

The Case for Color-Blindness

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The turn to purportedly benign race preferences marks a deeply unfortunate and unnecessary detour in the nation's progress toward equal liberty for all. Logic and experience alike suggest that color-blindness, which has never received a full and fair trial in American racial policy, is capable of addressing social problems effectively and in a manner fully consistent with the principles upon which the country was founded. Justice Blackmun was sorely mistaken when he declared in defense of modern race preferences, "There is no other way." In the idea of color-blindness rightly understood, there is another, better way.

Introduction

The idea of "color-blindness" signifies, in its core meaning, that distinctions of race or color play no proper part in the distributions of burdens and benefits in public law or policy. So understood, the idea has been embattled from the very beginning of U.S. history. For over a century, however, from the antebellum era to the conclusion of the Civil Rights Era, it signified the goal and the measure of justice in race relations for the most prominent and successful advocates of that cause.

For Frederick Douglass, the 19th century's greatest abolitionist and civil rights advocate, an abiding faith "in reason, in truth and justice" sustained an expectation that "the color line...will cease to have any civil, political, or

moral significance” in America. In the most famous dissenting opinion in U.S. Supreme Court history, Justice John Marshall Harlan provided a more focused expression of that sentiment, thus explaining his vote in *Plessy v. Ferguson* to invalidate a law mandating racial segregation on train cars: “Our constitution is color-blind.... The law regards man as man, and takes no account...of his color when his civil rights as guaranteed by the supreme law of the land are involved.”¹ In his brief for the plaintiffs in the landmark *Brown v. Board of Education* case, Thurgood Marshall argued, “distinctions... based upon race or color alone...[are] the epitome of that arbitrariness and capriciousness constitutionally impermissible under our system of government.”²

Three score and seven years after *Plessy* came the most resounding statement of all, when the Rev. Martin Luther King, Jr., stood under the shadow of Abraham Lincoln and immortalized the moral vision of the civil rights movement by declaring, “I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.”³

That color-blind nation, King added, is a dream “deeply rooted in the American dream.” When King spoke those words, it was also an idea strengthening its hold on the American polity. Less than one year after King’s speech, President Lyndon B. Johnson signed into law the most ambitious federal civil rights statute ever enacted—“the bill of the century,” a chronicler of its history has called it⁴—which prohibited race- or color-based discrimination in a broad range of institutional settings. This landmark legislation, together with its successor, the Voting Rights Act of 1965, seemed to many supporters to signal the final triumph of the color-blindness principle for which anti-racism activists had struggled for over a century.

Those hopes were soon dashed. As events unfolded, what had seemed a quickly solidifying consensus fractured no less quickly, and controversy over the color-blindness principle emerged anew. It is a remarkable feature of our own time that that principle, always objectionable to supporters of slavery or white supremacy, has become a source of sharp division in the

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1. Justice Harlan himself was not a consistent proponent of color-blindness. His opinion in *Plessy* was informed, however, by the argument of the late 19th-century equal rights advocate Albion W. Tourgée, Homer Plessy’s lead attorney in the case. Tourgée wrote in his brief to the Court, as “Justice is pictured blind...her daughter, the Law, ought at least to be color-blind.” See Mark Elliott and John David Smith, eds., *Undaunted Radical: The Selected Writings and Speeches of Albion W. Tourgée* (Baton Rouge: Louisiana State University Press, 2010), p. 309.
 2. Mark Tushnet, ed., *Thurgood Marshall: Speeches, Writings, Arguments* (Chicago: Lawrence Hill Books, 2001), p. 21.
 3. Martin Luther King, Jr., “I Have a Dream,” in James M. Washington, ed., *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.* (New York: HarperCollins, 1986), p. 219.
 4. Clay Risen, *The Bill of the Century: The Epic Battle for the Civil Rights Act* (New York: Bloomsbury Press, 2014).

latest generation of *their antagonists*. Supporters of racial equality are today more numerous than ever before, and so, too, are the egalitarian adversaries of color-blindness. In the matter of race, America is again, or still, a house divided.

For a society aspiring to justice across color lines, is color-blindness a virtue or a disability? Is color-blindness in the post-Civil Rights era a dictate of justice or a new face for injustice? Those and like questions lie at the heart of our present division over race. In one sense, our division over such questions can be viewed as a marker of progress—a predictable controversy in a society now decisively committed to justice in race relations and debating its proper means and modes. In a deeper sense, however, this controversy is fraught with peril. The present antagonism to color-blindness, prevalent in the nation’s academic institutions as well as in its elite media and even in its most powerful corporate enterprises, signifies an alienation of much of America’s leadership class from the principle that inspired and regulated previous, gloriously successful efforts in the antidiscrimination cause—a principle that stands as a corollary of the first principles of the American republic and of all free government.

The recovery and secure establishment of the color-blindness principle in America’s public life are urgent moral and civic imperatives. The challenge is formidable, however, at the level of argument as well as of practice. To make the case for color-blindness, it is first necessary to take the measure of the case against it, beginning with the genesis of the turn away from it by many supporters of the anti-racism cause.

The Renunciation of Color-Blindness: Genesis and Present Legal Status

Remedial Race-Classifications as Emergency Powers. The enactment of the landmark color-blind legislation of the mid-1960s, the Civil Rights Act of 1964 and the Voting Rights Act of 1965, did not signify, as some supporters had expected, the end and consummation of the civil rights movement. Movement leaders took a different view. “With Selma and the Voting Rights Act,” King opined, “one phase of development in the civil rights revolution came to an end. A new phase opened”—a phase meant to achieve the full “realization of equality”—which, King acknowledged, was even then dividing the movement’s supporters.⁵

5. Martin Luther King, Jr., *Where Do We Go From Here? Chaos or Community?* (Boston: Beacon Press, 1986), pp. 3–4. See also Whitney Young, *To Be Equal* (New York: McGraw-Hill, 1964), pp. 16, 22, and 36–37.

That next phase was understood by much of the civil rights leadership and by the Johnson Administration as an effort to address a condition of deepening socioeconomic deprivation that afflicted a majority of black Americans, not only in the old South but also in northern urban ghettos.⁶ Writing in 1964, National Urban League director Whitney Young Jr. declared that the condition of urban blacks paralleled the most severe deprivations in the Great Depression. An especially urgent source of concern, he noted prophetically, was the “social dynamite” of high and rising school dropout and unemployment rates among young males.⁷

Young’s diagnosis, along with a similar one issued by Johnson’s Undersecretary of Labor Daniel P. Moynihan, gained decisive force by the prompt detonation of the social dynamite of which both warned.⁸ The very same month the Civil Rights Act was enacted, racially charged rioting erupted in New York, but far more consequential was the similarly motivated riot, a massive outbreak of disorder in the Watts neighborhood of Los Angeles, that occurred a mere one week after Johnson signed into law the Voting Rights Act. During the next several years, the contagion of rioting spread to hundreds of the nation’s urban areas.⁹

Emergency circumstances call for emergency measures, and in that volatile environment a consensus among mainstream liberal policymakers quickly formed on two main points. First, the root cause of the rioting was racially concentrated economic deprivation. Second, to restore peace to America’s cities, it was imperative to provide immediate assistance, foremost by increasing employment among impoverished blacks by any means considered likely to prove effective.¹⁰ The post-Civil Rights era regime of preferential race-classifications thus originated in part as a crisis-management effort—or, more bluntly described, as a riot-control program, an attempt to quell urban violence by distributing economic outcomes on racial lines.¹¹

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6. Lyndon B. Johnson, “Commencement Address at Howard University: ‘To Fulfill These Rights,’” June 4, 1965, <http://americanrhetoric.com/speeches/lbjhowarduniversitycommencement.htm> (accessed July 24, 2019).
 7. Young, *To Be Equal*, pp. 25–26, 53, and 89.
 8. Daniel P. Moynihan, “The Negro Family: The Case for National Action,” in Lee Rainwater and William L. Yancey, eds., *The Moynihan Report and the Politics of Controversy* (Cambridge: MIT Press, 1967), pp. 43 and 49.
 9. Stephan and Abigail Thernstrom, *America in Black and White: One Nation, Indivisible* (New York: Simon & Schuster, 1997), pp. 158–166.
 10. See U.S. Justice Department, *Report of the National Advisory Commission on Civil Disorders* (better known as the Kerner Commission Report), 1968, <https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf> (accessed July 24, 2019).
 11. John D. Skrentny, *The Ironies of Affirmative Action* (Chicago: University of Chicago Press, 1996), pp. 14 and 67–110; John D. Skrentny, *The Minority-Rights Revolution* (Cambridge: Belknap Press, 2002), pp. 88 and 141–147; and Randall Kennedy, *For Discrimination: Race, Affirmative Action, and the Law* (New York: Pantheon Press, 2013), pp. 46–47.

Remedial Race-Classifications as Bureaucratic Initiatives. Modern race-preference policies emerged only partly as *ad hoc* reactions to emergency circumstances. The idea began to germinate by more deliberate designs in university admissions in the mid-1960s,¹² but the more powerful initial force in institutionalizing them was the Equal Employment Opportunity Commission (EEOC), in an act of bureaucratic improvisation. The EEOC, created by the Civil Rights Act as its enforcement agency, is empowered to receive and investigate complaints alleging workplace discrimination based on race, color, religion, sex, or national origin, and upon finding evidence of such discrimination, to use various methods to obtain “voluntary compliance” with the law. In cases wherein no such compliance could be obtained, the law authorizes aggrieved individuals or EEOC officials to file civil actions in federal district courts.

A controversy over the law’s meaning emerged shortly after its enactment, focusing on Section 703j. The language therein specifically forecloses any interpretation of the law, by the EEOC or by federal judges, as requiring employers or labor unions to grant “preferential treatment” to any individual or group in an attempt to achieve a numerical or proportional balance among employees or members, as identified by their particular race, color, religion, sex, or national origin.¹³ The law further provides that courts may render a judgment of unlawful discrimination and order a remedy only pursuant to finding that a given “respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint.”¹⁴

The key word in that provision is *intentionally*. The Civil Rights Act of 1964 as originally enacted prohibits only actions in which a party subject to the law knowingly and purposely discriminates based on the classifications specified. It provides accordingly that numerical disparities in employment-related outcomes do not suffice by themselves to substantiate a charge of unlawful discrimination.

The EEOC was initially understaffed and underfunded to handle the volume of complaints submitted to it. In the minds of agency officials, however, the backlog of cases was symptomatic of a deeper defect in the law itself. The root of their struggles to resolve cases satisfactorily, they

12. Kennedy, *For Discrimination*, p. 40.

13. The text of the law forbids preferential treatment based on any finding of “an imbalance which may exist with respect to the total number or percentage of [employees or union members] of any race, color, religion, sex, or national origin...in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin...in the available work force” in a given community. Civil Rights Act of 1964, Title VII, § 703j, https://www.eeoc.gov/eeoc/history/35th/thelaw/civil_rights_act.html (accessed July 24, 2019).

14. *Ibid.*, §§ 703, 705, and 706.

believed, was that intentional discrimination would be exceedingly difficult to prove, because its practitioners would be ordinarily clever enough to disguise their discriminatory intentions behind professions of fidelity to neutral standards. The more effective way to identify discrimination, on this reasoning, was to infer it from the *effects* of a given policy or practice—from precisely the numerical group-outcome disparities or imbalances whose use as identifiers of unlawful discrimination the law expressly foreclosed.

Desiring to enhance the agency’s effectiveness, EEOC officials came therefore to reject the enforcement model expressly provided by the law and set about to change it—not by persuading Congress to rewrite Title VII, but instead by their own administrative fiat. They reinterpreted the Civil Rights Act to accord with their ideas about efficacy, even though that meant disregarding the explicit intentions and public promises of the law’s framers. A few years later, the agency’s reinterpretation was upheld by the U.S. Supreme Court in *Griggs v. Duke Power Co.* In this way, the law Congress had enacted as a landmark anti-discrimination measure came to function as something approaching a mandate for the use of race- or color-classifications in pursuance of race-balancing in America’s workplaces.¹⁵

The Status of Race-Classifications in Law. In the *Griggs* case, the Court held that, the express language of Title VII notwithstanding, neither the facial neutrality of the policy nor the absence of any evident intention to discriminate could establish the company’s compliance with the law: “Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.” It thereby adopted an early version of the “disparate-impact” approach to identifying unlawful discrimination, as the EEOC had urged. In the standard enunciated by the *Griggs* court, whenever a given requisite of employment has a “disparate” or disproportionately negative effect on employment outcomes for any group identified by race, color, religion, sex, or national origin, the practice must be deemed presumptively unlawful, pending a showing by the company that the requirement in question bears a specific relation to job performance.¹⁶

In response to subsequent Supreme Court rulings, Congress amended the Civil Rights Act in 1991 to codify and also to clarify and strengthen the

15. See Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy* (New York: Oxford University Press, 1990), pp. 177–204 and 233–254; Skrentny, *Ironies of Affirmative Action*, pp. 111–144; and Paul D. Moreno, *From Direct Action to Affirmative Action: Fair Employment Law and Policy in America, 1933–1972* (Baton Rouge: Louisiana State University Press, 1997), pp. 199–282.

16. “The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.” *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), at 431–432 (emphasis added).

standard affirmed in *Griggs*.¹⁷ Into the 21st century, the EEOC has continued to employ this approach to identifying unlawful discrimination, and the Obama Administration expanded the application of the disparate-impact approach to a variety of institutional venues beyond the workplace, including school discipline policies, enforcement of the Fair Housing Act of 1968, the imposition of punishments in the criminal justice system, and the regulation of voting rights.¹⁸ The general effect is to create a strong incentive for companies and other institutions to engage in race- or color-balancing in order to pre-empt challenges under the law or other administrative sanctions. In many cases, too—most notoriously in university and admissions hiring policies—institutions voluntarily engage in this practice, again with the permission of the Supreme Court because their leadership is convinced it is the right thing to do.¹⁹ The effect, on either motive, is to negate the color-blindness principle.

As the high court's prompt ratification of the EEOC's revisionist interpretation indicates, arguments were readily available to support the renunciation of color-blindness in the post-Civil Rights era. Two main lines of argument emerged. Post-Civil Rights era critics of color-blindness and defenders of race- or color-classifications typically justify their position on *anti-discrimination* or on *pro-diversity* grounds.

Against Color-Blindness I: Race-Classifications as Anti-Discrimination Measures

Among post-Civil Rights era, anti-racist proponents, preferential classifications by race or color have been justified primarily on anti-discrimination grounds. Proponents argue that they function as correctives of past discrimination and as protections against present or prospective

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17. The Civil Rights Act of 1991 amends section 703 as follows: “[703k1] An unlawful employment practice based on disparate impact is established under this section when (A) a complaining party demonstrates that an employment practice results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practice is *required* by business necessity.” Civil Rights Act of 1991, Public Law No. 102-166 (emphasis added).
 18. On Obama Administration disparate-impact policy on school discipline, see Mary Ann Zehr, “Obama Administration Targets ‘Disparate Impact’ of Discipline,” *Education Week*, October 7, 2010, https://www.edweek.org/ew/articles/2010/10/07/07disparate_ep.h30.html (accessed July 24, 2019); on housing policy, Athena Jones, “Obama Administration Announces New Fair Housing Rules,” CNN, July 8, 2015, <https://www.cnn.com/2015/07/08/politics/fair-housing-rules-obama-administration/index.html>; (accessed July 24, 2019); on criminal justice, Roger Clegg, “Disparate Impact and Criminal Justice,” Center for Equal Opportunity, March 22, 2016, <http://ceousa.org/issues/other-issues/disperate-impact/990-disperate-impact-and-criminal-justice> (accessed July 24, 2019); and on voting rights regulations, Hans von Spakovsky and Roger Clegg, “‘Disparate Impact’ and Section 2 of the Voting Rights Act,” Heritage Foundation *Legal Memorandum* No. 119, March 17, 2014, <https://www.heritage.org/election-integrity/report/disperate-impact-and-section-2-the-voting-rights-act>.
 19. See *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003); and *Fisher v. University of Texas at Austin*, 579 U.S. ____ (2016).

discrimination. Proponents argue further that such classifications are not only *just* but also *necessary*—meaning that they are not only permissible but distinctively effective in the achievement of their intended objectives, and thus that alternative, race-neutral measures are or would be unacceptably less effective in the pursuance of those objectives.

Preferential Race-Classifications Are Just. In its basic, essential meaning, justice consists in rendering to all persons what is their due. Distributive justice consists in rendering to all according to their respective merits, and reparative justice consists in rendering to wrongdoers and their victims what is required to reverse the gains and losses that accrue from injurious actions. At this general level, these ideas are well settled in American and western traditions of law and political philosophy.²⁰

To affirm the justice of race- or color-classifications as anti-discrimination measures, proponents make the following claims:

- That black Americans as a class (principally, along with selected other racial minorities) qualify as victims of race-specific injustice;
- That race-specific injustice has damaged victims in the past and continues to damage victims in the present;
- That the pertinent damages are susceptible to meaningful repair; and
- That preferential race-classifications are the proper means for achieving the requisite protection and repair.

In the case of black Americans, no extended demonstration of the claim of historical victimization is required. The injustice of slavery as practiced in America from the 17th century through the mid-19th century is virtually self-evident—“if slavery is not wrong,” Abraham Lincoln tersely remarked, “nothing is wrong”²¹—and was acknowledged by large numbers of whites from the Revolutionary Era onward. Likewise, post-Civil Rights era Americans are almost unanimous in recognizing the injustice of the late 19th- and

20. For a sampling, see Aristotle, *Nicomachean Ethics*, Joe Sachs, ed. and trans. (Newburyport, MA: Focus Publishing, 2002), pp. 81–86 (1130b30–1132a11); John Locke, *Two Treatises of Government*, Lee Ward, ed. (Indianapolis: Hackett Publishing Co., 2016), (II.10) pp. 125–126 (also II.11, 125, 131, 182–183, pp. 126, 187, 189, and 219–220); William Blackstone, *Commentaries on the Laws of England* (publisher date), Book 3, Chapter 8; and James Wilson, *Lectures on Law* Part 3, Chapter 1, in Kermit L. Hall and Mark David Hall, eds., *Collected Works of James Wilson* (Indianapolis: Liberty Fund, 2007), vol. 2, p. 248.

21. Abraham Lincoln, “Letter to Albert G. Hodges,” April 4, 1864, in Richard N. Current, ed., *The Political Thought of Abraham Lincoln* (Indianapolis: Bobbs-Merrill, 1967), pp. 297–298.

20th-century regime of racial segregation and subordination known as “Jim Crow.” Moreover, a crucial premise of the argument for race-classifications is that the victims of those injustices include not only some or many but *all* African Americans. In his influential dissenting opinion in *Regents of University of California v. Bakke*, Justice Thurgood Marshall contended, “It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact.”²²

Another key element of the argument is that race-specific injustice is not only wrong but also *harmful*, and, in fact, has wrought profound and substantial damages. In the most famous iteration of this claim, King declared in his “I Have a Dream” speech, “one hundred years [after emancipation], the life of the Negro is still sadly crippled”—not simply confined but actually *crippled*—“by the manacles of segregation and the chains of discrimination.”²³ King made that claim in 1963, but over a half-century later, proponents of race-classifications continue to hold that the effects of racial injustice are not confined to the past. Racism, in the common refrain, remains alive and well. In one variant of this claim, racism is “cumulative,” such that past injustices have created an accumulation of white advantages and black disadvantages in material and social capital, leaving many blacks to this day mired in poverty and exclusion.²⁴ In another variant, race-specific injustice remains an active force in the present, perpetrated by individuals as well as by institutions, intentionally as well as incidentally. In either case, evidence of the damages wrought by racial injustice appears in disparities in the incidence of various socioeconomic goods and ills among racial groups.

These various claims converge in an extension of the disparate-impact model adopted by the EEOC. Recounting aggregate black deficits in such goods as wealth, income, employment, occupational status, educational attainment, and various others, newly prominent scholar Ibram X. Kendi contends, “when you truly believe that the racial groups are equal, then you also believe that racial disparities must be the result of racial

22. *Regents of University of California v. Bakke* 438 U.S. 265 (1978), at 400 (Marshall, J., dissenting). See also Bernard Boxill, *Blacks and Social Justice* (Lanham, MD: Rowman & Littlefield, 1992), pp. 150–152 and 159.

23. King, “I Have A Dream.” See also Johnson, “To Fulfill These Rights” (referring to blacks as “for years...hobbled by chains”). Compare Tim Wise, *Color-Blind: The Rise of Post-Racial Politics and the Retreat from Racial Equity* (San Francisco: City Light Publishers, 2010), p. 20.

24. Michael K. Brown et al., *Whitewashing Race: The Myth of a Color-Blind Society* (Berkeley: University of California Press, 2003), pp. 21–26; Bernard Boxill, *Blacks and Social Justice* (Lanham, MD: Rowman & Littlefield, 1992), p. 36; Carol A. Horton, *Race and the Making of American Liberalism* (New York: Oxford University Press, 2005), pp. 15 and 33–34; and Kennedy, *For Discrimination*, pp. 11 and 84.

discrimination.”²⁵ The implication of this reasoning is that such disparities are not only the *result* of racism, they are actually *constitutive* of racism. The minimum condition of a just society, in this view, is that no historically disfavored racial group would suffer *any* aggregate disadvantage in the incidences of the main goods and ills whereby we measure socioeconomic well-being. The ultimate expectation is that those goods and ills would be distributed among racial groups in rough proportion to their percentages of the societal population.

If racism is conceived in practical terms as a maldistribution of socioeconomic goods and ills, then its remedy must be conceived in terms of redistribution, not only of opportunities but also of outcomes. The proper function of preferential race-classifications would then be to effect the desired redistributions. This general objective was what King—who, despite his famous elevation of character over color in the “Dream” speech, did not categorically oppose remedial race-classifications—had in mind when he wrote in 1967, “a society that has done something special *against* the Negro for hundreds of years must now do something special *for* him.”²⁶

Moreover, conceiving of the damages in largely material terms, supporters of racially redistributive, reparative measures express a remarkably strong faith in the efficacy of such measures. King contended that the enactment of his proposed package of anti-poverty measures would “immediately transform the conditions of Negro life,” yielding massive “decline[s] in school dropouts, family breakups, crime rates, illegitimacy, swollen relief rolls and other social evils.”²⁷ Kendi harbors a similar faith: “Lawmakers have the power today to stamp out racial discrimination, to create racial ‘equality as a fact’...if they want to.”²⁸

In sum, according to the foregoing arguments, governmental use of race-classifications is just, when they are reasonably designed to combat racial discrimination or to remediate a condition of systemic, race-specific subordination. What justice permits, however, is not the same as what

25. Ibram X. Kendi, *Stamped from the Beginning: The Definitive History of Racist Ideas in America* (NY: Nation Books, 2016), pp. 1 and 11. Compare with Brown et al., *Whitewashing Race*, pp. 227 and 242. On the EEOC’s supposition, see Skrentny, *Ironies of Affirmative Action*, p. 15.

26. King, *Where Do We Go From Here?* p. 95; compare with Young, *To Be Equal*, p. 247. See also Martin Luther King, Jr., *Why We Can’t Wait* (New York: Signet Books, 1964), p. 134. King’s statements of provisional approval for remedial race preferences complicate—but do not negate—his famous affirmations of color-blindness. Although King’s exact, settled position with respect to remedial, temporary race preferences is difficult to discern, he never renounced the idea that the ultimate objective of race-related reforms must be the achievement of a color-blind society. In 1967, during the most radical phase of his career, King sent Thurgood Marshall a congratulatory telegram on his appointment to the U.S. Supreme Court: “Your appointment,” wrote King, “represents a momentous step toward a color-blind society.” See “Anniversary of the Confirmation of Thurgood Marshall to SCOTUS,” *Edge of Law*, <http://edgeoflaw.blogspot.com/2013/08/> (accessed July 27, 2019) (emphasis in original).

27. King, *Why We Can’t Wait*, pp. 137–138.

28. Kendi, *Stamped from the Beginning*, p. 508.

justice requires. Proponents of preferential race-classifications argue that such measures are not only permissible on grounds of justice, but also necessary to the achievement of their proper ends.

Preferential Race-Classifications Are Necessary. To say race preferences are necessary is to say they are distinctively effective as means to anti-discrimination ends. Proponents thus contend, first, that alternative, color-blind, or race-neutral measures are inadequate to the purpose, and second, that race-specific measures have proved successful in equalizing opportunities and outcomes across racial lines.

To proponents of race-specific remedies, the insistence on color-blind law and policy operates as a disability, even as a form of obstruction of justice. Color-blindness, former NAACP Chairman Julian Bond has charged, signifies “blind[ness] to the consequences of being the wrong color in America today.”²⁹ It signifies obtuseness to the continuing power of racial discrimination and, to the extent such injustice is recognized at all, weakness in addressing it.³⁰ Calls for color-blindness amount, in this view, to complicity in the perpetuation of racism—hence to racism itself. In his influential text *Racism Without Racists* (originally published in 2003 and now in its fifth edition), sociologist Eduardo Bonilla-Silva declares, “Color-blind racism [is] the dominant racial ideology” in present-day America. This new variant “otherizes softly” in comparison to its predecessors, he contends, but it operates to similar effect as “a formidable political tool for the maintenance of the [still iniquitous] racial order.”³¹ In the past couple of decades, the notion of a regime of “color-blind racism,” sometimes referred to as “laissez-faire racism,” has become a core idea for those on the anti-racist left.³²

On the affirmative side of the argument, among proponents’ most confident claims in support of race-specific remedies is the simple insistence they work—meaning that those policies produce enhanced socioeconomic outcomes for targeted beneficiary groups. “For all its imperfections,”

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29. Quoted in Wise, *Color-Blind*, p. 63. Compare with Kennedy, *For Discrimination*, p. 181: “[I]t is odd that so many have staked so much on a figure of speech that celebrates a disability.” See also Ian Haney-Lopez, *Dog-Whistle Politics: How Coded Racial Appeals Have Reinvented Racism and Wrecked the Middle Class* (New York: Oxford University Press, 2014), p. 10, and Kendi, *Stamped from the Beginning*, p. 467.
30. *Ibid.*, p. 17, and Kennedy, *For Discrimination*, pp. 91–92.
31. Eduardo Bonilla-Silva, *Racism Without Racists: Color-Blind Racism and the Persistence of Racial Inequality in America* (Lanham, MD: Rowman & Littlefield, 2018), p. 3.
32. See, e.g., Leslie Carr, *Color-Blind Racism* (Thousand Oaks, CA: Sage Publications, 1997); Lawrence Bobo, J. R. Kluegel, and J. R. Smith, “Laissez-Faire Racism: The Chrystallization of a Kinder, Gentler Anti-Black Ideology,” in S. A. Tuch and J. K. Martin, eds., *Racial Attitudes in the 1990s: Continuity and Change* (Westport, CT: Greenview Press, 1997); Brown et al., *Whitewashing Race*, p. 12; Manning Marable, *Living Black History: How Reimagining the African-American Past Can Remake America's Racial Future* (New York: Basic Civitas, 2006), pp. xix–xx, 47, and 193; Wise, *Color-Blind*, p. 24; Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Color-Blindness* (New York: The New Press, 2010), pp. 47–48; and Kendi, *Stamped from the Beginning*, p. 486.

Harvard sociologist Orlando Patterson asserts, “affirmative action...has been the single most important factor accounting for the rise of a significant Afro-American middle class.”³³ In defense of colleges’ and universities’ racially and ethnically preferential admissions policies, William G. Bowen and Derek Bok (Ivy League university presidents at the time of their writing) claim that by significantly broadening access to elite institutions in particular, those policies have played a crucial role in enlarging the leadership classes of black and Hispanic professionals—an effect, the authors believe, that promises in turn to elevate the educational and career prospects of beneficiaries’ offspring.³⁴

Against Color-Blindness II: Race-Classifications as Pro-Diversity Measures

For many proponents, the anti-discrimination imperative supplies the strongest justification for preferential race- or color-classifications.³⁵ Yet a second justification, even more widely invoked at present, holds a depth of its own and also sheds important light on the logic embedded in the anti-discrimination justification. This is the claim that race- or color-classifications are justified as means to promote diversity in major societal institutions.

The pro-diversity position as applied to race-classifications is a particular variant of the general idea that the major institutions of a given community should mirror the community’s population in the representation of various group constituencies. Diversity thus conceived is defended both on instrumental grounds and as a right or a good in itself.

The more mainstream justifications focus on diversity’s beneficial effects. The claim, in brief, is that institutions function better—commercial enterprises make better business decisions and provide better customer or client relations, military and law-enforcement agencies are accorded greater legitimacy, schools and universities provide better teaching and learning—so far as the diversity in their internal populations reflects that in the surrounding communities. This is the general claim that prevailed in *Regents v. Bakke* and, as a result, became broadly influential in the subsequent decades. “The interest of diversity is compelling in the context of a university’s admissions program,” Justice Lewis Powell wrote in his

33. Orlando Patterson, *The Ordeal of Integration* (New York: Basic Civitas Books, 1997), p. 147.

34. Derek Bok and William Bowen, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (Princeton: Princeton University Press, 1998), Chapters 3–6.

35. Kennedy, *For Discrimination*, pp. 78–79. Compare Andrew Hacker, *Two Nations: Black and White, Separate, Hostile, Unequal* (New York: Charles Scribner’s Sons, 1992), p. 219, and Boxill, *Blacks and Social Justice*, pp. 147–172.

plurality opinion for the *Bakke* court, because “an otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body.”³⁶ The breadth of subsequent endorsement of this argument, within and outside the academy, is abundantly attested to in the roster of amicus briefs filed by 69 major groups or organizations in the successor case, *Grutter v. Bollinger*, to support the University of Michigan’s use of racial and ethnic classifications to diversify the student body in its law school.³⁷

Although the Supreme Court played the major part in ushering the diversity argument into the American mainstream, the lineage of the argument is older and deeper than Justice Powell’s opinion in *Bakke*. It appears at the intersection of traditions of black nationalism in American political thought and multiculturalism in progressive liberal thought. Foundational to both traditions is the reasoning that one’s particular cultural identity is an essential constituent of one’s self; that the affirmation of cultural identity is a requisite of moral and psychological health; and that positive external, societal recognition is necessary to the proper cultivation and preservation of cultural identity. The implication, at least in modern, heterogeneous societies, is a conception of a just society as a federation of cultural identity groups, committed to respecting members’ rights to the affirmative recognition of their respective cultural identities and thus to the representation of the diversity of cultural identity groups in society’s major institutions.³⁸

On its face, the diversity justification for preferential race-classifications contrasts sharply with the anti-discrimination justification. To justify such classifications on anti-discrimination grounds is to approve of them only so far as necessary to correct a social evil—thus as necessary and presumably temporary evils themselves. By contrast, to justify such classifications on pro-diversity grounds is to regard them as promoting positive societal goods, redounding to the benefit of all, and presumably justified in perpetuity.

36. *Regents of University of California v. Bakke*, at 314.

37. Amicus supporters of the university include numerous elite universities, the Association of American Law Schools, the American Bar Association, the Association of American Medical Colleges, the AFL-CIO, and 65 major American corporations. A full list of parties filing amicus briefs in the case appears at “U.S. Supreme Court Docket,” Findlaw, https://supreme.findlaw.com/supreme_court/docket/2002/april.html#02-241 (accessed July 27, 2019).

38. For representative statements in the American black nationalist tradition, see W. E. B. Du Bois, “The Conservation of Races,” in David Levering Lewis, ed., *W. E. B. Du Bois: A Reader* (New York: Henry Holt and Company, 1995), pp. 20–27; W. E. B. Du Bois, *The Souls of Black Folk* (Toronto: Dover Publications, 1994); Carter G. Woodson, *The Mis-Education of the Negro* (Mineola, NY: Dover Publications, 2005); Malcolm X, “The Ballot or the Bullet,” in Herbert J. Storing, ed., *What Country Have I? Political Writings by Black Americans* (New York: St. Martin’s Press, 1970), pp. 145–163; and Stokely Carmichael and Charles Hamilton, *Black Power: The Politics of Liberation in America* (New York: Random House, 1967). For representative statements in the progressive liberal tradition, see Horace Kallen, *Culture and Democracy in the United States* (New York: Arno Press, 1970); Charles Taylor, “The Politics of Recognition,” in Amy Gutmann, ed., *Multiculturalism and the Politics of Recognition: An Essay With Commentary* (Princeton: Princeton University Press, 1992); and Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995).

In fact, however, mainstream proponents of race preferences on both justifications have presented them as temporary measures. In a 1995 speech defending such preferences under the heading of “affirmative action,” President Bill Clinton proclaimed, “as soon as a program has succeeded, it must be retired.... [A]ffirmative action should not go on forever.”³⁹ Supreme Court justices sympathetic to the policy have concurred. “I yield to no one,” declared Justice Harry Blackmun in *Bakke*, “in my earnest hope that the time will come when an ‘affirmative action’ program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade, at the most.”⁴⁰ Mainstream scholars have made similar representations.⁴¹

Even amid her opinion affirming a compelling state interest in diversity in higher education, Justice Sandra Day O’Connor, writing for the Court in *Grutter*, stipulated that universities’ “race-conscious admissions policies must be limited in time.... We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”⁴² Assessing this position, a commentator understandably remarks, “if diversity itself is a compelling interest, then one wonders why there is a time limitation.”⁴³ The answer, once again, is that mainstream proponents of preferential race-classifications, whether on anti-discrimination or on pro-diversity grounds, share the supposition that in a fully free and just society, all groups would be proportionately represented. Disparities and disproportions, they claim, are aberrations to be corrected by special governmental efforts; equal, proportional representation is the norm.

Their faith that proportional representation is the natural outcome of the operation of a free society enables mainstream proponents to profess support for color-blindness as the regulating principle of a *future* America—once the employment of race-classifications in the meantime has succeeded in cleansing the country of its racism. Justice Marshall (in an overstatement) affirmed in a 1987 speech: “I believe all of the participants in the current debate about affirmative action agree that the ultimate goal

39. William J. Clinton, “Speech on Affirmative Action,” July 19, 1995, <https://www.washingtonpost.com/wp-srv/politics/special/affirm/docs/clintonspeech.htm> (accessed July 27, 2019).

40. *Regents of University of California v. Bakke*, at 403 (Blackmun, J., concurring in part and dissenting in part). Compare with *Grutter v. Bollinger* 539 U.S. 306 (2003), at 344 (Ginsburg, J., concurring). See also *Adarand Constructors v. Peña* 515 U.S. 200 (1995), at 270 (Souter, J., dissenting).

41. For example, see Patterson, *Ordeal of Integration*, pp. 163–164 and 191–192, and Amy Gutmann, “Responding to Racial Injustice,” in Kwame Anthony Appiah and Amy L. Gutmann, *Color-Conscious: The Political Morality of Race* (Princeton: Princeton University Press, 1996), p. 133.

42. *Grutter v. Bollinger* 539 U.S. 306 (2003), at 342–343.

43. Alfred L. Brophy, *Reparations: Pro and Con* (New York: Oxford University Press, 2006), p. 61.

is the creation of a colorblind society.”⁴⁴ Amy Gutmann, president of the University of Pennsylvania, adds, “What’s right about color consciousness flows...from the truth in color blindness. The fundamental principle of justice as fairness is color blind,” so long as color-blindness is understood as an ideal, not as an inflexible constraint on law and policy.⁴⁵

In this way arguments for preferential race-classifications, as fashioned by their mainstream proponents, are clothed in moderation. They are said to accord with the country’s first principles, signifying only more nuanced and reasonable variants of color-blindness than the inflexible and retrograde position maintained by the adversaries of such classifications.

Much depends, then, on the viability of the claim that preferential race-classifications can, in fact, prove temporary. Let us consider the counterarguments.

Against Race Preferences: A Summary View

The case for color-blindness begins with the case against race preferences. Contrary to the claims that post-Civil Rights era race preferences are just, necessary, and beneficial, the stronger position in the controversy holds that such preferences are unjust, unnecessary, and pernicious. A brief review of now-familiar objections will prepare a fuller consideration of the fundamental difficulty in the arguments for race preferences.

Race Preferences Are Unjust. According to one common line of objection, race preferences as they have been designed in the post-Civil Rights era do injustice in two closely interrelated ways: They extend benefits to parties who are neither properly classified as victims nor otherwise deserving of special dispensations, and they impose the costs of those benefits on innocent parties. In the summary charge leveled by political scientist Russell Nieli, the recent regime of race preferences operates by the illogical inference that “because of the discrimination in the past against person A, which worked to the unmerited benefit of person B, it is now necessary to give special preference to person C at the expense of person D.”⁴⁶

This argument exposes serious weaknesses in the case for the justice of post-Civil Rights era race preferences, but it must be employed with care. Against the prevailing regime of race preferences, it does not suffice to

44. Thurgood Marshall, “A Colorblind Society Remains an Aspiration,” August 15, 1987, <http://teachingamericanhistory.org/library/document/a-colorblind-society-remains-an-aspiration/> (accessed July 27, 2019).

45. Gutmann, “Responding to Racial Injustice,” pp. 173 and 109. Compare with Carr, “Color-Blind” Racism, p. x.

46. Russell Nieli, *Wounds That Will Not Heal: Affirmative Action and Our Continuing Racial Divide* (New York: Encounter Books, 2012), p. 67.

contend that present-day Americans are not responsible for the pertinent historical injustices. Granting that all or virtually all present-day Americans bear no direct, personal responsibility for any such injustice, proponents of remedial race preferences may reasonably respond that because a nation is a corporate person with an identity extending across generations, the present generation is nonetheless responsible for paying the debts of the past. This logic applies to moral debts just as to fiscal debts: If the nation as a whole was culpable for the crimes of slavery and segregation, the nation as a whole is responsible for repairing them.

Instead of protesting that the present generation bears no responsibility for the wrongdoing of the past, opponents of race preferences would do better to observe that the attribution of national responsibility brings to light the *injustice*, not the justice, of race preferences as presently practiced. If race-based injustice counts as a national crime, then the costs of reparative measures should be borne by *all* Americans, not by the non-elite whites or Asian Americans who actually do bear most of the costs of those measures.

Proponents of race preferences might retort with a variant of the claim of “white privilege.” In this variant of the claim, present members of the white or non-black majority, though they may not be direct perpetrators, are beneficiaries of the anti-black crimes of the past—possessors of ill-gotten gains—and justice requires that they pay the costs of repairing those crimes. This more refined claim fails, too, as a justification of racially targeted reparative measures.

The main difficulty in the claim that members of historically disfavored groups are victims of cumulative racism and thus eligible beneficiaries of remedial race preferences is that the claim rests on an overgeneralized and oversimplified assumption. The assumption is that cumulative racism is manifested in socioeconomic disparities between a majority privileged by racism and the minority groups victimized by it—that all socioeconomic disparities that operate to the disadvantage of disfavored racial groups are assignable to racial discrimination.

In fact, however, among the members of historically disfavored groups, the pertinent disadvantages are very unequally distributed, just as the pertinent advantages are unequally distributed among members of the historically favored majority. Whereas a substantial minority of African Americans remain mired in deep poverty, unprecedented numbers now classify as members of the socioeconomic elite,⁴⁷ and conversely, incidences

47. Thomas Sowell, *Civil Rights: Rhetoric or Reality?* (New York: William Morrow and Company, 1984), pp. 77–82; Eugene Robinson, *Disintegration: The Splintering of Black America* (New York: Random House, 2010); and Boxill, *Blacks and Social Justice*, pp. 151 and 159.

of poverty and social misery are lately rising among working-class whites.⁴⁸ The implication is that remedial policies are misconceived, at once under-inclusive and overinclusive, so far as they are focused on race.

The fact that socioeconomic disadvantages are unequally distributed might mean that racism itself is unequally distributed, touching some and missing others. If so, then one's status as a victim, rather than one's racial identity, would be the proper basis of classification for remedial policies. Alternatively, the unequal distribution of disadvantages might mean that racism touches all members of disfavored groups but has materially damaging effects only on some. This would mean either that those relatively undamaged are somehow distinctively resistant to racism or that those more damaged are somehow distinctively susceptible to it, or both. If, however, racism touches all but materially damages only some, then the proper policy response would begin with a rigorous attempt to identify the particular strengths and weaknesses, the sources of distinctive resistance or susceptibility, that should be cultivated or corrected.

In either case, racial preference policies are underinclusive, directing benefits only to members of historically disfavored racial minorities rather than to all sufferers of socioeconomic disadvantage, and they are overinclusive, directing benefits toward undamaged as well as damaged members of those minority groups.⁴⁹ Moreover, by over-racializing their plight, the race preferences regime does a disservice to minority-group underclasses, assigning excessive weight to racism as the exclusive cause and thereby diverting attention from the more proximate causes and effectual remedies of their disadvantaged condition.

Race Preferences Are Unnecessary. To proponents' claims that race preferences are necessary—that they have proved effective as means of socioeconomic advancement for blacks and other disfavored racial minorities, that they have done so at minimal or acceptable cost, and that no race-neutral alternative could achieve equal or greater success—the rebuttal may be simply summarized: None of those claims is true, and all of them are both false and pernicious.

The specific claim that remedial race preferences are largely responsible, even indispensable, for the expansion of the black middle class over the past half-century is untenable. The period in which blacks made their largest and most rapid socioeconomic gains occurred in the decades immediately following World War II (1940s–1960s), prior to the advent of purportedly

48. Charles Murray, *Coming Apart: The State of White America, 1960–2010* (New York: Random House, 2012).

49. See, e.g., Sowell, *Civil Rights*, pp. 50–53; Nieli, *Wounds That Will Not Heal*, p. 20; and Alexander, *The New Jim Crow*, pp. 232–244.

anti-racism race preferences.⁵⁰ The most serious difficulty, however, is not that such preferences merely fail to produce the benefits proponents claim for them, but instead that they do *actual harm*—to their intended beneficiaries, to members of non-beneficiary groups, and to the social fabric of the nation.

A long-standing charge is that race preferences harm targeted beneficiaries by stigmatizing them. “So-called ‘benign’ discrimination,” Justice Clarence Thomas has remarked, “teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence.... These programs stamp minorities with a badge of inferiority.”⁵¹ The secrecy with which institutions tend to enshroud their practice of race preferences tends to corroborate this charge.

An additional difficulty is that even as they raise doubts among others about beneficiaries’ qualifications, such preferences tend to demoralize beneficiaries themselves by diminishing their incentives for competitive excellence.⁵² Moreover, according to the lately much-discussed “mismatch” theory, race preferences in academic admissions place preferred minority students in institutions where they are less likely to succeed, with the result that they actually depress the numbers of beneficiary-group university and professional school graduates, and especially the numbers of graduates with degrees in rigorous disciplines.⁵³ Still further, such preferences tend to stigmatize non-beneficiaries, whites in particular, by their implication that they are presumptive racists, untrustworthy to assess minority candidates fairly, and possessors of ill-gotten gains, undeserving of whatever successes they may have achieved. The inevitable effect is to exacerbate racial resentment and divisiveness.⁵⁴

These charges by themselves would sustain the conclusion that race-preference policies are profoundly harmful. Yet the deepest difficulty with such policies remains to be considered.

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50. Nathan Glazer, *Affirmative Discrimination: Ethnic Inequality and Public Policy* (New York: Basic Books, 1975), pp. 41–43 and 69; Thernstroms, *America in Black and White*, pp. 69–96 and 183–86; Thomas Sowell, *Affirmative Action Around the World* (New Haven: Yale University Press, 2004), pp. 19–21, 119–120, 145–48, 164, and 193–194.
51. *Adarand Constructors v. Peña* 515 U.S. 200 (1995), at 241 (Thomas, J., concurring). See also Sowell, *Affirmative Action Around the World*, p. 164; Nieli, *Wounds That Will Not Heal*, p. 101; and Harvey C. Mansfield, *America’s Constitutional Soul* (Baltimore: Johns Hopkins University Press, 1991), pp. 85 and 87–88.
52. Shelby Steele, *The Content of Our Character: A New Vision of Race in America* (New York: HarperCollins, 1990), pp. 14–15 and 89–90.
53. Richard Sander and Stuart Taylor, *Mismatch: How Affirmative Action Hurts Students It’s Intended to Help, and Why Universities Won’t Admit It* (New York: Basic Books, 2012). See also Sowell, *Affirmative Action Around the World*, pp. 145–148; Nieli, *Wounds Too Deep to Heal*, pp. 135–172, 189–199, and 222–232; and Gail Heriot, “Just Say No to Affirmative Action,” *Academic Questions*, Vol. 24, No. 4 (Winter 2011), pp. 449–466.
54. Sowell, *Affirmative Action Around the World*. See also Nieli, *Wounds That Will Not Heal*, pp. 356–381. Some proponents of color consciousness acknowledge the danger, e.g., Gutmann, “Responding to Racial Injustice,” p. 163.

Against Race Preferences: The Fundamental Issue

As noted above, the anti-discrimination and pro-diversity justifications of race preferences both lay claim to an ultimate consistency with basic American ideals. Proponents of the pro-diversity justification in particular claim for their position a distinctive harmonizing power, enabling Americans of various racial and ethnic identifications to think well of themselves, of each other, and of the nation at large. In contrast to its anti-discrimination counterpart, so runs this argument, the pro-diversity justification is non-accusatory and forward-looking in its focus on present and prospective benefits for all rather than on past or present injuries and obligations. By substituting abstract, gently ambiguous terms such as “underrepresented” for words such as “oppressed” or “victimized,” sociologist John D. Skrentny observes, the diversity rationale for race-preference policies seems to take a “no-fault” approach to governing racial- or ethnic-group relations.⁵⁵ It might seem to be the perfect anti-racism formula, directing benefits to members of historically victimized groups without stigmatizing or dividing.

Any such claim is profoundly misleading. In an early critique, sociologist Nathan Glazer maintained that the adoption of policies that “attach benefits and penalties to individuals simply on the basis of their race, color, and national origin” constitutes an abandonment of “the first principles of a liberal society” and of America’s “founding documents and ideas.”⁵⁶ More guardedly, Patterson also acknowledges, “affirmative action” consisting of race preferences “does conflict with some of the moral presuppositions of American society.”⁵⁷

The most concentrated summary of America’s first principles appears in the first section of the Declaration of Independence. In the Declaration’s summary account of justice, all human beings are created equal; all are endowed by their Creator with certain natural and unalienable rights; the purpose of government is to secure those rights; and just government derives its powers from the consent of the governed. In the Founders’ understanding, human beings possess natural, unalienable rights by virtue of a distinctively human combination of desires (for safety and happiness,

55. Skrentny, *The Ironies of Affirmative Action*, p. 142. See also Peter Wood, *Diversity: The Invention of a Concept* (San Francisco: Encounter Books, 2003), p. 135, and Kennedy, *For Discrimination*, pp. 97–98.

56. Nathan Glazer, *Affirmative Discrimination: Ethnic Inequality and Public Policy* (New York: Basic Books, 1975), pp. 13 and 200. Compare with Ward Connerly, *Creating Equal: My Fight Against Race Preferences* (San Francisco: Encounter Books, 2000), pp. 137 and 154, and Shelby Steele, *Shame: How America’s Past Sins Have Polarized Our Country* (New York: Basic Books, 2015), pp. 3, 109, and 131.

57. Patterson, *The Ordeal of Integration*, p. 158.

including liberty) and faculties (of reason or moral rationality).⁵⁸ In short, the Founders held that human beings have natural, unalienable rights to exercise their faculty of rational liberty in the pursuit of happiness, provided their exercise of those rights obstructs or impairs no other in the exercise of their corresponding rights, and government's primary purpose is to provide impartial protection of those rights.

President Lincoln, in his July 4, 1861, message to Congress, ably stated the essentials of the Founders' position. The Civil War, he explained, was "a struggle for maintaining in the world that form and substance of government whose leading object is to elevate the condition of men; to lift artificial weights from all shoulders; to clear the paths of laudable pursuit for all; to afford all an unfettered start and a fair chance in the race of life."⁵⁹

In Lincoln's and the Founders' natural rights-based conception, the objects of government are necessarily limited in scope: Government is to elevate the condition of its constituents only by lifting (and not itself imposing) artificial weights—by clearing the path for liberty and thus affording all a fair chance to rise by their own efforts and talents. Their account contains no suggestion or supposition that conditions under free government will yield equal outcomes or that government has a duty or right to rebalance outcomes to make them equal. "From the protection of *different and unequal* faculties of acquiring property," James Madison maintained—such protection being "the first object of government"—"the possession of different degrees and kinds of property immediately results."⁶⁰

In the Founders' natural rights argument, that expectation of inequality as an inevitable incident of freedom applies to outcomes among groups no less than among individuals. To begin with, in the Founders' view, it is natural that human beings divide into groups. The Declaration of Independence incorporates a supposition that humankind divides into peoples, with each people entitled by the law of nature to "separate and equal," self-governing sovereignty. That logic of division extends further in *The Federalist* essays, wherein Madison observes that politically sovereign peoples naturally subdivide into domestic factions—"the latent causes of faction are...sewn in the nature of man"—with members of such subgroups bound together variously by property-related interests, by sectarian religious faiths, by partisan

58. For a fuller account, see Peter C. Myers, "From Natural Rights to Human Rights—And Beyond," Heritage Foundation *Special Report* No. 197, December 20, 2017, pp. 4–11, <https://www.heritage.org/progressivism/report/natural-rights-human-rights-and-beyond>.

59. Abraham Lincoln, "Message to Congress in Special Session," July 4, 1861, in Roy P. Basler, ed., *Abraham Lincoln: His Speeches and Writings* (Cambridge: Da Capo Press, 2001), p. 607.

60. James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers*, Clinton Rossiter, ed. (New York: New American Library, 1961), No. 10, p. 78 (emphasis added).

political opinions, or by any of virtually innumerable causes of identity and division, certainly including national origin and racial or ethnic identity.

In this process of division and subdivision, there is no reason to suppose that each or any subgroup would constitute a perfect microcosm of the broader societal population, and thus no reason to suppose the distribution of socioeconomic goods and ills among the members of each subgroup would be proportionally representative of those distributions in society at large. “The idea of an actual representation of all classes of the people,” Alexander Hamilton maintained, “is altogether visionary.”⁶¹ Hamilton referred specifically to the representation of economic classes among elected political officials, but there is no reason to confine the significance of his observation either to groups linked by economic status or interest or to the distribution of political offices.

None of this is to suggest that the Founders or their acolytes thereby committed themselves to any supposition of the natural or categorical inequality of human subgroups relative to one another. As Lincoln pointedly noted, the doctrine of the Declaration contemplates the elevation of “all people of all colors.”⁶² Nor is it to suggest that the Founders’ principles entail indifference to the condition of socially disadvantaged groups or disregard for the duty to repair the damages of injustice so far as possible. The point is only that in the Founders’ vision, not all group disparities in the distributions of socioeconomic goods and ills are assignable to injustice; some are, and some are not. The notion that such group disparities necessarily signify injustice is a notion alien to the natural rights republicanism to which the country was originally dedicated.

The prevailing arguments for race preferences take as their premise precisely that alien notion, and for this reason, their full implementation in practice would indeed effectuate a fundamental transformation. On the premise that socioeconomic disparities in themselves signify injustice, the regime dedicated to the distribution of goods based on the free exercise of natural rights would be replaced by a regime marked by a governmentally enforced distribution and redistribution of goods to racial or ethnic identity groups in proportion to their percentages of the societal population—*in perpetuity*.

The permanence of the race-preferences regime pursuant to this premise is the crucial point. Once again, mainstream proponents of such preferences profess to support them as a temporary policy, even as they hold them to be

61. Ibid., p. 79, and Hamilton, *The Federalist* No. 35, p. 214.

62. Abraham Lincoln, “Speech on the Dred Scott Decision,” June 26, 1857, in *Speeches and Writings*, p. 361.

justified by the presence of disparities in the distribution of socioeconomic goods or in the institutional representation of identity groups. Proponents believe those two claims to be mutually consistent, based on the uncritical supposition that the racially proportional distribution of such goods reflects the natural or spontaneous ordering of things. As critics from the beginning have insisted, that position is incoherent: Preferences cannot be justified by group socioeconomic disparities and also be temporary, because such disparities are inevitably incident to the basic fact of group division.

Disparities among groups are inevitable, for general and specific reasons. The general reason, explained by Thomas Sowell, is that disparities in socioeconomic outcomes would frequently appear, by the mere operation of the law of averages, even among groups who received entirely equal, nondiscriminatory treatment and derived their memberships from purely random samplings of the larger societal populations.⁶³ All the more variance is predictable among real-world groups, whose memberships are not derived randomly and are thus likely to differ from one another in significant, socioeconomically consequential ways.

Suppose, for instance, there are two groups whose memberships differed from one another in variables including members' average ages, regions of residence, degrees and kinds of emphasis placed on education, occupational choices, preferred modes of entertainment, habits of saving and spending, attitudes and practices concerning marriage and family formation, and a host of others. Would not such differences inevitably result in disparities in socioeconomic outcomes between the two groups?

The answer is plainly yes, and the implication is that because socioeconomic disparities among groups do not suffice by themselves to attest to unjust discrimination, the elimination of such discrimination cannot be expected to result in the elimination of the pertinent disparities. Those disparities could only be eliminated by an empirically attentive investigation into their particular causes (including, but not limited to, unjust discrimination), followed by a carefully conceived effort to address *all* their causes. Yet any such comprehensive effort is ruled out by the assumption that the sole cause of the disparities is unjust discrimination. Absent such an effort, the disparities can be expected to persist.

The inescapable result of such thinking is support for race preferences in perpetuity. More broadly stated, the result is that in all policy areas touching racial differences—which means virtually all policy areas—reparative

63. Sowell, *Civil Rights*, pp. 53–60, and Thomas Sowell, *Discrimination and Disparities* (New York: Basic Books, 2018).

justice must become the whole of justice, not merely a part. The purpose of government, rather than the protection of individuals' free exercise of their natural rights, must become the reparative redistribution of socioeconomic goods, based on individuals' group identities rather than their actions or merits, all to the end of securing preordained outcomes, in perpetuity.

That this would constitute a revolution in first principles is clear. That it would be a negative revolution is clear in part from the arguments noted above and also for deeper reasons that now come into view. In its deepest significance, a regime of permanent race preferences would have the effect either of annihilating the very idea of justice as the bond of political society or of effacing our common humanity as an essential element of the idea of justice.

In the pro-diversity justification, the claim that affirmative public recognition of cultural diversity is a moral imperative rests ultimately on the premise that one's particular racial or ethnic culture, rather than one's essential humanity, is the decisive constituent of one's moral identity. As the influential postmodern philosopher Richard Rorty put it, "socialization goes all the way down." In defense of pro-diversity race preferences in academic hiring, Harvard Law Professor Duncan Kennedy likewise contends: "It is not unfair to judge the individual...on the basis of...connection to a cultural community, because the individual cannot be separated from his or her culture... There just isn't work I do or a me you can evaluate...that isn't embedded in culture."⁶⁴ On this premise, all principles of justice and all claims concerning the nature of moral identity are culturally specific and culturally confined, i.e., there are no universal moral principles.

That position is not only contrary to the principles of the Declaration of Independence, it is, at bottom, nihilistic. Against the "race men" of his own day, Frederick Douglass—himself a great apostle of natural rights principles—maintained, "there is no moral or intellectual quality in the color of a man's cuticle," nor in any cultural identity derived from it. There is "no such basis for the claims of justice."⁶⁵ So far as it posits the diversity of racial or ethnic cultural identities as a first principle, the pro-diversity argument for color consciousness becomes self-undermining.

To allow that principle to blot out any moral horizon transcending, and thus supplying a basis for judging the merits of particular group customs

64. Richard Rorty, *Contingency, Irony, and Solidarity* (New York: Cambridge University Press, 1989), pp. xiii and 185, and Duncan Kennedy, "A Cultural-Pluralist Case for Affirmative Action," *Duke Law Journal* (1990), p. 46. See also Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990), pp. 96–121, and T. Alexander Aleinikoff, "The Case for Race-Consciousness," *Columbia Law Review*, Vol. 91 (1991), pp. 1081–1082.

65. Frederick Douglass, "Blessings of Liberty and Education," September 3, 1894, <http://teachingamericanhistory.org/library/document/blessings-of-liberty-and-education/> (accessed July 27, 2019).

and creeds, is to surrender any claim to a rational moral basis for practices of intergroup tolerance or equal recognition. It is to negate *any* rational basis for *any* notion of intergroup justice, including the hopeful visions of intergroup harmony that pro-diversity advocates of race-classifications profess to cherish.⁶⁶ On the disintegrating premise of radical cultural difference, a multiethnic or multiracial society is conceivable only as a federation of rival groups, each with no rational objective in its relations to the others save for its own empowerment.⁶⁷ In the end, the distribution of socioeconomic goods could proceed only in accordance with the sub-moral rule, might makes right.

The result is no better when the case for race preferences rests on the anti-discrimination justification. Consider the further significance of that argument's implication that preferential race-classifications must be supported in perpetuity. For those who support race preferences to the end of eliminating socioeconomic disparities among racial groups, the support for such preferences in perpetuity is an incidental, unintended implication of their position. Among others, however, such support is not merely incidental but instead grounded in a presumption, increasingly explicit on the anti-racism left, of the permanence of racism in America. President Barack Obama himself tacitly conveyed such a presumption with his remark that racism is "part of [America's] DNA."⁶⁸ In either case, Americans would be permanently divided—in effect *naturally* divided—into groups of oppressors and oppressed. In the apt language of Justice Antonin Scalia, we would be divided into creditor and debtor races.⁶⁹ As Scalia noted, such an implication would qualify race preferences as permanent bills of attainder, entailing guilt unto the last generation upon all Americans not officially designated as members of victimized groups. This means that based on its prevailing rationales, the post-Civil Rights era regime of race preferences would signify a rejection of the principle of natural, jural human equality that is indispensable to the moral architecture of republican government.

Defending their position against the most powerful charges directed against it, proponents of the present regime of race preferences insist that with respect to both its moral intentions and its substantial effects, it is

66. Young, for instance, continues to hold the equal moral worth of persons as a fundamental principle (*Justice and the Politics of Difference*, p. 14), but in view of her rejection of universal, transcultural foundational principles, this position appears to be merely arbitrary or willful.

67. See, e.g., Stokely Carmichael and Charles Hamilton, *Black Power: The Politics of Liberation in America* (New York: Vintage Books, 1992), pp. 34–57.

68. Quoted in Michael D. Shear, "Making a Point, Obama Invokes a Painful Slur," *The New York Times*, June 22, 2015, <https://www.nytimes.com/2015/06/23/us/obama-racism-marc-maron-podcast.html> (accessed July 27, 2019). Cf. Derrick A. Bell, *Faces at the Bottom of the Well: The Permanence of Racism* (New York: Basic Books, 1992).

69. *Adarand Constructors, Inc. v. Peña*, at 239 (Scalia, J., dissenting).

separated by a vast gulf from the odious old regime of white supremacy. Of course it is. To concede that point, however, is not at all to affirm that the present regime is founded on sound principles—or that it yields no destructive effects of its own. With its diversionary justifications peeled away and its deeper implications laid bare, the present race-preferences regime signifies the endowment of some groups by birth with claims superior to those of others, in perpetuity. In this crucial respect, it does indeed bear the same resemblance as did slavery to the doctrine of divine-right injustice execrated by America’s revolutionary founders. “It is all,” as Lincoln remarked, “the same old serpent.”⁷⁰

In Support of Color-Blindness

The case for color-blindness requires more than an exposure of the fatal vices in the pro-race preferences position. What remains is to show affirmatively that color-blindness accords with justice and efficacy in addressing the problem of race. This means to show that color-blindness rightly understood is no disability: It permits and, in fact, requires vigilant protection against race- or color-based discrimination, and it also allows for a broad range of plausibly effective means for helping to elevate the socioeconomically disadvantaged.

Color-blindness Rightly Understood. The qualifying phrase, *rightly understood*, warrants emphasis. Many recent critics of color-blindness misconstrue the concept by imposing on it an oversimplified, absurdly literal interpretation. In the main misconception, color-blindness is taken to signify a mandate of rigid, categorical non-cognizance,⁷¹ according to which public authorities are prohibited from taking any notice of race or color, at any time or for any purpose. The result, critics charge, is a principle that is at once too strict and too permissive to function as an anti-racism regulatory principle.

Color-blindness so conceived would not only disable efforts to terminate or to repair race-based injustice, it would even, as in the remark by Julian Bond quoted above, disable the relevant authorities from taking notice of such injustice. It would prohibit all explicit, governmental race-classifications, all official mentions of race or color in law and policy, and even all facially

70. Abraham Lincoln, “Speech of July 10, 1858,” in *Speeches and Writings*, p. 402.

71. For the origin of the non-cognizance principle, see James Madison, “Memorial and Remonstrance Against Religious Assessments,” June 20, 1785, §§ 1, 8, in *The Founders’ Constitution*, Philip B. Kurland and Ralph Lerner, eds., http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html (accessed July 27, 2019).

neutral laws or policies whose authors declared thereby an intention to address race-related issues.⁷² In this conception of the idea, the excessive permissiveness of color-blindness results from its excessive strictness, as the makers and executors of policy are disabled from distinguishing between genuine, good-faith color-blindness and fraudulent, evasive semblances of it. Among historical instances, of paramount importance are the various facially neutral but intentionally and effectively anti-black voter-suppression devices enacted by ex-rebel states to nullify the operation of the Fifteenth Amendment—devices that qualify, in critics' interpretation, as legitimate representations of the color-blindness principle in action.

Beneath recent critics' opposition to color-blindness, conceived in these sweepingly literal terms, lies a legitimate concern: Color-blindness could not stand as a defensible principle if it operated to undermine the achievement of justice or equal rights irrespective of race or color. It is therefore imperative to emphasize that this legitimate concern justifies opposition only to color-blindness misconstrued, not to color-blindness rightly understood.

To think clearly and sensibly about the idea, it is necessary to put aside the prevailing misconstructions. Against the contention that color-blindness in principle entails indifference or obtuseness to race-based injustice stands, first, a consideration accessible to common sense. The objection is implausible on its face for the simple reason that the very idea of color-blindness was conceived in protest against race-based injustice and is unintelligible apart from a monitory consciousness of such injustice.⁷³

A passing familiarity with the history of the idea serves further to substantiate this point. The most famous and influential proponents of color-blindness in U.S. history—a list that includes Frederick Douglass, Charles Sumner, Albion Tourgée, Thurgood Marshall (in the early phase of his career), and (in a more complicated way) Martin Luther King, Jr.—also count, of course, among America's greatest anti-racists. All were fully alert to the distinctions between color-blindness rightly understood and the excessively prohibitive or permissive misconstructions of the idea. All were acutely cognizant of race-based injustice. None were fooled by fraudulent pretensions to color-blindness in law or policy.

72. On information gathering, see Connerly, *Creating Equal*, pp. 171–172. On the non-cognizance principle ruling out even some facially neutral policies, compare *Wallace v. Jaffree* 472 U.S. 38 (1985), in which the Supreme Court applied a variant of Madison's principle, an "endorsement" test, to a case involving silent prayer.

73. Professor Ronald Dworkin observes: The slogan that the Constitution is color-blind "means that the Constitution is so sensitive to color that it makes any institutional racial classification invalid as a matter of law." Ronald Dworkin, "Defunis v. Sweatt," in Marshall Cohen, Thomas Nagel, and Thomas Scanlon, eds., *Equality and Preferential Treatment* (Princeton: Princeton University Press, 1977), pp. 70–71.

To recover a proper understanding of color-blindness, it is necessary first to return to the fundamental principles from which it derives. In the Declaration's account, the fundamental principles are that human beings by nature are equally endowed with certain unalienable rights, and that the purpose of just government is to secure those rights. A direct corollary is that it is wrong for governments to assign to human beings differential rights and duties, or benefits and burdens, based on qualities, such as differences in race or color, that are irrelevant to the possession of rights. That, in sum, is the idea of color-blindness rightly understood.

Thus established on its proper foundation, color-blindness indeed entails a variant of the non-cognizance position, but one construed with reasonable, not inflexible or categorical, strictness. In simple terms, this means that color-blindness must not be construed so strictly or literally as to become self-negating. Under the color-blindness principle rightly understood, public cognizance of race or color is permissible so far, but only so far, as it is necessary or proper to effectuate the color-blindness principle itself, that is, to secure equal rights under law for all citizens. More specifically, for the idea to take effect as a principle of justice, color-blindness entails distinctions among three degrees and kinds of governmental race- or color-cognizance:

1. Race- or color-classification formalized in law or policy, for purposes of distributing or redistributing public benefits or burdens;
2. Race- or color-classification formalized in law or policy, for non-distributive purposes; and
3. Cognizance of race or color by public authorities not involving formalized classification, for non-distributive purposes.

Rightly understood, color-blindness subjects the first of these modes of race- or color-cognizance to a near-absolute prohibition. The latter two are conditionally permissible, when they assist in effectuating the prohibition of the first. Further explanation and examples will clarify these points.

No Distributive Race-Classifications. Because the color of one's pigmentation or one's identification with any particular racial subdivision is irrelevant to one's moral status as a rights-bearing human person, the prohibition of public race- or color-classification for distributive purposes must be virtually absolute. That prohibition must include government-mandated classifications by race or color for purportedly anti-racism purposes in the

post-Civil Rights era, no less than overtly invidious classifications of the type prevalent in earlier decades. Such classifications would be permissible only in circumstances of genuine, *extreme* necessity—circumstances wherein they were needed to avert a mortal danger to national sovereignty, constitutional union, or republican government in the U.S. The rule is similar to the one Lincoln ascribed to the Founders, who tolerated slavery, in his view, only because they judged it necessary to the preservation of constitutional union. It represents a purified version, too, of the “strict scrutiny” rule formulated by the U.S. Supreme Court, holding that preferential race-classifications are permissible only where strictly necessary and only so far as necessary, thus only where they operate as narrowly tailored means to the achievement of a compelling state interest.⁷⁴

As with the color-blindness idea itself, this rule against distributive or redistributive race- or color-classifications is likely to be misconstrued. Let it be clear: The prohibition of those sorts of classifications does not mean that the color-blindness principle forbids *any* measures to prevent or repair acts of race discrimination. It means only that permissible measures to those ends are not properly designed as preferential *race*-classifications. In a properly designed anti-discrimination law or policy, the pertinent classification is not by racial identity or color but instead by one’s status as a victim of unjust discrimination.⁷⁵ The effect is to rule out, as justification for such measures, any claims that assign an *a priori* victim status to all members of a given racial group, irrespective of the particular experiences of group members. Properly conceived anti-racism measures make no claims based on abstractions such as “structural,” “institutional,” or “societal” racism. They are instead designed to address *specific* acts or practices of racial discrimination, intentional or culpably negligent, committed by specific perpetrators against specific victims.

Two familiar examples suffice to demonstrate that the prohibition by the color-blindness principle of formalized, distributive race- or color-classifications is perfectly compatible with the fashioning of effective anti-racism measures.

The Voting Rights Act of 1965 (VRA), proclaimed President Lyndon B. Johnson at the law’s signing ceremony, is “one of the most monumental laws in the entire history of American freedom.”⁷⁶ The law has been credibly

74. It must be emphasized that the rule stipulated here signifies a *purified* version of the Court’s rule. The Court itself has applied its rule very loosely. In the most prominent instance, the claim in *Bakke* and successor cases that educational diversity constitutes a compelling state interest does not accord with the rule that race- or color-classifications are permissible only on grounds of strict necessity.

75. Carl Cohen, *Naked Racial Preference: The Case Against Affirmative Action* (Lanham, MD: Madison Books, 1995), pp. 95–97.

76. Lyndon B. Johnson, “Remarks on the Signing of the Voting Rights Act,” August 6, 1965, <https://millercenter.org/the-presidency/presidential-speeches/august-6-1965-remarks-signing-voting-rights-act> (accessed July 27, 2019).

described as the most effective anti-racism measure in U.S. history,⁷⁷ and it contains no distributive race- or color-classifications. The words “race” and “color” appear in the VRA’s original text only to identify unlawful bases of discrimination in the administration of voting rights, in accordance with the same prohibitions inscribed in the U.S. Constitution’s Fifteenth Amendment. The law’s major enforcement mechanisms are triggered by evidence defined in non-racial, color-blind terms—by suspiciously low registration and turnout among citizens of any race or color who were constitutionally qualified to vote.⁷⁸ Its design and early operation illustrate the abilities of policymakers along with prosecutors, consistent with the color-blindness principle, both to identify culpable states’ intentions to discriminate unjustly and, given that the instruments of disfranchisement made no explicit reference to race, to distinguish fraudulent from genuine professions of color-blindness.

The Civil Liberties Act of 1988 mandated an official acknowledgment of injustices, an official apology for those injustices, and a payment to selected citizens in compensation for the internment of over 100,000 Japanese Americans during World War II and for property losses incurred amid the relocation, under U.S. control, of selected Aleut residents to areas in south-east Alaska.⁷⁹ The law constitutes a reparative measure taken to address what the later Congress judged to be at least one episode of unjust discrimination. This legislation, too, is perfectly compatible with the color-blindness principle’s prohibition of distributive race-classifications (including, as in this case, classifications based on ethnicity or national origin). Although the law provided monetary compensation for selected Japanese and Aleut Americans, it did not employ any impermissible classification because it did not allocate compensation to *all* Japanese or Aleut Americans or to any class of persons defined by their race, color, or national origin. Instead, it assigned culpability to a specific perpetrator, the U.S. government, for specific acts of unjust discrimination or negligence, and it identified those eligible for compensation not by race or national origin but instead by their status as victims or direct descendants of victims.

Color-Blindness and Permissible Race-Cognizance. The foregoing examples do more than demonstrate that effective anti-discrimination measures need not, and therefore must not, employ distributive race- or color-classifications. They also indicate the permissibility in certain instances,

77. Kendi, *Stamped from the Beginning*, p. 391.

78. The Fourteenth Amendment contains a similar provision in section 2, in which denial of the voting right to any male inhabitant over the age of 21 is used as a proxy for preventing race- or color-based discrimination in voting rights.

79. See “Civil Liberties Act of 1988,” <http://digital.lib.usu.edu/cdm/ref/collection/Topaz/id/6370> (accessed July 27, 2019).

under the color-blindness principle, of lesser degrees of governmental race- or color-cognizance. Color-blindness, rightly understood, permits race- or color-cognizance for various non-distributive purposes, in cases in which such cognizance is: (a) forced upon a governmental authority by law or circumstance; or (b) prudentially advisable, as a means for achieving the broader objectives of equality under the law and interracial harmony embedded in the color-blindness principle.

Common sense dictates that to detect, prevent, or correct violations of the color-blindness principle itself, public authorities may be compelled to take cognizance of race or color. A remark by the great advocate of color-blindness Frederick Douglass makes the essential point: “My cause first, midst, last, and always, whether in office or out of office, was and is that of the black man; not because he is black but because he is a man, and a man subjected in this country to peculiar wrongs and hardships.”⁸⁰

Race- or color-cognizance to achieve the objectives of color-blindness can be, in some circumstances, compulsory, when the right kind of such cognizance is required in order to correct the wrong kind. Examples are numerous in the era of overt anti-black race-classifications in U.S. history. In the original instance, vanquished rebel states enacted “Black Codes” in 1865 and 1866, differentiating the rights of “freedmen, free negroes, and mulattoes” from rights held by whites, to which Congress responded by enacting the Civil Rights Act of 1866.

That 1866 law took cognizance of race so far as to declare that “citizens, of every race and color” shall have the same rights “as [are] enjoyed by white citizens.”⁸¹ Further instances appear in judicial rulings including *Strauder v. West Virginia* and *Nixon v. Herndon*, in which state statutes employed explicit race-classifications to disqualify black citizens from serving on juries or voting in Democratic Party primary elections. In those cases, the U.S. Supreme Court was compelled to take cognizance of race for the limited purpose of invalidating the unjust, distributive race-classifications contained in the statutes under review. The proper remedy, as the Court put it in *Strauder*, was color-blind or race-neutral: “[T]he law in the States shall be the same for the black as for the white.”⁸²

80. Frederick Douglass, *Life and Times of Frederick Douglass*, in *Frederick Douglass: Autobiographies* (New York: Library of America, 1994), p. 954.

81. “(1866) Mississippi Black Codes,” <https://www.blackpast.org/african-american-history/1866-mississippi-black-codes/> (accessed July 27, 2019), and “The Civil Rights Act of 1866,” <https://teachingamericanhistory.org/library/document/the-civil-rights-act-of-1866/> (accessed July 27, 2019).

82. *Strauder v. West Virginia*, 100 U.S. 303 (1880), at 307. Compare with *Nixon v. Herndon* 273 U.S. 536 (1927), at 541: “[I]t is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case.” The landmark case *Brown v. Board of Education* also qualifies, of course, as a case in which a discriminatory governmental race-classification compelled judicial race-cognizance for corrective purposes.

A comparable imperative applies in the Voting Rights Act, which repeatedly takes cognizance of “race or color” in order to identify unconstitutional discrimination and thereby to establish the basis for corrective action by Congress. Under the Fifteenth Amendment, Congress is authorized to take such action only pursuant to findings of a denial or abridgment of the voting right “on account of race, color, or previous condition of servitude.”

Here, however, a proponent of a still stricter interpretation of color-blindness might contend that the race- and color-cognizance incorporated into the Fifteenth Amendment was not itself an imperative mandate of the color-blindness principle. In this reasoning, the Framers of the Fifteenth Amendment could have achieved their objective of prohibiting discrimination by race or color, without even the Amendment’s limited form of race-cognizance, by language that simply prohibited *all* arbitrary discrimination relative to voting rights and thus tacitly included discrimination by race or color.

That argument succeeds in showing that the defensive or prohibitive race-cognizance that appears in laws such as the Fifteenth Amendment or in some civil rights statutes is more precisely understood as a dictate of prudence than as a strict imperative of color-blindness. It does not succeed, however, as an argument for a more strictly prohibitive variant of color-blindness, because the prudential case for limited forms of governmental race- or color-cognizance as means for achieving the main objectives of color-blindness is itself very strong.

In the framing of the Fifteenth Amendment, for instance, the effect of issuing only a broad, unspecified prohibition of arbitrary discrimination relative to voting rights would have been to leave to particular courts and congressional majorities the power to make their own judgments as to whether race- or color-discrimination qualifies as arbitrary and impermissible. A merely generalized prohibition of this sort would thus have weakened the rights-protections accorded the freed people and other African Americans, even as it also weakened constitutional states’ powers—the latter, so far as such a prohibition would have enabled a sweeping exercise of judicial review over state-level voting rights legislation and thus reversed the traditional constitutional presumption of the primacy of states’ authority in this area.

Further considerations lend additional force to the prudential case for limited forms of race- or color-cognizance in the U.S. and other racially or ethnically pluralist societies. To one degree or another, a history of unjust discrimination based on race, color, or ethnicity is a common feature of such societies. Where such a history exists, it is natural that memories of

subjection to the injustice in question would linger and perhaps would be conscientiously preserved among the members of historically victimized groups. Likewise, it is natural that for many members of such groups, perceptions of current events would be shaped by those memories, and that they would harbor heightened degrees of wariness and diffidence about the present security of their rights.

In such circumstances, public authorities might reasonably take cognizance of race or color in various ways, consistent with the color-blindness principle. To enhance the sentiment of governmental legitimacy among groups particularly susceptible to alienation and demoralization, public authorities might offer reassurances of governmental vigilance in securing the rights of all members of society. To this end, the specifying, in civil rights legislation, of race and color as prohibited grounds for discrimination would constitute permissible and advisable forms of race-cognizance under the color-blindness principle. In a similar spirit, public officials might take cognizance of race or color for pedagogical, preventive purposes. It would, of course, be foolish to interpret the color-blindness principle to prohibit efforts by elected officials or teachers to educate the public on the justice and virtue of color-blindness.

The same may be said of governmental employment of race- or color-classifications for informational purposes. A significant countervailing concern in this area is that the collection of race- or color-specific data regarding income and wealth, criminality and incarceration, and academic performance and school disciplinary outcomes—lately the most controversial subject areas—can and does supply material for racial demagoguery. Obvious cases in point are the claims propagated by opportunistic politicians and activists concerning endemic racism in the nation's criminal justice system.⁸³

On the other hand, a decision to refrain from collecting such data, as would be mandated by an excessively strict understanding of color-blindness, would surely increase, not diminish, the opportunities for such demagoguery, as it would fuel charges that a racist power structure is concealing evidence of persisting race discrimination. The collection of

83. For example, see Associated Press, "Elizabeth Warren Declares Criminal Justice System 'Racist' from 'Front to Back,'" CBS News, August 4, 2018, <https://www.cbsnews.com/news/elizabeth-warren-declares-criminal-justice-system-racist-from-front-to-back/> (accessed July 27, 2019); Callum Paton, "Kamala Harris Says Slavery Led to Untreated 'Physiological Outcomes,' Supports Reparations as Mental Health Issue," *Newsweek*, March 14, 2019, <https://www.newsweek.com/kamala-harris-slavery-untreated-physiological-outcomes-mental-health-1362870> (accessed July 27, 2019); Kelly Riddell, "Clinton, Sanders Lament 'Systemic Racism' in Criminal Justice," *Washington Times*, February 11, 2016, <https://www.washingtontimes.com/news/2016/feb/11/hillary-clinton-bernie-sanders-lament-systemic-rac/> (accessed July 27, 2019); and Eugene Scott, "Joe Biden's Tough-on-Crime Past Could Haunt Him in 2020," *Washington Post*, January 23, 2019, https://www.washingtonpost.com/politics/2019/01/23/joe-bidens-tough-on-crime-past-could-haunt-him/?noredirect=on&utm_term=.2db0af0dea67 (accessed July 27, 2019).

race- or color-specific data constitutes the only effective means for rebutting irresponsible, racially divisive allegations. Likewise, in its more positive aspect, the collection of such data is an indispensable means for sustaining or elevating morale by substantiating the social, economic, and political progress of members of historically disfavored groups.

Color-Blindness and Socioeconomic Disparities. One last clarification is in order. As is evident to all observers, the post-Civil Rights era is marked by sharp partisan controversies between the anti-racism right and the anti-racism left. Amid the continuing disputes over socioeconomic outcomes and intentionally discriminatory actions, it is helpful to note that the color-blindness principle permits attention via public policy to race-related social ills, irrespective of whether those ills are ascribed to unjust discrimination. It permits attention to conditions of socioeconomic disadvantage suffered predominantly or disproportionately by a given racial group, irrespective of the cause, so long as the proposed remedies are addressed to the conditions of disadvantage rather than to the racial identity of the group that suffers them.

Examples appear in policy proposals made by partisans on the left as well as in proposals from the right. On the left, Martin Luther King, Jr., was convinced of the provisional justice of remedial race preferences, but he was less convinced of the *wisdom* of such policies. King's proposed "Bill of Rights for the Disadvantaged" clearly signifies a race-cognizant remedy—recall his hopeful prediction that it would "immediately transform the conditions of *Negro* life"⁸⁴—but it does not qualify as a distributive race-classification. It was designed to address the problem of poverty in non-racial terms, and, in fact, King held color-blindness to be among its salient virtues: "economic aid...should benefit the disadvantaged of *all* races."⁸⁵

On the right, various policy measures have been conceived or adopted to address a range of social ills (e.g., high rates of violent crime, unemployment, fatherlessness, and school failure) concentrated in specific locales and disproportionately affecting members of specific racial-identity groups. Measures such as disproportionate police presence, tax-relief zones to stimulate local enterprise, the creation of charter schools, various family-formation initiatives, and so forth, are commonly conceived, at least in part, as race-cognizant remedies. Nonetheless, so far as they are framed to focus on the problems and remedies, not on the race or color of those affected by them—so far as they could apply to social ills in rural Appalachia

84. King, *Why We Can't Wait*, pp. 137–138 (emphasis added).

85. King, "Playboy Interview," 1965, in *A Testament of Hope*, p. 367 (emphasis in original).

as well as to those in South Side Chicago—they are in perfect accord with the color-blindness principle.

Finally, it should be clear that the point of this argument for color-blindness is not to endorse the soundness of a given law or policy solely by virtue of its conformity with the color-blindness principle. Some color-blind measures would make good public policy, and some would not. The point is only to refute the charge that color-blindness signifies blindness and inactivity with respect to race-related injustices or social ills—“laissez-faire racism.” As racially motivated injustices have often been clothed in color-blind or race-neutral terms, so, too, race-cognizant remedies can be framed in color-blind terms. The color-blindness principle is flexible enough to detect and prohibit the former and to sustain the latter.

Conclusion

The advent of a regime of preferential race-classifications in the fevered circumstances of the late 1960s is understandable. So, too, is the subsequent emergence of a polemical critique of the principle of color-blindness. The foregoing discussion has shown, however, that the post-Civil Rights era adoption of a regime informed by ideas of racial identity and racial preference rather than by color-blindness is fraught with peril for race relations, in particular, and for the larger cause of republican government in America.

Proponents of purportedly remedial and salutary race preferences, serving also as purveyors of racial identity politics, would do well to consider some fundamentally challenging questions: In a society harboring two or more racial groups, has the idea of race ever been what W. E. B. Du Bois called it, a “unifying ideal,” let alone “the vastest and most ingenious invention of human progress”?⁸⁶ Has government in any such society ever been a constructive promoter of race consciousness? Has purposely heightened race consciousness ever acted to deepen a people’s consciousness of common humanity?

Did not Frederick Douglass chart a wiser course in his valedictory speech, when he denounced “the talk now so generally prevailing about races and race lines?” Douglass called such talk an effort “to cast out Satan by Beelzebub,” and therefore rejected all efforts “to draw lines between the white and the black...or to draw race lines any where in the domain of liberty.”⁸⁷

86. Du Bois, “Of Our Spiritual Strivings,” and “The Conservation of Races,” in *Du Bois: A Reader*, pp. 33 and 21.

87. Frederick Douglass, “Blessings of Liberty and Education,” September 3, 1894, <http://teachingamericanhistory.org/library/document/blessings-of-liberty-and-education/> (accessed July 27, 2019).

In post–Civil Rights era America, the adoption of the disparate-impact model of racial discrimination, partnered with the *a priori* identification of all members of racialized minority groups as victims, may have avoided the difficulties of demonstrating particular and intentional discrimination. That questionable benefit, however, has come at the great cost of exacerbating division and demoralization, of discouraging a full, honest assessment of the causes of persisting racial inequalities, and worst of all, of discrediting the principles upon which genuine reform in America’s race relations has always depended.

Understandable as it may be, the turn to purportedly benign race preferences marks a deeply unfortunate detour in the nation’s progress toward equal liberty for all—unfortunate both because it is harmful and because it is unnecessary. Logic and experience alike suggest that color-blindness, which has never received a full and fair trial in American racial policy, is capable of addressing social problems effectively and in a manner fully consistent with the principles upon which the country was founded. Justice Blackmun was sorely mistaken when he declared in defense of modern race preferences, “There is no other way.” In the idea of color-blindness rightly understood, there is another, better way.

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