Race and Representation: Affirmative Action

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The Racial Rhetorics of Colorblind Constitutionalism: The Case of *Hopwood v. Texas*

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Since the founding of our nation, the project of constitutional democracy in the United States has been haunted by conflicts between the nation's ideals of egalitarianism and its practices of racial subordination. The original Constitution referred to chattel slaves obliquely as "*other* persons," counting them for purposes of representational apportionment as "three fifths" of "free persons," and barring any constitutional amendment that might forbid their importation prior to 1808.[1] The Constitution's rhetorical indirection, as much as the temporary restriction it imposed on the procedures for amendment set forth in Article V, testify to the unstable compromise the framers forged at the founding. We inherit today the legacy of this compromise, born of a charter for nationhood which William Lloyd Garrison once called "a covenant with death, and an agreement with hell."[2] A civil war and several constitutional amendments later, the Supreme Court continues to negotiate contradictions between the nation's democratic ideals and its racial practices through rhetorical indirection, albeit of a different character.

Over the centuries, strategies for reconciling conflicts between the nation's ideals and practices have evolved, producing changes in the rule structure and justificatory rhetoric of racial status law.[3] The language of federalism, citizenship, property, privacy, freedom, and equality have all played important roles here. For, as conflicts precipitate changes in the rules by which Americans regulate race relations, the discourses in which Americans represent race relations change as well. During the era of chattel slav-

ery, the Court unapologetically defined citizenship as the property of white persons;[4] today, with the demise of slavery and de jure segregation, the Court embraces the "ultimate goal" of "eliminating entirely from governmental decision making such irrelevant factors as a human being's race."[5] The rhetoric of colorblind constitutionalism is but another mode of talking about race, invoking the social fact of racial stratification in the course of denying its normative significance. As the nation's experience over the last several decades illustrates, the discourse of colorblindness can be invoked in support of distributive principles that alleviate or preserve racial stratification. This essay will demonstrate how some current usages of the discourse presuppose and protect the racial stratification of American society.

In this essay, I examine the rhetoric of colorblind constitutionalism in the case of *Hopwood v. Texas*,[6] in which the Fifth Circuit held that the University of Texas "may not use race as a factor in law school admissions."[7] The *Hopwood* case has attracted national attention because the court's reasoning calls into question the constitutionality of race-conscious admissions policies at public educational institutions and, possibly, private schools as well.[8] In *Hopwood*, the Fifth Circuit repudiated Justice Powell's opinion in *University of California v. Bakke*,[9] and held that the University of Texas Law School could not take race into account for purposes of admitting a diverse student body. The court also imposed quite strict constraints on the use of race-conscious admissions for purposes of remedying discrimination, past or present, in the Texas public education system. The court understood that its articulation of constitutional constraints on diversity and remedial uses of race in educational admissions would imperil conventional affirmative action programs. It viewed this result as warranted by Supreme Court cases that have recently imposed "strict scrutiny" on "benign" forms of race-conscious regulation.

As I will show, the diversity and remedial holdings of the *Hopwood* opinion are premised on two conflicting and irreconcilable conceptions of race, and so expose contradictions in the larger body of equal protection jurisprudence on which the case draws. Quoting liberally from the Supreme Court's recent opinions, the Fifth Circuit invokes both "thin" and "thick" conceptions of race. Sometimes the *Hopwood* opinion insists that race is but a morphological accident, a matter of skin color, no more. At other times, *Hopwood* discusses race as a substantive social phenomenon, marking off real cultural differences amongst groups. These conceptual inconsistencies are not incidental to the opinion, but instead arise out of the conflicting justifications the Supreme Court has offered for imposing constitutional restrictions on race-conscious regulation. Invoking these contradictory conceptions of race, *Hopwood* construes the Constitution to restrict government from regulating on the basis of race *and* construes the Constitution to protect the existing racial order. In a concluding, genealogical section of the essay, I show that, since Reconstruction, white Americans have frequently coupled talk of colorblindness with racial privacy rhetoric that seeks to protect relations of racial status from government interference. As this historical analysis reveals, current affirmative action law does not rest solely on values of colorblindness or racial "nonrecognition"; it also draws on a normative discourse about the racial private sphere, a domain of racial differences that the state may not disturb. If we read the contradictory racial rhetorics structuring affirmative action jurisprudence in light of this historical tradition, it is easier to understand their underlying preoccupations and considerable persuasive power.

In my view, debates over racial equality are impoverished if they focus on affirmative action alone. As I have elsewhere argued, more pressing questions of constitutional law and public policy are presented by the many forms of facially neutral state action that currently perpetuate the racial stratification of American society.[10] Yet, for this very reason, I believe it is important to examine the rhetorical grounds on which the Supreme Court has authorized, and progressively undermined, affirmative action programs. In applying strict scrutiny to benign forms of race-conscious regulation, the Court encourages the belief that affirmative action programs present one of the gravest threats to racial justice in America today. In my judgment, there are many facially neutral state practices — in the areas of criminal law, education, housing, employment, and political participation — that present far more significant threats to racial justice than do race-conscious remedies. These forms of facially neutral state action help perpetuate the forms of racial stratification that affirmative action redresses. Yet, the Court reviews equal protection chal-

lenges to such facially neutral practices deferentially, on the assumption that they are adopted in good faith.[11] Meanwhile, the Court applies strict scrutiny to race-conscious measures, intervening in the political process to protect the interests of whites as it does not when plaintiffs challenge facially neutral state action that has a disparate impact on minorities and women. In short, the prevailing equal protection framework identifies race-conscious remedies as pernicious discrimination, while characterizing other modes of state action that sustain the racial stratification of American society as presumptively race neutral. By analyzing the racial rhetoric of the *Hopwood* opinion, we are in a better position to understand the rhetorical strategies through which the Court has defined questions of racial equality in America today.

The Roots of the *Hopwood* Case

The admissions policy challenged in the *Hopwood* case was adopted by the University of Texas Law School in an effort to overcome decades of racially exclusionary admissions practices in the state's schools. Fact finding conducted by the district court established that racial segregation in the Texas public education system was mandated by the state's constitution and reached well into the modern period. Texas adopted a policy of official resistance to the Supreme Court's decision in *Brown v. Board of Education*,[12] a policy that resulted in numerous lawsuits and court-imposed desegregation plans over the ensuing decades. As of May 1994, the district court found, desegregation lawsuits remained pending against more than forty Texas school districts.[13] Officially mandated segregation prevailed in the state's system of higher education as well. Until 1947, there was only one state-supported institution of higher learning open to black students in Texas, which offered no form of professional training.[14] It was during this period that a black student first challenged the white-only admissions policy at the University of Texas Law School. A state court directed the legislature to create a separate law school for blacks;[15] but in 1950, the United States Supreme Court held in *Sweatt v. Painter*[16] that the state would have to admit the black student into the all-white University of Texas Law School. Sweatt left the law school in 1951 without graduating, after being subjected to racial slurs from students and professors, cross burnings, and tire slashings.[17]

As late as 1980, an investigation by the Department of Health, Education, and Welfare's Office for Civil Rights concluded that Texas still had "failed to eliminate vestiges of its former de jure racially dual system of public higher education, a system which segregated blacks and whites";[18] this same investigation also found that Hispanics were significantly underrepresented in state institutions.[19] In this period, Texas submitted a plan to achieve compliance with federal civil rights laws, in an effort to protect its share of federal education funding. As the district court rather dryly pointed out, it was Clarence Thomas, in his capacity as Assistant Secretary of Education, who ruled in 1982 that the Texas plan "was deficient because the numeric goals of black and Hispanic enrollment in graduate and professional programs were insufficient to meet Texas's commitment to enroll those minority students in proportion to the[ir] representation among graduates of the state's undergraduate institutions."[20] Under federal pressure, Texas revised its plan to include goals for increasing black and Hispanic student enrollment in professional and graduate programs at traditionally white institutions.[21] In 1987, Texas officials determined that the state still had not met the goals and objectives of the plan and developed a successor plan to avoid federal action.[22] At the time that the *Hopwood* plaintiffs filed suit challenging the admissions policy at the University of Texas Law School, the Office of Civil Rights had not yet determined that the state had desegregated its schools sufficiently to comply with federal civil rights laws.[23]

In the early 1990s, the admissions procedure in place at the law school relied heavily, but not exclusively, on a numerical index that was the product of a student's LSAT score and grade point average (GPA), with the latter adjusted to reflect the assumed strength of the student's undergraduate institution and major. Numerical ranges identified applicant scores that would presumptively result in admission or denial, with applications in the middle range reviewed more extensively by committee to determine whether the student would be admitted to the school. A somewhat higher numerical index was established to determine admissions of nonresident students, and a somewhat lower range was established to determine admissions of black and Mexican-American students, whose applications were reviewed by a separate subcommittee.[24] By state law, the law school was required to

admit an entering class of at least five hundred students a year, comprised of no more than 15 percent nonresidents. (The nonresident cap was recently increased to 20 percent.[25]) In addition, the law school sought to meet the targets established by the Office of Civil Rights through the Texas plan of 10 percent Mexican-American students and 5 percent black students in an entering class.[26] (The enrollment targets, described as "aspirations only, subject to the quality of the pool of applicants," reflected an effort to achieve an entering class with levels of minority enrollment generally consistent with the percentages of black and Mexican-American college graduates in the state.[27])

The *Hopwood* litigation started when four students – three men, one woman, all white – who were denied admission to the law school, filed suit, claiming that the law school's admission procedures were racially discriminatory. The gravamen of their complaint was that they presented GPA and LSAT scores that might have gained them admission to the law school had they been of a different race.[28] The district court ruled that there were constitutional defects in the law school's admissions procedures, but also determined that "legitimate, nondiscriminatory grounds exist[ed] for the law school's denial of admission to each of the four plaintiffs and that, in all likelihood, the plaintiffs would not have been offered admission even under a constitutionally permissible process."[29] According to the district court, the law school could take the race of applicants into account, both for purposes of ensuring a diverse student body and for purposes of remedying present effects of past discrimination in the state's system of public education. The court ruled, however, that under the Supreme Court's decision in *Bakke*, the law school could not isolate minority and nonminority applicants and concluded that the law school would have to revise its admissions procedures to "afford each individual applicant a comparison with the entire pool of applicants, not just those of the applicant's own race."[30]

The Fifth Circuit's Ruling in *Hopwood*

On appeal, the United States Court of Appeals for the Fifth Circuit ruled that, under applicable Fourteenth Amendment precedents, the University of Texas "may not use race as a factor in law school admissions" "even for the wholesome purpose of correcting perceived racial imbalance in the student body."[31] As the court construed recent Supreme Court cases requiring strict scrutiny of race-based governmental action, neither achieving a diverse student body nor remedying past discrimination provided a sufficient justification for the affirmative action plan at the University of Texas Law School. In so holding, the Fifth Circuit applied the reasoning of some of the Court's more recent equal protection cases to educational affirmative action in more aggressive terms than other appellate courts to date. Examining the Fifth Circuit's justifications for striking down the law school's admission policy illuminates the conflicting currents of racial reasoning informing the law of affirmative action.

The court opens its opinion by quoting Justice Scalia: "'Racial preferences appear to "even the score"... only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white.'"[32] With this opening salvo, the court makes clear its judgment that it is wrong to view American society as "divided into races" and so to compensate for past injustices against blacks "by discriminating against a white." The way to expiate past acts of racial discrimination is not to put African Americans as a group in the position in which they might have been but for discrimination, but instead to adopt a firm stance against acts of racial discrimination – including the "discrimination" whites suffer when their opportunities are constrained by policies of racial rectification. The court frames the question of affirmative action in terms that place discrimination against *white* Americans at the forefront of constitutional analysis, echoing popular objections to affirmative action policies advanced by "angry white males." Thus, an objection to affirmative action that begins by renouncing a group-based conception of the American polity simultaneously advances a legal argument premised on a group-based conception of the American polity. On this reading, the Fourteenth Amendment protects the interests of white Americans against the claims for racial rectification advanced by black Americans.

The *Hopwood* opinion begins in this vein, describing the mechanics of the law school's admissions process in terms that emphasize the injustices that affirmative action policies inflict on white Americans. As is conventional in these matters, the narrative

emphasizes numbers over all other factors relevant in admissions, without devoting any consideration to the social factors that shape numerical measures of educational attainment.[33] The *Hopwood* opinion offers a detailed account of the numerical ranges employed to evaluate the candidacy of minority and nonminority applicants, pointing out that "these disparate standards greatly affected a candidate's chance of admission."[34] The court's account calls attention to *racial* variances in admissions ranges, dropping into a footnote the observation that "residency also had a strong, if not often determinant, effect" on admissions,[35] and barely remarking on the varying weight given grade point averages earned at different undergraduate institutions.[36] In short, the narrative throws racial discrepancies in admissions ranges into stark relief, while treating as equitably inconsequential the variance in admissions opportunities produced by the school's policy of favoring residents and its practice of weighting grades in accordance with the reputation of the undergraduate institution, despite its predictably class salient impact on admissions. In this narrative, achievement is defined by numbers, and the only noteworthy departure from a strictly numerical ranking system is defined by race.

In attending to the forms of racial displacement that an affirmative action policy might effect, the *Hopwood* opinion reflects concerns expressed by various justices in the splintered Supreme Court opinions of the 1970s and 1980s, which cautioned that race-conscious remedies must be carefully circumscribed so as not unduly to burden the interests of "innocent" third parties. Justice Powell took the lead in articulating such views. For example, in *Bakke*, Justice Powell expressed concern about "forcing innocent persons . . . to bear the burdens of redressing grievances not of their making"[37] and warned

> *All state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened.* The denial to *innocent persons* of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. *These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others.* One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin.[38]

Because of his concern about harm to "innocent" members of the "dominant majority," Justice Powell sought strictly to limit the circumstances in which race-based remedies were allowed:

> *No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over-expansive.* In the absence of particularized findings [of discrimination], a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.[39]

For similar reasons, Justice Powell advocated constraints on race-based remedies, even in cases involving the rectification of identified discrimination.[40]

Throughout the 1970s and 1980s, Supreme Court justices reasoned about the equities of racial remedies in terms that openly worried about the interests of white people—except that white people were generally referred to, collectively, as "innocent people."[41] Thus, when the Court evaluated the kinds of relief courts or legislatures could provide African Americans and other minorities who suffered race discrimination, it imposed constitutional restrictions on racial remedies for the express purpose of protecting the interests of "innocent" third parties.[42] Perhaps even more significantly, when white plaintiffs complained that racial remedies entrenched on an educational or employment opportunity to which they believed they were rightfully entitled, the Court treated the complainants as stating a claim of race discrimination, often seeming to equate such claims with the race discrimination African Americans and other minorities suffered.

In this period, the Court was in fact divided about whether to treat the race discrimination claims of whites and blacks in symmetrical or asymmetrical terms. To the extent that policies of racial rectification constrained the opportunities of whites, whites could indeed claim to be injured by race-based state action; but if this injury amounted to "race discrimination," it was a form of "race discrimination" not wholly commensurable with the race

discrimination that African Americans have suffered, whether analyzed from the standpoint of history or social meaning. Is every act of racial differentiation an act of race discrimination or does race discrimination involve a systematic practice of group subordination? The Court struggled with this question during the 1970s and 1980s as it attempted to decide whether policies of racial rectification should be reviewed under the "strict scrutiny" framework it had developed to review, and invalidate, traditional forms of Jim Crow legislation. When a majority of the Court finally declared in the 1989 *Croson*[43] decision that state-sponsored affirmative action policies would be reviewed under a strict scrutiny framework, and then in the 1995 *Adarand*[44] case that federal affirmative action policies would be similarly scrutinized, the justices seemed definitively to embrace the view that race discrimination directed at whites and blacks was commensurable from a constitutional standpoint (even as they hedged the question by indicating that under highly circumscribed circumstances, affirmative action policies might be constitutionally permissible).[45] Yet, at the same time as the Court accorded special constitutional solicitude to the race discrimination claims of whites, it subtly shifted its rationale for according strict scrutiny to race-conscious remedies.

In its more recent pronouncements on affirmative action, the Court no longer talks so openly about protecting the interests of "innocent" third parties. Instead of focusing on the harm racial remedies inflict on white Americans, the Court's opinions now focus on the harm that racial remedies inflict on *black* Americans. The Court has now clearly decided that white plaintiffs who challenge an affirmative action plan have stated a claim of race discrimination sufficient to trigger strict scrutiny. ("To whatever racial group . . . citizens belong, their 'personal rights' to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decision-making".[46]) Yet, when explaining why affirmative action policies should be evaluated as presumptively unconstitutional under a strict scrutiny framework, the Court currently emphasizes the ways that racial remedies can injure racial minorities. In *City of Richmond v. J.A. Croson*,[47] Justice O'Connor explained that an affirmative action plan must be evaluated under a strict scrutiny framework because (1) it is often quite difficult to determine

"what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics"; (2) "classifications based on race carry a danger of stigmatic harm" and so may "promote notions of racial inferiority and lead to a politics of racial hostility";[48] and (3) a more permissive standard of review "effectively assures that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminat[ing] entirely from governmental decision-making such irrelevant factors as a human being's race' . . . will never be achieved."[49] It is only in this brief reference to "racial hostility" that *Croson*'s justification for applying strict scrutiny to the race discrimination claims of white plaintiffs adverts to the racial interests and attitudes of white people, and it does so in terse and unelaborated terms. With the justifications for strict scrutiny of affirmative action focusing on harm to minorities, the Court can invoke the Fourteenth Amendment to constrain legislative action in terms that are more congruent with the amendment's historic purposes.

Given these recent developments in the Court's equal protection jurisprudence, it is therefore not surprising that the bulk of the Fifth Circuit's analysis in *Hopwood* explores the constitutional equities of affirmative action without ever expressly invoking the interests of white Americans. Drawing on recent Supreme Court cases, the Fifth Circuit reasons that the University of Texas Law School lacked constitutionally sufficient grounds to employ an affirmative action component in its admissions process — either for purposes of enhancing the diversity of its student body or for purposes of remedying racial discrimination. It is worth examining the justifications the Fifth Circuit offers for striking down the law school's admission policy on each of these grounds, for the diversity and remedial sections of the *Hopwood* opinion rest on two utterly incompatible conceptions of race, and so expose deep conflicts in the Supreme Court's most recent pronouncements about race-conscious remedies. At the very least, these conceptual conflicts call into question the concerns underlying the Court's decision to apply strict scrutiny to "benign" forms of race-conscious regulation. More deeply, the competing conceptions of race invoked in *Hopwood* and the Court's recent equal protection cases raise questions about the forms of racial consciousness animating current usages of colorblindness discourse.

Rejecting Diversity Justifications for Affirmative Action

Ever since the Supreme Court's decision in *University of California v. Bakke*,[50] educational institutions have justified affirmative action programs by emphasizing the goal of attaining a diverse student body. The defendant medical school in the *Bakke* case in fact advanced multiple justifications for its use of affirmative action in admissions, but the justices only judged two purposes of constitutional magnitude. Of the five justices who sanctioned educational affirmative action in *Bakke*, four justices thought that remedying the effects of societal discrimination supplied the school a compelling reason for adopting an affirmative action plan;[51] Justice Powell, however, did not. Powell instead adopted an approach to race-conscious admissions that incorporated significant criticisms of affirmative action policies, while upholding them on nonremedial grounds.

In *Bakke*, Justice Powell criticized remedial justifications for affirmative action as resting on an untenable "two-class theory" of the Fourteenth Amendment.[52] Paraphrasing Nathan Glazer, Powell announced that, in the years since the Civil War, "the United States had become a Nation of minorities"[53]: "[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."[54] For this reason, Powell argued, the Court could not allow state actors to rectify race discrimination as they saw fit. Members of many groups could lay claim to such an entitlement and would deeply resent state policies "that rearrange burdens and benefits on the basis of race," even if "the deprivation they [were] asked to endure" were justified as "the price of membership in the dominant majority ... inspired by the supposedly benign purpose of aiding others."[55] Thus, Powell reasoned that "the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like [the plaintiff], who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered."[56] Only where there were findings of race discrimination made by a competent governmental body would Powell sanction affirmative action for remedial purposes.[57] Yet Powell did go on to suggest that school administrators might take race and ethnicity into account in making admissions decisions for purposes of achieving an diverse student body—so long as race and ethnicity were not the sole criteria of diversity, and so long as all applicants had an opportunity to compete for every seat in the class.[58] Justice Powell's opinion in *Bakke* seemingly rejected and obliquely accepted the case for race-conscious admissions, burying questions about rectifying America's racial caste system in a celebration of America's ethnic pluralism. Although joined by no other justices, the opinion had sufficient pragmatic appeal that achieving student diversity has since become the conventional rationale for affirmative action in education.

In *Hopwood*, the Fifth Circuit drew national attention by rejecting Justice Powell's reasoning, and ruling that the pursuit of student diversity did not supply a constitutionally sufficient basis for adopting a race-conscious admissions policy. To support its judgment, the Fifth Circuit emphasized that Justice Powell's opinion in *Bakke* was joined by no other justices, and that, since *Bakke*, a majority of the sitting justices had authored or joined opinions that severely criticized diversity justifications for race-conscious regulatory policies. While it remains an open question whether the Court is ready to repudiate Justice Powell's *Bakke* opinion,[59] several recent decisions of the Court have challenged viewpoint-based justifications for race-conscious regulation in cases involving voting rights and broadcast licensing.[60] The Fifth Circuit succinctly summarized the Court's recent criticism of viewpoint-based justifications for race-conscious regulation: "To believe that a person's race controls his point of view is to stereotype him."[61] Quoting one of Justice O'Connor's dissenting opinions which Justices Rehnquist, Scalia, and Kennedy joined, the Fifth Circuit stated: "'Social scientists may debate how people's thoughts and behavior reflect their background, but the Constitution provides that the government may not allocate benefits or burdens among individuals based on the assumption that race or ethnicity determines how they act or think.'"[62] Reasoning from this standpoint, the Fifth Circuit concluded:

> [T]he use of race in admissions for diversity in higher education contradicts, rather than furthers, the aims of equal protection. Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals. It may further

remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility.

> The use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants.[63]

Hopwood's repudiation of the diversity rationale for affirmative action in educational admissions rests on an amalgam of positive and normative claims. At the simplest level, the Fifth Circuit invokes the norm that group-based generalizations offend the Constitution: Under strict-scrutiny analysis, the state may not impute a particular point of view to an individual because of her group membership. (In fact, nothing in the record supports the court's claim that the admissions policy imputes particular points of view to individuals who belong to different social groups; as described, the policy would seem to allow group members to bring to the institution whatever distinctive experience or outlook they happen to have — thus facilitating dialogue in which students can discover the ways in which perspectives may cohere or diverge within and across groups.)

But the Fifth Circuit's objection to the diversity rationale rests on positive, as well as normative, claims. As the court sees it, the problem is not merely that the Constitution is intolerant of group-based generalizations, but that the generalizations supporting the admissions policy are themselves empirically unfounded. As the court puts it, "[t]he use of race, in and of itself, to choose students simply achieves a student body that looks different." On this account, race is nothing but morphological accident, a matter of skin color, physical size, or blood type, no more. The diversity justification for race-conscious admissions is therefore irrational because race has no identifiable social content, and any assumption that it does amounts to invidious racial stereotyping.

The stereotyping objection to diversity rationales for race-conscious remedies is a "second-generation" objection to affirmative action programs, one that emphasizes injury to the minority beneficiaries of such programs. Consistent with this approach, the Fifth Circuit goes on to enumerate additional objections to diversity-based affirmative action, invoking the *Croson* opinion for the proposition that "'[c]lassifications based on race

carry the danger of stigmatic harm. Unless . . . reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to the politics of racial hostility.'"[64] Thus race-conscious admissions policies that seek to diversify a student body stereotype and stigmatize their beneficiaries, and, more generally, "undercut the ultimate goal of the Fourteenth Amendment: the end of racially motivated state action."[65]

In rejecting the diversity rationale for affirmative action, the Fifth Circuit squarely embraces the view that race is devoid of socially relevant content, a "criterion [that] is no more rational on its own terms than would be choices based on the physical size or blood type of applicants."[66] Quoting Richard Posner, the court insists that "'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.'"[67] Yet, at the same time that the court insists that race may not be used as a proxy for social characteristics that might have relevance in admissions — "such as [the] economic or educational background of one's parents"[68] — the court also acknowledges that these "factors may, in fact, turn out to be substantially correlated with race,"[69] and emphasizes that they may be constitutionally considered in admissions so long as they are "not adopted for the purpose of discriminating on the basis of race":[70] "the key is that race itself not be taken into account."[71] Lurking beneath the court's assertion that race is but a morphological accident with no significant social content is a very different conception of race: one that plays a pivotal role in the court's analysis of affirmative action as a remedy for racial discrimination.

Restricting the Remedial Applications of Affirmative Action

The *Hopwood* opinion makes quite clear that, under prevailing Supreme Court opinions, remedying identifiable racial discrimination is a constitutionally compelling reason for adopting an affirmative action plan. At the same time it emphasizes that the Constitution only allows the use of affirmative action for remedial purposes in narrowly circumscribed circumstances. As the Fifth Circuit reads Supreme Court case law, affirmative action can be employed for the purpose of remedying the "present

effects of past discrimination," but not for the purpose of "remedying the present effects of past *societal* discrimination."[72] Drawing on plurality opinions of the 1980s, the Fifth Circuit construes statements prohibiting the use of affirmative action to remedy societal discrimination to mean that "the state's use of remedial racial classifications is limited to [rectifying] the harm caused by a specific state actor."[73] Moreover, before a state actor can implement an affirmative action plan, "it 'must ensure that... it has strong evidence that remedial action is warranted.' "[74]

The Fifth Circuit selectively discusses the justifications that various justices have advanced for restricting the remedial use of affirmative action to those circumstances where a state actor can show convincing evidence of prior acts of discrimination. The *Wygant* case from which the Fifth Circuit liberally quotes explains that affirmative action policies should be so limited to ensure that the policies do not unduly burden innocent people.[75] The Fifth Circuit's opinion does not mention this concern about burdening innocent parties, but it justifies the constitutional restrictions imposed on the remedial use of affirmative action by quoting a passage from the *Croson* case that explains why the government must supply evidence of prior discrimination before adopting an affirmative action plan:

> [A] generalized assertion that there had been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It "has no logical stopping point." "Relief" for such an ill-defined wrong could extend until the percentage of public contracts awarded to [minority businesses] in Richmond mirrored the percentage of minorities in the population as a whole.[76]

Quoting *Croson*, the Fifth Circuit observes that "'an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding quota.' Such claims were based upon 'sheer speculation' about how many minorities would be in the... business absent past discrimination."[77]

Reasoning from these passages, the Fifth Circuit concludes that the district court erred in allowing the University of Texas Law School to employ an affirmative action policy to remedy discrimination in the state's educational system: "[A] remedy reaching all education within a state addresses a putative injury that is vague and amorphous. It has no logical stopping point.' "[78] As the Fifth Circuit acknowledges, in *Croson*, the Court did indicate that in appropriate circumstances, state or local government could rectify the effects of private discrimination within its own legislative jurisdiction, in order to avoid becoming a passive participant in private discrimination;[79] but, the Fifth Circuit discounts this more expansive account of government's remedial authority,[80] insisting that a governmental unit can only rectify effects of discrimination which that particular governmental unit has caused. "[W]hen one state actor begins to justify racial preferences based upon the actions of other state agencies, the remedial actor's competence to determine the existence and scope of the harm and the appropriate reach of the remedy is called into question."[81] "Such boundless 'remedies' raise a constitutional concern beyond mere competence. *In this situation, an inference is raised that the program was the result of racial social engineering rather [than] a desire to implement a remedy*."[82] The court then concludes that, despite the long history of overt discrimination in University of Texas Law School admissions,[83] such discrimination ended in the 1960s when the school implemented its first program designed to recruit minorities,[84] and further concludes that there are no present effects of the school's past discrimination of sufficient magnitude to warrant the school's use of affirmative action in admissions.[85]

What is the basis of the Fifth Circuit's "inference" that an affirmative action program at the University of Texas Law School designed to remedy the effects of discrimination in the state's educational system would be "the result of racial social engineering rather than a desire to implement a remedy"? As the Fifth Circuit analyzes it, the law school lacks information about the extent of such discrimination and would therefore have to proceed on the basis of assumptions about the degree to which the underrepresentation of minorities in the competitive applicant pool was attributable to discrimination. But the *Hopwood* court insists that no legitimately remedial affirmative action program can rest on such assumptions. Following the *Croson* opinion, the *Hopwood* opinion insists that there is no way of knowing how many racial minorities would participate in any given social endeavor in the absence of discrimination; making assumptions

about such matters without proof is "'sheer speculation.'" In short, it is constitutionally impermissible to assume that in a world without discrimination minorities would participate in various social endeavors at the same rate as other social groups.[86] For the *Hopwood* court, affirmative action goals premised on assumptions about proportional participation raise "the inference that the program was the result of racial social engineering rather [than] a desire to implement a remedy." (The pejorative reference to social engineering derives from a famous article attacking affirmative action authored by Morris Abram, who objected to a new generation of "social engineers" in the leadership of the civil rights movement who believe that "the government's role [is] to bring about proportional representation."[87])

In the early days of the civil rights movement, the federal judiciary was confident that significant racial disparities had their roots in discrimination, but over the decades critics of civil rights law have energetically contested that assumption and courts have gradually retreated from it, requiring ever more detailed proof that social stratification is the product of discrimination perpetrated by the particular agent whose practices are contested.[88] The Supreme Court's opinion in *Croson* employed this body of antidiscrimination law to restrict constitutionally permissible uses of voluntary affirmative action,[89] and *Hopwood* in turn applied *Croson*'s reasoning with zeal. As the Fifth Circuit construes the Fourteenth Amendment, it is a violation of equal protection for a state actor to adopt a race-conscious remedy premised on the assumption that in a world without discrimination, African Americans and other minorities would participate in various social endeavors at the same rate as whites.

Hopwood*'s Internal Contradictions and Underlying Preoccupations*

By this point it should be clear that the diversity and remedial sections of the *Hopwood* opinion are premised on two deeply conflicting conceptions of race. The diversity sections of the opinion assert that race is but a morphological accident, a matter of skin color, no more: "The use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants."[90] On this view, race has no socially relevant content, and provides no basis for choosing among white and black applicants for admission to the law school. The Constitution forbids the University of Texas Law School from assuming that applicants of different racial backgrounds differ. But the remedial sections of the opinion make precisely the opposite assumption about race. Here the *Hopwood* opinion asserts that there *are* socially relevant differences among racial groups. It is "'sheer speculation'... how many minorities would be in [a] business absent past discrimination," and the Constitution forbids the University of Texas Law School from assuming that, in a world without discrimination, members of minority groups would participate and achieve in various social endeavors at the same rate as members of other groups. In short, the two sections of the opinion make diametrically opposing positive and normative claims about race. Indeed, if we distill the normative argument of the *Hopwood* opinion, we discover that the law school's affirmative action plan is unconstitutional because the Constitution forbids the law school from assuming that applicants of different racial backgrounds are different and because the Constitution forbids the law school from assuming that applicants of different racial backgrounds are the same. Thus, as the *Hopwood* opinion draws on the Supreme Court's recent equal protection cases, it reveals that these equal protection cases employ quite contradictory modes of reasoning about race.

It is clear enough that the racial rhetoric in the diversity sections of the *Hopwood* opinion is drawn from the civil rights tradition. This portion of the opinion turns concepts of racial "stereotyping" (and stigma) on the diversity rationale for affirmative action, drawing perhaps as well on academic criticisms of race and gender "essentialism."[91] But the racial rhetoric in the remedial sections of the *Hopwood* opinion seems to come from a very different source. Here the court reasons about race as a cultural phenomenon, drawing perhaps on commentators such as Nathan Glazer, Morris Abram, or Dinesh D'Souza, who analyze race as a form of ethnicity and explain racial status as a product of the cultural resources various groups bring to the task of assimilating to the norms of the dominant culture.[92] If we take seriously the justifications for restricting racial remedies spelled out in *Croson* and *Hopwood*, we confront a view of race-as-culture

that seems in deep tension with the professed aims of colorblind constitutionalism.

The analysis of race-conscious remedies contained in the *Croson* and *Hopwood* opinions seems to distinguish between licit and illicit forms of racial stratification. The analysis begins from the premise that we can in fact distinguish between racial formations that are the product of discrimination and those that would exist in the world "absent discrimination." That racial stratification which state actors can prove is traceable to institutional acts of racial discrimination may be rectified by race-conscious remedies. But racial stratification that cannot be shown to be the product of such discrimination is licit—and protected by the Fourteenth Amendment of the United States Constitution. *Hopwood*'s injunction against "racial social engineering" bars the state from pursuing policies of race-conscious remediation that risk disturbing "natural" forms of racial stratification, that is, those racial distributions that arise from differences in tastes or talents among racial groups. (Note how equal protection doctrine restricting the remedial use of affirmative action is concerned about the risk that racial remedies might alter real differences among racial groups—*not* the risk that race discrimination might go unrectified.) If one follows the logic of concerns about proportional representation and racial social engineering expressed in *Croson* and *Hopwood*, it appears that strict scrutiny doctrines under the Fourteenth Amendment radically restrict the use of race-conscious remedies in order to protect and preserve real differences among racial groups. To say the least, this is a counterintuitive ambition for a body of law that embraces as its "ultimate goal" the purpose "'of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race.'"[93]

Colorblind Constitutionalism: Some Genealogical Reflections

At least, the goal of preserving differences among racial groups *seems* like a counterintuitive ambition for a body of law that embraces values of colorblindness. It seems more plausible as an account of colorblind constitutionalism if one revisits the origins of the discourse, in early Fourteenth Amendment jurisprudence of the Reconstruction era. In this period, it remained an open and hotly contested question whether, and to what extent, racial status distinctions would survive under the body of civil rights law that would be required to disestablish chattel slavery. This was the sociolegal universe in which talk of colorblindness was born.

The white Americans who drafted and ratified the Fourteenth Amendment debated the meaning of emancipating African Americans in a discursive framework that is unfamiliar to many Americans today. In this period, some white Americans defined freedom from slavery as equality in civil rights; others insisted that emancipating African Americans from slavery entailed equality in civil and political rights; but most white Americans who opposed slavery did not think its abolition required giving African Americans equality in "social rights."[94] Social rights were those forms of association that, white Americans feared, would obliterate status distinctions and result in the "amalgamation" of the races.[95] Objections to granting freedmen "social equality" appear throughout the debate on emancipation, before and after the Civil War. Both those who supported and those who opposed civil rights reform asserted that equality in social status could not be legislated ("the social status of men is determined by original capacity, and cannot be fixed or safely tampered with by legislation"[96]), but opponents of reform transformed this descriptive claim into a normative argument—objecting to various civil rights measures on the grounds that the legislation would impermissibly *promote* social equality between the races.[97]

The Court's opinion in *Plessy v. Ferguson*[98] unfolds within this discursive framework. In *Plessy*, the Court drew on social rights discourse to explain why laws mandating racial segregation of public transportation were consistent with the Fourteenth Amendment's guarantee of equal protection of the laws: "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either."[99] The majority in *Plessy* believed that government could not draw racial distinctions in matters concerning civil and political rights (e.g., rights of contract or jury service), but contended that access to public transportation involved an associational or "social" right, and so implicated questions of "social, as distinguished from political equality," beyond the reach of the

Fourteenth Amendment's guarantee of equal protection of the laws. As the majority explained: "If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."[100]

As is well known, Justice Harlan dissented from the *Plessy* decision, arguing that segregation of public transportation violated the Fourteenth Amendment. In Justice Harlan's view, access to public transportation involved a civil right, hence could not be the subject of racially discriminatory regulation.[101] But Justice Harlan's dissenting opinion did *not* assert that "colored citizens" were the social equals of white citizens, or that the law should make them so; indeed, passages of his dissent — including the famous colorblindness argument — continue to emphasize distinctions between legal and social equality:

> *The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.* But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.[102]

As the narrative progression of the colorblindness passage illustrates, the legal equality of which Justice Harlan spoke *presupposed* continuing social *in*equality. His opinion subsequently reiterated this distinction between legal and social equality: "[S]ocial equality no more exists between two races when traveling in a passenger coach or a public highway than when members of the same races sit by each other in a street car or in the jury box, or stand or sit with each other in a political assembly."[103] When Justice Harlan asserted that "in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind," he was arguing that the legal system should not distribute certain entitlements ("civil rights") in accordance with the prevailing order of racial status relations. It is the social condition of racial stratification that makes the concept of *colorblindness* intelligible as a distributive principle.

The discourse of colorblindness involves what Neil Gotanda has called a practice of racial "nonrecognition."[104] The discourse presupposes a series of intelligible status distinctions ("color," "class," "caste") which it refuses to take account of in certain legal situations. The majority and the dissent in *Plessy* were in disagreement about the kinds of legal situations in which the Fourteenth Amendment required the government to adopt a stance of racial nonrecognition. But they were in agreement that law neither would nor should eliminate racial stratification — or, as they put it, bring about "social equality." In short, in this era, the practice of colorblindness, or racial nonrecognition, did *not* aspire to bring about the social equality of the races. In the nineteenth century, racial nonrecognition did not hold itself out as form of public pedagogy intended to inspire private emulation; indeed, its proponents repeatedly and emphatically disclaimed any intention of meddling with the private discriminations all Americans were at liberty to cultivate.

Thus, in the Reconstruction era, colorblindness discourse expressed a commitment to distribute legal entitlements in ways that defied the prevailing order of racial status relations; but the practice of racial nonrecognition was not intended wholly to disestablish racial stratification. Those joined in debate over the meaning of the constitutional and statutory provisions adopted in the wake of the Civil War understood such laws to guarantee the emancipated slaves *legal* equality, but they agreed that the law neither would nor should enforce the *social* equality of the races. In short, in the Reconstruction era, discourses of racial nonrecognition were commonly coupled with, and bounded by, privacy discourses that posited a domain of racial recognition beyond the proper reach of civil rights regulation. There is a logic to this rhetorical coupling. Once the federal government adopted civil rights laws conferring equality on the emancipated slaves, those seeking to defend relations of racial inequality had to justify limitations on the reach of such status-disestablishing laws. The defense of racial inequality could, and most certainly did, assume the form of assertions about the natural inferiority of blacks. But, in contests over the meaning of civil rights laws

embodying principles of equality, the defense of racial inequality increasingly assumed new rhetorical form, articulated as a set of counterprinciples constraining the reach of civil rights law itself. And so, during the Reconstruction era, overtly hierarchical discourses of racial status were gradually translated into a rhetoric of privacy and associational liberty concerned with protecting racial status relations from governmental interference.

It is, of course, possible to invoke the discourse of colorblindness unconstrained by concepts of a racial private sphere beyond the state's power to regulate; many in the modern civil rights movement have invoked concepts of colorblindness in this fashion. But the public/private distinction that undergirds the majority and dissenting opinions in *Plessy* has proven remarkably robust. As we will see, there are many proponents of colorblindness who currently embrace some form of this racial public/private distinction, still expressed in civil rights idiom as the distinction between legal and social equality. Now, as then, the concept of legal equality presupposes an ongoing condition of social inequality that law neither can nor should attempt to eradicate.

But if racial discourses of the private have persisted into the modern era, they have also assumed new rhetorical forms. In the Reconstruction era, white Americans discussed their prerogative to maintain racial status distinctions in the idiom of associational liberty or "social rights."[105] (Their continuing insistence that law neither could nor should mandate social equality testified to the clear understanding that maintaining a system of racial caste was at stake.) While opponents of civil rights legislation employed this same rhetoric of associational liberty in the 1950s and 1960s[106] — and some, including Charles Murray, continue to employ it today[107] — racial discourses of the private are now more commonly couched in a related, but distinct, market idiom that emphasizes individual and group competition.

For example, in his recent book, *What It Means to Be a Libertarian*,[108] Charles Murray first attacks the Civil Rights Act of 1964 on the grounds that it abridges "freedom of association,"[109] but then goes on to assert that the antidiscrimination statute interferes with natural and legitimate forms of social stratification: "At any moment in history a completely fair system for treating individuals will produce different outcomes for different groups, because groups are hardly ever equally represented in the qualities that go into decisions about whom to hire, admit to law school, put in jail, or live next door to."[110] According to Murray, federal antidiscrimination laws erroneously presume that gross discrepancies in racial or gender representation are attributable to discrimination, when instead such discrepancies are the product of meritocratic competition among groups.[111] Since Nathan Glazer elaborated this ethno-cultural account of social stratification to challenge the evidentiary assumptions of antidiscrimination law in the 1970s,[112] narratives of intergroup competition have played a central role in critiques of civil rights law. Dinesh D'Souza is currently their most prominent exponent. D'Souza rejects bias or bigotry as the reason why "America is developing something resembling a racial hierarchy — Asians and whites at the top, Hispanics in the middle, African-Americans at the bottom"; he contends this hierarchy exists because "African-Americans are not competitive with other groups in our society."[113] "Merit produces inequality not only between individuals, but also between groups."[114]

Narratives of group competition now play a central role in critiques of affirmative action. For example, in his influential article attacking affirmative action as "social engineering," Morris Abram embraces "the American system" as a "free market system," which in his view "guarantees civil and political rights," but not "social and economic rights."[115] In such a system, he argues, there will naturally be social stratification:

> Because groups — black, white, Hispanic, male, and female — do not necessarily have the same distribution of, among other characteristics, skills, interest, motivation, and age, a fair shake system may not produce proportional representation across occupations and professions, and certainly not at any given time. This uneven distribution, however, is not necessarily the result of discrimination. Thomas Sowell has shown through comparative studies of ethnic group performance that discrimination alone cannot explain these ethnic groups' varying levels of achievement. Groups such as the Japanese, Chinese, and West Indian blacks have fared very well in American society despite racial bias against these groups.[116]

Abram attacks proponents of affirmative action as "today's social engineers," who do not view justice as "an individual's claim to

equality before the law" but instead seek "a particular distribution of social, economic, and political power among groups." "This new conception of justice," he argues, "necessarily repudiates the ideal of the rule of law—a law that 'would treat people equally, but... not seek to make them equal.'"[117] A story about competition among groups with different genetic and cultural endowments explains, and justifies, relations of racial status; a story about maintaining appropriate distinctions between the public and private spheres explains, and justifies, legal rules that preserve relations of racial status. As Dinesh D'Souza concludes his attack on affirmative action and the Civil Rights Act of 1964: "What we need is a long-term strategy that holds the government to a rigorous standard of race neutrality, while allowing private actors to be free to discriminate as they wish."[118] He distills this prescription into a call for the "separation of race and state."[119]

One can discern different rhetorical strains of racial privacy discourse as one examines the justifications the *Croson* and *Hopwood* courts offer for the restrictions they impose on remedial affirmative action. When the Supreme Court struck down the minority business set-aside at issue in the *Croson* case, it condemned the Richmond City Council for engaging in constitutionally offensive "racial balancing" rather than racial remediation because the program was premised "upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population."[120] Echoes of *Plessy*'s claim that the Fourteenth Amendment could not have been intended "to enforce social, as distinguished from political equality" inform the insistence that affirmative action policies cannot rectify "societal discrimination" or promote proportional representation or otherwise engage in what the *Hopwood* court calls "racial social engineering." These are modern expressions of racial privacy rhetoric, positing a domain of racial inequality that civil rights law cannot reach or appropriately aspire to rectify. From the first that Justice Powell argued that it was unconstitutional for state actors to employ affirmative action policies to rectify societal discrimination, his purpose was to protect "innocent" parties whose interests might be entrenched on by racial remedies.[121] Though no longer justified so bluntly, the claims that affirmative action policies cannot rectify "societal discrimination" or promote proportional representation or otherwise engage in "racial social engineering" variously express this same, and continuing, concern that race-conscious remedies may entrench on the relative social position of whites. This underlying concern often finds more overt expression in popular debate and in the reasoning of some of the lower federal courts. A federal district court recently summarized the law of affirmative action by quoting the colorblindness passage in Justice Harlan's dissent and then observing:

> In a perfect world, neither reverse discrimination nor affirmative action would constitute legal issues. Indeed, *these social engineering programs serve primarily to aggravate racial tensions, not to heal past wounds.* However, taking our long and sad history of racial discord into account, *the United States Supreme Court permits conscious discrimination against white males to compensate for past injuries inflicted upon minority groups.*[122]

What is striking is that, in ambivalently authorizing and then progressively undermining affirmative action, the United States Supreme Court has rarely presented itself as concerned about protecting the social position of "white males." Justice Powell initially offered an unusually frank account of his reasons for prohibiting the use of affirmative action to rectify societal discrimination—one that emphasized the "deep resentment" and "outrage" that "innocent persons" might experience at being deni[ed]... equal rights and opportunities" as "the price of membership in the dominant majority"[123]—but such discussion is no longer commonplace, adverted to only in oblique references to affirmative action stimulating "racial hostility."[124] Now the rationales for restricting affirmative action emphasize the injuries race-conscious remedies inflict on racial minorities, or depict such constitutional restrictions as the product of colorblind "consistency." As the Court explained its commitment to "consistency" in *Adarand*: "'the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.'"[125] Like many recent colorblindness arguments for restricting affirmative action, *Adarand* applies the practice of racial nonrecognition in ways that protect the social position of whites, but in terms that disclaim any interest in pre-

serving the existing racial order, and, if anything, claim a fervent interest in hastening the day of its final disestablishment.[126]

In short, the discourse of colorblindness is remarkably flexible; its sociopolitical salience is dependent on the context in which it is invoked. When Justice Harlan or the modern civil rights movement invoked the discourse of colorblindness to challenge the rule structure of de jure segregation, the discourse supported a demand for disestablishment of race-based distributive rules supporting the existing racial order. Today, the state no longer employs openly race-based distributive rules to maintain racial stratification. With the regime of de jure segregation discredited, status-enforcing state action has evolved in rule structure and justificatory rhetoric. Now state action that perpetuates racial stratification is couched in facially neutral distributive rules and justified as advancing legitimate, nondiscriminatory ends. Now, it is those seeking to disestablish racial stratification who are using the tools of race-conscious regulation, and opponents of such initiatives have seized on the rhetorical materials of the civil rights movement to advance principled justifications for prohibiting, or radically restricting, the ambit of such status-disestablishing initiatives. In the nineteenth century, at the inception of America's experiment with disestablishing slavery, it was still feasible to advance an interest in preserving the existing racial order (or the right to discriminate in one's associations) as a basis for opposing or restricting civil rights regulation. Today, of course, claims about preserving the existing racial order do not carry the same authority, while expressing a commitment to principles of racial equality is understood to state a "legitimate, nondiscriminatory" reason for restricting civil rights initiatives that seek to alleviate the racial stratification of American society.[127] Under these circumstances, discourses of racial nonrecognition can now be employed in ways that preserve the existing racial order.

The justificatory rhetoric of racial status law is always evolving, mutating as conflicts precipitate shifts in the rule structure of racial status law.[128] In the nineteenth century, when race-based regulation of African Americans was commonplace, the *Plessy* Court drew on racialized discourses of the private to justify restricting the ambit of civil rights laws embodying rules of racial nonrecognition. Now, with the demise of de jure segregation, the Court employs the rules and rhetoric of racial nonrecognition to restrict new, race-conscious forms of civil rights legislation, but it also justifies restrictions on such legislation by invoking a private sphere of racial differentiation that civil rights law may not aspire to disestablish. The contradictory representations of race that *Hopwood* draws from the Court's recent equal protection cases reflect this synthetic rhetorical strategy. The claims about race-as-morphological-accident that justify repudiating diversity rationales for affirmative action are expressions of what Neil Gotanda calls "formal" race,[129] part of the rhetoric of racial nonrecognition, while the claims about race-as-culture that justify restricting remedial uses of affirmative action have deep roots in racial discourses of the private, referring to a domain of racial recognition "beyond" the proper reach of civil rights regulation. There is ample precedent for this synthetic rhetorical strategy. As we have seen, rhetorics of racial nonrecognition have been employed in conjunction with rhetorics of racial recognition since the days of Reconstruction, as Americans have debated the proper reach of civil rights regulation.

The Racial Commitments of Colorblind Constitutionalism

While some who argue that the state may only act in a rigorously colorblind fashion are rather forthright in their desire to protect the right of private citizens to discriminate without state interference (e.g., Murray, Epstein, D'Souza), the Court has continued, albeit at times weakly, to enforce civil rights legislation governing market place transactions,[130] and has ambivalently allowed race-conscious remedies, undermining but not quite prohibiting them. Moreover, the Court—unlike some of its more conservative critics—intermittently justifies the restrictions it imposes on affirmative action as promoting a world where we can finally get "beyond" race. For example, in *Adarand* the Court emphasized that race-based preferences give rise to the perception that their beneficiaries "are less qualified in some respect that is identified purely by their race," a perception that "can only exacerbate rather than reduce racial prejudice, [hence] delay the time when race will become a truly irrelevant, or at least insignificant, factor."[131] In restricting race-conscious remedies, the Court now presents itself as seeking to liberate the nation

from racial consciousness.[132] What weight should we give this claim?

As we have seen, in *Croson* and *Adarand*, the Court adopted a strict scrutiny framework that elevates the standing of white plaintiffs to contest race-conscious remedies and suggests that their claims of race discrimination have much in common with the race discrimination that minorities suffer; the Court has thus given constitutional protection to the injuries whites suffer as members of a racial group, even as it refuses to construe the equal protection clause to redress the grievances they suffer as members of income or occupational groups adversely affected by government policies. In short, the Court has applied strict scrutiny in ways that would seem to reflect and reinforce the racial-group consciousness of white Americans. But the Court also insists that in applying strict scrutiny to affirmative action, it is protecting the minority beneficiaries of such programs from the racial hostility, stereotyping, and stigma that resentful whites may direct at them. Of course, the Court itself has played a role in encouraging the resentment of affirmative action which it then claims it must accommodate. Still, if we suppose that the Court is ultimately a majoritarian institution, perhaps it has taken the only leadership role it can in permitting race-conscious remedies as "suspect" social undertakings. As a majoritarian institution, the Court may well be persuaded that restricting race-conscious state action is the best way to ameliorate racial consciousness in the polity at large. The Court might well hold this view in good faith — even if the strategy it has adopted focuses on the symbolism of governmental action, while ignoring the ways that persisting racial stratification will itself perpetuate racial consciousness.

Given all this, one might conclude that the Court is indeed struggling to bring about the day "when race will become a truly irrelevant, or at least insignificant, factor"[133] — even if it has chosen contestable means for achieving this goal. But it becomes harder to credit the Court's claim that it is attempting to move the nation "beyond" race as one considers the racial privacy discourse the Court invokes to justify restrictions on affirmative action. Consider, for example, the race-conscious views and commitments that the Court has expressed when it differentiates legitimate forms of affirmative action from constitutionally illegitimate forms of "racial balancing." As the Court has defined it, a race-conscious remedy is illegitimate "racial balancing" whenever such a remedy alleviates racial stratification that is the product of "societal discrimination" or disturbs racial formations that would naturally exist "absent unlawful discrimination."[134] In so reasoning, the Court has embraced a "thick" conception of race, expressing its view that, even in a world where there was no discrimination, there would *still* be occupational differences (and, presumably, income differences) among racial groups. More importantly, it has harnessed this view of race-as-culture to a normative discourse about the proper uses of state power, interpreting the Constitution to prohibit government from altering such natural racial differences. Whatever one thinks about the claim that there would be important racial differences in a world without race discrimination — and such claims must remain speculative because we have never inhabited such a world — they assume very different meaning as a foundation for a privacy discourse concerned with protecting such "natural" differences from governmental interference. When the Court, which generally espouses judicial deference, intervenes in the political process to prevent legislatures from disturbing racial stratification that is "merely" the product of societal discrimination and to prevent legislatures from altering cultural differences among racial groups that would naturally exist in a hypothetical world that has never existed, it seems safe to say that the Court is more involved in preserving the racial status quo than its claims about getting beyond race would seem to suggest.

But still, it can be objected, the Court has only intervened in the political process to inhibit *race-conscious* efforts to alleviate racial stratification; it has always allowed legislatures to use facially neutral means to attack the same problem.[135] Bearing this in mind, we could read the Court's use of racial privacy discourse as an ill-considered and ultimately incidental ground of objection to race-based state action. Whatever view of racial stratification the Court's embrace of racial privacy discourse would seem to express, the Court has, after all, voiced other objections to race-conscious remedies. As the Court and numerous critics of affirmative action have pointed out, such regulatory measures involve practices of racial group assignment that at this juncture of American history have become the site of heightened social conflict.

Given the unstable social meaning of race-conscious remedies, the Court could reasonably conclude that the quest to ameliorate racial stratification would be better pursued by formally race-neutral means.

Suppose, then, that the Court were committed to eliminating racial stratification, but, for reasons of principle or pragmatism, believed that it was wrong for government to pursue this goal by race-conscious means. Having taken the unusual measure of intervening in the political process to invalidate race-conscious efforts to ameliorate racial stratification, the Court might then use its institutional authority to encourage legislatures to adopt facially neutral means of achieving the same end. If legislatures reformed educational, zoning, and criminal laws or any number of social welfare policies that affect the life prospects of minority communities, such facially neutral measures might promote integration of basic social institutions just as surely as affirmative action programs do — and without the kind of conflict that race-specific regulation now engenders.

But if the Court *permits* legislatures to ameliorate racial stratification by facially neutral means, it certainly does not employ its institutional authority to encourage them to do so. In the years since the demise of de jure segregation, minority plaintiffs have repeatedly brought law suits challenging facially neutral forms of state action that contribute to the racial stratification affirmative action redresses. The Court might have construed the equal protection clause to require heightened scrutiny of facially neutral polices that have a disparate impact on minority communities — an interpretation of the Fourteenth Amendment that would commit the moral authority of the equal protection clause to the alleviation of racial stratification, without requiring government to act by race-based means.[136] On this view, the constitutional guarantee of equal protection of the laws would require the state to govern impartially, constraining the state from enacting policies that significantly disadvantaged subordinate social groups, unless the state could articulate a weighty justification for adopting policies that aggravated the racial stratification of American society. But the Court does not treat facially neutral state action that aggravates racial stratification as raising significant equal protection concerns. Since the days of *Bakke*, the federal judiciary has reviewed challenges to drug-sentencing guidelines, residential

zoning rules, and educational funding and districting policies that disparately burden minority communities on the presumption that such regulation is constitutional unless animated by discriminatory purpose; this is a quite restrictive standard, often defined as tantamount to malice or an intent to harm, which plaintiffs have great difficulty in proving and which the Court justifies as warranted by the deference courts owe to coordinate branches of government.[137] In short, the Court's willingness to intervene in the political process to restrict race-conscious initiatives intended to alleviate racial stratification utterly dissolves when it reviews facially neutral state action having a disparate impact on minorities; in these cases, concerns about the Court's position as a "counter-majoritarian" institution suddenly assume preeminence. Thus, today doctrines of strict scrutiny function primarily, if not exclusively, to restrict race-conscious initiatives intended to alleviate racial stratification, while the Court treats the forms of facially neutral state action that continue to perpetuate racial stratification as presumptively race-neutral, and warranting only the most deferential review. This is the larger constitutional context in which colorblindness objections to race-conscious remedies deserve to be evaluated.

For several decades now the Court has ambivalently sanctioned affirmative action, while subjecting the policies to increasing restrictions. In deciding *Hopwood*, the Fifth Circuit ignored these signs of begrudging tolerance and imposed more severe restrictions on educational affirmative action than the Court has yet embraced; but, as we have seen, the Fifth Circuit derived the core, and conflicting, rationales for its decision from the Supreme Court's recent rulings on race-conscious remedies. In this sense, *Hopwood* is the fruit of the Court's recent rulings on race-conscious remedies.

Since the *Hopwood* decision, minority applications and admissions at the University of Texas Law School have fallen precipitously. The University of Texas Law School has now offered positions in the fall 1997 class to 11 African American students, down from 65 last year, and to 33 Hispanic students, down from 70 last year.[138] Early in the summer, there were no black students willing to attend, although at present, 4 African-American and 21 Hispanic students are planning to enroll in the first-year class

of 494 students.[139] In short, it seems that the University of Texas Law School will have an entering class that is less than one percent black — no small achievement for an institution that was (once?) white by law.

If we consider the racial privacy rhetorics that accompany *Hopwood*'s use of colorblindness discourse — in particular, its condemnation of the law school's admission policy as "racial social engineering" — it is hard to view this result as an unintended by-product of the court's decision. As we have seen, *Hopwood* finds its roots in *Plessy v. Ferguson* — *both* the majority and dissenting opinions.

Notes

1. U.S. Constitution, Article I, Section 2 (emphasis added).

2. At the annual meeting of the Massachusetts Anti-Slavery Society, William Garrison offered the following resolution, which was adopted on January 27, 1843: "Resolved, That the compact which exists between the North and the South is a covenant with death, and an agreement with hell — involving both parties in atrocious criminality, and should be immediately annulled" (Massachusetts Anti-Slavery Society, Eleventh Annual Report [Boston: Oliver Johnson, 1843], appendix, p. 94).

3. For an account of this historical dynamic, see Reva B. Siegel, "Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action," *Stanford Law Review* 49 (1997): 1111.

4. See *Scott v. Sandford*, 60 U.S. 393, 407–26 (1856).

5. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (O'Connor, J., plurality opinion) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 320 [1986] [Stevens, J., dissenting]).

6. 78 F. 3d 932 (5th Cir. 1996).

7. *Ibid.* at 935.

8. The *Hopwood* opinion addresses the constitutionality of race-conscious admissions policies under the equal protection clause of the Fourteenth Amendment, which constrains state actors. However, recipients of federal education funds may be held to similar standards under Title VI of the Civil Rights Act of 1964. For discussion of this question, see Robert Post's introduction to this volume. The plaintiffs in the *Hopwood* case brought a Title VI claim in addition to their constitutional claims, but the Fifth Circuit did not squarely address the question of whether its holding bound private recipients of federal funds. Most private schools in Texas now construe the court's ruling as controlling their admissions decisions through Title VI. See Sylvia Moreno, "Private Colleges Expect Changes in Policy," *Dallas Morning News*, 3 July 1996, 5B.

9. 438 U.S. 265 (1978).

10. See Siegel, "Why Equal Protection No Longer Protects."

11. *Ibid.* at 1133–44.

12. 349 U.S. 294 (1955).

13. *Hopwood v. Texas*, 861 F. Supp. 551, 554 (W.D. Tex. 1994), *rev'd*, 78 F. 3d 932 (5th Cir. 1996).

14. *Ibid.* at 554–55 and n. 4.

15. See *Sweatt v. Painter*, 210 S.W. 2d 442 (Tex. Civ. App. 1948).

16. 339 U.S. 629 (1950).

17. *Hopwood*, 861 F. Supp. at 555.

18. *Ibid.* at 556.

19. *Ibid.*

20. *Ibid.*

21. *Ibid.*

22. *Ibid.* at 557.

23. *Ibid.*

24. *Ibid.* at 560–63.

25. *Ibid.* at 563 and n.33.

26. *Ibid.* at 563.

27. *Ibid.*

28. The class admitted for the fall of 1992 had an overall median GPA of 3.52, and an overall median LSAT of 162 (89th percentile). The median figures for non-minorities were a GPA of 3.56 and an LSAT of 164 (93rd percentile); for blacks, a GPA of 3.30 and an LSAT of 158 (78th percentile); and for Mexican-Americans, a GPA of 3.24 and an LSAT of 157 (75th percentile) (*Ibid.* at 563 n.32). The district court supplied no precise figures for the variance in GPA and LSAT scores between resident and nonresident admittees, but did indicate that because many nonresident applicants had credentials "well above those of the presumptively admitted residents . . . the presumptive admission and denial scores were set at a higher level for nonresident applicants" (*Ibid.* at 561 n.22).

29. *Ibid.* at 581.

30. *Ibid.* at 578–79.

31. *Hopwood v. Texas*, 78 F.3d 932, 934–35 (5th Cir. 1996).

32. *Ibid.* (quoting *Croson*, 488 U.S. 469, 528 [1989] [Scalia, J., concurring]).

33. See generally Susan Sturm and Lani Guinier, "The Future of Affirmative Action: Reclaiming the Innovative Ideal," *California Law Review* 84 (1996): 953, 968–97 (discussing literature on income, race, and gender bias in standardized tests).

34. *Hopwood*, 78 F.3d at 937.

35. *Ibid.* at 935, n.2.

36. *Ibid.* at 935 ("Of course, the law school did not rely upon numbers alone. The admissions office necessarily exercised judgment in interpreting the individual scores of the applicants, taking into consideration factors such as the strength of a student's undergraduate education. . ."). The Fifth Circuit notes that the plaintiff, Cheryl Hopwood, "was dropped into the discretionary zone for resident whites . . . , however, because [the admissions officer] decided her educational background overstated the strength of her GPA" (*Ibid.* at 938). The court omits reference to the fact that Hopwood's grades were earned at a community college and a state university. See *Hopwood v. University of Texas*, 861 F. Supp. 551, 564 (W.D. Tex. 1994).

37. *University of California v. Bakke*, 438 U.S. 265, 298 (1978).

38. *Ibid.* at 294 n.34 (emphasis added).

39. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (Powell, J., plurality opinion) (emphasis added).

40. See *Bakke*, 438 U.S. at 308 ("remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit").

41. Intermittently, the justices distinguished white people according to degrees of innocence, as when Justice Stewart observed, "Except to make whole the identified victims of racial discrimination, the guarantee of equal protection prohibits the government from taking detrimental action against innocent people on the basis of the sins of others of their own race." *Fullilove v. Klutznik*, 448 U.S. 448, 530 n.12 (1980) (Stewart, J., dissenting). More commonly, "sinning" white Americans were obliquely depicted as deceased, as when the justices discussed affirmative action as a remedy for the present effects of *past* discrimination.

42. There is now a substantial body of commentary on the discourse of white innocence in the Court's affirmative action cases. See, e.g., Thomas Ross, "Innocence and Affirmative Action," *Vanderbilt Law Review* 43 (1990): 297; Thomas Ross, "The Rhetorical Tapestry of Race: White Innocence and Black Abstraction," *William and Mary Law Review* 32 (1990): 1; Kathleen M. Sullivan, "Sins of Discrimination: Last Term's Affirmative Action Cases," *Harvard Law Review* 100 (1986): 1; see also Cheryl Harris, "Whiteness As Property," *Harvard Law Review* 106 (1993): 1707, 1781–84.

43. 488 U.S. 469 (1989).

44. 515 U.S. 200 (1995).

45. See *ibid.* at 224 ("'the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification'") (quoting Croson, 488 U.S. 469, 494 [1989] [O'Connor, J., plurality opinion]). But cf. *ibid.* at 2114 (arguing that even if all forms of race-based state action are analyzed under the same standard of review, it will still be possible for courts to differentiate between benign and invidious forms of race-based state action).

46. *Croson*, 488 U.S. 469, 493 (1989) (O'Connor, J., plurality opinion) ("'rights created by the first section of the Fourteenth Amendment are . . . guaranteed to the individual'") (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 [1948]).

47. 488 U.S. 469 (1989).

48. *Ibid.* at 493 (O'Connor, J., plurality opinion).

49. *Ibid.* at 495 (O'Connor, J., plurality opinion) (quoting *Wygant v. Board of Education*, 476 U.S. 267, 320 [1986] [Stevens, J., dissenting]).

50. 438 U.S. 265 (1978).

51. *Ibid.* at 362 (Brennan, J., concurring in the judgment in part and dissenting).

52. *Ibid.* at 295 (Powell, J., concurring).

53. *Ibid.* at 292. See Nathan Glazer, *Affirmative Discrimination: Ethnic Inequality and Public Policy* (New York, 1975), 201 ("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"). A lengthy quotation from this passage of Glazer's book appeared in one of the amicus briefs submitted in the case. See "Brief Amici Curiae of Anti-Defamation League of B'nai Brith" at 18, *University of California v. Bakke*, 438 U.S. 265 (1978) (No. 76-811). See also Charles R. Lawrence III & Mari J. Matsuda, *We Won't Go Back: Making the Case for Affirmative Action* (Boston, 1997), 48 (discussing influence of Glazer's book on Justice Powell's *Bakke* opinion).

54. *Bakke*, 438 U.S. at 295 (Powell, J., concurring). Even as Justice Powell undertook to deconstruct the concept of "whites" as a group, he nonetheless referred to the minorities composing the majority as "white," as the language quoted in the text illustrates. At the outset of his opinion, Powell characterized the groups in question as "European." To substantiate his claim that "the United States had become a Nation of minorities," Powell quoted a federal regulation (also quoted by Glazer) that stated: "Members of various religious and ethnic groups, primarily but not exclusively of Eastern, Middle, and Southern European ancestry, such as Jews, Catholics, Italians, Greeks, and Slavic groups, continue to be excluded from executive, middle-management, and other job levels because of discrimination based upon their religion and/or national origin." *Ibid.* at 292, n.32. (quoting 41 C.F.R. § 60-50.1(b) [1977]). Cf. Glazer, 75 (quoting same provision).

55. *Bakke*, 438 U.S. at 294, n.34 (Powell, J., concurring).

56. *Ibid*. at 310 (Powell, J., concurring).

57. *Ibid*. at 307–9.

58. *Ibid*. at 316–19.

59. For a sophisticated analysis of the various justices' views on this question, see Akhil Reed Amar & Neal Kumar Katyal, "*Bakke*'s Fate," *U.C.L.A. Law Review* 43 (1996): 1745.

60. *See* note 91 below (citing Supreme Court cases).

61. *Hopwood v. Texas*, 78 F. 3d 932, 946 (5th Cir. 1996).

62. *Ibid*. at 946 (quoting *Metro Broadcasting v. FCC*, 497 U.S. 547, 602 [1990] [O'Connor, J., dissenting]).

63. *Ibid*. at 945.

64. *Ibid*. at 947 (quoting *Croson*, 488 U.S. 469, 493 [1989] [O'Connor, J., plurality opinion]).

65. *Ibid*. at 947–48.

66. *Ibid*. at 945.

67. *Ibid*. at 946 (quoting Richard Posner, "The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities," *Supreme Court Review* [1974]: 12).

68. *Ibid*. at 947, n.31.

69. *Ibid*. at 948.

70. *Ibid*. at 947, n.31.

71. *Ibid*. at 948.

72. *Ibid*. at 949 (emphasis added).

73. *Ibid*. at 950.

74. *Ibid*. at 950 (quoting *Wygant v. Board. of Education*, 476 U.S. 267, 277 [1986] [Powell, J., plurality opinion]).

75. The Fifth Circuit relies heavily on the Supreme Court's splintered opinion in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1985), where a plurality opinion by Justice Powell and a concurring opinion by Justice O'Connor repeatedly expressed these concerns. See *ibid*. at 276 (Powell, J., plurality opinion) : "No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." See also *ibid*. at 287 (O'Connor, J., concurring in part and concurring in the judgment) (public employer may undertake an affirmative action program which furthers a "legitimate remedial purpose . . . by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan's racial preference"); *ibid*. at 288 (endorsing the plurality's view that "a governmental agency's interest in remedying 'societal discrimination,' that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny" and citing Justice Powell's *Bakke* opinion for support).

76. *Hopwood*, 78 F. 3d at 950 (quoting *Croson*, 488 U.S. 469, 498 [1989]).

77. *Ibid*. (quoting *Croson*, 488 U.S. at 499).

78. *Ibid*. at 950 (quoting *Wygant v. Board of Education*, 476 U.S. 267, 275 [1986] [Powell, J., plurality opinion]). For the same reasons, the court determines "that the University of Texas System is itself too expansive an entity to scrutinize for past discrimination." *Ibid*. at 951.

79. For the Supreme Court's discussion of this question, see *Croson*, 488 U.S. 469, 503–4 (1989); see also *ibid*. at 491–92, 509 (O'Connor, J., plurality opinion).

80. *See Hopwood*, 78 F.3d at 955 n.49.

81. *Ibid*. at 951.

82. *Ibid*. (emphasis added).

83. See text accompanying notes 12–23 above.

84. *Hopwood*, 78 F.3d at 953.

85. *Ibid*. at 952–56.

86. Objecting to the affirmative action plan challenged in the *Croson* case, the Supreme Court observed that "[i]t rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population," and quoted one of Justice O'Connor's opinions to the effect that " 'it is completely unrealistic to assume that individuals of one race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination.'" *Croson*, 488 U.S. at 507–8 (quoting *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 494 [1986] [O'Connor, J., concurring in part and dissenting in part]).

87. See Morris B. Abram, "Affirmative Action: Fair Shakers and Social Engineers," *Harvard Law Review* 99 (1986): 1312, 1313.

88. For a discussion of the early race cases, see Vicki Schultz, "Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument," *Harvard Law Review* 103 (1990): 1750, 1771–75. For an early and influential critique of the evidentiary presumptions of antidiscrimination law, see Glazer, 33–76 (arguing that judicial enforcement of the Civil Rights Act of 1964 had transformed its goal from "equal opportunity" to "statistical parity"). For a leading case in which the Supreme Court signaled that it was adopting a more cautious

approach to the question of proving discrimination, see *Hazelwood School District v. United States*, 433 U.S. 299, 307–8 and n.13 (1977) ("Where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination" but "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population [rather than to the smaller group of individuals who possess the necessary qualifications] may have little probative value").

89. In *Croson*, the Supreme Court invalidated Richmond's minority business set-aside program for city contracting, despite the fact that African Americans comprised half the city's population but minority businesses received only 0.67 percent of the city's prime construction contracts. See *Croson*, 488 U.S. at 479–80. According to the Court, the city's program was constitutionally defective, among other reasons, because the city had failed to gather evidence that would demonstrate that low minority participation in city-generated construction work was attributable to discrimination in the award of prime or subcontracts. When the city pointed to the fact that minority membership in the local contractors' associations was very low, the Court refused to infer that the absence of minority participation was attributable to discrimination: "There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction." *Ibid.* at 503. The Court held that before Richmond could adopt a remedial affirmative action plan, it would have to establish at least a prima facie case that there was discrimination in the bidding process, by demonstrating a discrepancy between the percentage of minority firms that received prime or subcontracts and the percentage of minority firms in the relevant market that were qualified to undertake prime or subcontracting work in public construction projects. *Ibid.* at 501–2.

In so ruling, the Court applied law governing proof of a prima facie case of employment discrimination to the voluntary affirmative action context. As the Court itself acknowledged, this inquiry is designed to identify whether discrimination occurred in a transaction in which a particular agent was involved (relevant where the imposition of liability is concerned); it will not identify structural barriers to participation in the transaction in question—factors the Court referred to as "past societal discrimination in education and economic opportunities."

90. *Hopwood*, 78 F.3d at 945.

91. Feminist and antiracist arguments about "essentialism" are now being appropriated and transformed by opponents of race-conscious remedies, much as the colorblindness argument was. Initially, scholars analyzing gender and race stratification described how an observer's social status or position could influence her perception of social relationships, arguing that this kind of positional bias often results in "essentialist" claims—generalizations about group experience that reflect the experience of certain, socially privileged group members rather than the experience of all group members. By the late 1980s, the critique of essentialism was appropriated by critics who were not interested in problems of positional bias, but instead objected to the possibility of making *any* general claims about the distinctive situation, experience, or "voice" of groups that have suffered discrimination. Cf. Angela P. Harris, "Foreword: The Jurisprudence of Reconstruction," *California Law Review* 82 (1994): 741, 754–55 (describing the "essentialism" debate).

With this new focus, the critique made its way into Supreme Court jurisprudence, supplying a new basis for objecting to "benign," race-conscious civil rights measures (e.g. race-based preferences in the award of radio broadcast licenses; race-conscious design of voting districts). Not only did such race-based programs discriminate against white people; now they were also said to discriminate against people of color by making "stereotypical" assumptions about the perspectives or opinions of people of color. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 911–12 (1995) ("When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'") (quoting *Shaw v. Reno*, 509 U.S. 630, 646 [1993]); *Metro Broadcasting v. FCC*, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting) ("Such [race-based] policies may embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.").

92. See, e.g., Michael Omi and Howard Winant, *Racial Formation in the United States From the 1960s to the 1990s* (2d ed. New York, 1994), 16–23 (discussing group of scholars who analyze race as ethnicity in order to explain the relative ability of African-Americans and immigrant ethnic groups to assimilate into American society); Dinesh D'Souza, *The End of Racism: Principles for a Multiracial Society* (New York, 1995) (arguing that the subordinate status of African Americans is better explained by cultural "pathologies" of the group than by theories that trace group status to genetic endowment or racial discrimination). For some examples of this mode of reasoning, see notes 108–19 below and accompanying text.

93. *Hopwood*, 78 F. 3d at 948 (quoting Croson, 488 U.S. 469, 495 [1989] [O'Connor, J., plurality opinion] [quoting *Wygant v. Jackson Board. of Education*, 476 U.S. 267, 320 (1986) (Stevens, J., dissenting)]).

94. See Siegel, "Why Equal Protection No Longer Protects," 1119–20.

95. As a Republican congressman observed in the early days of Reconstruction: "The greatest source of strife in this matter seems to be a fear of social equality and a personal mixing up and commingling of the races; but... it is folly to assume... that because a citizen is your equal before the law and at the ballot-box he is therefore your equal and must needs be your associate in the social circle." *Congressional Globe*, 40th Cong., 3d Sess., app. 241 (1869) (remarks of Rep. William J. Blackburn), quoted in Alfred Avins, "Social Equality and the Fourteenth Amendment: The Original Understanding," *Houston Law Review* 4 (1967): 640, 644, n.27.

96. *Congressional Globe*, 40th Cong., 2d Sess., 1409 (1868) (remarks of Sen. James W. Patterson, a Republican who voted for the Fourteenth Amendment), quoted in Avins, at 643.

97. See, e.g., *Charge to Grand Jury—The Civil Rights Act*, 30 F. Cas. 999, 1001 (C.C.W.D.N.C. 1875) (No. 18,258) ("Any law which would impose upon the white race the imperative obligation of mingling with the colored race on terms of social equality would be repulsive to natural feeling and long established prejudices, and would be justly odious.... The civil rights bill neither imposes nor was intended to impose any such social obligation. It only proposes to provide for the enforcement of legal rights guaranteed to all citizens by the law of the land, and leaves social rights and privileges to be regulated, as they ever have been, by the customs and usages of society"). For other examples of "social equality" discourse, see Siegel, "Why Equal Protection No Longer Protects," 1121–27.

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

99. *Ibid.* at 544.

100. *Ibid.* at 551–52.

101. See *ibid.* at 554, 562 (Harlan, J., dissenting).

102. *Ibid.* at 559 (Harlan J., dissenting) (emphasis added).

103. *Ibid.* at 561.

104. See Neil Gotanda, "A Critique of 'Our Constitution is Color-Blind'," *Stanford Law Review* 44, (1991): 1, 5–6.

105. See Siegel, "Why Equal Protection No Longer Protects," 1124, 1126.

106. *Ibid.* at 1128 and n.75.

107. See, e.g., Charles Murray, *What It Means to Be a Libertarian: A Personal Interpretation* (New York, 1997), 81–89 (attacking the Civil Rights Act of 1964 on the grounds that "[i]n a free society freedom of association cannot be abridged"); see also D'Souza, *The End of Racism*, 544–45 (arguing for repeal of the Civil Rights Act of 1964 on the grounds that it is a "universal," "defensible and in some cases even admirable trait" to "prefer [hiring] members of one's own group over strangers"); Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Cambridge, 1992) (arguing that in a free society people have a right to enter into voluntary transactions that other parties should be at liberty to accept or refuse).

108. Murray, *What It Means to Be a Libertarian*, 81–89.

109. *Ibid.* at 81.

110. *Ibid.* at 85.

111. *Ibid.* at 85–86 ("[A] system that... judg[ed] each case perfectly on its merits[] would produce drastically different proportions of men and women hired by police forces, blacks and whites put in jail, or Jews and gentiles admitted to elite law schools").

112. See, e.g., Glazer, *Affirmative Discrimination*, 62–63 (arguing that antidiscrimination law erroneously assumes that, absent discrimination, there would be random distribution of women and minorities in all jobs, when the distribution of jobs among minority groups is best explained by differences in educational qualifications, regional variables, and difficult to quantify factors "such as taste or, if you will, culture").

113. Dinesh D'Souza, "Improving Culture to End Racism," *Harvard Journal of Law and Public Policy* 19 (1996): 785, 789.

114. *Ibid.* at 788.

115. Abram, 1325.

116. *Ibid.* at 1315–16 (footnotes omitted).

117. *Ibid.* at 1317.

118. D'Souza, *The End of Racism*, 544. Charles Murray concludes his attack on the Civil Rights Act of 1964 along similar lines. He contends that government must act in colorblind fashion, but that citizens have a right to freedom of association; consequently, "[t]he good kinds of discrimination must be applauded. The bad kinds of discrimination must once again be made wrong, not illegal." Murray, *What It Means to Be a Libertarian*, 89.

119. D'Souza, *The End of Racism*, 545 (attributing the phrase to Jennifer Roback).

120. *Croson*, 488 U.S. 469, 507 (1989).

121. See text accompanying notes 37–40 above.

122. *Peightal v. Metropolitan Dade County*, 815 F. Supp., 1454, 1461 (S.D. Fla. 1993) (footnote omitted) (emphasis added).

123. See text accompanying note 38 above.

124. See text accompanying note 48 above.

125. *Adarand Constructors v. Pena*, 515 U.S. 200, 224 (1995) (*Croson*, 488 U.S. 469, 494 [1989] [plurality opinion]).

126. See text accompanying note 131 below.

127. There are some historical ironies here. Those, such as Robert Bork, who in the 1950s and 1960s professed fidelity to principles of associative liberty as a reason for opposing civil rights laws that sought to alleviate racial stratification by enlarging the sphere of racial nonrecognition now profess their fidelity to principles of racial nonrecognition as a reason for opposing civil rights laws that seek to alleviate racial stratification by race-conscious means.

128. See generally, Siegel, "Why Equal Protection No Longer Protects"; Reva B. Siegel, "The Rule of Love: Wife Beating as Prerogative and Privacy," *Yale Law Journal* 105 (1996): 2117, 2175–87.

129. Gotanda, "A Critique of 'Our Constitution is Color-Blind'," 6–7.

130. See *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989) (revising burdens of proof for disparate impact claims in employment discrimination cases to ensure that the Civil Rights Act of 1964 would not create incentives for employers to adopt "racial quotas" or otherwise attempt to hire a racially balanced workforce in order to avoid civil rights law suits).

131. *Adarand Constructors v. Pena*, 515 U.S. 200, 229 (1995).

132. In *Croson*, the Court argued that it was necessary to restrict policies of racial rectification in order to inhibit various social groups from pressing similar demands, the effect of which cumulatively would be to destroy "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement." *Croson*, 488 U.S. at 505–6.

133. *Adarand*, 515 U.S. at 229.

134. See, e.g., *Croson*, 488 U.S. 469, 507–8 (1989).

135. See, e.g., *ibid.* at 507–9.

136. During the 1970s, some federal courts were interpreting the Fourteenth Amendment in this fashion, but the Court decisively rejected this approach in *Washington v. Davis*, 426 U.S. 229 (1976). See Siegel, "Why Equal Protection No Longer Protects," 1133–34, 1144–45.

137. See *ibid.* at 1133–44.

138. See Jayne N. Suhler, "Texas Professional Schools See Few Minorities Decline in Fall Numbers Linked to Court Decision," *Dallas Morning News*, 5 June 1997, 1A.

139. See Karen Brandon, "In California, Minority Enrollments Falling at Leading Law Schools," *Chicago Tribune*, 6 July 1997; Suhler, 1A.