Can the Supreme Court Constitutionally Uphold the Hopwood Opinion? Race, Color-blindness and Public Opinion before Bakke

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CAN THE SUPREME COURT CONSTITUTIONALLY UPHOLD THE *HOPWOOD* OPINION?
Race, Color-blindness and Public Opinion before *Bakke*

by Marco Portales

Note: On Monday, December 2, 2002, the Supreme Court announced it will hear, likely in late March, Grutter v. Bollinger and Gratz v. Bollinger, two "reverse discrimination" cases, to determine whether Affirmative Action is needed to ensure racial diversity in our competitive colleges and universities. White applicants claim they are displaced by less qualified minority students. University of Michigan defendants claim racial diversity needs require the admission of qualified minorities who bring additional benefits in the form of different experiences. The following legislative history of the "color-blindness" concept seeks to explain why minority students are generally less qualified. In light of this shaping U.S. past, the author respectfully recommends that the Supreme Court uphold Bakke, re-embracing the necessity for diversity not only in higher education but throughout the education of all American students.

Examining past congressional dialogues on race reveals how long-held views and practices have evolved, and such knowledge should prompt the enactment of more enlightened laws and public policies. Informed, judicious statutes and public policies need to arise from the realities of the past, especially when practices and customs have created inequities that on first impression still appear to foment enmity between people of different races and cultures. Not to inquire into the reasons and beliefs that have shaped American attitudes and mores because such activities remain disagreeable places us in the position of being inadvertent accomplices, for silence on unfair and unethical habits and expectations suggests quiet acceptance or condonation of the *status quo*.

The Supreme Court intervention in the 2000 presidential election between George W. Bush and Al Gore dramatically underscored the extent to which the Constitution settles issues. This great document expresses an ideal set of rights, balances and relationships between Americans and our state and federal governments, but interpretation of this enlightened 18th-century statement has always been open to debate. Although nearly every aspect of the Constitution has guided efforts "to form a more perfect union," it is generally not known that the Constitution uses the words "race" and "color" to designate specific human qualities that cannot be disposed of, obviated, or ignored. "Color-blind," "color-blindness," and "race neutral," by contrast, are phrases not found anywhere in the original Constitution, nor in the 27 amendments that have been added to our most carefully thought-out statement of union. These

facts require articulation today because many Americans believe or suppose that the Constitution directs us to approach people in "color-blind" ways, since a number of recent court cases have embraced the view that people should not notice or consider race or pay attention to the color of a person's skin.[1]

Due to such legal opinions and decisions, American society has increasingly assumed that embracing color-blindness is the correct way of carrying out the daily business of hiring and selecting applicants for higher education admission. But even though federal and state courts have expressed legal opinions and have made decisions that attempt to negate the presence of race and skin color, Americans should know that the words of the Constitution itself do not support that judicial interpretation. By moving toward nullifying the importance that race and skin color play in the daily affairs of all Americans, the courts have recently become engaged in constructing legal interpretations that are noticeably at odds with the Constitution and with the amendments that Congress and the state governments have ratified.

Creating laws and public policies with the intention of being blind to both race and skin color was first formally introduced for discussion in Congress in the years after the Civil War. But at that point in our history, such ideas, historians may remember, were dismissed without being seriously considered. Motivated by the views of a widespread public consensus, we now need to recall that even the sympathetically-disposed Reconstruction legislators outrightly rejected color-blindness for reasons that would have been considered obvious.

It was not until *Hopwood v. State of Texas* in March 1996 that the Fifth Circuit Court of Appeals in New Orleans legally required college and professional school admissions officials in Texas, Louisiana and Mississippi to admit students without taking an applicant's race or skin color into account.[2] In legally requiring college and professional school personnel not to consider race or the color of a person's skin when making admissions decisions, the federal courts, in effect, stated, and then acted on the assumption, that Americans and American society are now ready to ignore the race and color of a person. The idea motivating or propelling this view is based on the supposition that race and skin color do not sufficiently matter in the life experiences of a person to make a difference or much of a difference in the nature of the lives that Americans live in the United States. Yet, as soon as we express such a statement, we find that this view is clearly not the case. Indeed, as we move into the 21st century, we are increasingly learning that race and the color of a person's skin continue to be important components in American lives and almost everywhere else in the world.

By turning or transforming such a *desideratum* into a legal opinion, the courts seem to hope to usher in the idea that race ought not to be an issue in college admissions nor anywhere else in American society. That, of course, might be seen as an ideal, and, although the courts do concern themselves with ideals and ideal behaviors, laws also have to be written to function fairly in the real world we all daily inhabit.

My position is that whereas the Supreme Court sensibly left race as one among other factors that ought to be taken into account in determining college and professional school admissions in *Regents of the University of California v. Bakke* (1978), color-blind court opinions and decisions which seek to disregard race and skin color completely in order to focus attention strictly on what are widely seen as merit criteria

are unfair. Such legal opinions are unfair to the futures that people of color might otherwise have because nothing in such legally-expressed positions takes into consideration an important disregarded truth. That fact is the widely-recognized reality that most applicants being rejected as a consequence of such laws and policies have not had the same kind of advantages received by candidates who are benefiting from color-blind admissions.[3] This means, in effect, that color-blind laws and policies are actually preferring candidates who have already been provided with society's better resources, and rejecting applicants, who, for one reason or another, have not usually benefited from advantages available in that same society.

Since merit criteria, as widely known today, tend to favor candidates historically not burdened by the negative associations that have been traditionally connected to race and skin color, how fair, we need to ask, is it to outlaw race and skin color considerations altogether? Judicial opinions and decisions which fail to factor in the fact that race and color have been perceived negatively in the past are not being honest. For it is known that such perceptions have shaped the realities that we know and continue to see in American society today. If such historically-shaped inequalities did not exist, color-blindness as a solution to race problems might be another matter. But so long as race-based inequalities stay in place in American life, we need to inquire if it is Constitutionally fair to disregard, outrightly, the continued significance and importance of race and color, especially at a time in history when all Americans remain quite aware that race differences and skin color still obstruct desirable equality. Such a question places the difficult race situation on center stage once more.

Americans should know that there is nothing in the Fifth Circuit's *Hopwood* opinion that expressly states or that encourages Americans to see race and skin color in a more positive light than how such human characteristics have been dealt with and treated in the past. This is to say that if the courts completely eliminate the consideration or the weighing of race and skin color, minimizing the attendant issues of parental background, schooling opportunities, and other environmental resources under "color-blind" and "race neutral" decrees, new legal requirements will only reiterate the same age-old prejudices and discriminatory laws, policies and practices that have created the race problems we now have. Such practices have long kept America's minority students from receiving the types of quality educations that Bowen and Bok have proven can noticeably improve society for everyone.[4] Instead of further closing doors to students who have generally not had the benefit of the K–12 resources and parental support that are necessary to deliver better educations, the courts need to pass laws and policies that will include students who have been historically excluded from receiving better educations. The goal of the judiciary, like that of our legislators and the executive branch, should be to create enlightened laws and policies that extend educational opportunities, even at the expense of reallocating federal and state resources. For at stake is nothing less than the overall future of the United States, which largely depends on the education that we provide for all citizens—instead of investing only in the select few from whom leaders are usually chosen.[5]

Since some of the federal courts now appear engaged in the process of erasing race and skin color, it is almost certain that many Americans, including minorities, will continue to see these human traits as contentious no-win issues. For that very reason,

many people are inclined to disregard and to ignore race and skin color, though, on other occasions, race and color are acceptably seen as defining characteristics by which people are permitted and even encouraged to identify themselves. The truth of the matter is that because we have not known how to deal adequately with race and skin color in hiring and in admissions situations, we have not sufficiently made an effort to accept and to embrace these human realities. Are race and skin color, then, being legally outlawed because the courts and public opinion have not been able to find positive attributes in these human traits? That is how the situation appears, for we are inconsistent about when race and skin color are acceptable and when they are not. I believe that finding positive qualities and expressing positive views and philosophies about ourselves after many years of skin color and race-based neglect in this country is one of the best feats that minority people have achieved since the 1964 Civil Rights Act. Whereas being black, Latino, or a member of another minority group was nothing to feel good about before 1964, today many people of color have developed self-pride and confidence in ourselves by studying and by promoting our different histories and culture—all within the context of how immigrants have continued to contribute to the greatness of the United States. By uncovering and then championing the victories and the long individual and community struggles toward self-expression, U.S. people of color have peacefully and yet dramatically worked quite hard to reinvent ourselves in positive ways, in spite of the constraints under which our ancestors and our own generation has labored.

Hopwood completely disregards these multi-faceted advances in virtually all fields of human endeavor. The courts that embrace *Hopwood* fail for this reason to observe and to make note of the admirable general progress that the American minority populations have made, particularly during the last 39 years. Without a sufficient rationale which satisfactorily educates people and which adequately explains why some of the courts feel compelled to nullify the unalterable genetic factors of race and skin color in the face of this remarkable progress, legally requiring people simply to ignore race and color issues by court *fiat* are decisions that are clearly not engendering the kind of equality that American society needs today.

1

For many years, ironically, a good number of minority people have worked, as Martin Luther King, Jr., did, to see race and skin color ignored in our relations to each other. That desideratum, however, was steadfastly disregarded by Congress, the courts and by the daily practices of the American people as a whole until Affirmative Action began to pay some attention to this traditionally disregarded population. Race and skin color as physical characteristics have just been too visible during our entire history to be ignored. It was not until Affirmative Action required race awareness that color-blindness suddenly became a perceived desideratum, the problem being that the American population was not sufficiently educated for either of these two monumental changes. This means, in effect, that race and skin color have throughout

remained with us, which explains why people are not convinced that being "color-blind" is truly that, that is, blind to color. In the absence of such education, opinions and decisions which follow the type of color-blindness that *Hopwood* requires can only continue to maintain racial differences and tensions that are not providing the kind of balanced racial equality that the courts now desire in light of the advances made by the minority populations of the United States during the last half century or so.

Now that some mainstream American citizens are claiming exclusion by admissions processes that hypothetically were set up to offer fairer, equal educational opportunities for minority applicants long denied the entitlement privileges normally accorded whites, the latter have sought and received legal redress. But the intended constitutional protection that the courts have accorded through judgments like *Hopwood* only attempt a solution, at the cost of excluding minorities once more. This time, however, the exclusion is different, for, instead of creating laws and public policies based on the unmistakable presence of race and skin color, as was the case, say, during the Jim Crow years, the courts have now gone completely in the other direction, opining that race and skin color do not exist, essentially, because the courts have now so said. Clearly, race and the color of people's skin do exist, and what the U.S. courts should do is to acknowledge that fact, as stated in the Constitution, and then to uphold *Bakke*, which simply recognizes race and skin color but does not overemphasize that reality when college and professional admissions officers are selecting students for their campuses or programs.

Fair treatment would inquire into the question of whether majority *and* minority people feel appreciated and empowered by the courts' solutions. To require everyone to ignore the race and skin color, especially when minorities have worked so hard during the last 39 years to feel proud, comfortable, and good about these very traits ourselves, has proven quite counter-productive. For, as minority people now see race and skin color, these human characteristics are important enough to help define us as American citizens. Race, in short, does not define us completely, as people used to believe, but race and skin color are important components of the people that we are. As such, race and skin color should not be erased, disregarded or ignored, as some federal circuit courts have held. Simply because the rest of the country, our history and our educations have not yet learned how to accept and how to see positive qualities in race and skin color are not sufficiently good reasons to outlaw these very human qualities recognized by the Constitution. *Hopwood*, it needs to be said, is completely inattentive to all of the efforts that United States minority *and* many mainstream citizens have worked on together since the passage of the Civil Rights Act in 1964 in the schools, in the arts, in politics, in sports, and in daily American life, reconstituting and reconfiguring race and color in nourishing, uplifting ways.

In embracing *Hopwood*, the reaction by the judiciary is understandable but not what is needed. For, although segregation and Jim Crow laws, which sharply divided America by race for roughly sixty years between the 1880s and the 1940s, were taken off the law books by enlightened Supreme Court decisions in the 1950s and 1960s, the courts need to understand that the American people as a whole have never been comprehensively educated to understand why it is necessary to treat all people, regardless of race or color, respectfully and with consideration. Passing legal require-

ments to that effect only tells people what they have to do to comply with the new law. Such edicts do not explain in ways that people can readily understand why society needs certain strictures in place in order to promote the public good and to benefit every citizen—instead of only certain people at the expense of others.

Due to that last clause, which pinpoints how the Constitution has been used by leaders and people with power positions, the U.S. idea, notwithstanding our democratic expressions, has always depended on the practice that some people have to labor for others.[6] While not speaking of an oligarchy as the term is known, Vidal does capture some truth in this observation. As a consequence, in the framing of the Constitution and in the added amendments, race and color consciousness have always been important political, social and economic considerations. Race and color issues have usually been marked either by complete absence in the ways that the laws and public policies have been framed, or by a very carefully stipulated presence. Which is to say that in light of past laws and long-standing policies and practices, the place and the significance of race and skin color in American life calls the *Hopwood* opinion into question. For, by attempting to neutralize race, following about 214 years of racial discrimination and social insistence on segregating people according to race, *Hopwood* fails. *Hopwood* is not fair because it fails to recognize and to take into account that most minorities today remain largely disadvantaged precisely because historically race and skin color were used to deny education, civil rights and other resources and opportunities that mainstream citizens have long taken for granted for self-improvement.

Having been, in effect, shaped, created and influenced by laws, policies and social practices that have used race and color to determine where minority people live, work, where we are educated, and where we play and socialize for more than ten generations, *Hopwood* attempts to reverse that socially created reality without providing any useful way to facilitate such a monumental change. By calling on all Americans not to pay attention anymore to the race and color realities that are largely responsible for creating the very inequalities that college and professional school admissions officers yearly notice between white and minority applicants, the federal courts approach justifying by *fiat* what everyone knows has long been unfair social preference. In declaring a new 180° policy turn regarding race and skin color, in other words, the courts have not endeavored to explain this enormous change in legal philosophy, given the history of discrimination over which the courts themselves have historically presided in the United States. Without requiring necessary changes in American education and life, such as the ones successfully articulated and implemented to improve the prison systems, abruptly asking Americans to disregard race and skin color completely has only exacerbated racial tensions and divisions in the United States.

The best way to illustrate and to understand the extent of the racial divide is by examining the congressional record to study how Congress and the federal courts have dealt with race and color to structure, to shape and to determine the kinds of lives made possible for America's majority and minority populations since the Constitution was signed. By prohibiting the consideration of race in *Hopwood*, the courts thus leave unaddressed the fact that for many generations minority people have wanted

society to respect and to appreciate race differences and skin colors. That desire has not been to have race and color outlawed, nor to have these immutable human traits declared invisible by legal fiat, but to have race and color accepted so that ethnic people can feel good about ourselves. Feeling good about oneself promotes a sense of well-being, competence in one's possibilities and abilities, allowing us to enhance ourselves and the community and society in which we live. The idea is to be embraced and provided not with government handouts less available to mainstream Americans, as some people believe, but simply with the same normal opportunities that have generally been traditionally available to other white Americans—instead of being ignored and marginalized in yet another different way.

During the last two generations, in particular, most African Americans, Asian Americans, Latinos, Native Americans and other groups of sidelined Americans have steadily worked to become full-fledged Americans. Newspapers and other media as well as a number of sympathetic groups and organizations since 1964 and before have monitored and have kept records that readily attest to such efforts. The minority goal, if it can be summarized, has been to usher in a new sense of ourselves that encourages self-pride in our own persons and in the accomplishments of our peoples. In one way or another, all of these social endeavors have sought to connect us to the socio-economic and geo-political struggles of ancestors who often endured unethical and unjust laws and policies in order to improve the quality of life for their progeny. By embracing and requiring only color-blindness in the *Hopwood* opinion, the Fifth Circuit Court of Appeals leaves all of those efforts, as well as the interests and the desires of people of color unrecognized and unaddressed, since substantial achievements that have considerably improved life for minority Americans are not even mentioned much less taken into account in *Hopwood* and other similar legal decisions.

As such, the *Hopwood* opinion has all the appearance at this point of being the vehicle that will create yet another—once more—generation of conflicted and ambivalent minority as well as majority citizens. All Americans, in short, appear destined to continue living difficult and, still, quite different, segregated lives, because as a society we have not yet developed the courage to deal with the immutable human traits of race and skin color in positive, psychologically healthy ways for everyone. Despite our more than 200 years of doing everything that we can to avoid dealing with race and skin color, the main observation that requires saying now is that we apparently still remain uncertain about how we ought to deal with race and skin color, if at all. In judicial areas that now prohibit the consideration of these inextricable human characteristics, race and color presumably will not matter anymore. Yet, who truly believes that such issues will not continue to matter throughout the United States and everywhere else in the world where people of different races live and associate on a daily basis?

2

The words race and color are used only once in the Constitution, and that instance occurs in the Fifteenth Amendment, which proclaims that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." As written, the statement is direct, clear, and eminently ethical. This amendment was added to the Constitution in 1870, but few people know that this one-sentence emendation was added only after more than seven years of congressional debates on whether African Americans should be allowed to vote. Except for a handful of legislators, most congressmen of the period believed that slaves were not educated enough to exercise the right to vote.

What has been less clear about the Fifteenth Amendment is not that a person's right to vote cannot be "denied or abridged by the United States or by any State," but that, in asserting every citizen's right to vote, the amendment specifically points out that "race, color or previous condition of servitude" are human qualities that exist, and that cannot, for that reason, be erased or ignored.[7] Indeed, on May 3, 1866, while standing on the U.S. Senate floor, Michigan Republican Senator Jacob M. Howard, who served and spoke for the Senate and House Joint Committee on Reconstruction, reluctantly acknowledged some of the racial realities that he saw:

> The colored race are destined to remain among us. They have been in our midst for more than two hundred years; and the idea of the people of the United States ever being able by any measure or measures to which they may resort to expel or expatriate that race from their limits and to settle them in a foreign country, is to me the wildest of all chimeras. The thing can never be done; it is impracticable. For weal or for woe, the destiny of the colored race in this country is wrapped up with our own; they are to remain in our midst, and here spend their years and here bury their fathers and finally repose themselves. We may regret it. It may not be entirely compatible with our taste that they should live in our midst. We cannot help it. Our forefathers introduced them, and their destiny is to continue among us; and the practical question which now presents itself to us is as to the best mode of getting along with them.
>
> The committee were of opinion that the States are not yet prepared to sanction so fundamental a change as would be the concession of the right of suffrage to the colored race. We may as well state it plainly and fairly, so that there shall be no misunderstanding on the subject. It was our opinion that three fourths of the States of this Union could not be induced to vote to grant the right of suffrage, even in any degree or under any restriction, to the colored race. We may be right in this apprehension or we may be in error. Time will develop the truth; and for one I shall wait with patience the movements of public opinion upon this great and absorbing question. The time may come, I trust it will come, indeed I feel a profound conviction that it is not far distant, when even the people of the States themselves where the colored population is most dense will consent to admit them to the right

> of suffrage. Sir, the safety and prosperity of those States depend upon it; it is especially for their interest that they should not retain in their midst a race of pariahs, so circumstanced as to be obliged to bear the burdens of Government and to obey its laws without any participation in the enactment of the laws.[8]

This is a remarkably candid assessment, uttered from one of the most public of forums, "to present to the Senate, in a very succinct way, the views and the motives which influenced that committee [consisting of 6 Senators and 9 Representatives]." Senator Howard was here summarizing "views and motives" that represented the "public opinion," an opinion that was not contested. A few legislators of his day had different views, but the opinions of the public they served were not substantially different from the views expressed by Senator Howard. Since "race, color or previous condition of servitude" were visible enough elements in the newly-freed slaves, these qualities, the Thirty-ninth Congress courageously declared two years later in the Fifteenth Amendment, should not be held against *nor* disregarded in a citizen who sought to vote.

Given the nature of the congressional discussions that ensued, it is clear that the legislators of the time would never have imagined that race could be erased or neutralized, since race and color were obviously regarded as part of the realities that all Americans are born with, live with throughout life, and take to the grave. By casting the Fifteenth Amendment in a precise phrase that took seven years to formulate, the Republican Reconstruction legislators successfully passed an amendment that acknowledged awareness that, following the Civil War, some states were using race, color and a person's previous position in life to deny and to abridge a citizen's right to vote and to restrict other constitutional privileges.

The congressional debates recorded in *The Congressional Globe* and in the *Congressional Record* demonstrate that legislators argued about whether the newly-freed slaves, who had been considered property when the Constitution was ratified in 1789, should be given or provided with the rights of citizenship.[9] Such discussions also led to congressional floor debates on whether the freed slaves should be educated, how, and to what extent. What these openly-debated public records reveal is that all kinds of discriminatory views existed and were publicly expressed concerning involuntary servitude, civil rights, and whether African Americans should be permitted to own patent rights, among other issues. Congressional records clearly show that the state senators and representatives fought at the federal government level to maintain the rights of their individual states, countering the views, again and again, of more enlightened leaders like Wendell Phillips (1811–1884), Charles Sumner (1811–1874), Thaddeus Stevens (1792–1868) and a few other senators and representatives who endeavored to grant African Americans full rights as citizens.

What is important to notice here is that a little more than 75 years after the states adopted the Constitution, Congress at that point had the opportunity and could have chosen to make the Constitution color-blind. For, despite the resistance of public opinion that Michigan Senator Howard spelled out, the idea of approaching people in color-blind ways was in the air, since it was broached and discussed on the

congressional floor. But, having lightly considered the option, legislators chose not to embrace color-blindness explicitly, because almost everyone knew that obtaining compelling support for treating the newly-freed slaves in color-blind ways in the post-Civil War environment could not be secured. So, after many discussions, what the legislators chose, rather, was to try to protect the slaves freed by Lincoln's 1863 Emancipation Proclamation by carefully crafting the Fifteenth Amendment. That is why it took the U. S. Congress seven years to pass the amendment that prohibited the federal government and the states from keeping citizens from exercising the right to vote on account of "race, color or previous condition of servitude."[10]

By choosing not to make the Constitution color-blind in the 1860s when the concept makes its appearance in the legislative speeches of the day, and by employing "race, color or previous condition of servitude" in the Fifteenth Amendment, the Thirty-ninth Congress effectively left the nature of the freedom of the newly-released slaves to the will of the legislature. Two years before, in the Fourteenth Amendment of 1868, adjudication of that freedom had been squarely placed in the judiciary, where that responsibility has resided to this day. All of which is to say that if the Constitution had been made unequivocally color-blind by either the Fourteenth or the Fifteenth Amendment, and if the latter provision had not explicitly recognized the importance of race and color, race issues since the Civil War are likely to have developed in the United States in a very different way.

But because the Constitution authorizes the courts to determine the legality of laws and policies passed by Congress, and because the judiciary was and has been historically charged with deciding both the degree and the means through which the freed slaves were to be brought into American society, for more than 130 years race and skin color issues have only received periodic adjustments and clarifications by the federal and state courts. Although color-blindness as a concept has, apparently, been embedded within the Fourteenth Amendment since 1868, it was not until the *Hopwood* opinion of March 1996 that the Fifth Circuit Court of Appeals in New Orleans embraced it. Now, largely supported by a public that has grown tired of dealing with race concerns that appear insolvable, that court ruled that race and skin color are to be specifically outlawed as factors when applicants are being considered for college and professional school admissions. Such an opinion when promoted as the law of the land, *sans* any connection to the history of the color-blind congressional debates, ought to help explain why *Hopwood* is a legal but unconstitutional aberration. When additionally propped and bolstered by the threat of both personal and institutional liability, we should be able to see why such a horrendous opinion changes everything for Americans, particularly minority ones.

As a consequence, since 1996 minority applications, acceptances and enrollments have declined at the most selective public universities and professional schools affected by the *Hopwood* opinion in Texas.[11] Mississippi and Louisiana, which are under different court-ordered desegregation agreements with the federal courts, for the time being have been exempted from *Hopwood* during the seven years that the opinion has been regional law. In California and in the state of Washington, the rescission of Affirmative Action by voter referenda has also reduced the number of minority students enrolled at the more competitive higher education and professional

institutions.[12] According to the *Hopwood* strictures enunciated by the New Orleans Fifth Circuit Court, college admissions personnel are now required to make color-blind decisions when selecting students from applicant pools, activating the very idea considered and rejected when the Reconstruction amendments were ratified in the years after the Civil War. Some people, to be sure, would argue that the time was not right then, and that we now have to move toward color-blindness in order to treat all citizens equally. But if color-blindness was not right then when people could see race and skin color distinctions, we ought to be courageous enough to acknowledge that it is those very same distinctions that have created the basic, fundamental inequalities that *Hopwood* cannot gloss over successfully nor ignore and disregard by leaving unaddressed.

3

Following Lincoln's 1863 Emancipation Proclamation, the United States legislatures of the period spent a good amount of the next seven years specifically considering how exactly the freed slaves would be configured into American society so that the general, largely white public would accept the new order. These were the years when the especially carefully-worded Thirteenth, Fourteenth and Fifteenth Amendments were added to the Constitution, "the three closely-related, century-old reconstruction amendments, which have [since] generated more recent Supreme Court litigation than most [of the] other provisions of the Constitution combined."[13]

The actual term "color-blind" first seems to have been used by Wendell Phillips, one of the most spell-binding speakers of the 19th century:

> It was in late December 1863 that the idea of an antislavery amendment received what stands in retrospect as its definitive public introduction. The occasion was a speech by Wendell Phillips on President Lincoln's plan of reconstruction, given before a group of Republicans at New York's Cooper Institute. A milestone in the history of the Thirteenth Amendment, the speech of December 22, 1863, is even more significant to the history of the color-blind Constitution. Phillips proposed to resolve the status of America's black population by means of two constitutional amendments: one prohibiting slavery, the other prohibiting the states from drawing legal distinctions on racial lines. His unparallel suggestion was that the U.S. Constitution be made color-blind by means of an amendment saying so in so many words. (Kull 55)

If the Constitution had been made a color-blind document during the years when the future of the freed slaves was being hotly debated, a number of race issues that have since arisen would not have happened or they would have been resolved in other ways. As a country, the United States would then have avoided the slow, gradual movement toward granting minority populations full Civil Rights, an act that was not

officially granted until President Lyndon B. Johnson enacted legislation to that effect in 1964.

But because legislators representing the opinions of the larger, mainstream American public have long debated the political issue of how best to amend the Constitution to deal with race and skin color realities, these issues have remained problems that have been passed from generation to generation. Each generation, indeed, has proposed a variety of options that have not substantially altered the living conditions of minority citizens nor provided noticeable improvements in how the young are being brought up nor prepared for a different, better life. In the years after Lincoln's Emancipation Proclamation, the congressional history record shows that the Fourteenth Amendment was the result of a patchwork of legislative phrases, which, in effect, were carefully designed to hide the color-blind concept. Embracing color-blindness at the end of the Civil War, scholars now believe, would have changed the history of race in the United States:

> Phillips's speech marked the beginning of a campaign that would last some two and a half years before it ground to a halt in the Thirty-ninth Congress: the first and last concerted attempt to achieve the legal prohibition of racial classifications by constitutional amendment. That the attempt was ever made has been virtually forgotten. Once the Constitution had been amended to include instead the [Fourteenth Amendment's] protean guarantee of "equal protection of the laws," the color-blind argument necessarily assumed the form of a claim that "equal protection" excluded racial distinctions. (Kull 56)

An important point to notice here is that by not specifically including the phrase "racial distinctions" within or next to the "equal protection of the laws" clause, the Fourteenth Amendment allowed the executive, the legislative and the judicial branches of the federal government to continue to use the widely-accepted racial classifications that everyone knew and could see in our laws and policies—all until the *Hopwood* opinion dramatically reversed that practice.

Yet all along the color-blind proposition has been embedded or tucked away within the fabric and meaning of the "equal protection of the laws" clause of the Fourteenth Amendment, as the 1996 Fifth Circuit Court of Appeals opinion has since brought out. Thus, instead of outrightly embracing "the legal prohibition of racial classifications by constitutional amendment," as the idea of promoting and embracing a color-blind society would have required, the Thirty-ninth Congress wrote the Fourteenth Amendment's "equal protection of the laws" clause, seemingly excluding racial categories, but actually leaving in racial distinctions as a constant factor and a consideration that has continued to shape a good amount of the social, political and legal thinking since that time.

This 1868 legislative decision served the double purpose of underscoring the traditional separation of powers, while it reiterated the role of the judiciary in determining the legality of laws and policies concerned with race and skin color. The "equal protection" language of the Fourteenth Amendment, in other words, con-

tained within it an idea that was not legally highlighted nor enforced until the *Hopwood* opinion embraced color-blindness. It was not until 1996, in short, that the courts were able to force the idea of racial equality on an American public that was used to race distinctions because by this point in the history of America's Civil Rights too many people were tired of dealing fruitlessly with race and color issues. That is how and why the courts, still backed by considerable public opinion, have now decided that it is better to be color-blind and race neutral. The alternative has clearly proven too troublesome and unpalatable, but is it? Personally, I think that in everyday American life we are now used to seeing and responding more appreciatively to race and skin color issues throughout society, for Americans are increasingly accepting people as we all are. The courts should recognize this reality. Such a reality calls for abandoning color-blindness, which does not exist nor does the idea work peacefully within society to bring about the desired equality that everyone wants and needs.

4

In studying the history of the issues of racial classifications and color-blindness in the Constitution, in 1992 Andrew Kull found that:

> A blanket prohibition of racial classifications is impossible to locate in a literal reading of the constitutional text, and it [the prohibition of racial classifications] has never been acknowledged by the Supreme Court as a requirement of the "equal protection of the laws" guaranteed by the Fourteenth Amendment. Yet the color-blind idea persists nevertheless, forming a seemingly indispensable theme in the constitutional law of race. (Kull 1)

The *Hopwood* opinion of the Fifth Circuit Court of Appeals in New Orleans makes just such a connection between prohibiting the use of race classifications in order to guarantee the Fourteenth Amendment's "equal protection of the laws." That is, in order to provide everyone with the "equal protection of the laws," the opinion extends itself further than the Fourteenth Amendment or the Constitution actually states, prohibiting admissions officials from recognizing that race and color distinctions do make a marked difference in the nature of the events and the worlds that applicants experience throughout their lives.

Hopwood goes beyond what is constitutionally allowed because, as Kull avers, nowhere does the Constitution explicitly prohibit racial categories or classifications. Indeed, such classifications are even used by the U.S. Census not only to keep better statistics, but, indeed, to understand the nature of the living conditions of the American citizenry better than we can without them. And, as previously stated, the Fifteenth Amendment also points to race and color as recognizable qualities that should not be used to keep citizens from voting. My point is that by acknowledging the existence of race and color as identifiable, physical human traits, the Fifteenth

Amendment posits that such qualities should nevertheless not allow a person to be treated nor perceived as having less value than other citizens.

Andrew Kull contends that Wendell Phillips's efforts in the 1860s to propose a color-blind amendment comprises the sole attempt to write color-blindness into the Constitution. The fact that the idea failed to garner the necessary legislative support tells us, as the records of the congressional debates amply demonstrate, that the American people, the legislators and the Supreme Court were not ready to embrace color-blindness then, nor, more importantly, were they inclined to ignore and to disregard race and color. Consciousness of these human traits, it hardly needs saying, have continued as prominent, life-shaping components of American life for the 131 years from the end of the Civil War in 1865 to 1996.

Racial classifications and color distinctions, in fact, were necessary considerations to most of the ideas discussed by the American public, even when muted or when no mention of these factors was included in the regulatory policies debated and enacted throughout these years by the legislature. Thus, instead of embracing color-blindness, Congress passed the Fourteenth Amendment, which Kull and other scholars have characterized as a proposition that amalgamates language from other amendments in the most litigious provision that has required the attention of the Supreme Court:

> At the close of the Civil War, when the nation briefly debated the terms on which civil rights for the Negro would be brought under federal protection, Wendell Phillips and Thaddeus Stevens campaigned strenuously for precisely the latter guarantee. (The vast literature of the framing of the Fourteenth Amendment—the most thoroughly worked ground in American constitutional history—entirely ignores Phillips's efforts to promote an amendment based on nondiscrimination.) Phillips's views, at the time, were as widely publicized as those of any Republican leader, and the rejection of his ideas in favor of John Bingham's "privileges and immunities," "due process," and "equal protection" carries unmistakable implications for the "original understanding" of the words ultimately adopted. (Kull 3–4)[14]

The Fourteenth Amendment in effect allowed, permitted and implicitly contained the race and color classifications that the Fifteenth Amendment enunciated when the latter provision employed the phrase "race, color or previous condition of servitude." Together, both amendments left the actual details of how African Americans would be incorporated into American society to the on-going discretion of congressional legislators. These took their cues from a public that elected them, as did the justices of the Supreme Court who were entrusted with interpreting the actual words of the Constitution, in keeping with the opinion of the public that has generally tended to shape our founding document.

This is what an examination of the constitutional history of the reconstruction amendments yields. The actual wording of the Fourteenth Amendment, to extend this argument, is such that most cases that have called meaning into question have, of course, required clarifications by the federal justices themselves. That is, given the phrases used by Ohio Senator John Bingham, the courts have had little option but to

interpret what this amendment means to the judges. This means that since 1868 and 1870, when the Fourteenth and Fifteenth Amendments were respectively adopted, laws and racial policies in the United States have largely depended not so much on what the Constitution explicitly states about race and color, but on how different members of the Supreme Court interpret the words of the Constitution. Regardless, the important fact is that the Constitution and the amendments do not specifically outlaw race and skin color, as some courts appear to believe.

Which is to say that from the adoption of the Fourteenth Amendment in 1868 until the Fifth Circuit Court of Appeals in New Orleans revealed its 1996 anti-race opinion in *Hopwood*, the Supreme Court has progressively recognized in the Constitution what might be called the good use and fairly recognized street sense of race and skin color. Such a history means that the Supreme Court has generally moved toward granting African Americans and other minority populations the same rights and opportunities that other citizens enjoy, on the assumption that such decisions will encourage the public good of the nation. That constitutional history can be followed in case law from "Charles Sumner's argument against the constitutionality of segregated public schools, delivered in 1849 on behalf of the plaintiff in *Roberts v. City of Boston*" (Kull 28) to *Plessy v. Ferguson* in 1896, to *Brown v. Board of Education* in 1954 and beyond. In *Plessy*, for example:

> Racial classification, announced Justice Brown, are [sic] like every other sort of classification, and those racial classifications will be constitutional that a majority of the Supreme Court considers to be "reasonable." That rule of constitutional law, and no other, will explain every Supreme Court decision in the area of racial discrimination from 1896 to the present. The true holding of *Plessy* is not "separate but equal" [as many people believe] but the Supreme Court's refusal to deny to the state the option of treating citizens differently according to race. The whole development of the question since 1896 has been merely the ebb and flow of the Court's idea of what constitutes reasonable discrimination. (Kull 118)[15]

For five or six generations, in other words, the Supreme Court has endeavored to determine to what extent racial classifications can be connected to publicly acceptable uses and practices that would constitute what has to be called "reasonable discrimination." The public legal policies and practices that have thus emerged, based on racial classifications, invariably have been shaped and guided by what is socially acceptable and tolerable to public opinion. Based on the wishes, desires and opinions of the public, then, practices have emerged and have been promulgated as judicially justifiable law.

Even though Wendell Phillips first appears to have conceived of the color-blind concept in 1863, and Judge John Marshall Harlan first made specific use of the term in *Plessy* in 1896, it was not until *Bakke* in 1978 and *Hopwood* in 1996 that the federal courts embraced the actual term "color-blind," extracting the idea from within the constitutional folds of the "equal protection of the laws" clause of the Fourteenth Amendment:

> The color-blind argument [initially] was a product of the struggle for legal equality for black Americans—"equality before the law," in Charles Sumner's phrase—and it was discovered nearly at the outset. The Massachusetts constitution of 1780 contained, in effect, the guarantee of legal equality that was added to the U.S. Constitution only in 1868. In consequence, issues of racial discrimination that would occupy the nation during the hundred years following the Civil War were addressed in Massachusetts during the twenty years that preceded it. Massachusetts did not exclude free Negroes from coming within her borders, as did Indiana; nor provide public schools for white children only, as did Ohio; nor restrict her black citizens' exercise of the franchise, as did New York. Some cities in Massachusetts, however, provided education for black and white children in separate schools; and a state statute forbade interracial marriage. The arguments that proved significant for the future were developed in the context of the school segregation controversy. (Kull 2)

This passage has been presented at some length to suggest the extent to which even some of the northern states had discriminatory laws in their constitutions. Such thinking provided for educational segregation and problematical integration, and these are the basic historical realities that have been widely documented as producing the unequal educational and social opportunities between whites and people of color that *Hopwood* fails to recognize.

Today the federal courts and most Americans tend to overlook the pervasive effects of these long-standing discriminatory laws in our more recent efforts to institute what we now consider fairer laws. But we cannot afford to forget that the social and economic realities created by those long-held prejudicial views remain embedded within American life and culture and that they continue to shape and to affect the infrastructure of society, as most racial prejudice cases continually prove.[16] We should also ethically remember that the records show that most

> Opponents of slavery never had much success in the courts. In the early years of the Republic a few state decisions held that slavery violated libertarian guaranties of state constitutions. As time went on, however, the judiciary paid less and less attention to the claims of liberty and more and more attention to the needs of slaveholders.[17] (Curtis 213)

Since well before the ill-conceived *Dred Scott v. Sanford* (1857) decision, which held that "even free blacks, belonged to a degraded class at the time the Constitution was written and, short of a constitutional amendment making them citizens, could never be citizens of the United States," the Supreme Court was thus engaged in determining the nature of the "reasonable discrimination" that could be legally allowed (Curtis 42). Thus, for 126 years, and, indeed, for 207 years, since the Constitution was ratified by the states in 1789, racial discrimination has been part of American society.

This is to say that the interpretations of the Supreme Court, based on the intentions of the framers of the Constitution and on what the justices have progressively thought would be socially acceptable interpretations, have made and have permitted such decisions and opinions. "Reasonable discrimination" for this reason has depended on what the Supreme Court has felt comfortable about legally establishing, given the actual words in the Constitution and in the amendments, including the situations and the circumstances which shape the rulings made. In carrying out the onerous and difficult responsibility of determining what exactly the Constitution means, Supreme Court judges have been and continue to be guided not only by the language of the Constitution, but also by precedent, perceived reasonableness, public opinion, and by what they feel would be justifiable and fair, given the fact that the Constitution holds the justices of the high court as the last resort for adjudication.[18]

5

Should federal court decisions be based on the constitutional standard of "reasonableness," which is usually based on what is comfortable and socially acceptable for mainstream Americans? In looking back through the history of African Americans, since the experiences of other minority Americans have impacted the history of the color-blind issue in Congress and in the judiciary in less sustained ways, "reasonableness" invariably appears as judicial social control. What needs scrutiny and analysis in *Hopwood* is the realization that from the ratification of the U.S. Constitution in 1789 until 1996, racial classifications have been legally recognized and used. Throughout these years, race has been officially seen as one of several operating factors which have historically shaped and determined not only the standing laws, but also the political practices, the public policies, and the public affairs that the existing social attitudes and conditions have permitted or allowed. Even as late as 1978 in *Regents of University of California v. Bakke*, which permitted the use of race in college admissions only because Justice Lewis Powell carefully crafted an argument that allowed it, the Supreme Court has acknowledged the existence and the need to take race into account as one of other acceptable considerations in college and professional school admissions.[19]

For the Fifth Circuit Court of Appeals to turn from the long-established practice of factoring in race and skin color when considering reverse discrimination cases, pulling out or extracting not only color-blindness from the "equal protection of the law" clause of the Fourteenth Amendment, but further prohibiting all racial classifications—after Congress and the federal courts chose not to embrace color-blindness when African Americans could have benefited from such an interpretation for 128 years—is an issue that the Supreme Court has to be sensitive to when it re-examines its decision concerning race. The truth is that for many generations majority or mainstream citizens have enjoyed privileges and advantages that have allowed such citizens to capitalize on inequities kept in place by what reluctantly have to be called legal and reasonable discrimination. Such inequities early in the history of the United

States created long-standing preferences, entitlements and other social and economic advantages that now appear "normal" and very natural to Americans who have benefited from such advantages for many generations. In allowing the legal consideration of race in *Bakke* while excluding race in *Hopwood*, the federal courts have invited the charge that when the Constitution is interpreted, decisions consistently will favor what the majority of the citizens want at the expense of being inattentive to the less attractive and defensible position or positions of minority Americans.[20] In some cases the text, history, and the intent of the framers provide fairly clear answers. By the prevailing jurisprudence of the 19th century, at least, in such cases the judge was required to follow the law, even if it produced morally unacceptable results.

The Supreme Court, to be sure, can only select cases for review from the disputes that it chooses to rule on from the cases brought before the justices. What is noteworthy is that between 1868, when the Fourteenth Amendment was passed, and 1978, when the reverse discrimination case of *Bakke* brought out the color-blind issue anew, the federal courts did not interpret the "equal protection of the law" principle as prohibiting racial classifications. But having now indicated a new direction in *Hopwood*, it is clear that, at a time when budgets are especially tight due to distention, state legislators are being left with having to take other unclear and less satisfactory steps in order to improve minority admissions to the most selective universities and professional schools.

My view is that if *Hopwood* is not rescinded by the Supreme Court, this opinion will unjustly keep in place an academic system that supports and endorses the current unequal K–12 education disparities that year after year educate majority students better than most minority students. As the federal courts stepped in to improve prison conditions in the 1960s, perhaps the Court now needs to require state legislatures to articulate a philosophy about race and color that is in keeping with the positive ways that most Americans see people behave around us, regardless of race or skin color. The other need would be to provide the necessary resources to assure the same kind of quality education for all students—again, accepting race or skin color differences—instead of trying to erase these immutable qualities. The main Supreme Court challenge, then, is one of reaffirming the necessary consideration of race and color in college and professional school admissions, instead of rejecting or seeking to neutralize these unalterable human traits, reasserting Justice Lewis Powell's correct reading of the Constitution as he expressed it in *Bakke*.

NOTES

1. Several federal court rulings at the state universities of Michigan, Georgia, Texas and Washington are likely to be selected by the U.S. Supreme Court to examine the legal validity of *Hopwood*. See, for example, Michael Greve's "Affirmative Action Is on the Rocks, Thanks to College Leaders," *The Chronicle of Higher Education*, April 20, 2001, http://chronicle.com/weekly/v47/i32/32b01101.htm.
2. Since the states of Louisiana and Mississippi, which normally fall within the purview of decisions made by the Fifth Circuit Court of Appeals, were undergoing desegregation litigation in their public higher education systems when the *Hopwood* opinion was announced, Texas has been the only state directly affected by *Hopwood*. In July, 1996, the U.S. Supreme Court denied *certiorari*, that is, did not request a transcript of the Fifth Circuit's opinion, because,

writing for the Court, Justices Ginsburg and Souter stated that the issue was moot. By the time the case against the University of Texas School of Law was settled, the law school had already abandoned an admissions policy that required different criteria for candidates of different races. Cheryl Hopwood and three white male plaintiffs called that particularly unfair admissions practice into question and justifiably won.

3. "Whenever you feel like criticizing any one," Nick Carraway's dad tells him in F. Scott Fitzgerald's *The Great Gatsby* (1925), "just remember that all the people in this world haven't had the advantages that you've had." Please see my "*Hopwood*, Race, *Bakke* and the Constitution" for a discussion of why some people are not prepared to compete academically with others.
4. See *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* by William G. Bowen and Derek Bok.
5. This and other related issues are discussed at greater length in *Crowding Out Latinos: Mexican Americans in the Public Consciousness*.
6. "American politics is essentially a family affair, as are most oligarchies. When the father of the Constitution, James Madison, was asked how on earth any business could get done in Congress when the country contained a hundred million people whose representatives would number half a thousand, Madison took the line that oligarchy's iron law always obtains. A few people invariably run the show; and keep it, if they can, in the family." See Gore Vidal's "Democratic Vistas" (<http://www.thenation.com/docPrint.mhtml?0=20010108&s=vidal>).
7. When Martin Luther King, Jr., delivered his "I Have a Dream" speech from the steps of the Lincoln Memorial in Washington D.C. on August 28, 1963, he said several words which have led some people to believe that King promoted color-blindness. By saying "I have a dream that my four children will one day live in a nation where they will not be judged by the color of their skin and by the content of their character," King was not urging color-blindness. Martin Luther King, Jr., instead, was saying that people should notice and acknowledge "the color of their skin," and that such recognition should not negatively affect how his children and people of color are judged. Judging people by pretending not to see the color of their skin, and being willing to judge people by their character, despite seeing their race and color, are two very different responses to a human being. The first, I would submit is silly and not possible nor advisable; and the second is desirable, and the mature and respectful way to treat people of color.
8. *The Congressional Globe*, May 23, 1866, cited in Alfred Avins's *The Reconstruction Amendments' Debates: The Legislative History and Contemporary Debates in Congress on the 13th, 14th and 15th Amendments* (220).
9. John A. Bingham, a Republican Representative from Ohio, largely responsible for the actual wording of the Fourteenth Amendment and also a legislator of the 15-member Joint Committee on Reconstruction of the Thirty-ninth Congress, stated on January 8, 1866, according to Avins's edition of *The Congressional Globe*, the following view: "Mr. Speaker, everybody at all conversant with the history of the country knows that in the Congress of 1778, upon the adoption of the Articles of Confederation as articles of perpetual union between the States, a motion was made then and there to limit citizenship by the insertion in one of the articles of the word 'white,' so that it should read, 'All white freemen of every State, excluding paupers, vagabonds, and so forth, shall be citizens of the United States.' There was a vote taken upon it, for our instruction, I suppose; and four fifths of all the people represented in that Congress rejected with scorn the proposition and excluded it from their fundamental law; and from that day to this it has found no place in the Constitution and laws of the United States, and colored men as well as white men have been and are citizens of the United States" (99).
10. The strictures and restrictions that some state governments then went on to adopt to defeat and to counter this constitutional voting amendment, I think, are widely known.
11. See my "Examining the Recruitment and Enrollment of Eligible Hispanic and African American Students at Selective Public Texas Universities."
12. Developments on whether to consider race in college and professional school admissions continue as this article goes to press. Two different federal courts recently accepted arguments for considering race based on the need for diversity at the University of Michigan and at the University of Washington, two campuses where the issue is in the courts. In the Federal District Court in Detroit, Judge Patrick J. Duggan ruled "that the University of Michigan is justified in considering race in undergraduate admissions because of the educational benefits of diversity on campus." Emphasizing Michigan's "narrowly tailored" admissions criteria "to avoid outright, illegal discrimination against white students," the report said that "Judge Duggan's ruling was the second in as many weeks in which a federal court has declared that diversity is

an adequate justification for race-conscious admissions policies. Last week, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit unanimously upheld an admissions policy formerly used by the University of Michigan. Although Michigan is not part of the Ninth Circuit, which covers nine Rocky Mountain and Pacific states, Judge Duggan cited the Ninth Circuit's ruling heavily in his own opinion. Both rulings relied strongly on Justice Lewis F. Powell Jr.'s endorsement of affirmative action to promote campus diversity in the U.S. Supreme Court's landmark 1978 decision, *Regents of the University of California v. Bakke*." See Peter Schmidt's "Federal Judge Approves U. of Michigan's Use of Race in Admissions Decisions."

13. These are the opening words in the editorial Preface of Alfred Avins's *The Reconstruction Amendments' Debates: The Legislative History and Contemporary Debates in Congress on the 13th, 14th and 15th Amendments*. Avins adds: "Most constitutional provisions relate to the political organization of the government; lawsuits about them are few and far between. By way of contrast, the Thirteenth Amendment, the first section of the Fourteenth Amendment, and the Fifteenth Amendment protect personal rights," or individual rights, one of the most contentious areas of litigation. This assessment has since been confirmed by recent studies like Jill Norgren and Serena Nanda's *American Cultural Pluralism and Law* and Stephen L. Wasby's *Race Relations Litigation in an Age of Complexity*.
14. Kull continues, writing: "The Phillips/Stevens Fourteenth Amendment [that did not pass] would have prohibited state and federal governments from distinguishing between persons on the basis or race, no more and no less: it would thus have made the Constitution color-blind in so many words. Bingham's sibylline phrases were the conservative alternative: since Bingham's proposal, whatever it meant, promised less interference with those forms of racial discrimination with which the Republicans of the Thirty-ninth Congress felt comfortable. Phillips and Stevens would have prohibited all racial classifications; Bingham wished to prohibit only the reasonable ones. The difference has dominated our constitutional law of race ever since.

    A constitutional standard of "reasonableness" gives the final say to judges. The real choice made by the Thirty-ninth Congress thus lay between a rule permitting the legislature to employ racial classifications in its discretion, subject to judicial veto; and a law forbidding such classifications altogether. Once the Fourteenth Amendment had been ratified, and its meaning entirely entrusted to the judiciary, proponents of color blindness were in the anomalous position (whether they realized it or not) of asking judges to declare that the judges' own determination of the reasonable uses of race afforded an inadequate safeguard [against discrimination]. They had to argue, in other words, that an arbitrary, prophylactic rule was preferable to a wise and flexible judicial discretion that would strike down the bad uses of race while allowing the good ones. Precisely that self-denying assertion forms the heart of Harlan's opinion in *Plessy v. Ferguson*, though it is not usually so understood. Harlan's argument is the more noteworthy, especially from the perspective of the present day, because he nowhere asserts that the use of racial classifications must in every instance be bad policy" (4).
15. Regarding the scrutiny of judicial judgment and decisions, Kull states: "A constitutional standard of 'reasonableness' gives the final say to judges. The real choice made by the Thirty-ninth Congress [in 1868] thus lay between a rule permitting the legislature to employ racial classifications in its discretion, subject to judicial veto; and a rule forbidding such classification altogether. Once the Fourteenth Amendment had been ratified, and its meaning entrusted to the judiciary, proponents of color blindness were in the anomalous position (whether they realized it or not) of asking judges to declare that the judges' own determination of the reasonable uses of race afforded an inadequate safeguard" (4). This would be like asking a judge what he or she thinks of his or her decision.
16. Tangentially-related support for parts of my argument can be found in David Domke's "Strategic Elites, the Press, and Race Relations" and in Roopali Mukherjee's "Regulating Race in the California Civil Rights Initiative: Enemies, Allies, and Alibis."
17. See also Robert M. Cover's *Justice Accused: Antislavery and the Judicial Process*.
18. The legislators of the time would agree. Avins writes that "On January 25, 1872, a unanimous Senate Judiciary Committee report, signed by senators who had voted for the Thirteenth, Fourteenth, and Fifteenth Amendments in Congress, declared: 'In constructing the Constitution we are compelled to give it such interpretation as will secure the result which was intended to be accomplished by those who framed it and the people who adopted it. The Constitution, like a contract between private parties, must be read in the light of the circumstances which surrounded those who made it . . . If such a power did not then exist under the Constitution of the United States, it does not now exist under this provision of the Constitution, which has not

been amended. A construction which should give the phrase "a republican form of government" a meaning differing from the sense in which it was understood and employed by the people when they adopted the Constitution, would be unconstitutional as a departure from the plain and express language of the Constitution in any other particular. This is the rule of interpretation adopted by all commentators on the Constitution, and in all judicial expositions of that instrument; and your committee are satisfied of the entire soundness of this principle. A change in the popular use of any word employed in the Constitution cannot retroact upon the Constitution either to enlarge or limit its provisions'" (Preface 2).

19. Kull states that "Justice Powell's opinion in *Bakke* set the pattern for the decisions that followed, reviving the familiar rule that racial classifications were permissible so long as they were properly used for good ends." *Fullilove v. Klutznick*, a 1980 decision upholding the constitutionality of "minority set-asides: in a federal public works appropriation, was in one sense merely another application of the same proposition. Yet *Fullilove* is historically noteworthy. The law in question was the first federal statute in well over a century to provide expressly that citizens of different races be treated differently by the government" (208). For antebellum racial discrimination by the federal government, Kull refers readers to Leon F. Litwack's excellent "The Federal Government and the Free Negro, 1790–1860."
20. As part of his concluding observations in *No State Shall Abridge*, Michael Kent Curtis writes: "Judges operate within a tradition that requires them to honor rules set by others, to follow the text of constitution and statutes, and to make decisions within an historical tradition. But the area of discretion is far wider than is typically recognized."

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