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Colorblind Constitutionalism

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**THE ROBERT L. LEVINE
DISTINGUISHED LECTURE SERIES
COLORBLIND CONSTITUTIONALISM**

*Randall Kennedy**

PROF. ZIPURSKY: Good afternoon, everyone. It's my pleasure to welcome you this afternoon to the Robert Levine Lecture.

For more than twenty years, the children of Robert L. Levine have supported the Levine Lecture at Fordham Law School, bringing to our law school great figures, such as Justice Sandra Day O'Connor, Judge Leon Higginbotham, Professors Ronald Dworkin, Martha Minow, Louis Henkin, and many, many more. It's an honor to add to our list of esteemed Levine Lecturers Professor Randall Kennedy.

Professor Kennedy, the Michael R. Klein Professor at Harvard Law School, is a towering figure in legal academia. He comes, of course, with golden credentials, a graduate of Princeton, Oxford, and Yale, and a law clerk to Judge James Skelly Wright and Justice Thurgood Marshall. While Professor Kennedy is the author of several important books and innumerable articles, he has also been friend, teacher, and mentor to many of our colleagues here at Fordham Law School.

When I think of Professor Kennedy, I do not think of all of his objective accomplishments and personal connections; I think of his work, and in particular of his extraordinary book, *Race, Crime, and the Law*.¹ You will, I hope, excuse me for being a little bit cynical when I say that many books about the law by leading scholars tend to be overblown theory or thinly veiled politics. Professor Kennedy's *Race, Crime, and the Law* is neither of those. It is empirical and careful, without losing the forest for the trees; it's politically significant and pointed, without being grandiose or strident; and it is deeply synthetic about race, crime, and the law in a way that I learned from greatly when I read it as a starting law professor.

That's why I mention this, because when I realized he would be our Levine Lecturer, I remembered what a fine experience it was as a starting

* Michael R. Klein Professor, Harvard Law School. Professor Kennedy is the author, most recently, of *FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW* (2013). These remarks were made during a lecture at Fordham University School of Law on February 5, 2013. The text of his remarks has been lightly edited. The views expressed herein are his alone.

1. RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997).

law professor to read his book, which really did what one hopes a book can do.

So it's intensely gratifying to have Professor Kennedy presenting a lecture today that comes from his next book, boldly addressing color consciousness and the law.

Without further ado, Professor Kennedy.

PROF. KENNEDY: Thank you very much for the gracious introduction. I would like to thank all of those who have facilitated this gathering. It's a great pleasure to be here.

I'm going to address my remarks to the idea of colorblindness. Colorblindness is a key idea in American life. It stands for the proposition that race ought to play no role in assessing individuals. Some see it as a long-term aspiration that should not be demanded immediately. They say they yearn for the day when race has sunk into irrelevancy, but contend that comprehensive colorblindness immediately is premature. They associate themselves with Justice Harry Blackmun's statement that "[i]n order to get beyond racism, we must first take account of race."² This is the camp of the colorblind gradualist.

Other proponents of colorblindness are "immediatists." They insist that in order to make race irrelevant, one must make it irrelevant now. Chief Justice John Roberts reflected the sentiments of that camp when he and a majority of the justices voted in 2007 to strike down a racially selected student assignment plan instituted to retain racial balance.³ "The way to stop discrimination on the basis of race," Roberts insisted, "is to stop discriminating on the basis of race."⁴

Another colorblind immediatist, Professor William Van Alstyne, put it this way: "[O]ne gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment *never* to tolerate in one's own life—or in the life or practice of one's government—the differential treatment of other human beings by race."⁵ "That," according to Van Alstyne, "is the great lesson for government itself to teach: in all we do in life, whatever we do in life, to treat any person less well than another or to favor any more than another for being black or white or brown or red, is wrong."⁶

Immediatists come in at least two varieties. One views all racial discrimination, including affirmative action, as having always been illicit. A second views affirmative action as having been useful as a needed expedient in the late 1960s and early 1970s, but as an intervention that became disastrously entrenched, requiring uprooting. There is a consensus among immediatists, however, that whatever the proper status of

2. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

3. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

4. *Id.* at 748.

5. William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809 (1979).

6. *Id.* at 809–10.

affirmative action in the past, currently it should play no role in American life.

Well, to take the measure of colorblindness, especially as it relates to affirmative action, I chart its history, note its attractions, and posit its weaknesses. I conclude that as an aspiration and strategy, colorblindness is misconceived. The single most widely cited statement associated with the idea of colorblindness is a declaration by Justice John Marshall Harlan: “In respect of civil rights, common to all citizens, the Constitution of the United States does not . . . permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. . . . There is no caste here. Our Constitution is colorblind, and neither knows nor tolerates classes among citizens.”⁷

Harlan made this statement dissenting from the Supreme Court’s ruling in *Plessy v. Ferguson* in 1896. That was the holding which upheld the constitutionality of a Louisiana law that required passengers of different races to occupy equal but separate cars on intrastate trains.⁸ The Court concluded that compulsory racial separation was reasonable in light of custom and public opinion.⁹ Justice Harlan, by contrast, saw the law as a stigmatizing brand inflicted on Negroes.¹⁰

Harlan’s assertion that government ought not be allowed to make racial distinctions in the enjoyment of civil rights stemmed in part from a resilient but marginalized strand of thought and feeling in nineteenth-century America. One set of contributors to this tradition was the women dissidents who petitioned the Massachusetts legislature in 1839 to repeal all laws which made any distinction on account of color.¹¹ Another contributor to this tradition was Charles Sumner, who, attacking racial segregation in the Boston public schools, maintained that any and all racial discriminations amounted to unacceptable manifestations of caste.¹²

More immediately, Justice Harlan’s invocation of the colorblind Constitution echoed the brief of the losing lawyer in *Plessy v. Ferguson*. Albion Tourgée remarked that “Justice is pictured blind and her daughter, the Law, ought at least to be color-blind.”¹³ Condensing that language, Justice Harlan made it more memorable.

Justice Harlan offered no historical or textual support for his claim that our Constitution is colorblind. There is little support to offer. Congressional framers of the Fourteenth Amendment declined to accept language that would have expressly prohibited government from drawing racial lines. Wendell Phillips—the great Wendell Phillips—proposed a

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

8. *Id.* at 550–51 (majority opinion).

9. *Id.* at 552.

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

11. ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 22 (1992).

12. *Id.* at 42–43.

13. Brief for Plaintiff in Error at 19, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (No. 210), 1893 WL 10660, at *19, reprinted in 13 *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW* 46 (Philip B. Kurland & Gerhard Casper eds., 1975).

Fourteenth Amendment which would have proclaimed that “No State shall make any distinction in civil rights and privileges . . . on account of race, color, or descent.”¹⁴ If adopted, that proposal would have required as a constitutional rule colorblind immediatism. That proposal, however, was not accepted. What was, is a purposely open-ended standard that says nothing explicitly whatsoever about racial distinctions.

Moreover, many of the framers and ratifiers of the Fourteenth Amendment countenanced laws that explicitly differentiated people on a racial basis. In a few instances, Congress enacted laws that benefited only colored persons.¹⁵ More widespread in the late 1860s were state laws that separated people along racial lines.¹⁶ Most discussed at the time were laws that prohibited people of different races from marrying one another.¹⁷ When asked whether such statutes were inconsistent with the demand that states afford all persons the equal protection of the laws, the principal framers of the Fourteenth Amendment replied that there was no such inconsistency; after all, whites could not marry blacks, just as blacks could not marry whites.¹⁸ All were subject to the same law, and thus were treated equally.

The U.S. Supreme Court ratified that understanding of the Equal Protection Clause in 1883, thirteen years before *Plessy v. Ferguson*, in a unanimous ruling that included Justice Harlan. In *Pace v. Alabama*, the Supreme Court upheld an Alabama law that more harshly punished interracial as opposed to intraracial fornication.¹⁹ Since the law applied the same set of punishments to whites as well as blacks, the Court saw no constitutional infirmity in the statute.²⁰

True, even at the dawn of the Equal Protection Clause, there were some who repudiated oppressive racial laws that were camouflaged by the forms of racial neutrality. But that perspective was an outlier among those with political influence.

In addition to the absence of any reference by Harlan to a textual or intentionalist constitutional basis for his famous declaration is another noteworthy feature, one often obscured by casebook editors and others who

14. KULL, *supra* note 11, at 62.

15. *See, e.g.*, Second Freedmen’s Bureau Act, ch. 200, 14 Stat. 173 (1866).

16. *See, e.g.*, Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s–1960s*, 70 CHI.-KENT L. REV. 371, 377–78 (1994) (citing an 1867 Alabama statute that mandated imprisonment for two to seven years for whites and blacks who engaged in a sexual relationship while living together, regardless of their marital status).

17. *See, e.g.*, KULL, *supra* note 11, at 76–77.

18. *See* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955) (arguing that the Equal Protection Clause, like the Civil Rights Act of 1866, was not meant to apply to antimiscegenation statutes); *id.* at 15–16 (noting that Moderate Republicans like William Pitt Fessenden and Lyman Trumbull stated that the Civil Rights Act of 1866 would not invalidate antimiscegenation laws because they were not discriminatory, as “Negroes could not marry whites and whites could not marry Negroes” (citing CONG. GLOBE, 39th Cong., 1st Sess. 505–06 (1866))).

19. *Pace v. Alabama*, 106 U.S. 583 (1883).

20. *See id.* at 585.

decline to quote what the Justice stated immediately before his allusion to colorblindness. He wrote,

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.²¹

What Harlan seems to be saying is that to remain ascendant, the dominant race need not resort to ruses like equal but separate, precisely because it is dominant and will continue to be for all time, if it observes the principles of constitutional liberty. These principles, he suggested, pose no real threat to white supremacy. Under the new regime of the Thirteenth, Fourteenth, and Fifteenth Amendments, white supremacy in American society could continue unabated, albeit under a new, unofficial form.

This reading of Harlan's colorblindness declaration comports realistically with the historical, as opposed to the romanticized, Justice Harlan. After all, he was a former slave owner, initially opposed the Thirteenth Amendment, and tolerated various forms of segregation, notwithstanding his *Plessy* dissent.²²

Whatever its limitations, the Harlan dissent did challenge Jim Crow segregation. Perhaps unsurprisingly, therefore, it was absent from the pages of the *United States Reports* during the long period when segregation was seen as an innocuous racial distinction as opposed to a dangerous racial discrimination.

But the absence continued even after the Court began to view segregation critically. References to the Harlan dissent appear neither in *Brown v. Board of Education*²³ nor any of the other Supreme Court decisions in the 1950s that invalidated state laws requiring racial segregation. The first time the Harlan declaration surfaces explicitly in a Supreme Court opinion subsequent to *Plessy v. Ferguson* is a concurring opinion by Justice William O. Douglas in a 1961 case, *Garner v. Louisiana*, that invalidated the arrest of civil rights demonstrators.²⁴ That reference, however, is fleeting. For the remainder of the 1960s, it does not reappear.

The Harlan declaration becomes an oft-used rhetorical weapon only later, when it was deployed against affirmative action policies. Justice Potter Stewart inaugurated the practice in 1980, when he began a dissent to the Court's validation of a federal minority business set-aside program by quoting Harlan.²⁵ Elaborating, Stewart wrote that in *Plessy*, the Court had upheld "a statute that required the separation of people on the basis of their race . . . because it was a 'reasonable' exercise of legislative power and had

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

22. See Alan F. Westin, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, 66 YALE L.J. 637, 637–38, 642, 653 (1957); see also Goodwin Liu, *The First Justice Harlan*, 96 CALIF. L. REV. 1383, 1385–88 (2008).

23. 347 U.S. 483 (1954).

24. *Garner v. Louisiana*, 368 U.S. 157, 177, 184–85 (1961) (Douglas, J., concurring).

25. *Fullilove v. Klutznick*, 448 U.S. 448, 522–23 (1980) (Stewart, J., dissenting).

been ‘enacted in good faith for the promotion [of] the public good.’”²⁶ “Today,” he complained, “the Court upholds a statute that accords a preference to citizens who are ‘Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts,’ for much the same reasons. I think today’s decision is wrong for the same reason that *Plessy v. Ferguson* was wrong.”²⁷

In 1989, Justice Antonin Scalia invoked “our Constitution is colorblind” to explain his vote to invalidate a municipal business set-aside program analogous to the one which Justice Stewart had objected to. According to Justice Scalia,

The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a Nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin.²⁸

In 2007, Justice Clarence Thomas invoked the Harlan declaration in a case that was not precisely an affirmative action dispute, but did involve the legality of state action challenged by whites who claimed that on account of race, their children had been victimized by reverse discrimination.²⁹ Supporting the plaintiffs, Justice Thomas declared, “My view of the Constitution is Justice Harlan’s view.”³⁰

Constitutional colorblindness has several apparent attractions. It offers the benefit of seeming moral clarity, which is, as Michael Kinsley observes,³¹ a great rhetorical plus. The colorblind position—disregard race altogether in assessing people—is vivid, succinct, and simple. It enjoys the bumper-sticker advantage. It is a clear rule, understandable to all and amenable to accountability. It appears to promise a clean break with a longstanding and ugly practice.³²

Colorblindness also offers the allure of heroic associations. Earlier, I quoted the colorblindness rhetoric of nineteenth-century radical, racial egalitarian Wendell Phillips. His ideological heirs kept this rhetoric alive throughout the twentieth century.

The first time racial colorblindness surfaces in the pages of *The New York Times* is a story that appears December 26, 1942. The story begins in the following way: “Complete social, political, and economic emancipation for the Negro in a world that is seeking true democracy was advocated here [in Black Mountain, North Carolina] today by the Fellowship of Southern

26. *Id.* at 523 (quoting *Plessy*, 163 U.S. at 550 (Harlan, J., dissenting)).

27. *Id.*

28. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520 (1989) (Scalia, J., concurring).

29. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 772 (2007) (Thomas, J., concurring).

30. *Id.*

31. Michael Kinsley, *The Spoils of Victimhood*, *NEW YORKER*, Mar. 27, 1995, at 62.

32. *Id.*

Churchmen in a statement which calls upon all followers of democracy and Christianity to become color blind.”³³

Shortly after, the *Times* quotes Ralph Bunche, declaring that “[r]eal democracy . . . is color-blind.”³⁴

Throughout the 1950s and 1960s, in books, sermons, speeches, editorials, essays, letters, briefs, and conversations, opponents of segregation raised high the banner of colorblindness to shame, challenge, and overcome state-enforced racial separateness. Justice Thomas and other champions of conservative constitutional colorblindness are not fabricating the quotations in which the lawyers attacking segregation praised colorblindness.

The appellants in *Brown v. Board of Education* did declare in their brief, “That the Constitution is colorblind is our dedicated belief.”³⁵ That’s what Thurgood Marshall and company stated.

During oral argument, the representatives of the appellants did assert, “We have one fundamental contention which we will seek to develop . . . and that contention is that no state has any authority under the Equal Protection Clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.”³⁶

Judge Constance Baker Motley did state that the bible to which the great Thurgood Marshall turned in his depressed moments was the Harlan declaration.³⁷

A major lesson articulated by leading figures in the civil rights revolution was that assessment without regard to race was the proper, enlightened, virtuous way to judge individuals. Of course, that view was always contested. The civil rights revolution was a hydra-headed movement. But colorblindness was one of its signature themes. That theme gained enormous prestige, and understandably so. It seemed to be the very antithesis of segregationist race consciousness. It voiced a healthy desire to break free from the suffocating anticorred bigotry that had saturated every sphere of American life. It expressed an urge to tear away blinders that prevent people from appreciating fully the humanity of others.

Constitutional colorblindness—at least certain versions of it—also displays other attractions. One is a healthy skepticism regarding capacities to distinguish between acceptable and unacceptable racial distinctions.

33. *Churchmen Urge Full Negro Rights*, N.Y. TIMES, Dec. 26, 1942, at 9.

34. *Democracy is Color-Blind*, N.Y. TIMES, Jan. 28, 1951, at 8E.

35. Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument at 65, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (No. 8), 1953 WL 78288, at *65.

36. Transcript of Oral Argument at 4, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (No. 8).

37. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 773 (2007) (Thomas, J., concurring) (quoting IN MEMORIAM: HONORABLE THURGOOD MARSHALL, PROCEEDINGS OF THE BAR AND OFFICERS OF THE SUPREME COURT OF THE UNITED STATES, at X (1993) (remarks of Judge Constance Baker Motley)).

After all, leading twentieth-century jurists—Oliver Wendell Holmes, Jr.³⁸ and Louis Brandeis³⁹—failed to recognize Jim Crow racial distinctions as a constitutional evil. And in *Korematsu v. United States*, a Supreme Court that decried invidious racial discrimination simultaneously affirmed it in an egregious ruling upholding the unwarranted internment of people of Japanese descent during World War II—a ruling agreed with by some of the leading civil libertarians and civil rights champions of the day.⁴⁰

A colorblind constitutionalist might well argue, with *Korematsu* in mind, that in the presence of the entrancing race line, no one, including the judges, can safely be trusted. Where race is concerned, the colorblind constitutionalist might contend, we must lean over backwards to protect ourselves from ourselves.

There are, however, problems with the proposition that under our Constitution the government may not make distinctions on the basis of race. For one thing, few who purport to embrace this proposition are truly committed to erasing all governmental racial distinctions. Most who have purported to embrace that proposition have a narrower commitment than that: colorblindness in routine matters, but with a safety hatch that permits attentiveness to race when necessary.

In *Johnson v. California*, the Supreme Court adjudicated the constitutionality of a policy under which California prison officials racially segregated prisoners for their first several weeks of incarceration to prevent violence fomented by racial gangs.⁴¹ The Court held that, despite the violence context, officials were still required to justify this racial discrimination to the same extent as any other governmental racial discrimination.⁴² Justices Thomas and Scalia dissented.⁴³ The Court's leading colorblind immediatists argued that a due regard for the expertise of prison authorities and the reality of prison violence justified relaxing the normal rules regulating governmental racial distinctions.⁴⁴

Their argument is reasonable, but dramatically at odds with the declaration that our Constitution is colorblind. Thomas and Scalia say that they believe that the Constitution should be colorblind, except in an emergency.⁴⁵ That raises the question of why the lingering destructive consequences of past racial wrongs do not count as emergencies that justify the use of racially selective measures. These circumstances could be deemed emergencies.

38. See, e.g., *Berea Coll. v. Kentucky*, 211 U.S. 45, 51, 58 (1908) (affirming the conviction of a teacher for educating white and black students together). Justice Holmes concurred in the judgment but did not write an opinion. *Id.* at 58.

39. See Christopher A. Bracey, *Louis Brandeis and the Race Question*, 52 ALA. L. REV. 859, 868 (2001).

40. *Korematsu v. United States*, 323 U.S. 214 (1944).

41. *Johnson v. California*, 543 U.S. 499, 502 (2005).

42. *Id.* at 512.

43. *Id.* at 524 (Thomas, J., dissenting). Justice Scalia joined Justice Thomas's dissent but did not write his own. See *id.*

44. *Id.*

45. *Id.* at 540.

What Professor Nathan Glazer observed decades ago continues to obtain today.

[G]eneral principles that mean justice are often suspended to correct special cases of injustice, as when the immigration laws are suspended to let in a body of political refugees, or tax moneys are made available to those suffering from flood or other disasters. Negroes are the victims of a man-made disaster more serious than any flood . . .⁴⁶

Glazer is absolutely right. Racial minorities, particularly blacks, have been hit by man-made disasters more serious than any flood. But Thomas, Scalia, and those of similar mind have decided to decline designating those catastrophes as such. By conceding, however, that in some circumstances the government may properly differentiate on a racial basis, Thomas, Scalia, and other colorblind immediatists confess that they do not believe literally that government must never make racial distinctions. Rather, they believe that only under exceptional circumstances may the government properly differentiate on a racial basis. The issue then becomes identifying those circumstances—a task that gives rise to the inescapable messiness of line drawing. The vaunted simplicity and clarity of constitutional colorblindness is not so simple and clear after all.

Previously I noted that an allure of colorblindness is association with admirable figures who have used colorblindness rhetoric to oppose white supremacy. I think here of the abolitionists—William Lloyd Garrison, Wendell Phillips, founders of the National Association for the Advancement of Colored People, and the organizers of the Student Nonviolent Coordinating Committee. All of those people—all of those people—at one time or another spoke the rhetoric of colorblindness. And they are indeed entitled to great respect and gratitude.

One should recognize, however, another facet of the history of colorblindness: false proponents who use its rhetoric only opportunistically. Enemies of *Brown v. Board of Education* long fought against it, only to embrace a narrow version of the landmark ruling to forestall the implementation of a broader conception of desegregation. Similarly, white supremacists long fought against any and all versions of colorblindness, only eventually to embrace a version serviceable for suppressing affirmative action. This describes the trajectory of a number of influential figures. I think of a number of senators. I think of Senator Sam Ervin. I think of Senator Jesse Helms.

It also describes the evolution of Supreme Court Justice and later Chief Justice William H. Rehnquist. A law clerk to Justice Robert Jackson when *Brown v. Board of Education* was before the Supreme Court, the young Rehnquist opposed invalidating segregation, though he later lied about this matter during confirmation hearings before the Senate.⁴⁷ He lied on two

46. NATHAN GLAZER, *THE SOCIAL BASIS OF AMERICAN COMMUNISM* 181–82 (1961).

47. See *Nomination of Justice William Hubbs Rehnquist To Be Chief Justice of the United States: Hearings Before the S. Committee on the Judiciary*, 99th Cong. 161–63, 224 (1986).

occasions, in fact.⁴⁸ Nothing that Rehnquist did prior to his elevation to the high court suggested that he had substantially changed his mind as he matured. Then, as a Justice, he persistently sought to constrain *Brown's* scope.⁴⁹ He also resisted exporting to new areas antidiscrimination norms helpful to racial minorities. For example, when the issue arose whether racially discriminatory peremptory challenges should be prohibited as violative of the Equal Protection Clause, Justice Rehnquist, characteristically, voted in the negative.⁵⁰

With remarkably few exceptions, he somehow managed to avoid discerning illicit discrimination against racial minorities in the many cases that came before him during his long tenure.⁵¹ Just as consistently, he ruled in favor of whites claiming to be victims of reverse discrimination in affirmative action litigation.⁵²

Rehnquist was a notably low-key justice. His opinions typically displayed little emotion. But in several affirmative action disputes, Rehnquist exhibited an indignation that seldom surfaced in other contexts.⁵³ Indifferent to or tolerant of racial policies that wrongly disadvantaged racial minorities, Rehnquist was keenly alert to racial policies he perceived as unfair to whites. Resistant to colorblind constitutionalism when open, invidious racial discrimination oppressed colored people, Rehnquist was all too willing to deploy colorblindness against affirmative action that benefited racial minorities.

I am not suggesting that racism infects all opposition to affirmative action. I am saying, though, that racism does infect some substantial element of that opposition.

Immediatists' colorblindness is also marred by an insistence on the part of some of its proponents that affirmative action is the moral and legal equivalent of Jim Crow segregation and kindred forms of racial oppression. A striking example is found in the jurisprudence of Justice Clarence Thomas, who declares,

I believe that there is a moral and constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. . . .

48. *See id.*

49. *See, e.g.,* *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 254–56 (1973) (Rehnquist, J., dissenting).

50. *See* *Batson v. Kentucky*, 476 U.S. 79, 134 (1986) (Rehnquist, J., dissenting).

51. *See, e.g.,* *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982); *Moose Lodge No. 107 v. Irisv*, 407 U.S. 163 (1972). *But see* *Hunter v. Underwood*, 471 U.S. 222 (1985).

52. *See, e.g.,* *Gratz v. Bollinger*, 539 U.S. 244 (2003); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

53. *See, e.g.,* *Weber*, 443 U.S. at 222 (Rehnquist, J., dissenting) (“Thus, by a *tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini, the Court eludes clear statutory language, ‘uncontradicted’ legislative history and uniform precedent in concluding that employers are, after all, permitted to consider race in making employment decisions.”).

That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. . . .

. . . .

In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.⁵⁴

Thomas's equation of racial distinction intended to impose white supremacy with racial distinctions intended to undo white supremacy is one of the silliest formulations in all of American law. When the University of Texas practiced Jim Crow segregation, it excluded all blacks categorically because they were black, pursuant to a state policy that was based on a belief in the contaminating inferiority of African Americans and a desire to express and propound that belief. When the University of Texas practices affirmative action, the policy decreases, by a relatively small amount, whites' chances for admission. The majority of seats at the university continue to be occupied by whites.⁵⁵ When affirmative action contributes to the rejection of a white candidate who would have been accepted if he or she were black, the aim is not to express or propound racial contempt. The aim is to undo past racial wrongs or to foster integration or to facilitate diversity.

Those who say that intent is immaterial are wrong. An accidental slap is altogether different from an intentional one. A sign declaring "Blacks Welcome" means something altogether different from a sign declaring "Blacks Unwelcome," though both contain a racial distinction.

Now, just one more word on this. Colorblind constitutionalism does not require negating the obvious difference between segregation and affirmative action. One could concede, as one sensibly should, that invidious discrimination rests on a different moral and legal plane than positive discrimination—i.e., affirmative action—yet still conclude that the latter is unwise and unlawful. One could take that position.

Judge Thomas Gibbs Gee showed this to be so in an opinion voicing his disagreement with a Supreme Court decision upholding an affirmative action program.⁵⁶ Judge Gee said that as a lower court judge, he would follow what he perceived to be the Supreme Court's erroneous judgment because to him affirmative action was merely mistaken as opposed to evil.⁵⁷ Judge Gee declared that if he thought affirmative action was evil, truly

54. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240–41 (1995) (Thomas, J., concurring) (alterations omitted) (internal quotation marks omitted).

55. *See, e.g.*, THE UNIV. OF TEX. AT AUSTIN OFFICE OF INFO. MGMT. & ANALYSIS, STUDENT CHARACTERISTICS FALL 2011, at 1, 3 (2011), available at www.utexas.edu/academic/ima/sites/default/files/SHB11-12Students.pdf.

56. *See Weber v. Kaiser Aluminum & Chem. Corp.*, 611 F.2d 132, 133 (5th Cir. 1980).

57. *See id.*

equivalent to segregation, he would have felt honor bound to resign rather than enforce malevolent social policy.⁵⁸

Justice Thomas and like-minded immediatists, however, refuse to make such distinctions and, instead, paint with excessively broad strokes, proclaiming all the while that their own personal policy preferences have nothing to do with their rulings.

Using the equivalence of negative and positive racial discrimination as a predicate, purveyors of colorblind immediatism threaten to devour public policies that are much needed in the ongoing struggle against racial hierarchy that the colorblind slogan once hated. Clearly, colorblind immediatism threatens affirmative action in all of its various guises, both the hard forms of affirmative action and the softer versions.

It also threatens other much-needed legal devices. It threatens the disparate impact theory of racial discrimination. But it goes further than that. A strong version of colorblind immediatism could theoretically threaten disparate treatment antidiscrimination law, as well as programs that say nothing about race on their face, but are proposed for the purpose of assisting racial minorities. Many observers see the most traditional antidiscrimination laws as a fundamentally different kind from affirmative action, and thus wholly insulated from the objections of immediatist colorblind constitutionalists. Like affirmative action, however, the ban on racial disparate treatment—that is to say, intentionally disfavoring a person because of his race—the old-fashioned model, the narrowest model of antidiscrimination law—that model also requires race consciousness. A simple charge of racial disparate treatment requires a court or other adjudicator to identify the race of the plaintiff, or at least the perceived race of the plaintiff.

Furthermore, the aim to redistribute resources along racial lines was the primary legislative purpose behind Title VII and the other antidiscrimination statutes.⁵⁹ Prior to Title VII, racially unregulated employment markets severely disadvantaged black workers even when they possessed skills and education comparable to white competitors. To assist black workers within the confines of equal opportunity competition was the primary aim animating the coalition that ultimately succeeded in passing Title VII of the Civil Rights Act of 1964.⁶⁰

Some in this coalition may have been more interested in other things—economic efficiency, electoral calculation, paying off a political debt—but the most influential, urgent, and publicly expressed purpose of Title VII was to assist black Americans.⁶¹ Yet that aim is illicit according to some versions of colorblind immediatism.

58. *See id.* (“Subordinate magistrates such as I must either obey the orders of higher authority or yield up their posts to those who will. I obey, since in my view the action required of me by the Court’s mandate is only to follow a mistaken course and not an evil one.”).

59. *See* *United Steelworkers v. Weber*, 443 U.S. 193, 202–07 (1979).

60. *See id.*

61. *See id.*

Now, there is little chance that immediatists will challenge, much less dislodge, disparate treatment antidiscrimination law. Regardless of the collective intent with which it was conceived, disparate treatment antidiscrimination law is pervasively viewed now as colorblind and uncontroversial. It is simply too deeply embedded for anyone to attack without suffering severe discreditation.

But theoretically—theoretically—a robust version of colorblind constitutionalism does pose a real threat to basic antidiscrimination law. More vulnerable are policies that are facially race silent, but established primarily for reasons of racial redistribution.

Following a court decision barring racial affirmative action at the University of Texas,⁶² the Texas legislature enacted a plan under which any student in the top 10 percent of his or her high school graduating class became automatically eligible for admission to the university.⁶³ This legislation was proposed and passed for the publicly expressed purpose of recovering at least some of the racial diversity lost on account of the abolition of the more conventional affirmative action program under which race had been explicitly counted as a plus by admissions officials.⁶⁴

The Texas 10 percent plan is widely dubbed “race-neutral.”⁶⁵ Any mention of race is absent from its criteria, and thus all students are eligible for its benefits. More whites than Latinos or blacks obtain entry to the university through its program.⁶⁶

But is the top 10 percent program really race blind? It is difficult to see how that label can be applied to a program which was established mainly for the purpose of doing, in a roundabout way, what the invalidated affirmative action program had done more directly by explicitly counting racial minority status as a plus in admissions competition.

The top 10 percent plan arose from a keen concern with the racial demographics of the students admitted to the University of Texas, not from a race-blind indifference to those demographics.⁶⁷ Moreover, if the racial shoe were on the other foot, if the Texas legislature passed a law for the purpose of increasing the number of white students admitted to the university system, opponents would rightly label that law an exercise in illicit racial discrimination. Race would be absent from the face of the policy, but deeply present right beneath the surface.

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

63. 1997 Tex. Sess. Law Serv. 304–06 (West); *see also* TEX. EDUC. CODE ANN. § 51.803 (West 2009).

64. *See* *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2415–16 (2013).

65. *See, e.g., Studies Show Race-Neutral College Admissions Could Work*, USA TODAY (Oct. 3, 2012, 7:59 AM), <http://www.usatoday.com/story/news/nation/2012/10/03/study-race-neutral-admissions/1609855/> (“In Texas and Georgia leading public universities use a race-neutral system.”).

66. *See, e.g.,* THE UNIV. OF TEX. AT AUSTIN, REPORT TO THE GOVERNOR, THE LIEUTENANT GOVERNOR, AND THE SPEAKER OF THE HOUSE OF REPRESENTATIVES ON THE IMPLEMENTATION OF SB 175, 81ST LEGISLATURE FOR THE PERIOD ENDING FALL 2012, at 26–27 (2012).

67. *See Fisher*, 133 S. Ct. at 2415–16.

Policies that are silent as to race but initiated for the purpose of establishing or maintaining racial advantage for whites are invalidated nowadays on the grounds that they violate the constitutional prohibition against government action motivated by race that cannot withstand strict scrutiny.⁶⁸ Why, then, are policies like the Texas 10 percent plan allowed to stand?

The reason is that rigorous and immediatist colorblind constitutionalism is yet to be fully ascendant. Even some immediatists are willing to countenance racially motivated percentage plans, so long as they are silent as to race in form.

On the other hand, some colorblind immediatists are already laying siege to policies such as the Texas 10 percent plan. Hence, Professor Brian T. Fitzpatrick contends that when government actors attempt to gerrymander racial results by race-neutral means, these efforts are often no more legal than the explicit racial discrimination they are trying to avoid.⁶⁹

Ward Connerly, the anti-affirmative action activist, objects as well. He writes,

It is not the legitimate business of government in America to promote “diversity.” When the government uses “race-neutral” means to achieve a desired racial outcome instead of explicit race preferences, the two approaches become a distinction without a difference. The deliberate pursuit of racial diversity by either race-neutral means or “quotas” is the antithesis of ensuring that individuals are guaranteed freedom from government discrimination and then letting the chips fall where they may.⁷⁰

The espousal of racial laissez-faire expressed by Professor Fitzpatrick and Ward Connerly highlights the biggest drawback of immediatist colorblindness—its equanimity in the face of a social structure still terribly disfigured by past and ongoing racial wrongs. In every aspect of American life, racial differentials and well-being don’t just exist; they erupt, showering the social landscape with stark, familiar patterns. Everybody in this room will certainly be familiar with these patterns: average white life spans that are four to six years longer than those of blacks,⁷¹ black infant mortality rates that are twice those of whites,⁷² black poverty rates that are double those of whites,⁷³ black incarceration rates that are many times those

68. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–68 (1977).

69. Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 290 (2001).

70. Ward Connerly, *No Place in Life or Law*, WASH. TIMES (Jan. 21, 2003), <http://www.washingtontimes.com/news/2003/jan/21/20030121-010425-2813r/>.

71. LAURA B. SHRESTHA, CONG. RESEARCH SERV., RL32792, LIFE EXPECTANCY IN THE UNITED STATES 15 (2006), [available at http://www.aging.senate.gov/crs/aging1.pdf](http://www.aging.senate.gov/crs/aging1.pdf).

72. Donna L. Hoyert & Jiaquan Xu, U.S. Dep’t of Health & Human Servs., Deaths: Preliminary Data for 2011, Nat’l Vital Stat. Rep., Oct. 10, 2012, at 5, [available at http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_06.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_06.pdf).

73. SUZANNE MACARTNEY ET AL., U.S. CENSUS BUREAU, ACSBR/11-17, POVERTY RATES FOR SELECTED DETAILED RACE AND HISPANIC GROUPS BY STATE AND PLACE: 2007–2011, at 1 (2013), [available at http://www.census.gov/prod/2013pubs/acsbr11-17.pdf](http://www.census.gov/prod/2013pubs/acsbr11-17.pdf).

of whites,⁷⁴ a situation in which for every dollar of wealth held by a typical white family, a typical black family holds a dime.⁷⁵ And those patterns could be replicated if we were talking about Latinos. They could be replicated if we were talking about Native Americans.

Ward Connerly says, “let[] the chips fall where they may,”⁷⁶ as if where they will fall is a mystery, unconnected to the past and dependent only upon individuals’ pluck and luck. We know, however, where the chips will fall in a laissez-faire regime governed by benign neglect of racial inequity. They will fall in favor of whites, who continue to benefit in innumerable ways from a long train of beliefs, habits, practices, and institutions that systematically privilege Euro-Americans and systematically disfavor others, especially blacks, Latinos, and Native Americans.

In the face of that daunting reality, more is required than adherence to a merely procedural colorblindness. What is required is a substantive commitment to racial justice that unavoidably entails the racial distribution of scarce resources.

My remarks thus far have mainly addressed immediatist colorblindness, the version that would abolish affirmative action now. What about the version that tolerates affirmative action for now, but awaits, with an eye on the clock, its departure from the American scene? That’s the type that Justice Sandra Day O’Connor embraced in the affirmative action case that she wrote a number of years ago, in which she expressed a desire, a hope that affirmative action would be gone in twenty-five years.⁷⁷

What about that version of constitutional colorblindness, what I’ve termed “gradualist” constitutional colorblindness? I offer two responses.

The first has to do with the question: how long should affirmative action continue? This is a useful inquiry in that it makes us think about the goals we envision, the progress we are making—or failing to make—in reaching those goals. Colorblind constitutionalists of both the immediatist and gradualist variety say that they envision as their goal a country in which, absent emergency, officials make no racial distinctions among individuals.

That goal, in my view, is insufficiently attentive to its political and social surroundings. A policy that eschews—indeed, prohibits—routine, official racial distinctions would be very attractive if the antidiscrimination rule reflected appropriately the will of those affected, including racial minorities, and arose in a context in which there exists no current or vestigial subordination or marginalization of racial outsiders.

A policy would be very unattractive, however, if the antidiscrimination rule reflected the will of the historically dominant racial group and arose in

74. MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 4 (2007), *available at* http://www.sentencingproject.org/doc/rd_stateratesofincbyraceandethnicity.pdf.

75. PAUL TAYLOR ET AL., PEW RESEARCH CTR., WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS AND HISPANICS 1 (2011), *available at* http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf.

76. *See* Connerly, *supra* note 70.

77. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

a context in which current and vestigial subordination or marginalization of racial outsiders is evident.

The character of the antidiscrimination rule is thus contingent on its surroundings and consequences. Colorblind antidiscrimination should not be viewed as a transcendent goal commendable no matter what the surrounding circumstances.

Many proponents of colorblindness, including gradualists, still underestimate the burdens imposed upon people of color by past and ongoing racial discrimination. The underestimation often prompts impatience with the victims of inequality rather than the unfair circumstances they face. Seeking to preempt such impatience, Justice Ruth Bader Ginsburg appropriately noted that “it remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities.”⁷⁸

Alluding to Justice O’Connor’s twenty-five-year timeline, Justice Ginsburg cautioned that while “one may hope,” one cannot “firmly forecast[] that over the next generation’s span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.”⁷⁹

I have just argued that a mistaken impatience sometimes mars even gradualist colorblindness. But my objection to the colorblindness motif itself, gradualist as well as immediatist, reaches further than that. According to Justice O’Connor, a “core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.”⁸⁰ If by that she meant a core purpose of the Fourteenth Amendment was to abolish invidious race-based government action—meaning action meant to adversely affect a given racial group—I would agree with her. But that is not what she meant. O’Connor meant that a core purpose of the Fourteenth Amendment was and is to do away with governmentally imposed racial discriminations, whatever their motivations or consequences. I disagree with that proposition for reasons previously noted.

Justice O’Connor’s putative core purpose is absent from the original intent of those principally responsible for framing and ratifying the Fourteenth Amendment and absent, too, from the constitutional text.

What should be recalled—though it is difficult to do so, given the salience, popularity, and prestige of the colorblind mantra—is a point made by Professor Paul Freund years ago: the constitutional mission of the Fourteenth Amendment is the establishment of equal protection, not colorblindness.⁸¹ The strategy of disregarding race—that is to say, colorblindness—is a methodology that can, in appropriate circumstances, serve as a tool helpful for attaining racial justice. It should not, however, be

78. *Id.* at 346 (Ginsburg, J., concurring).

79. *Id.*

80. *Id.* at 341 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

81. PAUL A. FREUND, *ON LAW AND JUSTICE* 33–34 (1968).

elevated to the rank of a purpose, a principle, a goal in and of itself.⁸² The strategy of disregarding race can be used for good. But it can also be used for bad—to cover up injustice.

Recall that textually, the original U.S. Constitution, the Constitution of 1787 to 1791, said nothing expressly about race. It was, thus, in an important sense, race blind, even while it countenanced racial slavery and all manner of other forms of racial mistreatment.

It was only when race was expressly mentioned in the legal innovations of Reconstruction—the Fifteenth Amendment, the Civil Rights Act of 1866, and the other Reconstruction statutes—it was only then that American “pigmentocracy” was frontally challenged on a nationwide basis.

Finally, allow me to observe that it is odd that so many have staked so much on a figure of speech that celebrates a disability. Some people are truly colorblind. They cannot distinguish colors. But they are not happy with this. Their incapacity is a bane. It is past time to come up with a new metaphor that will better serve our desire to create within the context of our multiracial society a more perfect union, one decidedly more fair than we have today.

Thank you very much.

[Applause]

PROF. ZIPURSKY: We have a little time to take some questions.

QUESTIONER: A fascinating talk. One of the most interesting things you said is the tension between a sort of Texas 10 percent plan, which you would think of constitutional colorblindness as sort of accommodating—it got me to think that maybe the problem with colorblindness as a norm is that it’s a kind of empty principle. That is to say, the fact that you see various people deploying it at different points in our history suggests that people sort of piggyback it onto other principles that they really care about.

For example, I’m thinking about Reva Siegel’s work on the tension between the anticlassification and the antistatutory subordination.⁸³ If what you really care about is anticlassification and you are piggybacking colorblindness on that, then you could be against *Brown* and against affirmative action, but be for a Texas 10 percent plan. But if you really care about antistatutory subordination and you’re comfortable striking down *Brown*, but not either the Texas plan or affirmative action, you could call what you’re doing sort of a colorblindness and piggyback on the antistatutory subordination.

In that sense, colorblindness, to me—I wonder if it just doesn’t state a sort of coherent principle, but rather is piggybacked on other constitutional values or social values that people really believe, but use this shortcut of colorblindness.

82. *See id.* at 33 (“The most important point to be made in considering [the] question [of colorblindness] is that the color-blind test is not a term of art found in the Constitution . . .”).

83. *See, e.g.,* Reva B. Siegel, *Equality Talk: Antistatutory Subordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004).

PROF. KENNEDY: The point seemed to be that the idea of colorblindness can be seen as an empty principle, a useful vehicle for people to use to get at other things they really care about.

QUESTIONER: And other constitutional principles.

PROF. KENNEDY: I think there's something to what you say. I don't want to lose sight of the fact, however, that there are a lot of really good people today and in the past who have embraced colorblindness, and not opportunistically. It's the presence of those people that complicates things and that makes this phrase, it seems to me, a particularly interesting one in the life of the law.

PROF. ZIPURSKY: Other questions? George Conk.

QUESTIONER: The thing that strikes me about the 10 percent rule is that we sustained affirmative action with the concurring opinion of Justice Harlan, and the embrace of his diversity line was essentially a statement that we're going to let educators make educational judgments. We sustained affirmative action for a long time on that principle. Then, after *Hopwood*, I guess, if I have the sequence right, the Fifth Circuit struck down any race-conscious affirmative action in the name of merit.⁸⁴

What strikes me about the 10 percent is that it's educationally arbitrary. Does that play a role in your analysis of what's wrong with that Texas 10 percent approach?

It's an embrace of existing patterns of residential—that strikes me as a potential vulnerability, too, on the grounds that it's potentially discriminatory.

PROF. KENNEDY: I'm not against the Texas 10 percent plan. I'm not against affirmative action. In my view, affirmative action, the Texas 10 percent plan, other things like that are very modest efforts to reconfigure opportunity in our country.

What's striking to me is the extreme resistance to them, because they are so modest. If I were king—I like that idea—I would seek to institute policies that were much more robust, much more redistributist than these. These are what we have. Are they vulnerable? Sure, they're very vulnerable.

Justice Lewis Powell's idea of affirmative action as being justified in higher education only on grounds of diversity⁸⁵—I'll take it, just because that's what is provided, but why is that a better justification for affirmative action than seeking to undo a couple of centuries of racial mistreatment? I don't get it. Why is that a better justification for affirmative action than a state policy of trying to integrate people who are outsiders, whether they have been in this country for a long period of time or not? Recent immigrants who are on the outside—have they been subject to mistreatment

84. *See Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996); *see also, e.g., Lalla v. City of New Orleans*, Nos. 96-2640, 96-2658, 98-3591, 1999 WL 138900, at *1, *4-5 (E.D. La. Mar. 12, 1999) (holding that a fire department's fifty-fifty racial quota system violated white applicants' equal protection rights as a matter of law).

85. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313-14 (1978).

in the United States? No. But are they on the outside and we want to bring them in? Yes. It seems to me that's a perfectly good reason to have affirmative action.

I think there are a bunch of reasons better than diversity for affirmative action. I'm not against the diversity rationale. I think it's very vulnerable, because the Supreme Court has knocked out everything else and so much pressure is put on it.⁸⁶ So people have to make claims for it that, it seems to me, are implausible. But that's what we're stuck with.

The Texas 10 percent plan—yes, it has a bunch of vulnerabilities. But that's what we're stuck with.

Not only that, but we're also stuck with a rhetoric that just—it's very difficult to even talk about these things sensibly in public. If you're at a university and there's some public forum and the authorities are talking about their affirmative action plan, they can't even talk straightforwardly and honestly about their affirmative action plan, because there's litigation in the wings. So they have to talk this diversity language. Everything is diversity, diversity, diversity, even when, in their own minds, that's not—they might have that in mind to some extent, but that's clearly not what's at the forefront of their minds.

That is a part of our current scene that reiterates other episodes in American life. I'm writing something now, a little book, about the civil rights revolution. I've just been reading about the Civil Rights Act of 1964, Title II, the section of the 1964 Civil Rights Act that prohibits racial discrimination in places of public accommodation. What was the big constitutional fight with respect to the framing of Title II? It was whether Title II was going to be justified by Section 5 of the Fourteenth Amendment or the Commerce Clause. It was justified mainly on grounds of the Commerce Clause because in 1883, the Supreme Court in *The Civil Rights Cases* invalidated the public accommodation section of the Civil Rights Act of 1875.⁸⁷

So now, as we speak—right now—if you drive from New York City to Columbia, South Carolina, as a matter of federal law, what disables the owner of a restaurant or the owner of a hotel from putting up a sign saying, “Whites Only”? As a matter of federal law, the 1964 Civil Rights Act, Title II, what gives Congress power to do that is the Commerce Clause. That sign would put an undue pinch on interstate commerce.

People knew in 1964 that that's not really what's going on here. That's not why people are being blown to smithereens in Birmingham, Alabama. That's not why little children are braving police dogs and the fire hoses. It was a matter of human dignity.

But we couldn't talk about that. We had to talk about interstate commerce.

86. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (“[A]s the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over expansive.”).

87. *The Civil Rights Cases*, 109 U.S. 3 (1883).

We have seen that throughout American life. The sad fact is, we're not past that. So in the affirmative action debate, we go all around the mulberry bush talking about things that are not really in the forefront of our minds, because the legal system requires us to. That's a very sobering thing, and we should seek, by all means, to change that.

PROF. ZIPURSKY: This was a wonderful lecture. So with that, we would like to thank you.

PROF. KENNEDY: Thank you again.

[Applause]