COMMENT

CONSTITUTIONAL THEORY BUILDING IN THE CONTEXT OF THE FOURTEENTH AMENDMENT: THE HISTORY OF AFFIRMATIVE ACTION

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Foreword

The twentieth century philosopher Michel Foucault once wrote that we ought to do away with what he termed the "author-function."[1] By this he meant that readers ought not to take the personal characteristics of authors into account when scrutinizing their work. His point essentially boils down to the following: an author's reputation, political background, and personality have the potential to pervert an otherwise objective criticism. One danger here is that of the unimaginative novel written by a prolific and successful author imputed with a complex and undeserved interpretation as a means of excuse. Likewise, the author may be pigeonholed into an unsatisfying genre, say fiction, despite a philosophical maturation; the political conservative's surprisingly liberal opinion is misconstrued to the right; the provocative feminist's work may be discounted by virtue of his gender. Each of these situations describes the potential entanglement of a work's meaning with the author's social status to the end that the author's ideas fail to reach his or her reader as they were originally intended.

This brief account of obscure French philosophy is not intended to obfuscate, challenge, demean, or otherwise question the reader's ability to sense out what is meaningful about this essay in particular. In fact, quite the opposite is true. This paper is intended for an audience of professors and students of law. If

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1. Michel Foucault, *What is an Author?*, *in* TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM 148 (Josue V. Harari, trans. and ed., 1979).

anyone has the ability to root out the logic of erudite arguments, it is surely this community, versed as it is in the world of complex judicial opinion and legal treatise.

Foucault's point is provided instead because it is clearly relevant to the culture of the Affirmative Action debate within both popular and academic circles. In the wider world, it is not uncommon for a person's stance on the issue of Affirmative Action to become qualified by his or her race. The white opponent of Affirmative Action, for example, is often said to be speaking as a white person, that is, as a racially resentful person guarding racial hegemony. Conversely, the black proponent of Affirmative Action is often said to speak as a black person, arguing in his or her self-interest, rather than as a disinterested critic. The same is true when a white person speaks out in favor of Affirmative Action or a black person speaks out against it. The former is all too often regarded in terms of white anxiety or guilt while the latter is usually labeled as a "black conservative," thereby objectifying the opponent based on his race.

Typically loathe to consider race in the calculus of an argument, the academic world has been surprisingly influenced by race in the context of the Affirmative Action debate. Strikingly similar arguments are sometimes considered differently in large part due to the color of the author's skin. The distinction between conservatism and black conservatism emerged in academia despite what appear to be similar themes and arguments.[2] Even more importantly, one of the strongest arguments in favor of Affirmative Action in education, an argument favored by several sitting justices of the Supreme Court, unintentionally stereotypes students on the basis of skin color.

That argument, the impetus behind the "Harvard Plan" referred to in *Regents of the University of California v. Bakke*,[3] urges us to believe that racial diversity, in and of itself, gives us "intellectual rewards." Although well meaning, the argument is founded on the fallacy that race is imbued with normative force. That is, while proponents speak of the plan's potential to encourage unpopular perspectives, it is more likely that such a plan merely encourages new ornamentation to old ideas. This is not to say that diversity is without social value. Interaction surely works to stem social stereotyping and helps to bridge racial misunderstanding. Rather, I question whether proponents of the Harvard Plan are right to collapse race, experience, and perspective into a single unidentifiable unit.

2. The differences could just as easily, and more palatably, be attributed to the personalities of the authors rather than to their race.

3. 438 U.S. 265 (1978).

I return to these issues again at a later point in the essay. For the time being, suffice it to say that the author-function, and the author's race in particular, is usually accorded a stronger role within the Affirmative Action debate than it is in other academic or sociopolitical contexts. I will reserve wholesale judgment as to the rightness or wrongness of such a role, limiting myself to the observation that the phenomenon exists.

As a pragmatist, it simply makes sense to remark on my own ethnicity as it may or may not be relevant to the thoughtful inquiry. I feel as though I am in the odd position of being at once both part of the white power structure and yet somehow also not part of it. Jews are often considered to be white when it is convenient to do so – usually in the context of not being black – but in lesser and greater degrees come up against the same kind of stigmatizing, demoralizing, majoritarian influences that other racial minorities face. Whether or not this has affected my approach to Affirmative Action is a question to which I have no answer. I can say, however, that I have in fact adopted something of a middle ground. On the one hand, it is the author's view that Affirmative Action programs based upon race are repugnant to the guiding principles of the Constitution of the United States, the civil rights movement, and the ideologies by which we mean to teach our children. On the other hand, I recognize the great social (and consequent economic) value of a diverse classroom and workplace. Each theme figures prominently in this essay. It is my hope that by its end, the reader will have found some measure of resolve in these pages.

In the first section, I examine the historical roots of Affirmative Action and its associated jurisprudence by tracing equal protection methodology as it applies to race, from its dawn until the watershed *Brown v. Board of Education of Topeka* [4] case. I then turn to problems of strict scrutiny, benign racism, and racial resentment. Next I explore constitutional theory more broadly but with an eye to the Affirmative Action debate. Here I am especially concerned with the question of whether the Fourteenth Amendment should serve individual or group rights. The final chapter focuses on the Harvard Plan, as it provides a nice backdrop upon which to frame and define the constitutional arguments of the preceding section. Here I argue that race, while an acceptable basis on which to fashion a Harvard-style plan, should yield to economic preferences where class may be substituted for race to obtain a similarly good result yet by less objectionable means.

4. 347 U.S. 483 (1954).

I. HISTORICAL ROOTS OF THE AFFIRMATIVE ACTION DEBATE: FROM *POST* TO *BROWN*

> *Amendment XIV (1868): Section I. All Persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.*[5]

Any inquiry into the history of the jurisprudence that has given rise to the Affirmative Action debate usually begins with the Fourteenth Amendment and, more specifically, with its prohibition against denying equal protection of the laws. Perhaps one could begin even earlier, with the culture of slavery and racism that created the need for the Fourteenth Amendment. The Constitution itself impliedly authorized slavery in at least two places. Article I, Section 2 provided a formula for apportioning representation and taxes where "all other Persons" other than free persons were to be counted as a paltry sixty percent human.[6] Article I, Section 9, meanwhile, prohibited Congress from taking actions to curb the influx of persons owing to the international slave trade until the year 1808.[7]

By 1845, the culture of slavery had become so pervasive that Justice Nevius, writing the opinion in *State v. Post*[8] upholding the legal status of slavery in New Jersey, was able to voice a moral depravity so vile that today it seems nearly unimaginable. Despite listening with "great pleasure" to the "pathetic appeals" made by abolitionist lawyers who felt that the state's constitution had outlawed slavery when it had declared all men by nature free and independent, Justice Nevius felt compelled to exercise what he termed "legal intelligence," rather than compassion.[9] It was this legal intelligence that appears to have led Nevius to the conclusion that "judges must be more than men," which is to say that courts must exercise their judgment in a way that is detached from popular, moral and other political pressures.[10]

Nevius thought it plain that "[a]uthority and subordination are essential under every form of civil society."[11] He therefore concluded that if the Constitution speaks of freedom, it must be read in this context. But in dismissing the abolitionist claim in such a fashion, Nevius demonstrated the shortsightedness of his

5. U.S. CONST. amend. XIV.
6. U.S. CONST. art. I, § 2.
7. U.S. CONST. art. I, § 9.
8. 20 N.J.L. 368 (1845).
9. *Id.* at 369.
10. *Id.* at 377.
11. *Id.* at 374.

logic. The cold calculus of *State v. Post* is besmirched by incongruity. Surely the abolitionist lawyers did not attempt to question the validity of the social contract. Rather they questioned its terms. For all of his lofty words, Nevius falls prey to the dominant sociopolitical ideology of his time: the natural right of the white person to dominate a racial hierarchy. In reality, the logic of the decision required judges to be less than men, not more. Judges were required to embody anachronistic values and could not reassess, as normal men often do, the changing moral landscape.

Nowhere was Nevius' vision of jurisprudence in better evidence than in the well known, and much maligned, *Dred Scott*[12] opinion. In that opinion, Justice Taney argued that freed slaves could not be considered "people of the United States"[13] or "citizens"[14] on the basis that the Framers were racists. "The duty of the court," Taney proposed, is to interpret the Constitution "according to its true intent and meaning when it was adopted."[15] Since African Americans had, at that time, "been regarded as beings of an inferior order, and altogether unfit to associate with the white race,"[16] it was clear to Taney that the Framers had not intended to make them citizens. Because the intentions of the Framers were "the best lights" Taney could employ in his inquiry, it was equally clear to Taney that it was not in the Court's authority to make them citizens either.[17]

Perhaps the most interesting aspect of *Dred Scott* was the fact that Taney chose the intentions of the Framers to be the guiding light upon which to rest his decision. *Dred Scott* was, after all, only the second instance in the history of the United States where the Supreme Court employed its power of judicial review. The first instance, *Marbury v. Madison*,[18] refers to the Framers' intent, but a case can be made that it was the language of the Constitution that was dispositive. In issuing the *Marbury* opinion, Justice Marshall explained that it was "the *particular phraseology* of the constitution of the United States"[19] that "confirms and strengthens"[20] the Court's holding. Had Taney taken the particular phraseology of the Constitution as his "guiding light" then *Dred Scott* would almost certainly have turned out the other way. Taney's choice reinforces that the *State v. Post*'s prin-

12. Dred Scott v. Sandford, 60 U.S. 393 (1857).
13. *Id.* at 404.
14. *Id.*
15. *Id.* at 405.
16. *Id.* at 407.
17. *Id.* at 405.
18. 5 U.S. 137 (1803).
19. *Id.* at 180 (emphasis added).
20. *Id.*

ciple of judges being "more than men" was imbued with sociopolitical leanings that worked to disadvantage African Americans.

The Fourteenth Amendment changed the terms, but not the underlying character, of the debate. While judges could no longer regard the intention of the Framers as dispositive, they continued to employ intent as a means of strictly construing, and thereby limiting, any new rights. In *The Slaughter-House Cases*,[21] Justice Miller declared that "the one pervading purpose" of the post-war amendments was the "freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from . . . the oppressions of those who had formerly exercised unlimited dominion over him."[22]

Shortly thereafter, the Court narrowed the purpose further. The 1879 case of *Strauder v. West Virginia*[23] stated that the purpose of the Fourteenth Amendment was "to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons . . . whenever it should be denied by the States."[24] In the ironically named *Civil Rights Cases*,[25] the Court agreed, determining that the purpose of the Fourteenth Amendment was "prohibitory in its character, and prohibitory upon the States."[26] Such determinations placed a severe limit on the pervading purpose of the Fourteenth Amendment as interpreted by Justice Miller in *The Slaughter-House Cases*. The *Civil Rights Cases* Court was prepared to say that the Fourteenth Amendment did not give Congress the power to prohibit private discrimination with respect to public lodging.[27] This was a far cry from providing the security and firm establishment of the newly freed slave's freedom, indeed!

The jurisprudence of the *Civil Rights Cases* period managed to strip away, bit by bit, the character of the language contained in the Fourteenth Amendment. *Plessy v. Ferguson*,[28] the 1896 decision that laid the foundation for the "separate but equal" doctrine, indicates just how bare the "equal protection of the laws" was to become.[29] In that case, the United States Supreme Court upheld a Louisiana statute that required railroad companies to provide "equal but separate accommodations for the

21. 83 U.S. 36 (1873).
22. *Id.* at 71.
23. 100 U.S. 303 (1879).
24. *Id.* at 306.
25. 109 U.S. 3 (1883).
26. *Id.* at 10.
27. *Id.* at 17-18.
28. 163 U.S. 537 (1896).
29. *Id.* at 552 (Harlan, J., dissenting).

white, and colored races."[30] The majority opinion rested its decision on the assumption that although the object of the Fourteenth Amendment "was undoubtedly to enforce the absolute equality of the two races before the law,"[31] that objective "could not have been intended to abolish distinctions based upon color, or to enforce social . . . equality."[32] This having been said, the majority concluded that the Louisiana statute did not upset the balance of legal equality because the criterion of separateness did not, in and of itself, stamp African Americans with a badge of inferiority. If such a badge of inferiority was inferred it was only "because the colored race [chose] to put that construction upon it."[33]

In his dissent in *Plessy*, Justice Harlan recognized the manifest unreasonableness of the majority opinion. Only by shutting their eyes to the real meaning behind the statute, namely, "that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens,"[34] could the majority uphold its language. The majority opinion, like the *State v. Post* calculus, spoke in a language of disinterested abstraction but was dominated by ideology and political motive. Why else would constitutional analysis begin and end with reference to intention and a view "to the established usages, customs and traditions of the people"?[35] Harlan suggested an altogether different approach to analyzing the Fourteenth Amendment. Rather than adhere to a methodology founded on history, Harlan read a vision for the future into the Constitutional language. Harlan wrote, "The destinies of the two races are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law."[36] This forward looking approach gave rise to Harlan's bold proclamation that the "Constitution is color-blind, and neither knows nor tolerates classes among citizens."[37] It is the author's contention that Harlan *got it right.* If there has been any tragedy in the recent history of the Fourteenth Amendment, it is that the Supreme Court has strayed so far from Harlan's advice.

It was not until 1954 that the "separate but equal" doctrine of *Plessy* was rejected in the landmark case of *Brown v. Board of*

30. *Id.* at 540.
31. *Id.* at 544.
32. *Id.*
33. *Id.* at 551.
34. *Id.* at 560 (Harlan, J., dissenting).
35. *Id.* at 550.
36. *Id.* at 560 (Harlan, J., dissenting).
37. *Id.* at 559 (Harlan, J., dissenting).

Education of Topeka.[38] Unfortunately, the *Brown* Court failed to follow Harlan's lead and ultimately premised its decision on rather feeble grounds. *Brown* represents the Supreme Court's squandered opportunity to shed the rudiments of Fourteenth Amendment jurisprudence that were preoccupied with intent and tradition and tended naturally to favor white racism. Instead, the *Brown* Court made out a weak case that the intent and tradition of the Fourteenth Amendment were inconclusive, thereby giving the majority just enough wiggle room to decide the case solely on a shaky social science basis.[39]

The intent behind the post-war amendments, said the Court, was inconclusive due to the fact that it was impossible to discern what legislators who were neither avid proponents nor antagonists of the amendments had in mind for them.[40] The Court also maintained that the specific intent behind the Fourteenth Amendment with respect to education was unascertainable because compulsory public schooling did not exist as such at the time the amendment was ratified.[41] Looking at the Court's arguments in hindsight, they seem tenuous at best.

Can the intent of legislators who were neither active proponents nor antagonists of the Fourteenth Amendment be at all relevant? Query whether we would look to such legislators to determine the intent of any other congressional legislation. The relevant aspects of the intent inquiry typically deal with what the proponents of the legislation believed and what specific language was, in fact, employed. If the most avid proponents of the Fourteenth Amendment "undoubtedly intended . . . to remove all legal distinctions among 'all persons born or naturalized in the United States',"[42] as the *Brown* Court believed they did, and the Amendment was, in fact, ratified as part of our Constitution with its very broad language, then why should the Court see the intent of the amendment in any terms other than those proposed by the victors?

The proposition that the history of public education lends something to the intent inquiry is similarly questionable. The Court may have been right to point out that the relatively short life of public schooling in the South had resulted in little Fourteenth Amendment jurisprudence. This fact alone, however, gives us little reason to believe that public education was a special case. The *Plessy* Court had, some fifty-eight years earlier, unambiguously pronounced that the "established usages, cus-

38. 347 U.S. 483 (1954).
39. *Id.* at 494 n.11.
40. *Id.* at 489.
41. *Id.* at 489-90.
42. *Id.* at 489.

toms, and traditions of the people" were mired in racism.[43] If the intent of the Amendment, as determined in *Plessy*, was not to protect African Americans from segregation in public accommodations, then how could its intent possibly be to protect African Americans from segregation in public schools?

The *Brown* Court danced around the intent analysis. It would have been better for the Court to say simply that ascertaining the intent behind the Fourteenth Amendment was not the most important aspect of the constitutional inquiry. The Court plainly knew what was at stake in *Brown*; the "all deliberate speed"[44] provisions of *Brown II* bear testament to the fact that the Court was well aware that not only the future of the schools, but the future of the nation, hung in the balance. Had the Court introduced this aspect of the controversy into the Court's opinion then it would not have felt constrained to limit the overruling of *Plessy* to the language surrounding the "badge of inferiority." Nor would it have had to rest its decision on the dubitable pretext of social science.

Although the *Brown* decision will forever be regarded with admiration, it is this element of the opinion that has left equal protection jurisprudence in the precarious position it is in today with regard to race. Social science, like history, is not irrelevant to the judicial inquiry. But the psychological findings championed in *Brown* are an extremely weak basis on which to rest such a mighty decision. For one, the opinions of social scientists are constantly in flux. What is a good theory today is often an embarrassment tomorrow. Here, there is ample opportunity for a statistician to come forward with data to the effect that segregation does not automatically result in a sense of inferiority or that such a feeling does not automatically retard educational development. Secondly, the decision leaves room for the possibility that segregation may be constitutional in certain situations where the requisite subjective mindset does not develop. Finally, the findings on which *Brown* relies are at such a high level of abstraction that they may unintentionally stereotype many African American students.

A better opinion in *Brown* would have revived Justice Harlan's approach. Instead of beginning with why the history of the Fourteenth Amendment proved inconclusive, the Court would have begun with why the future of the amendment was uncertain. It might attempt, as I have, to show how the spirit of the amendment had been stripped nearly bare. Whether or not the Court's account proved convincing would be of little impor-

43. *Plessy*, 163 U.S. at 550.
44. Brown v. Board of Educ. of Topeka et al., 349 U.S. 294, 301 (1955).

tance, for the focus would be in looking forward in time rather than back. The opinion would, like Harlan had, point to the fact that our nation's people, whatever their color, share in a common future. Racial hostility, it might say, can serve only to disrupt national unity and upset the civil order. It would then reaffirm the central concepts of Harlan's dissent: the Constitution is color-blind. Our nation's laws cannot discriminate on the basis of race.

Had the *Brown* Court been willing to promote these principles unambiguously, it could then have supplemented the holding with social science, historical accounts, literature or whatever else it liked. A simple, inherently just, bright line rule would have been established. Instead, the Court allowed the perverse course of Fourteenth Amendment constitutional methodology, the "legal intelligence" of intent and tradition, to escape relatively unscathed. The *Brown* Court, for all its bravery and vision, failed to seize upon the full extent of its opportunity. Federal judges continue to look for constitutionality in the wrong places. In short, judges continue to be "more than men," and the ghost of *State v. Post* remains.

II. Strict Scrutiny, "Benign" Racism, and Racial Resentment

Although courts had long paid heed to the fact that the post-war amendments grew out of a pressing need for racial equality, it was not until 1944 that the Supreme Court clearly articulated the now-familiar strict scrutiny standard. In *Korematsu v. United States*,[45] the Supreme Court was asked to decide the constitutionality of the World War II exclusion orders that forced Japanese-Americans into internment camps.[46] The *Korematsu* Court noted at the outset of its discussion that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect."[47] However, the Court qualified the statement by saying that "not . . . all such restrictions are unconstitutional."[48] Rather, the Court maintained that such restrictions required a review of "the most rigid scrutiny."[49] Racial restrictions may pass constitutional muster, the *Korematsu* Court concluded, only in the face of "[p]ressing public necessity."[50] Racial antagonism, on the other hand, would never be enough.[51]

45. 323 U.S. 214 (1944).
46. *Id.* at 215-16.
47. *Id.* at 216.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*

It is of passing interest that no racial restriction since the exclusion orders that were the subject matter of *Korematsu* has been upheld upon the application of strict judicial scrutiny. Given the result in that case, it is natural to wonder whether even the strictest scrutiny is good enough. In this section, I propose that it is not. His private prejudices notwithstanding, Justice Harlan, the justice who argued most persuasively that "our Constitution is color-blind," should be the model for our equal protection analysis.

The first principle of a "Constitution is color-blind" approach could well be that "benign" racism is an irreconcilable oxymoron. The Supreme Court, however, has rejected such an approach in favor of a view that ultimately undermines the political objectives of the Affirmative Action programs it purportedly supports. This is not to say that the Court's political leanings are not admirable. In fact, many of the ideas upon which Affirmative Action programs are premised make sense. Racial minorities should get their due. Racial minorities should be given the opportunity to succeed in the face of white racism. The attainment of racial diversity should be a priority with which society should concern itself. It is only unfortunate that Affirmative Action, as it stands today, is the way in which promoters of these ideas have gone about achieving them.

The support of "benign" racism has a number of deleterious effects. First, it likely encourages white racial resentment – rightly or wrongly – which has an adverse impact on racial harmony. Secondly, it may act to place an asterisk next to African American achievement such that it may work against minority success or, at least, perceptions of that success.[52] Thirdly, and most prominently, it sacrifices the guiding philosophy of the Civil Rights Movement, that race is a poor candidate upon which to discriminate, which also serves as the infrastructure for the Fourteenth Amendment.

Perhaps the positives of Affirmative Action outweigh these negatives. But why premise Affirmative Action on race at all? Given the racial stratification of economic opportunity in this country, programs that favor the advancement of the lower classes sustain the positives of racially based Affirmative Action while limiting the negatives.[53] Surely the practical motivations are present. Programs that benefit the poor are generally less

52. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 241 (1995) (Thomas, J., concurring) ("These [Affirmative Action] programs stamp minorities with a badge of inferiority").

53. Studies on the disparate economic status of whites and blacks in America are too numerous to mention. My favorite shall suffice: MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH (1997). The latest census

controversial than programs founded on "benign" racism. Moreover, the constitutionality of such programs is less suspect. Given such a viable alternative and popular support of similar programs that work to favor the lower classes such as tax progressivity and the Earned Income Tax Credit, it is difficult to see why social liberals continue to favor race-based Affirmative Action measures.

One explanation may be that liberals were persuaded more than we should have been by the Supreme Court's myopia. The Court's opinion in *Bakke*[54] set the stage for the debate that has endured and so it is proper to begin there. In that case, Justice Powell's plurality opinion, applying the strict scrutiny of *Korematsu*, struck down the racial quota admissions policy in place at the University of California at Davis medical school.

In retrospect, none of the *Bakke* opinions pursued a fully satisfactory argument. Powell's tie-breaking opinion outlined the issues appropriately, but failed to take the final step toward colorblindness. The concurring opinions of Justices Brennan, White, Marshall, and Blackmun properly pointed out that the Harvard approach is indistinguishable constitutionally from a Davis-style quota system, but then went in the wrong direction by adhering to the *Brown* "stamp of inferiority" rationalization. Justice Marshall's opinion observed correctly that the history of Fourteenth Amendment jurisprudence comprised a circuitous attack on African American rights, but failed to articulate why it is that we should restore the special treatment of the *Plessy* era rather than Harlan's vision. Justice Stevens' opinion, which Justices Burger, Stewart, and Rehnquist joined, appeared to avoid the meaningful issues altogether.[55] Justice Blackmun's opinion moved in the opposite direction of colorblindness.

Justice Powell's opinion, which has come to embody the precedent of *Bakke*, is full of uneasy tensions. He began in the right direction by applying strict scrutiny to the admissions preferences despite the fact that it was the white majority that was being harmed. Equal protection cannot permit "the recognition of special wards entitled to a degree of protection greater than that accorded others."[56] Such special recognition flies in the face of common sense as well as the precedent that "[d]istinctions be-

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data is also illustrative, but its income centered approach fails to fully articulate the problem.

54. Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978).

55. Allowing the issue to simmer at the state level might have been the proper course for the Court to take at one time, but four years has already passed since the Court avoided the *DeFunis* challenge. *See* DeFunis v. Odegaard, 416 U.S. 312 (1974). Only the dissenting Justice Douglas reached the merits in that case. *Id.* at 320. He argued in favor of colorblindness. *Id.* at 312.

56. *Bakke*, 438 U.S. at 295 (Powell, J., plurality).

tween citizens solely because of their ancestry,"[57] are "odious to . . . the doctrine of equality."[58] But Powell backs off from this position later in the opinion by suggesting that Davis adopt a Harvard-style plan. Here, a students' race, while alone not dispositive, "may be deemed a 'plus' in a particular applicant's file"[59] that may work to tip the scale in the student's favor. That is, while a minority applicant is not insulated from competition from the rest of the applicant body as in a quota system, the Harvard approach allows the applicant's race to work in his or her favor. Taking account of race, in this view, is a means to the end of achieving classroom diversity. As Powell put it, "a black student can usually bring something that a white person cannot offer."[60]

Justice Blackmun's opinion offers a similar theme. In it, Blackmun echoes a sentiment often expressed in the academic literature that "in order to treat some persons equally, we must treat them differently."[61] By this Blackmun and similar theorists wish to say that ignoring race serves to promote institutional advantage for whites. However, the question ought to be posed: Why is the "taking account of race" anything more than an invitation to stereotyping? Neither Blackmun, nor Powell, nor Marshall provides a convincing explanation. The paradoxical language of the Blackmun opinion is particularly troublesome, if not dangerous and destructive. In order to get beyond racism we must get beyond race, not take account of it. Blackmun's opinion to the contrary, like the Brennan minority opinion, appears rooted in the decision that a race-neutral factor, such as poverty, cannot successfully serve as a race substitute and achieve the ends of race preferences.

Not only does precedent suggest that the Court is ill-suited to make such decisions, but common sense seems to dictate that the Justices were plainly wrong in this regard. Perhaps the data was inconclusive in 1978. Today, however, given the range of studies at our disposal, it should go without saying that a class-based initiative would work to the benefit of people of color. Of course, poor whites would also stand to profit. But it is difficult to understand why this should be seen in a negative light.

For one, poor whites face many of the same impediments to higher education and career success that African Americans face, such as the poor quality of their local schools, severe limitations

57. Loving v. Virginia, 388 U.S. 1, 11 (1967) (quoting Hirabayashi v. U.S., 320 U.S. 81, 100 (1943)).
58. *Id.*
59. *Bakke*, 438 U.S. at 317 (Powell, J., plurality).
60. *Id.* at 316 (Powell, J., plurality).
61. *Id.* at 407 (Blackmun, J., concurring and dissenting).

on the range of their opportunities, and a lack of encouragement within their youth culture. But even more importantly, the belief that a class-based scheme will fail to improve the lot of African Americans because whites "make up a far larger percentage of the total population . . . at every socio-economic level"[62] tends toward the inexplicable. Unless admissions committees work specifically to the detriment of students of color, it is plain that African Americans stand to benefit disproportionately from a class-based approach. The actions of racist admissions committees are, in turn, already actionable under Title VI.

In any case, *Bakke* has left us in the odd position whereby racial distinctions are commonly regarded as "odious," not merely contrary, to the Fourteenth Amendment's Equal Protection Clause, but in special cases such distinctions take on a more "benign" character. *City of Richmond v. Croson*[63] illustrates how the Court will distinguish between the two kinds of racial distinctions. In that case, the Court, employing a strict scrutiny analysis, struck down the City of Richmond's set-aside program for minority business enterprises (MBEs). Under the program, MBEs were entitled to at least 30% of any prime contractor's city project absent a special showing that every effort had been made, but qualified MBEs were unavailable. The City of Richmond, itself 50% African American, had relied heavily on a study that indicated only .67% of the city's prime construction contracts had been awarded to minority businesses over the preceding five years.[64] There had been no direct evidence, however, of racial discrimination.[65]

Justice O'Connor observed that "[o]ne of the central arguments for applying a less exacting standard to 'benign' racial classifications is that such measures essentially involve a choice made by dominant racial groups to disadvantage themselves."[66] The *Croson* case did not involve such a choice; the majority of the city council that approved the plan, and half of the city's population, were African American. Moreover, "an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota."[67] Allowing a history of societal discrimination to itself give rise to racial preferences is to lose the "dream of a [n]ation of equal citizens . . .

62. *Id.* at 376 (Brennan, J., concurring and dissenting).
63. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).
64. *Id.* at 479.
65. *Id.* at 480
66. *Id.* at 495.
67. *Id.* at 499.

where race is irrelevant . . . in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs."[68]

Rather, a locality must proffer some direct evidence of racial discrimination upon which it may premise its Affirmative Action remedy. Otherwise, it must employ race-neutral means to get at the sources of the problem. The City of Richmond, for instance, had adopted its plan in part because MBEs lacked the capital required to compete effectively. Justice O'Connor therefore reasoned that Richmond could remedy this problem by instituting a program to finance small construction firms that would be race-neutral but work to the benefit of MBEs.[69]

Justice Marshall, writing for the *Croson* dissenters, disagreed with virtually all aspects of the O'Connor opinion. Most importantly, Justice Marshall challenged the use of strict scrutiny where racial classifications are not motivated by racial hatred and fail to place a stamp of inferiority upon the disadvantaged race.[70] The "stamp of inferiority" argument was suspect even at its inception in *Brown*. The Fourteenth Amendment is unequivocal; neither its spirit nor its language suggests that the government shall abridge the equal protection of the laws subject to the self-esteem of the disadvantaged class. The mistake of *Plessy* was not only that the Court was wrong to adduce that "separate but equal" did not stamp blacks with a badge of inferiority, but that it should have considered such a stamping at all. This was precisely Harlan's point. Justice Marshall's approach is vulnerable to, *inter alia*, a finding that whites are being stamped by feelings of inferiority. In fact, there is some reason to believe that the "subtle prejudice for modern times" may be in part owing to feelings of resentment and jealousy. This aspect of the problem will be addressed shortly.

Justice Marshall also argued that the City of Richmond's program was not designed so much to remedy past discrimination, as O'Connor had believed, as to remedy the present effects of past racial discrimination.[71] There is a good case to be made for such an argument. The social sciences have in recent times explored institutional prejudice, oftentimes coming to conclusions similar to that of Marshall; namely, that social preferences can subtly become part and parcel of everyday institutions, with the result that ignoring such preferences allows them to proliferate.

68. *Id.* at 505-06.
69. *Id.* at 507.
70. *Id.* at 552 (Marshall, J., dissenting).
71. *Id.* at 555 (Marshall, J., dissenting).

These ideas are inherently forceful. However, in the present context, some instance (or theory) of institutional racism must be presented. No such showing was ever made by the City of Richmond. O'Connor seemed to be saying that she would be open to Marshall's "present effects" approach but for the fact that no present effects were offered on the record. If qualified MBEs were plentiful, for instance, but still scarcely employed by prime contractors, then a "present effects" analysis would be useful. Similarly, if black contractors faced bars peculiar to their race in gaining funding or licensing, a "present effects" analysis would suffice. But nothing on the record ever suggested that racial discrimination even factored into Richmond's lack of MBE contracts.[72]

Justice Scalia's concurring opinion came the closest to a correct approach in *Croson*. There he revived the spirit of the Fourteenth Amendment as interpreted by Justice Harlan in his *Plessy* dissent. Scalia correctly identifies racial discrimination as an "illegitimate means" to compensate for social disadvantage.[73] Scalia set forth that "[t]he difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency . . . to classify and judge men and women on the basis of . . . the color of their skin."[74] In Scalia's view, a "solution to the first problem that aggravates the second is no solution at all."[75] Scalia, too often preoccupied with intent in his constitutional analysis, should be applauded for adopting such a forward-looking approach. Scalia is also right to point out that the relevant consideration in equal protection analysis is that of individual rights rather than group rights. This proposition will be examined in broader detail in the next section.

Scalia runs afoul, however, when he allows for only one circumstance where states "*may act* by race to 'undo the effects of past discrimination': where that is necessary to eliminate their own maintenance of a system of unlawful racial classification."[76] Scalia is correct that in such circumstances such measures are necessary. The view he adopts of the Fourteenth Amendment, however, does not make the states' action in such a situation permissive. Rather, state action on the basis of race in such a circumstance is mandatory. That is, where a state has maintained a system of unlawful racial classification, it *must act* by race to remedy the situation and preserve equal protection. Any other ac-

72. *Id.* at 510.
73. *Id.* at 520 (Scalia, J., concurring).
74. *Id.* (Scalia, J., concurring).
75. *Id.* at 520-21 (Scalia, J., concurring).
76. *Id.* at 524 (Scalia, J., concurring) (emphasis added).

tion would leave some degree of racial distinction on the books. But this is plainly disallowed as a logical corollary of the color-blind Constitution theory. It appears, however, that Scalia's mistake is semantic rather than hermeneutic.

Permissive action is premised on Justice Marshall's interpretation of the Equal Protection Clause. If and only if a racial distinction places a badge of inferiority on the disadvantaged race is a remedy required. This is the legacy of *Plessy*. Mandatory action, on the other hand, is premised on the idea that racial distinctions are themselves "odious" to the Constitution. It is the treatment of individuals on the basis of their ancestry that is the primary evil, although the stamping of a badge of inferiority may often be a secondary evil that accompanies it. This is the legacy of the Harlan dissent.

As to the Marshall approach, the question naturally arises as to what a badge of inferiority looks like. Is it a question of one's own self-worth or one's regard of one's race in a broader perspective? Is it limited to a feeling of overall inferiority or does it touch on more complex concerns such as learned helplessness, envy and self-doubt? Answers to these questions are not readily ascertainable from the language of *Plessy*, *Brown*, or *Croson* alone. The badge of inferiority appears to be an amorphous and malleable concept adaptable to the circumstances of each case on its own facts. Justice Marshall appears to take it as self-evident that Affirmative Action programs fail to stamp the white majority with such a badge. Perhaps he is right. But it is unlikely that Affirmative Action has no effect whatsoever on the white psyche.

Much recent scholarship has been devoted to the phenomenon of white racial resentment. One study, for instance, concluded that present day resentment is simply a permutation of the outright racial animosity of the past.[77] However, the authors of that study could not be certain that the racially unsympathetic statements they documented were solely the result of presumption and ignorance, as would be the case with common racial prejudice.[78] It is not unlikely that many whites, as the authors of the study believe, have substituted a more politically correct racism, seizing upon special treatment, for the biological racism of the past. However, it is also not unlikely that many other whites are drawn to racial resentment primarily on the basis of special treatment alone.

77. DONALD R. KINDER & LYNN M. SANDERS, DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS 92-127 (1996) (providing detailed empirical data supporting the existence of "subtle prejudice for modern times").

78. *Id.* at 109.

"Benign" racial discrimination is in fact bewildering. Academics and Supreme Court justices are divided as to its constitutionality. We should not be surprised if less sophisticated individuals find the idea confusing. Notions of institutional racism are less accessible to such persons as the colorblind equality ideal. The authors of the racial resentment study themselves acknowledge that the widespread adoption of the equality ideal has been a tangible gain for minorities. "As a rule," the authors say, "white Americans now reject the idea that blacks originate from an inferior race, and they accept equal opportunity and racial integration as matters of principle."[79] Without a doubt, the legitimization of racial preference constitutes a reworking of, if not a direct attack upon, the traditional equality ideal that most Americans have come to accept. Resentment may in many cases be an emotional response. Indeed, theorists rarely require the subjects of discrimination to agree with the discrimination in principle in other contexts.

Affirmative Action may also, in certain instances, negatively affect the black psyche. Many have pointed to the stigmatizing influence of such programs. Justice Thomas, for example, supports the view that "[s]o-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence."[80] Thomas goes so far as to say that such programs "stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences."[81] Yet even if Thomas overstates the problem and the authors of the racial resentment study are right to conclude that racial resentment merely disguises a more invidious type of racial discrimination, it can hardly be doubted that Affirmative Action has helped provide a channel for the mainstream expression of racial difference.

This alone appears to be counterproductive and morally suspect. Whether or not it places a badge of inferiority upon people of color or encourages racial resentment among whites, Affirmative Action programs tend to place an obstacle in the way of Justice Harlan's and, for that matter, the more inspiring Martin Luther King's vision of a colorblind society. As Justice Thomas put it, "government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice."[82] "In each instance," Thomas noted, "it is

79. *Id.* at 126.
80. *Adarand Constructors*, 515 U.S. at 241 (Thomas, J., concurring).
81. *Id.* (Thomas, J., concurring).
82. *Id.* (Thomas, J., concurring).

racial discrimination, plain and simple."[83] Putting an end to racial discrimination is the task to which society must remain committed. A badge of inferiority based on race, however well entrenched in our institutions over the course of history, cannot and will not survive a colorblind society.

III. UNDERSTANDING "EQUALITY": EQUAL PROTECTION AND AFFIRMATIVE ACTION

On its face, the concept of equality seems relatively simple. Treat "A" as you would "B" and vice-versa. In the context of Affirmative Action, however, that definition, which may be referred to as the "antidiscrimination principle,"[84] is under fire. Many theorists argue that treating people of color and whites equally in the narrow context of admissions or hiring simply sustains broader inequalities. They urge us to accept the Fourteenth Amendment on a "group disadvantaging principle" rather than on an antidiscrimination principle.[85] The result of such an approach is the confusing paradigm that in order to treat people of color equally, they must be treated differently (at least in the short run).

Let us delve deeper into the antidiscrimination principle and the group disadvantaging principle. Surely, we should like the Equal Protection Clause to stand for both. Equal protection should protect the rights of individuals alone or in combination. In the context of Affirmative Action, however, the group rights of minorities to equal protection are said to come up against the individual rights of whites to equal protection. Which rights should be favored?

The answer to this question must be founded on the moral standing of the grouping itself. Paul Brest's account is instructive. "The antidiscrimination principle," Brest maintains, "holds that . . . race has no moral salience."[86] Rather, race is a social construction to which some people have given more weight than others. Although the history of the race construction has been an extremely prominent force in guiding American sociopolitical theory, Brest persuasively argues that the underlying political theory of our nation "has not been a theory of organic groups but of liberalism, focusing on the rights of individuals, including the rights of distributive justice."[87]

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83. *Id.* (Thomas, J., concurring).

84. Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976).

85. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976).

86. Brest, *supra* note 84, at 49.

87. *Id.* at 155.

The language of the Fourteenth Amendment, for instance, was not written in racial terms but in personal terms, despite the fact that the drafters of the amendment were concerned with racial prejudice. This was not an accident. The fundamental rights of our nation are everywhere concerned with individual freedoms. The freedom to associate; to speech; to arms; to travel; to choose one's profession; are founded on an appreciation of individual liberty. Where group rights tend to contradict individual rights, therefore, it seems reasonable that the former must yield to the latter.

Proponents of the group disadvantaging principle are unclear as to where they derive group rights. They always begin by saying that the post-war amendments were drafted in order to protect African Americans. However, they rarely, if ever, limit the group disadvantaging principle to African Americans alone. Owen M. Fiss, for instance, suggests that the principle may be extended to other racial minorities, Jews, women, aliens, and certain language groups.[88] In his view, what the Equal Protection Clause protects is "specially disadvantaged groups."[89]

But Fiss limits protection to what he believes to be natural classes. "[A]rtificial classes," such as "those created by tax categories," do not receive special protection.[90] These classes, Fiss argues, "do not have an independent social identity and existence, or if they do, the condition of interdependence is lacking."[91] Fiss is not clear why these conditions are important. Such conditions help Fiss personally to understand and define social groups, but that is not itself especially interesting or relevant.[92] Perhaps the key is that without independent social identity or interdependence, "[i]t is difficult . . . to make an assessment of their socioeconomic status or of their political power."[93]

Yet if this were indeed the case, two responses are immediately apparent. First, why should constitutional rights vary with the ease of assessing them? That is, it may be difficult to ascertain the limits of free speech, *but courts still try*. Second, what about artificial classes where such an assessment is in fact easy? Employing Fiss's own example, people in the lowest tax bracket have a readily definable socioeconomic status and a clear limitation to their political power. In fact, the history of oppression

88. Fiss, *supra* note 85, at 155.
89. *Id.*
90. *Id.* at 156.
91. *Id.*
92. In his words: "*for me*, a social group is more than a collection of individuals"; "A social group, *as I use the term*, has two. . . characteristics." *Id.* at 148 (emphasis added).
93. *Id.* at 156.

against the poor only varies by degree, rather than in kind, with the history of oppression against people of color. Certainly, the judiciary has been even more hesitant to protect the rights of the poor than it has been to protect the rights of African Americans.[94] Moreover, the poor qualify as "very badly off" and as "America's perpetual underclass" to the same extent as people of color. The constitution of the poorest classes is in fact defined by these indicia.

So why should the Fourteenth Amendment recognize the moral status of racial classifications but sweep other "artificial" classifications aside? One argument, articulated with great success by T. Alexander Aleinikoff, proposes that colorblindness is just an impractical, unrealistic, and ultimately destructive ideal.[95] This argument, which may be the implicit backbone of the group disadvantaging principle, deserves a closer look and careful consideration. Aleinikoff's argument begins with the premise that the theory of colorblindness should in fact be broken down into distinct genera: strong colorblindness and weak colorblindness.[96] Aleinikoff is critical of both.

Strong colorblindness is the theory that we should ignore race altogether so as to achieve racial equality in the future.[97] It may be characterized by Justice Harlan's dissent in *Plessy* or Justice Scalia's concurrence in *Croson*. To Aleinikoff and like-minded theorists, strong colorblindness is a dangerous and stupid denial of reality. This is to say, strong colorblindness does not nullify the recognition of race but simply masks it. Such a masking leads to strange consequences. Aleinikoff refers, for instance, to certain inwardly race conscious, but outwardly colorblind, teachers that fail to teach their students that Martin Luther King or George Washington Carver were black out of a desire to avoid racial issues.[98] Moreover, Aleinikoff suggests that strong colorblindness fails to recognize the "local knowledge" of racial minorities.[99] This suggestion leads to the implication that people of color should be seen in "white" terms, rather than their own.

Weak colorblindness, on the other hand, is the theory that society can recognize race as a practical matter but should not

94. The poor are not, for example, a "suspect class." Nor is there any fundamental right to basic necessities of life. Maher v. Roe, 432 U.S. 464, 471 (1977), *citing* San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973) *and* Dandridge v. Williams, 397 U.S. 471 (1970).

95. T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991).

96. *Id.* at 1078-79.

97. *Id.*

98. *Id.* at 1080.

99. *Id.* at 1081-82.

give it legal significance.[100] Aleinikoff attacks weak colorblindness on the basis that a failure to break down institutional racism is tantamount to the affirmative protection of such racism. He points to Justice Powell's opinion in *Bakke*, recognizing the value of diversity in education, as an instance where race-consciousness was acknowledged as a reasonable objective. "Most fundamentally," Aleinikoff believes, "weak colorblindness sacrifices much of the cultural critique that race-consciousness can provide."[101]

Aleinikoff's observations may be challenged on a number of bases. Firstly, he misconstrues colorblindness as a backwards-looking principle rather than a forward-looking one. The theory of colorblindness does not require "whites to assert that . . . . they do not notice or act on the basis of race"[102] as Aleinikoff wants us to believe. Colorblindness, strong and weak, requires only that we not take action to enhance or impair social or legal opportunities on the basis of race. At the same time it expresses a desire that, in time, race will carry no more normative significance than other physical qualities, like eye color, to which we devote little attention. These characteristics will, with certainty, continue to be noticed. What is important is that race will not serve as proxy for any other statement or generalization.

Aleinikoff is wrong to suggest that the theory of colorblindness attempts to nullify the past. The teacher who is a proponent of colorblindness should not ignore the racial dimensions of issues when they ought to be considered. But he or she should ask when they are appropriate. When, not if, is the practical distinction between proponents of a colorblind theory and advocates of race consciousness. Even the most superficial exploration of American history requires reference to race; the theorist of colorblindness will not tell you differently. Likewise, political theory must retain race-conscious theories and lessons as long as race remains an important influence on political thought.

The question is where we want to end up. We all know that a future in which race is ignored with the result that students believe all of the important figures in history were white is unacceptable. However, a society where the importance of race is overstated – a society that pits white children against black – is similarly unacceptable. Advocates of colorblindness want the assumptions society tends to make about race disappear. Thus, the teacher-advocate of colorblindness will not avoid talking about race where it will help break down the racist assumptions of the past and present. On the other hand, advocates of colorblindness

100. *Id.* at 1079.
101. *Id.* at 1089.
102. *Id.* at 1079.

will not propose that race-conscious identity theory and its consequent politics are preferable to racially independent theory and its consequent politics.

This is really the crux of the debate. Aleinikoff and the advocates of race-consciousness champion identity politics while advocates of colorblindness urge us to move beyond them. Aleinikoff points to Clifford Geertz's theory of local knowledge, which instructs us to recognize the non-universality of our own group's knowledge and give credit to other group's local knowledge as an example of what colorblindness denies us. I question whether colorblindness denies us the Geertzian moment. "[T]o students and faculty open to a Geertzian moment," says Aleinikoff, "the intellectual rewards are enormous."[103] I doubt that advocates of colorblindness are denied such rewards.

Once again, it is important to note that advocates of colorblindness do not seek to nullify history or ignore present-day race consciousness. There is therefore no reason to suspect that advocates of colorblindness believe in the universality of their own culture's knowledge. To the contrary, the theory of colorblindness emerged out of a cross-cultural recognition of the "other's" local knowledge; Justice Harlan, his many private prejudices notwithstanding, gave credit to Mr. Plessy's local knowledge. "It is scarcely just," wrote Harlan, "to say that a colored citizen should not object to occupying a public coach assigned to his own race."[104] Notice that the focus is on Plessy as a subject, not an object. It was the advocate of colorblindness that gave Plessy a voice. The race-conscious advocates on the *Plessy* Court denied to Plessy the "construction" that he put upon segregation. Likewise, an advocate of colorblindness will give credit, despite Aleinikoff's suspicions, to other race-conscious cultural transformations such as the black pride movement of the 1960s.

An advocate of colorblindness will not, however, support identity politics over the "deep humanism" that "there is something, under the skin, common to all human beings."[105] That is, between competing philosophies of human identity and racial identity, the advocate of colorblindness will choose the former. This is not to say that colorblindness requires us to ignore the teachings of the latter. Rather, it observes such teachings but ultimately discounts them on the basis that they are more shortsighted than a colorblind approach. Historically, the colorblind approach has built bridges and brought real reform. Identity

103. *Id.* at 1091.
104. Plessy v. Ferguson, 163 U.S. 537, 561 (1896).
105. Aleinikoff, *supra* note 95, at 1081.

politics, on the other hand, has inevitably led to divisiveness. While black pride, or to take an example closer to the author, the Jewish tradition of intra-Jewish marriage, has allowed some members of these oft-burdened groups to assert a measure of self-pride, humanity and solidarity, these same devices have stifled other blacks and Jews from asserting a broader measure of the same ideals.

Nor does "recognizing race [validate] the lives and experiences of those who have been burdened because of their race,"[106] to a better degree than does colorblindness. Colorblindness does not deny that "'blackness' [is] a relevant category in our society"[107] or "tell blacks that they are no different from whites, even though [they] are persistently made to feel that difference."[108] Rather, it suggests that "blackness" is a less relevant category than "citizenship" and tells blacks and whites that they share more commonalities than distinctions. Difference is a persistent force in today's society. Advocates of colorblindness accept the proposition but not this state of affairs. Colorblindness does not imply that Adrienne Rich should look at a black woman and see her as white.[109] It implies that her descendants should one day be able to look at a black woman and see her as human. To the theorists of race-conscious, this is a naïve and unrealistic flight of idealism. To those in support of colorblindness, such theorists are not trying hard enough.

This leads us to the question of what rewards the recognition of a race-conscious "Geertzian moment" will bring us. "[R]ace consciousness," we are told, "can aid in . . . cultural transformations."[110] Nobody denies that this is the case. But it should be noted that colorblindness can aid social transformations as well. The Civil Rights Movement of the 1960s is just one example of a cultural transformation that, of necessity, was rooted in colorblindness. The language of and impetus behind the post-Civil War amendments is also rooted in colorblind theory.

Furthermore, it should be noted that race-conscious cultural transformations tend to be more dangerous than colorblind ones. The German cultural transformation of the 1920s, the South African regime of apartheid, the enduring crisis in the Middle East, and the rise of slavery in the antebellum South are all illustrative in this regard. Colorblind social transformations, on the other hand, at least head in the right direction. Color-conscious advo-

106. *Id.* at 1087.
107. *Id.*
108. *Id.*
109. *Id.* at 1088.
110. *Id.* at 1091.

cates say that they do not move far enough but, then again, this is the crux of the debate.

Third, advocates of race consciousness are generally no quicker to seize upon the "Geertzian moment" than are advocates of colorblindness. The rise of the race-conscious black pride movement, for example, was not the result of a Geertzian moment but precisely the opposite. Advocates of black pride did not give credit to the local knowledge of the "other," the whites, but rather thrust their local knowledge, quite rightly, upon them. The recognition of the non-universality of racial ideology is as well or better suited to colorblindness than it is to race consciousness. To employ a present-day example, advocates of race-consciousness have been at least as slow as advocates of colorblindness to recognize that black "rappers" have appropriated the term "nigger – which like the term "black" had for several hundred years symbolized degradation and solidarity – and turned it into an expression of African American solidarity. In fact, a colorblind critique is more likely to take account of such a revolution since race-conscious methodology is stripped away to reveal race-neutral power relationships.

Moreover, there does not appear to be a good reason to limit the "Geertzian moment" to group ideology. This kind of limitation leads to the kind of stereotyping of which Aleinikoff warns. But if the Geertz's theory is applied to the level of the individual, there can be no fear of "white students [making] the error of assuming that comments by black students express 'the' black perspective."[111] This is another way of saying that the assumption of universality for one's personal knowledge is the real evil. Opening one's mind to the local knowledge not only of other races, but other political parties, sociological leanings, geographic localities and philosophical doctrines is the key to retrieving the rewards of diversity.

IV. Reassessing the Rewards of Racial Diversity

But what are the rewards of racial diversity? The answer to this question, at first glance, seems self-evident. But a more thoughtful response allows us to see the flaws in race-conscious ideology. To draw these flaws out, I will examine the so-called Harvard Plan, the admissions program endorsed by Justice Powell in *Bakke* that awards a "plus" to a prospective student based on the color of his or her skin. Powell recommended the Harvard Plan on the basis that racial diversity, in and of itself, improved the quality of classroom education. Aleinikoff ex-

111. *Id.*

pressed a similar idea in his case for Race-Consciousness. Both failed to articulate precisely what they had in mind as the "intellectual rewards" of racial diversity. My thesis in this chapter is that the intellectual rewards to which they refer are either the social rewards that are undisputed or, in the alternative, they are a euphemism for stereotyping based on race.

Aleinikoff states that the racial diversity of student classes is not only needed "to show white students that students of color can perform as well as white students, but also to help all students become more self-conscious of the underlying assumptions with which they approach the world."[112] The question, one supposes, is how? Recourse to the Geertzian moment is not particularly helpful unless one assumes that minority students offer the local knowledge of minority races. This, however, seems to be precisely the sort of assumption that Aleinikoff elsewhere disapproves. "[W]hite students," cautions Aleinikoff, "may make the error of assuming that comments by black students express 'the' black perspective."[113]

It might follow that diversity in the classroom is beneficial not because of its intellectual rewards but because of its social rewards. On this view, Aleinikoff is right to point out that racial diversity helps to eliminate white prejudice by giving white students the opportunity to witness the myriad abilities of students of color. Similarly, it gives both white and black students the opportunity to interact on a number of levels, including an intellectual and social level, thereby encouraging mutual respect and cross-cultural understanding.

These are, of course, pressing social needs that should not be taken lightly. Advocates of colorblindness have long understood that integration, or cross-cultural familiarity, is the key to achieving a colorblind society. That is why an advocate of colorblindness may at once oppose Affirmative Action on the basis of race while at the same time supporting other measures to increase racial diversity. The contemporary theorist of colorblindness accepts as a baseline that racial prejudice stems principally from ignorance. Similarly, the colorblindness advocate observes that institutional racism embodies the ignorance of past generations.

Thus, working against ignorance is a worthy goal. The need for racial diversity — in the classroom and elsewhere — may reasonably be sustained on this ground. Aleinikoff, Powell, and others go astray, however, when they propose that racial diversity gives us some other intellectual reward distinct from the social rewards considered above. I ask the reader: What normative

112. *Id.* at 1090-91.
113. *Id.* at 1091.

significance can the quality of "being black" or "being white" have in the context of classroom discussion if it is not that of a stereotype?

To my knowledge, no commentator on the subject has offered a convincing alternative. The best reply has been that a student's race may help his or her colleagues by helping them to identify with an academic subject or inquiry. It is argued, for instance, that the reflections of a Japanese-American student will give a constitutional law class additional perspective into the *Korematsu* opinion. If this is the case, however, it is surely due to the power of personal experience to "fill out" an otherwise listless history book account.

The personal account simply does not possess normative significance in the context of theory building. To return to our example, the student's perspective, perhaps the story of a parent or grandparent, may help a colleague to understand a historical dimension of *Korematsu* that was not addressed by his professors or textbooks; or give him a tangible imprint of the case for use during the exam; or help him to empathize with the plight of the Japanese-American. These are all consequences of varying social benefit. The encouragement of empathy, for instance, is of enormous social significance. But as Aleinkoff pointed out, our Japanese-American student's personal account will never give the student's colleague "the" Japanese-American perspective. For this reason, if our student offers the class something more than personal account, say a theory or perspective of looking at *Korematsu*, it *does not* take on additional value due to her ethnic background. If it did, then we would be reducing the student as an individual to the unfortunate status of a racially imbued object.

Many theorists have, in recent memory, made this mistake. Race is too often said to inform opinion. This is likely what Aleinikoff was hinting at with his "intellectual rewards." But the category of race is not equipped to serve this function. Academics have often, perhaps unconsciously, underestimated the range and variety of minority opinion. Political tendencies of blacks or whites are just tendencies. Personal experience may serve to catalyze a specific impression of the world that bears some relationship to an academic debate but such impressions are readily attainable through other means as well. The personal experience of being subjected to discrimination, for instance, certainly reifies the concept of racism but one need not be the target of racism to recognize its existence or even its character.[114] Similarly, the ex-

114. This is precisely the sort of observation that has often been criticized as "sociocentric." To such a criticism, I respond in the alternative. Either I speak as a

perience of being white does not give the student additional intellectual insight into the phenomenon of racial resentment. In either case, perspectives within the given culture vary to a near infinite degree. Arguments to the contrary, I submit, are irrational remnants of the politics of division.

So we must return to the Harvard Plan. Are the social rewards of racial diversity enough to warrant a "plus" in the column of a minority applicant? Looking at the social benefits of racial diversity in their totality, I believe that they are. However, a "plus" based on economic class would be a more justified approach. Once we shed the metaphysical "intellectual rewards" concept, we see that many of the positive social qualities attributed to racial diversity are in kind attributable to economic diversity. The perspective of the common poor student is likely to be influenced by personal obstacles similar as that of the common minority student. Like minorities, the poor have consistently been denied an active voice in social and political policy. There is also good reason to believe that poor non-minority students have been denied opportunities to a similar degree as poor minority students because they have not had the benefit of the Affirmative Action and outreach programs that are already in place. This is especially true in rural communities, where the state of high school education is usually as abysmal as it is in the inner city.[115]

Giving an admissions preference to poor applicants will also serve to advantage racial minorities because minorities tend to make less money than whites[116] and tend to have less accumulated wealth.[117] Hopefully, this advantage will allow minority scholarship to grow while the racial objectivity of the economic proxy for advancement will help to combat racial resentment and stigmatizing influences stemming from racial preferences. Meanwhile, students will continue to benefit from associations across both racial and economic cultures; the influx of students representing the lower rungs of the socioeconomic ladder will stimu-

disinterested human mind or I speak as a Jew who has been the subject of real-life discrimination. My perspective remains the same regardless of which persona I adopt.

115. Rural minorities and whites both suffer from a lack of outreach. *See* Larry R. Spain, *Public Interest Law: Improving Access to Justice: The Opportunities and Challenges of Providing Equal Justice in Rural Communities*, 28 WM. MITCHELL L. REV. 367 (2001); The Rural School and Community Trust, *at* http://www.ruralchallengepolicy.org/index.cfm (last visited June 22, 2002).

116. According to the US Census Bureau, the median household income in 2000 was $43,148. The median African American and Hispanic households earn $30,439 and $33,447, respectively. United States Census Bureau, *Money Income in the United States: 2000*, *at* http://www.census.gov/prod/2001pubs/p60-213.pdf (last visited June 22, 2002).

117. *See* OLIVER AND SHAPIRO, *supra* note 53.

late important scholarship on economic inequality; and, perhaps most importantly, faith in Justice Harlan's vision of a colorblind society will be restored and American liberalism will no longer suffer from self-contradiction.