

# **“A Nation of Minorities”: Race, Ethnicity, and Reactionary Colorblindness**

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## *Abstract*

Justice Clarence Thomas avers “a ‘moral and constitutional equivalence’ between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality.” This asserted congruence between Jim Crow laws and affirmative action may seem intellectually indefensible but it is now a constitutional commonplace, as it underlies the rise an anticlassification understanding of the Equal Protection Clause that accords race-conscious remedies and racial subjugation the same level of constitutional hostility. What arguments have its proponents offered to justify this equivalence? This Article places efforts to read colorblindness into the Fourteenth Amendment against evolving understandings of racial dynamics in the United States. It gives particular attention to the recent efforts to harness colorblindness to the project of preventing race-conscious remedies, arguing that the intellectual coherence of reactionary colorblindness initially depended on a turn to ethnicity as a means of reconceptualizing race. An ethnic analysis replaced the notion of dominant and subordinate races with a narrative of culturally-defined groups in pluralistic competition, where culture rather than systematic racial advantaging or disadvantaging explained disparate group success. This Article details the rise of an ethnic analysis outside the legal academy; traces its influence on arguments for colorblindness by legal elites, from Richard Posner and the first full-blown argument for reactionary colorblindness in 1974, to Justice Lewis Powell’s 1978 *Bakke* opinion, to the instantiation of colorblindness by a Supreme Court majority in *Richmond v. Croson* in 1989. The Article also critiques the inability of liberal defenders of affirmative action, including Justice William Brennan, John Hart Ely, and Paul Brest, to respond effectively to the argument that racial remediation and racial subordination equally reduced, as Thomas would claim, to “racial discrimination pure and simple.”

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## CONTENTS

I.	INTRODUCTION	3
II.	COLORBLINDNESS: RADICAL, REACTIONARY, REJECTED	9
	A. <i>The First Reconstruction</i>	9
	B. <i>Emerging Theories of Race, 1900–1950s</i>	13
	C. <i>The Liberal Argument for Colorblindness in Brown</i>	17
	D. <i>The Emergence and Rejection of Colorblindness as a Limit on Racial Reform</i>	19
III.	FROM RACE TO ETHNICITY	22
	A. <i>Structural Racism</i>	23
	B. <i>Race as Ethnicity</i>	25
IV.	EARLY LEGAL ARGUMENTS FOR COLORBLINDNESS	29
	A. <i>Early Arguments against Affirmative Action in the Legal Academy</i>	29
	B. <i>Alexander Bickel</i>	31
	C. <i>Richard Posner</i>	34
V.	NATHAN GLAZER, ETHNICITY AND REACTIONARY COLORBLINDNESS	38
	A. <i>Ethnicity and Antidiscrimination Law</i>	39
	B. <i>Whites as Vulnerable Minorities</i>	43
	C. <i>Formal-Race and Culture-Race</i>	45
VI.	BAKKE	47
	A. <i>Statutory Colorblindness</i>	47
	B. <i>Against Colorblindness</i>	49
	C. <i>A Nation of Minorities</i>	51
	D. <i>Black is White, White is Black</i>	55
	E. <i>Integration, Societal Discrimination, and Diversity</i>	58
	F. <i>Powell and Glazer</i>	60
VII.	LIBERAL SUPPORT FOR REACTIONARY COLORBLINDNESS	64
	A. <i>William Brennan</i>	64
	B. <i>John Hart Ely and Paul Brest</i>	68
VIII.	CONSTITUTIONAL COLORBLINDNESS	74
	A. <i>Richmond v. Croson</i>	75
IX.	CONCLUSION	80

*I believe that there is a “moral and constitutional equivalence” between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. . . . [G]overnment-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination pure and simple.*

—Justice Clarence Thomas<sup>1</sup>

## I. INTRODUCTION

Justice Clarence Thomas’s emphatic insistence on the moral and constitutional equivalence of laws designed to subjugate a race and programs aimed at fostering equality seems patently absurd. It would deserve no more than derisive dismissal, but for the fact that this equation defines contemporary constitutional antidiscrimination law. Drawing on decisions and reasoning from the 1970s, the Supreme Court in the last three decades has moved ever closer to a full embrace of an anticlassification or colorblind conception of the Equal Protection Clause.<sup>2</sup> Under this approach, much criticized by legal scholars, the Fourteenth Amendment demands the highest level of justification anytime the state employs a racial distinction, irrespective of whether such race-conscious means are advanced to enforce or to ameliorate racial inequality.<sup>3</sup> Indeed, one hallmark of contemporary constitutional race law is the stark congruence that colorblindness asserts between hostile racial practices on the one hand and efforts to respond to societal discrimination on the other. Nevertheless, when this risible equivalence is stated so baldly, the intellectual problem with contemporary colorblindness is immediately manifest. What understandings of racial dynamics could

<sup>1</sup> *Adarand v. Peña*, 515 U.S. 200, 240-41 n.1 (1995).

<sup>2</sup> *See, e.g., City of Richmond v. Croson*, 488 U.S. 469 (1989); *Adarand, supra*; *Shaw v. Reno*, 509 U.S. 630 (1993); *Rice v. Cayetano*, 528 U.S. 495 (2000); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Johnson v. California*, 125 S. Ct. 2410 (2005).

<sup>3</sup> *See, e.g., Adarand, supra*. The many critics of the anticlassification approach often argue instead that, properly understood, the Equal Protection Clause targets only those racial practices that contribute to racial hierarchy. The proponents of this antistatutory approach prominently include the following: Owen Fiss, *Groups and the Equal Protection Clause*, 5 *PHILOSOPHY & PUB. AFFAIRS* 107 (1976); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 *NYU L. REV.* 1003 (1986); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 *MICH. L. REV.* 1 (1999); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *STAN. L. REV.* 1111 (1997); J.M. Balkin, *The Constitution of Status*, 106 *YALE L.J.* 2313 (1997); Cass Sunstein, *The Anticaste Principle*, 92 *Mich. L. Rev.* 2410 (1994).

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

This Article probes the conceptions of race and racism that supported the rise of what I term “reactionary colorblindness.” By reactionary colorblindness I mean an anticlassification understanding of the Equal Protection Clause that accords race-conscious remedies and racial subjugation the same level of constitutional hostility.<sup>4</sup> I use this term to distinguish the current doctrine from colorblindness generally.

Given the long and sorry history of racial subordination in the United States, there is tremendous rhetorical appeal to Justice John Marshall Harlan’s famous dissent in *Plessy v. Ferguson* that “[o]ur constitution is colorblind, and neither knows nor tolerates classes among citizens.”<sup>5</sup> At first blush, it seems difficult to argue against the insistence that the state should finally eschew all racial distinctions. But as it stands today, this appeal depends almost entirely on the elision between colorblindness as an ideal vision of a future society in which race no longer correlates to privilege and disadvantage, and as a means to achieve this end.<sup>6</sup> In evaluating colorblindness as an actual mechanism for racial change (rather than as a distant future), however, even Justice Sandra O’Connor—herself the author of many of the decisions shifting the Court toward reactionary colorblindness—belatedly recognized that context matters.<sup>7</sup> With cursory attention to context, one can trace a general shift over the twentieth century from colorblindness as a progressive demand to a reactionary one.

This metamorphosis in the meaning of colorblindness is reflected in the arguments made by Thurgood Marshall the lawyer and Thurgood Marshall the Supreme Court Justice. As counsel for the NAACP in the late 1940s and early 1950s, Marshall repeatedly encouraged his colleagues to cite Harlan’s famous injunction to argue that, as Marshall put it in a 1947 brief to the Supreme Court, “classifications and distinctions based on race or color have no moral or legal validity in our society. They are contrary to our constitution and laws.”<sup>8</sup>

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<sup>4</sup> As applied, reactionary colorblindness almost invariably strikes down race-conscious remediation, making it “strict in theory, but fatal in fact,” the one exception being *Grutter*. Frankly, I do not expect *Grutter* to much survive Justice O’Connor’s departure from the swing-position on racial issues on the Court.

<sup>5</sup> *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

<sup>6</sup> See *infra* notes \* and accompanying text (discussing the Court’s use of colorblind reasoning to support racial subjugation during Reconstruction) and *infra* notes \* and accompanying text (discussing Alexander Bickel’s oft-quoted defense of colorblindness).

<sup>7</sup> *Grutter*, 539 U.S. at 327 (“Context matters when reviewing race-based governmental action under the Equal Protection Clause.”).

<sup>8</sup> Brief for Petitioner, *Sipuel v. Bd. of Regents of the Univ. of Okla.*, 332 U.S. 631 (1948) (No. 369), at 27.

Marshall there sought to harness colorblindness to attack the racial degradation given constitutional sanction by *Plessy*.<sup>9</sup> Yet, as the Court struck down Jim Crow laws and Congress proscribed major forms of private discrimination over the course of the 1950s and 1960s, civil rights activists increasingly recognized the need for state and private actors to use race-conscious means to target the edifices of inequality. In this new context, the call for colorblindness came instead from those opposing racial integration: the language of colorblindness, enshrouded with the moral raiment of the civil rights movement, provided cover for reactionary opposition to race-conscious remedies. By 1978, Justice Marshall found himself urging the Court in its first full affirmative action case to reject colorblindness. “It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America,” Marshall inveighed.<sup>10</sup> As the nation’s racial commitments swung from defending to dismantling white supremacy, the practical import of colorblindness shifted from promoting to defeating integration, and its political valence slipped from progressive to conservative.

Marshall did not prevail in his colorblind arguments, either for it as a lawyer or against it as a justice. Today, colorblindness as a presumptive bar on affirmative action—that is, reactionary colorblindness—has been firmly read into the Fourteenth Amendment. The most striking feature of colorblindness lies not in the mere fact of its general opposition to race-conscious remedies, however, but in the strict doctrinal equation of affirmative action and Jim Crow racism. Supporters of affirmative action, such as Justice William Brennan, conceded that race-conscious preferences raise troubling issues, for instance countervailing liberal notions of individual merit and potentially fueling racially divisive politics as well as stigmatic notions of minority inability.<sup>11</sup> Indeed, Brennan’s concerns led him to favor heightened, though not strict, constitutional scrutiny of affirmative action for exactly these reasons.<sup>12</sup> Yet, the underlying premise of reactionary colorblindness is not simply that race-conscious remedies raise moral and political and even constitutional problems, but that benign

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<sup>9</sup> 163 U.S. 537, 559 (1896).

<sup>10</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 402 (Marshall, J., concurring in part, dissenting in part).

<sup>11</sup> *United Jewish Orgs. of Williamsburgh, Inc., v. Carey*, 430 U.S. 144, 172-74 (1976) (hereafter *UJO*), discussed *infra* at note \*.

<sup>12</sup> *UJO, supra; Bakke*, 438 U.S. at 360-61 (citation omitted) (Brennan, J., concurring in part and dissenting in part), discussed *infra* at notes \* and accompanying text.

and invidious discrimination are indistinguishable and equally invidious, such that both must be subject to an identical level of constitutional hostility. The purpose of this Article is to carefully historicize this foundational assertion of noxious congruence.

In the 1960s, a broad consensus began to emerge that racism reflected more than the prejudice of discrete individuals but represented instead a deeply entrenched aspect of U.S. society.<sup>13</sup> This conceptualization implied a national obligation to undertake sweeping structural reform. Simultaneously, however, a countervailing racial theory developed in the 1960s and early 1970s, arguing that the abolition of Jim Crow had ended systemic discrimination and that continued inequalities in group position reflected not persistent racism but differences in group culture. This competing narrative, which drew on notions of ethnicity developed early in the twentieth century to celebrate pluralism among whites, had dramatic implications when extended across the color line.<sup>14</sup> The attribution of an ethnic identity to blacks and other non-whites implied that racial subordination was largely past, and that social inequalities, if any, reflected the cultural failings of minorities themselves. It further suggested that there existed no dominant white race as such, but instead only a welter of competing cultural groups defined in national origin terms, for instance Irish- or Italian-Americans. Under this conception, not only did the supposed absence of entrenched disadvantage strip affirmative action of its primary rationale, but preferential treatment for non-whites amounted to invidious discrimination against other “minorities”—that is, the discrete national origin groups into which whites had been disaggregated. As arguments for reactionary colorblindness developed in the 1970s, its proponents confronted the task of explaining why the command of equality should proscribe efforts to undue the legacy of centuries of racial oppression. These arguments could not be made solely in legal terms, but required as well the articulation of a vision of race relations in the United States. Placing developments in equal protection law in the larger context of evolving racial ideas in the United States, I argue in this Article that the intellectual coherence of reactionary colorblindness initially depended on a turn in the 1970s to ethnicity as a means of reconceptualizing race.

While scholars have offered insightful work delimiting the operation of colorblindness as ideology and doctrine, the intellectual history of the ideas and rationalizations that allowed

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<sup>13</sup> See *infra* notes \* and accompanying text.

<sup>14</sup> See *infra* notes \* and accompanying text.

a majority of the Court to embrace reactionary colorblindness has not been adequately mapped.<sup>15</sup> This Article explores the ideas offered by legal elites, meaning here leading constitutional scholars and U.S. Supreme Court justices, in announcing that the Fourteenth Amendment condemned remedial and malicious treatment equally. I do not claim that the invocation of colorblindness today continues to require an ethnic analogy; indeed, one rarely hears now a sustained defense of the argument that Jim Crow and affirmative action are equally poisonous. Most contemporary proponents of this view are content simply to assert this equivalence as a constitutional and self-evident fact. But after Harlan in *Plessy*, not until the 1980s did any sitting Supreme Court justice suggest that the Constitution was colorblind. To lay the groundwork for this claim required in the 1970s not just an assertion of but an argument for an anticlassification understanding of the Fourteenth Amendment. My primary aim in this Article is to demonstrate that race-as-ethnicity provided the first coherent intellectual justification for reactionary colorblindness. My secondary aim is to critique this impoverished understanding of race, as well as reactionary colorblindness generally.

I build my argument as follows. Part II reviews the evolving understandings of race in the United States to the mid-twentieth century, briefly traces colorblindness since Reconstruction, and then reviews the attempt to use colorblindness as a shield against integration in the 1950s and 1960s, finishing with the Supreme Court's emphatic rejection of that effort. Part III notes the emergence of a structural understanding of racial domination in the 1960s, and details the countervailing effort to recast U.S. race relations in ethnic terms, reflected principally in the work of leading liberals such as sociologists Patrick Moynihan and Nathan Glazer.<sup>16</sup> Part IV explores early efforts by legal scholars to justify a regime of reactionary colorblindness, focusing on likely the first full-blown demand for a constitutional ban on affirmative action, authored by Richard Posner in 1974. Part V highlights the greater

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<sup>15</sup> I have found the following works especially helpful in fathoming the contemporary Court's racial jurisprudence: Alan Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Neil Gotanda, *A Critique of "Our Constitution is Colorblind,"* 44 STAN. L. REV. 1 (1991); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758; and Reva Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77 (2000). Siegel, Freeman, and Gotanda have all previously noted the importance of ethnicity theory in the emergence of colorblind reasoning, though without offering a sustained analysis of this phenomenon. Siegel, 88 CALIF. L. REV. at 103-105 (2000); Freeman, 64 TULANE L. REV. at 1432-1434; Gotanda, 44 STAN. L. REV. at 60-62. *See also* Cheryl Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753, 1772-74 (2001) (noting that Powell's opinion in *Bakke* treats race as ethnicity).

<sup>16</sup> *See infra* notes \* and accompanying text.

coherence achieved by Glazer in 1975, when in a book entitled *Affirmative Discrimination* he wove together ethnicity theory and reactionary colorblindness. Part VI identifies *Regents of the University of California v. Bakke* as a critical juncture when justices on the Supreme Court fully engaged the debate over reactionary colorblindness, showing how Justice Lewis Powell's opinion strongly echoed the ethnicity framework elaborated by Glazer. Part VII critiques the inability of liberal defenders of affirmative action, including Brennan, John Hart Ely, and Paul Brest, to respond effectively either to the ethnicity model or to the equation of affirmative action with racial discrimination. Finally, Part VIII adumbrates the first embrace of reactionary colorblindness by a Supreme Court majority in *Richmond v. Croson* in order to demonstrate the power of ethnicity, especially as elaborated by Powell in *Bakke*, as a justificatory racial rhetoric.

This Article is not centrally concerned with advancing a particular theory of racial oppression, though of course it is relevant that I proceed from the position that race and racism do not reflect natural human divisions but are instead constitute a socially and legally produced system of social subordination.<sup>17</sup> Nor do I propose to assess the constituent components of colorblindness, either as legal doctrine or as racial ideology. Such a project would focus much more on the 1980s and 1990s and, while I hope eventually to turn to that work, my aim here is much more focused. This is a history of the ideas about race relations in the United States that legal elites in the 1970s used to justify the claim that under our Constitution remedial race-consciousness and racial subordination are equally noisome. In this context, I start from the premise that race and racism are structurally embedded in U.S. society. I insist on this irrefragable point not because my argument depends on a specific conception of racial subjugation, but because it requires the recognition that a general dynamic of systematic group subordination lies at the core of race in the United States.<sup>18</sup>

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<sup>17</sup> See Ian Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994); IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996); IAN HANEY LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* (2003).

<sup>18</sup> For a small sampling of the leading contemporary scholarship emphasizing the structural nature of racial oppression in the United States, see MICHAEL BROWN, ET. AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (2003); THOMAS C. HOLT, *THE PROBLEM OF RACE IN THE 21<sup>ST</sup> CENTURY* (2000); MELVIN OLIVER & THOMAS SHAPIRO, *BLACK WEALTH, WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1995); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993); AUDREY SMEDLEY, *RACE IN NORTH AMERICA: ORIGIN AND EVOLUTION OF A WORLDVIEW* (1993); DAVID WELLMAN, *PORTRAITS OF WHITE RACISM* (2d ed. 1993); MANNING MARABLE, *RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945-1990* (2d ed. 1991); MICHAEL OMI &

Charles Black wrote in 1960 that the many forms of racial oppression were “matters of common notoriety, matters not so much for judicial notice as for the background knowledge of educated men who live in the world.”<sup>19</sup> I write in a similar vein (though admittedly at somewhat greater length). I will not spend much time establishing the fact of racial hierarchy, but will note where legal thinkers have failed to grapple with it, as it forms the basis of my critique of both ethnicity theory and reactionary colorblindness.

## II. COLORBLINDNESS: RADICAL, REACTIONARY, REJECTED

Contemporary colorblindness arises out of both the doctrinal flow of Supreme Court cases that washed away Jim Crow, and the larger flood of changing racial ideas over the twentieth century. This section briefly surveys those mingled elements by focusing on the period from Reconstruction to *Brown v. Board of Education* in 1954, during which time colorblindness was often advanced as a method to attack racial hierarchy; and then from *Brown* to the *Swann* decisions in 1971, when multiple jurisdictions developed a sudden tropism toward the colorblind Constitution, only to have the Supreme Court firmly reject colorblindness as a limitation on racial remediation.

### A. *The First Reconstruction*

Contemporary proponents of reactionary colorblindness almost invariably draw a straight line from Harlan’s 1896 dissent in *Plessy* to their own impassioned advocacy for race blindness in all circumstances today. Andrew Kull, for example, on the first page of his 1992 book *The Color-Blind Constitution*, quotes Harlan’s invocation of colorblindness before baldly asserting: “The comfortable metaphor stands for an austere proposition: that American government is, or ought to be, denied the power to distinguish between its citizens on the basis of race.”<sup>20</sup> It’s hard to resist pointing out that Kull, like virtually every other contemporary fan of colorblindness, elides Harlan’s acknowledgement of white superiority in

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HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S* (1986); GEORGE FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY* (1981). Conceptions of race as social hierarchy undergird critical race theory in the legal academy. See generally DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* (4th ed. 2000); GERALD TORRES & LANI GUINIER, *THE MINER’S CANARY* (2000); KIMBERLÉ CRENSHAW ET. AL., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (1995).

<sup>19</sup> Charles Black, *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 426 (1960).

<sup>20</sup> ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 1 (1992).

the very paragraph in which he proclaimed fealty to colorblindness. That paragraph begins: “The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time.”<sup>21</sup> As this statement should make immediately obvious, the earliest battles over colorblindness took place in terms and with implications we scarcely understand today.

The debate in *Plessy* over the state’s use of race did not turn on affirmative action, as it does today—indeed, the Congress which drafted the Fourteenth Amendment also enacted numerous laws specifically benefiting blacks, including the creation of the Freedmen’s Bureau.<sup>22</sup> Rather, as viewed by the Court the central question concerned where to place limits on the state’s participation in fostering the separation of racial groups understood to be unequal by nature (hence Harlan’s comfortable endorsement of white superiority). Harlan and the majority agreed on the basic premise that the state could enforce racial separation in the social but not in the civic or political arenas; they differed on where to draw the line between those spheres.<sup>23</sup> For Harlan, the segregated train cars at issue in *Plessy* implicated the capacity of blacks to participate as full citizens in civil life, whereas the majority saw such segregation only as a regulation of social relations sanctioned by long usage and custom. Two years later, Harlan would write for a unanimous Court in supporting a whites-only high school, finding no “clear and unmistakable disregard of rights secured by the supreme law of the land”—education, Harlan concluded, lay within the social sphere in which the state could mandate racial separation.<sup>24</sup>

Harlan simply never meant to proscribe all governmental uses of race through his evocative call for colorblindness. Indeed, a fairer read (albeit one which also suffers from historical presentism) would link Harlan’s effort to craft a broad conception of the civil sphere

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<sup>21</sup> *Plessy*, *supra*, 163 U.S. at 559.

<sup>22</sup> Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 789 (1985); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430 (1997). Kull concedes that the debate about colorblindness is now centrally about affirmative action, and as such differs fundamentally from its original contours. KULL, *supra* note \*, at 6. Despite this concession his analysis largely proceeds as if colorblindness describes a timeless principle, rather than a policy prescription tied necessarily to contemporary racial politics.

<sup>23</sup> Cf. Mark Tushnet, *The Politics of Equality in Constitutional Law*, 74 J. AM. HIST. 884, 886 (1987) (“The lawmakers who discussed equality during Reconstruction accepted mid-century conceptions that distinguished equality with respect to civil rights, to social rights, and to political rights. The core of each conception was also well defined: The core of civil rights included the rights to sue and testify; social rights included the right to select one’s associates; voting was the central political right.”).

<sup>24</sup> *Cumming v. County Board of Education*, 175 U.S. 528, 545 (1899). See Earl Maltz, *Only Partially Colorblind: John Marshall Harlan’s View of Race and the Constitution*, 12 GA. ST. U. L. REV. 973, 989 (1996).

to opposition to state involvement in racial oppression, or more generally to an anti-subordination stance. The civil arena mattered so greatly because state exclusions from public life threatened to reduce the newly emancipated once again to an inferior social status mandated by law. Thus, immediately before his invocation of colorblindness, Harlan stated that “in the eyes of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here.”<sup>25</sup> And in another, more compelling portion of his dissent, he warned that “we have yet, in some of the states, a dominant race,—a superior class of citizens,—which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race,” and foretold that “[t]he present decision . . . [will] only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens.” Harlan’s central objection to Louisiana’s use of race in *Plessy* turned on relations of group domination and subordination, on hostility toward state-sanctioned superior classes and legally degraded castes. Whether one can fairly harness Harlan to a pro-affirmative action interpretation of the Fourteenth Amendment, the call for colorblindness during Reconstruction, as in Harlan’s hands, principally aimed at combating racial oppression. Indeed, the metaphor of “colorblindness” should be more properly regarded as having been introduced into our constitutional lexicon not by Harlan but by Homer Plessy’s attorney, Albion Tourgee, who stridently insisted on the connection between ending racial categorization and protecting blacks from state-mandated subordination.<sup>26</sup>

While colorblindness during Reconstruction carried a progressive connotation, however, even during that epoch it had the potential to impede efforts to secure racial equality. After *Plessy*, explicitly race-based regulations designed to enforce a racial caste system gave rise to Jim Crow laws across a broad range of “social” arenas, from education to marriage to public space. But in the civil and political spheres, involving for instance jury duty and voting, the Court barred racial exclusion in cases such as *Strauder v. West Virginia*.<sup>27</sup> In response, in these areas colorblind subordination became the norm, and encountered no constitutional hostility. Thus, in *Williams v. Mississippi*, the Court considered a poll tax and other facially race-neutral limitations on voting sanctioned by Mississippi’s highest tribunal as discrimination not against “the negro race” but against “its characteristics”:

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<sup>25</sup> *Plessy, supra*, 163 U.S. at 559.

<sup>26</sup> Brief for Plaintiff in Error, *Plessy v. Ferguson*, 163 U.S. 537 (No. 210) (1896).

<sup>27</sup> *Strauder v. West Virginia*, 100 U.S. 303 (1880).

“Restrained by the federal constitution from discriminating against the negro race, the convention discriminates against its characteristics, and the offenses to which its criminal members are prone.”<sup>28</sup> Responding to this confession of anti-black hostility thinly veiled by an admitted ruse, the Court nevertheless ruled that “nothing tangible can be deduced from this. . . . [T]he operation of the [Mississippi] constitution and laws is not limited by their language or effects to one race. They reach weak and vicious white men as well as weak and vicious black men.”<sup>29</sup> Even where a state patently sought to engage in racial oppression and confessed its evil intent, so long as it accomplished its malignant purpose in a manner that did not employ a racial classification, the Court found the Constitution satisfied. Having forbidden states from using race as an explicit basis for subjugation in the civil and political spheres, the Court nonetheless acquiesced to racial oppression in those arenas so long as achieved in a facially colorblind manner.<sup>30</sup>

Colorblindness as a ban against the use of race has no inherent social or political valence; instead, its emancipatory or repressive implications arise from the racial milieu generally and even more specifically in terms of the racial actions colorblindness is asserted to proscribe. Colorblindness is merely a rule or a policy prescription; especially when one distinguishes colorblindness as a means and as an ends, it becomes evident that as a method it utterly lacks a transcendent moral quality, and instead takes on moral and social significance only by virtue of its instant application.<sup>31</sup> During Reconstruction and after *Plessy*, proponents of colorblindness saw in it a potential to undermine the explicitly race-based subordination

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<sup>28</sup> *Williams v. Mississippi*, 170 U.S. 213, 222 (1898).

<sup>29</sup> *Id.*

<sup>30</sup> The clearest contemporary analog to *Williams* is *Washington v. Davis*, 426 U.S. 229 (1976). *Davis* is not typically considered a colorblindness case, as it announces an intent rule in tension with the insistence that all uses of race should be equally suspect irrespective of the animating purpose. Nevertheless, if one understands colorblindness as requiring that *all* racial classifications be considered suspect, *Davis* insists in complementary form that *only* the intentional use of race raises constitutional concerns. For reasons of length, however, this Article focuses on reactionary colorblindness as a sword against race-conscious remedies, rather than as a shield for race-neutral but nevertheless status-enforcing state action, and so gives little attention to *Davis* and its progeny.

<sup>31</sup> Of course, if one defined the colorblind ideal not as a society free from racial hierarchy but as a society in which no racial distinctions are made, then obviously ending racial categorization would promote this goal. This “ideal,” however, depends for its social relevance and in turn for its moral stature on the unstated assumption that this future society would exist in contradistinction to a present one marred by racial hierarchy. Absent this assumption, we might with equal moral authority call for a society in which persons did not acknowledge differences in height, or in the length of limbs. Obviously such calls do not carry equal weight. To proclaim a colorblind vision is to invoke the dream of a racially egalitarian society; again, however, without demonstrating that colorblindness as a means will likely get us to that promised land. Thus, this reformulated version of the colorblindness ideal too merely replicates the elision between means and ends, albeit at one remove.

that formed the core of Jim Crow segregation. But during this period, and in a way that strikingly anticipated our current situation, the Supreme Court instead used colorblind reasoning to preserve racial hierarchy, by upholding facially neutral but nevertheless deeply racially oppressive state action.

### B. *Emerging Theories of Race, 1900–1950s*

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

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

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<sup>32</sup> See, e.g. *Takao Ozawa v. United States*, 260 U.S. 178 (1922) (unanimously holding that “white person” under U.S. naturalization law meant persons of the “Caucasian race”); *United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923) (unanimously rejecting the argument that “white persons” include all members of the “Caucasian race” when confronted by a South Asian categorized by anthropologists as Caucasian). See generally HANEY LÓPEZ, *supra*, 79-109 (discussing *Ozawa* and *Thind* in terms of the legal construction of race).

<sup>33</sup> OMI & WINANT, *supra* note \*, at 14-23.

<sup>34</sup> THOMAS F. GOSSETT, *RACE: THE HISTORY OF AN IDEA IN AMERICA* 418 (1997) (“[I]t is possible that Boas did more to combat race prejudice than any other person in history.”).

(rather than as the folkways of particular sub-groups).<sup>35</sup> Thus, in the early part of the twentieth century, a liberal race theory developed that pictured race in terms of merely superficial physical differences, and that decidedly repudiated the claim that nature placed races in hierarchical relationship to each other. This theory was “liberal” in the sense that it broke from racial theories that sought to justify the status quo of stark racial hierarchy, and also because it rejected the connection between racial group membership and individual ability and worth. It was also liberal in contradistinction to the more radical claim, still on the horizon, that race and racism formed bedrock elements of U.S. society that would necessitate fundamental structural change to achieve racial justice.

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

The cross between a white man and an Indian is an Indian; the cross between a white man and a negro is a negro; the cross between a white man and a Hindu is a Hindu; and the cross between any of the three European races and a Jew is a Jew.<sup>36</sup>

The last clause deserves emphasis: According to eugenicists, no white race existed as such, but instead three European races vied with each other—Nordic, Alpine, and Mediterranean (again arrayed from superior to inferior); and simultaneously Jews constituted a further and yet more degraded race. These beliefs spawned legislation in the United States closing the border to southern and eastern European immigrants, and also promoting the sterilization of “low-grade” whites (with “grade” supposedly measuring, among other things, intelligence and criminality).<sup>37</sup> In Germany, such views gave rise to the 1935 Nuremberg Laws on Citizenship and Race and

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<sup>35</sup> See MATHEW FRYE JACOBSON, *BARBARIAN VIRTUES: THE UNITED STATES ENCOUNTERS FOREIGN PEOPLES AT HOME AND ABROAD*, 1876-1917, at 149-151 (2000); SMEDLEY, *supra*, at 275-82. For an insightful reading of antimiscegenation cases against these shifting racial paradigms, see Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of “Race” in Twentieth Century America*, 83 J. AM. HIST. 44 (1996).

<sup>36</sup> Quoted in JACOBSON, *BARBARIAN VIRTUES*, *supra*, at 161.

<sup>37</sup> Immigration Act of 1924, 39 Stat. 874 (1924); *Buck v. Bell*; *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

soon thereafter to the horrors of racial extermination. Experience with this brand of racial extremism during World War II spelled the near death of eugenics in the United States.<sup>38</sup>

The extreme racialization of European groups, in particular the virulent notions of Jewish biological inferiority, led to the introduction of a new word into the popular vocabulary of the United States: “racism.” George Fredrickson, in his history of that phenomenon, concludes that “[t]he word ‘racism’ first came into common usage in the 1930s when a new word was required to describe the theories on which the Nazis based their persecution of the Jews.”<sup>39</sup> The emergence of “racism” marked a tremendously important intellectual juncture, for it signaled not just developing skepticism toward theories of racial inequality, but more fundamentally the recognition that notions of racial difference were contestable (and indeed detestable) ideas and not instead acquiescence to natural fact. In the 1940s, undoubtedly drawing on the terrible events in Europe, Justice Frank Murphy became the first Supreme Court justice to use the term racism in a court opinion.<sup>40</sup> He used that word in five cases between 1944 and 1948, clearly having in mind the racial horrors of Nazism—as when he condemned efforts to restrict land ownership by persons of Japanese descent as “an unhappy facsimile, a disheartening reminder, of the racial policy pursued by those forces of evil whose destruction recently necessitated a devastating war. It is racism in one of its most malignant forms.”<sup>41</sup> By and large, however, the concept of racism was not applied across the white/non-white divide until the 1960s, instead remaining a term that primarily designated illegitimate and unfounded racial ideas distinguishing among whites.<sup>42</sup> Until the 1960s, for many the color line continued to mark a natural division between superior and inferior races. Murphy’s invocation of racism proved two decades premature, for the Court would not again talk in such stark terms until 1967, when in *Loving v. Virginia* it branded anti-miscegenation laws instances of “white supremacy.”<sup>43</sup>

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<sup>38</sup> Justice Douglas seemingly drew on the lessons of Nazism when he struck down Oklahoma’s criminal sterilization law on the grounds that “[i]n evil or reckless hands [the power to sterilize] can cause races or types which are inimical to the dominant group to wither and disappear.” *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535, 541 (1942).

<sup>39</sup> GEORGE FREDRICKSON, *RACISM: A SHORT HISTORY* 5 (2003).

<sup>40</sup> *Oyama v. California*, 332 U.S. 633, 673 (1948) (Murphy, J., concurring). *See also* *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 208 (1944); *Korematsu v. U.S.*, 323 U.S. 214, 234 (1944); *Ex parte Mitsuye Endo*, 323 U.S. 283, 307 (1944); *Duncan v. Kahanamoku*, 327 U.S. 304, 334 (1946).

<sup>41</sup> *Oyama, supra*, at 673.

<sup>42</sup> FREDRICKSON, *supra* note \*, at 156, 167.

<sup>43</sup> 388 U.S. 1 (1967). *Loving* was followed by another hiatus. The term “racism” did not appear again until the debate on reactionary colorblindness was firmly underway on the Court. In *Bakke*, Justice Blackmun insisted that “in order to get beyond racism, we must first take account of race,” *Regents of Univ. of Cal. v. Bakke*, 438 U.S.

Nevertheless, the seemingly natural equation of races with socially salient differences had substantially foundered by mid-century, even as applied to blacks and other non-whites. The more immediate intellectual catalyst came when Gunnar Myrdal in 1944 published *An American Dilemma*, marking a watershed in twentieth century racial thought.<sup>44</sup> Building on the framework advanced by Boas and other liberal race theorists, and with financial support from the Carnegie Foundation to underwrite “a comprehensive study of the Negro in America,” Myrdal commissioned dozens of studies by many of the leading social scientists of the day, shaping the whole into a massive indictment of the systematic oppression of blacks in the United States.<sup>45</sup> Myrdal and his colleagues believed it axiomatic that race amounted to superficial physical differences alone, most often mere “skin color,” having nothing to do with intelligence, morals, temperament, or character. Instead, they laid social differences between races directly at the feet of culture and environment, or more specifically, white prejudice and discrimination: “White prejudice and discrimination keep the Negro low in standards of living, health, education, manners and morals.”<sup>46</sup> Myrdal’s tome solidified the demise of biological racism among progressive thinkers and established a new paradigm in which social differences between races that previously served as evidence of innate superiority and inferiority now came to be understood as the result of illegitimate racial practices.<sup>47</sup>

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

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265, 407 (Blackmun, J., concurring), whereas in *United Steelworkers of America v. Weber*, Justice Rehnquist retorted that the nation must eschew “racism in reverse,” 443 U.S. 193, 232 n.12 (1979) (Rehnquist, J., dissenting).

<sup>44</sup> GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944).

<sup>45</sup> STEPHEN STEINBERG, *TURNING BACK: THE RETREAT FROM RACIAL JUSTICE IN AMERICAN THOUGHT AND POLICY* 33, 37 (1995).

<sup>46</sup> MYRDAL, *supra* note \*, at 75.

<sup>47</sup> STEINBERG, *supra*, at 50.

said something meaningful about individual capacity. Thus, in his introduction Myrdal offered this prescription for change, using italics for emphasis:

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

The core problem of race, Myrdal asserted, lay in misguided attitudes: The “dilemma” to which his title pointed was the need for Americans to choose between their vaunted ideals of liberty and equality, and their embrace of irrational prejudice. Its resolution, Myrdal assured his readers, was already settled. For Myrdal, the telos of American history pointed to a fast approaching end to the injurious mythology of race. “What America is constantly reaching for is democracy at home and abroad,” he wrote in his concluding chapter. “The main trend in its history is the gradual realization of the American creed.”<sup>49</sup> The insurgent liberal race theory of the early twentieth century—in which race comprised only irrelevant somatic difference—became common wisdom among liberals by mid-century, but now further refined to include the beliefs that racial discrimination stemmed from individual maldisposition rather than structural dynamics, and that racial harmony depended only on convincing bigots to mend their irrational ways.

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

In its campaign against segregation, the NAACP Legal Defense Fund continued the Reconstruction era pattern of attacking the use of racial classifications as a subordinating practice, and also began to draw on Myrdal’s groundbreaking work. In 1947 Thurgood Marshall argued before the Supreme Court in *Sipuel v. Board of Regents of the University of Oklahoma*, a precursor to *Brown*, that “[c]lassifications and distinctions based on race or color have no moral or legal validity in our society. They are contrary to our constitution and laws.”<sup>50</sup> Marshall attacked not classification *per se*, but rather segregation, and more

<sup>48</sup> MYRDAL, *supra* note \*, at lxii.

<sup>49</sup> *Id.*, at 109.

<sup>50</sup> Brief for Petitioner at 27, *Sipuel v. Bd. of Regents of the Univ. of Okla.*, 332 U.S. 814 (1947) (No. 369). U.S. district judge Constance Baker Motley recalled that when she and Marshall were colleagues at the NAACP, Harlan’s dissent was Marshall’s “‘Bible’ to which he turned during his most depressed moments. . . . Marshall would read aloud passages from Harlan’s amazing dissent. I do not believe we ever filed a major brief in the pre-*Brown* days in which a portion of that opinion was not quoted. Marshall’s favorite quotation was, ‘Our

particularly the oppression attendant to Jim Crow. In *Plessy*, the Court had rejected the idea that segregation harmed blacks, infamously writing: “If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”<sup>51</sup> In turn, for the next five decades the Court continued to reason as if no oppression resulted from segregation, making the question of harm a central element in the challenge to *Plessy* and its progeny. To prove this victimization, Marshall turned for support to Myrdal, extensively citing *An American Dilemma*.<sup>52</sup> He used the same strategy combining an anticlassification argument with an emphasis on segregation’s harms in *Brown*, arguing that “[d]istinctions drawn by state authorities on the basis of color or race violate the Fourteenth Amendment,”<sup>53</sup> and invoking *An American Dilemma* to support his argument that segregation constituted a *per se* harm. During oral argument in *Brown*, for instance, Marshall insisted that “Gunnar Myrdal’s whole book is against the argument [for segregation]. . . . I know of no scientist that has made any study, whether he be anthropologist or sociologist, who does not admit that segregation harms the child.”<sup>54</sup>

The Supreme Court seemingly adopted Myrdal’s framing of racial dynamics as irrational prejudice but did not adopt an anticlassification approach when, at last, it committed itself to overthrowing Jim Crow in *Brown*. In striking down school segregation, Chief Justice Earl Warren’s opinion apparently conceptualized both the source of discrimination and its harms primarily in attitudinal terms. Warren identified the principal harm of segregation as the “feeling of inferiority as to their status in the community” imposed on black children by state mandated racial separation.<sup>55</sup> This reference to stigma invoked the prejudice model’s emphasis on psychological injury, even as Warren’s failure to note any of segregation’s material harms implied a focus on individual bad actors and victims. Warren utterly disregarded the materially entrenched nature of segregation. But as many commentators have

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Constitution is color-blind.’ It became our basic creed.” TINSLEY E. YARBROUGH, *JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN* 229 (1995) (quoting Judge Baker Motley’s address at a memorial ceremony for Justice Marshall, Nov. 5, 1993).

<sup>51</sup> *Plessy v. Ferguson*, 165 U.S. 537, 551 (1896).

<sup>52</sup> See, e.g., Sipuel Brief at 28-29, 46, 51.

<sup>53</sup> Brief for Appellants, *Brown v. Board of Educ.*, 49 Landmark Briefs 481, 529-543 (1953).

<sup>54</sup> Oral argument in *Brown*, quoted in RICHARD KLUGER, *SIMPLE JUSTICE* 577 (1975). See also MARK TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION* 119 (1987) (“The book collected a large amount of information that drove home to readers the degree to which blacks were oppressed. . . . *An American Dilemma* said nothing new to the NAACP, but it certified to the general public that people should pay attention to what the NAACP said.”).

<sup>55</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

noted, Warren crafted his opinion to disparage as little as possible Southern racial folkways, the better to secure cooperation from other justices as well as targeted school districts. In addition, the posture of the cases consolidated in *Brown* constrained a focus on structural inequality, because to challenge the “separate” component of *Plessy*’s “separate but equal” formulation the Legal Defense Fund had stipulated that the targeted school districts had “been equalized, or [were] being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other ‘tangible’ factors.”<sup>56</sup> Finally, the lack of attention to entrenched oppression probably rested partly on the fact that Myrdal’s individual-prejudice approach constituted the dominant conception of racism in the early 1950s. Widespread dissemination of a racial analysis that focused on white supremacy or that emphasized the structural nature of racial subordination still lay a decade in the future. Whatever the reason that compelled Warren to rely on liberal race theory, however, he left no doubt of his intellectual sources in his famous footnote eleven, which ended with “And see generally Myrdal, *An American Dilemma*.”<sup>57</sup>

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

Even a decade after *Brown*, virtually no southern school system had actually desegregated.<sup>58</sup> White support for Jim Crow segregation ran the gamut from creative delays and endless litigation on the part of local school boards to bold public intransigence and defiance by state officials.<sup>59</sup> In addition, beginning almost immediately in the wake of *Brown*, various jurisdictions, many but not all of them in the South, declared that the Constitution did not demand integration but only prohibited discrimination. For instance, on remand from *Brown*, the district court in *Briggs v. Elliott* declared in 1955 that the Constitution “does not require integration. It merely forbids discrimination. It does not forbid such segregation as

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<sup>56</sup> *Id.*, at 492.

<sup>57</sup> 347 U.S. at 495 n.11. On the controversy sparked by Warren’s citation to Myrdal in particular, see KLUGER, *supra* note \*, at 708-710. As further evidence that Myrdal’s groundbreaking study formed part of the background against which the Supreme Court decided the challenges to segregation, consider the memo on *Brown* written by William Rehnquist in 1952, when he was serving as a clerk to Justice Robert Jackson. Rehnquist’s memo concluded: “I think *Plessy v. Ferguson* was right and should be re-affirmed. If the Fourteenth Amendment did not enact Spencer’s Social Statics, it just as surely did not enact Myrdal’s *American Dilemma*.” William H. Rehnquist, *A Random Thought on the Segregation Cases*, reprinted in 117 CONG. REC. 45,440-45,441 (1971 (1952)).

<sup>58</sup> GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 52 (1991).

<sup>59</sup> *See, e.g.* Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964) (holding that the County could not shut down its public schools to avoid complying with *Brown* by integrating).

occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation.”<sup>60</sup> Only a short skip separated the claim that the Constitution did not mandate integration from the insistence that it affirmatively prohibited efforts to achieve integration through race-conscious means. Thus, in 1964 a district court in Ohio declared:

The law is color-blind and, in cases such as this, that principle, which was designed to insure equal protection to all citizens, is both a shield and a sword. While protecting them in their right to be free from racial discrimination, it at the same time denies them the right to consideration on a racial basis when there has been no discrimination.<sup>61</sup>

The following year, the federal district court in South Carolina quoted with approval the conclusion that “[t]he Constitution is color-blind; it should no more be violated to attempt integration than to preserve segregation.”<sup>62</sup> By 1965, reactionary colorblindness had emerged: according to the new friends of colorblindness, the Constitution forbade any state use of race, whether to segregate or to integrate.

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

The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose.<sup>63</sup>

Wisdom recognized that the constitutional significance of colorblindness had to be measured in terms of the uses of race ostensibly proscribed. Where the goal was integration, color conscious means were not only constitutional but necessary: “disestablishing segregation among students, distributing the better teachers equitably, equalizing facilities, selecting

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<sup>60</sup> 132 F. Supp. 776, 777 (E.D.S.C. 1955).

<sup>61</sup> *Lynch v. Kenston Sch. Dist. Bd. of Educ.*, 229 F. Supp. 740, 744 (N.D. Ohio 1964).

<sup>62</sup> *Randall v. Sumter Sch. Dist. No. 2*, 241 F. Supp. 787, 789 (E.D.S.C. 1965).

<sup>63</sup> *United States v. Jefferson County Board of Education*, 372 F.2d 836, 876 (5th Cir. 1966).

appropriate locations for schools, and avoiding resegregation *must necessarily be based on race*,” he concluded.<sup>64</sup>

The Supreme Court added its voice to the rejection of colorblindness in 1968 in *Green v. County School Board*, and again twice in the 1971 *Swann* cases. In *Green*, a unanimous Court rejected as inadequate a “voluntary” integration plan, emphatically insisting that *Brown* did not simply prohibit discrimination: school boards were “clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.”<sup>65</sup> In 1971, in *Swann v. Charlotte-Mecklenburg Board of Education*, the Court unanimously reiterated its conclusion that the Constitution required the actual dismantling of inequality, through race-conscious means if necessary, and explicitly repudiated the school board’s contention that the Constitution permitted only “color-blind” measures.<sup>66</sup> Then, in a related case, the Court unanimously rejected North Carolina’s legislative effort to craft a “color blind” limit on the state use of race to remedy segregation:

[T]he statute exploits an apparently neutral form to control school assignment plans by directing that they be “color blind”; that requirement, against the background of segregation, would render illusory the promise of *Brown v. Board of Education*. Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems.<sup>67</sup>

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<sup>64</sup> 372 F.2d at 877 (emphasis added). Cf. *Wanner v. Sch. Bd.*, 357 F.2d 452 (4th Cir. 1966) (Constitution allows school boards to use race to end racial discrimination); *Offermann v. Nitkowski*, 248 F. Supp. 129, 131 (W.D.N.Y. 1965) (“[T]he Fourteenth Amendment, while prohibiting any form of invidious discrimination, does not bar cognizance of race in a proper effort to eliminate racial imbalance in a school system.”); *Taylor v. Board of Education of City School Dist. of the City of New Rochelle*, 191 F. Supp. 181, 196 (S.D.N.Y. 1961) (“The Constitution is not this colorblind.”). See also J. Skelly Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation*, 40 N.Y.U. L. REV. 285, 298 (1965) (“Voluntary action by school authorities seeking to reduce racial imbalance is easily supported once the ‘the Constitution is color-blind’ argument is analyzed and answered. In fact, it is difficult to understand how a court could actually hold that a state may not act to relieve the inequality caused by de facto segregation; yet several courts have done precisely that.”); Robert L. Carter, *De Facto School Segregation: An Examination of the Legal and Constitutional Questions Presented*, 16 W. RES. L. REV. 502, 524 (1965) (race-conscious legislation that protects racial minorities does not offend equal protection).

<sup>65</sup> 391 U.S. 430, 437-38 (1968).

<sup>66</sup> 402 U.S. 1, 19 (1971).

<sup>67</sup> *North Carolina Board of Education v. Swann*, 402 U.S. 43, 45-46 (1971) (citation omitted). See also *McDaniel v. Barresi*, 402 U.S. 39 (1971) (unanimously holding that a school board could properly take race into account in attempting to achieve racial balance).

<sup>67</sup> *Swann, supra*, 402 U.S. at 46.

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

By the end of the 1960s, even as colorblindness had become the favored argument of those attempting to protect segregation, it had lost much of its attractiveness to those striving for racial progress. Partly, the colorblindness argument pushed by Marshall in *Sipuel* and after had proved unnecessary to the defeat of explicit Jim Crow laws: the judiciary had largely accomplished this instead under an ersatz antistatutory rationale, albeit more slowly than if it had simply declared impermissible all racial classifications in 1954. Meanwhile, by the mid-1960s Congress had taken up the challenge of racial subordination, culminating in a series of civil rights acts addressing conduct across a range of public spheres, from the housing market to the workplace to education. More importantly, racial activists increasingly perceived a need for race-conscious means to respond effectively to racial inequality, and also saw the reactionary potential of colorblindness. By the mid-1960s, proponents of racial justice had largely dropped objections to racial classification per se, and instead had begun to focus on the core fact of racial hierarchy.

### III. FROM RACE TO ETHNICITY

Myrdal's thesis that individual prejudice formed the heart of American race relations came under sustained attack in the 1960s. The pronounced hostilities and profound inequalities that burdened blacks and other minorities hardly seemed explicable as merely a matter of prejudice, and changing attitudes seemed at best only a partial solution to subordination. Race-conscious efforts to undue the legacy of centuries of racial hierarchy seemed an obvious necessity, and in the mid- to late 1960s, the nation's political leadership began to pass numerous laws intended to end racial domination, ranging from antidiscrimination statutes to social welfare legislation. In retrospect, however, the window for fundamental change opened just slightly before blowing shut again in the face of a quickly gathering backlash. That backlash took multiple forms, including angry opposition to affirmative action and busing, and involved not just persons with commitments to old style supremacist politics, but also those who counted themselves as staunch liberal supporters of civil rights for minorities. Among these neoconservatives—liberal defenders of formal rights who nevertheless broke with the civil rights movement over race-conscious remedies—

Nathan Glazer and Patrick Moynihan proved early leaders. Contemporary colorblindness has its origins in this era, not so much in its brass use by the recalcitrant south, but in the efforts by northern opponents of affirmative action to craft a conception of racial dynamics in the United States that simultaneously embraced the moral necessity of ending de jure discrimination and yet rejected race-conscious remedies.

#### A. *Structural Racism*

In 1967, the same year that the Court handed down *Loving*, the term “institutional racism” entered the national vocabulary. In *Black Power*, Stokely Carmichael and Charles Hamilton took square aim at the notion that racism in the United States reduced solely to the action of individuals. Instead, they insisted, racism also formed part of the daily operation of “established and respected forces in society,”<sup>68</sup> providing a tragic example to drive their meaning home:

When white terrorists bomb a black church and kill five black children, that is an act of *individual racism*, widely deplored by most segments of the society. But when in that same city—Birmingham, Alabama—five hundred black babies die each year because of the lack of proper food, shelter and medical facilities, and thousands more are destroyed and maimed physically, emotionally and intellectually because of conditions of poverty and discrimination in the black community, that is a function of *institutional racism*.<sup>69</sup>

One did not need to read *Black Power*, however, to hear echoes of the emerging structural view of race. Indeed, in 1968 one could scarcely avoid that developing perspective, for in that year the National Advisory Commission on Civil Disorders published what became popularly known as the Kerner Report.<sup>70</sup> Seeking to explain the devastating riots marching across the country, from Los Angeles in 1965, to Chicago in 1966, to Newark in 1967, the report famously warned that the United States was “moving toward two societies, one black, one white—separate and unequal.”<sup>71</sup> Buttressing this claim, the report detailed the punishing reality confronting African Americans, compiling nearly five hundred pages of evidence on the extreme material hardships of overt discrimination, segregated and inferior schooling,

<sup>68</sup> STOKELY CARMICHAEL & CHARLES HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 4 (1967).

<sup>69</sup> *Id.* (emphasis added).

<sup>70</sup> UNITED STATES KERNER COMMISSION, *REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS* 1 (Bantam ed. 1968) [hereinafter *KERNER COMMISSION*].

<sup>71</sup> *Id.*

inadequate housing, lack of access to healthcare, systematic police violence, and labor market exclusion.<sup>72</sup> More than simply painting the tenebrous circumstances confronting blacks, however, the report identified its root cause not in blacks themselves but in American racial dynamics. Focusing particularly on the ghetto, the report stated on its first page that “[s]egregation and poverty have created in the racial ghetto a destructive environment totally unknown to most white Americans . . . . White institutions created it, white institutions maintain it, and white society condones it.”<sup>73</sup> Regarding the riots, the Kerner Report concluded that they reflected deep anger and frustration with the grinding injustices imposed on minorities in America, laying the blame for racial unrest squarely at the feet of white society: “white racism,” the report insisted, “is essentially responsible for the explosive mixture which has been accumulating in our cities since the end of World War II.”<sup>74</sup>

The commission that issued this report was no radical group: it was sufficiently “moderate” that it included not a single African-American social scientist.<sup>75</sup> Nor did the report disappear into obscurity. Instead, it rose to first place on the *New York Times* paperback best seller list, selling some two million copies.<sup>76</sup> It would be overstatement to claim that the nation’s elites, let alone the country as a whole, fully embraced collective responsibility for white racism, but a dramatic shift in racial understandings was nonetheless developing. The liberal conception of racism, tied to a vocabulary of “prejudice,” “race relations,” and “discrimination,” began to give way in the 1960s to a more structural understanding marked by such words as “subordination,” “white supremacy,” and “institutional racism.” This shift tracked the emergence of a new literature on race, some radical, some scholarly, and some mainstream, but all of it focused on the pervasive and calamitous nature of racial oppression in the United States.<sup>77</sup> Arguably, one could also measure this shift in terms of legal doctrine: cases like *Green* and *Swann* in the educational context, *Griggs* in the employment arena, and

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<sup>72</sup> See *id.* at 2-13 (summarizing the Commission’s findings).

<sup>73</sup> *Id.* at 1.

<sup>74</sup> *Id.* at 4.

<sup>75</sup> KERNER COMMISSION, at v, vi.

<sup>76</sup> STEINBERG, *supra* note \*, at 77.

<sup>77</sup> For a sampling of the racial literature from this era focused on racial domination, see CARMICHAEL AND HAMILTON, *supra*; FRANTZ FANON, *THE WRETCHED OF THE EARTH* (1966); MALCOLM X & ALEX HALEY, *THE AUTOBIOGRAPHY OF MALCOLM X* (1964); ROBERT BLAUNER, *RACIAL OPPRESSION IN AMERICA* (1972); WILLIAM GRIER AND PRICE COBB, *BLACK RAGE* (1968); WINTHROP JORDAN, *WHITE OVER BLACK* (1968); KERNER COMMISSION, *supra*; MARTIN LUTHER KING, JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY* (1968).

the 1965 Voting Rights Act, seemed to stand for the proposition that results mattered.<sup>78</sup> They also signaled a realization that to achieve equality demanded going beyond proscribing openly discriminatory practices and required in addition race-conscious efforts capable of transforming embedded practices and entrenched oppressions.

### B. *Race as Ethnicity*

In the face of the ascendant structural critique, liberal race theory did not collapse but evolved in a portentous fashion. Beginning in the early 1960s, liberal race theory was reworked into a theory of race as ethnic differences that could compete with, and indeed has largely come to supplant, the focus on structural racism. Among the pioneers of this racial retooling the sociologists Nathan Glazer and Patrick Moynihan stand out. In 1963, they published a history of New York City, *Beyond the Melting Pot: The Negroes, Puerto Ricans, Jews, Italians, and Irish of New York City*, that effectively laid the groundwork for contemporary reactionary conceptions of race relations in the United States.<sup>79</sup>

“Ethnicity” is now firmly ensconced in the American social vocabulary, but like liberal race theory and “racism” its origins lie in the early twentieth century.<sup>80</sup> In the hands of cultural anthropologists like Franz Boas, liberal race theory sought to break the connection between race and identity, arguing that human differences reflected culture, not biology. In making this argument, anthropologists had in mind a broad definition of culture, something akin to social environment. More or less simultaneously, however, others searched for a nomenclature by which to counteract the increasingly virulent hierarchies among whites while still preserving the notion that groups differed in important and normatively positive ways. Ethnicity offered a helpful rhetoric, particularly to members of the nascent Zionist movement, who sought at once to preserve a notion of a distinct culture and at the same time to repudiate claims of innate Jewish racial inferiority.<sup>81</sup> Even as ethnicity offered an alternative to the

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<sup>78</sup> *Green v. County Sch. Bd.*, 373 U.S. 683 (1963); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

<sup>79</sup> NATHAN GLAZER & DANIEL PATRICK MOYNIHAN, *BEYOND THE MELTING POT: THE NEGROES, PUERTO RICANS, JEWS, ITALIANS, AND IRISH OF NEW YORK CITY* 49-50 (1963).

<sup>80</sup> OMI & WINANT, *supra* note \*, at 14.

<sup>81</sup> David Roediger describes the effort to fashion ideas that explained Jewish solidarity but avoided racial terms linked to ideas of innate Jewish inferiority:

Anti-Semitic pogroms internationally, Klan organization in the United States, and assimilative pressures on immigrants seemed to threaten Jewish survival. In such crosscurrents, claiming white racial status

vocabulary of race, though, it remained closely tied to the complex of racial ideas. First, ethnicity talked of cultures closely associated with and indeed handed down generation by generation within distinct groups. Because ethnic culture depended on familial and kinship ties, ethnicity was not primarily a matter of volition but, like race, of descent.<sup>82</sup> Second, ethnicity addressed hierarchy among whites, but not across the color line. As Nancy Foner and George Fredrickson remark, “Very much aware of the American color line, Jewish thinkers like the philosopher Horace Kallen and the educator Isaac Berkson strove to legitimize difference without running the risk of being put on the wrong side of the great racial divide.”<sup>83</sup> In its initial elaboration, to be an “ethnic” was to be white.<sup>84</sup>

Ethnicity depicted group cultures as static and relatively immune from broader social pressures: folkways came down more or less intact across generations. But it also drew on a dynamic and somewhat contradictory conception of group culture, one focused on stories of immigrant incorporation into the American corpus. During the 1920s, University of Chicago sociologist Robert Park used the concept of cultural difference to promote a version of liberal race theory that stressed the gradual assimilation of diverse groups under the rubric of a “race relations cycle.”<sup>85</sup> Under this view, immigrant groups followed a similar trajectory from exclusion, clannishness, and poverty, to eventual full inclusion, assimilation, and material

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was axiomatic for Zionist intellectuals, but such a claim was insufficient to define what made Jewishness distinctive and viable. New terms and new meanings for old terms seem required, and Kallen produced them with uncommon fecundity: ethnic group, ethnic faction, and ethnic type, for example.

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

<sup>82</sup> Stephen Cornell & Douglas Hartmann, *Conceptual Confusions and Divides: Race, Ethnicity, and the Study of Immigration*, in *NOT JUST BLACK AND WHITE: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON IMMIGRATION, RACE, AND ETHNICITY IN THE UNITED STATES* 23, 28 (Nancy Foner & George Fredrickson eds., 2004).

<sup>83</sup> Nancy Foner & George M. Fredrickson, *Immigration, Race, and Ethnicity in the United States: Social Constructions and Social Relations in Historical and Contemporary Perspective*, in *NOT JUST BLACK AND WHITE: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON IMMIGRATION, RACE, AND ETHNICITY IN THE UNITED STATES* 1, 4 (Nancy Foner & George Fredrickson eds., 2004).

<sup>84</sup> Roediger, *supra* note \*, at 22-23. See also Werner Sollors, *A Critique of Pure Pluralism*, in *RECONSTRUCTING AMERICAN LITERARY HISTORY* (Sacvan Bercovitch ed., 1986) (critiquing Horace Kallen for excluding blacks from his pluralist vision).

<sup>85</sup> STEPHEN STEINBERG, *THE ETHNIC MYTH: RACE, ETHNICITY, AND CLASS IN AMERICA* 47-48 (2001 (1981)).

success.<sup>86</sup> The influence of Park's theories reached well beyond the sociology of group relations, strongly informing popular theories of cultural pluralism and group change. Not until World War II had fully revealed the horrors of supremacist reasoning as applied among whites did an ethnic vocabulary that sharply distinguished between race as biology and ethnicity as culture gain widespread acceptance in the United States.<sup>87</sup> By the 1950s, however, notions of merely ethnic rather than racial divisions among whites had helped consolidate that group into a monolithic, racially undifferentiated people ostensibly composed of ethnic sub-groups sharing similar histories of struggle and success on America's shores.

Glazer and Moynihan innovated in *Beyond the Melting Pot* by pushing ethnicity across the color line. Ethnicity would explain the group histories and positions of Jews, Italians, and the Irish, but also blacks and Puerto Ricans. This development had the potential to extend to racial minorities the presumption that they possessed valuable cultural traditions. But in the actual case, Glazer and Moynihan used ethnicity not to celebrate black and Latino culture but to locate in those cultures the ultimate source of these groups' social failure. Consider their explanation for why minority children (unlike earlier white immigrants students) failed to learn in New York's schools:

There is little question where the major part of the answer must be found: in the home and family and community . . . It is there that the heritage of two hundred years of slavery and a hundred years of discrimination is concentrated; and it is there that we find the serious obstacles to the ability to make use of a free educational system to advance into higher occupations and to eliminate the massive problems that afflict colored Americans and the city.<sup>88</sup>

Structural impediments did not figure in their analysis. Rather, they directed attention to "the home and family and community" for the root cause of the inferior educational, social, and material position of racial minorities. According to Glazer and Moynihan, blacks and Puerto Ricans lacked valuable folkways and artistic traditions: "The Negro is only an American, and nothing else. He has no values and culture to protect."<sup>89</sup> Puerto Rican culture "was sadly defective: It was weak in folk arts, unsure of its cultural traditions, and without a powerful

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<sup>86</sup> *Id.*

<sup>87</sup> ROEDIGER, *supra* note \*, at 25. See also Werner Sollors, *Foreword: Theories of American Ethnicity*, in THEORIES OF ETHNICITY: A CLASSICAL READER xxix (Werner Sollors ed., 1996) ("[ethnicity] was intended to substitute for 'race' at a time that the older word had become deeply compromised by 'racism.'").

<sup>88</sup> GLAZER & MOYNIHAN, *BEYOND THE MELTING POT*, 49-50. For an early and trenchant critique of *Beyond the Melting Pot*, see ROBERT BLAUNER, *RACIAL OPPRESSION IN AMERICA* (1972), especially Chapter Four.

<sup>89</sup> Quoted in STEINBERG, *supra* note \*, at 8.

faith.”<sup>90</sup> Instead, both black and Puerto Rican cultures were exclusively produced by subordination and mistreatment, and in turn incapacitated those communities, unfitting them to pursue the path of assimilation blazed by earlier ethnic groups. As applied to blacks and Puerto Ricans, ethnicity erased the enormous differences in historical experience between white immigrants and racial minorities, and gave new legitimacy to the belief that not structural disadvantage but inability, now cultural rather than innate, explained the social and material marginalization of racial minorities in the United States.

The substantive impact of reconceptualizing race as ethnicity came immediately in the rising debates over affirmative action. Writing separately, Glazer and Moynihan used an ethnic conception of black identity to attack preferential treatment. In 1964, Glazer sounded the alarm about race-conscious remedies in a leading liberal journal, *Commentary*.<sup>91</sup> His reliance on ethnicity theory comes through in his implicit comparison of blacks with white ethnic groups and in his disaggregation of whites into “a series of communities.”<sup>92</sup> But ethnicity operated most powerfully in Glazer’s depiction of affirmative action not as a needed national response to racial subordination, but instead as the sort of group rent-seeking one would expect in the context of ethnic group competition. “The Negroes press these new demands because they see that the abstract color-blind policies do not lead rapidly enough to the entry of large numbers of Negroes into good jobs, good neighborhoods, good schools. It is, in other words, a group interest they wish to further.”<sup>93</sup> Extending Glazer’s arguments in a 1968 *Atlantic Monthly* article entitled “The New Racialism,” Moynihan repeated the claim that blacks constituted only another ethnic group, and that interest group politics explained support for affirmative action.<sup>94</sup> By dropping structural inequality and entrenched racial hierarchy from the ethnic account, Glazer and Moynihan stripped the clarity of history from race-conscious remedies. Such demands no longer seemed to call on the nation to repair a gross injustice; instead, they sounded like special pleading by yet another pressure group, effectively shifting the moral register of affirmative action from an impassioned call to political puling. In addition, Glazer and Moynihan depicted affirmative action as a dangerous

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<sup>90</sup> GLAZER & MOYNIHAN, *MELTING POT*, *supra* note \*, at 88-89.

<sup>91</sup> Nathan Glazer, *Negroes and Jews: The New Challenge to Pluralism*, *COMMENTARY*, Dec. 1964, at 29 [hereinafter Glazer, *New Challenge*].

<sup>92</sup> *Id.* at 33.

<sup>93</sup> *Id.* at 32.

<sup>94</sup> Daniel Moynihan, *The New Racialism*, *ATLANTIC MONTHLY*, Aug. 1968, at 35, 37.

deviation from a supposed national commitment to a rule of colorblindness. Glazer explicitly placed the “new demands” in contrast to “color-blind policies”; Moynihan bemoaned a perceived departure from supposed federal efforts pioneered during the New Deal and after “forbidding acknowledgment even of the existence of [racial] categories.”<sup>95</sup> Glazer and Moynihan simultaneously deployed ethnicity as well as an incipient understanding of antidiscrimination law as more properly an anticlassification regime. These two ideas were not logically connected to each other at this point, but from the beginning they appeared together in ethnicity-based critiques of structural reform.

#### IV. EARLY LEGAL ARGUMENTS FOR COLORBLINDNESS

The civil rights movement reached its apogee in the mid- to late 1960s, but barely survived that decade. Elected to the presidency in 1968, Richard Nixon did little to implement the myriad structural reforms advocated by the Kerner Report, instead railing against “forced integration.” Nixon’s campaigns depended upon, and energized, opposition to civil rights reforms; his reelection in 1972 by a crushing margin signaled the dramatic swing in the national mood against a continued effort to deal with America’s racial legacy.<sup>96</sup> Opposition to affirmative action had been percolating since the early 1960s, including within law school hallways. The mid 1970s, however, would see sustained efforts to craft arguments capable of supporting a legal ban on race-conscious remedies.

##### A. *Early Arguments against Affirmative Action in the Legal Academy*

In the 1960s and early 1970s, a few law review articles began inching toward reactionary colorblindness, though none clearly and unequivocally concluded that the Fourteenth Amendment prohibited race-conscious remedies. Among the most prominent were pieces by Yale Law School professor Boris Bittker, Stanford Law professor John Kaplan, and law professor Lino Graglia from the University of Texas, Austin. In a famous 1962 article entitled “The Case of the Checker-Board Ordinance: An Experiment in Race Relations,” Bittker framed the debate over the preferential use of race in terms of a fractured opinion by

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<sup>95</sup> *Id.* at 36-37.

<sup>96</sup> See THOMAS BRYNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 96-97 (1991) (describing how Nixon capitalized on white opposition to the civil rights revolution of the 1960s).

three judges in a hypothetical case involving a local ordinance that imposed racial restrictions on the transfer of property in order to produce an integrated residential “checker-board.”<sup>97</sup> One judge voted to strike the ordinance on the ground that *Brown* and other cases flatly prohibited the use of racial classifications, while another sought to uphold the restrictions because they amounted to general social legislation.<sup>98</sup> Bittker perhaps most nearly reproduced his own views in those of a third judge who sought to hew a middle course, not adopting a colorblind approach wholesale, but nevertheless trending in that direction because of the dangers associated with treating racial discrimination as ordinary legislation.<sup>99</sup> Presaging arguments that would come to the forefront in the 1970s, Bittker’s third judge identified potential harms as including the threat of paternalistic reasoning, the difficulty of distinguishing benign from malignant uses of race, and problems of racial classification.<sup>100</sup>

In “Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment,” another article that would receive wide play, including citation in two Supreme Court opinions, John Kaplan in 1966 acknowledged that the moral claims of blacks for special treatment rendered overbroad any simple call for a single principle of colorblindness.<sup>101</sup> But he also argued that the negative practical ramifications of affirmative action—which he supposed included exacerbating racial divisions, dampening black motivation, and involving the state in racial classifications—militated against such efforts.<sup>102</sup> The ethnicity/cultural pathology literature strongly influenced Kaplan’s analysis. He wrote, for instance, that “the damaged Negro family structure [is] one of the most serious and fundamental obstacles to equality for the Negro”; that “many of us still believe . . . that the damage done to many Negro children occurs before they enter school”; that “[o]ne of the words most often used to describe the condition to which our history has reduced many Negroes is ‘apathy’”; and also, that “insofar as we are willing to admit that the Negro has a culture, and that it has something to contribute to American life, we must recognize that the

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<sup>97</sup> Boris Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387, at 1387-88 (1962).

<sup>98</sup> *Id.* at 1389-92, 1396-1401, 1403-04.

<sup>99</sup> *Id.* at 1423.

<sup>100</sup> *Id.* at 1419-22.

<sup>101</sup> John Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U. L. REV. 363, 364-367, 410 (1966), cited in *Bakke*, 438 U.S. at 287 n.25 (Powell) and *UJO*, 430 U.S. at 173 (Brennan).

<sup>102</sup> Kaplan, *supra*, at 375, 378-79, 383-84.

more efforts we undertake to compel integration, the more difficult it will be for that culture to survive.”<sup>103</sup>

Among legal academicians, one of the most strident opponents of affirmative action remains Lino Graglia, who in 1970 began his campaign against, as the title of his essay put it, “Special Admission of the ‘Culturally Deprived’ to Law School.”<sup>104</sup> In this initial foray, Graglia criticized affirmative action on policy rather than legal grounds, attacking as well the liberal law school milieu which acquiesced to preferential admissions. He worried at length about “the admission of unqualified or unprepared students,” caviled about the tendency of affirmative action to “reinforce stereotypes of incompetence,” complained of the “general debasement of academic standards” occurring in law schools, and protested “intimidation and extortion” by proponents of increased minority representation in law schools.<sup>105</sup> He also embraced race blindness as a general moral principle: “True and complete elimination of racial discrimination is as close as I had hoped to see the approach of the millennium. Societally approved racial discrimination, even as a temporary expedient to rectify past racial discrimination, dilutes the purity of that goal.”<sup>106</sup> Nevertheless, Graglia did not address the legal parameters of affirmative action.<sup>107</sup> Despite the early starts toward colorblindness recorded in the articles by Bittker, Kaplan, and Graglia, none of these authors offered a full endorsement of, let alone a compelling justification for, constitutional colorblindness.

### B. *Alexander Bickel*

In 1974, the Court for the first time confronted a higher education affirmative action case in *DeFunis v. Odegaard*, but voted to avoid the constitutional issues as moot.<sup>108</sup>

Alexander Bickel, a preeminent Supreme Court scholar on the Yale Law School faculty and a public intellectual who commented frequently on civil rights in the pages of *The New*

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<sup>103</sup> *Id.* at 373, 402, 386, 398.

<sup>104</sup> Lino Graglia, *Special Admission of the “Culturally Deprived” to Law School*, 119 U. PA. L. REV. 351 (1970).

<sup>105</sup> *Id.*, at 353, 355-56, 360, 361.

<sup>106</sup> *Id.*, at 352.

<sup>107</sup> Nor did Graglia fully equate affirmative action with subordination. *Id.*, at 357. He would be less restrained in 1976, when he savaged the constitutional law governing school desegregation remedies, in particular court-ordered busing, as “unprincipled and unscrupulous,” “heedless of both fact and reason,” and “ultimately [lacking] a moral foundation.” LINO GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS* 16 (1976).

<sup>108</sup> 416 U.S. 312 (1974).

*Republic*, co-authored an amicus brief in *DeFunis* arguing against affirmative action.<sup>109</sup> The brief itself mashed together various rationales, railing against “quotas,” extensively excerpting a black scholar’s recently published rant about being stigmatized by race-based admissions, and characterizing decisions from *Slaughter House* to *Loving* as requiring a showing of compelling interest in affirmative action cases.<sup>110</sup> This brief most likely had little influence beyond the case, as the arguments were underdeveloped and in any event it’s unlikely it had a wide audience. Nevertheless, Bickel extracted a couple of key paragraphs from his amicus, recombining them in an essay ultimately published posthumously in 1975, the year after his death, in *The Morality of Consent*.<sup>111</sup> These paragraphs represent, so far as I know, the first prominent endorsement of constitutional colorblindness in the legal academy. Though largely resting on elisions and absent arguments, Bickel’s hollow, sonorous words have become a staple among those extolling an anticlassification Fourteenth Amendment.<sup>112</sup> His key argument follows:

The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution.<sup>113</sup>

The normative power of this paragraph lay in its resounding opposition to racism—the condemnatory crescendo describing “discrimination” as “illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.” But as a critique of race conscious remedies, it traded on the strength of its anti-racist pretensions to elide the missing argument that affirmative action somehow constituted racism. This slippage stood at the rhetorical heart

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<sup>109</sup> Brief of the Anti-Defamation League of B’nai B’rith Amicus Curiae, *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (hereafter *ADL DeFunis Brief*).

<sup>110</sup> *Id.* at 17, 25 (quoting from THOMAS SOWELL, *BLACK EDUCATION, MYTHS AND TRAGEDIES* 292 (1972)), and 28.

<sup>111</sup> ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 132-33 (1975) (quoting without attribution from *ADL DeFunis Brief* at 16-17, and 31).

<sup>112</sup> See, e.g., *Regents of University of California v. Bakke*, 438 U.S. 265, 294 n.35 (1978) (Powell); *City of Richmond v. Croson*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring); *Fullilove v. Klutznick*, 448 U.S. 448, 547 n.21 (1980) (Stevens, J., dissenting); *Adarand Constructors, Inc., v. Peña*, 515 U.S. 200, 241 n.1 (1995) (Thomas, J., concurring).

<sup>113</sup> BICKEL, at 133.

of Bickel's prose, for the crux of the debate centered exactly on the relationship between race-conscious programs and malignant oppression: did affirmative action respond to or instead itself constitute invidious treatment? Bickel simply implied, without explanation, that the key term "discrimination" referred to the same racial dynamic when used to describe the social practices at issue in segregation and affirmative action.

Needless to say, declaring the opposition to discrimination a "fundamental principle" in the second sentence added no clarity to why constitutional hostility toward racial discrimination should be understood to encompass affirmative action. In turn, asserting that the matter reduced to "whose ox is gored" amounted only to a restatement of Herbert Wechsler's view that the Court lacked a principled way to distinguish integration from segregation, even as it provided no response to Charles Black's effective refutation of that worn charge.<sup>114</sup> Just as Wechsler created an equivalence between the harm inflicted on blacks by segregation and the unpleasantness purportedly suffered by whites forced to associate with minorities, Bickel implied a moral and historical equivalence of experience between victims of racial oppression and those not directly benefited by affirmative action, despite the patently asymmetrical reality of racial hierarchy in the United States that Black insisted all must recognize.<sup>115</sup> Postulating that proponents of equality now "demanded" that they be made "more equal than others" then suddenly turned the table, alleging that if a hierarchy existed, the beneficiaries of affirmative action now stood at the apex. But Bickel failed to defend this pretension too—no surprise, since a serious case that racial minorities comprised the truly advantaged would seem difficult to mount. Finally, insinuating that those supporting affirmative action "claim support for inequality" took Bickel back to where he began, again eliding the difference between segregation and the reparative use of race-conscious remedies (ostensibly the "inequality" now hypocritically sought by those supporting affirmative action).

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<sup>114</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Charles Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

<sup>115</sup> Bickel in 1962 had moved toward adopting Black's retort to Wechsler. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 57 (2d ed. 1986 (1962)). But with regard to "benevolent quotas," he had concluded that "it cannot be denied that in its objective operation, a benevolent quota is as invidious as straight-out segregation." *Id.* at 61. At least in 1962, however, Bickel had refused to embrace an anticlassification reading of the Fourteenth Amendment, describing such a rule as "rigidly doctrinaire." *Id.* at 64. Instead, Bickel concluded that "the problem of the association of the black and white races will not always yield to principled resolution, that it must proceed through phases of compromise and expedient muddling-through." *Id.*, at 65. Apparently, the time for muddling through had expired by 1974.

Bickel inserted this turgid passage in the context of a chapter otherwise devoted to challenges to university intellectuals during the tumultuous seventies, including an extended lament on the travails engendered by the “dilution in the standards in the university as a whole” and “loose talk about the obsolescence and rottenness of our society and all our institutions.”<sup>116</sup> On the constitutionality of preferential treatment, *Morality of Consent* offered no elaboration on the confused arguments initially marshaled in the amicus brief, instead contenting itself with retooling borrowed paragraphs within a tired jeremiad. It did not attempt anew, let alone provide, a developed argument for why preferential treatment and invidious discrimination should be punished by the same constitutional hostility. But for all of that, Bickel had crafted and disseminated a rhetorically powerful critique of race-conscious law.

### C. Richard Posner

If Bickel failed to elaborate a justification for reactionary colorblindness, Richard Posner, then a young professor at the University of Chicago, broke new ground in 1974 by crafting a complete defense for colorblindness, one based explicitly on a theory of race and racism. Posner had just published the first edition of his law and economics treatise—a book one of his earliest critics described as a picaresque novel wherein “[t]he world presents itself as a series of problems; to each problem [Posner applies an economic analysis] as a form of solution; and the problem having been dispatched, our hero passes on to the next adventure.”<sup>117</sup> In 1974, that next adventure was race-conscious remediation. In a *Supreme Court Review* article entitled “The *DeFunis* Case and the Constitutionality of Preferential Treatment of Racial Minorities,” Posner argued that affirmative action should be unconstitutional.<sup>118</sup> This article marks perhaps the first effort in the legal academy to fully develop a racial understanding under which affirmative action and invidious discrimination appeared equally troubling. In effect, Posner attempted a redescription of racial dynamics that would support reactionary colorblindness. He did so by combining rational choice and ethnicity theory.

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<sup>116</sup> BICKEL, *supra* note \*, at 132, 137.

<sup>117</sup> Arthur Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974) (reviewing RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (1973)).

<sup>118</sup> Richard Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1 (1974).

Posner began by asserting that “most discrimination in today’s America can be explained simply by the cost of information.”<sup>119</sup> Certain characteristics associated with race were expensive to measure directly, Posner suggested, but race was easy to observe and act upon, and this cost-effective human sorting, he claimed, explained “most” racial discrimination. This account of statistical or rational discrimination was standard rational choice fare. But in Posner’s hands this rational choice model relied on an agglutination of liberal and ethnic understandings of race. Race in Posner’s conception, as in the mid-century liberal estimation, amounted to a superficial characteristic: “[B]lack people (and Chicanos, Filipinos, etc.) . . . differ only in the most superficial physical characteristics from whites.”<sup>120</sup> Incorporating an ethnicity approach, though, Posner also understood racial groups to be strongly linked to certain characteristics—not as a matter of biology, but as function of culture. Consider Posner’s speculation about “a particular racial or ethnic identity [that] is correlated with characteristics that are widely disliked.” He offered the following to flesh out his thought experiment: “A substantial proportion of the members of this group may be loud, or poor, or hostile, or irresponsible, or poorly educated, or dangerously irascible, or ill-mannered, or have different tastes, values, and work habits from our own, or speak an unintelligible patois.”<sup>121</sup> Might this group be blacks? Posner coyly did not say—but he did distinguish their culture from “our own,” and added to the above sentence a helpful footnote on “black versus white educational achievement.”<sup>122</sup> Such group differences, in turn, provided the motivation for most racial discrimination. To clarify, he volunteered the following: “This is a type of economically efficient conduct similar to a consumer’s reluctance to try a new brand.”<sup>123</sup> So there’s Posner’s theory of racial subordination in 1974 America: whites refused to associate with African Americans in the same way that the average consumer resisted changing from Tide to Cheer—or, if one accepts Posner’s sense that qualitative differences in culture and behavior distinguished racial groups on average, from a Mercedes to a Kia.<sup>124</sup>

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<sup>119</sup> *Id.*, at 9.

<sup>120</sup> *Id.* (original parentheses).

<sup>121</sup> *Id.* at 9-10.

<sup>122</sup> *Id.* at 10.

<sup>123</sup> *Id.*

<sup>124</sup> Posner had advanced this theory of statistical discrimination the year before in his text on law and economics. See POSNER, AN ECONOMIC ANALYSIS OF LAW (1973). For a critique of rational choice theories of discrimination, see Ian Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1761-1769 (2000). See also JODY DAVID ARMOR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA (1997).

Reframing racism from a dynamic rooted in white dominance to one based on individual efforts at efficient sorting formed no incidental point, but provided the key to Posner's defense of colorblindness: this redescription allowed him to equate affirmative action of the sort practiced in *DeFunis* with supremacist segregation. Posner described the preferential admission of minorities as a form of administrative convenience: in the context of admissions, "[r]ace is simply a proxy for a set of other attributes—relevant to the educational process—with which race, itself irrelevant to the process, happens to be correlated."<sup>125</sup> Pursuant to this understanding, affirmative action that favored minorities differed not at all from the hostile discrimination that excluded them: both were "rooted in the same habit of mind—that of using race or ethnic origin to establish a presumption, in the case of a racially preferential admissions program a conclusive one, that the individual possesses some other attribute as well."<sup>126</sup> Accentuating the link between preferential and invidious discrimination, Posner argued that "[t]he characteristics that university admissions officers associate with 'black' . . . are the same characteristics that the white bigot ascribes to every black, although he uses a different terminology (*e.g.* 'lazy' rather than 'unmotivated.')."<sup>127</sup> Apparently Posner thought that university officials sought to enroll African Americans because they were "unmotivated"—but don't be distracted by this claim. "My point is," Posner insisted, "the use of a racial characteristic to establish a presumption that the individual also possesses other, and socially relevant, characteristics exemplifies, encourages, and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America."<sup>128</sup> In referring to "prejudice and bigotry in modern America," Posner briefly abandoned the line that most harmful discrimination is motivated by the economics of information gathering, instead associating affirmative action with the bigotry that he otherwise insisted largely did not exist. But set this aside too, for what matters most here is his claim that affirmative action and racial discrimination reduced to the same basic dynamic: the use of race as a synecdoche for something else. In another iteration of this claim, Posner asked rhetorically, "[I]s not the law school's action [in favoring an individual because he is black] fundamentally similar to

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<sup>125</sup> Posner, *supra* note \*, at 9.

<sup>126</sup> *Id.* at 11.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 12.

the decision of a country club to deny this individual membership on the sole ground that it does not admit blacks?”<sup>129</sup>

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

Posner ignored the first problem, but attempted to address the second. He argued that race as a system of efficient sorting should be constitutionally banned because “[t]o permit discrimination to be justified on efficiency grounds . . . [would] thwart the purpose of the Equal Protection Clause by allowing much, perhaps most discrimination to continue.”<sup>130</sup> Posner acknowledged, however, that this prohibition would treat race differently from other characteristics used for statistical discrimination: “[It] does not explain why only race and ethnic origin, and not all immutable and involuntary characteristics which are used as proxies for other characteristics, are subject to the principle.”<sup>131</sup> Why, in short, prohibit all discrimination on the basis of race, but not also on the basis of, say, “[a]lienage, nonresidence, height, homosexuality, youth, poverty, and low IQ,” all examples Posner provided of “immutable or involuntary characteristics used as criteria for government regulation[.]”<sup>132</sup> Posner offered two answers: first, courts need some rule, otherwise “it would give judges

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<sup>129</sup> *Id.* at 14.

<sup>130</sup> *Id.* at 22-23. Of course, this seems a bit circular. If, for instance, the purpose of the clause is to prevent subordination, then why not allow “efficient” discrimination? Posner would not allow that this is, in fact, the purpose of the clause—which is my point: at stake here is what the clause means, a question that cannot be answered by reference to what the clause means.

<sup>131</sup> *Id.* at 23.

<sup>132</sup> *Id.*

carte blanche to pick and choose among groups defined in accordance with one of the involuntary characteristics.” Fine, but why *this* rule? Merely asserting that the judges need *some* rule hardly answered that question. So Posner tried again: “Second, the grouping of people by ancestral characteristics is *surely* not the same phenomenon as, say, grouping by sex or age.”<sup>133</sup> He did not, however, offer anything more about what that difference might be. “Surely,” Posner said—the very invocation of the term, in the absence of further evidence or argument, a strong signal that Posner had backed himself into a corner.

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

#### V. NATHAN GLAZER, ETHNICITY AND REACTIONARY COLORBLINDNESS

Richard Posner’s effort to advance a racial theory that would justify a constitutional ban on affirmative action encountered two principal difficulties: it was implausible, and by picturing racism as innocuous it rendered more difficult the case for constitutional suspicion. Writing from outside the legal academy, Nathan Glazer in 1975 offered a critique of antidiscrimination law built on ethnicity theory that more successfully evaded both trip points. First, Glazer’s emphasis on an ethnic conception of race, rather than an ethnic conception filtered through rational choice theory, had greater cultural legitimacy insofar as it drew on nearly six decades of racial discourse and incorporated some aspects of liberal race theory. Second, Glazer offered a racial narrative that interpreted the Fourteenth Amendment to ban affirmative action, not because race served as a cost-effective proxy for other attributes, but

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<sup>133</sup> *Id.*

because it amounted to invidious discrimination against vulnerable minorities—though this time, white ethnic groups.

#### A. *Ethnicity and Antidiscrimination Law*

In 1975, Glazer published *Affirmative Discrimination: Ethnic Inequality and Public Policy*.<sup>134</sup> Taking on case law in employment, education, and housing, Glazer devoted the vast bulk of *Affirmative Discrimination* to attacking the antidiscrimination law that had developed through the early seventies—which is to say, the jurisprudence of remedy, rather than the jurisprudence of retrenchment that was developing even as Glazer wrote.<sup>135</sup> Reserving special ire for cases such as *Green*, *Swann*, and *Griggs*, Glazer spent the preponderance of his book battling legal opinions, his efforts indicating among other things the importance of law in shaping public debates about race and racism. For Glazer, 1964 marked a shining moment when the nation embraced, in the form of the Civil Rights Act, the anticlassification principle: “[t]he Act could only be read as instituting into law Judge Harlan’s famous dissent in *Plessy v. Ferguson*: ‘Our Constitution is color-blind.’”<sup>136</sup> He lamented that the decade after, however, betrayed that principle. “Having placed into law the dissenting opinion in *Plessy v. Ferguson* that our Constitution is color-blind, we entered into a period of color- and group-consciousness with a vengeance.”<sup>137</sup> The now bastardized civil rights laws, Glazer charged, “assumes everyone is guilty of discrimination,” puts employers “under siege,” and saddles citizens with a “new plague of legal proceedings.”<sup>138</sup>

For our purposes, Glazer’s extended peregrinations through legal thickets are less interesting than his effort to promote a countervailing theory of race relations. Glazer implicitly grasped that antidiscrimination law rested on particular conceptions of race and racism—and in *Affirmative Discrimination*, he set out to challenge those understandings. Glazer speculated that “courts rule the way they do” because “facts are assumed . . . *that are*

<sup>134</sup> NATHAN GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* (1975).

<sup>135</sup> On the periodization of these cases, see Freeman, *supra*.

<sup>136</sup> GLAZER, *supra* note \*, at 44.

<sup>137</sup> *Id.* at 31.

<sup>138</sup> *Id.* at 58, 36-37. Glazer now supports affirmative action for African Americans, though not for other racial minorities, who remain, to his mind, ethnic groups which do not suffer structural disadvantage. NATHAN GLAZER, *WE ARE ALL MULTICULTURALISTS NOW* 149 (1998). See also Nathan Glazer, *The Future of Race in the United States*, in *RACE IN 21<sup>ST</sup> CENTURY AMERICA* 73 (Curtis Stokes et al. eds., 2001).

*not true*, but serve as the basis to guide judicial decisions.”<sup>139</sup> Glazer then catalogued what he saw as the courts’ false assumptions: that minorities continued to face race-based impediments in the work place, that residential segregation persisted because of racial antipathy, and that racism helped explain resistance to racial remediation.<sup>140</sup> Rather than simply criticizing the estimation of race and racial discrimination relied on by the courts, however, Glazer offered ethnicity as another way to view racial dynamics. *Affirmative Discrimination* amounted to an extended complaint that U.S. race law did not enact ethnicity theory. As in his 1963 volume with Patrick Moynihan, Glazer pushed the argument that, whatever the troubled past of overt racial hierarchy, contemporary race relations could best be understood as the competition between similarly situated ethnic groups comprised of individuals bound together by shared cultures.

Writing in 1975 and so in the context of extraordinary white hostility to the reforms of the civil rights movement, Glazer faced the challenge of making the case that ethnic competition rather than racial animosity accurately described American group relations. Glazer acknowledged a high degree of tension between whites and blacks, conceding that “[u]ndoubtedly this arises in large part, out of general racist sentiments.”<sup>141</sup> But what Glazer gave with this single sentence, he took away over the course of the book. Glazer insisted that such hostility more fundamentally reflected not racist sentiments but disparate group interests, for example “the conflict over jobs.”<sup>142</sup> White ethnics, Glazer explained, predominated in unions, and resented the challenges posed by “affirmative action and quotas for blacks and other groups.”<sup>143</sup> “It is understandable,” he continued, “that there should be this kind of pragmatic, interest-based conflict.”<sup>144</sup> To make sense as a refutation of the argument that racial animosity fueled opposition to affirmative action, Glazer’s claim depended on the separation of self-interest and racism. Glazer argued, in effect, that if self-interest explained group conflict, racial animus could not be a contributing factor. But the history of race in the United States suggests instead that racial hostility and group interests are deeply

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<sup>139</sup> GLAZER, *supra* note \*, at 217, 219 (emphasis added).

<sup>140</sup> *Id.* at 219.

<sup>141</sup> *Id.* at 186.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 187.

<sup>144</sup> *Id.*

intertwined.<sup>145</sup> The “pragmatic, interest based conflict” Glazer identified was not, for being interest-based, thereby free of racial taint; instead, it constituted all the more securely a part of structural racism.

Glazer also opined that, in addition to divergent interests, variations in group culture better explained group tensions—“ways of life,” he said, “come into conflict.”<sup>146</sup> He offered the following characterization of black life: “more black families today are broken; there is a higher rate of illegitimacy, and there is a higher rate of crime among the young”; there is, in addition, “a great deal of prostitution, crime, runaway husbands, broken families, incest.”<sup>147</sup> These differences, Glazer insisted, “are real, and . . . may be taken by white ethnics as a symbol of what they fear—threats to safety, morality, neighborhood stability, and legitimate order and authority.”<sup>148</sup> White neighborhoods, in contrast, “are scenes of a marked social order: stable neighborhoods, with children succeeding parents in the same area, strong organizations centered around the church, formal ethnic associations or patterns of informal ethnic association, the local political organization, the trade union, the local small businesses of members of the group, which serve as much for socialization as for ordinary business.”<sup>149</sup> “These are realities,” Glazer continued, “and it is hardly likely they would not lead to resistance in the white ethnic neighborhoods to the entry of blacks or resistance to having their children sent into the black areas.”<sup>150</sup> Here again ethnicity theory operated as a justification for neighborhood and school segregation: not prejudice but black pathology engendered “resistance in the white ethnic neighborhoods to the entry of blacks [and] resistance to having their children sent into the black areas.”<sup>151</sup>

Glazer’s obdurate unwillingness to see racism in the white support of de facto segregation comes through most strongly in a final example. Seeking to dispel the notion that

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<sup>145</sup> For explorations of the mutual elaboration of racism and self-interest in the labor movement, see DAVID ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1991); ALEXANDER SAXTON, *THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* (1975).

<sup>146</sup> GLAZER, *supra* note \*, at 188.

<sup>147</sup> *Id.* For good measure, Glazer opined that some of these attributes of minority culture might represent “the mixed blessings of welfare.” *Id.*

<sup>148</sup> *Id.* at 189. Glazer argued in a way that echoed Posner: people discriminated against minorities because of the dysfunctional cultures with which they were associated, rather than because of animus against minorities per se. The similarity in their arguments buttresses the point that Posner employed a version of ethnicity theory.

<sup>149</sup> *Id.* at 188-89.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 189.

white opposition to blacks in the workplace reflected prejudice, Glazer provided the following quote from Milan, a white foreman, describing his frustration with a black worker:

Milan says, “One of these young shiners is going to kill a foreman someday soon. You can see it in their eyes, those black bastards. It used to be nice to work here, now with all these young niggers coming into the mill you never know what’s going to happen. You take your life into your hands when you tell them to do something.”<sup>152</sup>

Glazer immediately followed this quote with a sentence on the “differences between the Italian and East European neighborhoods and the black neighborhoods expanding into them,” a non-sequitur that switched the topic to neighborhood tensions, as if Milan’s comments finished the conversation on workplace conflict, or as if supposed dangers of violence at the job site demonstrated too the perils of residential integration. For Glazer, a white foreman who railed against the threatening presence of “shiners,” “black bastards,” and “niggers” proved the existence of “cultural” conflict in the workplace and neighborhood. If Glazer cannot perceive racism there, it is no surprise he does not see it anywhere.

Glazer set out to respond to the more structural understanding of race implicated in cases such as *Green* and *Swann* that used race to combat racism, and in cases such as *Griggs* implying a requirement for structural change. He did so by again advancing, as he had in the 1960s, a vision of race rooted in ethnic conflict, where minorities featured as just one among a number of competing cultural groups (though in doing so he ignored the voluminous scholarship that had repudiated his obloquies in *Beyond the Melting Pot*).<sup>153</sup> Glazer sought to convince the courts that they erred to believe that racial discrimination sharply truncated minority lives in the work place, in education, and in residential selection, or fueled widespread hostility to broad racial reform. Instead, he insisted, racial dynamics in the United States reflected nothing more than competition between groups marked by disparate cultures. America had triumphed over racial domination, though admittedly some of its deleterious effects remained manifest in the pathological cultures of minorities. It was time, Glazer insisted, for antidiscrimination law to eschew racially divisive policies and return to the colorblind ideal.

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<sup>152</sup> *Id.* at 191-92 (citation omitted).

<sup>153</sup> Saxton, *supra* note \*, at 148.

### B. *Whites as Vulnerable Minorities*

As with Posner and his rational discrimination model, though, perhaps ethnicity theory proved too much. If racial discrimination merely reflected group competition, why ban it? Put differently, if racial subordination existed only in the past and ethnic competition presently featured as a typical element in American life, why not simply allow such competition to continue, moderated by democratic politics as the normal arena for interest group pluralism? Why have the courts intervene?<sup>154</sup> Neither Glazer nor Moynihan offered an answer in the sixties, but in *Affirmative Discrimination* Glazer advanced an influential argument that would figure prominently in the Court's first full affirmative action case: discriminating in favor of minorities discriminated against whites—not whites as a majority, but rather whites as members of vulnerable minority groups.

In *Beyond the Melting Pot*, Glazer and Moynihan had argued in effect that blacks were really whites, in the sense that racial minorities now no longer faced racial impediments but instead could be expected to interact with and eventually integrate into society along the lines pioneered by white ethnic groups. This argument figured prominently in *Affirmative Discrimination*. Simultaneously, however, Glazer introduced a new argument—that whites were really black. This trick depended upon the following moves: First, the disaggregation of whites into ethnic group. Under affirmative action, Glazer complained, “All ‘whites’ are consigned to the same category, deserving no special consideration.” But, he said, “That is not the way ‘whites’ see themselves, or indeed are, in social reality. Some may be ‘whites,’ pure and simple. But almost all have some specific ethnic or religious identification.”<sup>155</sup> The scare-quotes around “white” add a nice grammatical emphasis to the disaggregation of that dominant group. Second, the argument that whites too have suffered discrimination: “Most immigrant groups have had periods in which they were discriminated against. For the Irish and Jews, for example, these periods lasted a long time.”<sup>156</sup> Finally, the coup-de-grace: whites suffer when they are asked to bear the burdens of remedies for other, preferred minorities. “They came to a country which provided them with less benefits than it now provides the protected groups. There is little reason for them to feel they should bear the burden of the

<sup>154</sup> For a discussion of the *Carolene Products* version of this question, see *infra* notes \* and accompanying text.

<sup>155</sup> GLAZER, *supra* note \*, at 200.

<sup>156</sup> *Id.*, at 198. As a corollary, Glazer also argued that many racial minorities have *not* suffered discrimination: “Nor is it the case that all the groups that are now recorded as deserving official protection have suffered discrimination, or in the same way.” *Id.*

redress of a past in which they had little or no part, or to assist those who presently receive more assistance than they did.”<sup>157</sup> Glazer summed up all of these moves in a powerful sentence, one that would be repeated in Powell’s opinion in *Bakke*, and which in turn prompts the title of this Article: “We are indeed *a nation of minorities*; to enshrine some minorities as deserving of special benefits means not to defend minority rights against a discriminating majority but to favor some of these minorities over others.”<sup>158</sup>

Where the Kerner Commission saw two Americas, black and white, separate and unequal, Glazer also saw two Americas—but divided now between favored minorities and dispreferred whites. “We have created two racial and ethnic classes in this country,” he wrote, “to replace the disgraceful pattern of the past in which some groups were subjected to an official and open discrimination. The two new classes are those groups that are entitled to statistical parity in certain key areas on the basis of race, color, and national origin, and those groups that are not.”<sup>159</sup> Glazer evoked a nation divided by a new form of domination in which disparate white ethnic groups, many the victims of past discrimination, now additionally suffered from the allocation of “special benefits” to “protected groups.” Glazer warned of ethnic conflict run amok, where race-conscious remedies represented the illegitimate capture of the state by victorious factions locked into zero-sum conflict with other, no less deserving groups. Affirmative action for minorities did not simply fail to benefit whites, it actually victimized them.

To be sure, this depiction of whites as vulnerable minorities systematically harmed by antidiscrimination law existed in tension with Glazer’s more basic claim that all groups competed more or less equally with each other, none especially advantaged nor burdened. This more basic claim lay at the heart of the depiction of blacks as white. In moving to the claim that whites were black, Glazer ironically began to push ethnicity back toward a group subordination model—though this time with whites in the subordinate position. Affirmative action became “affirmative discrimination” not just in the sense of relying on a racial classification, but in the sense of constituting an invidious practice. If Posner equated

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<sup>157</sup> *Id.*, at 201.

<sup>158</sup> *Id.*, at 201 (emphasis added).

<sup>159</sup> *Id.* at 197. See also Amicus Brief for the Committee on Academic Nondiscrimination and Integrity and the Mid-America Legal Foundation, 1977 WL 189551, at \*58-59 (contrasting the two Americas described by Glazer and by the Kerner Commission). Glazer sat on the steering committee of one of the signatories to that brief, the self-styled Committee on Academic Nondiscrimination and Integrity, *id.* at 2.

affirmative action and Jim Crow by describing both as relatively harmless efforts at efficient group sorting, Glazer took a different tack, defining both as group subordination. Enter now the argument for reactionary colorblindness, justified on the claim that Jim Crow laws and affirmative action comprised equal evils.

I use the term “evil” advisedly, not only because Glazer articulated a general model of discrimination emphasizing the pernicious nature of affirmative action, but because he upped the rhetorical ante by describing all racial distinctions as nightmarish, Orwellian, and reminiscent of Nazism. “Thus the nation is by government action increasingly divided formally into racial and ethnic categories with differential rights. The Orwellian nightmare ‘. . . all animals are equal, but some animals are more equal than others, . . .’ comes closer.”<sup>160</sup> And: “We have not yet reached the degraded condition of the Nuremberg laws, but undoubtedly we will have to create a new law of personal ethnic and racial status to define just who is eligible for these benefits, to replace the laws we have banned to determine who should be subject to discrimination.”<sup>161</sup> In his hyperbole, Glazer paved the way for subsequent Supreme Court reasoning: regarding the putative evils of classification *per se*, Orwell, Nazism, and Apartheid South Africa have all emerged as rhetorical tropes.<sup>162</sup>

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

Neil Gotanda in a groundbreaking 1991 article “A Critique of ‘Our Constitution is Color-Blind’” systematically dissected the shifting conceptions of race employed by the contemporary Supreme Court in moving strongly toward an anticlassification jurisprudence.<sup>163</sup> Gotanda recognized that debates over the nature of equality and the scope of equal protection inescapably turned on competing understandings of race, and he suggested a framework that has since been quite influential for distinguishing four racial models variously

<sup>160</sup> GLAZER, *supra* note \*, at 75.

<sup>161</sup> *Id.*, at 200.

<sup>162</sup> *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 535 n.5 (Stevens, J., dissenting) (“If the National Government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reich’s Citizenship Law of November 14, 1935.”); Weber (Rehnquist, dissenting) (Orwell), discussed *infra* at note \*; Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 633 n.1 (1990) (Powell, J., dissenting) (a government seeking to classify by race “must study precedents such as the First Regulation to the Reich’s Citizenship Law of November 14, 1945. Other examples are . . . Population Registration Act No. 30 of 1950, Statutes of the Republic of South Africa.”); Shaw v. Reno, 509 U.S. 630, 647 (1993) (majority-minority voting district bears “an uncomfortable resemblance to political apartheid.”).

<sup>163</sup> Neil Gotanda, *A Critique of “Our Constitution is Colorblind,”* 44 STAN. L. REV. 1 (1991).

deployed by the Court.<sup>164</sup> Two in particular are relevant to this Article: “formal-race,” conceptualizing race as “merely ‘skin color’ or country of ancestral origin”;<sup>165</sup> and “culture-race,” referring to the “culture, community, and consciousness” of (minority) racial groups.<sup>166</sup>

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

My first and second arguments roughly correspond to Gotanda’s notions, respectively, of formal-race and culture-race. But for Gotanda, formal-race on the one hand and culture-race on the other form distinct conceptualizations of race. In contrast, I argue that formal-race and culture-race are both aspects of the same vision, race-as-ethnicity. This unity has important explanatory significance: it is not that a skin color conception of race exists in opposition to a view of race as culturally significant, but that these conceptions work hand in hand to produce a theory of race capable of claiming that racism is a thing of the past, that group inequality reflects cultural capacity, and that whites are now vulnerable minorities. That is, the ability of race-as-ethnicity to continually shift emphasis between points one and two constitutes a necessary prerequisite for claims three through five. The language of formal-race and culture-race helpfully illustrates the way in which race-as-ethnicity points in two directions, but one should not see these elements distinct understandings of race. Instead, the power of ethnicity lies in its ability to simultaneously gesture in contradictory directions—making blacks white and whites black.

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<sup>164</sup> See, e.g., PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 835-837(4<sup>th</sup> ed. 2000) (summarizing and adopting Gotanda’s racial framework).

<sup>165</sup> Gotanda, *supra* note \*, at 4, 6-7.

<sup>166</sup> *Id.* at 4. Gotanda also suggested attention to “status-race,” meaning “the traditional notion of race as an indicator of social status,” and “historical-race,” which pictures race as embodying “past and continuing racial subordination.” *Id.* Reva Siegel subsequently adapted Gotanda’s matrix, though she refashioned the concept of “culture-race” into ethnicity—“that mode of talking that treats race as akin to ethnicity, as involving the distinctive forms of life that social groups work out over time.” Reva Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 91 (2000). Gotanda himself sometimes seems to slip toward an equation of culture-race and ethnicity. Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity, and the California Civil Rights Initiative*, 23 HASTINGS CONST. L. Q. 1135, 1141, 1149 (1996).

VI. *BAKKE*

In 1978, in its first full affirmative action case, *Regents of the University of California v. Bakke*, the Supreme Court split, with four members for an anticlassification rule and four against, and Justice Powell in the middle.<sup>167</sup> Powell's opinion has emerged as the Court's de facto ruling, but not for this reason holds the greatest interest here. Rather, Powell's analysis merits attention because, ironically much more than the opinion of the four openly committed to prohibiting the remedial use of race, it laid the ground work for contemporary reactionary colorblindness. Nevertheless, before turning to Powell's watershed opinion, it bears examining the debate as framed by those for and against colorblindness.

A. *Statutory Colorblindness*

The University of Davis Medical School denied admission to Alan Bakke two years running. He sued, arguing that he had suffered racial discrimination since, being white, the medical school had not considered him for the sixteen seats out of an entering class of one hundred allegedly set aside for minority students.<sup>168</sup> The facts seemed to document a clear case of racial discrimination *if* one understood discrimination to mean any distinction on the basis of race, a position strenuously urged by four justices. By the time *Bakke* came before the Court, John Paul Stevens had replaced Douglas. Stevens, joined by Burger, Rehnquist, and Potter Stewart, argued that the case should be decided on statutory grounds, with prudential reasons cautioning against prematurely reaching the deeper question of the Constitution's meaning.<sup>169</sup> It's hard to resist the conclusion, though, that Stevens favored statutory grounds because, in 1978, little space existed to argue that the Constitution prohibited remedial uses of race. From *Brown* to *Swann*, the Supreme Court had consistently rejected the premise that the Fourteenth Amendment barred all governmental use of race, and as recently as 1976 in *United Jewish Organizations of Williamsburgh v. Carey (UJO)*, the Court had upheld race-conscious electoral redistricting.<sup>170</sup>

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<sup>167</sup> 438 U.S. 265 (1978).

<sup>168</sup> For a helpful history of the case, see JOEL DREYFUS & CHARLES LAWRENCE III, *THE BAKKE CASE: THE POLITICS OF INEQUALITY* (1979). Dreyfuss and Lawrence note that, as a factual matter, some evidence exists that whites were considered for these seats, but note as well that this point was never argued by the University in its defense. *Id.*, at 41, 60

<sup>169</sup> *Bakke*, 438 U.S. at 408-11 (Stevens, J., dissenting).

<sup>170</sup> 430 U.S. 144 (1976).

For Stevens, the legislative history of Title VI, the part of the 1964 Civil Rights Act proscribing the use of federal funds to support segregated institutions, provided more favorable terrain on which to wage the campaign for colorblindness. This ground provided some cover, for he selectively culled from the thousands of pages of legislative history various snippets seeming to indicate an intention that all racial classifications be barred. The weakness of this argument becomes immediately manifest, however, in the overall thinness of the evidence marshaled to support it. Stevens argued that “the proponents of the legislation gave repeated assurances that the Act would be ‘colorblind’ in its application”—and then offered as evidence just three quotes from the Act’s voluminous debates, only one of which actually invoked colorblindness.<sup>171</sup> Not to be deterred, Stevens insisted: “the meaning of the Title VI ban . . . is *crystal clear*: Race cannot be the basis of excluding anyone from participation in a federally funded program.”<sup>172</sup> Like Posner’s deployment of “surely,” Stevens recourse to “crystal clear” in the context of scarce evidence indicates nothing so much as the feebleness of his thesis. A year later, Rehnquist in *USWA v. Weber* would employ the same statutory argument, and even more exaggerated rhetoric, in claiming that Title VII prohibited affirmative action in employment.<sup>173</sup>

Despite, or rather because of, their lack of foundation, these opinions are nevertheless important to the history of reactionary colorblindness. They show that by 1978 four justices supported reactionary colorblindness as a political matter, but they also confirm that, as late as 1979, no member of the Court argued that the *Constitution* required colorblindness. In neither *Bakke* nor *Weber* did any of the justices propounding colorblindness identify the Fourteenth Amendment, rather than statutory law, as the source of a ban on racial classification. The Court had been unanimous in the early seventies in rejecting an anticlassification stance when

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<sup>171</sup> 438 U.S. 265, 415 n.16 (Stevens, J., dissenting). Stevens notably conceded that “[n]o doubt, when this legislation was being debated, Congress was not directly concerned with the legality of ‘reverse discrimination’ or ‘affirmative action’ programs,” *id.* at 413—a concession that one might think would answer whether congressional intent could serve as the basis for asserting an anticlassification meaning for the Act.

<sup>172</sup> *Id.*, at 418 (emphasis added).

<sup>173</sup> *USWA v. Weber*, 443 U.S. 193 (1979). Despite dedicating more than thirty pages to “a thorough examination” of a congressional record that included 83 days of debate just in the Senate, Rehnquist could come up with only half a dozen quotes that directly addressed the question of whether race could be used for remedial purposes. He did, however, definitively defeat the contention—neither made nor at issue—that Title VII *required* affirmative action. *Id.*, at 231, 222-254. In terms of inflated rhetoric, Rehnquist began his dissent with a new Orwellian analogy, this one drawn from *1984*, in which Brennan, as the author of the majority opinion upholding affirmative action, figured as a totalitarian leader manipulating a passive crowd by cynically switching a new “truth” for the opposite, and now discarded, old one. *Id.* at 219-22.

confronted by segregated school districts that sought to manipulate colorblindness to maintain racial hierarchy. In the face of affirmative action, and reflecting the changing composition of the Court, near the close of that decade a strong plurality of justices embraced colorblindness as the appropriate understanding of antidiscrimination law, but located their support for that stance in feigned deference to supposed congressional intent. Not until the 1980s would any justices support constitutional colorblindness, and then they would do so by invoking the reasoning offered in *Bakke* not by the anticlassification justices, but by Powell.

### B. *Against Colorblindness*

Despite the inanity of Stevens's opinion, the liberal members of the Court sensed the rising strength of colorblindness, and in *Bakke* set to its repudiation. Brennan wrote the main opinion for the four justices who proposed to uphold the Medical School's plan as implemented, centering his opinion on an extended refutation of Stevens's legislative history.<sup>174</sup> More importantly for our purposes, however, Brennan bookended his rebuttal with condemnations of colorblind reasoning. Brennan started by warning against letting "color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens,"<sup>175</sup> and he concluded by reminding his brethren that "the position that [race] must be 'constitutionally an irrelevance' summed up by the shorthand phrase 'our Constitution is color-blind,' has never been adopted by this Court as the proper meaning of the Equal Protection Clause. Indeed, we have expressly rejected this proposition on a number of occasions."<sup>176</sup> Blackmun, too, in a separate opinion warned against constitutional colorblindness, offering one of the pithiest responses: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy."<sup>177</sup>

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<sup>174</sup> *Bakke*, 438 U.S. at 328-356 (Brennan, J., concurring in part and dissenting in part).

<sup>175</sup> *Id.*, at 327.

<sup>176</sup> *Id.*, at 355.

<sup>177</sup> *Id.*, at 407 (Blackmun, J., concurring in part and dissenting in part). William Van Alstyne famously retorted that "one gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment never to tolerate in one's own life—or in the life or practices of one's government—the differential treatment of other human beings by race." William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809 (1979). But as did other supporters of colorblindness, Van Alstyne too blurred the distinction between the "racism" with which he began his passage and "the differential treatment of other human

It was Marshall, however, who delivered the most thorough critique of conservative colorblindness. He started by recounting the legal subordination of blacks, drawing heavily on racial scholarship, for example John Hope Franklin’s *From Slavery to Freedom*, Richard Kluger’s *Simple Justice*, and C. van Woodward’s *The Strange Career of Jim Crow*, to develop his indictment of legal oppression.<sup>178</sup> Over the course of six pages, Marshall provided what may well be the most sustained engagement with the social and specifically legal oppression of blacks ever to appear in the pages of a Supreme Court decision. In his second point, Marshall connected this iniquitous history with contemporary injustice. Writing that “[t]he position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment,” Marshall segued to demonstrating that “[m]easured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.”<sup>179</sup> To drive this home, he summarized a range of government statistics that numerically traced the ongoing legacy of racism across indices measuring health care disparities, wealth inequalities, and persistent segregation in professional fields.<sup>180</sup> “The relationship between those figures and the history of unequal treatment afforded to the Negro cannot be denied,” Marshall averred.<sup>181</sup> Next, Marshall recounted the thrust of Fourteenth Amendment jurisprudence from its original drafting up through the most recent case law, including *Green*, *Swann*, and *UJO*, all of which had interpreted the Fourteenth Amendment to allow the governmental use of race.<sup>182</sup> For good measure, Marshall jabbed that when it would have really helped blacks, the Court had consistently refused to adopt colorblindness. “[H]ad the Court been willing in 1896, in *Plessy v. Ferguson*, to hold that the Equal Protection Clause forbids differences in treatment based on race, we would not be faced with this dilemma in 1978,” Marshall admonished his colleagues.<sup>183</sup>

But it is Marshall’s final sally against colorblindness that seems particularly prescient, because it evinces that he understood that the ultimate issue before the Court was its

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beings by race” with which he concluded—an especially crucial distinction given that Van Alstyne was writing against affirmative action plans using racial distinctions precisely to combat racism.

<sup>178</sup> 438 U.S. at 388 n.1 (Marshall, J., concurring in part and dissenting in part) (citing RICHARD KLUGER, *SIMPLE JUSTICE* (1975); JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM* (1974); C. VAN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d ed. 1974)).

<sup>179</sup> *Id.* at 395.

<sup>180</sup> *Id.* at 395-96 (citations omitted).

<sup>181</sup> *Id.* at 396.

<sup>182</sup> *Id.* at 398.

<sup>183</sup> *Id.* at 401.

conception of race. Marshall directly repudiated the key step that would be used to justify a blanket ban on all racial distinctions—the ethnic analogy:

The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.<sup>184</sup>

Blacks were not another ethnic group, Marshall insisted, but a race, whose historical and persistent subordination made any analogy to the experiences of white groups utterly inapposite. No justification existed, then, for equating affirmative action designed to end racial inequality with racist measures intended to perpetuate it. Marshall’s *Bakke* opinion provides perhaps the single most developed judicial critique of reactionary colorblindness. His opinion, however, has largely slipped from memory, overshadowed almost entirely by Powell’s, which, in the years since *Bakke*, has dominated the Court’s thinking on affirmative action as well as its racial imagination more generally.<sup>185</sup>

### C. *A Nation of Minorities*

Despite its later salience to claims of colorblindness, Powell quickly dispatched the contention that Title VI’s legislative history supported colorblindness, and also firmly rejected any claim that the Constitution barred all racial classifications, noting that not even *Bakke*’s lawyers “argue that all racial or ethnic classifications are *per se* invalid.”<sup>186</sup> Nevertheless, Powell laid the framework for the subsequent adoption of reactionary colorblindness by framing a parallel conversation in terms of the appropriate standard of review. The level of scrutiny turned on whether affirmative action and racial subordination differed in a constitutionally meaningful way. The Brennan four insisted that they did, with the

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<sup>184</sup> *Id.* at 400-01.

<sup>185</sup> Few major casebooks on constitutional law include substantial excerpts—or even mention—Marshall’s opinion. *See, e.g.*, BREST, *supra* note \*, at 899-914 (devoting ten pages to Powell’s opinion, seven pages to Brennan’s, a paragraph to Stevens’s, but not excerpting or even mentioning the Marshall opinion); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 761 n.120. (6th ed. 2000) (giving eight pages to the *Bakke* decision in the form of summaries of the opinions of Powell, Brennan, and Stevens, with a two-sentence footnote mentioning that Justice Marshall wrote a separate opinion that “emphasized the history of racial discrimination both in the nation at large and in the decisions of the Supreme Court.”). *But see* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW (13th ed. 1997) (including Marshall’s concurring opinion).

<sup>186</sup> 438 U.S. at 287.

consequence that affirmative action policies should not be subject to the same stringent review reserved for laws harming minorities.<sup>187</sup> Powell concluded, however, that the government’s reasons for using race must in all cases meet “the most exacting judicial examination.”<sup>188</sup> In arguing for the same standard in all cases, Powell effectively argued that for constitutional purposes preferential treatment and Jim Crow laws amounted to the same thing—the core claim under reactionary colorblindness.

Powell noted that before applying heightened review, the Court typically asked—as he had insisted upon in 1973 in *Rodriguez*—the *Carolene Products* footnote four question, whether the harmed group comprised “a ‘discrete and insular minority’ requiring extraordinary protection from the majoritarian political process.”<sup>189</sup> In *Carolene Products*, Justice Stone famously distinguished between ordinary social legislation that merited judicial deference and legislation targeting discrete and insular minorities that required heightened review.<sup>190</sup> Powell embraced and amplified this approach in *Rodriguez*, where he held that heightened review depended upon demonstrating the “traditional indicia of suspectness: [that] the class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”<sup>191</sup> But in the context of racial classifications, Powell contended, this inquiry was superfluous: “Racial and ethnic distinctions of any sort are *inherently suspect* and thus call for the most exacting judicial examination.”<sup>192</sup> To explain why, Powell explained that “[t]his perception of racial and ethnic distinctions is rooted in our Nation’s constitutional and demographic history.”<sup>193</sup> Powell then invoked the pervading purpose of the Fourteenth Amendment as “the freedom of the slave race . . . and the protection of the newly-made freeman and citizen from the oppressions of

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<sup>187</sup> *Id.*, at 359.

<sup>188</sup> *Id.*, at 291. Powell’s description of strict scrutiny did not match later formulations, leaving open the question of whether affirmative action in fact could meet the strict scrutiny standard as developed in the 1980s. *See* Hopwood v. Texas, 78 F.3d 936, 944 (5th Cir. 1996). This question was answered affirmatively in *Grutter*. For the purposes of this discussion, the important point is that Powell raised and answered the question of whether the standard of review was the same irrespective of the nature of the government’s use of race.

<sup>189</sup> 438 U.S. at 290 (citation omitted).

<sup>190</sup> *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.4 (1938).

<sup>191</sup> *San Antonio v. Rodriguez*, 411 U.S. 1, 28 (1973).

<sup>192</sup> 438 U.S. at 291 (emphasis added).

<sup>193</sup> *Id.*

those who had formerly exercised dominion over him.”<sup>194</sup> But if the state’s use of race always deserved the highest level of scrutiny because of slavery and racial oppression, why require that same level of justification for affirmative action?

Ethnicity provided Powell’s answer. Immediately after referencing the nation’s “constitutional and demographic history,” Powell introduced a revised history, one that adverted to a new “nation of minorities” that supposedly emerged in the twentieth century. Powell observed that after Reconstruction the Equal Protection Clause fell into a period of desuetude, not again attaining vitality until 1938 in *Carolene Products*.<sup>195</sup> “During the dormancy of the Equal Protection Clause,” Powell wrote, the nation had changed:

[T]he United States had become a Nation of minorities. Each had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic majority, but of a “majority” composed of various minority groups of whom it was said—perhaps unfairly in many cases—that a shared characteristic was a willingness to disadvantage other groups. As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination.<sup>196</sup>

Powell supported this claim with a string of case citations to which he attached parentheticals listing the groups purportedly protected: Celtic Irishmen, Chinese, Austrian resident aliens, Japanese, and Mexican Americans.<sup>197</sup> Notice that Powell did not include blacks, but nevertheless invoked other non-whites denominated in terms of countries of origin. The facts of the cases cited by Powell—*Yick Wo*, overturning an ordinance administered with “an evil eye and an unequal hand” against Chinese residents;<sup>198</sup> *Korematsu*, upholding the mass interment of Japanese Americans in a crusade described by Justice Murphy as falling “into the ugly abyss of racism”;<sup>199</sup> and *Hernandez v. Texas*, striking down Jim Crow laws excluding Mexican Americans from Texas juries<sup>200</sup>—do not demonstrate a new ethnic pluralism so much as the virulence of race-based hierarchy targeting not blacks but other groups on the nether side of the color line. But in Powell’s usage, these non-black minorities helped make more plausible the claim that race operated similarly for all ethnic groups—that the

<sup>194</sup> *Id.* (quoting *Slaughter-House Cases*, 16 Wall. 36, 71 (1873)).

<sup>195</sup> *Id.*, at 292.

<sup>196</sup> *Id.*, at 292-93.

<sup>197</sup> *Id.*, at 293 (citations omitted).

<sup>198</sup> *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

<sup>199</sup> *Korematsu v. United States*, 323 U.S. 214 (1944)

<sup>200</sup> *Hernandez v. Texas*, 347 U.S. 475 (1954).

experiences of the Irish and Austrians resembled that of the Chinese, Japanese, and Mexicans in the United States, and by implication tracked the fate of blacks as well. In short, Powell turned to ethnicity to rewrite the American history of race in the twentieth century: he disaggregated the white “majority” (notice even the *de rigueur* scare quotes) into “various minority groups” who “struggle” against “prejudice,” while converting racial minorities into sub-groups that shared an identical American experience with white ethnics. The color-line erased, the United States now progressed harmoniously as a “Nation filled with the stock of many lands,” and the Constitution gave equal concern to “all *ethnic groups* seeking protection from official discrimination.” “Ethnic groups” constituted no casual synonym for race, but instead a heavily laden term signifying a conception of group dynamics in the United States in which racial hierarchy had ceased to operate.

Lest the implications of this new history be lost, Powell immediately turned to the question of whether it mattered in *Bakke* that the case involved “discrimination against members of the white ‘majority,’” once more with “majority” in quotes.<sup>201</sup> Invoking again the felicitous history of twentieth century ethnic competition, Powell asseverated that “[i]t is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others.”<sup>202</sup> He buttressed this sentence with a footnote reprinting Alexander Bickel’s entire “whose ox is gored” paragraph.<sup>203</sup> Powell’s reference to “special wards” oddly echoed the language of Justice Bradley when he chastised blacks for seeking to be the “special favorites of the law” in the *Civil Rights Cases*, the Reconstruction era decision in which the Court concocted the state action doctrine to defeat remedial legislation aimed at protecting blacks from racial exclusion in the public sphere.<sup>204</sup> This echo intimates that though Powell wrote almost a century after Bradley and in a very different racial context, he not only lacked understanding of or sympathy for the iniquitous reality confronting blacks, but he too may have harbored resentment toward those demanding racial change. In any event, the endorsement of Bickel’s sonorous but empty paragraph highlights the extent to which Powell embraced the conclusion

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<sup>201</sup> 438 U.S. at 294.

<sup>202</sup> *Id.*, at 295 (emphasis in original).

<sup>203</sup> *Id.* at 295 n.35 (quoting Bickel, *supra* note \*, at 183).

<sup>204</sup> *Civil Rights Cases*, 109 U.S. 3, 25 (1883).

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

Building on the ethnic analogy, Powell professed that there did not exist a feasible manner to decide which groups might merit special solicitude as a subordinate class. “There is no principled basis for deciding which groups would merit ‘heightened judicial solicitude’ and which would not.”<sup>205</sup> Powell fretted that “Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups,” forcing courts to calculate “those whose societal injury is thought to exceed some arbitrary level of tolerability”—only to find that as “the consequences of past discrimination were undone, new judicial rankings would be necessary.”<sup>206</sup> An equality jurisprudence that gave greater scrutiny to efforts to harm African Americans or other racial minorities, Powell worried, would plunge the Court into the untenable position of freezing the shifting kaleidoscope of ethnic politics which was now simply democratic politics. “Political judgments regarding the necessity for the particular classification . . . are the product of rough compromise struck by contending groups within the democratic process.”<sup>207</sup> As Powell succinctly put it, “the concepts of ‘majority’ and ‘minority’ necessarily reflect temporary arrangements and political judgments.”<sup>208</sup> Powell deployed ethnicity to locate all groups in the same position, that of temporary minorities all similarly engaged in ethnic politics and facing the same levels of societal hostility—and all deserving an identical level of judicial protection. Because the United States contained not dominant and subordinate races but a welter of “ethnically fungible” groups, to paraphrase Alan Freeman, the Constitution could make no distinction among the beneficiaries or victims of racial classifications.<sup>209</sup>

#### D. *Black is White, White is Black*

In making the ethnic argument, Powell confronted the same problem that Posner faced after positing an innocuous conception of racial sorting. If ethnic politics constituted normal

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<sup>205</sup> 438 U.S. at 297.

<sup>206</sup> *Id.*, at 296-97.

<sup>207</sup> *Id.*, at 299.

<sup>208</sup> *Id.*, at 295. Although Powell insisted that whites as the dominant race were a heterogeneous group, just the year before he had refused to accept that point regarding Mexican Americans. See *Castaneda v. Partida*, 430 U.S. 482, 515 (1977) (Powell, J., dissenting).

<sup>209</sup> Alan Freeman, *Antidiscrimination Law: The View from 1989*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 121, 125 (David Kairys ed., 1990 ed.).

politics, perhaps no special judicial scrutiny was warranted. Consider Rehnquist's 1972 dissent to the extension of heightened review to non-citizens targeted by harmful legislation. Using a version of ethnicity theory, he objected that "[o]ur society, consisting of over 200 million individuals of multitudinous origins, customs, beliefs, and cultures is, to say the least, diverse. It would hardly take extraordinary ingenuity for a lawyer to find 'insular and discrete' minorities at every turn in the road."<sup>210</sup> Rehnquist expressed what might be termed pluralist panic, the fear that the number of minority groups needing special protection might suddenly explode. Bittker had expressed a similar concern as early as 1962, and Graglia had raised the same specter in his 1970 attack on affirmative action.<sup>211</sup> Powell took this one step further, describing a multiplication of minorities, and then in addition arguing that none stood in a fixed subordinate position relative to any other. To use a short hand version, blacks were really white. But notice the constitutional thrust of this analysis: if multitudinous ethnic groups stood in relations of shifting competition forming only temporary majorities, no special solicitude for racial groups seemed required. Arguing that blacks were white strongly pushed in the direction of Rehnquist's 1972 dissent, toward the conclusion that special constitutional concern did not avail the myriad minorities now found "at every turn in the road."

This dilemma can be restated in terms of the *Carolene Products* framework Powell had invoked in both *Rodriguez* and *Bakke*. Footnote four identified racial minorities as the quintessential "discrete and insular" groups requiring heightened review because they were typically unprotected by "the operation of those political processes ordinarily to be relied upon to protect minorities."<sup>212</sup> In contrast, the text of *Carolene Products* had supposed that the successes and failures of temporary majorities and minorities constituted the ordinary tussle of interest group pluralism and thereby became "a matter for the legislative judgment and not that of the courts."<sup>213</sup> But if Powell's ethnic analysis applied, it seemed to pull racial

<sup>210</sup> *Sugarman v. Dougall*, 413 U.S. 634, 649 (1972) (Rehnquist, J, dissenting)

<sup>211</sup> Bittker, *Checker-Board Ordinance*, *supra* note \*, at 1415 ("In one sense, even if the term 'minority' is confined to groups that are subjected to pressures or prejudices that have a noticeable effect on their geographical distribution, persons of Chinese, Mexican, Italian, Puerto Rican, Jewish, and many other ancestries would qualify."); Graglia, *Special Admission*, *supra* note \*, at 352 ("Perhaps discrimination in favor of a minority can be distinguished from discrimination against a majority, but America consists of minorities and I fear the claims that could be made or conditions justified if this distinction should be generally accepted.").

<sup>212</sup> *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

<sup>213</sup> *Id.* at 151.

minorities out of the footnote, placing them instead securely in the realm of the text. This is not the claim that under a footnote four analysis whites failed to qualify for strict scrutiny, the argument made by Brennan in *Bakke* and also by John Hart Ely in his elaboration of process defect theory.<sup>214</sup> Rather, Powell's analysis seemingly indicated that since all racial dynamics involved merely interest group politics, *no* government action would merit heightened review simply because it disadvantaged groups on the basis of racial or ethnic classifications. As an expression of pluralist panic, Powell's ethnic theory not only failed to justify heightened review in the affirmative action context, it failed to justify it in every case from *Korematsu* to *Loving*. Powell's ethnic analysis seemed to convert racial discrimination, both benign and invidious, into ordinary social legislation.<sup>215</sup>

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

[T]he white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants.<sup>216</sup>

Recall the moves pioneered by Glazer to convert whites into the new subordinated group: disaggregating whites into discrete ethnicities; insisting that many of these groups faced prior discrimination; and implying that the rights and remedies reserved for preferred minorities

<sup>214</sup> 438 U.S. at 357 (Brennan); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 170-71 (1980).

<sup>215</sup> In a close read of Powell's *Bakke* opinion, Keith Bybee too notes Powell's engagement with interest group pluralism and agrees that under his ethnic ethnic which minority groups apparently should *not* receive special protection. Keith Bybee, *The Political Significance of Legal Ambiguity: The Case of Affirmative Action*, 34 L. & SOC. REV. 263, 278 (2000). Bybee resolves the seeming tension by positing that Powell sought to use *Bakke* to lay out a new approach to the problem of judicial review in a democracy dominated by pluralist politics, but little evidence supports this resolution. *Id.*, at 285.

<sup>216</sup> 438 U.S. at 295-96.

threatened white ethnic subgroups.<sup>217</sup> Powell performed these dance steps almost flawlessly, converting the “white ‘majority’” into “various minority groups,” decrying the “prior discrimination” against those groups, and objecting that “the only ‘majority’ left would be a new minority of white Anglo–Saxon Protestants.” Powell magically conjured WASPs as America’s most vulnerable potential victim. And if even America’s elite now suffered the threat of racial discrimination, then no white—indeed no American—was safe. Powell argued that the Constitution did not protect “special wards” if that meant affording racial minorities heightened protection.<sup>218</sup> But in considering the position of the “white ‘majority,’” Powell moved back toward a concern with specifically group-based disadvantage. Powell may have put “majority” into scare quotes, but he rarely lost sight of the fact that he was discussing whites as the casualties of affirmative action. Echoing the ethnicity theory advanced by Glazer, Powell erased whites as a dominant group, and summoned instead whites as potential victims in the brave new world of civil rights and racial remediation. Not pluralist anxiety but the possibility of group subordination—of whites—justified special solicitude in racial cases.<sup>219</sup>

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

In the first half of his opinion, just discussed, Powell reasoned toward a requirement of strict scrutiny in affirmative action cases. Under this constitutional standard, state efforts to use race to redress social problems would survive review only if the government demonstrated it had a “compelling interest” in enacting such remedies. In the second half of his opinion, Powell turned to consider the possible justifications for affirmative action. There, he rejected fostering integration or responding to societal discrimination as compelling

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<sup>217</sup> See *infra* note \*.

<sup>218</sup> 438 U.S. at 295.

<sup>219</sup> John Skrentny suggests that much opposition to affirmative action must be located in the proliferation of groups able to take advantage of that practice. JOHN SKRENTNY, *THE MINORITY RIGHTS REVOLUTION* 101-02, 142 (2002). This may well be, but the constitutional justification for strict scrutiny in affirmative action cases could not turn on such panic, but depended instead on the depiction of whites as vulnerable minorities. Note, however, that Powell later employed the logic of pluralist panic in *McCleskey v. Kemp*, where he worried that statistical challenge to sentencing “on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender.” 481 U.S. 279, 315-317 (1987). In the accompanying note, Powell not only invoked the part of his *Bakke* opinion treating ethnicities as interest groups, but various census documents listing numerous racial, ethnic, and ancestry groups. *Id.*, n.39. Buttressing the point that such panic could not be used to support heightened review, in *McCleskey* Powell invoked the multiplication of minorities in order to ridicule demands for review of group discrimination.

interests, but held that encouraging racial diversity satisfied strict scrutiny. Many commentators find these two halves difficult to square. Critics on the right point out that diversity hardly rises to the level of other interests described as “compelling” in race cases, for instance the national security putatively at stake in *Korematsu*.<sup>220</sup> Critics on the left object that if race deserves heightened scrutiny it must be because of past and ongoing harmful social practices, drawing into question why remedying such practices fails to qualify as a compelling government interest.<sup>221</sup> No contradiction divides these two parts of Powell’s opinion, however, if one accepts his vision of race as ethnicity.

Powell considered several justifications for U.C. Davis’s special admissions program, including “reducing the historic deficit of traditionally disfavored minorities” and “countering the effects of societal discrimination.”<sup>222</sup> The first goal was tantamount to requiring desegregation, the aim of almost every school case to reach the Court in the late 1960s and early 1970s and a central focus of the civil rights movement. But Powell did not address this goal in terms of desegregation or integration. Instead, he claimed that efforts to achieve racial representation in theretofore exclusively white institutions amounted to pursuing “some specified percentage of a particular group merely because of its race or ethnic origin,” adding that “[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake.”<sup>223</sup> It’s almost impossible to make sense of this characterization of the call for integration, except in the context of ethnicity theory. In the world of race-as-ethnicity, segregation reflected not racial animus and persistent patterns of exclusion and marginalization but normal politics, and could give rise to no claim for intervention. Only in this make-believe world could one oppose integration as a preference for certain racial groups “for no reason” or as “discrimination for its own sake.” Powell extended strict scrutiny to affirmative action by using ethnicity to deny the continued salience of racial

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<sup>220</sup> *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, dissenting).

<sup>221</sup> See, e.g. CHARLES LAWRENCE & MARI MATSUDA, *WE WON’T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* 51-53 (1997).

<sup>222</sup> 438 U.S. at 306 (citation omitted). Cf. *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Thomas, J. dissenting) (affirmative action perhaps explainable only as “tinkering” or an effort to achieve proper “racial aesthetics”).

<sup>223</sup> 438 U.S., at 307. Powell’s resistance to integration in *Bakke* contrasts with his support for mandatory integration in public elementary and secondary schools, expressed five years earlier in *Keyes v. School District No. 1*, 413 U.S. 189, 224 (1973) (Powell, J., concurring). Powell subsequently attempted to square these two positions by arguing that most affirmative action was repugnant to the Constitution because it limits whites’ access to scarce resources, whereas race-conscious remedies in the public school context involved no such deprivations. *United States v. Paradise*, 480 U.S. 149, 188 n.2 (1987).

subordination; he relied on ethnicity again to present efforts to promote integration as instead irrational acts of racial discrimination. If racial hierarchy did not exist as a basis for distinguishing licit from illicit racial practices, neither did it factor as an explanation for persistent de facto segregation, nor therefore as a justification for affirmative action—making efforts to integrate the equivalent of discrimination for its own sake.

Similar reasoning supplied Powell’s response to the argument that counteracting “societal discrimination” warranted affirmative action. Ameliorating the effects of societal discrimination constituted one of the strongest moral and policy justifications for affirmative action, whether in the workplace or the classroom. But not for Powell, nor for the majority of Supreme Court justices who in *Crosby* would follow Powell’s lead.<sup>224</sup> First, Powell argued that the Court’s school cases had recognized the propriety of race-conscious remedies only in cases of “identified discrimination,”<sup>225</sup> thereby hoping to limit the contradictory thrust of cases such as *Griggs* and the 1965 Voting Rights Act that focused on results.<sup>226</sup> Next, he ridiculed “societal discrimination” as “an amorphous concept that may be ageless in its reach into the past,”<sup>227</sup> thereby constitutionalizing a vision of race as nebulous rather than concrete in its societal impact. Finally, Powell warned that “[w]ithout . . . findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another.”<sup>228</sup> Powell here sharply demarcated the operation of the Equal Protection Clause: if one could show explicit racial subordination of the sort associated with Jim Crow, the clause would recognize racial hierarchy as a problem; but absent such a showing, the Fourteenth Amendment would presume the country thrived as a welter of competing groups, none deserving particular protection. Under race-as-ethnicity, societal discrimination did not afflict racial minorities in a unique way but described equally the experiences of all or none, making it dangerously subjective and therefore constitutionally unacceptable as a justification for affirmative action.

If Powell’s embrace of ethnicity explains the rejection of integration and racial remediation as compelling interests, it also explains the single compelling interest he

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<sup>224</sup> See *infra* notes \* and accompanying text.

<sup>225</sup> 438 U.S. at 307.

<sup>226</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971); 1965 Voting Rights Act, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

<sup>227</sup> 438 U.S. at 307.

<sup>228</sup> *Id.*, at 308-309.

identified: “the attainment of a diverse student body.”<sup>229</sup> According to Powell, the “‘nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.”<sup>230</sup> His invocation of a “Nation of many peoples” echoes the “nation of minorities” language used earlier, but here Powell gestured not toward the absence of a dominant race but instead toward the unique cultures possessed by racial groups. Powell favored cultural pluralism (a concept, recall, invented in tandem with ethnicity), not racial integration, as a sufficient justification for affirmative action. He lauded the admissions program at Harvard, particularly for its effort to pay “some attention to the distribution among many types and categories of students,” including “the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year.”<sup>231</sup> The cultures borne by ethnic groups resembled those possessed by musicians and Californians. In the first half of Powell’s *Bakke* opinion, ethnicity stripped race of all meaning as a form of super- or subordination. In the second half, ethnicity instead reconstituted race as a vessel for superficial cultural differences. In both halves, the United States was a nation of minorities.

#### F. *Powell and Glazer*

Ethnicity did not make its first Supreme Court appearance in *Bakke*. Strains of ethnicity appeared in the Court’s jurisprudence as early as 1945, essentially at the same time that concept first gained widespread national acceptance.<sup>232</sup> Moreover, legal scholars had long since offered a conception of the United States as a conglomeration of minority groups: Boris Bittker had invoked the idea that “we are all members of minority groups” as early as 1962, and Lino Graglia had claimed in 1970 that “America consists of minorities.”<sup>233</sup> Powell was not even the first justice to invoke the language of ethnicity to oppose a race-conscious

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<sup>229</sup> *Id.*, at 311.

<sup>230</sup> *Id.*, at 313.

<sup>231</sup> *Id.* at 313-317 (citation omitted).

<sup>232</sup> *See, e.g.*, *Akins v. Texas*, 325 U.S. at 403 (1945) (stating that grand juries cannot reflect the racial composition of the community because “[t]he number of our races and nationalities stands in the way”); *Hughes v. Superior Court of the California*, 339 U.S. 460, 463 (1950) (rejecting the right of African Americans to picket stores that failed to employ members of their race for fear that otherwise “there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities.”).

<sup>233</sup> *See supra* note \*.

remedy; that distinction goes to Burger, whose dissent in the 1976 *UJO* decision chastised a majority-minority apportionment scheme partly on the grounds that “[t]he assumption that ‘whites’ and ‘nonwhites’ in the County form homogenous entities for voting purposes is entirely without foundation.”<sup>234</sup> Elaborating on the ethnic deconstruction of whites, Burger continued: “The ‘whites’ category consists of a veritable galaxy of national origins, ethnic backgrounds, and religious denominations. It simply cannot be assumed that the legislative interests of all ‘whites’ are even substantially identical.”<sup>235</sup>

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

Did Powell take his lessons about ethnicity directly from Glazer? Although it’s true that Powell did not cite Glazer’s work, his opinion gave pride of place to the reference to a “nation of minorities,” a concept also at the heart of *Affirmative Discrimination*. Even more probative, Powell’s reasoning strikingly paralleled Glazer’s basic analysis. It’s not just that Powell repeated the phrase but that he adopted the matrix of ideas surrounding the “nation of minorities” claim. Like Glazer, Powell argued in effect both that blacks were white and that whites were black. The complicity (not to say incoherence) of that position strongly suggests that it was not for Powell a *sui generis* insight. Perhaps Powell read Nathan Glazer’s book, or perhaps he (or his clerks) picked up on the “nation of minorities” language in one of the briefs. The self-styled Committee for Academic Nondiscrimination and Integrity, with Nathan Glazer sitting on its steering committee, submitted a brief in *Bakke* that repeatedly cited the

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<sup>234</sup> *United Jewish Orgs. of Williamsburgh, Inc., v. Carey*, 430 U.S. 144, 185 (1976) (Burger, C.J., dissenting) (citations omitted).

<sup>235</sup> *Id.*

arguments in *Affirmative Discrimination*.<sup>236</sup> And the Anti-Defamation League of B'nai B'rith submitted a brief that prominently included the entire paragraph from *Affirmative Discrimination* in which Glazer disaggregated whites into discrete ethnicities, the paragraph that concluded “We are indeed a nation of minorities.”<sup>237</sup> Or maybe Powell simply developed the ethnic analysis on his own, drawing upon the Court’s previous invocations of ethnicity. While it seems quite likely that Glazer provided the ethnic analysis that Powell relied on, it’s impossible to know with certainty.<sup>238</sup>

Whatever the source, though, Powell’s reconfiguration of the United States from a country of dominant and subordinate races to a nation of minorities provided the keystone to his analysis in *Bakke*. Indeed, it is difficult to exaggerate the centrality of this understanding of ethnicity to Powell’s evaluation of affirmative action: it justified treating race-conscious remedies as the constitutional equivalent of racial subordination; authorized the quick dismissal of efforts to achieve integration as discrimination for its own sake; recast the reality of widespread racial discrimination as amorphous and subjective; and ultimately ratified “diversity” as the sole basis for upholding affirmative action. As reactionary colorblindness developed on the Court in the 1980s, its proponents initially embraced not only his equation of affirmative action and racial oppression but his reliance on ethnicity theory too.<sup>239</sup>

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<sup>236</sup> Amicus Brief for the Committee on Academic Nondiscrimination and Integrity and the Mid-America Legal Foundation, 1977 WL 189551, at \*2. Glazer’s academic committee had joined forces with the Mid-America Legal Foundation, one of the legal advocacy groups that formed in the 1970s to promote conservative causes. LEE COKORINOS, *THE ASSAULT ON DIVERSITY: AN ORGANIZED CHALLENGE TO RACIAL AND GENDER JUSTICE* 6-7 (2003).

<sup>237</sup> Brief Amici Curiae of Anti-Defamation League of B'nai B'rith et al., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 189541, at \*18. *But see* TIMOTHY O’NEILL, *BAKKE & THE POLITICS OF EQUALITY: FRIENDS AND FOES IN THE CLASSROOM OF LITIGATION* 172 (1985) (“few briefs in *Bakke* did more than echo the arguments of the parties, and what original contributions were made may have been lost amidst the deluge of fifteen hundred pages of amici briefs.”).

<sup>238</sup> Bybee notes that Powell does not cite Glazer. Bybee, *supra* note \*, 278 n.19. *But see* LAWRENCE & MATSUDA, *supra* note \* (describing Powell as paraphrasing Glazer’s key “nation of minorities” paragraph).

<sup>239</sup> Scalia would not wait until he was put on the bench to embrace ethnicity as the basis for colorblindness. A year after *Bakke*, then-Professor Scalia published a short article condemning race-based remedial action. On the one hand, he presented race as just a matter of physical differences, stripped entirely of history, context, and power: “I owe no man anything, nor he me,” Scalia wrote, “because of the blood that flows in our veins.” Antonin Scalia, *The Disease as Cure*, 1979 Wash. U. L.Q. 147, 153 (1979). On the other hand, races—and whites in particular—were in fact ethnicities, all in equal competition with each other:

My father came to this country when he was a teenager. Not only had he never profited from the sweat of any black man’s brow, I don’t think he had ever seen a black man. There are, of course, many white ethnic groups that came to this country in great numbers relatively late in its history—Italians, Jews, Irish, Poles—who not only took no part in, and derived no profit from, the major historic suppression of the currently acknowledged minority groups, but were, in fact, themselves the object of discrimination

## VII. LIBERAL SUPPORT FOR REACTIONARY COLORBLINDNESS

The intellectual history of reactionary colorblindness centers principally on the efforts of liberals who had supported the civil rights movement in toppling de jure segregation but who opposed the campaign to challenge through race-conscious means the de facto racial hierarchy that permeated American society. Though I term such persons “neoconservatives,” it is important not to lose sight of the liberal credentials of persons such as Glazer and especially Moynihan, who became a stalwart of the Democratic Party renowned for his expertise on issues of welfare and urban poverty. In the rise of ethnicity as a countervailing narrative of American race relations, there’s something of a Nixon-in-China dynamic, for it’s liberal northern elites, rather than the post-*Brown* southern converts to colorblindness, who lay the groundwork for the current Court’s embrace of reactionary colorblindness. But what of those liberals who supported affirmative action? After all, the great weight of elite opinion supported race-conscious remedies in the early 1970s.<sup>240</sup> In retrospect, liberal support for remedial uses of race did little to impede the development of reactionary colorblindness. Indeed, the language and logic of some of affirmative action’s most outspoken legal defenders sounded little different than that of affirmative action’s colorblind critics.

### A. *William Brennan*

Justice Brennan supported race-conscious remedies, for instance in *Bakke*, but Kenneth Karst and Harold Horowitz probably correctly observed in 1974 that Brennan nevertheless understood affirmative action as “merely a matter of expediency, a kind of under-the-table violation of the Constitution.”<sup>241</sup> In *Bakke*, Brennan portrayed preferential treatment as a threat to liberal notions of merit and also warned against the risks of minority

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by the dominant Anglo-Saxon majority. If I can recall in my lifetime the obnoxious “White Trade Only” signs in shops in Washington, D.C., others can recall “Irish Need Not Apply” signs in Boston, three or four decades earlier.

*Id.* at 152. Scalia, the son of an Italian immigrant, vigorously adopted the ethnicity model promoted by Glazer and read into constitutional law by Powell; for him the exclusion of blacks paralleled the exclusion of the Irish, the Poles, the Jews, and most pointedly the Italians, ethnics all and all equally the victims of discrimination.

<sup>240</sup> Nicholas Lehman, *What Happened to the Case for Affirmative Action?*, N.Y. TIMES MAG., June 11, 1995, at 54 (during the 1970s and 1980s “the overwhelmingly white establishment has supported affirmative action . . . and that is what accounts for its durability.”)

<sup>241</sup> Kenneth Karst & Harold Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955, 974 (1974).

stigmatization and racial separatism supposedly engendered by race-conscious remedies: “State programs designed ostensibly to ameliorate the effects of past racial discrimination obviously create the . . . hazard of stigma, since they may promote racial separatism and reinforce the views of those who believe that members of racial minorities are inherently incapable of succeeding on their own.”<sup>242</sup> In these comments, Brennan reprised his concurring opinion in *UJO*, where he had elaborated at length his concerns over race-based affirmative action.<sup>243</sup>

The point here is not to criticize Brennan for raising troubling points about race-conscious remedies; surely these deserve airing and attention. Rather, it is to highlight the conception of race and racism on which Brennan relied, for it ill-equipped him to respond to the equation of affirmative action and invidious discrimination. In *Bakke*, at two junctures Brennan moved toward the recognition that race constituted a system of subordination: at the outset of his opinion, when Brennan detailed the sorry history of black exclusion from legal protection;<sup>244</sup> and near the end, when he recounted how “[f]rom the inception of our national life, Negroes have been subjected to unique legal disabilities impairing access to equal educational opportunity.”<sup>245</sup> Ultimately, however, Brennan did not offer an account of race grounded in subjugation. Instead, he proffered the following assessment: “race, like gender and illegitimacy, is an immutable characteristic which its possessors are powerless to escape or set aside . . . . [S]uch divisions are contrary to our deep belief that ‘legal burdens should bear some relationship to individual responsibility or wrongdoing.’”<sup>246</sup> Set aside the problematic claim that race, gender, and illegitimacy are “immutable,” and focus instead on Brennan’s reliance on liberal individualism.<sup>247</sup> Brennan described racism’s central harm, and

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<sup>242</sup> *Bakke*, 438 U.S. at 360-61 (citation omitted) (Brennan, J., concurring in part and dissenting in part).

*Cf.* 438 U.S. at 403 (Blackmun, J., concurring in part and dissenting in part) (“I yield to no one in my earnest hope that the time will come when an ‘affirmative action’ program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most.”).

<sup>243</sup> In his *UJO* concurrence, Brennan expressed doubts about affirmative action ranging from fears that plans purportedly favoring minorities might in fact disguise policies aimed at hurting them to concern with the sense among whites that preferential treatment was unjust. 430 U.S. at 172-74.

<sup>244</sup> *Bakke*, 438 U.S. at 327.

<sup>245</sup> *Id.*, at 371.

<sup>246</sup> *Id.*, at 360-61.

<sup>247</sup> The critiques of immutability are many, both as to the failure of immutability to explain equal protection doctrine, *see, e.g.*, JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 150 (1980), and as to its failure to accurately describe socially constructed identities, *see, e.g.*, Janet Halley, *Reasoning about Sodomy: Act and Identity in and after Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993).

the harm of sexism in *Frontiero*, as a derogation of individuality.<sup>248</sup> For Brennan as late as 1978, to make a distinction on the basis of race or gender harmed the individual by treating him or her differently based on a characteristic over which the individual had no control. Under this view, racism and sexism impinged upon liberal individuality. But for however valid, this insight misses the core dynamic that distinguishes racism and sexism as social hierarchies from the many social practices that treat individuals differentially on the basis of characteristics over which they have little or no control, for instance place of birth, age, or height. To think of hierarchies whose principal harms lie in dehumanization as entailing merely “arbitrary” mistreatment is to entirely miss the way race and sex gain social meaning from the systematic deployment of force, power, coercion, and dominance.

In turn, the focus on capricious mistreatment invited the equation of invidious and benign discrimination. Alan Bakke effectively argued that because of his race, “an immutable characteristic [he was] powerless to escape,” to use Brennan’s language, U.C. Davis did not consider him for the sixteen seats supposedly reserved for minorities. Brennan might have responded that many distinctions on the basis of factors beyond one’s control do not warrant heightened constitutional concern (recall Posner’s recognition of this point); that arbitrary mistreatment did not rise even remotely to the level of the group subordination the Court had begun to address in its racial jurisprudence; and that by no stretch of the imagination could the costs of affirmative action be equated with the brutality of white supremacy. But Brennan offered none of these rejoinders; instead, to distinguish benign from invidious discrimination Brennan resorted to the notion of stigma. He wrote in *Bakke*: “there is absolutely no basis for concluding that Bakke’s rejection as a result of Davis’ use of racial preference will affect him throughout his life in the same way as the segregation of the Negro schoolchildren in *Brown I* would have affected them.”<sup>249</sup> Affirmative action still amounted to racial discrimination, according to Brennan; the difference lay only in that it did not stigmatize whites.

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<sup>248</sup> *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (“[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate ‘the basic concept of our system that legal burdens should bear some relationship to individual responsibility.’”). In *Frontiero* too Brennan began by noting historical patterns of domination, only to shift to an analysis focused on mistreatment on the basis of arbitrary characteristics.

<sup>249</sup> 438 U.S. at 375.

Brennan's invocation of *Brown* is no accident, for 1978 he drew on exactly the racial model used by Warren in 1954.<sup>250</sup> It is liberal race theory, where race is nothing but skin color that carries no social significance, that pictures social distinctions on the basis of race as "arbitrary" and that conceives of racist harms primarily in the psycho-social terms of stigma. That *Brown* should have employed liberal race theory comes as no surprise: it formed the dominant racial ideology of the time; the delicacy of the historical and constitutional moment probably precluded a more thoroughgoing critique of white racism; and the posture of the case required the Court to assume equal facilities, thus pushing toward a psychological rather than material understanding of racial harms. But Brennan should have learned the lessons of the sixties and seventies. The massive resistance in the South, the white riots over busing and neighborhood integration in the North, the urban uprisings and militancy by minorities across the country, all demonstrated that race deeply permeated our society and carried tremendous social resonance as a system for the allocation and justification of privilege and disadvantage; that racism did not reduce to individual prejudice, but rather rose to the level of systemic injustice; and that the harms of racial subordination took not principally stigmatic form but instead reflected thoroughgoing exploitation and immiseration. These central racial lessons were broadcast over the nightly news, through the analysis of the Kerner Commission report, in the exhortations of Martin Luther King, Jr., and in mainstream and insurgent race scholarship. Yet Brennan in *Bakke* focused on discrimination as a derogation of meritocratic norms. Conceiving of racial dynamics in terms of liberal individualism precluded Brennan from clearly articulating exactly how affirmative action and racial discrimination fundamentally differed as social phenomena. Brennan would move toward a structural theory of racial domination in the 1980s.<sup>251</sup> Nevertheless, his account of racial dynamics in *Bakke*

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<sup>250</sup> For a discussion of stigma in *Brown*, see *supra* notes \*.

<sup>251</sup> Brennan's majority opinion in *Plyler v. Doe*, 457 U.S. 202 (1982), for example, which centered on the efforts of Texas to exclude the children of undocumented immigrants from public schools, led Brennan to focus not on race *per se* but on the social dynamics of ostracism. He correctly framed the issue in terms of "shadow populations" and the creation of "a permanent caste." *Id.*, at 218. *McCleskey v. Kemp*, 481 U.S. 279 (1986), also moved Brennan toward a more structural understanding of racism. Presented with an exhaustive study showing that Georgia's death penalty machinery gave great weight to the race of the victim and the race of the defendant, the majority nevertheless insisted on proof of purposeful discrimination by a particular decision maker. *Id.* at 297. Brennan grounded his impassioned dissent in an extended discussion of Georgia's "dual system of crime and punishment . . . whose lineage traced back to the time of slavery," *id.* at 329, and extensively documented the statistical evidence proving the persistence of widespread racial discrimination, *id.* at 325-28. In neither *Plyler* nor *McCleskey* did Brennan posit an understanding of racial discrimination as merely arbitrary treatment,

buttressed the claim that affirmative action and invidious discrimination were, stigma aside, the same.

Perhaps Brennan did not ground his *Bakke* opinion on subordination because such a conception, while available intellectually, seemed unworkable judicially for either doctrinal or political reasons. This may be, but it is important not to overstate the degree of constraint, especially given *Loving* and its emphasis on white supremacy as a precedent, and the fact that Brennan in *Bakke* had failed to assemble a majority at any rate. Note too the heavy emphasis on the particularity of black oppression in Marshall's opinion, as well as Brennan's own acknowledgement of the unique history of discrimination against African Americans, suggesting that this analysis was available and not illegitimate. To reiterate, though, I am not chastising Brennan for failing to embrace a particular conception of racial oppression or for not offering a fully-elaborated anti-subordination jurisprudence. My point is much more basic: Brennan failed to explain why affirmative action and pernicious discrimination were, stigma aside, qualitatively different phenomena. The explanation—at its simplest the insight that racism reflected a dynamic of systematic oppression but affirmative action did not—was in 1978 both obvious and readily available.

#### B. *John Hart Ely and Paul Brest*

Brennan in the 1970s was not alone in sticking to the liberal race theory relied on in 1954; rather, elite liberal law professors kept him intellectual company. They too ignored the evidence that race and racism constituted a structural system. In detailing his concerns about affirmative action in the *UJO* decision, Brennan cited to three law review articles, including John Kaplan's highly equivocal engagement with preferential admissions.<sup>252</sup> In addition, Brennan cited Harvard Law professor John Hart Ely's 1974 article in the *University of Chicago Law Review*, "The Constitutionality of Reverse Discrimination," and Stanford Law professor Paul Brest's "In Defense of the Antidiscrimination Principle," published as the foreword to *Harvard Law Review's* prestigious Supreme Court issue in 1976.<sup>253</sup> Ely and Brest

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but instead focused his reasoning on structural inequalities measured in terms of social practices and racial history.

<sup>252</sup> See *supra* note \*.

<sup>253</sup> *UJO*, 430 U.S. at 178 n.7 (Brennan, J., concurring) (citing Paul Brest, Foreword, *The Supreme Court 1975 Term: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976)); *Id.* at 174 (citing John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974)).

had come down solidly for the constitutionality of affirmative action, but in manners that buttressed rather than repudiated the comparison of affirmative action to segregation.

Ely began his defense of the constitutionality of race-conscious efforts by describing such policies negatively—casting affirmative action as “a wrenching moral issue” and “quite troubling” insofar as it “hurt[] people precisely because of their color.” He further suggested that to allow preferential treatment “seems to be countenancing the most flagrant double standards” because such programs “must mean denying opportunities to some people solely because they were born White.”<sup>254</sup> Nevertheless, Ely defended the constitutionality of what he termed “reverse racial discrimination.”<sup>255</sup> He suggested, in a harbinger of process-defect theory, that “it is not ‘suspect’ in a constitutional sense for a majority, any majority, to discriminate against itself.”<sup>256</sup> For Ely, the central issue came down to cognitive accuracy. He speculated that in general majorities would be prone both to overvalue their own interests and systematically to miscomprehend the interests of minorities.<sup>257</sup> In this context, he supposed that whites would be unlikely to slight themselves in designing a program that disadvantaged whites but advantaged minorities.<sup>258</sup> In his pithy summary, “[w]hether or not it is more blessed to give than to receive, it is surely less suspicious.”<sup>259</sup>

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

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<sup>254</sup> Ely, *supra*, at 723. Ely included this article with virtually no changes as a chapter in JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

<sup>255</sup> Ely, *supra* note \*, at 727.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*, at 733.

<sup>258</sup> *Id.*, at 735.

<sup>259</sup> *Id.* at 736.

affirmative action and racial caste laws, thereby tainting affirmative action by associating it with vicious uses of race.

It might seem implausible that Ely, writing in 1974, thought that racism resulted from mistaken judgments, but consider the following quote: “racial segregation may have been based on a feeling that Blacks were ‘different,’ and therefore had a different ‘place’ in the proper scheme of things—coupled with an unfeeling assumption that because we weren’t bothered by segregation, they won’t be either.”<sup>260</sup> Ely presented racial segregation as rooted in erroneous judgments about what “we” value and about how “they” feel—which would have been bad enough if he misunderstood so drastically the segregation of the 1970s.<sup>261</sup> But Ely was describing pure, old fashioned, straight up Jim Crow racism, for he continued: “In asserting that segregation will hurt only if Blacks choose to let it hurt, the majority in *Plessy v. Ferguson* convicted itself not so much of racial prejudice as of the lesser included offense of gross insensitivity.”<sup>262</sup> Ely treated Jim Crow as troubling because it rested on a mistaken judgment, rather than because it amounted to oppressive hierarchy. A focus on cognitive error makes sense from the point of view of the individual prejudice model prevalent in the 1950s, of course, and Ely explicitly invoked this model.<sup>263</sup> But nothing warranted reliance on this schema in 1974, for by then it was abundantly clear that race and racism amounted to group subordination. To excuse Jim Crow—and *Plessy* in particular—as resting on “gross insensitivity” fundamentally misunderstood the nature of racial hierarchy in the United States. The Jim Crow era heralded by *Plessy* did not rest on mistakes in judgment, but on the collective decision by whites to enforce a thorough regime of racial hierarchy through severe state and private violence. By erasing subordination as the core racial dynamic, Ely’s reasoning facilitated the emergence of reactionary colorblindness. Adopting a process defect theory centered on judgment errors, Ely hardly offered a compelling response to the claims of Posner and Bickel, or Stevens, Burger, Rehnquist, and Stewart, that affirmative action

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<sup>260</sup> *Id.*, at 732 n.41.

<sup>261</sup> Ely couched his comments as a response to speculation by Bickel in 1962 that perhaps “decent feelings” motivated proponents of racial segregation. *Id.* (quoting BICKEL, *THE LEAST DANGEROUS BRANCH*, at 61-62.) In partial defense of Bickel, his point was the difficulty of measuring intent, and he did not claim that such motives in fact obtained. Ely, in contrast, purported to offer a “more plausibl[e]” analysis of the motivation behind Jim Crow laws. *Id.*

<sup>262</sup> *Id.* (citation omitted).

<sup>263</sup> *Id.*, at 731.

amounted to racial discrimination.<sup>264</sup> Just the opposite, Ely seemed to add his weight to the claim that “reverse racial discrimination,” as he termed it, differed only marginally from racial discrimination generally.<sup>265</sup>

Paul Brest began his famous article “In Defense of the Antidiscrimination Principle” by proclaiming flatly that “our nation was committed to the antidiscrimination principle,” which he then defined as “the general principle *disfavoring classifications* and other decisions and practices that depend on the race (or ethnic origin) of the parties affected.”<sup>266</sup> In short, Brest committed himself at the outset to an anticlassification or colorblind rule.<sup>267</sup> Following Ely, Brest also proceeded on the assumption that racism reflected mistakes in judgment—what Brest referred to as “racially selective sympathy and indifference,” which he defined as “the unconscious failure to extend to a minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one’s own group.”<sup>268</sup> He also pursued Ely in his analysis of affirmative action, reprising the argument that whites would largely avoid judgment errors when disadvantaging themselves, and attacking preferential treatment as bad social practice.<sup>269</sup> “Preferential practices may be constitutional,” he wrote, but that “is no more of a compliment than it is to say that [they are] not intolerable.”<sup>270</sup> For support, he referenced John Kaplan’s “Equal Justice in an Unequal World,” lauding its “prescient discussion of the issues.”<sup>271</sup> In addition, he cited to Nathan Glazer’s *Affirmative*

<sup>264</sup> Indeed, Ely would complement Kaplan’s article, *supra* note \*, for “an unusually sensitive presentation.” Ely, *supra* note \*, at 738 n.54.

<sup>265</sup> As late as 1998, Ely did not seem to appreciate the operation of Jim Crow as a form of group oppression. In that year, he sought to explain the legitimacy of *Loving* against the fact that “black and white people did indeed seem to be treated equally” by antimiscegenation laws by emphasizing that such discrimination harmed, not “one race more than another,” but Richard Loving and Mildred Jeter as individuals. John Hart Ely, *If at First You Don’t Succeed, Ignore the Question the Next Time? Group Harm in Brown v. Board of Education and Loving v. Virginia*, 15 CONST. COMMENT. 215, 219, 220 (1998).

<sup>266</sup> Brest, *supra* note \*, at 1 (note omitted, emphasis added).

<sup>267</sup> Fiss, *supra* note \*, at 119-120 (“[t]he antidiscrimination principle . . . invokes the metaphor of blindness—as in ‘color blindness.’”). There was a core instability in Brest’s article, however, for he wed his anti-classification principle to a concern with group harm. Brest, *supra* note \*, at 6 (“Stated most simply, the antidiscrimination principle disfavors race-dependent decisions and conduct—at least when they selectively disadvantage the members of a minority group.”). This instability pervades his article, but I will not discuss it here.

<sup>268</sup> Brest, *supra* note \*, at 7-8. Brest cited two articles by Ely to support this understanding of racial discrimination, including his *Unconstitutionality of Reverse Discrimination* piece. *Id.* at 8 n.36.

<sup>269</sup> *Id.*, at 16-17, 18.

<sup>270</sup> *Id.* at 17 (citation omitted).

<sup>271</sup> *Id.* at 16 n. 66.

*Discrimination*.<sup>272</sup> Like Ely, Brest relied on liberal race theory in a way that led him to largely equate affirmative action and harmful discrimination.

As his citation to Glazer signals, though, Brest also subscribed to ethnicity theory. Brest's adoption of race-as-ethnicity comes through particularly in how he conceptualized racism's harms. In keeping with both the liberal and ethnic model, Brest emphasized primarily psychological damage: he argued that discrimination inflicted "psychological injury by stigmatizing . . . victims as inferior."<sup>273</sup> In contrast, Brest struggled to identify racism's material manifestations. He speculated that often black culture and poverty explained what otherwise might seem to be racial inequalities. "Not all racially disproportionate impact can be attributed to past and remote discrimination: culture and social environment play major roles in shaping people's motivations, habits, and skills, and the values voluntarily held by different social groups conduce to differing extents to success on tests and jobs in any society."<sup>274</sup> Or again, citing Glazer and Moynihan for support: "Because cultural, rather than genetic, characteristics of race are salient, and because race and class co-vary in so many situations, harms that appear to be race-specific may in fact be class-specific."<sup>275</sup> Brest even questioned the damage done by segregated schooling "where," he claimed, "exhaustive analyses by social scientists have not yielded a consensus that adventitious or de facto segregation inflicts race-specific harms."<sup>276</sup> In this context, he wondered whether school segregation's "main or sole injury" lay in "stigmatizing the victim," and asked, "does the stigmatic harm of past de jure segregation continue into the present?"<sup>277</sup> Brest thought, as Warren had posited in *Brown* and as Brennan supposed in *Bakke*, that the main and perhaps sole harm of segregation was stigmatic. More striking, though, he reasoned as if material harms from segregated schooling had not been demonstrated, making the only constitutional question whether stigma from the era of de jure segregation continued. Writing in the mid-1970s, Brest simply did not know whether significant race-specific harms existed. When

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<sup>272</sup> *Id.* at 18 n.78.

<sup>273</sup> *Id.* at 8

<sup>274</sup> *Id.* at 32.

<sup>275</sup> *Id.* at 46.; *see Id.* at 32 n.152 (citing an introduction by Glazer and Moynihan to *ETHNICITY: THEORY AND EXPERIENCE* 11-15 (Nathan Glazer & Daniel P. Moynihan eds., 1975).

<sup>276</sup> *Id.* at 35 (emphasis added). Brest might profitably have consulted the classic CARTER G. WOODSON, *THE MIS-EDUCATION OF THE NEGRO* (1933), or the more recent work by Jonathan Kozol, *JONATHAN KOZOL, FREE SCHOOLS* (1972); *JONATHAN KOZOL, THE NIGHT IS LONG AND I AM FAR FROM HOME* (1975);

<sup>277</sup> Brest, *supra* note \*, at 35.

Brennan read John Hart Ely, he saw affirmative action through a process-oriented version of Myrdal; when he read Brest, he looked through a lens shaped by Glazer, one which occluded any recognition of racial oppression in the United States.

The vast weight of 1970s legal scholarship defended affirmative action in the weakest terms.<sup>278</sup> For the most part, 1970s legal scholars stood at the cutting edge of 1950s race theory: they understood racism as individual prejudice, decried the mistreatment of persons on the basis of arbitrary, immutable characteristics, and pictured racism's harms in terms of stigma to individuals. It was as if, for legal scholars, the 1960s and the revolution in racial scholarship that it produced simply never happened. After the tumult of that decade, and in the face of entrenched racial patterns of inequality and spreading white backlash, prejudice theory could not have been more out of date. But, to judge by their analyses as much as their footnotes, virtually every law professor remained steeped in the orthodoxy of the fifties—or worse, uncritically accepted the extension of ethnicity theory to minorities.

As reactionary colorblindness struggled to gain intellectual coherence during the 1970s, virtually no elite legal scholar declared, clearly and convincingly, that affirmative action and Jim Crow racism were two entirely distinct social phenomena. Rather, article after article defended affirmative action in words that tended to conflate it with racism. By relying on an outmoded theory of race and by ignoring not only recent history but a voluminous scholarship on racial hierarchy, the liberal defenders of affirmative action in the legal academy did surprisingly little to forestall the rise of reactionary colorblindness.<sup>279</sup> Indeed, they likely contributed to its intellectual and moral legitimacy. The rise of reactionary colorblindness is partly a story about a general turn by the nation's elites, including most liberal legal defenders of affirmative action, away from the structural conceptions of race that emerged in the 1960s. Marshall, in his powerful critique of colorblindness in *Bakke*, may have

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<sup>278</sup> The few exceptions included work by Derrick Bell, Owen Fiss, Alan Freeman, Graham Hughes, and Richard Wasserstrom. DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* (1st ed. 1973); Derrick Bell, *In Defense of Minority Admissions Programs: A Response to Professor Graglia*, 119 U. PA. L. REV. 364 (1970); Derrick Bell, *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. REV. 5 (1976); Fiss, *supra* note \*; Freeman, *supra* note \*; Graham Hughes, *Reparations for Blacks?*, 43 N.Y.U. L. REV. 1063 (1968); Richard Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581 (1976).

<sup>279</sup> Writing in the mid-1980s, Richard Delgado took the previous decade's leading Fourteenth Amendment thinkers to task for failing to engage minority scholarship. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984). I criticize liberal legal scholars not for their refusal to read minority scholarship but for their failure to engage almost any scholarship on race at all (one reads most of this legal work in vain even for an occasional cite to Gunnar Myrdal).

cited to historians of black subordination and the government's extensive statistics in insisting upon the centrality of oppression in race relations, but he did not cite to a single law review article. There were, as it happens, almost none to which an opponent of colorblindness might have cited.

### VIII. CONSTITUTIONAL COLORBLINDNESS

The justices arguing for colorblindness in *Bakke* and *Weber* located the source of this command in civil rights statutes because previous case law reiterated time and again that the Constitution did not bar the use of racial classifications. But as Marshall, Brennan, and Blackmun had feared in *Bakke*, the claim was nigh that the Fourteenth Amendment itself barred race-conscious remedies. Just a year after *Weber*, the Court in *Fullilove v. Klutznick* considered a challenge to a federal requirement that at least ten percent of public works money be used to procure services from minority owned business.<sup>280</sup> *Fullilove* reprised the struggle instigated in *Bakke* over colorblindness, but now in terms of the Constitution's meaning. Burger's majority opinion stated unequivocally that "[a]s a threshold matter, we reject the contention that in the remedial context the Congress must act in a wholly 'color-blind' fashion."<sup>281</sup> And Marshall, joined by Brennan and Blackmun, continued to warn that equality could not be achieved in a colorblind fashion: "doors cannot be fully opened without the acceptance of race-conscious remedies."<sup>282</sup> But Stewart, joined by Rehnquist, sought to appropriate Harlan's famous dissent:

"Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. . . ." Those words were written by a Member of this Court 84 years ago [in] *Plessy v. Ferguson*. . . . I think today's decision is wrong for the same reason that *Plessy v. Ferguson* was wrong, and I respectfully dissent.<sup>283</sup>

Stewart's dissent marks the first judicial commitment in a modern Supreme Court case to an anticlassification interpretation of the Constitution itself.<sup>284</sup> It says something profound about

<sup>280</sup> *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

<sup>281</sup> *City of Richmond v. Croson*, 488 U.S. 469, 483 (1989).

<sup>282</sup> 448 U.S. at 522 (Marshall, J., concurring) (citation omitted).

<sup>283</sup> 448 U.S. at 522-23 (Stewart, J., dissenting).

<sup>284</sup> Meanwhile, Powell continued to equivocate. Powell wrote that on the one hand, "[a]t least since the decision in *Brown v. Board of Education*, the Court has been resolute in its dedication to the principle that the Constitution envisions a Nation where race is irrelevant," but on the other concluded that "in our quest to achieve a society free from racial classification, we cannot ignore the claims of those who still suffer from the effects of identifiable discrimination." 448 U.S. at 516 (Powell, J., concurring).

the new colorblindness that this first contemporary embrace of Harlan's phrase on the Court equated affirmative action with the Jim Crow segregation upheld in *Plessy*.

Debate regarding the meaning of Equal Protection has continued on the Court since *Fullilove*, though the weight of opinion has decidedly shifted to support reactionary colorblindness. By 1989, the Court in *Richmond v. Croson* reversed a state set-aside program modeled on the one upheld in *Fullilove*, with a clear majority favoring Stewart's colorblind reading of the Constitution. It is beyond the scope of this Article to recount the back and forth in the nine years between *Fullilove* and *Croson*, let alone between *Croson* and the Court's 2005 decision in *Johnson v. California*, where the two justices who most vigorously support colorblindness nevertheless voted to apply relaxed review rather than strict scrutiny to the California prison system's racial segregation policy.<sup>285</sup> Instead, I seek only to show through a quick review of *Croson* that the ethnic turn so fundamental to Powell's analysis in *Bakke* heavily influenced the colorblind reasoning now dominant on the Court.

#### A. Richmond v. Croson

Richmond, like the federal government, justified its set-aside program directing thirty percent of its contracting dollars toward minority owned businesses as a remedy for extensive racial discrimination in the construction industry.<sup>286</sup> The former capital of the confederacy, Richmond's population was half black, but less than two-thirds of one percent of its contracts had gone to minority businesses in the five years before it adopted the challenged plan.<sup>287</sup> Richmond relied on research by the federal government, gathered as a predicate for the set-aside program in *Fullilove*, that racial discrimination pervaded the construction industry, and also documented the near total exclusion of minorities from receipt of its contracting dollars and from the local trade associations.<sup>288</sup> Putting a name to the practice evident in those numbers, a former mayor of Richmond testified: "I can say without equivocation, that the general conduct in the construction industry in this area . . . is one in which race discrimination and exclusion on the basis of race is widespread."<sup>289</sup>

<sup>285</sup> *Johnson v. California*, 125 S. Ct. 1141, 1164 (2005) (Thomas, J., dissenting, joined by Scalia, J.).

<sup>286</sup> *Croson*, 488 U.S. at 477-78.

<sup>287</sup> *Id.*, at 479-480.

<sup>288</sup> *Id.* at 530-34 (Marshall, J., dissenting).

<sup>289</sup> *Quoted at* 488 U.S. at 535 n.5.

Two central questions confronted the Court in *Croson*, one the standard of review in an affirmative action case and the other whether remedying societal discrimination constituted a sufficient justification for employing a racial classification. To answer both questions, the Court turned to colorblindness, and more particularly to ethnicity theory. Regarding the standard of review, O'Connor for the majority approvingly cited Powell's conclusion that strict scrutiny applied.<sup>290</sup> She then rebutted Marshall's argument for intermediate review in remedial settings by invoking a vision of colorblindness that, typically, blurred the distinction between means and ends. "The dissent's watered-down version of equal protection review," she warned, "effectively assures that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being's race,' will never be achieved."<sup>291</sup> Again in ways unexplained, race-conscious remedies were presented as threatening to retard rather than advance the achievement of the ideal society. But perhaps the most striking part of O'Connor's analysis came when she appealed to *Carolene Products*, John Hart Ely, process-defect theory, and the necessity of heightened review to protect discrete and insular minorities.<sup>292</sup> Which discrete and insular minority did O'Connor have in mind? Why, following directly in Powell's race-as-ethnicity footsteps, none other than whites.

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

blacks constitute approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case.<sup>293</sup>

One might be tempted to think this a throw-away argument, one made only by O'Connor and only because of the particular facts of the case. But in fact the sense that whites suffered as an embattled minority in the Confederacy's former capital pervades the case. Stevens in his concurring opinion referred to whites as "the disadvantaged class,"<sup>294</sup> while Scalia's concurrence intoned that one sees in Richmond "the enactment of a set-aside clearly and

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<sup>290</sup> 488 U.S. at 494.

<sup>291</sup> *Id.*, at 495 (citation omitted).

<sup>292</sup> *Id.*, at 495-96.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*, at 516.

directly beneficial to the dominant political group, which happens also to be the dominant racial group.”<sup>295</sup> What is this so-called affirmative action, these justices seem to say, but racial rent-seeking by a new dominant race? Racism by whites is over; ethnic self-interest and group politics by blacks and other so-called minorities marks the new day, and whites are the newly vulnerable. Whites are really black, potential victims as ascendant minority groups seek their turn at the trough.<sup>296</sup>

Having adopted strict scrutiny, O’Connor turned to review the constitutionality of employing race-conscious means to respond to “societal discrimination.”<sup>297</sup> To begin with, she reasoned that in the absence of proof of a particular misdeed—something rising to the level of “a prima facie case of a constitutional or statutory violation”<sup>298</sup>—racism no longer availed as an explanation for social action. This analysis paralleled Powell’s bifurcation in which racism either rose to the level of Jim Crow practices or was amorphous; indeed, O’Connor approvingly quoted Powell’s assertion in *Bakke* that “‘societal discrimination’ [was] an amorphous concept of injury that may be ageless in its reach into the past.”<sup>299</sup> According to both Powell and O’Connor, in the absence of extreme and explicit racism, racial hierarchy did not operate. “To a large extent,” O’Connor wrote, “the set-aside of subcontracting dollars seems to rest on *the unsupported assumption* that white prime contractors simply will not hire minority firms.”<sup>300</sup> She then cited with approval a lower court’s decision to “decline to assume . . . that male caucasian contractors will award contracts only to other male caucasians.”<sup>301</sup> Stevens in his concurrence expressed even greater outrage at Richmond’s temerity in claiming that racial discrimination continued. He decried the “stereotypical thinking that prompts legislation of this kind,” and condemned the Richmond ordinance because “it stigmatizes the disadvantaged class with the unproven charge of past racial discrimination.”<sup>302</sup> To suspect whites of discrimination now constituted more than error, but actual stereotyping, a veritable racial assault on whites as the new

<sup>295</sup> *Id.*, at 524 (Scalia, J., concurring).

<sup>296</sup> *Cf. Fullilove*, 448 U.S. at 541-42 (Stevens, J., dissenting) (“[T]here is a group of legislators in Congress identified as ‘the Black Caucus’ and . . . members of that group argued that if the Federal Government was going to provide \$4 billion of new public contract business, their constituents were entitled to ‘a piece of the action.’”).

<sup>297</sup> *Croson*, 488 U.S. at 498-507.

<sup>298</sup> *Id.*, at 500.

<sup>299</sup> *Id.*, at 497 (citations omitted).

<sup>300</sup> *Id.*, at 502 (emphasis added).

<sup>301</sup> *Id.* (citation and note omitted).

<sup>302</sup> *Id.*, at 516 (Stevens, J., concurring).

“disadvantaged class.” Discrimination by whites required specific proof; in its absence, the Court would presume racial neutrality governed Richmond’s social and economic life. O’Connor relegated systematic racial harm to the distant past, even as she transformed charges of bias into the new paradigm of racism.

Turning next to explain the vast disparities in group position Richmond had amply demonstrated, O’Connor again relied on an ethnic model. “It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination,” O’Connor opined.<sup>303</sup> In particular, one could not simply expect that, without discrimination, races would be proportionately represented: “it is completely unrealistic to assume that individuals of one race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination.”<sup>304</sup> Instead, “Blacks may be disproportionately attracted to industries other than construction.”<sup>305</sup> O’Connor here virtually parroted Glazer, who in *Affirmative Discrimination* had used similar logic to explain segregated workplaces: rejecting the argument that “[a]bsent discrimination, one would expect a nearly random distribution of women and minorities in all jobs,” Glazer retorted, “[a]bsent discrimination, of course, one would expect nothing of the sort. . . . Some of the relevant factors are: level of education, quality of education, type of education, location by region . . . . taste or, if you will, culture.”<sup>306</sup> Under ethnicity theory, structural disadvantage did not exist, but differences in group culture did. As Glazer put it, “Distinctive histories have channeled ethnic and racial groups into one kind of work or another, and this is the origin of many of the ‘unrepresentative’ work distributions we see.”<sup>307</sup> O’Connor followed Glazer and Powell down the ethnic road, and for however implausible the claim confidently suggested that the virtual absence of blacks from one of the few employment sectors where persons with relatively little formal education nevertheless earned a living wage actually reflected some perverse volition or cultural maldisposition on their part. O’Connor, relying on ethnicity theory, transmogrified Richmond’s evidence of structural exclusion into an attenuated claim of societal discrimination damaged by unwarranted accusations of white racism and more likely the result of autonomous black preferences.

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<sup>303</sup> *Id.*, at 499.

<sup>304</sup> *Id.*, at 507-508 (citation omitted).

<sup>305</sup> *Id.*, at 503.

<sup>306</sup> GLAZER, *AFFIRMATIVE DISCRIMINATION*, *supra* note \*, at 63.

<sup>307</sup> *Id.* at 203

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

To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.<sup>308</sup>

Despite the heavy particularity of Virginia's history, *Croson* relied on a vision of a tug of war between various identically situated ethnic groups to strike down Richmond's affirmative action plan. O'Connor had used the version of ethnicity picturing whites as black to justify strict scrutiny. Now, in considering whether affirmative action could be justified as a remedy for structural disadvantage, she reverted to the version of ethnicity that depicted blacks as white, in which all groups labored under equal disadvantage. O'Connor wrapped her opinion in the moral legitimacy afforded by the "dream of a Nation of equal citizens in a society where race is irrelevant." But for this invocation of the colorblind ideal to make sense as a basis for constitutionally striking down a set-aside program geared to further racial emancipation, a redescription of racial dynamics in the United States was necessary. Race-as-ethnicity, first given constitutional form by Powell in *Bakke*, provided that neat revision, positing whites as vulnerable minorities even as it denied the persistence of racial hierarchy.

I do not argue here that all or even most contemporary defenses of colorblindness resort openly to an ethnic model. Instead, my thesis is that ethnicity theory provided the intellectual framework to support the early development of a discourse of reactionary colorblindness. Particularly in the context of school desegregation, the Court had committed itself to dismantling the institutionalized results of racial hierarchy, embracing race-conscious means to do so. But even as race-conscious remedies gained in importance, a backlash against the attack on de facto subordination gathered force. Race-as-ethnicity provided the intellectual underpinning to that backlash, for it provided an alternative framework capable of recasting racial hierarchy as a matter of cultural difference and ethnic group competition. Powell constitutionalized this frame, using it to support treating affirmative action and invidious

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<sup>308</sup> 488 U.S. at 505-06 (citation omitted).

discrimination as indistinguishable under the Fourteenth Amendment, and O'Connor followed suit in *Croson*. In turn, cases such as *Bakke* and *Croson* now serve as precedent for reactionary colorblindness. The particular rationales for treating affirmative action and Jim Crow alike increasingly matter less and less: it's now simply our constitutional law, an Equal Protection bromide strenuously asserted but rarely explained.

## IX. CONCLUSION

Reactionary colorblindness targets equally all racial classifications, refusing to distinguish between remedial and pernicious purposes. It now forms a dominant trope in American race relations, firmly established not only in law but also the public discourse of race.<sup>309</sup> Yet surely, as Justice Stevens came at long last to recognize, there is a sharp “difference between ‘an engine of oppression’ and an effort ‘to foster equality in society,’ or, more colorfully, ‘between a “No Trespassing” sign and a welcome mat.’”<sup>310</sup> For however problematic one might think race-conscious remedies, Jim Crow and affirmative action simply are not the same thing. But the current majority of the Supreme Court understands the Fourteenth Amendment to say otherwise, so that under equal protection both endure the same level of constitutional hostility.

I argue in this Article that legal elites justified the rise of reactionary colorblindness by invoking a particular understanding of race, and that this conception developed out of the questionable imposition of an ethnic model across the color line. Situating debates about equal protection against background understandings of race, one discerns the fingerprints of liberal race theory in *Brown* and more structural analyses in *Griggs*, *Green*, and the *Swann* decisions. In turn, the extension of an ethnic narrative to racial minorities facilitated the rise of reactionary colorblindness in the 1970s. Race-as-ethnicity erased subordination from the American story by positing that all groups faced the same dynamic of competition and assimilation, additionally claiming that disparities in social position reflected nothing more than differences located in the cultures and capacities of the ethnic groups themselves. In this step, blacks and other minorities faced the same social conditions as white ethnics, none more

<sup>309</sup> EDUARDO BONILLA-SILVA, *WHITE SUPREMACY AND RACISM IN THE POST-CIVIL RIGHTS ERA* 137 (2001) (arguing that “color-blind racism” is now “the central ideological formation that has emerged to support and reproduce the new racial structure in the United States.”). See also EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* (2003).

<sup>310</sup> *Adarand*, 515 U.S. at 229 (O'Connor, quoting J. Stevens).

or less the victims of group discrimination. But in a contradictory move, ethnicity also posited that the white experience tracked that of blacks in the sense that whites carried their own histories of cultural victimization, which antidiscrimination law and affirmative action impermissibly ignored. A vulnerable minority did exist, but now in the form of the disaggregated white “majority,” making racial distinctions disfavoring whites the invidious equal of segregation laws. Fully articulated outside the legal academy in 1975 by Nathan Glazer, this peculiar logic appealed to legal elites seeking to legitimize opposition to race-conscious efforts at structural reform. Powell’s decision in *Bakke* stands out for first fully embracing race-as-ethnicity: his opinion justified treating affirmative action and Jim Crow laws as constitutionally equivalent by depicting blacks as white but whites as black. Powell’s ethnic reasoning, ineffectively countered and even to some extent buttressed by liberal supporters of affirmative action, laid the cornerstone for later efforts to read reactionary colorblindness into the Fourteenth Amendment, not least by the Court majority in *Croson*.

I do not object to ethnicity as such.<sup>311</sup> I have no quibble with extending the general insight that groups possess distinctive cultures to non-whites. On the contrary, many social groups of the sort typically described in racial terms share local folkways and customs, where such cultures, while fluid and evolving, nevertheless substantially depend for their transmission upon familial, kinship, and community ties. I object strongly, however, to the depiction of minority cultures as solely the legacies of group oppression, and consequently as deeply damaged and damaging. What race-as-ethnicity usually offers is not a sustained engagement with the vibrant complexity of black or other minority cultures, but the transmutation of racial stereotypes about minority failings into the more serviceable but no less inaccurate or pernicious language of pathological group cultures. Similarly, the dynamic story of gradual acculturation no doubt holds important insights as applied to various groups in the United States, including racial minorities. But it should not occlude the history of violent subordination that set the parameters for America’s treatment of non-whites incorporated into this country. Entrenched racial hierarchy has ensured that whites struggling to find acceptance in the United States, even those subject to group hostility, have received a far more hospitable welcome than have non-whites. In addition, the implicit focus of ethnicity

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<sup>311</sup> Cf., Ian Haney López, *Race, Ethnicity, Erasure: The Salience of Race to Latcrit Theory*, 85 CAL. L. REV. 1143 (1997) (evaluating and rejecting efforts to depict Latinos in ethnic terms).

on sub-groups defined by national origin or local cultures is all too the good, even as applied to non-whites. Important cultural differences rooted in national ancestry, immigrant status, and regional origins, among other sources, contribute to profound heterogeneity among Latinos, blacks, Asians, and Native Americans, in addition to whites. But I reject as sociologically incomplete and indeed politically reactionary a cultural inquiry that supplants, rather than complements, a focus on group subordination. One learns much about racial minorities, as about whites, by engaging in a detailed study of their disparate cultures and communities—but one would be blind to perhaps the most significant facets of their lived realities if one did not also inquire into the nature of racial hierarchy in the United States.

Like Powell in *Bakke*, Scalia in *Croson* endorsed Bickel's critique of affirmative action: "I share the view expressed by Alexander Bickel that '[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.'"<sup>312</sup> I, like most everyone, share the view that discrimination is inherently wrong and socially destructive—but insist that one appropriately understands racial discrimination as the furtherance of hierarchy rather than as any distinction on the basis of race, especially given a current context in which the overwhelming tendency is for the state to use race-based classifications to aid in racial emancipation. I, like most, also embrace colorblindness—but as a vision of a future society in which racial hierarchy is no more, rather than as a reactionary policy geared toward maintaining the racial status quo. We should reject reactionary colorblindness of the sort ensconced in current Equal Protection jurisprudence, for it rests on the facile indictment of all racial classifications, the undefended assertion that eschewing racial distinctions today furthers rather than retards the achievement of a better tomorrow, and the risible equation of racial subordination and racial remediation. More fundamentally, it rests on an intellectual sham: the depiction of race as ethnicity.

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<sup>312</sup> *Croson*, 488 U.S. at 520-21 (Scalia, J., concurring) (emphasis added) (quoting BICKEL, THE MORALITY OF CONSENT, *supra* note \*, at 133).