the standard historical reading of the Hayes-Tilden compromise in which an agreement to withdraw federal troops from the South was part of the agreement which elected Rutherford B. Hayes president. See generally ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877 (1988).

272. 163 U.S. 537 (1896).

273. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).