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THE GHOSTS OF HOMER PLESSY

Rodney A. Smolla[†]

INTRODUCTION

It is 1996 and *Plessy v. Ferguson*¹ is one-hundred years old and forty-two years dead. *Plessy* is forty-two years dead because in 1954 in *Brown v. Board of Education*² the Supreme Court overruled it. But I believe in ghosts, and Homer Adolph Plessy left many behind.

On June 7, 1892, Plessy attempted to board a train traveling between New Orleans and Covington, Louisiana, a small town thirty miles north of New Orleans near the Louisiana-Mississippi state line. He took a vacant seat in a coach designated as for whites only. Plessy was one-eighth African blood and seven-eighths Caucasian and, according to the allegations in the lawsuit he filed, a "mixture of colored blood was not discernible in him."³ He was ordered by a train conductor to vacate the coach and to take a seat in the coach "assigned to persons of the colored race,"⁴ but he refused. He was forcibly ejected with the aid of a police officer and thrown in the parish jail.⁵ Plessy had violated an 1890 Louisiana law providing for separate railway carriages for whites and blacks.⁶

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1. 163 U.S. 537 (1896).

2. 347 U.S. 483 (1954).

3. *Plessy*, 163 U.S. at 541.

4. *Id.* at 542.

5. *Id.*

6. *See id.* at 540-41 (citing 1890 La. Acts 111, p. 152). The Supreme Court summarized the pertinent provisions of the legislation:

The first section of the statute enacts "that all railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: *Provided*, That this section shall not be construed to apply to street railroads. No person or persons, shall be admitted to occupy seats in coaches, other than, the ones, assigned, to them on account of the race they belong to."

The passage of the 1890 Louisiana legislation was in some respects historically surprising, for it was passed against the backdrop of the peculiarly cosmopolitan and multi-ethnic New Orleans society. As Richard Kluger explains, New Orleans was a racial bouillabaisse of French, African, Anglo-Saxon, and Indian stock unlike any other community in the nation, where "many no longer bothered to fret about how racially pure or polluted their blood was."⁷ During Reconstruction in 1869, Louisiana had actually passed a law *prohibiting* segregation by public carriers—precisely the reverse of the 1890 law Homer Plessy was charged with breaking.⁸

A challenge to the 1869 law reached the Supreme Court in *Hall v. DeCuir*.⁹ Josephine DeCuir, a woman of color, boarded the steamboat "Governor Allen" for a trip from New Orleans to Hermitage, a landing within Louisiana. The boat master refused to let her ride in a whites-only cabin, and she sued him under the Louisiana anti-segregation law. The Supreme Court held the law unconstitutional. While the Louisiana statute at issue purported to outlaw discrimination by common carriers only with regard to traffic within Louisiana, the Supreme Court struck the

By the second section it was enacted "that the officers of such passenger trains shall have power and are hereby required to assign each passenger to the coach or compartment used for the race to which such passenger belongs; any passenger insisting on going into a coach or compartment to which by race he does not belong, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison, and any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison; and should any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this State."

The third section provides penalties for the refusal or neglect of the officers, directors, conductors and employés of railway companies to comply with the act, with a proviso that "nothing in this act shall be construed as applying to nurses attending children of the other race."

Id.

7. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 72 (1975).

8. *Id.* at 72-73.

9. 95 U.S. 485 (1877).

law down as a violation of the Commerce Clause. Noting that the Mississippi River and its tributaries traverse many states, the Court concluded that the effect of the statute would be to force white passengers in a whites-only cabin who were on a vessel coming from a state that permitted or required segregation to "share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced."¹⁰ This the Court found quite reprehensible, for it interfered with the dormant prerogative of Congress to legislate on such issues under the Commerce Clause.

The Supreme Court would subsequently find, however, in *Louisville, New Orleans and Texas Railway Company v. Mississippi*,¹¹ that the mirror opposite of the law in *Hall*—a law, like that in *Plessy*, that *required* segregation on traffic moving intrastate—did not violate the Commerce Clause. So at least as far as the Commerce Clause was concerned, it was not a burden on interstate commerce to require a black person sitting next to a white person to get up and move as the carrier moved into a segregated state, but it was an unreasonable burden to require a white person to allow a black person into the cabin as the carrier moved into a non-segregation state. Go figure.

So Homer Plessy was caught in the "one-drop" rule, the principle that one drop of African-American blood renders a person black. The rule embraces a metaphor of purity and contamination: White is unblemished and pure, so one drop of ancestral black blood renders one black.¹² Plessy challenged the 1890 Louisiana law as violating the Thirteenth and Fourteenth Amendments. In a decision by Justice Henry Billings Brown,¹³ the Supreme Court rejected Plessy's constitutional challenges,

10. *Id.* at 489.

11. 133 U.S. 587 (1890).

12. Neal Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 6 (1991). Langston Hughes remarked on the power of that "one drop of Negro blood":

"One drop—you are a Negro! Now, why is that? Why is Negro blood so much more powerful than any other kind of blood in the world? If a man has Irish blood in him, people will say, 'He's *part* Irish.' If he has a little Jewish blood, they'll say, 'He's *half* Jewish.' But if he has just a small bit of colored blood in him, BAM!—'He's a Negro!' Not, 'He's *part* Negro.' . . . That drop is really powerful."

LANGSTON HUGHES, *SIMPLE TAKES A WIFE* 201 (1953).

13. For a portrait of Justice Brown, see Robert Glennon, Jr., *Justice Henry Billings Brown: Values in Tension*, 44 COLO. L. REV. 553 (1973).

approving the doctrine of "separate-but-equal," and with it the caricature of equality known as Jim Crow.¹⁴ It is one-hundred years since *Plessy* and forty-two years since *Brown*. Just think how far we have come. Think hard.

I. THE *PLESSY* OPINION

The majority's opinion was utterly insouciant in its treatment of Plessy's Thirteenth Amendment claim, dismissing it in three cryptic paragraphs. The Court claimed that the lack of conflict with the Thirteenth Amendment was "too clear for argument"¹⁵—a fortunate thing for the Court, for it failed to provide one. Relying on the *Slaughter-House Cases*,¹⁶ the Court held that the Thirteenth Amendment was "intended primarily to abolish slavery, as it had been previously known in this country, and that it equally forbade Mexican peonage or the Chinese coolie trade, when they amounted to slavery or involuntary servitude."¹⁷ Taking its first pass at a theme that would permeate its opinion, the Court began to sketch a distinction between genuine legal harm—the stuff of slavery, for example—and the mere acts of social discrimination of the sort that Homer Plessy impudently dared to complain. It is the first of the *Plessy* Court's many invocations of the "whiny blacks" theme. The Court repeated the admonition of Justice Bradley in the *Civil Rights Cases*¹⁸ that "[i]t would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his

14. In the words of Juan Williams:

There were Jim Crow schools, Jim Crow restaurants, Jim Crow water fountains, and Jim Crow customs—blacks were expected to tip their hats when they walked past whites, but whites did not have to remove their hats even when they entered a black family's home. Whites were to be called "sir" and "ma'am" by blacks, who in turn were called by their first names by whites. People with white skin were to be given a wide berth on the sidewalk; blacks were expected to step aside meekly.

JUAN WILLIAMS, *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965*, at 10 (1987).

15. *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896).

16. 83 U.S. (16 Wall.) 36 (1872).

17. *Plessy*, 163 U.S. at 542.

18. 109 U.S. 3 (1883).

coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business.”¹⁹

What blacks like Homer Plessy just do not understand, the Court was saying, is that white is white and black is black, and laws that say the twain shall not meet do not subject either race to servitude or destroy their legal equality: “A statute which implies merely a legal distinction between the white and colored races—a distinction *which is founded in the color of the two races*, and which *must always exist* so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude.”²⁰

Yet in its paternalistic beneficence, the Court acknowledged that the Thirteenth Amendment “was regarded by the statesmen of that day”²¹ as not going far enough. It would not suffice to merely abolish slavery and be done with the issue. Instead, the Fourteenth Amendment was passed “to protect the colored race from certain laws which had been enacted in the Southern States, imposing upon the colored race onerous disabilities and burdens, and curtailing their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value.”²² Indeed, the Court pointed again to the *Slaughter-House Cases*, this time in a vein that might have held out more promise for Homer Plessy, observing that “the main purpose” of the Fourteenth Amendment was to protect African-Americans from “hostile legislation.”²³ But hard on this promising opening came the slamming of the front door on Plessy’s face. It is perhaps the most famous passage from the majority opinion:

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. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not

19. *Plessy*, 163 U.S. at 543 (quoting *Civil Rights Cases*, 109 U.S. at 24).

20. *Id.* (emphasis added).

21. *Id.* at 542.

22. *Id.*

23. *Id.*

necessarily imply the inferiority of either race to the other²⁴

Warming to his theme, Justice Brown announced a distinction between interference with political equality, which the Fourteenth Amendment prohibited, and interference with social equality, which it did not. Some sort of distinction along these lines was necessary to achieve his result, for without it there would have been no way to distinguish the Court's prior decision in *Strauder v. West Virginia*²⁵ and some of its embarrassing language. *Strauder* struck down a state statute excluding African-Americans from juries, holding that the Fourteenth Amendment secured to them "all the civil rights that the superior race [may] enjoy."²⁶ *Strauder* also seemed to endorse the notion that laws that stigmatize African-Americans violate the Fourteenth Amendment, decrying legislation "implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy," and "which are steps towards reducing them to the condition of a subject race."²⁷ To get past *Strauder*, Justice Brown had to explain first why the law at issue in *Plessy* did not constitute any infringement of the "civil rights" that the "superior race may enjoy," and second, why the law was not an action "implying inferiority in civil society" or impairing the "enjoyment of the rights which others enjoy."

Justice Brown's opinion initially attacked these problems in a series of oblique passes. Significant ink was spilled discussing the *Civil Rights Cases*,²⁸ testing the constitutionality of the Civil Rights Act of 1875.²⁹ The Civil Rights Act of 1875 prohibited race discrimination in access to inns, public conveyances, and places of amusement.³⁰

The Supreme Court declared the Civil Rights Act unconstitutional. The Act was not supported by the Thirteenth Amendment,³¹ the Court reasoned, because that Amendment

24. *Id.* at 544.

25. 100 U.S. 303 (1879).

26. *Id.* at 306.

27. *Id.* at 308.

28. 109 U.S. 3 (1883).

29. *See id.* (citing 18 Stat. 335 (1875)).

30. The *Civil Rights Cases* were a consolidation of five cases, all of which involved prosecutions against private citizens who had denied African-Americans accommodations in theaters or hotels.

31. The Thirteenth Amendment reads:

was intended to abolish slavery and "all badges and incidents of slavery."³²

The Civil Rights Act, however, did not concern itself with the badges and incidents of slavery because equality in access to things such as inns and theaters could not be equated with slavery or its badges. "Mere discriminations on account of race or color," the Court argued, "were not regarded as badges of slavery."³³

The central holding of the *Civil Rights Cases* remains a cornerstone of American constitutional law: the so-called "state action doctrine." In defending the Civil Rights Act of 1875, the government claimed that Congress had authority to pass the legislation pursuant to the Equal Protection Clause of the Fourteenth Amendment.³⁴ The Fourteenth Amendment, the Court reasoned, could not be invoked to support legislation barring discrimination by private actors, as opposed to governmental entities. The Fourteenth Amendment, the Court asserted, was aimed only at guaranteeing the "equal protection of the laws" in matters concerning the laws and actions of the state itself, not private individuals or businesses:

It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have the power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII.

32. *Civil Rights Cases*, 109 U.S. at 20.

33. *Id.* at 25. This aspect of the *Civil Rights Cases* has now been rendered obsolete; the Supreme Court in modern times is far more expansive in its understanding of the "badges and incidents" of slavery, particularly when Congress invokes its power under § 2 of the Thirteenth Amendment to enforce the Amendment through "appropriate legislation." See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

34. The Fourteenth Amendment reads: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

process of law, or which denies to any of them the equal protection of the laws. It not only does this, but . . . the last section of the amendment invests Congress with power to enforce it by appropriate legislation. . . . To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it.³⁵

In making these arguments, the Court in the *Civil Rights Cases* presaged *Plessy* and its distinction between civic equality and social equality. The purpose of the Thirteenth Amendment, the Court argued in the *Civil Rights Cases*, was to guarantee "those fundamental rights which appertain to the essence of citizenship,"³⁶ not to ensure equality in "social rights."³⁷

The *Plessy* Court's emphasis on the *Civil Rights Cases*, however, was primarily an exercise in atmospherics, for as a legal matter the *Civil Rights Cases* could not support the ruling in *Plessy*, in which a state law mandated segregation, creating discrimination that was plainly the product of state action. Ultimately, to turn that trick, the *Plessy* Court had to meet head-on the language in *Strauder* holding that laws stamping one race as inferior violated the Fourteenth Amendment. The solution was to insist that the segregation law quite simply did not imply the inferiority of African-Americans. If African-Americans thought it did, it was their problem, a problem of their own sorry construction and making:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race

35. *Civil Rights Cases*, 109 U.S. at 11. The Court in the *Civil Rights Cases* thus dealt a twin blow to the protection of the civil rights of African-Americans. It first took a narrow view of the scope of the Thirteenth Amendment, disabling that Amendment as an effective tool for combating discrimination. It second restricted the reach of the Fourteenth Amendment's Equal Protection Clause—a clause that was phrased in terms far broader than the Thirteenth Amendment's abolition of involuntary servitude—by limiting the Fourteenth Amendment to wrongs committed directly by the government. "The wrongful act of an individual, unsupported by . . . [state] authority, is simply a private wrong, or a crime of that individual," the Court explained, and not a violation of the Fourteenth Amendment. *Id.* at 17.

36. *Id.* at 22.

37. *Id.*

chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . . Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. 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.³⁸

There are two components to this passage. The first, and most brazenly false, is that the law did not stamp blacks with a badge of inferiority. Of course it did, and as Justice Harlan so eloquently argued in defense, no candid person then or now could maintain otherwise.³⁹ That the law implied inferiority was all but admitted in a strange digression in the Court's opinion itself, in which the Court speculated about whether the law injured the reputation of persons improperly classified as members of the wrong race. A white called a black, the Court reasoned, might well have a cause of action for the damage to his "property" in the good reputation of the dominant race.⁴⁰

38. *Plessy v. Ferguson*, 163 U.S. 537, 551-52 (1896).

39. See *infra* notes 41-56 and accompanying text.

40. *Plessy*, 163 U.S. at 549 ("It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is *property*, in the same sense that a right of action, or of inheritance, is property. Conceding this to be so, for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so called property. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of

The second claim of this infamous passage is that legislation is powerless to influence racial attitudes, and that if the races are not willing to meet on an equal plane, the law cannot place them there. This claim by the majority is the most terrifying of all Homer Plessy's ghosts. For one-hundred years later, we continue to confront the Court's disturbing claim. The ghost is awful to contemplate: Was the Court right?

A century after *Plessy* and four decades after *Brown*, racial tension and polarization in America remain high. Is Justice Brown having the last laugh? To face this ghost properly we must first look to the *Plessy* majority's nemesis, Justice John Marshall Harlan, and his celebrated dissent.

II. HARLAN'S DISSENT

Justice Harlan began his analysis by discussing the legal status of railroads. Justice Harlan believed deeply in the sanctity of property,⁴¹ but for him railroads were not like any other private enterprise. They were instead "public highways," clothed with the power of eminent domain, intended for public use and benefit, operated "in trust for the public."⁴² Although we cannot know precisely what Justice Harlan had in mind with this opening line of argument, he might have seen it as serving several purposes. It was, on a most basic level, an oblique attack on the holding of the *Civil Rights Cases* and its narrow view of the state action doctrine. If railroads were public trustees, then when they discriminated they arguably discriminated under color of law, and therefore would violate the Fourteenth Amendment even in the absence of any explicit legislation requiring that discrimination. Imbuing the railroads with the status of public trustees also set the stage for the parade of implications Harlan would later make, in which he presciently asked where the "separate but equal" principle might stop—if people could be separated on railroads, then why not streets, sidewalks, open streetcars, courtrooms, and legislative halls?⁴³ More than that,

being a white man.").

41. See Kluger, *supra* note 7, at 81.

42. *Plessy*, 163 U.S. at 554 (Harlan, J., dissenting).

43. *Id.* at 557-58 ("It is one thing for railroad carriers to furnish, or to be required by law to furnish, equal accommodations for all whom they are under a legal duty to carry. It is quite another thing for government to forbid citizens of the white and black races from travelling in the same public conveyance, and to punish officers of

Harlan observed, if these discriminations were permissible as to race, then they would be equally permissible for other characteristics; Harlan thus asked, "if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the State require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?"⁴⁴

Perhaps most importantly, Harlan's description of the railroads as fiduciaries for the public interest set the groundwork, early on, for his assault on Justice Brown's distinction between social and civil rights. If segregation by the railroads was segregation in the context of a public highway operated for public use, it arguably took on more of the characteristics of a "civil right," even in the relatively narrow sense that Justice Brown was using the term.

And indeed, the very first sentence to follow his discussion of the public status of railroads stated: "In respect of *civil rights, common to all citizens*, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights."⁴⁵ With this sentence, Justice Harlan introduced the first grand theme of his dissent, the idea that government should be color-blind, that it is not permitted, in the words just quoted, even "to *know* the race of those entitled to be protected."⁴⁶ Yet in the next breath, there is a qualification—a complexity. Harlan does not himself seem to be color-blind, nor expect others to be. He thus writes the peculiar statement that "[e]very *true man has pride of race*, and under appropriate circumstances when the rights of others, his equals before the law, are not to be affected,

railroad companies for permitting persons of the two races to occupy the same passenger coach. If a State can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in street cars or in open vehicles on a public road or street? Why may it not require sheriffs to assign whites to one side of a court-room and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the consideration of the political questions of the day?"

44. *Id.* at 558.

45. *Id.* at 554 (emphasis added).

46. *Id.* (emphasis added).

it is his privilege to express such pride and to take such action based upon it as to him seems proper."⁴⁷

The juxtaposition here is both intriguing and revealing. Harlan seems to be accepting, in some faint degree, the "civil right" versus "social right" dichotomy of Justice Brown's majority opinion. By making the extraordinary claim that "every *true man*" has "pride of race" and under appropriate circumstances will "express such pride," he seems to be embracing the notion that people inevitably do think and act in race-conscious ways, and that, when contained within the private sphere in which the rights of others are not affected, race-conscious expression and action is not a bad thing.

Harlan then writes with reverence about the Thirteenth, Fourteenth, and Fifteenth Amendments, proclaiming: "These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems."⁴⁸

Having thus set matters up, Justice Harlan challenged the majority's contention that the Louisiana law treated blacks and whites equally. It is important to bear in mind that the majority in *Plessy* actually approached a tentative embrace of Justice Harlan's premise; the Court did not say that laws passed with the intent of stamping a particular race with a badge of inferiority are constitutionally permissible—to the contrary, the Court's argument seemed to proceed on the assumption that such laws would indeed run afoul of the Fourteenth Amendment. The Court's argument was not that the legislature could constitutionally brand blacks as inferior, but rather that the legislature in the case before it had not engaged in any such branding.⁴⁹

But this was simply disingenuous, Harlan argued; the law was passed to stigmatize African-Americans, Harlan argued. Proof of this required no investigation into legislative history, no painstaking parsing of the statutory language, no demonstrations of social science. "*Every one knows*" the purposes of the segregation laws, Harlan lectured, and that was to discriminate

47. *Id.* (emphasis added).

48. *Id.* at 555.

49. See Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1030 (1979).

against blacks, and only persons "wanting in candor" would assert the contrary:

Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of accommodation for travellers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while travelling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary.⁵⁰

This was Harlan's haunting appeal to candor and conscience, made all the more powerful by his lack of citation to evidence or authority. For of course, it was true. Everyone *did* know the racist motivation underlying the law, and those who denied it—including Harlan's seven colleagues in the Court's majority—were simply lacking in candor and anesthetized in conscience. And in a vain but valiant effort to awaken that conscience, Harlan wrote the most famous paragraph in his nearly 34 years and 14,226 cases⁵¹ on the Supreme Court—indeed, one of the most famous passages in the entire history of American law:

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. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final

50. *Plessy*, 163 U.S. at 557 (Harlan, J., dissenting).

51. See Kluger, *supra* note 7, at 81.

expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.⁵²

These magnificent words are poetic, courageous, inspiring. They provided the lone dissenting ghost that would haunt the Court until *Plessy* was repudiated. They stir our most fundamental instincts about the promise of American life. They are all of that. But they are not color-blind.

Justice Harlan did not argue that we as a people do not know color. He argued only that the law does not know it. Conjuring a ghost of his own, that of the slave Dred Scott, Harlan asserted that the destinies of blacks and whites in America are indissolubly linked together, and that laws sanctioning separation could only sow seeds of race-hate:

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case. It was adjudged in that case that the descendants of Africans who were imported into this country and sold as slaves were not included nor intended to be included under the word "citizens" in the Constitution, and could not claim any of the rights and privileges which that instrument provided for and secured to citizens of the United States; that at the time of the adoption of the Constitution they were "considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them." The recent amendments of the Constitution, it was supposed, had eradicated these principles from our institutions. But it seems that we have yet, in some of the States, a dominant race—a superior class of citizens, which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race. The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes

52. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

which the people of the United States had in view when they adopted the recent amendments of the Constitution, by one of which the blacks of this country were made citizens of the United States and of the States in which they respectively reside, and whose privileges and immunities, as citizens, the States are forbidden to abridge. Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.⁵³

Again, note Harlan's appeal to self-evident candor. These laws, he states bluntly, *in fact* proceed on the assumption that African-Americans are inferior and degraded, something that *all will admit*. Something, in fact, that his seven Brethren and most of the nation denied.

At many times the tone of Harlan's opinion is both prophetic and apocalyptic. In discussing the many devices of separating the races in jury rooms and public meeting places that the ruling in *Plessy* would countenance, Harlan presciently anticipates the many indignities of Jim Crow. The bleak side of the human imagination has an almost inexhaustible capacity for ingenious variations on the theme of degradation. The abolition of slavery would have been accomplished, Harlan admonished, but its evil racist roots would remain alive:

If laws of like character should be enacted in the several States of the Union, the effect would be in the highest degree mischievous. Slavery, as an institution tolerated by law would, it is true, have disappeared from our country, but there would remain a power in the States, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom; to regulate civil rights, common to all citizens, upon the basis of race; and to place in a condition of

53. *Id.* at 559-60 (citation omitted).

legal inferiority a large body of American citizens, now constituting a part of the political community called the People of the United States⁵⁴

Like Ghandi and Martin Luther King, Jr., after him, Harlan held the blight of injustice in his own country up to the conscience of international opinion:

We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.⁵⁵

Yes, Justice Harlan was a prophet, a courageous and inspiring one. But what, precisely, was his prophecy? Above all else, the opinion is most cited and most remembered for one sentence: "*Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.*"⁵⁶

III. THE EVOLVING NEAR-COLOR-BLINDNESS OF THE MODERN COURT

A. *The Recent Voting Rights Cases*

Today, of course, our Constitution and laws are not color-blind. Civil rights laws from the Voting Rights Act to affirmative action programs of all kinds are race-conscious. The Supreme Court today permits the government to both "know" and "tolerate" racial classifications. Is this the most persistent ghost of *Homer Plessy*—the ghost of race-consciousness? Are we still paying the price for not heeding the call of the prophet Harlan?

One line of argument is that we remain a nation divided on racial grounds because we remain a nation officially conscious of race. The true antidote for the majority's views in *Plessy*, the argument goes, is the antidote supplied by the lone dissenter in the case. Until the nation finally embraces Harlan's ideal, abolishing race-conscious policies from affirmative action to the Voting Rights Act, we will never know peace, and the ghosts of *Homer Plessy* will continue to harass us.

54. *Id.* at 563-64.

55. *Id.* at 562.

56. *Id.* at 559 (emphasis added).

This argument appears to be gaining ground in the Supreme Court, where a growing number of Justices appear to be increasingly hostile to any use of race in governmental classifications. The voting rights decisions of recent terms provide the most vivid examples of this trend.

1. *Shaw v. Reno*

In *Shaw v. Reno*,⁵⁷ for example, the Court expressed deep-seated suspicion of race-conscious redistricting. The dispute in *Shaw* arose when the State of North Carolina became entitled to an additional twelfth seat in the United States House of Representatives as a result of the 1990 census. The North Carolina General Assembly enacted a reapportionment plan that included one congressional district containing a majority of African-American residents. Preclearance review is required for the "covered jurisdictions" under the provisions of section 5 of the Voting Rights Act.⁵⁸ The Attorney General refused to accept the General Assembly's plan, taking the position that the legislature could have created a second district with a majority of minority voters.⁵⁹ In response, the General Assembly passed new legislation creating a second congressional district with a majority African-American population.⁶⁰ It was not, however, located in the southeastern part of North Carolina, as recommended by the Attorney General, but rather in the north-central region of North Carolina, along a corridor formed by Interstate Highway 85.⁶¹ This plan was challenged by a group of North Carolinians who alleged that the revised

57. 113 S. Ct. 2816 (1993).

58. 42 U.S.C. § 1973c (1993). Under § 5, the jurisdiction must obtain either a judgment from the United States District Court for the District of Columbia declaring that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or administrative preclearance from the Attorney General. *Id.* In North Carolina's case, some 40 of the state's 100 counties are covered by § 5, and thus are prohibited by law from implementing changes in a "standard, practice, or procedure with respect to voting" without federal authorization.

59. *See Shaw*, 113 S. Ct. at 2820. The Attorney General took the position that the General Assembly should have created a second district that would have given greater effect to black and Native American voting strength in the southeastern area of the state. The Attorney General asserted that the state failed to create such a second district for pretextual reasons. *Id.*

60. *Id.* (citing 1991 N.C. Extra Sess. Laws, ch. 7).

61. *See id.*

reapportionment scheme was an unconstitutional gerrymander because it included voting district boundary lines of dramatically irregular shape.⁶²

As the Supreme Court described the new plan in *Shaw*, "District 1," the first of the two majority-black districts contained in the revised plan, "is somewhat hook shaped."⁶³ The Court explained: "Centered in the northeast portion of the State, [District 1] moves southward until it tapers to a narrow band; then, with finger-like extensions, it reaches far into the southern-most part of the State near the South Carolina border."⁶⁴ District 1, the Court noted, "has been compared to a 'Rorschach ink-blot test' "⁶⁵ and a "bug splattered on a windshield." "⁶⁶

It was "District 12," however, the second majority-black district created in North Carolina's revised plan, that drew the more notorious descriptions. As the Court in *Shaw* described it, District 12 is "even more unusually shaped."⁶⁷ District 12 "is approximately 160 miles long and, for much of its length, no wider than the I-85 corridor. It winds in snake-like fashion through tobacco country, financial centers, and manufacturing areas 'until it gobbles in enough enclaves of black neighborhoods.' "⁶⁸ District 12's shape, indeed, was all too easily

62. See *id.* at 2820-21. To set this claim in context, it is important to understand the basic geography and demographics of North Carolina. North Carolina's geography consists of an eastern Coastal Plain, a central Piedmont Plateau, and a mountainous western region. *Id.* at 2820 (citing HUGH T. LEFLER & ALBERT R. NEWSOM, *THE HISTORY OF A SOUTHERN STATE: NORTH CAROLINA 18-22* (3d ed. 1973)). The voting-age population of North Carolina is approximately 78% white, 20% African-American, 1% Native-American, and 1% other ethnic groups. *Id.* Persons in the "other" group category are predominately Asian and Asian-American. *Id.* The African-American population is somewhat dispersed in the state. African-Americans are a majority of the general population in only 5 of the state's 100 counties. The largest concentrations of African-Americans are in the Coastal Plain area, particularly in the northern sections of the plain. *Id.* (citing OLE GADE & H. DANIEL STILLWELL, *NORTH CAROLINA: PEOPLE AND ENVIRONMENTS* 65-68 (1986)).

Given these demographic patterns, it was quite natural that the North Carolina General Assembly's original redistricting plan contained one district centered in the northern part of the eastern Coastal Plain area that had a majority African-American population. The great debate arose over the attempt to create the second predominately African-American district.

63. *Id.*

64. *Id.*

65. *Id.* (quoting *Shaw v. Barr*, 808 F. Supp. 461, 476 (E.D.N.C. 1992) (Voorhees, C.J., concurring in part and dissenting in part)).

66. *Id.* (quoting *WALL ST. J.*, Feb. 4, 1992, at A14).

67. *Id.*

68. *Id.* at 2820-21 (quoting *Shaw v. Barr*, 808 F. Supp. 461, 476-77 (E.D.N.C. 1992))

amenable to parody. The Court in *Shaw* noted that northbound and southbound drivers on Interstate 85 sometimes found themselves in separate districts in one county, only to "trade" districts when they entered the next county.⁶⁹ Towns were divided into different districts, five counties were cut into three different districts, and at one point the district was kept contiguous "only because it intersect[ed] at a single point with two other districts before crossing over them."⁷⁰ The Court in *Shaw* quoted the quip of a North Carolina state legislator, who sniped that "[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district."⁷¹

The Supreme Court's opinion in *Shaw* was written by Justice Sandra Day O'Connor. The central theme of the Court's opinion was that the North Carolina reapportionment plan too closely resembled the types of *invidious* racial gerrymandering that the Court had long condemned under the Equal Protection Clause. The Court described at length the evils of race discrimination in the design of voting districts, discrimination that had historically been used to dilute or disenfranchise African-American voters. While North Carolina's plan was not designed to hurt African-Americans, but to help them, a majority of the Justices on the Court clearly felt disturbed, at a very visceral level, at how openly and blatantly the awkwardly shaped North Carolina Districts 1 and 12 used race as their defining characteristic. Thus, Justice O'Connor's opinion for the Court stated that the challenge to North Carolina's plan struck "a powerful historical chord"⁷² and remarked that it was "unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past."⁷³

The Court began its analysis by acknowledging that the Constitution is *not* color-blind. Race-conscious remedies are permitted under the Equal Protection Clause; and indeed, race-

(Voorhees, C.J., concurring in part and dissenting in part)).

69. *Id.* at 2821.

70. *Id.*

71. *Id.* (internal quotations omitted) (quoting WASH. POST, Apr. 20, 1993, at A4). The Court further noted that District 12 has even inspired poetry: "Ask not for whom the line is drawn; it is drawn to avoid thee." Bernard Grofman, *Would Vince Lombardi Have Been Right If He Had Said: "When it Comes to Redistricting, Race Isn't Everything, It's the Only Thing?"*, 14 CARDOZO L. REV. 1237, 1261 n.96 (1993); see *Shaw*, 113 S. Ct. at 2821.

72. *Shaw*, 113 S. Ct. at 2824.

73. *Id.*

conscious redistricting is sometimes constitutional.⁷⁴ The problem, as the Court saw it, was how to place limits on this principle. Does the Constitution permit redistricting plans that create districts so extremely irregular on their face that they may rationally be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification? The Court concluded that the answer to this question is no.

The central purpose of the Equal Protection Clause, the Court argued, "is to prevent the States from purposefully discriminating between individuals on the basis of race."⁷⁵ Drawing on its affirmative action jurisprudence,⁷⁶ the Court held that all overt racial classifications must be subjected to strict judicial scrutiny;⁷⁷ the Equal Protection Clause, the Court insisted, does not embody a lower standard of judicial review for the "benign" use of racial classifications.⁷⁸ Drawing on her own prior opinion in *Richmond v. J.A. Croson Co.*,⁷⁹ Justice O'Connor observed that "[e]xpress racial classifications are immediately suspect because, '[a]bsent searching judicial inquiry . . . , there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.'"⁸⁰

74. See *id.* ("This Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances.").

75. *Id.* (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)); see *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979); see also *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 485 (1982).

76. See *supra* text accompanying notes 109-67.

77. See *Shaw*, 113 S. Ct. at 2825 ("Accordingly, we have held that the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest."); see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78 (1986) (plurality opinion).

78. *Shaw*, 113 S. Ct. at 2824.

79. 488 U.S. 469 (1989) (O'Connor, J., plurality opinion).

80. *Shaw*, 113 S. Ct. at 2824 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)). Justice O'Connor's opinion in *Shaw* also quoted a prior statement by Justice Brennan that "a purportedly preferential race assignment may in fact disguise a policy that perpetuates disadvantageous treatment of the plan's supposed beneficiaries." *United Jewish Org. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 172 (1977) (Brennan, J., concurring in part); see *Shaw*, 113 S. Ct. at 2824.

2. *Miller v. Johnson*

More recently, in *Miller v. Johnson*,⁸¹ the Supreme Court examined a congressional redistricting plan for the State of Georgia under the principles announced in *Shaw*. Justice Anthony Kennedy's opinion for the Supreme Court in *Miller* described the critical Eleventh District in Georgia in highly unflattering terms:

The Eleventh District lost the black population of Macon, but picked up Savannah, thereby connecting the black neighborhoods of metropolitan Atlanta and the poor black populace of coastal Chatham County, though 260 miles apart in distance and worlds apart in culture. In short, the social, political and economic makeup of the Eleventh District tells a tale of disparity, not community.⁸²

Elections were held pursuant to the new plan in 1992, and three black members of Congress were elected from the three majority-black districts. Five white voters from the Eleventh District sued to challenge the redistricting plan, alleging that the district was an unconstitutional gerrymander under the principles of *Shaw v.*

81. 115 S. Ct. 2475 (1995). Since 1965 Georgia had been a "covered jurisdiction" for purposes of the Voting Rights Act, requiring preclearance review under § 5 of the Act of any change in a standard, practice, or procedure with respect to voting. Between 1980 and 1990, one of Georgia's ten congressional districts contained a majority of black voters. The 1990 Decennial Census indicated that Georgia's population had grown sufficiently to entitle it to an additional eleventh congressional seat. The Georgia General Assembly first drew up a plan that included two majority-black districts, the Fifth and the Eleventh, plus an additional district, the Second, that contained a 35% black population. The Department of Justice, however, rejected the plan on preclearance review. The General Assembly tried again. Its second effort increased the black populations of the three districts, but again resulted in only two majority-black districts. The Justice Department also rejected this plan. On its third attempt, the General Assembly created three majority-black districts, following largely the so-called "max-black" plan drawn by the American Civil Liberties Union for the General Assembly's black caucus. The key to this plan was the "Macon/Savannah trade." The dense black population in the Macon region of Georgia was transferred from the Eleventh District to the Second, converting the Second into a majority-black district, and the Eleventh District's loss in black population was offset by extending the Eleventh to include the black populations in the coastal city of Savannah. *Id.* at 2483-84.

82. *Id.* at 2484. Quoting from a reference work on American politics, the Court further observed: "Geographically, it is a monstrosity, stretching from Atlanta to Savannah. Its core is the plantation country in the center of the state, lightly populated, but heavily black. It links by narrow corridors the black neighborhoods in Augusta, Savannah and southern DeKalb County." *Id.* (quoting MICHAEL BARONE & GRANT UJIFUSA, *ALMANAC OF AMERICAN POLITICS* 356 (1994)).

Reno. The district court struck down the plan, holding that race was the "overriding, predominant force" animating its enactment, citing the irregular shape of the district, including appendages drawn for the obvious purpose of capturing additional black populations.⁸³

In the Supreme Court, the Justice Department and State of Georgia did not defend the redistricting plan by disputing that racial motivation was a dominant purpose. Rather, the plan was defended on the theory that under *Shaw* a plaintiff must demonstrate that a district's shape is so bizarre that it is unexplainable other than on the basis of race.⁸⁴ Justice Kennedy's majority opinion rejected this view, stating that it erroneously characterized the holding in *Shaw*.⁸⁵ The equal protection violation in *Shaw*, the Court explained, was "analytically distinct"⁸⁶ from vote dilution claims. The Court then placed the use of race in drawing congressional districts on a par with the types of invidious discrimination that had been struck down in the various cases from the 1950s emanating from *Brown v. Board of Education*,⁸⁷ stating that "[j]ust as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, buses, golf courses, beaches, and schools, so did we recognize in *Shaw* that it may not separate its citizens into different voting districts on the basis of race."⁸⁸ The Court claimed that "[t]he idea is a simple one: At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class."⁸⁹ Picking up on a theme prominent in both *Shaw* and the dissenting opinions in the Court's now-

83. *Johnson v. Miller*, 864 F. Supp. 1354, 1372, 1378 (S.D. Ga. 1994).

84. *Miller*, 115 S. Ct. at 2485.

85. *Id.*

86. *Id.*

87. 347 U.S. 483 (1954).

88. *Miller*, 115 S. Ct. at 2486 (citing *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (per curiam) (parks); *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (buses); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (per curiam) (golf courses); *Mayor and City Council of Baltimore v. Dawson*, 350 U.S. 877 (1955) (per curiam) (beaches); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (schools)).

89. *Id.* (internal quotation marks omitted) (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (quoting *Arizona Governing Comm'n for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1083 (1983))).

overruled affirmative action decision in *Metro Broadcasting*,⁹⁰ the Court asserted that “[w]hen 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.’”⁹¹ The Court then explained that “bizarreness” was not a constitutional requirement, but mere evidence of an underlying constitutional violation.⁹²

Elaborating on this theme, the Court further rejected the argument “that the Equal Protection Clause’s general proscription on race-based decisionmaking does not obtain in the districting context because redistricting by definition involves racial considerations,” holding that this argument indulged “the very stereotypical assumptions [that] the Equal Protection Clause forbids”—namely, “that individuals of the same race share a single political interest.”⁹³ Nevertheless, the Court drew a distinction between a legislature’s *awareness* of race in drawing district lines, and situations in which race *predominates* in the redistricting process.⁹⁴ Thus, the Fourteenth Amendment will not be offended when lines are drawn “in spite of” rather than “because of” their racial consequences.⁹⁵ Applying this standard,

90. 497 U.S. 547 (1990).

91. *Miller*, 115 S. Ct. at 2486 (quoting *Shaw v. Reno*, 113 S. Ct. 2816, 2827 (1993)).

92. *Id.*

Our observation in *Shaw* of the consequences of racial stereotyping was not meant to suggest that a district must be bizarre on its face before there is a constitutional violation. Nor was our conclusion in *Shaw* that in certain instances a district’s appearance (or, to be more precise, its appearance in combination with certain demographic evidence) can give rise to an equal protection claim, a holding that bizarreness was a threshold showing, as appellants believe it to be. Our circumspect approach and narrow holding in *Shaw* did not erect an artificial rule barring accepted equal protection analysis in other redistricting cases. Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature’s dominant and controlling rationale in drawing its district lines. The logical implication, as courts applying *Shaw* have recognized, is that parties may rely on evidence other than bizarreness to establish race-based districting.

Id. (citation omitted).

93. *Id.* at 2487.

94. *Id.* at 2488.

95. *Id.* (quoting *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)). “‘[D]iscriminatory purpose’ . . . implies more than intent as volition or intent as

the Court agreed with the district court below that race was the predominant, overriding factor in the Georgia General Assembly's redistricting plan, and thus applied strict scrutiny to the plan.⁹⁶ The critical question then became whether Georgia could successfully defend itself under the strict scrutiny test by asserting that it had a compelling governmental interest in complying with the requirements of the Voting Rights Act.

The Court did not unequivocally state in *Miller* that compliance with the Voting Rights Act, *standing alone*, would ever automatically satisfy the strict scrutiny test, stating instead that "[w]hether or not in some cases compliance with the Voting Rights Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination, it cannot do so here."⁹⁷ Reiterating what it had said in *Shaw*, the Court in *Miller* emphasized that compliance with federal antidiscrimination laws cannot justify race-based districting when the challenged district "was not reasonably necessary under a constitutional reading and application of those laws."⁹⁸ In a rebuke to the Justice Department, the Court then held that the first two redistricting plans submitted by Georgia were not in violation of the Voting Rights Act. Those plans, which increased the number of majority-minority districts from one to two, were "ameliorative," and thus did not violate the nonretrogression principle of section 5 of the Act.⁹⁹ Nor was there any evidence in

awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects." *Id.* (footnotes and citation omitted). The Court then summarized the plaintiff's burden in *Shaw* challenges to districting plans:

The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can "defeat a claim that a district has been gerrymandered on racial lines."

Id. (quoting *Shaw v. Reno*, 113 S. Ct. 2816, 2827 (1993)).

96. *Id.* at 2490.

97. *Id.* at 2490-91.

98. *Id.* at 2491.

99. *Id.* at 2492.

the record that Georgia's initial two plans were motivated by any discriminatory intent.¹⁰⁰ Thus, the Court reasoned, the Justice Department's refusal to accept Georgia's earlier plans was based on the Department's own misapplication of the Voting Rights Act; the Justice Department's further insistence that Georgia adopt a plan that increased the number of majority-minority districts to three was an "implicit command that States engage in presumptively unconstitutional race-based districting."¹⁰¹ Seeming to rub salt in the Department's wounds, the Court then suggested that such far-reaching and unconstitutional interpretations of the Voting Rights Act could bring into question the very constitutional legitimacy of the Act itself, observing that if Congress actually intended such a construction of the Act—a proposition the Court seemed to doubt—then the Act could well exceed Congress's enforcement authority under the Fifteenth Amendment.¹⁰²

Justices Stevens, Ginsburg, and Breyer dissented. Justice Ginsburg's dissent examined the history of federal court intervention into the "political thicket" of apportionment, arguing that federal court intervention had often been required because the political system was scarcely open to self-correction.¹⁰³ Turning to the merits of the Georgia plan, Justice Ginsburg disagreed with the Court's conclusion that race "overwhelmed" the Georgia legislature's traditional districting practices, in the same sense that race had appeared to overwhelm all other factors in *Shaw*.¹⁰⁴ Georgia's Eleventh District, she observed, was not bizarre, extremely irregular, or irrational on its face.¹⁰⁵ She noted further that in the Georgia legislature nonracial factors had clearly played an important role, including the accommodation of "an incumbent State Senator regarding the placement of the precinct in which his son lived."¹⁰⁶ Most significantly, she took eloquent issue with the majority's failure to recognize the unique circumstances that justify special judicial protection of minority voters:

100. *Id.*

101. *Id.* at 2493.

102. *Id.*

103. *Id.* at 2500 (Ginsburg, J., dissenting).

104. *Id.* at 2502.

105. *Id.*

106. *Id.* at 2503.

Special circumstances justify vigilant judicial inspection to protect minority voters—circumstances that do not apply to majority voters. A history of exclusion from state politics left racial minorities without clout to extract provisions for fair representation in the lawmaking forum. The equal protection rights of minority voters thus could have remained unrealized absent the Judiciary's close surveillance. The majority, by definition, encounters no such blockage. White voters in Georgia do not lack means to exert strong pressure on their state legislators. The force of their numbers is itself a powerful determiner of what the legislature will do that does not coincide with perceived majority interests.¹⁰⁷

Justice Ginsburg concluded that the result of *Miller* and *Shaw* would be to put all redistricting plans at risk; only after litigation, she observed, "will States now be assured that plans conscious of race are safe."¹⁰⁸

B. Affirmative Action and the Fragile Position of "Diversity"

The ghosts of *Homer Plessy* are also visible in the Supreme Court's recent treatment of affirmative action.¹⁰⁹ From the Court's very earliest affirmative action decisions, a majority of Justices signaled an unwillingness to interpret either the Fourteenth Amendment or civil rights statutes as imposing a standard of absolute color-blindness that would bar all race-conscious remedial programs by government. A majority of the Court in early decisions such as *Regents of the University of*

107. *Id.* at 2506 (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938)).

108. *Id.* at 2507 (Ginsburg, J., dissenting).

109. See generally John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Richard A. Posner, *The Bakke Case and the Future of "Affirmative Action,"* 67 CAL. L. REV. 171 (1979); Terrance Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975); Laurence M. Tribe, *Perspectives on Bakke: Equal Protection, Procedural Fairness, or Structural Justice?*, 92 HARV. L. REV. 864 (1979); William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775 (1979).

*California v. Bakke*¹¹⁰ and *Fullilove v. Klutznick*,¹¹¹ for example, squarely rejected Justice Harlan's claim in *Plessy* that the Constitution is color-blind.¹¹² The Court's more recent

110. 438 U.S. 265 (1978). The "reverse-discrimination" question had reached the Court prior to *Bakke* in *DeFunis v. Odegaard*, a case in which a white male challenged a minority-admissions program at the University of Washington School of Law. *DeFunis v. Odegaard*, 416 U.S. 312 (1974). The special-admissions program reserved a portion of the law school class for blacks, Chicanos, American Indians, and Filipinos. The Court did not reach the merits, holding in a 5-4 decision that the case was moot because DeFunis was registered for the final term of his third year of law school by the time the case was argued in the Supreme Court. Justice Douglas, dissenting on the mootness issue, reached the merits. He wrote that the program was unconstitutional, stating that the law school must treat each applicant "in a racially neutral way." *Id.* at 334 (Douglas, J., dissenting). Justice Douglas adopted a color-blind equal protection standard, writing that "[i]f discrimination based on race is constitutionally permissible when those who hold the reins can come up with 'compelling' reasons to justify it, then constitutional guarantees acquire an accordionlike quality." *Id.* at 343 (Douglas, J., dissenting).

111. 448 U.S. 448 (1980).

112. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). In *Regents of the Univ. of Cal. v. Bakke*, the petitioner, Alan Bakke, challenged the validity of a special admissions program for minority students at the medical school of the University of California at Davis. Four members of the Court, Justices Brennan, White, Marshall, and Blackmun, voted to uphold the special-admissions program, stating that the "[g]overnment may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice." *Bakke*, 438 U.S. at 325 (Brennan, White, Marshall, & Blackmun, JJ., concurring in part and dissenting in part). Justice Powell, who cast the critical swing vote in *Bakke*, agreed with these Justices that government may in some circumstances use race as a selective criterion. He held, however, that the particular race-conscious program used by the Davis Medical School was constitutionally impermissible because it tended to pursue racial preference for its own sake, rather than for valid educational reasons. *Id.* at 307-20 (Powell, J.). The remaining four Justices never reached the constitutional issue, holding that the Davis program violated Title VI of the Civil Rights Act of 1964, Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), which they construed to be color-blind. *See id.* at 408-21 (Stevens, J., concurring in part and dissenting in part, joined by Burger, C.J., Stewart, & Rehnquist, JJ.). Thus, the peculiar judicial compromise in *Bakke* approved in principle the government's use of race as a selective criterion, but struck down the particular racially selective program before the Court.

Justice Powell's opinion in *Bakke* is particularly important, for his views largely created the blueprint for the Court's next two decades of affirmative action jurisprudence. Powell's opinion is a riveting example of a great Supreme Court Justice struggling to accommodate the competing tugs and pulls of process and equality thinking. The compromise he reached permitted the use of race as a factor in admissions to achieve the *outcome* of a more diverse student body, but only because "diversity" was perceived by Justice Powell as a goal *distinguishable* from the pursuit of an ideal racial balance *for its own sake*. And Justice Powell in *Bakke* held that even if the outcome-oriented goal of pursuing education diversity is a permissible goal under the Constitution, it may be pursued only through a *process* that is individualistic in its application. The cruder "group rights" style remedy of setting

pronouncements on affirmative action, however, seem to have come closer to a color-blind position.

1. *Adarand Constructors, Inc. v. Peña*

In *Adarand Constructors, Inc. v. Peña*,¹¹³ the Supreme Court narrowed the scope of constitutionally permitted affirmative action. The case involved the constitutional propriety of clauses typically found in the contracts of most federal agencies, which by law must contain a subcontractor compensation clause giving a prime contractor a financial incentive to hire subcontractors certified as small businesses controlled by socially and economically disadvantaged individuals, and requiring the contractor to presume that such individuals include minorities or any other individuals found to be disadvantaged by the Small

aside a limited quota of seats for minority members only was simply too brazenly outcome-centered for Justice Powell to tolerate. Thus Powell approved of the government's pursuit of pluralism in education, writing that "the attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education." *Id.* at 311-12 (Powell, J.). Powell proceeded, however, to focus on the distinction between educational pluralism and racial balance for its own sake. That distinction is the crucial point in his opinion and thus in the judgment of the *Bakke* Court. Powell stated that the Davis Medical School's pursuit of ethnic pluralism was permissible only as "one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body." *Id.* at 314. By contrast, ethnic pluralism pursued for its own sake is neither a compelling state interest, nor a constitutionally permissible goal: "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Id.* at 307. Describing race as one in a wide range of factors that should be considered in the interest of academic pluralism—a factor incident to developing a student body capable of enjoying a robust exchange of ideas and perspectives—Powell rejected the argument that the permissible educational pursuit of diversity requires reserving a specified number of spaces for a given racial group. On the contrary, Powell argued that a specific racial quota hinders the attainment of true diversity. In rejecting the idea of specific quotas, Justice Powell wrote:

[T]he argument misconceives the nature of the state interest that would justify consideration of race or ethnic background. It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admission program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity.

Id. at 315.

113. 115 S. Ct. 2097 (1995).

Business Administration.¹¹⁴ The precise dispute arose from highway construction undertaken by the United States Department of Transportation in Colorado. The prime contractor was Mountain Gravel & Construction Company, which solicited bids for certain guardrail subcontract work. Adarand Constructors, Inc., a Colorado-based highway construction firm, submitted the low bid. Gonzales Construction Company, a company certified as controlled by "socially and economically disadvantaged individuals," submitted a higher bid, but was awarded the contract. Under the terms of the prime contract, Mountain Gravel would receive additional compensation if it hired such a designated disadvantaged business.¹¹⁵ Pursuant to

114. *Id.* at 2102. The Small Business Act (SBA), 72 Stat. 384, as amended, 15 U.S.C. §§ 631-647 (1976), declares it to be "the policy of the United States that small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals, . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." *Id.* (quoting 15 U.S.C. § 637(d)(1) (1976)). The Act defines "socially disadvantaged individuals" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," *id.* (quoting 15 U.S.C. § 637(a)(5) (1976)), and it defines "economically disadvantaged individuals" as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id.* (quoting 15 U.S.C. § 637(a)(6)(A) (1976)). In furtherance of the stated policy, the Act establishes "[t]he Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals" at "not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year." *Id.* (quoting 15 U.S.C. § 644(g)(1) (1976)). "It also requires the head of each Federal agency to set agency-specific goals for participation by businesses controlled by socially and economically disadvantaged individuals." *Id.*

115. Under the SBA's "8(a) program," which is available to small businesses controlled by socially and economically disadvantaged individuals as the SBA has defined those terms, a wide range of benefits are conferred on participating businesses. *Id.*; see 13 C.F.R. §§ 124.303-.311, -.403 (1994); 48 C.F.R. subpt. 19.8 (1994). One such benefit is automatic eligibility for subcontractor compensation provisions. *Adarand Constructors*, 15 S. Ct. at 2102-03 (citing 15 U.S.C. § 637(d)(3)(C) (1976) (conferring presumptive eligibility on anyone "found to be disadvantaged . . . pursuant to section 8(a) of the Small Business Act")).

To participate in the 8(a) program, a business must be "small," as defined in 13 CFR § 124.102 (1994); and it must be 51% owned by individuals who qualify as "socially and economically disadvantaged," § 124.103. The SBA presumes that Black, Hispanic, Asian Pacific, Subcontinent Asian, and Native Americans, as well as "members of other groups designated from time to time by SBA," are "socially disadvantaged," § 124.105(b)(1). It also allows any individual not a member of a listed group to prove social disadvantage "on the basis of clear and convincing evidence," as described in § 124.105(c). Social

a Department of Transportation appropriations measure, "not less than 10 percent" of the appropriated funds were to be expended on certified disadvantaged businesses.¹¹⁶ When Adarand lost the subcontract bid to Gonzalez, Adarand sued in federal court to challenge the constitutionality of the affirmative action scheme; the lower courts found for the government, upholding the affirmative action programs.¹¹⁷

The Supreme Court began by noting that while the programs at issue spoke in terms of "disadvantaged," a race-neutral concept, the race-based rebuttable presumption used in the

disadvantage is not enough to establish eligibility, however; SBA also requires each 8(a) program participant to prove "economic disadvantage" according to the criteria set forth in § 124.106(a).

[Another SBA program, the "8(d) subcontracting program,"] is limited to eligibility for subcontracting provisions In determining eligibility, the SBA presumes social disadvantage based on membership in certain minority groups, just as in the 8(a) program, and again appears to require an individualized, although "less restrictive," showing of economic disadvantage, § 124.106(b). A different set of regulations, however, says that members of minority groups wishing to participate in the 8(d) subcontracting program are entitled to a race-based presumption of social and economic disadvantage. 48 CFR §§ 19.001, 19.703(a)(2) (1994).

Id. at 2103. The Supreme Court in *Adarand* confessed "some uncertainty as to whether participation in the 8(d) subcontracting program requires an individualized showing of economic disadvantage," but noted that, "[i]n any event, in both the 8(a) and the 8(d) programs, the presumptions of disadvantage are rebuttable if a third party comes forward with evidence suggesting that the participant is not, in fact, either economically or socially disadvantaged." *Id.* (citing 13 C.F.R. §§ 124.111(c)-(d), 124.601-609 (1994)).

116. *Id.* (quoting Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. 100-17, 101 Stat. 132). Section 106(c)(1) of STURAA provides that "not less than 10 percent" of the appropriated funds "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." *Id.* (quoting 101 Stat. 145).

STURAA adopts the Small Business Act's definition of "socially and economically disadvantaged individual," including the applicable race-based presumptions, and adds that "women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection."

Id. (quoting 101 Stat. 146, § 106(c)(2)(B)).

117. The District Court granted the Government's motion for summary judgment. *Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. 240 (D. Colo. 1992). The Court of Appeals for the Tenth Circuit affirmed. *Adarand Constructors, Inc. v. Peña*, 16 F.3d 1537 (10th Cir. 1994). The Tenth Circuit understood the decision in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), to have adopted "a lenient standard, resembling intermediate scrutiny, in assessing" the constitutionality of federal race-based action. *Adarand*, 16 F.3d at 1544. Applying that "lenient standard," as further developed in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), the Court of Appeals upheld the use of subcontractor compensation clauses. *Adarand*, 16 F.3d at 1547.

decision to certify a business as "disadvantage" rendered the classifications at issue classifications based explicitly on race, thus requiring some level of heightened scrutiny.¹¹⁸ The Court turned then to the central issue of the case, whether *federal* affirmative action programs should be subjected to less rigorous judicial scrutiny than state and local programs.¹¹⁹

118. *Adarand*, 115 S. Ct. at 2105.

119. Reversing its decision in *Metro Broadcasting*, the Court held that one standard should govern review of all affirmative action programs. Two FCC minority preference policies were at issue in *Metro Broadcasting*: the FCC's minority preference policies in comparative licensing proceedings and its minority preference policies for "distress sales." See 497 U.S. 547, 556-57 (1990). In its comparative licensing process, the FCC grants "plus points" for minority ownership when evaluating competing applicants for new licenses. The FCC uses numerous criteria when evaluating applicants for broadcasting licenses. Those criteria include past broadcast record, efficient use of the frequency, character, and proposed program service. See *id.* (citing *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965)). In 1978 the FCC announced that minority ownership and participation in management would be considered as a "plus" factor, to be weighed with all other relevant factors, in comparative licensure hearings. See *id.* (citing *WPIX, Inc.*, 68 F.C.C.2d 381, 411-12 (1978)). The *Metro Broadcasting Company* was in competition with *Rainbow Broadcasting Company* for a license to construct and operate a new UHF television station in Orlando, Florida. *Rainbow* was ultimately awarded the license over *Metro* because *Rainbow* was 90% Hispanic-owned. An FCC Review Board awarded *Rainbow* "substantial enhancement" because it was 90% Hispanic-owned. *Rainbow's* minority enhancement points outweighed *Metro's* local residence and civic participation points. *Id.* at 558 (citing *Metro Broadcasting, Inc.*, 99 F.C.C.2d 688 (Rev. Bd. 1984)).

The FCC's minority "distress sale" program permits certain licensees who were in jeopardy of losing their licenses to sell their licenses to minority-controlled firms. Normally, when a licensee's qualifications to continue to hold a broadcast license come into question, the licensee is not allowed to assign or transfer the license until the FCC has conducted a hearing resolving the licensee's qualifications. *Id.* at 557. Exceptions to the rule occur when the licensee is either bankrupt or mentally or physically disabled. See *id.* (citing *Minority Ownership*, 68 F.C.C.2d 979, 983 (1978)). The minority preference distress sale policy is an exception to that general rule, allowing a broadcaster whose license has been designated for a revocation hearing, or whose renewal application has been designated for hearing, to assign the license to an FCC-approved "minority enterprise" at a distress sale price. See *id.* (citing *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849, 851 (1982)). The minority ownership must exceed 50% or be controlling. The price of the distress sale must not exceed 75% of the fair market value. *Id.* at 558. Rather than endure a protracted hearing over its qualifications, the licensee may prefer to sell out to a minority enterprise, even though the licensee receives less than it might otherwise have obtained from the sale. The assignee must meet the FCC's basic qualifications.

The Supreme Court upheld both FCC minority preference policies. In a 5-4 decision written by Justice William Brennan, the Court held that the FCC's policies should be judged by the "intermediate scrutiny" standard of equal protection review, rather than by "strict scrutiny." *Id.* at 565. The application of the more lax intermediate scrutiny test was surprising because the Court had appeared to be

The Court first reviewed the modern history of equal protection analysis as applied to the federal government. Many early pronouncements of the Court refused to extend any equal protection principles to actions of the federal government, on the reasoning that the Fourteenth Amendment's equal protection guarantee extends only to the states.¹²⁰ As the Court first began to examine federal action under equal protection principles, the results were disastrous. The Court in *Hirabayashi v. United States*¹²¹ sustained a curfew applicable only to persons of Japanese ancestry, and in the infamous *Korematsu v. United States*¹²² sustained the internment of Japanese-Americans in relocation camps. The best that can be said of these decisions is that they were the product of wartime hysteria; Congress itself would, generations later, recognize the injustice that had been done.¹²³

The first major watershed in this history came in the Supreme Court's decision in *Bolling v. Sharpe*,¹²⁴ the federal school desegregation decision involving schools in Washington, D.C., that was the companion case to *Brown v. Board of Education*.¹²⁵ In *Bolling*, "the Court for the first time explicitly questioned the existence of any difference between the obligations of the Federal Government and the States to avoid racial classifications."¹²⁶ While the Court in *Bolling* noted that "the 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,'"¹²⁷ it concluded that, "[i]n view of

settling on the strict scrutiny test as the appropriate standard of review for racial affirmative action.

120. See *Detroit Bank v. United States*, 317 U.S. 329, 337 (1943) ("Unlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress."); *Helvering v. Lerner Stores Corp.*, 314 U.S. 463, 468 (1941); *LaBelle Iron Works v. United States*, 256 U.S. 377, 392 (1921) ("Reference is made to cases decided under the equal protection clause of the Fourteenth Amendment; but clearly they are not in point. The Fifth Amendment has no equal protection clause." (citations omitted)).

121. 320 U.S. 81 (1943).

122. 323 U.S. 214 (1944).

123. See Pub. L. No. 100-383, § 2(a), 102 Stat. 903 (1988) ("The Congress recognizes that . . . a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II.").

124. 347 U.S. 497 (1954).

125. 347 U.S. 483 (1954).

126. *Adarand Constructors Inc. v. Peña*, 115 S. Ct. 2097, 2107 (1995).

127. *Id.* (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)).

[the] decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."¹²⁸ In all subsequent cases *other* than the affirmative action line of decisions, the Supreme Court after *Bolling* appeared to apply identical equal protection standards to all governmental action, without regard to whether it was a federal or state program being challenged.¹²⁹ As Professor Kenneth Karst observed, "[i]n case after case, fifth amendment equal protection problems are discussed on the assumption that fourteenth amendment precedents are controlling."¹³⁰

The affirmative action cases, however, were unique. The Supreme Court, in cases such as *Regents of the University of California v. Bakke*,¹³¹ *Fullilove v. Klutznick*,¹³² *Wygant v. Board of Education*,¹³³ *Richmond v. J.A. Croson Co.*,¹³⁴ and *Metro Broadcasting, Inc. v. FCC*,¹³⁵ struggled to achieve consensus on the appropriate standard of review. In *Wygant* and *Croson*, the Court settled on "strict scrutiny" as the governing standard for reviewing race-based affirmative action programs implemented by state and local governments, but first in *Fullilove*, and later in *Metro Broadcasting*, the Court adopted a more lax standard for federal affirmative action. *Adarand* brought this two-tiered approach to an end.

128. *Id.* (quoting *Bolling*, 347 U.S. at 500).

129. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *McLaughlin v. Florida*, 379 U.S. 184 (1964).

130. Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541, 554 (1977).

131. 438 U.S. 265 (1978).

132. 448 U.S. 448 (1980).

133. 476 U.S. 267 (1986).

134. 488 U.S. 469 (1989).

135. 497 U.S. 547 (1990).

IV. THE FUTURE OF AFFIRMATIVE ACTION

A. *The Near-Colorblindness of Adarand*

The Court in *Adarand*, although confessing that there remained "lingering uncertainty in the details," distilled its jurisprudence regarding racial classifications into three general propositions, which it labeled "skepticism," "consistency," and "congruence."¹³⁶ By "skepticism," the Court meant that all preferences based on racial or ethnic criteria must reserve a most searching examination—that is, be subjected to strict scrutiny.¹³⁷ By "consistency," the Court meant that it makes no difference what racial or ethnic group is being preferred; "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."¹³⁸ And by "congruence," the Court meant that equal protection analysis as applied to the states under the Fourteenth Amendment is identical to that applied to the federal government under the Fifth.¹³⁹ To the extent that *Metro Broadcasting* conflicted with these principles, it was overruled.¹⁴⁰

Having established the standard of review, the Court in *Adarand* did not resolve the question of whether the program before it was or was not constitutional. Instead, because the lower courts had upheld the program under too lenient a standard, the Court remanded the case to them for their initial determination of whether, applying strict scrutiny, the programs are constitutional.¹⁴¹ However, the Court made some general observations about the content of the strict scrutiny standard. Most importantly, the Court went out of its way "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"¹⁴² There are situations, the Court emphasized, in which affirmative action is constitutional:

136. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2111 (1995).

137. *Id.*

138. *Id.* (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion)).

139. *Id.*

140. *Id.* at 2114-18.

141. *Id.* at 2118.

142. *Id.* at 2117.

Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. As recently as 1987, for example, every Justice of this Court agreed that the Alabama Department of Public Safety's "pervasive, systematic, and obstinate discriminatory conduct" justified a narrowly tailored race-based remedy. When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.¹⁴³

Beyond this general admonition that the strict scrutiny standard does not absolutely forbid the use of race, however, the opinion in *Adarand* only prolonged, to use the Court's own phrase, the "lingering uncertainty in the details."¹⁴⁴

Concurring opinions were filed in *Adarand* by Justices Scalia and Thomas. Justice Scalia wrote: "Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race."¹⁴⁵ Although Justice Scalia joined in the disposition of the case by the Court, including its application of strict scrutiny, he noted that in his view:

[G]overnment can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction. . . . To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.¹⁴⁶

143. *Id.* at 2117 (citations omitted). The phrase "strict in theory, but fatal in fact" is taken from Justice Thurgood Marshall. *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment). The example of the remedies approved in the Alabama case referred to in the Court's statement is from *United States v. Paradise*, 480 U.S. 149, 167 (1987) (plurality opinion of Brennan, J.).

144. *Adarand*, 115 S. Ct. at 2111.

145. *Id.* at 2118 (Scalia, J., concurring in part and concurring in the judgment).

146. *Id.* at 2118-19.

Justice Thomas expressed quite passionate dislike for all affirmative action:

Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.

That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution.

These programs not only raise grave constitutional questions, they also undermine the moral basis of the equal protection principle. Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society. Unquestionably, "[i]nvidious [racial] discrimination is an engine of oppression." It is also true that "[r]emedial" racial preferences may reflect "a desire to foster equality in society." But there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences. . . .

In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.¹⁴⁷

147. *Id.* at 2119 (Thomas, J., concurring in part and concurring in the judgment) (citations and footnote omitted).

B. The Diversity Rationale After Adarand

Justices Stevens, Ginsburg, Souter, and Breyer all dissented. The dissenting opinion of Justice Stevens is particularly important, for it addresses an important question left open by the majority in *Adarand*: Whether *Adarand*'s overruling of *Metro Broadcasting* reaches only the question of the appropriate standard of review, or extends to the other key feature of *Metro Broadcasting*—its reliance on the “diversity” rationale. The question of whether public entities such as universities may engage in affirmative action to achieve greater diversity is central to answering the assertion by the *Plessy* majority that law cannot place the races on an equal social plane.¹⁴⁸ For the pursuit of diversity is in many respects the pursuit of that which the *Plessy* majority denied was possible and Justice Harlan claimed was essential: the recognition that the destinies of the two races are indissolubly linked together.

In *Bakke*,¹⁴⁹ Justice Powell approved of the interest of the university in achieving a diverse student body as a “compelling” interest for the purposes of the strict scrutiny test:

The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.¹⁵⁰

Justice Powell understood the goal of obtaining a diverse student body as among the “four essential freedoms” that comprise the “academic freedom” of a university.¹⁵¹ Quoting the words of the

148. See *supra* notes 15-40 and accompanying text.

149. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

150. *Id.* at 311-12.

151. *Id.* at 312 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

“It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”

Id.; see also *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

President of Princeton University, Justice Powell observed that the speculation, experiment, and creation so essential to higher education is promoted by a diverse student body:

[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, 'People do not learn very much when they are surrounded only by the likes of themselves.' . . . In the nature of things, it is hard to know how, and when, and even if, this informal 'learning through diversity' actually occurs. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth.¹⁵²

Justice Powell thus concluded that "it is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."¹⁵³ Seeking a diverse student body, Justice Powell explained, is thus "a goal that is of paramount importance in the fulfillment of its mission."¹⁵⁴

The goal of diversity, Justice Powell further argued, is as important for professional and graduate education as for the

Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment. . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."

Id. (quoting *United States v. Associated Press*, D.C., 52 F. Supp. 362, 372 (1943)).

152. *Id.* at 312 n.48 (alterations in original) (quoting William G. Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WKLY., Sept. 26, 1977, at 7, 9).

153. *Id.* at 313.

154. *Id.*

undergraduate level, noting that "even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial."¹⁵⁵ Citing *Sweatt v. Painter*,¹⁵⁶ Powell observed that in law schools, for example, the exchange of ideas among students of diverse backgrounds is critical to the learning experience.¹⁵⁷

Justice Powell's quarrel with what the University of California had done in *Bakke* to achieve diversity was not with its ends, but its means. For Justice Powell, in order for a university's pursuit of "diversity" to be constitutionally valid, the pursuit must embrace the ideal of diversity in a broad and inclusive sense, and not limit that pursuit to race or ethnicity alone:

Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body. Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded.¹⁵⁸

The key to Justice Powell's endorsement of the diversity idea was that it be pursued in a "unified" admissions system, without set-asides or special "tracks" for particular racial or ethnic groups:

It may be assumed that the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups would contribute to the attainment of considerable ethnic diversity in the student body. But petitioner's argument that this is the only effective means of serving the interest of diversity is seriously flawed. In a most fundamental sense the argument misconceives the nature of the state interest that would justify consideration of race or ethnic background. It is not an interest in simple ethnic

155. *Id.*

156. 339 U.S. 629 (1950).

157. *Bakke*, 438 U.S. at 314.

The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

Id. (citing *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)).

158. *Id.*

diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity.

Nor would the state interest in genuine diversity be served by expanding petitioner's two-track system into a multitrack program with a prescribed number of seats set aside for each identifiable category of applicants. Indeed, it is inconceivable that a university would thus pursue the logic of petitioner's two-track program to the illogical end of insulating each category of applicants with certain desired qualifications from competition with all other applicants.¹⁵⁹

Justice Powell then touted, as an example of the appropriate and constitutional pursuit of diversity, the admissions process at Harvard, in which "ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats."¹⁶⁰ For Justice Powell, this preserved an appropriate balance between the goal of diversity and the constitutional imperative that government treat individuals as

159. *Id.* at 315 (footnote omitted).

160. *Id.* at 317. Elaborating, Justice Powell wrote:

The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a particular quality may vary from year to year depending upon the "mix" both of the student body and the applicants for the incoming class.

Id. at 317-18.

individuals, and not fungible commodities of a racial or ethnic class:

This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.¹⁶¹

Following *Bakke*, however, the diversity rationale did not play a significant role in many Supreme Court affirmative action cases. The issue came up in *Wygant v. Jackson Board of Education*,¹⁶² in which Justice Stevens argued that "race is not always irrelevant to . . . governmental decisionmaking,"¹⁶³ and the Court, in the opinion of Justice O'Connor, noted in response that although the school board in *Wygant* had relied on an interest in providing black teachers to serve as role models for black students, that interest "should not be confused with the very different goal of promoting racial diversity among the faculty."¹⁶⁴ Justice O'Connor added that, because the school board had not relied on an interest in diversity, it was not "necessary to discuss the magnitude of that interest or its applicability in this case."¹⁶⁵

161. *Id.* at 318 (footnote omitted). In a footnote, Justice Powell again emphasized the "case-by-case" nature of a proper admissions program:

Universities . . . may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose. So long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process. If an applicant can establish that the institution does not adhere to a policy of individual comparisons, or can show that a systematic exclusion of certain groups results, the presumption of legality might be overcome, creating the necessity of proving legitimate educational purpose.

Id. at 319 n.53.

162. 476 U.S. 267 (1986).

163. *Id.* at 314-15 (Stevens, J., dissenting).

164. *Id.* at 288 n.*.

165. *Id.*

Prior to *Metro Broadcasting*, a majority of the Court had not yet decided whether the interest in promoting diversity was an interest of sufficient magnitude to justify a racial classification. *Metro Broadcasting*, of course, answered that question in the affirmative; the FCC did not defend its program on the theory that it was remedial, but rather on the theory that it was intended to achieve diversity in broadcasting. Justice Stevens, in his opinion in *Adarand*, dealt with whether the *diversity* aspect of *Metro Broadcasting* had been affected by the Court's ruling, and argued that it had not:

The majority today overrules *Metro Broadcasting* only insofar as it is "inconsistent with [the] holding" that strict scrutiny applies to "benign" racial classifications promulgated by the Federal Government. The proposition that fostering diversity may provide a sufficient interest to justify such a program is *not* inconsistent with the Court's holding today—indeed, the question is not remotely presented in this case—and I do not take the Court's opinion to diminish that aspect of our decision in *Metro Broadcasting*.¹⁶⁶

This statement by Justice Stevens is of enormous importance for those institutions, such as universities, that often base affirmative action programs on the interest in creating diversity among students and faculty. If Justice Stevens is correct, those programs, most of which have drawn their claim to constitutional legitimacy from Justice Powell's famous opinion in *Bakke*, remain constitutionally sound after *Adarand*, provided they comply with the requirements of "narrow tailoring."

CONCLUSION: WILL WE EVER BANISH HOMER PLESSY'S GHOSTS?

As the contemporary Court struggles toward an ever more color-blind Constitution, it is worth considering more carefully the spirit of Justice Harlan's famous dissent. We must face Harlan head-on. When we do, we find that Justice Harlan and his color-blindness turn out to be a great deal more complex than the sound-bite "Our Constitution is color-blind" initially reveals.

For all its moral courage and rhetorical power, for all its insistence that the law be color-blind, Harlan is unable, entirely, to escape his own time and culture—as the ghosts of his opinion

166. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2127-28 (1995) (citation omitted).

are unable to escape ours. Justice Harlan saw the world in color, and so do we. When I read Harlan's dissent in class each year with my students, I ask them what they make of all the openly stereotypical allusions to racial and ethnic groups in the opinion. Here they are, once again paraded in open view:

Every true man has pride of race, and under appropriate circumstances when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. . . .

. . . .

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. . . .

. . . .

. . . This question is not met by the suggestion that social equality cannot exist between the white and black races in this country. That argument, if it can be properly regarded as one, is scarcely worthy of consideration; for social equality no more exists between two races when travelling 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, or when they use in common the streets of a city or town, or when they are in the same room for the purpose of having their names placed on the registry of voters, or when they approach the ballot-box in order to exercise the high privilege of voting.

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union, who are entitled, by law, to participate in the political control of the State and nation, who are not excluded, by law or by reason of their race, from public stations of any kind, and who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to

imprisonment, if they ride in a public coach occupied by citizens of the white race.¹⁶⁷

Now what are we to make of *these* passages? *They* are haunting, too, but in a different and more vivid hue than Harlan's color-blind Constitution. For if the Constitution, to Justice Harlan, was color-blind, he surely was not. And neither was his celebrated opinion.

And for all Harlan's moving rhetoric, the Constitution he expounded was not color-blind, not prior to the Civil War, not after, not now. We know that the Framers of the Fourteenth Amendment did not understand the law they were enacting as turning the Constitution color-blind—they did not understand, for example, the Fourteenth Amendment to abolish racially segregated public schools.¹⁶⁸

Witness Justice Harlan's actions in 1899, three years after *Plessy*, when the Court for the first time heard a challenge to racially separate schools. In Richmond County, Georgia, the district ran separate high schools for blacks, white girls, and white boys. When the district's school buildings became overcrowded, the black high school was shut down and converted into an elementary school, leaving black high school children in the district with no public school to attend. Relying on the *majority* opinion in *Plessy*, parents of the black children sued, claiming that at the very least they were entitled to separate but equal schools. The Supreme Court in *Cumming v. County Board of Education*¹⁶⁹ rejected their claim in a unanimous opinion written by none other than Justice Harlan himself. Justice Harlan's opinion in *Cumming* has no hint of candor or moral outrage. It is a whitewash job well worthy of the *Plessy* majority.

There was in *Cumming* some sleight-of-hand by the school district. But unlike in *Plessy*, where Justice Harlan cut through all euphemism and pretext, in *Cumming* he positively aided and abetted. The district had a tax-supported high school for white females. It had no tax-supported school for white males, as Harlan explained the facts, although it did use tax moneys to "assist" a "private" school in the county for white males. There

167. *Plessy v. Ferguson*, 163 U.S. 537, 554, 559, 561 (1896) (Harlan, J., dissenting).

168. Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 56 (1955); Laurence H. Tribe, *In What Vision of the Constitution Must the Law be Color-Blind?*, 20 J. MARSHALL L. REV. 201, 204 (1986).

169. 175 U.S. 528 (1899).

was no high school for black males or females that either got direct tax support or any financial assistance from the school district. On this set of facts, Justice Harlan simply flitted away the constitutional claim, arguing that, if anything, it was a case of sex discrimination, not race discrimination:

The only complaint is that these plaintiffs, being taxpayers, are debarred the privilege of sending their children to a high school which is not a free school, but one where tuition is charged, and that a portion of the school fund, raised by taxation, is appropriated to sustain white high schools to which negroes are not admitted. We think we have shown that it was in the discretion of the Board to establish high schools. It being in their discretion, they could, without a violation of the law or of any constitution, devote a portion of the taxes collected for school purposes to the support of this high school for white girls and to assist a county denominational high school for boys. In our opinion, it is impracticable to distribute taxes equally. The appropriation of a portion of the taxes for a white girls' high school is not more discrimination against these colored plaintiffs than it is against many white people in the county. A taxpayer who has boys and no girls of a school age has as much right to complain of the unequal distribution of the taxes to a girls' high school as have these plaintiffs. The action of the Board appears to us to be more a discrimination as to sex than it does as to race.¹⁷⁰

This is a remarkable passage on several counts. First, note that the possibility that the greater form of discrimination here may be discrimination based on gender seems to be introduced as no more than a rhetorical twitter. *This* ghost has largely been exorcized from our constitutional system, although the Supreme Court even in its 1995-96 term is entertaining the question of separate but equal for all-male military academies. More important, however, is Justice Harlan's astonishing treatment of the race issue in *Cumming*. Justice Harlan's blindness here is not to color but to basic justice, for surely the principle of *Plessy* must have meant, at minimum, that when tax moneys are used to establish some program of public largess, such as a school system, there must be equal opportunities for both races, even if "separate." Consider further his cavalier analysis of the Georgia

170. *Id.* at 542-43.

constitutional provision¹⁷¹ that required separation of the races in public schools:

It was said at the argument that the vice in the common school system of Georgia was the requirement that the white and colored children of the State be educated in separate schools. But we need not consider that question in this case. No such issue was made in the pleadings. Indeed, the plaintiffs distinctly state that they have no objection to the tax in question so far as levied for the support of primary, intermediate and grammar schools, in the management of which the rule as to the separation of races is enforced. We must dispose of the case as it is presented by the record.

The plaintiffs in error complain that the Board of Education used the funds in its hands to assist in maintaining a high school for white children without providing a similar school for colored children. The substantial relief asked is an injunction that would either impair the efficiency of the high school provided for white children or compel the Board to close it. But if that were done, the result would only be to take from white children educational privileges enjoyed by them, without giving to colored children additional opportunities for the education furnished in high schools. The colored school children of the county would not be advanced in the matter of their education by a decree compelling the defendant Board to cease giving support to a high school for white children. The Board had before it the question whether it should maintain, under its control, a high school for about sixty colored children or withhold the benefits of education in primary schools from three hundred children of the same race. It was impossible, the Board believed, to give educational facilities to the three hundred colored children who were unprovided for, if it maintained a separate school for the sixty children who wished to have a high school education. Its decision was in the interest of the greater number of colored children, leaving the smaller number to obtain a high school education

171. *See id.* at 543.

"There shall be a thorough system of common schools for the education of children in the elementary branches of an English education only, as nearly uniform as practicable, the expenses of which shall be provided for by taxation, or otherwise. The schools shall be free to all children of the State, but separate schools shall be provided for the white and colored races."

Id. (quoting GA. CONST. art. VIII, § 1).

in existing private institutions at an expense not beyond that incurred in the high school discontinued by the Board.¹⁷²

This from the Justice who wrote that our Constitution is color-blind, and that "[t]here is no caste here." Making matters worse—indeed, charting an argumentative strategy that would be used to block efforts to overturn Jim Crow over the next century—Harlan proceeded to defend the blatant discrimination in *Cumming* with the soothing insulation of federalism and states' rights:

We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land. We have here no such case to be determined¹⁷³

George Wallace, Lester Maddox, or Orval Faubus at their worst could not have said it better.

Laws that impose separation are not the same, morally or constitutionally, as laws that promote combination. The moral principle animating the advocates of a truly color-blind Constitution is certainly powerful. It is the principle that race-consciousness is wrong, wrong in all contexts, perhaps, but at the very least, wrong when the government indulges in it. But there are counter-principles of substantial weight. The lingering difficulty many African-Americans continue to have in placing themselves in the nation's competitive public and private institutions quite simply *is*, without doubt, caused in part by the lingering effects of hundreds of years of group degradation.

A decade after *Brown v. Board of Education*,¹⁷⁴ when the Supreme Court held that a mere move by a school district to a "freedom of choice" plan was not sufficient to dismantle, root and branch, the regime of separate but equal, the Court well and properly understood that so many years of evil will not be

172. *Id.* at 543-44.

173. *Id.* at 545.

174. 347 U.S. 483 (1954).

undone by a surface move to "neutrality." Many school boards responded to the *Brown* ruling first by dragging their feet or resisting, and then finally by adopting "freedom of choice" plans that let school children enroll in any school in the school district. A freedom of choice plan is ostensibly a perfect form of equality, and to a pure process thinker may seem like all any school board could ever be asked to do. The problem, however, is that in most of those freedom of choice school districts, black children continued to attend the exclusively black schools and white children the exclusively white schools, and so it appeared in reality as if nothing had changed. In *Green v. County School Board of New Kent County*,¹⁷⁵ the Court in 1968 announced that simply moving to such a freedom of choice regime was not good enough. If a school district had been guilty of intentional segregation of its students, and thus guilty of a constitutional violation under *Brown*, the remedy must be more aggressive; the school district was under an "affirmative duty" to dismantle the vestiges of the discriminatory system "root and branch." The Court wanted results; it wanted them now. In *Swann v. Charlotte-Mecklenburg Board of Education*,¹⁷⁶ Chief Justice Burger, writing for a unanimous Court, stated that school boards could voluntarily adopt prescribed ratios of black students to white students for each school within a system, even in the absence of a constitutional violation,¹⁷⁷ although the Court also admonished that it would not approve the notion that there is a "substantive constitutional right" to "any particular degree of racial balance or mixing."¹⁷⁸ The Court in *Swann* recognized the power of a school board faced with a history of segregation to use its awareness of the racial imbalance as a starting point for voluntarily dismantling a dual school system.¹⁷⁹

If we understand that affirmative steps were required to dismantle the formal mechanisms of separate but equal, why do

175. 391 U.S. 430 (1968).

176. 402 U.S. 1 (1971).

177. *Id.* at 16.

178. *Id.* at 24.

179. *Id.* at 25. For the definitive treatment of the Charlotte desegregation story, see DAVISON DOUGLAS, *READING, WRITING, & RACE: THE DESEGREGATION OF THE CHARLOTTE SCHOOLS* (1995). See also *United States v. Fordice*, 112 S. Ct. 2727 (1992) (applying *Brown* principles to the desegregation of higher education in Mississippi). For an excellent treatment of *Fordice*, see Kay P. Kindred, *Civil Rights and Higher Education*, in *A YEAR IN THE LIFE OF THE SUPREME COURT* 208-30 (Rodney Smolla ed., 1995).

we find it so difficult to understand that affirmative steps are required to dismantle the psychological and cultural effects? As Kimberlé Williams Crenshaw has explained, the subordination of blacks in American society exists on many levels.¹⁸⁰ Formal, legal subordination of the type approved in *Plessy* is surely the worst, for it legitimizes and encourages all other forms of subordination, and is fed by a perverse normative vision of equality, a vision in which people of color are not full members of the polity. Other forms of subordination persist, however, long after formal legal subordination is abolished. Material subordination exists in the form of discrimination in employment, housing, or education, as well as in lives degraded by poverty, poor health care, and violence.¹⁸¹ Symbolic subordination persists in the pervasiveness of a race-consciousness that embraces myths of inferiority.¹⁸² Taking down the "Whites Only" signs was an important legal step, for it rejected the principle of racial supremacy as the nation's moral vision, but can hardly have been expected to cure material or symbolic subordination, and indeed has not.

Quite to the contrary, the elimination of formal legal subordination, when juxtaposed with the momentum of economic subordination and cultural prejudice that had developed for three centuries, may actually have *fed* the persistence of prejudice. Here is the simple-minded equation: African-Americans no longer have any formal barriers to equal opportunity, but many still are not making it. They must be inferior after all. And "[i]f whites believe that Blacks, because they are unambitious or inferior, get what they deserve, it becomes that much harder to convince whites that something is wrong with the entire system."¹⁸³

Both sides in the affirmative action debate can summon moral indignation. Those who advocate color-blindness can argue that affirmative action is, in its way, racist, for it continues the habits and patterns of race-consciousness, and indulges the assumption that minority groups cannot make it on their own.¹⁸⁴ Those who defend affirmative action can argue that the advocates of color-

180. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1377-78 (1988).

181. *Id.* at 1377.

182. *Id.*

183. *Id.* at 1380-81.

184. See Van Alstyne, *supra* note 109.

blindness are racist in their own way. For although they proudly tout formal equality, the practical impact of their policies and their insensitivity to the causal lines that still emanate from slavery, *Dred Scott*, *Plessy*, and their many ghosts, make them enemies of persons of color.

For many African-Americans, one of the bewildering aspects of obstructionist principles advanced by some whites is the apparently sincere request that the damage done to African-Americans is "nothing personal." In the words of Derrick Bell's character Geneva Crenshaw:

"You know, friend, we civil rights lawyers spend our lives confronting whites in power with the obvious racial bias in their laws or policies, and while, as you know, the litany of their possible exculpatory responses is as long as life, they all boil down to: 'That's the way the world is. We did not make the rules, we simply play by them, and you really have no alternative but to do the same. Please don't take it personally.'"¹⁸⁵

To escalate the rhetoric in this way damages both sides, however, and only sets back the cause of racial justice in America.

Our dialogue would be more fruitful if each side recognized the good faith of the other, and conceded to the other the legitimacy of the other's animating moral impulses. Those against affirmative action should understand and empathize with the world view of those who advocate it. The mainstream advocates of affirmative action do not seek a system of racial spoils. They do not seek to perpetuate stereotypes and stigma. They do not argue that people of color cannot make it in society without help. They argue, rather, that many persons of color still suffer the lingering effects of past discrimination, and that Justice Harlan was *right* in his prophecy that the destinies of the two races are "indissolubly linked together." Moderate and flexible affirmative action policies that genuinely diversify our public and private institutions are the only path toward achieving *in fact* the links that persons of all racial and ethnic groups must feel toward one another if future community in this nation is to be possible.

The issue of stigma, for example, is far more complex than the public rhetoric of opponents of affirmative action admit. A law stigmatizes when it places on an individual a symbol that

185. DERRICK BELL, AND WE ARE NOT SAVED 44 (1987).

degrades or humiliates.¹⁸⁶ It is the cultural and historical context that makes the symbol degrading; thus, as Charles Lawrence explains, separate-but-equal bathrooms for men and women are not ordinarily understood in our culture as degrading to either sex; while separate-but-equal bathrooms for blacks and whites are.¹⁸⁷ We understand from our cultural and historical experience that the message communicated by a bathroom sign that says "Whites Only" is that blacks are unfit to defecate there: blacks are dirty, or dangerous, or less than fully human—their presence can defile and contaminate even a bathroom.

Affirmative action programs in modern times simply do not carry any equivalent social and cultural message of stigma. Indeed, programs that are premised on enhancing *diversity* may actually be understood to carry a *positive* message about the person of color admitted to an institution: the message being that the institution values and needs the individual for the experiences and viewpoints that the individual brings to the community.

At the same time, proponents of affirmative action must recognize the validity of the moral principle advanced by opponents of affirmative action, and the cogency of many of the arguments that are advanced against its more draconian forms. There should come a day when such programs are no longer needed or tolerated. But we are not there yet. -

Ultimately, the pursuit of genuine racial equality in the country must focus on substance and not on form. Self-reliance and personal responsibility are crucial. The emphasis on those values in forums such as the Million Man March are an important symbolic step. A serious grappling with the social infrastructure of society, including meaningful progress in education, drug abuse, child care and family support, welfare reform, and crime are obviously the most important of all. But the single most critical determinant of success will be our ability to foster cross-racial tolerance and community. This will require a continued emphasis on policies of inclusion, such as affirmative action, but in forms that do everything possible to meet the legitimate objections to the excesses of some such policies, forms that create the least moral backlash. It is only through these

186. Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 350-51 (1987).

187. *Id.*

efforts that we have any hope of finally banishing the ghosts of Homer Plessy.