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"A way of seeing is also a way of not seeing. . . ."[1]

INTRODUCTION

The title of this article owes a great deal to the provocative questions raised by the "framers", and here I mean the framers of the conference. Specifically they ask: *Do the Constitution's protections of certain freedoms and of equality itself limit what government may do to secure equal citizenship for all?*

To begin, we should ask, to what Constitution do we refer when we speak of what the Constitution provides? While the answer may seem obvious, it turns out each of us may have very different things in mind when we speak of the Constitution. Consider, for example, the views of the late Justice Thurgood Marshall. In a controversial and trenchant critique of the Bicentennial Celebration, Marshall argued that one of his objections to a bicentennial celebration of the 1787 Constitution was that it was neither the only constitution nor the only important constitutional moment:

> I do not believe that the meaning of the Constitution was forever "fixed" at the Philadelphia Convention. Nor do I find the wisdom, foresight, and sense of justice exhibited by the framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war,

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1. Kenneth Burke, Permanence and Change: An Anatomy of Purpose 49 (3d ed. 1954).

> and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today. When contemporary Americans cite "The Constitution," they invoke a concept that is vastly different from what the framers barely began to construct two centuries ago.... While the Union survived the civil war, the Constitution did not.[2]

Note that this is not simply an argument about the evolution of meaning; Justice Marshall is asserting that over time the Constitution itself has been altered, destroyed and recreated by struggle. According to Marshall, the post-Civil War Constitution did not simply expand to incorporate as whole persons those who had previously appeared only as fractions; the Constitution was itself Reconstructed. The 1787 Constitution "did not survive" because, in Marshall's view, the pre-Civil War Constitution was transformed, not only by the texts of the Thirteenth, Fourteenth and Fifteenth Amendments, but by the fierce struggle that radically reshaped the country's political and social landscape and ultimately, the relationship between the individual citizen and state and national power. Because Marshall conceived of constitution- making as engaging people and institutions outside the courts and legislatures, for him, the Constitution is not a yellowed and venerated document, but an ongoing and organic text and process, giving rise to multiple constitutional births worthy of commemoration. I share this view. The Constitution is more than simply the written document and more than what the Court says that it means at any given moment. The Constitution is what *we* collectively make it mean. From this vantage point, the most important source of limitations on government derive not from the Constitution, but from the imperfect vision with which the people of the nation are endowed.

Of course, the question of whether the constitutional protection of certain freedoms—and of equality itself—limits the government's equality-creating efforts hinges on interpretations of the text, framework and history of the Constitution. Nevertheless, I want to resist the notion that this can be correctly framed as a decoding exercise. This is because I am skeptical of the view that constitutional interpretation can be reduced to merely applying the correct analytical tools to find meaning "in" the Constitution. Others have explained why this account of interpretation is incomplete and misleading. Indeed, in many instances, it may be more accurate to say that meaning is made, not found.[3] The text is of obvious importance,

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2. Thurgood Marshall, Commentary, *Reflections on the Bicentennial of the United States Constitution*, 101 Harv. L. Rev. 1, 2-4 (1987).

3. Sanford Levinson summarizes the debate as follows:

> Two classic approaches to understanding a written constitution involve emphasizing either the allegedly plain words of the text or the certain meaning to be given those words through historical reconstruction. I think it

but because, as has often been noted, the text is not self-revealing,[4] interpretations of the Constitution depend upon the contentious question of guiding principles—principles that often appear nowhere in the document itself.[5] This does not mean that these principles are non-existent or illegitimate, but it simply reinforces the point that in the absence of consensus about such principles, it is unlikely that we will all endorse a singular, superior interpretive tool that will unlock the hidden meaning in the Constitution.

My approach then assumes a multiplicity of analytical stances and meanings, each exhibiting various strengths and weaknesses, each reflecting different principles, perspectives and preferences. Recognizing that these differences reflect choices allows space to open around the question of why some choices are being made and how

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> fair to say that these particular approaches are increasingly without defenders, at least in the academic legal community.... As Richard Rorty has pointed out, however, there are at least two options open to critics who reject the two approaches outlined above but who, nonetheless, remain interested in interpreting the relevant texts. The first option involves the use of an allegedly more sophisticated method to extract the true meaning of the text. [This is a] "weak" textualist [approach]... Perhaps the best current example of such a "weak" textualist is John Hart Ely, whose *Democracy and Distrust*,... is merely the latest effort to crack the code of the United States Constitution and discover its true essence.... What unites Ely and most of his critics, though, is the continued belief that there is something "in" the Constitution that can be extracted if only we can figure out the best method to mine its meaning. [In opposition to this view, strong textualists like Stanley Fish argue] '[i]nterpretation is not the art of construing but the art of constructing.'

Sanford Levinson, *Law as Literature*, 60 Tex. L. Rev. 373, 378-81 (1982) (citations omitted).

This is not an entirely new observation or controversy. As Charles Evans Hughes has famously noted, "We are under a Constitution, but the Constitution is what the judges say it is." Charles Evans Hughes, Speech before Elmira Chamber of Commerce, May 3, 1907, *in* Addresses of Charles Evans Hughes, 1906-1916, at 179, 185 (1916).

4. Akhil Amar advances a strong claim for giving primacy to the text but allows that text will not lead one to clear answers. Akhil Reed Amar, *The Supreme Court, 1999 Term-Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 28 (2000) ("[E]ven after close study the document itself will often be indeterminate over a wide range of possible applications.").

5. Primary examples include the principles of "separation of powers" and "federalism." *See id.* at 30 (noting that "the phrases "'separation of powers'" and "'checks and balances' appear nowhere in the Constitution, but these organizing concepts are part of the document, read holistically"). Even vociferous textualists like Scalia occasionally lapse into non-textually based arguments about interpretive principles. *See, e.g.*, Printz v. United States, 521 U.S. 898, 905 (1997) (noting that "[b]ecause there is no constitutional text speaking to [the question of the constitutionality of compelling state officials to execute federal laws], the answer... must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court."). Indeed, Scalia contends that it is through "consideration of the structure of the Constitution" that he "discern[s] among its 'essential postulates,'" a principle of "dual sovereignty" that controls the case. *Id.* at 918 (citation and alteration omitted).

they are being justified. My engagement with the question of how the Constitution may limit government efforts to secure equal citizenship thus begins by examining whether and in what ways the dominant majority on the Supreme Court has created and established such limits, and the underlying justifications of those limits.

While I do not hold the view that there is something inherent in the Constitution that inevitably and fatally constricts the possibilities of government action to secure equal citizenship, it is certainly the case that current interpretive approaches now prevalent in the Supreme Court's Equal Protection jurisprudence lead precisely to such limitations. Among the limitations external to the Equal Protection guarantee, the culprits are many: federalism, states' rights, state sovereignty and the requirement of state action.[6] But purportedly embedded within the Clause itself is another powerful constraint: a mediating principle that defines equal protection as equal treatment. Recent Supreme Court decisions reflect the view that not only is the Equal Protection guarantee of the Fourteenth Amendment consistent with the principle of equal treatment, but that equal treatment defines the scope of equal protection in its entirety. This stands in contrast to longstanding axioms of equal protection that command not only that the similarly situated should be treated alike, but that those who are differently situated should be treated differently.[7] The second prong

6. I freely acknowledge that principles of autonomy, individual liberty, as well as conceptions of property have been read to restrict governmental action designed to eliminate inequality. Examples include *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (invalidating a municipal bias-motivated crime ordinance as violative of First Amendment protections of free expression), and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (holding that First Amendment expressive rights of parade organizers included the right to exclude openly gay and lesbian Irish-American group from marching under banner identifying the group in Boston's St. Patrick's Day Parade). Since the early days of the Fourteenth Amendment, the provision has been read to incorporate a state action requirement used to invalidate congressional legislation adopted to address racial inequality. *See* Civil Rights Cases, 109 U.S. 3 (1883). More recently, in a 5-4 decision, the Court invalidated provisions of the Violence Against Women Act on similar grounds. The Court held that the reach of Section 5 enforcement powers did not encompass the creation of a federal civil cause of action for victims of gender-motivated violence, as the injuries were caused by private actors. United States v. Morrison, 529 U.S. 598 (2000). Moreover, the Court's insistence on proof of specific intent to discriminate in cases where facially neutral laws have produced racially disparate impact severely limits the reach of the Constitution in addressing racial and other forms of inequality. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987). While all of these limitations have been prevalent and persistent, my point is simply that nothing in the text of the Constitution itself compels such results.

7. As expressed by Laurence Tribe:

> [A] distinction should be made between two basic ways in which the constitutional norm [of equal protection] can be violated. First, equality can be denied when government classifies so as to distinguish, in its rules or programs, between persons who should be regarded as similarly situated .... Second, equality can be denied when government *fails* to classify, with the result that its rules or programs do *not* distinguish between

of this analysis has been excised from the majority view with respect to race. Actual differences between the races are beyond the reach of the law unless there is evidence they were intentionally and maliciously produced, or the argument runs they are not real or relevant differences. Thus, Equal Protection means only equal treatment. When equal treatment defines equal protection, not only are subordinated groups foreclosed from exercising effective legal remedies, but the law functions to actually promote and entrench subordination. This article contends that the current constitutional concept of equal treatment as equal protection exploits and reproduces inequality.

Equal treatment as equal protection rests on a particular (mis)conception of groups in general and of race in particular. This version of the equality principle depends on the disaggregation of history and social context and the mischaracterization of group identity. Because one precondition to the attainment of equality is the elimination of institutional dominance, and in turn this is primarily a group experience, groups are central to equal citizenship. Discrimination is not only an act of an individual actor against an individual victim, but a set of engrained institutional preferences that operate to continue to exclude the previously excluded. This exclusion operates against individuals, but against individuals as members of a group.[8] Yet, to the adherents of equal treatment, group identities are incoherent and normatively suspect. The perceived incoherency is based on the notion that group identities are shifting and unstable. The claim that group identity is normatively suspect derives from the notion that assertions of group identity actually reify or manufacture identity differences, differences that encourage discrimination and undermine national unity. Theoretically, neither the incoherency argument nor the normative concern about group identity claims is illegitimate or specious. Indeed, groups *are* fluid and relational. And, there are ample examples of how group identity can

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> persons who, for equal protection purposes, should be regarded as differently situated. So it was with the majestic equality of French law, which Anatole France described as forbidding rich and poor alike to sleep under the bridges of Paris.... As the Supreme Court observed in *Jenness v. Fortson*, "sometimes the greatest discrimination can lie in treating things that are different as though they were exactly alike."

Laurence Tribe, American Constitutional Law, 1438-39 (2d ed., 1988) (citation omitted).

8. *See* Burke Marshall, *A Comment on the Non-Discrimination Principle in a "Nation of Minorities"*, 93 Yale L.J. 1006, 1006 (arguing that discrimination and subordination were imposed not against individuals but against a people so that the remedy "has to correct and compensate for the discrimination against the people and not just discrimination against identifiable persons.") This does not mean that all members of the group experience the exclusion the same way. Nevertheless, racial subordination is by definition focused upon the domination of groups. Thus, it is impossible to understand equality and inequality without also having sustained engagement with groups.

be asserted in highly destructive terms. But within the context of the Court's current Equal Protection analysis, the deployment of these arguments is deeply problematic. More specifically, each argument is enlisted as part of a jurisprudential strategy to recognize or see race (i.e. the racial identities of particular bodies) in order to de-recognize or not see race (i.e. a structural system of group-based privileges and disadvantages produced by socio-historical forces). The equal treatment as equal protection principle is buttressed by this recognition/de-recognition dynamic. Thus, even as the recognition of certain groups and group-based claims are rejected as illegitimate and counter to principles of neutrality, other group hierarchies are naturalized and at times even declared non-existent. The result is that race and racial inequality are made to disappear.

In order to tell the story of how equal treatment came to stand (again) for equal protection and what this has done (and failed to do) with respect to inequality, I begin by examining the Court's historical engagement with race. Part I of the project advances two basic points: First, the Court is not simply reflecting commonly held understandings of race; it is engaged in constructing them. Second, these conceptions are contingent and unstable. Each of these points is crucial to unpacking the Court's doctrinal treatment of equal treatment as equal protection and is the framework for understanding what I am calling the jurisprudential strategy of recognition and de-recognition of race.

Part II shifts discussion away from a general account of the role the Supreme Court historically has played in constructing race to a specific discussion of colorblindness as the ideological center of the Court's view of equal protection. Here I provide a brief account of the ascent of the colorblind constitutionalism in order to illustrate how the Court's equal protection doctrine is tied to its conceptions of race. The move to colorblindness—to de-recognize or "not see" race—has rested upon a very specific reconceptualization of race—a recognition or way of "seeing" race. Paradoxically then, in order not to see race, one must see race in a particular way. In this sense, not only does colorblindness not render race irrelevant; it ensures its visibility.

Part III entails a close examination of two important cases in which the Court recognizes and de-recognizes race: *Rice v. Cayetano*[9] and

9. 528 U.S. 495 (2000). The Court's decision in *Rice* is based not on the Equal Protection clause of the Fourteenth Amendment but the Fifteenth Amendment guarantee that "the right to vote shall not be abridged on account of race, color or previous condition of servitude." Despite the different sources for the analysis, the Court's vision of what equal protection requires under the Fourteenth Amendment and what equality commands under the Fifteenth are quite closely related. *See* Gomillion v. Lightfoot, 364 U.S. 339 (1960) (redrawing of city's boundaries to exclude blacks from participating in city elections challenged under the Fourteenth and Fifteenth Amendments).

Justice Powell's opinion in *Bakke*.[10] In both cases, the opinions advanced the argument that equality compels equal treatment for all, notwithstanding underlying differences, as distinctions that implicate race are either illegitimate, unsustainable or incoherent. In both cases, the end result is that inequality is reproduced.

There are certainly other cases that could be included as exemplars of the recognition/de-recognition dynamic I describe,[11] but I want to focus on these two in order to illuminate another point: equality can be reduced to equal treatment only when groups are disaggregated from history and social context, and are reshaped through the concept of race. In these two cases, the rights of historically subordinated groups are adjudicated under the rubric of race. In both cases, the Court engages in similar strategies of racial recognition and de-recognition; it recognizes or "sees" race in order to de-recognize or "not see" race. Indeed, in each case the court redefines race in order to banish it. In *Bakke*, racial groups are transformed into ethnicities. In *Rice,* an aboriginal people is transformed into a race. In each case the feat is accomplished by a re-telling of history, a history not only about the particular issues in the case, but about the history and meaning of race. Justice Powell's opinion in *Bakke* teaches that the white majority and white racial privilege are in fact not artifacts of race but of ethnicity—what looks like race is not race. The *Rice* majority asserts that what looks like a form of recompense to an aboriginal people is in fact a racial preference. What looks like something other than race, is in fact race. While on the one hand *Bakke* reconfigures race as ethnicity and *Rice* reconfigures an aboriginal people as a racial group, each case reveals both the Court's full engagement in constructing an account of race, as well as the centrality of the Court's racial conceptions to the notion that equality means only equal treatment.

I. THE SUPREME COURT AND THE CONSTRUCTION OF RACE

In contemporary social, legal and political discourse, race is a chameleon. Race is cast as skin color, as biology, as diversity, as ethnicity, as a form of class, as psychology, as fictive, as an empty set,

10. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

11. The application of equal treatment as equal protection to cases explicitly involving race and the rights of subordinated groups is my focus here, but it is worth noting that the principle of equal treatment as equal protection "has legs" and has found its way into cases in which race has never been mentioned with, I would argue, equally pernicious results. *See* Bush v. Gore, 121 S. Ct. 525 (2000) (reversing a decision of the Florida Supreme Court requiring a manual recount in certain contested counties of ballots cast in a presidential election because the process had insufficient guarantees of "equal treatment" of all ballots—equal treatment being what equal protection requires). The profound irony of the case is that while the racial dimensions of the vote counting problems loomed large in the public debate, race did not figure anywhere in the Court's discussion of the issues.

as a political strategy. We all believe we know race when we see it, yet we are hard-pressed to agree as to when we have seen it, or when it is meaningful, in part because we do not agree about what race is.[12] What do we mean when we talk about race?

In truth, no definition of race—not even a comprehensive, nuanced one—will in and of itself provide the key to dismantling racial inequality, eliminating racial subordination, or solving any of the other complex structural issues that involve race. The centrality of race in contemporary social, political and economic reality ensures that "race" will be invoked and that invocation will call forth contentious and multiple meanings, both implicit and explicit.[13] Assuming even that one believes that such problems have largely been solved, there is not even a definition of race that will "get us beyond race."[14] Given that fact, I want to examine more closely the

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12. As Leslie Espinoza says:

> This is the problem of race. It is both easily knowable and an illusion. It is obviously about color and yet not about color. It is about ancestry and bloodlines and not about ancestry and bloodlines. It is about cultural histories and not about cultural histories. It is about language and not about language. We strive to have a knowable, systemic explanation for race. We struggle with its elusivity.... Race should be rational and it is not.

Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race,* 85 Cal. L. Rev. 1585, 1609-10 (1997).

13. As john powell argues, "At any given moment race has a number of different meanings and these meanings often interact with each other in complex ways." john a. powell, *The "Racing" of American Society: Race Functioning as a Verb Before Signifying as a Noun,* 15 Law & Ineq. 99, 114 (1997).

14. For an example of a definition of race that endeavors to reveal the emptiness of the construct, see Kwame Anthony Appiah, In My Father's House: Africa in the Philosophy of Culture 28-46 (1992). Appiah contends that because there is no coherence to the idea of race, there really is nothing to be gained by using or invoking "race". Instead, he argues that the differences we talk about when we invoke race are really cultural. *Id.* at 45. Yet, even assuming that race is really a "metonym for culture," *id.* there is no evidence that recognizing cultural differences as cultural instead of racial prevents the phenomenon of racialization or racial formation. *See* Michael Omi & Howard Winant, Racial Formation in the United States: From the 1960s to the 1990s, 55 (2d. ed. 1994) (describing "racial formation" as "the sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed" (emphasis omitted)). Thus, for example, even if we acknowledge that it makes little sense to think of Jews as a "race" since most differences denoted by that identity are really cultural and religious in nature, this recognition of the identity as cultural does not prevent Jews from being racialized in certain periods. In those moments, Jews as a "race" come to signify a complex stereotype: they are constructed as racially distinct, typified as both intellectually superior and morally deficient. *See* Sander L. Gilman, Smart Jews: The Construction of the Image of Jewish Superior Intelligence (1996). For a critique of Appiah's argument, see Jayne Chong-Soon Lee, *Navigating the Topology of Race, in* Critical Race Theory: The Key Writings That Formed the Movement 441-49 (Kimberlé W. Crenshaw et al. eds., 1995) (arguing that Appiah's question is incorrectly focused on the content of the category of race rather than the social processes which brought about "race"). I believe that Orlando Patterson makes a similar error by arguing that references to ethnicity should replace the use of "race". *See* Orlando Patterson, *The Race Trap,* N.Y. Times, July 11, 1997, at A27.

role of the law in the construction of race, through focusing on the Supreme Court as a specific and important site of racial conceptualization—a place where race is given meaning.

The Court's interpretation of equal protection commands that we not see race or at least that we not see the materiality of race. In so doing, the Court reconfigures race as neutral and fixed. Indeed, it directs that we see race as a proxy for some other "real" phenomenon. The Court thus constructs race, infusing race with a particular meaning in order to assert its irrelevance.

A. *The Constitutive Force of Law*

Because the law is by its nature a conservative, backward looking enterprise, governed by interpretive rules which tie it to the past, it is sometimes assumed that its role in the construction of dominant beliefs, consciousness and ideologies is primarily reiterative rather than innovative. On this view, the law's articulation of a "new" social reality represents a legitimation or consolidation of a shift that has already occurred elsewhere outside of law's domain.[15] While it is certainly the case that the Supreme Court is an institution that is deeply influenced by external events, the relationship between law and social reality is more complex than the external/internal dichotomy would allow. Neither the standard liberal account which describes law as an institution that exists apart from or outside of politics, nor the cruder forms of the left critique which see the law as "merely an 'ideological reflection of some class interests elsewhere"[16]

15. For example, the Supreme Court's 1937 decision in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), which repudiated *Lochner v. New York*, 198 U.S. 45 (1905), is sometimes described as such an instance. In *Lochner* the Supreme Court invalidated a labor law restricting the maximum hours of work for bakers because of its alleged interference with a fundamental "freedom of contract." Lochner, 198 U.S. at 64. This right, as Holmes' dissent somewhat caustically pointed out, was not to be found in the Constitution's guarantee of due process, but rather was derived from the majority's assumptions about the economic system and the free market. *Id.* at 75-76 (Holmes, J., dissenting). By the time of the Court's decision in *West Coast Hotel*, the failure of the economy and the emergence of the Great Depression had called into question the laissez-faire market ideology that was the underpinning of *Lochner*. Thus, in some accounts the Court's move away from substantive economic due process epitomized by *Lochner* is an instance of external political events driving the doctrinal shift.

One influential text in constitutional law described the change as follows:

> By the mid-1930s the Court was prepared to abandon *Lochner*. This was due to changes in the composition of the Court, internal tensions in the doctrine, an attack on market ordering as a product of law and as sometimes inefficient and unjust, increasing judicial and academic criticism, and, perhaps most important, the economic realities of the Depression, which seemed to undermine *Lochner's* central premises.

Geoffrey R. Stone et al., Constitutional Law, 831 (3d ed. 1996).

16. Kimberlé W. Crenshaw et al., *Introduction* to Critical Race Theory: The Key Writings That Formed the Movement, at xxiv (1995) [hereinafter Crenshaw, Critical Race Theory].

adequately account for the crucial role of the law in the production of "consensus" and the definition of interests which are at the heart of political discourse and social concern. Clearly, the law is different from other terrains of political contest, and is structurally both more conservative in its express commitments (e.g., stare decisis, issues of institutional competence) and opaque in its forms; but it is also a site in which dynamic social debate takes place and in which views and ideology are worked, reworked and given power. It is a place where new "consensus" emerges and is pushed forward. It is an institution that does not simply reflect the prevailing social order but is one which has "constitutive force . . . [and is] thoroughly involved in constructing the rules of the game, in selecting the eligible players and in choosing the field on which the game is played."[17]

This is especially true with regard to race. In the United States, the law has always been deeply implicated in assigning, negotiating and defining race. Indeed, as many have argued, it has been one of the law's central tasks. The exercise of racial power through law was a foundational element of slavery and a crucial aspect of the regime of racial subordination that emerged from it. In the post-slavery era the law continued to construct and reformulate race in two interrelated ways. First, it overtly elaborated race as an analytic category and collective group experience subject to and the object of legal analysis and doctrine.[18] Secondly, it indirectly structured racial identities through the "rule of law" of the liberal polity where the values of neutrality and objectivity were enshrined more broadly and racial inequality was rationalized and legitimated.[19] Indeed, one of the central projects of the body of work known as critical race theory has

17. *Id.* at xxv.

18. Black racial identity was the mark of slavery and the marker of subordination. *See* Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1709, 1716-21 (1993).

19. Crenshaw, Critical Race Theory, *supra* note 16, at xxv. As Crenshaw notes elsewhere, this has been one of the principal functions of constructs of "merit" and the "market." *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331, 1380 (1988). One such example from anti-discrimination law is *Washington v. Davis*, 426 U.S. 229 (1976). There the Supreme Court rejected an equal protection challenge to the use of "neutral testing" by the Police Department on the grounds that racial disparities in the pass/fail rate were not sufficient evidence of racial discrimination. The Court was unwilling to adopt either heightened scrutiny or even the evidentiary presumption of Title VII claims: evidence of disparate impact gives rise to a prima facie case of discrimination rebuttable by evidence of business necessity. In part the Court said that to require the state to justify neutral practices that produce unequal results would be problematic because it would open up a whole range of statutes and rules to such scrutiny and perhaps invalidate them. *See id.* at 248. The racial inequality produced by the test was thus deemed inconclusive and insufficient evidence of an equal protection violation. In effect, both the test and the racially disparate results it produced were affirmed as legitimate.

been "[to] uncover how law was a constitutive element of race itself . . . [to uncover] how the law constructed race."[20]

B. *The Shifting Meaning of Race When Race is Legally Fixed*

Neil Gotanda's foundational work, *A Critique of "Our Constitution is Colorblind,"*[21] points out that while race has been a persistent category by which people have been classified and socially determined, the dominant consensus about race expressed through law has changed over time. Thus, he notes legal conceptualizations of race have embraced at least four identifiable strands: 1) status-race, in which race is seen as largely inherited and assigned social status;[22] 2) formal race, in which race is "seen as [a] neutral, apolitical description[], reflecting merely 'skin color' or region of ancestral origin"[23] disconnected from any other social attribute;[24] 3) historical-race, in which race embodies past and continuing racial subordination;[25] and 4) culture-race which Gotanda reads as a specific reference to "black as African-American culture, community and consciousness."[26]

Despite these significant shifts in racial conceptions, Gotanda argues that one of the critical and salient characteristics of the law's description of race has been to treat race as though it is fixed and determinate when in fact it is both historically contingent and socially and legally constructed. The mutability of racial categorization is obscured and race is given the status of immutability, becoming not merely objective fact but super-objective fact. Under an asserted regime of empirical certainty, the Court has pursued various racial projects that are highly political in character.[27] By maintaining that

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20. Crenshaw, Critical Race Theory, *supra* note 16, at xxv.

21. Neil Gotanda, *A Critique of "Our Constitution is Colorblind"*, *in* Crenshaw, Critical Race Theory, *supra* note 16, at 257-75.

22. His example of the paradigm case here would be *Dred Scott v. Sanford*, 60 U.S. 393 (1857), where according to the majority view, there is a natural hierarchy of the races. Gotanda, *supra* note 21, at 262.

23. Gotanda, *supra* note 21, at 257.

24. Here, *Plessy v. Ferguson*, 163 U.S. 537 (1896) is the case that comes to mind. Gotanda, *supra* note 21, at 263.

25. In *Loving v. Virginia*, the Court rejected Virginia's assertion that its anti-miscegenation law did not offend equal protection because Blacks and whites were equally constrained. Loving v. Virginia, 388 U.S. 1 (1967). The Court found that despite the formally equal treatment accorded those who transgressed the law, in fact the purpose of the law was to maintain the purity of the white race and uphold the system of white supremacy. *Id.* at 11-12. *Loving* can be read as a case which acknowledges the linkage between racial categories and subordination in contrast to *Plessy*—a case embracing formal race—in which the existence of that linkage is denied.

26. Gotanda, *supra* note 21, at 258. While Gotanda specifically refers to culture-race as African-American it is not a concept limited to Blacks. Rather as he contends, "[c]ulture-race is the basis for the developing concept of cultural diversity." *Id.*

27. As Omi and Winant argue, the conception of race has historically been

race is a fixed characteristic that functions the same way in all contexts, the Court has endeavored to preserve and support its claim of neutrality in adjudicating issues that implicate race. Its engagement with race is not one that is self-constructed or self-directed; rather the Court's understanding of race is one that is determined by external forces which in turn define the reality of race that is received and reported as part of law. The Court conceptualizes race as a phenomenon that is "out there." Common sense has replaced "science" as a source of understanding race, but in both instances, then and now, the Court articulates the view that race is external to the operation of law and is thus an objective fact which the Court simply observes. The important consequence of the law's construction and legitimation of race is that political choices are naturalized and given the dimension of order and routine, indeed, law itself.

II. THE PRESENT ERA: THE ASCENT OF THE COLORBLIND CONSTITUTION

While some have argued that the Supreme Court's views are inconsistent or out of touch with public politics or even with what happens in the law more broadly, the ascendancy of colorblindness in the Court's decisions is not only consistent with general political trends, but a view the Court itself enables and empowers. Consider for example the selective appropriations of anti-racist discourse from important historical figures that are used to support the attack on affirmative action. Fractional redactions of Martin Luther King's speech—"it is not the color of one's skin but the content of one's character"—are paired with clips from Harlan's dissent in *Plessy v. Ferguson*—"[o]ur Constitution is color-blind"[28]—to form an important and ubiquitous part of anti-affirmative action discourse. Indeed, they are explicitly cited as validation of Proposition 209 and its progeny.[29] The legal conception of colorblindness now constitutes the political

contested and given the role of the state in enforcing racial regimes, the state is a crucial site of this contest. *See* Omi & Winant, *supra* note 14, at 65.

28. *Plessy*, 163 U.S. at 559.

29. *See* Greg Lucas & Edward W. Lempinen, *State GOP Pulls King Ad But Not Blitz: Party Still Will Spend Millions to Push Prop. 209,* S.F. Chronicle, Oct. 25, 1996, at A21 (describing a plan to use Martin Luther King's "I Have a Dream Speech" as a way of reducing the meaning of race to skin color, thus making racial preferences fundamentally arbitrary). *See also* Ronald Walters, *Affirmative Action and the Politics of Concept Appropriation*, 38 How. L.J. 587, 600 (1995) (describing the capture and appropriation of discourse and norms of the civil rights movement by opponents of civil rights, so that "where racial discrimination was originally defined as the prohibition or exclusion of blacks and other disadvantaged groups from access to normal or equal participation in society, it has devolved to mean any racial distinction.").

vision, and the language and reasoning of the law has itself become part of the political rhetoric.[30]

Since 1989, the Court has struck down every affirmative action program that it has reviewed, save one—*Metro Broadcasting*,[31] a 5-4 decision, which was subsequently overruled by *Adarand Constructors, Inc. v. Pena*.[32] The move from tentative approval and intermediate review in split opinions to a solid majority in favor of strict scrutiny of affirmative action programs has been one of the most striking features of this period. Thus, in *City of Richmond v. J.A. Croson Co.*[33] and finally in *Adarand*, a majority of the Supreme Court has held that all race conscious remediation programs must be reviewed under a standard of strict scrutiny, notwithstanding their benign intent, or whether they are the product of action taken by the federal government pursuant to its Fourteenth Amendment enforcement powers.

This shift marks a period in which the majority's vision of equality is premised upon a specific understanding of the Fourteenth Amendment's guarantee of equal protection. That understanding is a command that the state not take race into account in formulating public policy—the state must be colorblind. Why does the Constitution command that the state not see race? The constitutional answer cannot lie merely in a policy preference regarding which is the better or most efficacious way to eliminate racial subordination. To take race into account or to refuse to take race into account then becomes a matter of policy for the legislature to decide. The Constitution can trump this policy choice only if equal protection requires that it do so. Thus, the assertion of colorblindness as equal protection mandate rests upon the contention that the races are formally and legally equal; neither substantive inequality, nor past or present forms of racial oppression change how the law should treat racial groups or individual members of such groups. Indeed, adherents of this view argue that the Constitution commands that the law not see these groups; the law must see only (raceless) individuals. Because all racial identities are the same, all racial distinctions are prohibited whether for good or bad reasons. Since there is no fundamental difference between racial groups, equal treatment constitutes the sum total of equal protection. The law must be blind to race. And yet, in order for the Court to enforce the eradication of

30. There is a strong interactive relationship between the political and legal rhetoric and visions. *See* John O. Calmore, *Exploring Michael Omi's "Messy" Real World of Race: An Essay for "Naked People Longing to Swim Free"*, 15 Law & Ineq. 25, 53 (1997) (describing how neo-conservative and right-wing racial projects have led and influenced the Court, which in turn "is intentionally solidifying the projects' gains").

31. Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990).

32. 515 U.S. 200 (1995).

33. 488 U.S. 469 (1989).

race it must tell us what race is—it must "see" race—re-inscribing it once again within legal doctrine.

The Court sees race as an aspect of identity that is apolitical, non-material and neutral. Race, as the Court views it, is essentially raceless. Put another way, while the Court's colorblind jurisprudence is ostensibly race-neutral, these ideas rest upon, and the Court is invested in, a *particular* account of race. Paradoxically, under the regime of colorblindness, the debate about what race is takes center stage and the salience of race is intensified.

As this account reveals, the Court's vision of equality under the Constitution is linked to its formalist vision of race. Indeed, this vision helps to explain the doctrinal shift in Equal Protection. Concretely, the Court's construction of colorblind race accompanies and animates the colorblind view of the Constitution. This is a "way of seeing" race and racial (in)equality that is new and yet not new; it is rather a variation on a theme. While modern decisions of the Court have repudiated Judge Taney's vision in *Dred Scott* of a natural, racial hierarchy, Taney's reading of racial "type" from the "objective" fact of blood, skin and physical features is very much alive in the current equal protection jurisprudence. Today, the notion of a racial type or the idea of race as blood is not articulated especially to support racial hierarchy. Instead, the conception of race as blood is redeployed in furtherance of the argument that race is "a neutral and apolitical term without social content."[34] Through the claim that race is only blood or skin color, and in its essence biologic, the Court's new majority treats race like height or other physical attributes—a fact without moral or social meaning and hence, without legal significance. This is the linchpin of the argument that the Constitution compels colorblindness and that all race consciousness or even racial recognition is another form of racism and racial subordination. Colorblindness is said to be the true meaning of equality and lays claim to historical pedigree and original, "pure" meaning.

The Supreme Court's insistence on the extension of strict scrutiny to all uses of race, even when deployed to remediate long-standing patterns of racial inequality, represents the repackaging of the formalist precepts about race implicit in the reasoning and holding of the Court's majority in *Plessy*.[35] In *Plessy* the Court asserted that there was no equal protection violation in excluding Blacks from train cars reserved for whites, because whites were equally excluded from train cars reserved for Blacks and subject to criminal penalties. Underpinning the Court's analysis was the assumption—indeed, the assertion—that the exclusion *meant the same thing* for both Blacks and whites. Plessy's contention that the exclusion was meant to and in

34. Gotanda, *supra* note 21, at 261.
35. *Id.* at 263.

fact did enforce racial subordination was dismissed by the majority as a matter of viewpoint, of a chosen construction placed on the act by Blacks.[36]

As was the case with the Supreme Court of 1896, because to today's Supreme Court race is merely color, race is without social significance. Because being Black in America holds the same meaning as being white, both should be treated the same in the context of claims of racial subordination. The modern Court thus lifts the words of Harlan's dissent: "Our Constitution is color-blind" as an affirmation of that formalism. Yet, it simultaneously disregards the heart of Harlan's argument that state sponsored segregation violated the Equal Protection Clause because, at least as it pertains to the public sphere—an important limitation under Harlan's analysis—the law should not ignore that race-based exclusion was intentionally and inherently subordinating.[37] The formal assertion that all are citizens and that all are then treated equally by a rule of equal prohibitions ignores the fundamental inequality between racial groups. Because racial categories and identities are tightly bound to a regime of hierarchy and subordination, "white" and "Black" are not then symmetrical in their societal or experiential meaning. This fundamental insight offered by Harlan is ignored at the same time that the Court enshrines his words. Equal treatment then cannot be the sum total of equal protection because the application of that principle requires that the circumstances of the groups be similar. Race, however, embodies asymmetry—of resources, power, access, and social status.

III. EQUALITY AS EQUAL TREATMENT IN *BAKKE* AND *RICE*

Justice Powell's opinion in *Bakke* and the majority opinion in *Rice* are cases that strongly articulate the equal treatment as equality principle. Each case argues for equal treatment through a particularized conception of race in which race is conflated with something else. Redescribing race as another feature of social identity, or alternately identifying another feature of social identity as race, is key to the decision to extend equal treatment—strict scrutiny—to affirmative action in one case and a set of state enacted reparative measures in another. The state's remedial powers were then circumscribed by the very doctrine of equal protection and conception of equality adopted by the Court. In this part, I more closely examine the rationales offered in each case as part of interrogating the Court's racial project.

36. As proof the Court asked whether whites would feel oppressed if Blacks enacted rules of racial exclusion against whites. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

37. *Id.* at 562 (Harlan, J., dissenting).

A. *Equal Treatment as Equality:* Bakke *as the Foundational Statement*

Justice Powell's opinion in *Bakke* is a foundational statement of the equal treatment as equal protection principle. Bakke's equal protection claim derived from the decision by the Medical School at the University of California at Davis denying Bakke admission. Bakke alleged that the Medical School's decision violated equal protection guarantees because his MCAT scores and GPA were higher than the primarily Black, Latino and Asian students admitted through a special program for disadvantaged students. Because his academic qualifications as measured by grades and test scores were higher than the special admissions group, Bakke reasoned that he had been unlawfully denied admission on account of his race and thus the principle of equal protection had been violated.[38]

In the end, a plurality of the Court agreed that Bakke should be admitted, but the case did not produce a unified rationale. Indeed, the sharply split opinions of the Court make it difficult to say what the Court held.[39] What is notable is that Justice Powell's opinion was the only one that ruled for Bakke on the basis of his equal protection challenge, arguing explicitly that strict scrutiny review should apply.[40]

Contemporary understandings of equality owe a great deal to Justice Powell's opinion in *Bakke*—an opinion remarkable for its enduring presence, prescience and at least for some decades, its influence. It is also remarkable for its schizophrenic treatment of group identity—for both seeing and not seeing race. While Powell recognized and affirmed the significance and importance of considering race in admitting a diverse class,[41] the remainder of his opinion functioned to repudiate the legitimacy and efficacy of substantive interventions by the state to remedy the unequal distribution of power under the current racial status quo because of the incoherence of racial identity. Thus, the only way out of the morass, according to Powell, is to accord equal treatment across the board, and apply strict scrutiny to all forms of state policy that implicate race, notwithstanding the underlying intent or difference in circumstances.

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38. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 276-79 (1978).

39. Chief Justice Rehnquist, Justices Stevens, Burger and Stewart reasoned that the special admissions plan constituted a violation of Title VI of the Civil Rights Act, and did not reach the constitutional question directly. *Id.* at 408-21 (1978) (Stevens, J., concurring in part and dissenting in part). Justices Marshall, Brennan, White and Blackmun held that the evaluation of the affirmative action plan should proceed under a kind of intermediate Equal Protection review and that under that standard the school had established the necessary justification of the program. *Id.* at 355-79.

40. *Id.* at 290-305.

41. *Id.* at 315-20.

In defense of Davis' program, the university argued that even if affirmative action was deemed to disadvantage whites, it was a policy adopted by the majority against itself and thus was not equivalent to a policy adopted by a majority against a discrete and insular minority without political power.[42] Powell vigorously rejected this argument in the following passage:

> [P]etitioner argues that the court below erred in applying strict scrutiny to the special admissions program because white males, such as respondent, are not a "discrete and insular minority" requiring extraordinary protection from the majoritarian political process. This rationale, however, has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny.... Racial and ethnic classifications, however, are subject to stringent examination without regard to these additional characteristics.... This perception of racial and ethnic distinctions is rooted in our Nation's constitutional and demographic history. The Court's initial view of the Fourteenth Amendment was that its "one pervading purpose" was "the freedom of the slave race..." [But] it was only as the era of substantive due process came to a close that the Equal Protection Clause began to attain a genuine measure of vitality.
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> By that time it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority. During the dormancy of the Equal Protection Clause the United States had become a Nation of minorities. Each had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic "majority," but of a "majority" composed of various minority groups of whom it was said—perhaps unfairly in many cases—that a shared characteristic was a willingness to disadvantage other groups. As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination....
>
> Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white "majority" cannot be suspect if its purpose can be characterized as "benign."... It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others.... Once the artificial line of a "two-class theory" of the Fourteenth Amendment is put aside, the difficulties entailed in varying the level of judicial review according to a perceived "preferred" status of a particular racial or ethnic minority are intractable. The concepts of "majority" and "minority"

42. This is John Hart Ely's argument regarding why affirmative action is not per se subject to strict scrutiny. John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723 (1974).

> necessarily reflect temporary arrangements and political judgments. As observed above, the white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable.[43]

In reaching the conclusion that equal protection can only be guaranteed by equal treatment, Powell was compelled to first engage the issue of race. In doing so, he took a noted departure from biologically-based notions of race and redefined race through a kind of social constructionist analysis. While social practices continue to follow the notion that race is a genealogy of the "blood," social constructionists argue that race is constructed despite its biologic and pseudo-scientific trappings. Thus, racial identity formally follows rules of descent but within those rules[44] as Gotanda has revealed, blood functions not as a scientific fact but as a metaphor—a metaphor asymmetrically constructed to buttress white supremacy.[45] This underscores the fact that as Omi and Winant have demonstrated in their work on racial formation, groups are racialized as a result of historical forces and processes; racial identities are the ideological and material product of these forces.[46] Undertaking the archeology of

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43. *Bakke*, 438 U.S. at 290-97 (citations and footnotes omitted).

44. The blood quantum rules that included the one drop rule and its variations were not only social norms at one point but actual legal rules. *See* Harris, *supra* note 18, at 1738.

45. Gotanda, *supra* note 21, at 259. As Plessy's lawyer asked, why is the rule not the reverse? In his brief he argued,

> It may be said that all those should be classed as colored in whom appears a visible admixture of colored blood. By what law? With what justice? Why not count everyone as white in whom is visible any trace of white blood? There is but one reason to wit, the domination of the white race.

Brief of Homer Plessy, *cited in* Harris, *supra* note 18, at 1748.

46. Omi & Winant, *supra* note 14, at 54-58.

race requires attention not to the physical sciences but to the social sciences. Critical interventions from many disciplines including law have traced how a bounded and determinate category like "white person" was actually negotiated; it was an exclusive club into which various groups were gradually admitted.[47]

Powell's argument is a classic invocation of social constructionism: "white" is not a monolithic category fixed by biology; it is a "'majority' composed of various minorit[ies]."[48] Powell anticipates the claim that the salient and unifying characteristic of this amalgamation was that it defined itself in relation to what it was not—that at its core white identity was centered on a right to exclude others. He counters this argument by pointing to the history of nativist and anti-immigrant sentiment which meant that, "each [minority] had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic majority, but of a 'majority' composed of various minority groups . . . ."[49] This history of anti-immigrant bias suffered by many then rebuts the claim that the "glue" of white identity was its exclusion and subordination of others. Thus he argues, "it was said—*perhaps unfairly in many cases*—that a shared characteristic was a willingness to disadvantage other groups."[50] This is the sole allusion to the linkage between whiteness and racial power, between white racial identity and exclusion. All subsequent references to the white majority "ethnicize" it by deconstructing it into its constituent parts, each of which has suffered its own history of oppression.[51] The white majority then disintegrates into a group of ethnic minorities, each of which has equal moral claim to remediation for historic subordination.[52] Raising the specter of an

47. *See* Andrew Hacker, Two Nations 12 (1992) (arguing that the question was not so much "who is white" but "who may be considered white" as various ethnic immigrants were gradually accepted into a white identity shaped around Anglo-American norms).

48. *Bakke*, 438 U.S. at 292, 295.

49. *Id.* at 292.

50. *Id.* (emphasis added).

51. As noted by one scholar:

> Instead of race, ethnicity is the term used by academic scholars today to codify the conventional belief in the virtue of assimilation, the gradual homogenizing of diverse groups predicated on value consensus ("the American Creed") and the norms of social integration. In this sense "Americanization" virtually means cultural and psychological suicide for peoples of color. . .

E. San Juan, Jr., Racial Formations/Critical Transformations: Articulations of Power in Ethnic and Racial Studies in the United States 6 (1992). He further notes:

> Race not ethnicity articulates with class and gender to generate the effects of power in all its multiple protean forms. Ethnicity theory eludes power relations, conjuring an illusory state of parity among bargaining agents. It serves chiefly to underwrite a functionalist mode of sanctioning a given social order. It tends to legitimize a pluralist but hierarchical status quo.

Id. at 5.

52. As Alan Freeman notes, the Supreme Court's analysis has fostered "the

"oppression sweepstakes,"[53] Powell concludes that subjecting affirmative action designed to benefit the historically disadvantaged to a different standard of review would be unworkable as the idea of a "white majority" is simply illusory. Race is seen, but seen as ethnicity. No one ethnic group is different from another in ways that matter legally; therefore all distinctions drawn on race must be treated the same.

While the insight that race is socially constructed has been crucial to the project of mapping the role of law and state power in fixing racial hierarchy and institutionalizing racial subordination, here social constructionist accounts of race have been conscripted into the argument that race and racial consciousness cannot be taken into account by the state. Because race is mutable and determined by social forces it is too unstable. It is a sociological fact, not a legal fact, or a fact that can take the force of law. Alongside the notion of race as biology, as "mere skin color," or "blood," race is described as a social construction. Through Powell's partial engagement with the idea "that the natural is produced by the social,"[54] race is deconstructed into a category too incoherent to form the basis of any remedial strategy.

While Powell's opinion is clearly heir to an older tradition of portraying race as ethnicity, it updates that tradition and puts forward a more sophisticated spin. It responds to the claim that based on the experience of group subordination, group remediation was and is appropriate. Where critical race theorists have linked the insight of social constructionism to tracking and exposing how law has been engaged in constructing race, protecting racial hierarchy and legitimizing racial subordination, Powell's move explicitly decouples social constructionism from the critique of racial power. Powell's opinion projects another vision of race in which the "natural" category of race is seen to be produced by social forces and is highly mutable—indeed so mutable that the idea of a white majority and by implication white domination is incoherent. This contention lays the groundwork for a new consensus about race in which race is not biologic, but under which whiteness is continually naturalized and white dominance is legitimated.

Powell's analysis reflects what Kimberlé Crenshaw has called "vulgar anti-essentialism."[55] This is the claim that since all identities

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startling claim of 'ethnic fungibility'—the notion that each of us bears an 'ethnicity' with an equivalent legal significance and with an identical claim to protection." Alan Freeman, *Antidiscrimination Law: The View From 1989*, 64 Tul. L. Rev. 1407, 1412 (1990).

53. Regina Austin is the author of this phrase. Regina Austin, *Sapphire Bound!*, 1989 Wis. L. Rev. 539, 546.

54. Diana Fuss, Essentially Speaking: Feminism, Nature and Difference 3 (1989) (emphasis omitted).

55. Thus, "where classical liberalism argued that race was irrelevant to public

are socially constructed, there is no such thing as "women's" experience, or "Black" experience or anything that can be legitimately described as group experience. On this view, any attempt to speak of "Blacks" or "women" or even "Black women" reproduces illegitimate categories that mask over difference rather than describe commonalities. Indeed, they argue that "women" or "Blacks" can be deconstructed to a set of individual experiences and characteristics that defy any coherent category. Taken to its logical conclusion this means that race-based remediation and race consciousness itself is fatally flawed. While this submergence of race into ethnicity is hardly new—indeed the origins of the ethnicity lie in an attempt to find another way of talking about race[56]—this form of race talk facilitates the erasure of racial privilege and subordination. After all, if race equals ethnicity it makes no sense to talk about a white ethnicity. This approach renders incoherent any alternative vision of racial justice and re-legitimates the existing social order in which myriad forms of racial inequality are legal and white privilege is simply there.

All this lends itself to a kind of multiple (or split) consciousness about race expressed and constituted through law: Race is biologic, immutable; race is also a social construction that is produced. Race is articulated through culture and is a highly significant and expressive identity; Race is an artificial veil over ethnicity and is thus irrelevant. While these conceptions seem to conflict along the vectors of essentialist vs. constructionist theories of race, they actually cohere in painting race without tracking or acknowledging the exercise of racial power.[57] The absence of any account of how power and specifically the force of law was and is brought to bear in forging race and racial identities allows the court to render a version of race in which race only coincidentally correlates with life chances and experiences. Individual experience is primary and group subordination an historical artifact. Thus on this view disproportionate poverty, wealth, physical well-being, and life expectancy only happen to correlate with

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policy, there critics argued that race simply didn't exist. The position is one we have come to call "vulgar anti-essentialism." By this we mean to capture the claim made by some critical theorists that since racial categories are not "real" or "natural" but are instead socially constructed, it is theoretically and politically absurd to center race as a category of analysis or as a basis for political action." Crenshaw, Critical Race Theory, *supra* note 16, at xxiv.

56. *See* Omi and Winant, *supra* note 14, at 14-16 (noting that the ethnicity paradigm within sociology emerged in the 1920s and 1930s to challenge prevailing views of race as a natural, biological category). They further note, however, the limits of ethnicity theory and the immigrant analogy in addressing the dynamics of race, since the immigration studies that undergirded ethnicity theory had largely focused on European immigrants whose experiences were not reflective of the lived experience of race. *See id.* at 16-20.

57. *See* Ruth Frankenburg, White Women, Race Matters: The Social Construction of Whiteness 52 (1993) (noting the "color-evasiveness" or "power-evasiveness" tendency of whites when discussing race to avoid questions of power and hierarchy).

African-American racial identity as a result of neutral sorting and choice.[58] This is a more sophisticated strategy than the explanation of racial hierarchy as natural, and is also a way of responding to some of the obvious defects of the old formalist analysis. In "proving" that white and Black do not really exist, except as kind of privatized ethnicities, race is then a concept that must be ignored by the state. So too is racial disparity unless one can locate the ever elusive intent and seldom seen discriminatory actor. Thus, in Scalia's words in *Adarand*: "In the eyes of the government we are just one race here. It is American."[59]

B. Rice v. Cayetano: *Equality as Equal Treatment in the New Millennium*

Bakke illustrates how Powell laid the groundwork for the full blown emergence of colorblind constitutionalism by articulating a particular conception of race in which race conflates with ethnicity. This

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58. *See, e.g.*, United States v. Armstrong, 517 U.S. 456 (1996).

59. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment). In contrast to Scalia's Olympic perspective, the view from the ground is poignantly quite different. LeAlan Jones, a young African-American man, along with his friend, Lloyd Newman, created two radio documentaries for National Public Radio about their lives in an impoverished, racially isolated Chicago neighborhood. They were in their mid-teens at the time the book based on the documentaries was published:

> We live in two different Americas. In the ghetto, our laws are totally different, our language is totally different, and our lives are totally different. I've never felt American. I've only felt African-American. An American is supposed to have life, liberty, prosperity and happiness. But an African-American is due pain, poverty, stress and anxiety. As an African-American I have experienced beautiful things, but the majority of the things I have experienced are not beautiful. And I don't even have it as bad as most—there are millions of young men and women living the struggle even harder than me. As children, they have to make day-to-day decisions about whether to go to school or whether to go on the corner and sell drugs. As children, they know that there may not be a tomorrow. Why are African-American children faced with this dilemma at such an early age? Why must they look down the road to a future that they might never see? What have my people done to this country to deserve this?
>
> And yet I am supposed to feel American. I am supposed to be patriotic. I am supposed to love this system that has been detrimental to the lives of my people. It's hard for me to say how I'm an American when I live in a second America—an America that doesn't wave the red, white and blue flag with fifty stars for fifty states. I live in a community that waves a white flag because we have almost given up. I live in a community where on the walls are the names of fallen comrades of war. I live in a second America. I live here not because I chose to, but because I have to. I hate to sound militant, but this is the way I feel.... I know you don't want to hear about the pain and suffering that goes on in "that" part of the city. But little do you know that "that" part of the city is your part of the city too. This is our neighborhood, this is our city and this is our America...."

LeAlan Jones, Lloyd Newman with David Isay, Our America: Life and Death on the South Side of Chicago 199-200 (1997).

conceptualization facilitates the doctrinal move to equal treatment as equal protection as there is no white majority under this model and thus no basis for distinguishing between the history, social reality or contemporary meaning of white from Black. Applying a rule of symmetrical treatment to conditions which are fundamentally unequal actually reproduces inequality. In focusing on *Rice v. Cayetano*[60] this part provides another case study of unequal equality.

Harold Rice, a white citizen of the state of Hawaii, challenged election procedures that excluded non-Hawaiians from voting for officers of the Office of Hawaiian Affairs ("OHA"), an agency created to provide redress to Native Hawaiians. Rice contended that defining the electorate for OHA in terms that restricted the vote to Native Hawaiians[61] was inherently and irreducibly a racial restriction that offended the Constitution; it was an instance of treating voters differently on the basis of race.[62] For a majority of the Court, which in *Adarand* had just dictated that Equal Protection analysis must be guided by notions of consistency and congruence—the basic idea being to treat everyone alike[63]—*Rice* was an easy case. It extended *Adarand's* interpretation of the Fourteenth Amendment's Equal Protection Clause to the Fifteenth Amendment guarantees. And, of course, if one "sees" the way the majority sees, *Rice* is a paradigm case of unequal treatment.

But in order to see *Rice* as the majority perceives it, there is much that one has to not see. The voting procedures at issue in *Rice* do not

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60. 528 U.S. 495 (2000).

61. The relevant statute defined "Hawaiian" and "Native Hawaiian"—the groups eligible to vote—as follows:

> "Hawaiian" means any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.
>
> "Native Hawaiian" means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

Haw. Rev. Stat. § 10-2 (1993).

62. *Rice*, 528 U.S. at 517.

63. As the majority opinion in *Adarand* articulated it, prior case law has established three general propositions concerning governmental racial classifications:

> First, skepticism: "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination" . . . Second, consistency: "[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification" . . . And third, congruence: "Equal Protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment" . . .

Adarand, 515 U.S. at 223-24 (citations omitted).

mask a narrative about unequal treatment and racial exclusion. It is a story about equalizing treatment, inclusion and the possibility of redemption. There is also the matter of history, not only the history of Hawaii which was central to the case, but also a history or narrative about race. And the majority is blinded to this story and this history in part because of how it sees race.

The history of OHA is crucial to an understanding of the case. Yet, while the majority opinion begins with an account of that history, what is striking is that it is rendered in terms that make it unrecognizable and irreconcilable with reality.[64] OHA and its Hawaiian-only election procedures were created by a vote of the entire electorate of the state as part of the Hawaiian Constitution in 1978.[65] OHA was heir to the federally created Hawaiian Homes Commission that acted as trustee over 200,000 acres of land—so-called "ceded land"—that was to be used for the benefit of Native Hawaiians. Upon the admission of Hawaii to the union in 1959, the state took over the Hawaiian Homes Commission and 1.2 million additional acres of land in trust, with one of the obligations of the trust being to benefit Native Hawaiians.[66] However, the trust was poorly administered, and widespread recognition of these problems in part led to the 1978 constitutional amendments creating OHA that were approved by an overwhelming majority vote of the state's electorate.[67]

The central fact obscured by the majority's account is that the land that forms part of the corpus of OHA's trust is land that formerly belonged to the Hawaiian government. This land was taken by the United States upon the annexation of Hawaii as a territory in 1900 following the illegal overthrow of the Hawaiian government in 1893 by a coup by American businessmen backed by the United States military.[68] These are not contested facts. In 1993, the United States Congress issued a resolution apologizing for United States government complicity in the illegal overthrow of the Native Hawaiian government in 1893 and acknowledging that 1.8 million acres of ceded lands had been obtained "without the consent of or compensation to the native Hawaiian people of Hawaii or their

64. As the dissent points out: "The Court's holding today rests largely on the repetition of glittering generalities that have little, if any, application to the compelling history of the State of Hawaii." *Rice*, 528 U.S. at 527-28 (Stevens, J., dissenting).

65. As Yamamoto notes, "[T]hat OHA and its voting limitation were created by the overwhelming vote of Hawai'i's multiracial populace partly to rectify the legacies of U.S. colonialism by affording Hawai'i's indigenous peoples a measure of self-determination was completely dismissed by the Court's majority opinion." Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. Rev. 1747, 1773 (2000).

66. *Id.* at 1767.

67. *Id.*

68. *Id.* at 1766-67.

sovereign government."[69] In other words, under the provisions creating OHA, the indigenous people of Hawaii were granted control over OHA and the land it controlled because they were the people from whom the land had been taken. By a democratic vote, the people of Hawaii—all of them—agreed that the Office of Hawaiian Affairs should consist of Native Hawaiians selected by Native Hawaiians.[70] The voting mechanism was not an affirmative action program or some kind of act of reverse discrimination, but was rather a modest recognition of a right to reparations and self-determination for an aboriginal people[71] who, like most aboriginal people in the United States, have been the victims of overt state policies designed to separate them from their land, their culture and their way of life. This is the basic reality that the majority fails to see.

Rice v. Cayetano marks the extension of the myopic principle of equal treatment as equal protection in cases concerning race to cases concerning the rights and interests of indigenous peoples. While Powell's opinion in *Bakke* reduced race to ethnicity, in *Rice* the Court's majority conflates race with indigenous status, with equally devastating results. In the name of equal treatment, the claims of indigenous people for redress are treated as claims for racial preference, leaving a horrific historical injury beyond recompense. *Rice* represents a complete failure to recognize that sameness is not the equivalent of equality: Treating likes alike—what Equal Protection commands—is different than treating *everyone and everything alike.*

The State and OHA argued that this was not a case in which those who were similarly situated were treated differently because the status and position of Native Hawaiians and their relationship to OHA was essentially different than that of non-Hawaiians. The voting limitation was not a racial restriction in the first instance because Native Hawaiians, like Native Americans are political, not racial minorities.[72] This argument relied on *Morton v. Mancari*,[73] in which

69. Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, and to Offer an Apology to Native Hawaiians on Behalf of the United States for the Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

70. As one example of how the majority conveys facts without context, it reports that "In 1978 Hawaii amended its Constitution to establish the Office of Hawaiian Affairs . . ." *Rice*, 528 U.S. at 508. However, the majority never once mentions that these amendments that established the Hawaiian only voting procedures were approved by a vote of the entire electorate. *See* Hom & Yamamoto, *supra* note 65, at 1772-73.

71. OHA has been charged with "serving as the principal public agency . . . responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians . . . serving as a receptacle for reparations." Haw. Rev. Stat. § 10-3 (1993).

72. This was the basis for the Ninth Circuit's rejection of Rice's claim. Rice v. Cayetano, 146 F.3d 1075, 1082 (9th Cir. 1998).

the Court upheld a hiring preference for Native Americans in the Bureau of Indian Affairs because the designation "Native American" was deemed to be a political description of a quasi-sovereign group, not a racial designation, even though Native Americans were defined in terms of blood quantum rules typically associated with race.[74] Rice argued, and a majority of the court agreed, however, that *Mancari* did not apply in the case because OHA was not a quasi-sovereign entity, but an agency of the state. While the majority asserted that it did not have to reach the issue of whether Native Hawaiians have a status equivalent to the political status of Indians in federally recognized tribes, the clear import of the decision is that they do not.[75] This is despite the fact that, as noted by the dissent, numerous acts of Congress relating to indigenous people include Native Hawaiians as Native Americans for the purposes of the statutes. [76]

In the eyes of the majority the voting procedures for OHA constituted a racial distinction that clearly offends the equal treatment principle. On this view, the statute defining Hawaiian and Native Hawaiian as descendants of aboriginal peoples inhabiting the island prior to European contact in 1778 amounted to nothing more than a racial classification. The state argued that "Native Hawaiian" and "Hawaiian" were not racial categories, but a classification limited to

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73. 417 U.S. 535 (1974).

74. The preference in *Mancari* favored individuals who were "one-fourth or more degree Indian blood and... member[s] of a Federally-recognized [Indian] tribe." Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974). Like the definition of native Hawaiians at issue in *Rice*, the class was defined in terms that referred to lineal ancestry.

75. The majority reasoned that there was a distinction between elections excluding non-Indians and elections excluding non-Hawaiians:

> If a non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a quasi-sovereign. The OHA elections, by contrast, are the affair of the State of Hawaii.... [T]he elections for OHA trustee are elections of the State, not of a separate quasi-sovereign, and they are elections to which the Fifteenth Amendment applies.

Rice, 528 U.S. at 520-22. However, though the court attempts to draw the distinction based on whether the entity created is an agency of the state or some more semi-autonomous body, in reality the difference the majority seeks to highlight is the nature of the group—that is whether the group is a political entity—a quasi-sovereign—as distinct from a racial group. The fact that the state created OHA rather than Congress is not really a salient distinction since as the dissent points out, the federal power to pass laws pertaining to its trust relationship with native tribes can be delegated to the states. *Id.* at 536 (Stevens, J., dissenting). Were the Court to consider native Hawaiians to have the status of a quasi-sovereign entity, then the exclusion of non-Hawaiians from the OHA electorate would not be a racial restriction but "an internal affair of a quasi-sovereign." *Id.* at 520. This is why the dissent concludes: "[I]it is a painful irony indeed to conclude that native Hawaiians are not entitled to special benefits designed to restore a measure of native self-governance because they currently lack any vestigal native government—a possibility of which history and the actions of this Nation have deprived them." *Id.* at 535.

76. *See id.* at 533-34 (Stevens, J., dissenting) (citing federal statutes that include native Hawaiians as part of the aboriginal or indigenous peoples).

the lineal descendants of the peoples inhabiting Hawaii in 1778, regardless of their race. Since this group is not solely comprised of one race, race was neither the singular nor most important criterion defining the group.[77] The statutory definition of Hawaiians and Native Hawaiians was designed to designate historical, not racial ties. But the majority rejected the argument:

> Ancestry can be a proxy for race. It is that proxy here. Even if the residents of Hawaii in 1778 had been of more diverse ethnic backgrounds and cultures, it is far from clear that a voting test favoring their descendants would not be a race-based qualification. But that is not this case. For centuries Hawaii was isolated from migration. The inhabitants shared common physical characteristics, and by 1778 they had a common culture. Indeed, the drafters of the statutory definition in question emphasized the "unique culture of the ancient Hawaiians" in explaining their work.... The provisions before us reflect the State's effort to preserve that commonality of people to the present day. In the interpretation of the Reconstruction era civil rights laws we have observed that "racial discrimination" is that which singles out "identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics." The very object of the statutory definition in question and of its earlier congressional counterpart in the Hawaiian Homes Commission Act is to treat the early Hawaiians as a distinct people, commanding their own recognition and respect. The State, in enacting the legislation before us has used ancestry as a racial definition and for a racial purpose.[78]

The Court insists this is a case about race because the voting class is defined in terms that refer to ancestry and ancestry can function as a proxy for race. But of course, the fact that it did not function as such a proxy here—that is there was no evidence that the law was motivated by a desire to exclude or favor any race—the court treats as irrelevant. And yet in treating that distinction as irrelevant the majority's reasoning leads to quite illogical results. Indeed, the majority's assertion that rules defining a class by ancestry are the equivalent of rules defining a class by race could extend to invalidate the treatment of Indians under the numerous federal statutes as an impermissible racial classification.

What then does the majority cite as evidence that ancestry does function as a proxy for race here? The Court's majority charges that the heart of the state's offense is that it derives from the state's efforts,

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77. *Id.* at 514; noting that:
the State argues, the restriction in its operation excludes a person whose traceable ancestors were exclusively Polynesian if none of those ancestors resided in Hawaii in 1778; and, on the other hand, the vote would be granted to a person who could trace, say, one sixty-forth of his or her ancestry to a Hawaiian inhabitant on the pivotal date.

78. *Id.* at 514-15 (citation omitted).

assumed as a condition of its admission to the union, to preserve the commonality of a culturally distinct people "commanding their own recognition and respect."[79] Apparently, according respectful treatment to a culturally distinct people as a people constitutes a purpose repugnant to the Constitution; indeed, recognizing Native Hawaiian people as a culturally distinct indigenous group constitutes a racial injury. In the eyes of the majority, the act of recognizing an indigenous people is an act of racial discrimination because the cultural distinctiveness of this group is seen as a marker of race. Thus, *Rice* stands for the proposition that seeing native Hawaiians as Native Hawaiians is an evil not countenanced by the Constitution.

Though the statute defining "Hawaiian" and "Native Hawaiian" relies on ancestry, the majority sees ancestry as a synonym for race.[80] In point of fact, however, the statutory definitions have always focused on the lineal descendants of "peoples" or "races" resident in the Islands prior to 1778—the date of Captain Cook's arrival.[81] "Hawaiian" was never conceived as an exclusive racial category.[82] Yet, in the majority view, they are a biologically defined racial group. The irony is that the majority recognizes the existence of Native Hawaiians as a distinct group but only to denominate them as a race that has benefited from a statutorily enacted racial preference. The majority re-constructs Native Hawaiians into a race in order to command that race be excised – that it not be seen. This inverts the

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79. *Id.* at 515.

80. The majority draws on the legislative history of the statute in which the definitions of Hawaiian and native Hawaiian originally made reference to "any descendant of the races inhabiting the Hawaiian Islands, previous to 1778." The substitution of the word "peoples" for "races" was described as merely "technical." *Id.* at 515-16. Thus, the Court concludes that the definitions are essentially racial.

81. The proposed statute defined "Hawaiian" as "any descendant of the races inhabiting the Hawaiian Islands previous to 1778." The definition was later changed by substituting the word "peoples" for "races." *Id.* at 515-16. The majority reads this history as an admission that the statutory definitions are racial and an admission by the state of a racial purpose. *Id.* at 516-17. But if the group defined is constituted by members of various "races" it is difficult to see how the definition itself can be characterized as racially exclusive. The majority here seems to treat the mere mention of race as an indication that a forbidden classification has been made, in part because it sees the inquiry into ancestral lines as inherently offensive. *Id.* at 517. The assertion that ancestry functions as a proxy for race here then seems to rest on the contention that ancestral distinctions work the same way and cause the same harms as race. But of course, the definition of membership in a tribe has also been expressed in terms of lineal ancestry and we do not understand that definition to be racial simply because it rests on ancestry. We understand it to be descriptive of an indigenous people, which is what the statute here was constructed to do.

82. As the dissent argues:

> The ability to vote is a function of the lineal descent of a modern-day resident of Hawaii, not the blood-based characteristics of that resident, or of the blood-based proximity of that resident to the 'peoples' from whom that descendant arises. The distinction between ancestry and race is more than simply one of plain language.

Id. at 539 (Stevens, J., dissenting).

recognition/de-recognition process in *Bakke* but achieves the same effect—the eradication of race and the maintenance of inequality. Race is transformed into an ethnicity in *Bakke*; a people bound by experience and culture is transformed into a race in *Rice*.[83] This all ignores the fact that the framework of the statute in *Rice* was based on the need to make restitution to an indigenous people and was part of a political process of reparations. Race was not a proxy used to target viewpoint or diversity; ancestral ties were part of defining the group injured for the purposes of rectifying the group harm. The majority's failure to grasp the essential difference here lead its to anomalous results. Under this logic the award of $1.6 billion in reparations to Japanese-Americans for internment during World War II authorized by Congress would be subject to attack by a white citizen wrongfully jailed on charges of treason during the war as an instance of unequal treatment on the basis of race.[84]

To make matters even more bizarre, the majority opinion cites without the slightest hint of irony the string of voting rights cases from the era of racial exclusion and intimidation of Black voters as testament to the proposition that equality means equal treatment. Undoubtedly, it is true that to some extent the claims in cases like *Guinn v. United States*,[85] challenging the grandfather clause, and *Terry*

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83. This is not to deny that common history and culture cannot also be part of the self-definition of racially subordinated groups. Indeed, the assertion and expression of that commonality is often of greater significance than the idea of "blood." Moreover, it is well-known that the lines between race, nation and ethnicity are notoriously difficult to draw. The point here is that the claims asserted here by native Hawaiians were grounded in the notion of the historical ties to land, culture and history, not racial designations. Race is obviously implicated in the discussion because of the degree to which the conquest of Hawaii was justified as a legitimate effort to civilize a subordinate race. *See* Hom & Yamamoto, *supra* note 65, at 1769 n.105.

84. Justice Stevens' dissent in *Adarand* predicted that the principle of consistency would lead to precisely these illogical results:

> [C]onsider our cases addressing the Federal Government's discrimination against Japanese-Americans during World War II.... The discrimination at issue in those cases was invidious because the Government imposed special burdens—a curfew and exclusion from certain areas on the West Coast—on the members of a minority class defined by racial and ethnic characteristics. Members of the same racially defined class exhibited exceptional heroism in the service of our country during that War. Now suppose Congress decided to reward that service with a federal program that gave all Japanese-American veterans an extraordinary preference in Government employment. If Congress had done so, the same racial characteristics that motivated the discriminatory burdens in *Hirabayashi* and *Korematsu* would have defined the preferred class of veterans. Nevertheless, "consistency" surely would not require us to describe the incidental burden on everyone else in the country as "odious" or "invidious" as those terms were used in those cases.

Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 244 (Stevens, J., dissenting) (citations omitted).

85. 238 U.S. 347 (1915) (holding that exemptions from literacy requirement based

v. Adams,[86] invalidating the whites-only primary system that ensured that the only candidates on the ballot were white, were framed in terms that condemned these rules as instances of unequal treatment. However, the actual gravamen of the complaint was that these laws—some of which accorded nominally equal treatment—were intended to and in fact did buttress racial exclusion from the political process as part of a system of racial subordination. Where unequal treatment was the instrument of injustice, equal treatment was the cure, at least in part, but it was never the case that these challenges conceived of equality only in terms of equal treatment. Were the claims of Black voters reducible to no more than a violation of the principle of equal treatment, there would be no basis to challenge the most efficient form of exclusion—facially neutral rules like the grandfather clause. Indeed, there would be nothing to answer the majority's claim in *Plessy* that America's apartheid laws treated Blacks and whites equally. While *Plessy* is certainly viewed with disfavor, even by members of the Court who are staunch supporters of the principle of equal treatment as equal protection, *Plessy* survives in the assertion that equal treatment is the only equal protection concern.

The heirs of *Plessy* then are *Memphis v. Greene*[87] and *Palmer v. Thompson*,[88] in which racially motivated decisions to close off access to a public street in the former case and to close public swimming pools despite a court order to integrate in the latter were deemed not to offend Equal Protection. This is because in each case the Court concluded that despite evidence of an illegitimate motive, there was no unequal treatment of Blacks and whites—all were excluded from the public swimming pools once they were closed and the street barrier turned away everyone.[89] This conception of equality allows

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on ancestral ties to those entitled to vote prior to the end of slavery was a violation of the Fifteenth Amendment).

86. 345 U.S. 461 (1953) (invalidating Texas "Jaybird" primary system which excluded Blacks).

87. 451 U.S. 100 (1981).

88. 403 U.S. 217 (1971).

89. In *Memphis v. Greene*, the barrier was erected at the point of separation of black and white neighborhoods at the request of white property owners who had expressed concerns about the influx of "undesirable traffic." 451 U.S. at 115 The majority found there was no violation of equal protection because it found that the rationale for the closing—protecting the neighborhood from unwanted traffic was appropriate. While a benefit had been conferred on white property owners, the only harm suffered by blacks was a minor inconvenience. *Id.* at 119. In *Palmer v. Thompson*, the city of Jackson, Mississippi was under court order to desegregate all of its public parks and facilities, and complied with the order excepting for the swimming pools. The city council ordered the pools closed. The majority decision rejected the argument that the closure amounted to a violation of equal protection, because "this is not a case where the whites are permitted to use public facilities while blacks are denied access." 403 U.S. at 220. The court rendered this finding despite strong evidence of discriminatory motive; there the mayor had made statements indicating his hostility to integration. *Id.* at 250 (White, J., dissenting) (quoting the newspaper accounts of the mayor's comments that "neither agitators nor President

the Court to see the closure of the pool and the street as constitutionally acceptable instances of equal treatment. Ironically, the psychic and symbolic injury rejected in *Memphis* and *Palmer* turns out to be the precise definition of harm to which the court turns in *Rice*; the problem, as *Rice* sees it, is the message of inequality that the Hawaiian-only voting scheme conveys.[90] This injury was obvious to the Court in *Rice* but invisible to it in *Palmer* and in *Memphis*. This is the inconsistency of the equal treatment principle.

CONCLUSION

The Court-centric focus of this article should not be read to convey that it is my view that the feat has been accomplished and that the story is over. Indeed, part of my objective is to put the Supreme Court majority's reasoning under a microscope in order to expose the inherent instability in these doctrinal moves. Equal treatment as equal protection appears to deliver very little either in terms of actual equality or actual logical consistency. My point is that the path chosen is not given, inevitable, or inherently "in" the Constitution. Indeed, if history is any guide (though it may not be much comfort) one thing is certain: the Court's interpretive stance on equality is contingent and unstable. No doubt there is little on the horizon that portends a quick turnaround, but I think it is fair to say that if equal treatment as equal protection leads the court to decisions like *Bush v. Gore*,[91] in which counterveiling doctrinal and institutional forces (like the political question doctrine, standing requirements, and deference to state court interpretations of state law) were brushed aside, at a minimum the role and reasoning of the Court will be under some closer scrutiny. It is my hope that this essay will contribute to that trend and make blind acceptance of the Court's interpretations less likely.

Kennedy will change the determination of Jackson to retain segregation.").

90. The majority contends that the problem with the Hawaiian-only voting scheme for OHA is that it conveys the symbolic and demeaning message "that citizens of a particular race are somehow more qualified than others to vote on certain matters." Rice v. Cayetano, 528 U.S. 495, 523 (2000). Of course, the underlying premise is something quite different— not the idea of inequality but of the need to rectify inequality and oppression.

91. 121 S. Ct. 525 (2000).