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Racial Adjudication

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> [T]he Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*.[1]

> Elaine: Well, what do you think?
> Jerry: What? About you dating a black guy? What's the big deal?
> Elaine: What black guy?
> Jerry: Darryl. He's black, isn't he?
> Elaine: He is?
> George: No, he isn't.
> * * *
> Jerry: I think he's black.
> George: Should we be talking about this?
> * * *
> George: Why don't you just ask him?
> Elaine: Because, if I ask him, then it's like I *really want to know*.
> George: Maybe he's, um . . . [sotto voce] "mixed."
> Elaine: Is that the right word?
> George: I really don't think we're supposed to be talking about this.[2]

I. INTRODUCTION

The oral arguments for *Parents Involved in Community Schools v. Seattle School District No. 1*[3] witnessed a thought-provoking exchange between Justice Anthony Kennedy and Harry J.F. Korrell, arguing on behalf of petitioners, who objected to Seattle's use of race in assigning pupils to school. Justice Kennedy posed a question:

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1. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

2. *Seinfeld: The Wizard*, Ep. No. 171 (NBC television broadcast Feb. 26, 1998). Interestingly for our purposes, Elaine later attempts to use a self-reported survey as a ruse to get her boyfriend to reveal his race. Darryl, in a subversive mood, instructs her to put down "Asian."

3. 127 S. Ct. 2738 (2007).

> [C]an you use race for site selection? [Y]ou need to build a new school. There are three sites. One of them would be all one race. Site two would be all the other race. Site three would be a diversity of races. Can the school board with . . . the intent to have diversity pick site number 3?[4]

The question reemerged several times both in the Seattle argument[5] and again in that of its companion case, *Meredith v. Jefferson County Board of Education*,[6] always without adequate answer, prompting Justice Kennedy to ask:

> Isn't it odd jurisprudence where we have an objective that we state in one set of terms but a means for achieving it in another set of terms, unless your answer is thar individual classification by race is . . . impermissible, but other, more broad measures based on [and] with a racial purpose are all right?[7]

This is not the first time this puzzle has been raised, most particularly in the context of race-neutral, often "class-based" affirmative action.[8] For a while, the question seemed to be rendered moot by *Grutter v. Bollinger*,[9] which upheld what amounted to a thinly disguised racial quota, even while purporting to apply strict scrutiny.[10] But as the composition of the Supreme Court continues

4. Transcript of Oral Argument at 4–5, *Parents Involved*, 127 S. Ct. 2738 (No. 05-908), 2006 WL 3486958 [hereinafter Oral Argument of *Parents Involved*].

5. *Id.* at 4–8, 18–29.

6. Transcript of Oral Argument at 15–20, 23, *Parents Involved*, 127 S. Ct. 2738 (No. 05-915), 2006 WL 3486966 [hereinafter Oral Argument of *Meredith*].

7. Oral Argument of *Parents Involved*, *supra* note 4, at 22.

8. *See, e.g.*, Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289 (2001); Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331 (2000); Daria Roithmayr, *Direct Measures: An Alternative Form of Affirmative Action*, 7 MICH. J. RACE & L. 1 (2001); Girardeau A. Spann, *Neutralizing* Grutter, 7 U. PA. J. CONST. L. 633, 648–52 (2005); Kathleen M. Sullivan, *After Affirmative Action*, 59 OHIO ST. L.J. 1039 (1998); Chapin Cimino, Comment, *Class-Based Preferences in Affirmative Action Programs After* Miller v. Johnson*: A Race-Neutral Option, or Subterfuge?*, 64 U. CHI. L. REV. 1289 (1997); Paul Diller, Note, *Integration Without Classification: Moving Toward Race-Neutrality in the Pursuit of Public Elementary and Secondary School Diversity*, 99 MICH. L. REV. 1999 (2001); *see also* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003) (inquiring whether disparate impact legislation motivated by race violates Equal Protection principles).

9. 539 U.S. 306 (2003).

10. *See id.* at 381–85 (Rehnquist, C.J., dissenting); Spann, *supra* note 8, at 653–54 (citing *Grutter*, 539 U.S. at 381–85).

to change, and in light of *City of Richmond v. J.A. Croson Co.*,[11] *Adarand Constructors, Inc. v. Peña*,[12] and the majority and concurrences of *Parents Involved*,[13] we will eventually have to reconcile these two impulses and answer Justice Kennedy's query. Justice Kennedy's questions at oral arguments and his concurring opinion in *Parents Involved* show that he (joining the academics cited above) has seen where the logic of "reactionary colorblindness"[14] is ultimately taking us. He needs a stopping point—and so do we.

This Article will attempt to provide that stopping point. It will attempt to identify a principled limit to colorblindness—to chart a course between the Scylla of a jurisprudence where "the Equal Protection Clause perpetuate[s] racial supremacy,"[15] and the Charybdis of a racial politic where "discrimination on the basis of race . . . is not a matter of fundamental principle but only a matter of whose ox is gored."[16] It is a "nonreactionary" vision of colorblindness that simultaneously remains committed to an aggressive program of racial justice—and, indeed, of racial redistribution. And, far from being, as Justice Souter suggested, "an unacceptable [place] to draw a constitutional line,"[17] this Article will argue that this vision is one that has been immanent in the Supreme Court's affirmative action and "benign" classification jurisprudence all along.

Part II of this Article further elaborates on the dilemma at the heart of Justice Kennedy's hypothetical. Part III will describe "racial adjudication": the process of individual racial classification and definition of benefits and burdens on that basis, rather than mere

11. 488 U.S. 469 (1989).

12. 515 U.S. 200 (1995).

13. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).

14. Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN L. REV. 985, 988 (2007) ("By reactionary colorblindness I mean an anticlassification understanding of the Equal Protection Clause that accords race-conscious remedies and racial subjugation the same level of constitutional hostility."). Though it would not shock me if Professor Haney López disagreed, I do not consider a focus on racial adjudication to be "reactionary" in that sense, for it still permits—indeed, in some cases, demands—race-consciousness remedies at a policymaking level.

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

16. ALEXANDER BICKEL, THE MORALITY OF CONSENT 133 (1975).

17. Oral Argument of *Parents Involved*, *supra* note 4, at 23.

"classification," that is central to the Supreme Court's race jurisprudence. This Part will distinguish racial adjudication from race-conscious policymaking, which has not yet been squarely examined by the courts, but ought to be permitted. Part IV will explain why the process of racial adjudication is so troubling. Part V will demonstrate how a focus on racial adjudication can square with existing and future Equal Protection doctrine. Finally, Part VI will provide a brief conclusion.

II. A PUZZLE: IF USING RACE TO INTEGRATE AND TO SEGREGATE ARE THE SAME, THEN WHY IS USING RACE-NEUTRAL MEANS TO ACHIEVE THESE ENDS ANY DIFFERENT?

The Supreme Court is generally considered to have announced the "strict scrutiny" standard for racial classifications in *McLaughlin v. Florida*, a case involving an anti-cohabitation statute.[18] Beginning with Justice Powell's opinion in *Regents of University of California v. Bakke*,[19] however, the Court has also applied strict scrutiny to "benign" racial classifications.[20] Indeed, Justice Thomas, in *Adarand*, went so far as to assert 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."[21] At the same time, the Court has declared, in cases like *Washington v. Davis*,[22] *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[23] and *Personnel Administrator v. Feeney*,[24] that a racially "discriminatory purpose" is sufficient to warrant an application of strict scrutiny, even if the means are facially race-neutral.

Meanwhile, in response to restrictions on affirmative action, whether judicial,[25] legislative,[26] or executive,[27] a number of state and

18. McLaughlin v. Florida, 379 U.S. 184, 191–92 (1964); *see* Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1569 (2002).

19. *Bakke*, 438 U.S. 265.

20. *See id.*; Grutter v. Bollinger, 539 U.S. 306 (2003); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

21. *Adarand*, 515 U.S. at 240 (Thomas, J., concurring) (quoting *id.* at 249 n.5 (Stevens, J., dissenting)).

22. 426 U.S. 229, 231 (1975).

23. 429 U.S. 252, 265 (1977).

24. 442 U.S. 256, 260 (1979) (explaining the result of *Washington v. Davis*).

25. *E.g.*, Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

local actors have responded by enacting facially race-neutral programs designed, more-or-less explicitly, to promote or maintain racial diversity. Sometimes the criteria for these programs are geographical, such as a student's neighborhood, or the school the student attends;[28] at other times, these programs involve nonracial demographic characteristics such as socioeconomic or family status.[29]

A syllogism of sorts begins to emerge:

Major premise: No distinction is made between "benign" or malign motives for racial classification—in both cases, such classifications are considered discriminatory, and subject to equally strict scrutiny.

Minor premise: Facially neutral actions motivated by racially discriminatory motives are to be treated as racial classifications.

Conclusion: Facially neutral actions that have benign racial purposes will also be treated as racial classifications and subject to strict scrutiny.

In other words, if "[a] 'benign' racial purpose is nonetheless discriminatory, [then] a race-neutral law motivated by such a purpose is arguably just as 'suspect' and subject to strict scrutiny as a similarly motivated express racial classification."[30]

The scholarship generated by this puzzle largely—though not universally—rejects this conclusion.[31] A few scholars, however, have suggested that such measures should indeed be struck down.[32] The courts do not seem to have addressed the matter directly, but every indication is that they, too, tend to reject the syllogism's conclusions. In *City of Richmond v. J.A. Croson Co.*, the majority opinion explicitly endorsed "the use of race-neutral means to increase

26. *E.g.*, CAL. CONST. art. I, § 31; MICH. CONST. art. I, § 26; WASH. REV. CODE ANN. § 49.60.400 (West 2002).

27. *E.g.*, Fla. Exec. Order No. 99-281 (1999) ("One Florida").

28. Diller, *supra* note 8, at 2052.

29. *Id.* at 2049–50.

30. Forde-Mazrui, *supra* note 8, at 2348.

31. *See, e.g.*, *id.* at 2398; Roithmayr, *supra* note 8, at 32; Sullivan, *supra* note 8, at 1054; Diller, *supra* note 8, at 2061.

32. *See, e.g.*, Fitzpatrick, *supra* note 8, at 348; Cimino, *supra* note 8, at 1310.

minority business participation in city contracting,"[33] including the "[s]implification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs."[34] Even Justice Scalia approved of such measures, though without overtly endorsing the "racial motive" behind them.[35] Justice O'Connor's majority opinion never explicitly endorsed race-consciousness in crafting policy, but such an endorsement is implicit—how else could the measures be a meaningful "alternative," if not because it achieves something like the appropriate racial effect? By *Grutter*, however, Justice O'Connor explicitly endorses the result: "Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives *that will achieve the diversity the university seeks.*"[36] Lower courts have also seemed to approve these devices,[37] and Justice Kennedy's concurrence in *Parents Involved* is still more explicit in its endorsement of such measures:

> School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.[38]

By contrast, Justice Kennedy rejects as "profoundly mistaken" any suggestion that the "Constitution mandates that state and local

33. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989).

34. *Id.* at 509–10.

35. *Id.* at 526 (Scalia, J., concurring) ("A State can, of course, act 'to undo the effects of past discrimination' in many permissible ways that do not involve classification by race. In the particular field of state contracting, for example, it may adopt a preference for small businesses, or even for new businesses—which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on race."); *see also id.* at 527–28.

36. Grutter v. Bollinger, 539 U.S. 306, 339 (2003) (citing *Croson*, 488 U.S. at 509–10) (emphasis added)). Of course, by the time she wrote her opinion in *Grutter*, Justice O'Connor had also endorsed race-conscious *means*.

37. *See, e.g.*, Podberesky v. Kirwan, 38 F.3d 147, 161 (4th Cir. 1994) ("[T]he University has not made any attempt to show that it has tried, without success, any race-neutral solutions to the retention problem.").

38. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2792 (2007) (Kennedy, J., concurring in part and concurring in judgment).

school authorities must accept the status quo of racial isolation in schools"[39]—the inevitable conclusion of the syllogism.

Interestingly, even Justices approving of remedies involving racial classification have implied that race-neutral measures are to be preferred. Justice Brennan, in *United States v. Paradise*, which upheld a strict one-for-one racial quota against an especially intransigent police agency, listed "the necessity for the relief and the efficacy of alternative remedies" as one of the several factors the Court would look to in "determining whether race-conscious remedies are appropriate."[40] Implicit in this factor is the same idea that Justice O'Connor advances in *Croson*—that race-neutral remedies are, all things being equal, superior, and that racial classifications are to be adopted if, and only if, "[t]here is no other way."[41]

If our syllogism fails, then we must reexamine our premises. We will begin by looking into the very idea of racial "classification" itself.

III. RACIAL ADJUDICATION DEFINED

The cases quoted above—indeed, almost all of the Court's modern race jurisprudence, speak of racial "classifications." The most radical assert that government must be "colorblind."[42] Justice Scalia writes: "In the eyes of government, we are just one race here. It is American."[43] Justice Thomas states that "the government may not make distinctions on the basis of race."[44] This language is unfortunate, however, because it is not really "classification" generally that is under review, but a sort of classification *with effect.* The distinction is subtle but important. "The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from *treating* differently persons who are in all relevant respects alike."[45] In *Adarand*, for example, Justice Scalia

39. *Id.* at 2791.

40. United States v. Paradise, 480 U.S. 149, 171 (1987).

41. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring); *see also* City of Richmond v. J.A. Croson Co., 488 U.S.469, 507 (1989) (plurality opinion) ("[T]here does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting.").

42. *See, e.g., Parents Involved*, 127 S. Ct. at 2782–83 (Thomas, J., concurring).

43. Adarand Constructors v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

44. *Id.* at 240 (Thomas, J., concurring).

45. Nordlinger v. Hahn, 505 U.S. 1, 10 (1992) (emphasis added).

rejects not classification itself, but "*dispositions* based on race."[46] Paul Brest, in his famous article, *In Defense of the Antidiscrimination Principle*, describes that principle as one "disfavoring classifications and other decisions and practices that depend on the race (or ethnic origin) *of the parties affected*."[47] Again, Justice Kennedy's concurrence in *Parents Involved* seems to have articulated the problem most directly: his central holding is to reject "plans [that] classify individuals by race and *allocate benefits and burdens on that basis*."[48]

Racial classifications *without* immediate effect have survived challenge in the lower courts. In *Morales v. Daley*, the Southern District of Texas sustained census race classification against constitutional challenge,[49] and racial data gathering by other government agencies has been approved of by several circuit courts.[50] This distinction seems to have been ratified by the voters of California. In 1996, Proposition 209, banning the consideration of race for many purposes, passed with 54.6% of the vote.[51] Seven years later, however, a follow-up ballot measure, Proposition 54, the so-called "Racial Privacy Initiative," which truly would have prohibited *all* classifications, including those used in data-gathering, failed overwhelmingly, receiving only 36.1% of the vote.[52] Indeed, one of the original authors of Proposition 209 opposed Proposition 54, fearing that abandoning data-gathering would undermine

46. *Adarand*, 515 U.S. at 239 (Scalia, J., concurring) (emphasis added).

47. Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 1 (1976) (emphasis added).

48. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2789 (2007) (Kennedy, J., concurring in part and concurring in judgment) (emphasis added).

49. Morales v. Daly, 116 F. Supp. 2d 801, 814 (S.D. Tex. 2000). While the plaintiffs argued that "asking a resident of the United States to indicate on a form his race or national origin is a classification by the government," the Court held that their "position is based on a misunderstanding of the distinction between collecting demographic data so that the government may have the information it believes at a given time it needs in order to govern, and governmental use of suspect classifications without a compelling interest." *Id.* at 811, 814.

50. *See, e.g.*, Caulfield v. Bd. of Educ. of N.Y. City, 583 F.2d 605, 612 (2d Cir. 1978); United States v. New Hampshire, 539 F.2d 277, 280–82 (1st Cir. 1976).

51. Bill Jones, California Secretary of State, Statement of Vote, xiii (Nov. 5, 1996), *available at* http://www.ss.ca.gov/elections/sov/1996_general/sov_nov96.pdf.

52. *See generally* Bill Jones, California Secretary of State, Official Declaration of the Result of the Statewide Special Election held on Tuesday, October 7, 2003, throughout the State of California on Statewide Measures Submitted to a Vote of Electors, xiii (2003), *available at* http://www.ss.ca.gov/elections/sov/2003_special/sum.pdf.

enforcement of Proposition 209.[53] It would seem, then, that "classification" by itself is not problematic. Neither is classification with any effect. After all, this data is collected not merely for intellectual edification; it is intended be used to craft and adopt the very race-neutral remedial measures the Supreme Court Justices—and, it would seem, the California electorate—approve of. Rather, it is classifications with a particular *kind* of effect that are objectionable.

I call this classification-with-effect *racial adjudication*: the incorporation of racial classification into an adjudicative process. I use "adjudication" here in the broad sense, similar to how it is used in administrative law, as a particularized proceeding dealing with concrete circumstances and facts and having an immediate effect on specific, identifiable individuals.[54] A *racial* adjudication, then, is a particularized proceeding that seeks to identify, as one of its determinative elements, the race of the person whose rights or liabilities are being adjudicated. It is not necessary that the subject's race always control the outcome of the adjudication, only that the subject's race *could* control that outcome, requiring the adjudicator to make a racial determination. These adjudications can run the gamut of formality, from the passive acceptance of an individual's self-identification to a full courtroom proceeding. They can also involve both elements of fact (as in an inquiry into one's parentage to determine how to view one in light of one's ancestors)[55] and elements of law (as in a proceeding where one's lineage is not in question, but how one ought to be categorized is not immediately apparent).[56] The consequences, too, can vary, from circumstances

53. *See generally* Thomas E. Wood, President, Americans Against Discrimination and Preferences, The Ideology of the Racial Privacy Initiative (Mar. 23, 2003), http://web.archive.org/web/20040603185048/http://www.aadap.org/ideology.htm.

54. *See* Yesler Terrace Cmty. Council v. Cisneros, 37 F.3d 442, 448 (9th Cir. 1994) ("Two principal characteristics distinguish rulemaking from adjudication. First, adjudications resolve disputes among specific individuals in specific cases, whereas rulemaking affects the rights of broad classes of unspecified individuals. Second, because adjudications involve concrete disputes, they have an immediate effect on specific individuals (those involved in the dispute). Rulemaking, in contrast, is prospective, and has a definitive effect on individuals only after the rule subsequently is applied.") (citations omitted). *See generally* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

55. *See generally* Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998) (documenting many historical examples of such litigation).

56. *See, e.g.*, United States v. Thind, 261 U.S. 204 (1923) (holding that Asian Indians are not white within the meaning of naturalization statute); Ozawa v. United States, 260 U.S.

where one's race is directly determinative (as in immigration or employment quotas) to where its role in the final determination is unclear, whether this uncertainty is deliberate or not.

We should contrast racial adjudication with *race-conscious policymaking*. This is the prospective design of generally applicable policies not directed at identifiable individuals, which takes into account the aggregate racial makeup of those predicted to be affected by these policies. These policies may be facially neutral, with no reference to race whatsoever; but as we will see, they do not need to be. Rather, they need only be "race-conscious measures to address the problem in a *general* way."[57]

Take Justice Kennedy's hypothetical school-placement question. Placing the school in the third site between the two segregated neighborhoods, in order to further integration, would be an example of race-conscious policymaking, as the motive—an integrated school—is explicitly racial. By contrast, we can imagine a less progressive school board choosing to establish schools only in the first two sites for the purpose of maintaining *segregation*.[58] This, too, would constitute race-conscious policymaking. The latter is absolutely impermissible,[59] while the former is, as discussed above, legitimate. The reason we treat them differently, while treating racial adjudications the same, is discussed below.[60] Notably, however, in both cases the only relevant adjudication (the assignment of each individual pupil to his or her school) is race-neutral because it asks only what neighborhood each pupil lives in.

178 (1922) (holding that Japanese are not white within the meaning of naturalization statute); Ritchey Produce Co. v. Ohio Dep't of Admin. Servs., 707 N.E.2d 871 (Ohio 1999) (holding that Lebanese are not "Orientals" for the purposes of minority business enterprise certification); *see also* IAN F. HANEY LÓPEZ, WHITE BY LAW 163–67 (2006) (listing "Racial Prereqnisite Cases" in table form). *See generally id.* at 27–77 (describing and analyzing same).

57. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2792 (2007) (Kennedy, J., concurring in part and concurring in judgment) (emphasis added).

58. *Cf.* Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189, 201–02 (1973) ("[T]he practice of building a school . . . to a certain size and in a certain location, 'with conscious knowledge that it would be a segregated school . . . .'" (quoting Keyes v. Sch. Dist. No. 1, Denver, Colo., 303 F. Supp. 279, 285 (D. Colo. 1969))).

59. *See, e.g., id.*; *cf.* Green v. County Sch. Bd. of New Kent County, Va, 391 U.S. 430 (1968) (invalidating racially motivated school choice program); Griffin v. County Sch. Bd. of Prince Edward County, 377 U.S. 218 (1964) (invalidating similarly motivated school closures, grade-a-year program).

60. *See infra* Part V.

The distinction between adjudication and policymaking generally is not always a clear one,[61] and the distinction between *racial* adjudication and policymaking has ambiguities as well.[62] Similarly, most policies will require instituting and maintaining a system of adjudication for carrying them out. For example, a college administrator may wish to increase minority enrollment at his school. His creation and adoption of measures to do so constitute the policymaking. The policy that he has made might involve two prongs: first, his college will send recruiters to neighborhoods and schools that are overwhelmingly populated by minorities to encourage students there to apply and to assist them with application advice. Second, his college will give all minority applicants preferential consideration, roughly equivalent to that given recruited athletes or applicants with perfect SAT scores. Both measures involve adjudications—both the individualized decision as to which high schools to visit (made on a school-by-school basis) and the individualized decision to admit students (made on an applicant-by-applicant basis). But only one—the preference in admissions—involves an *individual* determination of race, with the potential for direct consequences to that *same individual.*

The selection of high schools, by contrast, while an adjudication, is not a *racial* one. It necessarily involves individualized racial classifications: how is the administrator to know which school to visit without someone having individually classified each school's students and aggregating the sum? It is, of course, exceedingly unlikely that the statistics on the school's racial makeup were collected in order to qualify the school for our administrator's recruiting visits—but even if those collecting the racial data knew the data would be so used, the data collection would still not be adjudication. For each student asked to identify her race, the consequence is generally not specific to the *student*, the consequence is one to the *school* (or the student body) generally. Only in the most marginal cases would an individual student's classification have any impact on that same student's fate.[63]

61. *See generally* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) (criticizing *Londoner v. Denver*, 210 U.S. 373 (1908), for adjudicating for a small number of citizens rather than rule-making for the entire citizenry).

62. *See, e.g., infra* Part IV.C (discussing how the practice of racial redistricting has both policymaking and adjudicative aspects in its use of racial classification).

63. One could imagine, for example, a student of indeterminate racial background at a school just on the cusp of the college administrator's criterion for "overwhelmingness" in

IV. PROBLEMS WITH RACIAL ADJUDICATION

A. Racial Adjudication Is an Indeterminate Practice—But Does That Matter?

Some commentators have criticized racial adjudications for being indeterminate. Justice Scalia, for example, in the *Parents Involved* oral arguments, inquired into how students were classified,[64] as he did in the oral arguments of *Metro Broadcasting*, where he questioned the criteria used in determining who gets minority preferences as "ha[ving] to do with nothing . . . except blood,"[65] and inquiring as to whether a Portuguese would qualify as "Hispanic" and "what degree of blood does one have to be to qualify" as Hispanic.[66] Justice Powell's opinion in *Bakke* compared racial and gender-based classifications and similarly noted:

> Gender-based distinctions are less likely to create the analytical and practical problems present in preferential programs premised on racial or ethnic criteria. With respect to gender there are *only two possible classifications*. The incidence of the burdens imposed by preferential classifications is clear. . . . Classwide questions as to the group suffering previous injury and groups which fairly can be burdened are relatively manageable for reviewing courts. The resolution of these same questions in the context of racial and ethnic preferences presents far more complex and intracrable problems than gender-based classifications.[67]

Other commentators have cited the indeterminate nature of racial classification as a reason for doing away with them altogether.[68]

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population of minorities, who would herself benefit greatly from such a recruiting visit. To classify her as a minority would put the school over the top, as a white would mean the school gets passed over for a visit. As stated above, the distinction between adjudication and policymaking is not always a clear one.

64. *See* Oral Argument of *Parents Involved*, *supra* note 4, at 43–44.

65. *See* Transcript of Oral Argument at 45, Metro Broadcasting v. FCC, 497 U.S. 547 (No. 89-453), *available at* http://www.oyez.org/cases/1980-1989/1989/1989_89_453/argument.

66. *Id.* at 35.

67. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 302–03 (1978) (emphasis added).

68. *See, e.g.*, Melanie Gart, *Permitting Unsubstantiated Own-Race Bias Arguments in Summation Invites Juror Confusion and Irrelevant Racial Considerations into Criminal Trials*, 65 MD. L. REV. 1018, 1034 (2006); Thomas G. Gee, *Race-Conscious Remedies*, 9 HARV. J.L. & PUB. POL'Y 63, 68 (1986); John E. Morrison, *Colorblindness, Individuality, and Merit: An*

There are two sources of uncertainty in a racial adjudication, roughly correlating to the problems of fact and of law identified in the previous section. The first source is what I will term "abuse"—persons with little to no legitimate claim to membership in a certain race (under whatever concept of legitimacy the racial scheme or set of criteria we have adopted creates), who have nonetheless attempted to "game" the system by claiming to be of that race.[69] We should distinguish this from the more specific idea of "passing."[70] While passing is a sort of misuse of the racial system,[71] abuse is generally a far more limited deception. Those who abuse the system are not living their lives, or even a significant part of their lives, as one race, rather than another.[72] Instead, their claim to membership of a race is

Analysis of the Rhetoric Against Affirmative Action, 79 IOWA L. REV. 313, 317–18 (1994); Richard A. Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 12–13; Twilia L. Perry, *Power, Possibility and Choice: The Racial Identity of Transracially Adopted Children*, 9 MICH. J. RACE & L. 215, 231 (2003) (book review) ("The argument that race is fluid, indeterminate, or meaningless intersects comfortably with recent colorblind jurisprudence that seeks to dismantle affirmative action by arguing that racial classifications are inherently evil."); Bruce Fleming, *Not Affirmative, Sir; A Well-Meaning Admissions Board's Absurd Reality*, WASH. POST, Feb. 16, 2003, at B2; Kevin Merida, *Did Freedom Alone Pay a Nation's Debt?*, WASH. POST, Nov. 13, 1999, at C1.

69. Others have called this phenomenon "fraud." *See, e.g.*, Tseming Yang, *Choice and Fraud in Racial Identification: The Dilemma of Policing Race in Affirmative Action, the Census, and a Color-Blind Society*, 11 MICH. J. RACE & L. 367 (2006). I reject this term, as it seems to implicate a fixed, verifiable "truth" that is being concealed (a problem that Professor Yang explicitly recognizes, *id.* at 390–92). By contrast, "abuse" merely connotes a misuse of a process to achieve ends other than those intended, for example, by the process's creators or implementers.

70. *See* Robert Westley, *First-Time Encounters: "Passing" Revisited and Demystification as a Critical Practice*, 18 YALE L. & POL'Y REV. 297, 307 (2000) (defining "passing" as "the social process whereby the phenotypically qualified accept a racial identity in order to function within a system of racially justified privileges and exclusions").

71. We may, of course, sympathize with the African American who passes for white to avoid the oppression of Jim Crow, and might hesitate to characterize that as "abuse." As Frank Wu asserts, "passing for white also has an ulterior purpose, but that purpose is to obtain treatment equal to that enjoyed by the majority. Only a hypocrite sees that as a dubious motivation." Frank H. Wu, *From Black to White and Back Again*, 3 ASIAN L.J. 185, 204 n.114 (1996) (reviewing HANEY LÓPEZ, *supra* note 56). I disagree—a completely honest white supremacist might also find it dubious, and the term "abuse" reflects the perspective of those instituting the racial adjudicative process. The white supremacist would view a passing African American as "abusing" the system, just as the liberal might view a white person gaming an affirmative action program to gain benefits to which he would not otherwise have access.

72. For example, Ward Churchill, the controversial ethnic studies professor at the University of Colorado at Boulder, has claimed—allegedly falsely—American Indian descent, not only on, say, student and employment applications, but throughout his professional and public life. *See* Kevin Flynn, *Special Report: The Churchill Files, The Charge: Misrepresentation*,

limited solely to their involvement in impersonal racial adjudications, call it "passing on paper."[73] Though documented cases of this appear rare, anecdotal evidence suggests it does occur.[74]

The second, and more difficult problem, is that of "close cases." These cases involve persons of no immediately obvious racial status, who might reasonably fall into two or more categories. This may be possible because they are of "mixed"[75] racial descenr or because their ancestors hail from parts of the world whose indigenous peoples do not easily fall into one of the traditional parts of America's "ethno-racial pentagon."[76] In the latter group, for example, we might include Arabs and others of Middle Eastern origin, who are currently classified officially as "white,"[77] but are not popularly considered "white" in many contexts, and face discrimination as a result.[78] Also consider Australian Aborigines, who have skin every bit as dark as persons from Africa, but are in no way related.[79]

ROCKY MTN. NEWS, June 9, 2005, http://www.rockymountainnews.com/drmn/local/article/0,1299,DRMN_15_3841949,00.html. This, assuming the truth of the allegations, could constitute "passing" as well as "abuse." By contrast, the Malone brothers, "two fair-haired and fair-skinned identical twins [who] had claimed in their job applications . . . that they were Black for affirmative action hiring purposes," Yang, *supra* note 69, at 368, but did not otherwise present themselves as African Americans, would have committed "abuse" simpliciter.

73. *See* Yang, *supra* note 69, at 380 ("Passing via a paper identity is thus open not only to mixed race individuals or those whom nature has endowed with particular physical features, but to anybody.").

74. *See* Malone v. Haley, No. 88-339 (Sup. Jud. Ct. Suffolk County, Mass. July 25, 1989), *aff'd sub nom.* Malone v. Civil Serv. Comm'n, 646 N.E.2d 150 (Mass. App. Ct. 1995); *see also* Yang, *supra* note 69, at 368 n.4, 369 n.13 (relating other anecdotes of abuse).

75. For an explanation of my use of scare quotes, see *infra* notes 110–111 and accompanying text.

76. DAVID A. HOLLINGER, POSTETHNIC AMERICA: BEYOND MULTICULTURALISM 33 (rev. ed. 2000) (referring to the four races (white, black, Asian, American Indian) and the additional "ethnicity" (Hispanic)).

77. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782 (proposed Oct. 30, 1997) (defining "white" as "having origins in any of the original peoples of Europe, the Middle East, or North Africa").

78. *See* John Tehranian, *Compulsory Whiteness: Toward a Middle Eastern Legal Scholarship*, 82 IND. L.J. 1 (2007).

79. It is unclear how immigrants of indigenous Australian origin are classified. As best as I can tell, they fall into the 5.5% of Americans classified as "Some Other Race." U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN, No. C2KBR/01-1, at 3 (2001), *available at* http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf.

Richard Delgado has pointed out that, in many cases, the gap between abuse and close cases is narrow, and that the two often overlap:

> For many, the biracial and multiracial category is a new, and sophisticated form of what we used to call 'box-checking'—the cynical assertion of a minority identity by one who has not earned it and aimed at securing an advantage, such as affirmative action in admissions or a job search.[80]

The phenomenon results in a sort of "racial arbitrage"—persons who are able to take advantage of their "ethnic" claims when it suits them, but avoid the negative consequences that that ethnicity might bring.[81] To continue with a tax metaphor, our categorical ambiguities may also result in the very opposite phenomenon: a sort of "racial double taxation." After John Tehranian was notified that he, as a putatively "white" person, was passed over for a job in favor of a minority candidate, he reports quipping, "White, huh? That's not what they call me at the airport."[82] Just as the fair-skinned Hispanic may be able to take advantage of affirmative action while avoiding hassle by border guards on returning to the United States, so, conversely, a person of Arab or (like Professor Tehranian) Iranian descent may find his official "whiteness" to be cold comfort following the next terrorist attack.

That racial adjudication is indeterminate at the margins is not, however, a conclusive, or even a particularly persuasive, argument

80. Posting of Richard Delgado to Blackprof.com, *ASK MOM: "I Finally Discovered My Roots,"* at http://www.blackprof.com/?p=1869#more-1869 (Mar. 19, 2007 01:17 PM). Professor Delgado does not elaborate on how one "earns" a minority identity, although there are hints that it has something to do with suffering "stigma and heavy burdens," and being able to "diversif[y] discussion and increase[] the number of points of view that are apt to find their way into classroom repartee." *Id.*; *cf.* STEPHEN CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 32 (1991) ("In this latter-day vision of affirmative action, black people in positions of prominence have become *representatives of their people.*"); Adrian Piper, *Passing for White Passing for Black*, 58 TRANSITION 4, 6–7 (1992) ("I have sometimes met blacks socially who, as a condition of social acceptance of me, require me to prove my blackness by passing the Suffering Test: They recount at length their recent experiences of racism and then wait expectantly, skeptically, for me to match theirs with mine.").

81. Another commentator, calling these "phantom minorities," has pointed out that the very fact that these individuals can double-count undermines the very goals racial adjudications are designed to promote. Edward C. Thomas, Comment, *Racial Classification and the Flawed Pursuit of Diversity: How Phantom Minorities Threaten "Critical Mass" Justification in Higher Education*, 2007 BYU L. REV. 813.

82. Tehranian, *supra* note 78, at 2.

against it. *Every* legal issue has problems of classification, and it is not clear that this distinction is that much more confusing than any other of the myriad fine distinctions in law—such as, indeed, the distinction between adjudication and rulemaking described above. As Justice Oliver Wendell Holmes famously wrote, "[W]here to draw the line . . . is the question in pretty much everything worth arguing in the law. Day and night, youth and age are only types."[83]

There is no natural "boundary" between races—but that does not prevent us from crafting one. We routinely draw arbitrary lines to establish bright-line rules. The state does not ask if a potential consumer is mature when he attempts to purchase alcohol—it does not even ask if he is "old." It asks merely whether he is "old enough." Race-neutral alternative adjudications, too, ask categorical questions—about poverty, status, and experiences—and ultimately categorize. Being asked whether one is "old enough" may establish a line at, say, twenty-one years. But we still have an index—age—on which to draw the line. The line may be arbitrary, but it is drawn on a rational continuum. Could we not develop similar indices of "blackness," even if we have to choose an arbitrary threshold to decide if one is "black enough?"

Moreover, racial adjudication has *always* been seen as a "line-drawing problem"—even in an age when racial classifications were seen as most important and meaningful.[84] In 1910, Gilbert Thomas Stephenson, in his treatise, *Race Distinctions in American Law*, stated, of the question "What is a Negro?" that, "[a]bsurd as the question apparently is, it is one of the most perplexing and, at times, most embarrassing that has faced the legislators and judges."[85] In 1922's *Ozawa v. United States*, which ruled that "the words 'white person' were meant to indicate only a person of what is popularly known as the Caucasian race,"[86] thereby excluding Japanese, the Supreme Court explicitly recognized the problem:

> Controversies have arisen and will no doubt arise again in respect of the proper classification of individuals in border line cases. The

83. Irwin v. Gavit, 268 U.S. 161, 168 (1925) (citations omitted).

84. *See generally* Donald Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375 (1999); Daniel J. Sharfstein, *The Secret History of Race in the United States*, 112 YALE L.J. 1473 (2003).

85. GILBERT THOMAS STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 12 (photo. reprint 1969) (1910).

86. Ozawa v. United States, 260 U.S. 178, 197 (1922).

> effect of the conclusion that the words "white person" means a Caucasian is not to establish a sharp line of demarcation . . . but rather a zone of more or less debatable ground outside of which, upon the one hand, are those clearly eligible, and outside of which, upon the other hand, are those clearly ineligible for citizenship. Individual cases falling within this zone must be determined as they arise from time to time by what this court has called, in another connection, "the gradual process of judicial inclusion and exclusion."[87]

The following year, *United States v. Thind* presented the Court with just such a problem—whether Indians, sometimes thought of as "Caucasian," were also "white." The Court elaborated on the problem racial classification posed:

> The various authorities are in irreconcilable disagreement as to what constitutes a proper racial division. . . . The explanation probably is that "the innumerable varieties of mankind run into one another by insensible degrees," and to arrange them in sharply bounded divisions is an undertaking of such uncertainty that common agreement is practically impossible.
>
> It may be, therefore, that a given group cannot be properly assigned to any of the enumerated grand racial divisions. The type may have been so changed by intermixture of blood as to justify an intermediate classification.[88]

The Supreme Court nonetheless went on to declare Mr. Thind not to be "white."[89] The Court did not think the problems of racial definition and line-drawing were not worth the candle then. Rather, its profound commitment to racialism—as well as that of the society of which it was a part—made such line-drawing critical. "If race distinctions are to be recognized in the law," Professor Stephenson stressed, "it is essential that the races be clearly distinguished from one another," notwithstanding the difficulties in making such distinctions.[90] And, as with modern advocates of racial adjudication,

87. *Id.* at 198 (quoting Davidson v. New Orleans, 96 U.S. 97 (1877)).

88. United States v. Thind, 261 U.S. 204, 212 (1923) (quoting 2 ENCYCLOPEDIA BRITANNICA 113 (11th ed. 1910)).

89. *Id.* at 215.

90. STEPHENSON, *supra* note 85, at 12.

these earlier authorities were insistent that differential treatment in no way implied a violation of principles of equality.[91]

An emphasis on racial adjudication as indeterminate practice is, therefore, nor a self-sufficient argument against racial adjudication generally. I submit, however, that it draws its force not as a reasoned argument but as a rhetorical technique. The reference to indeterminacy is interesting precisely because it forces us to examine the *processes* of racial adjudication. When some individuals are clearly white, and others clearly black, we need not go any further, and the exact mechanism for the determination can remain comfortably hidden. It is in the abuses and the close cases, where the rubber meets the road, that our criteria for classification and membership come to the fore, and we are forced to restore essence to categories that most of us feel are not only irrelevant, but insidious.

B. Racial Adjudication Might Be a Demeaning Practice

Ultimately, the non-reactionary colorblind vision rests on a view of racial adjudication as fundamentally degrading, both to the subject of adjudication and the adjudicator himself. The problem with "defin[ing] what it means to be of a race" and identifying "[w]ho exactly is white and who is non-white"[92] is not that it is a close question. Rather, the problem is that being "forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society."[93]

It is important to note that this view is not solely the province of those who oppose racial adjudication—many of those who support it simply view it as a necessary evil. One commentator, who nonetheless endorses racial adjudication, confesses that he finds the

91. *See Thind*, 261 U.S. at 215 ("It is very far from our thought to suggest the slightest question of racial superiority or inferiority."); *Ozawa*, 260 U.S. at 198 ("Of course there is not implied—either in the legislation or in our interpretation of it—any suggestion of individual unworthiness or racial inferiority. These considerations are in no manner involved."); STEPHENSON, *supra* note 85, at 353, 359 ("[R]ace distinctions are not based fundamentally upon the feeling by one race of superiority to the other, but are rather the outgrowth of race consciousness. . . . Colored people everywhere should realize that a race distinction is not necessarily a badge of racial inferiority, but may be simply a natural result of racial differentiation.").

92. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2796–97 (2007) (Kennedy, J., concurring in part and concurring in judgment).

93. *Id.*

practice "demeaning";[94] another, more uncomfortable with racial adjudication as currently practiced, feels it "raises the specter of South African Apartheid or the Jim Crow Deep South."[95] Justice Powell, in his opinion in *Bakke* endorsing certain flavors of racial adjudication, cites with approval a line of cases that describe racial classification as not only vague but "inherently odious."[96] Justice Breyer in *Parents Involved* does not "deny that there is a cost in applying 'a state-mandated racial label.'"[97] And, as noted above, even many outright supporters of racial adjudication prefer race-neutral measures, where practicable.

The more rigorous advocates of colorblindness, however, have been categorical. Chief Justice Roberts describes racial classification as a "sordid business."[98] Justice Stevens, in an earlier incarnation opposed to affirmative action, states that "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals," and suggests reference to the Nazi Nuremberg Laws as "precedent[]."[99] Alexander Bickel writes that "a racial quota derogates the human dignity and individuality of all those to whom it is applied; it is invidious in principle as well as in practice."[100]

1. Criteria for racial adjudication

Very racist systems have had correspondingly well-developed processes for adjudicating race. Jim Crow America relied largely on rough judgments of phenotype and rules of descent, employing administrative or judicial process to classify persons, with varying

94. *See* Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573, 600–01 (2000) ("It may be that to maintain racially- or ethnically-oriented "diversity" programs will require even more than is currently the case that one engage in highly questionable, indeed demeaning, conversations about whether some person *X* is a "real" member of group *Y* given that he/she has the wrong last name, grew up in the wrong locale, etc . . . . [O]f course, for all my ambivalence amply reflected here, I still wish to praise, rather than to bury, such programs myself.").

95. Yang, *supra* note 69, at 371.

96. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 303 (1978).

97. *Parents Involved*, 127 S. Ct. at 2836 (Breyer, J., dissenting) (quoting *id.* at 2797 (Kennedy, J., concurring in part and concurring in judgment)).

98. League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594, 2663 (2006) (Roberts, C.J., concurring in part).

99. Fullilove v. Klutznick, 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting).

100. BICKEL, *supra* note 16, at 133.

degrees of complexity and rigorousness.[101] By contrast, apartheid-era South Africa, which was both more industrial, and, in many ways, more committed to racism than the Jim Crow South, had a vast, baroque administrative apparatus devoted entirely to classification, whose determinations were binding on the rest of the state.[102]

Conversely, modern America attempts to avoid thinking about the matter altogether. We often delegate the racial classification stage of adjudication, occasionally to quasi-sovereign entities (for example, Native American Indian identity),[103] but most often to the subjects themselves.[104] Racial adjudicators routinely defer to self-identification,[105] not because it is superior, but because they want to take race as given, rather than have to engage in the "sordid business" themselves. Even then, we avoid thinking about it. Just as we want the *inputs'* origins concealed, so we prefer to obfuscate *what is done with them.* Justice O'Connor, for example, preferred Michigan Law's indeterminate "critical mass" to the College's point system not because the former does not constitute a quota system[106]—but because the latter makes it all too clear what is going on. One commentator has described this approach as "something akin to a 'don't ask, don't tell' approach to race-conscious decisionmaking: use race, but don't be obvious about it."[107]

Let us reexamine the criteria for race. Criteria based on descent, while common (it is, for example, how race is defined by the Federal Government[108] as well as by the Nuremberg Laws cited by Justice

101. Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1274–76 (1994).

102. *Id.* at 1276–80.

103. *Id.* at 1263–66.

104. Yang, *supra* note 69, at 407 ("Anecdotal evidence suggests that many race remedial and race-conscious programs operate on the basis of self-identification. In essence, they operate largely on the 'honor system.'").

105. *See* John Martinez, *Trivializing Diversity: The Problem of Overinclusion in Affirmative Action Programs*, 12 HARV. BLACKLETTER L.J. 49, 53 (1995) ("[C]andiates are almost routinely included in affirmative action programs unless they fail the 'laugh test . . . .'").

106. As Chief Justice Rehnquist pointed out, it clearly does. Grutter v. Bollinger, 539 U.S. 306, 383–85 (2003) (Rehnquist, C.J., dissenting).

107. Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 104 (2007).

108. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,789 (proposed Oct. 30, 1997) (defining, e.g., "white" as a "person having origins in any of the original peoples of Europe, the Middle East, or North Africa," and "black," tautologically, as a "person having origins in any of the black racial groups of Africa").

Stevens),[109] is problematic. There is, in the first instance, the problem that determining one's "mixture" implies the existence of a pure type,[110] which only sets the problem back a generation. As one scholar notes, "[r]acial identity is not a question that can be answered by ancestral 'facts' alone."[111] Far more troubling, however, is the fact that the *rules* of descent are themselves profoundly shaped by racism. Is there any way to explain the rule of hypodescent—that "one drop" of African blood renders one black—apart from the notion that black blood "taints"?[112]

Genetics is useless—there is no "black gene," nor even a set of genes that stand for "black," or any particular race. As is often noted, genetic variation is far greater within races than between them.[113] There are, of course, genes that code for physiognometric criteria, the "grosser physical differences of color, hair and bone"[114] that are commonly thought of as being the essence of race. But, again, that merely pushes the question back: what *features* count, and how do we measure them? One commentator has suggested, with "would-be Swiftian irony," distributing "paint cards with varying skin tones" to university applicants.[115] Even this would not suffice, since many blacks have melanin levels identical to those of South Asians, or even very tan whites. Albinos, of course, number among all races.[116]

Alternatively racial adjudicators could rely on "anthropologists" to examine subjects with calipers, to testify as to the presence of the "negroid brow" or the "mongoloid skull," and other vulgar

109. *See* First Supplemental Decree of Nov. 14, 1935 art. 4, *available at* http://www.jewishvirtuallibrary.org/jsource/Holocaust/nurmlaw4.html.

110. Michael Omi, *Racial Identity and the State: The Dilemmas of Classification*, 15 LAW & INEQ. 7, 19 (1997).

111. Yang, *supra* note 69, at 392.

112. *See* F. JAMES DAVIS, WHO IS BLACK: ONE NATION'S DEFINITION (1991); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 23–37 (1991); Daniel J. Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600–1860*, 91 MINN. L. REV. 592, 593 (2007).

113. KWAME ANTHONY APPIAH, IN MY FATHER'S HOUSE 36, 57 (1992) ("[T]he chances of two people who are both 'Caucasoid' differing in genetic constitution at one site on a given chromosome are about 14.3 percent, while, for any two people taken at random from the human population, they are about 14.8 percent."); *see also* Sharona Hoffman, *Is There a Place for "Race" as a Legal Concept?*, 36 ARIZ. ST. L.J. 1093, 1116–22 (2004).

114. W.E.B. DU BOIS, *The Conservation of Races*, *in* 1 W.E.B. DU BOIS SPEAKS: SPEECHES AND ADDRESSES 1890-1919, at 75 (Philip S. Foner ed., 1970).

115. Fleming, *supra* note 68, at B2.

116. DAVIS, *supra* note 112, at 20.

proceedings that not only make a mockery of both science and the adjudicative process,[117] but treat the subject of the adjudication like a bred show-dog. This was, in practice, one way in which the Nazis enforced the Nuremburg Laws[118] formally based on descent, with an intricate methodology for racial classification based on hair and eye color; the shape of nostrils, skull, jaw, and earlobes; posture, and gait.[119] We could have no assurance, however, that any of this would match the reality of race we care about: "Discriminators . . . may indeed be 'poor anthropologists'; any scientific definition of race has little to do with the realities of racial discrimination."[120] Moreover, we know that physical appearance, however described, is not always an accurate predictor of how race is lived in this country—were it so, the phenomenon of "passing" would be not only impossible, but incomprehensible. As Justice Thurgood Marshall observed during the *Brown* oral arguments, race cannot be limited to "color because there are Negroes as white as the drifted snow, with blue eyes, and they are just as segregated as the colored man."[121] Physical criteria are troubling, no matter which ones we choose. But is the paint swatch to measure skin color any different than one used to measure eye color, or a ruler to measure height?

Finally, there are performative criteria. These, too, have an ancient and sordid history, running from pre-Civil War cases involving social and personal morality as proof of whiteness,[122] through Nazi classifications,[123] to modern criteria questioning whether Republicans could lose their claim to "blackness."[124]

117. *See generally* JACQUES BARZUN, RACE: A STUDY IN MODERN SUPERSTITION (1937).

118. *See, e.g.*, First Supplemental Decree of Nov. 14, 1935, *supra* note 109, art. 5.

119. Judy Scales-Trent, *Racial Purity Laws in the United States and Nazi Germany: The Targeting Process*, 23 HUM. RTS. Q. 259, 279 (2001).

120. Sandhu v. Lockheed Missiles & Space Co., 31 Cal. Rptr. 2d 617, 624 (Cal. Ct. App. 1994) (quoting Manzanares v. Safeway Stores, Inc., 593 F.2d 968, 971 (10th Cir. 1979)).

121. ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA 1952–55, at 239 (Leon Friedman ed., 1969).

122. *See* Gross, *supra* note 55, at 156–76.

123. *See* The Reich Citizenship Law of Sept. 15, 1935, art. 2(1) (defining a "citizen of the Reich" as both "one who is of German or kindred blood, and who, *through his conduct*, shows that he is both desirous and fit to serve the German people and the Reich faithfully") (emphasis added), *available at* http://www.mtsu.edu/~bavstin/nurmlaw2.htm.

124. *See, e.g.*, Posting of Jean Stefancic to Blackprof.com, *ASK MOM: Bogus Minorities Crowding Out Real Ones,"* http://www.blackprof.com/archives/2006/12/post_10.html

Richard Ford, an opponent of what he terms "racial culture," points out that in many cases a performative criterion "does not simply react to or even mirror majority group bigotry—in many cases it employs precisely the same description of group difference that the bigots employ."[125] Professor Ford cites Janice Hale-Benson, who describes an African American tendency "to approximate space, numbers, and time rather than stick to accuracy," and preferences for inferential over deductive or inductive reasoning and "novelty, freedom, and personal distinctiveness . . . shown in the development of improvisations in music and styles of clothing."[126] While Hale-Benson's generalization may not be not true in every case, it may well be true as a matter of generalities—and to the degree this description describes the subject of adjudication, perhaps to that degree the subject can be said to be "black." What is wrong with that?

2. The case against racial classification

"Racism" is a dual phenomenon. It is at once an abrogation of individuality, through stereotyping and prejudice, and the subordination of a people, the creation and reification of caste. The two components, of course, are not unrelated. The moral force for the condemnation of the first can only be understood in the light of the second.[127] Race is not merely an ***arbitrary*** classification like eye color, astrological sign, or whether one's surname falls between the letters A and H—it is an ***invidious*** one, made morally objectionable because of the larger social context of subordination. Richard Wasserstrom, for example, describes racial and sexual discrimination against blacks and women as "part of a larger social universe which systematically maintained an unwarranted and unjust scheme which concentrated power, authority, and goods in the hands of white

(Dec. 14, 2006 03:19 PM) (complaining about "barely-minority students" who "are very white-looking and exhibit little tie to their communities" and "[o]ne or two have been registered Republicans and active opponents of the very race-conscious programs under which they were admitted").

125. RICHARD THOMPSON FORD, RACIAL CULTURE: A CRITIQUE 3 (2004).

126. JANICE E. HALE-BENSON, BLACK CHILDREN: THEIR ROOTS, CULTURE, AND LEARNING STYLES 42 (1982).

127. Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 586–87 (1977).

males."[128] The colorblind theorist extends that critique beyond "programs that discriminated against blacks" to the very *idea* of blackness and whiteness itself.[129]

The racial adjudication forces us into that scheme of oppression—precisely because it is used to adjudicate legal rights. That the scheme places certain races into an especially unfortunate place in the scheme should not distract us from the reality that those of other races are also wronged by their placement therein. Consider, for example, the "model minority" myth regarding Asian Americans. A recent article breaks the myth down into five constituent components: (1) hard-working, (2) intelligent and highly educated, perhaps to the point of geekiness, (3) economically successful, (4) assimilated into mainstream American life, while paradoxically (5) remaining exotic and foreign.[130] With the exception of the last prong, the myth assigns Asian Americans a not entirely unenviable place in America's racial hierarchy. It is, however, no less of a slight against those to whom it is applied. As Frank Wu writes:

> Whatever else might be said about the [model minority] myth, it cannot be disputed that it is a racial generalization. As such, it contains the premise that people can be arranged by racial group, and, furthermore, that the differences between racial groups are more significant than either the similarities between racial groups or the differences within them. It makes race the main feature of an individual as well as the leading division among people.[131]

128. *Id.* at 618.

129. *Id.*

130. Miranda Oshige McGowan & James Lindgren, *Testing the "Model Minority Myth,"* 100 NW. U. L. REV. 331, 335 (2006).

131. FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE 56 (2002). Several of the objections to the myth that McGowan and Lindgren cite could also apply to anything said about whites and whiteness: that it denies many poorer Asian American populations the help they need, that it implicitly blames other minority groups for their problems, and that it divides Asian Americans from other minorities with whom they otherwise would share interests. McGowan & Lindgren, *supra* note 130, at 336–42. So too with the negative implication of component (2), intelligence to the point of geekiness. The nerd, it could be said, is also a white stereotype—indeed, nerdiness constitutes a refinement or purer type of whiteness. *See* Mary Bucholtz, *The Whiteness of Nerds: Superstandard English and Racial Markedness*, 11 J. LINGUISTIC ANTHROPOLOGY 84, 86 (2001) (describing nerds in a large urban high school as having adopted a "hyperwhite" persona: "the production of nerdiness via the rejection of coolness and the overt display of intelligence was often simultaneously (though not necessarily intentionally) the production of an extreme version of whiteness").

Whiteness, too, bears a cost: a race without culture, defined solely by a history of subordinating others. As David Roediger writes:

> It is not merely that whiteness is oppressive and false; it is that whiteness is *nothing but* oppressive and false. . . . Whiteness describes, from Little Big Horn to Simi Valley, not a culture but precisely the absence of culture. It is the empty and therefore terrifying attempt to build an identity based on what one isn't and on whom one can hold back.[132]

It should take nothing from the pain of subjection to slavery to suggest that being cast as the master hurts too.

Racial identity is not immutable in that it is biological, or in that conceptions of race do not change over time, but it *is* immutable in that most of us cannot effectively change our own. It is fundamentally ascriptive. The phenomenon of "passing," far from disproving this idea, as some seem to claim, only proves it—passing necessarily relies on a "real" race that one *cannot* change, even as one looks and acts like another. Race is a profoundly negative ascription, with tragic consequences—often for the ascribed individual, but always for society. In engaging in racial adjudication, we find ourselves forced to play a part in an ancient and profoundly wicked ritual. To participate in racial adjudication is to reenact in miniature our nation's bitter history of racial exclusion and domination, even as we attempt to remedy it. While it may be possible to imagine a world of "racial difference without reinscri[ption of] racial stereotypes and subordination,"[133] we must live in ours, where race, though constantly in flux, has always been about oppression.[134]

This much has all been said before, of course. So is this simply a matter of belief—either you buy the characterization of racial classification as degrading, or you don't? Perhaps, but it is critical to note that all of the foregoing applies solely to racial *adjudication*. As Justice Kennedy wrote, the "dangers presented by individual

132. DAVID R. ROEDIGER, TOWARD THE ABOLITION OF WHITENESS 13 (1994); *see also* Omi, *supra* note 110, at 20 (identifying "the absence of a clear culture and identity . . . and the stigma of being perceived as the oppressors of the nation" as being among "the themes and dilemmas of White identity in the current period").

133. Jayne Chong-Soon Lee, *Navigating the Topology of Race*, 46 STAN. L. REV. 747, 779 (1994).

134. *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 61–69 (2d ed. 1994) (charting the "Evolution of Modern Racial Awareness").

classifications . . . are not as pressing when the same ends are achieved by more indirect means."[135] Race-conscious policymaking cannot strip the dignity of individuals affected thereby—at least, no more than any other policymaking can. For policymaking *always* deals with generalities and groups. It cannot "derogate individuality," because it does not deal in individuals. Only when policies require adjudications to enact them do individuals enter the picture.

There is also a question of self-determination. Heather Gerken, in an attempt to distinguish between what she calls "retail" and "wholesale" race-consciousness, notes that "[w]hen the state moves from the wholesale to retail . . . the state is no longer constructing a space in which students choose their own identities. Instead, it is choosing an identity *for* them."[136] It matters little whether this is valuable because we value individual autonomy in choosing a racial identity, or because we want to deemphasize racial identity generally and want to foster non-racial identities—in either event, racial adjudication undermines our goal. Racial adjudication reifies and reinforces racial identity because real and potentially lasting legal and economic consequences flow from it. By contrast, racial classification withour immediare effect, as in a census, does little to reinforce that identity—it goes on a form, and down the memory hole, no longer describing me, but rather an entry in a database, used only in aggregation with many (dozens or millions of) others. Colorblind adjudication affords us as individuals the freedom to fashion and assume our own identities, racial or otherwise; race-conscious policymaking forces us as a society to recognize and redress the lingering effects of race.

C. Racial Adjudication Is an Incoherent Practice

A serious interrogation of the practice of racial adjudication reveals it to be not merely arbitrary at the margins, but fundamentally incoherent: a perversion not so much (or, at any rare, not only) of the ideal of equal protection, but of the ideal of adjudication itself.

135. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2796 (2007) (Kennedy, J., concurring in part and concurring in judgment).

136. Gerken, *supra* note 107, at 118–19 (emphasis added).

The last forty years have witnessed a revolution in our conception of race. It is now a commonplace belief, at least among educated persons, that race is a social construction—a phenomenon created by human interaction, not biology.[137] This broad recognition is by no means limited to adherents of critical race theory.[138] This idea has even been recognized by the courts.[139] In a footnote in *Saint Francis College v. Al-Khazraji*, Justice White included a lengthy disquisition on the fiction of race:

> There is a common popular understanding that there are three major human races—Caucasoid, Mongoloid, and Negroid. Many modern biologists and anthropologists, however, criticize racial classifications as arbitrary and of little use in understanding the variability of human beings. It is said that genetically homogeneous populations do not exist and traits are not discontinuous between populations; therefore, a population can only be described in terms of relative frequencies of various traits. Clear-cut categories do not exist. The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. It has been found that differences between individuals of the same race are often greater than the differences between the "average" individuals of different races. These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature.[140]

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137. *See* Sharfstein, *supra* note 84, at 1480, nn.39–40 ("For nearly forty years, historians, philosophers, anthropologists, sociologists, and scientists have theorized and documented the historically contingent and often shifting meaning of race.").

138. *See* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 7 (2001) (citing the "social construction thesis" as a "theme of critical race theory"; "that race and races are products of social thought and relations"; "[n]ot objective, inherent, or fixed, they correspond to no biological or genetic reality; rather, races are categories that society invents, manipulates, or retires when convenient").

139. *Contra, e.g.*, HANEY LÓPEZ, *supra* note 56, at 72 ("For the Court, race remains natural." (citing Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604 (1987)); Gotanda, *supra* note 112, at 32.

140. *Al-Khazraji*, 481 U.S. at 610 n.4. Professor Haney López claims that this is offset by the later assertion that "The Court of Appeals was thus quite right in holding that [the law] reaches discrimination against an individual 'because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of *homo sapiens*.'" HANEY LÓPEZ, *supra* note 56, at 72 (quoting *Al-Khazraji*, 481 U.S. at 613). Professor Haney López omits, however, both an "at a minimum" before "reaches," and what immediately follows:

> It is clear from our holding, however, that a distinctive physiognomy is not essential to qualify for § 1981 protection. If respondent on remand can prove that he was

Were this written today, twenty years later, even Justice White's "but not all" qualification would likely disappear. The modern equation of "race" with "ethnicity," in both the academy and the judiciary, only emphasizes its cultural, rather than its biological, nature.[141]

That race is constructed does not mean that it does not exist—only that its reality has little to do with biology. Removing race from natural science, however, forces us to reconceptualize it. One influential reconceptualization appears in Neil Gotanda's *A Critique of "Our Constitution is Color-Blind,"* which divides "race" into "four distinct ideas: status-race, formal-race, historical-race, and culture-race."[142] "Status-race" is the race of racism, the now-discredited "traditional notion of race as an indicator of social status."[143] "Formal-race" is "merely 'skin color' or country of ancestral origin . . . unrelated to ability, disadvantage, or moral culpability [and] unconnected to social attributes such as culture, education, wealth, or language."[144] "Historical-race embodies past and continuing racial subordination," a recognition of the continuing effects of status-race.[145] "Culture-race" emphasizes the cultural and ethnic attributes of peoples—"broadly shared beliefs and social practices."[146] Professor

> subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, or his religion, he will have made out a case under § 1981.

Al-Khazraji, 481 U.S. at 613. Both omissions make it clear that "race," even in 1987, was conceived as being far less "biological" than Professors Haney López and Gotanda imply.

141. *See* Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1021–51 (2007) (describing, and critiquing, the Court's adoption of a "race-as-ethnicity" conception of race).

142. Gotanda, *supra* note 112, at 4.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* In his original "Critique," Professor Gotanda claims that "'Black' and 'white' should not be considered types of ethnicity," *id.* n.12, but the distinction between culture-race and ethnicity has proved impossible to maintain, both for others, *see* Haney López, *supra* note 141, at 1028–29 & n.180; Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77, 91 (2000) (defining "culture-race" as "that mode of talking that treats race as akin to ethnicity, as involving the distinctive forms of life that social groups work out over time"); and for Professor Gotanda himself, see Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity, and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 1135, 1141 (1996) (Under colorblindness, the "meanings of African-American identity would be discounted to zero and any consideration of them would be deemed illegitimate. If ethnicity—especially those ethnicities traditionally considered as non-white—is subsumed as racialized, the color-blind

Gotanda, and others adopting his framework, criticize the Court for emphasizing the disconnected "formal-race" in its classification jurisprudence, to the exclusion of historical- and culture-race, which together provide more than enough rationale for race-conscious action.[147] What Professor Gotanda ignores, however, is that the Supreme Court did not pluck formal-race out of thin air: in almost all of its "benign" classification jurisprudence, it is precisely formal-race *that is under review*.

Reva Siegel, in her elaboration on Professor Gotanda's model, differentiates between status- and formal-race on the one hand, and historical- and cultural-race on the other. The former two, she observes, are "group-categorical," describing a "trait that all individuals possess and by which they can be differentiated into groups."[148] The latter two, by contrast, are "group-salient," differentiating based on "traits that are unevenly distributed in society and that correlate closely, but by no means precisely, with racial group membership."[149] These are not innate, but "aris[e] out of the unequal distribution of socially salient traits across populations, or more dynamically, as a group-status relation arising out of the interaction of social structure and social meaning."[150]

Adjudications, however, do not deal in generalities and populations—they deal in particular individuals. And racial adjudications almost entirely deal with group-categorical, rather than group-salient, conceptions of race. The racial adjudicator asks, "Are you black?" He does not ask (or, almost never asks), "How black are you?" The adjudicator can, of course, ask about those traits which *are* salient among various historical-racial and cultural-racial groups: your and your family's wealth, level of education, experience with discrimination, cultural background, and the like—by remarkable coincidence, precisely the elements of race-neutral affirmative action. But when the subject of adjudication is asked to check a box and thereby determine his status, he is being asked a categorical question. By contrast, race-conscious policymaking, which necessarily deals with individuals only in the aggregate, is perfectly at home dealing

vision applied to these ethnicities discounts their identities as equally valueless to society.").

147. Gotanda, *supra* note 112, at 40–52; Siegel, *supra* note 146, at 84–107.

148. Siegel, *supra* note 146, at 90–91.

149. *Id.* at 91.

150. *Id.* at 99.

with group-salient characteristics, and can speak, without contradiction, of group disadvantage, practice, or status, and what can be done to address them.

Put another way: when Stephen Carter, then an applicant to law school, received a frantic call from Harvard Law School late in the admissions season, withdrawing Harvard's rejection and offering admission solely in light of its discovery of Carter's race[151]—"I was told by one official that the school had initially rejected me because 'we assumed from your record that you were white'"[152]—what conceivable "modes of talking about 'race'"[153] could Harvard possibly have been using? In its adjudication,[154] Harvard had been presented with no further information about Carter's "beliefs or social practices,"[155] his "outlook and mores,"[156] his "social situation,"[157] or any other imaginable index of the group-salient meanings of race—indeed, from what Harvard had of those, it evidently assumed him to be white. He was classified, as all subjects of racial adjudications are, by formal-race. This is not to say that group-salient notions came nowhere into the matter. They were, no doubt, first and foremost in the minds of those who crafted Harvard's affirmative action program: the redress of past wrongs to members of certain historical-races and an attempt to promote diversity by admitting members of different culture-races. It is entirely coherent—indeed, most natural—to speak of policymaking, race-conscious or otherwise, as motivated by such group-salient classifications. But Harvard's policy entailed a racial adjudication which could *only* take account of one of the two group-categorical techniques—either the invidious status-race, or the irrelevant formal-race. And the color-blind vision wants nothing to do with either one.

151. CARTER, *supra* note 80, at 15–17.

152. *Id.* at 15.

153. Siegel, *supra* note 146, at 88.

154. Not a *governmental* adjudication, of course, as Harvard is a private institution, and so not directly subject to the Fourteenth Amendment, but the principle—here legally enforceable in Title VI—is largely the same. And, of course, the public-private distinction is itself not unproblematic. *See, e.g.*, MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 138–39, 145 (2004) (characterizing "state action" as a normative question: "the state-action question is not whether the state *is* responsible for certain behavior, but whether it *should be deemed* responsible"); Gotanda, *supra* note 112, at 7–16 (same).

155. Gotanda, *supra* note 112, at 4.

156. Siegel, *supra* note 146, at 88.

157. *Id.*

Lon Fuller, in his classic article *The Forms and Limits of Adjudication*, states that "the distinguishing characteristic of adjudication" is that it involves each participant "presenting proofs and reasoned arguments for a decision in his favor. Whatever heightens the significance of this participation lifts adjudication toward its optimum expression. Whatever destroys the meaning of that participation destroys the integrity of adjudication itself."[158] Its essence is as "a device which gives formal and institutional expression to the influence of reasoned argument in human affairs."[159]

Racial adjudication, implementing formal-race, must fail in Fuller's framework. Formal-race, is, *by definition*, irrelevant and irrational, and can only subvert Professor Fuller's pure model of adjudication as rationality. To adjudicate on its basis is an act of legal absurdity, no more an expression of reason than a trial by ordeal, a shamanistic oracular consultation, or a trial before the Queen of Hearts.[160] No one would want to participate in such a farce. So the adjudicator must cast about, looking for substance, something to pour into these hollow vessels he has been given. It would not surprise if he should, inevitably, find it in the only other group-categorical conception of race available, one with 400 years of precedent: status-race.

It is thus that race is re-essentialized—the "group stereotyping" the Supreme Court fears—not merely that the group-salient traits of historical- and culture-race will be mapped onto each individual, but that, through the process of racial adjudication, we will resummon the very demon we, as a nation, seek to exorcise. Such an effect is potentially dangerous in itself, as it encourages us to see individuals in racial terms, fitting into one of the two or five, or however many boxes we have created. But more importantly, it is also irrational—indeed, profoundly more so than adjudication on the basis of formal race—and thereby defeats the purpose of adjudication as a form of social ordering.

Whether or not racial adjudication can be rationalized, or whether it is inherently degrading or not, is probably the central question of American race law, and will not be resolved here. There

158. Fuller, *supra* note 54, at 364.

159. *Id.* at 366.

160. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 162–88 (London, MacMillian 1866).

may well be a "poetic justice" or even an "appealing[] symmetr[y, in] using . . . a technique to promote racial equality that is the same as the technique previously used by southern segregationists to promote racial discrimination."[161] The point of this Article is more limited: to articulate a non-reactionary colorblind vision that rests ultimately on a judgment about racial adjudication, rather than classification. Equal Protection jurisprudence goes well beyond scrutiny for racial adjudication, however. For, as noted in Part II, Ametica's racial jurisprudence does not deal only with facial classifications, but also with racial motives. How, then, can we affirmatively justify certain racial motives, and distinguish "good" motives from "bad"?

V. RACIAL ADJUDICATION AND LEGAL DOCTRINE

A. Dueling Values: The Antidiscrimination and Antisubordination Principles

The discourse of the law of racial classifications can largely be characterized as a dialogue (often of the deaf) between what is sometimes called the "antidiscrimination"[162] or "anticlassification"[163] principle on the one hand, and the "antisubordination,"[164] "anticaste,"[165] or "group-disadvantaging"[166] principle on the other. Put briefly, the antidiscrimination principle states that the government ought not to make distinctions based on race, while the principle of antisubordination qualifies that rule, applying it only where such distinctions serve to subordinate one race to another.

The colorblind vision views racial adjudication as properly restricted by the antidiscrimination principle. As Owen Fiss, himself a critic of the principle, points out, the focus of the antidiscrimination

161. Spann, *supra* note 8 at 649, 663–64.

162. Brest, *supra* note 47, at 1.

163. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1505 (2004).

164. *Id.* at 1472.

165. Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411 (1994) ("[T]he anticaste principle forbids social and legal practices from translating highly visible and morally irrelevant differences into systemic social disadvantage, unless there is a very good reason for society to do so.").

166. Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 147 (1976).

principle is on *means*,[167] and "embodies a conception of equality that roughly corresponds to the conception of equality governing the judicial process."[168] It also emphasizes other adjudicatory values, such as value neutrality, objectivity, and individualism.[169] A conception of equality that "yields a highly individualized conception of rights,"[170] moreover, is entirely appropriate for adjudication, a process that, by definition, deals with individuals and their rights.

A non-reactionary colorblind vision finds the antisubordination principle, on the other hand, to provide a justification for race-conscious policymaking—both for its legislative or administrative enactment and its judicial review. Here, the focus is on an intended *end*.[171] Facially neutral means that address race do not present the problems inherent in racial adjudication.[172] Moreover, race-conscious ends are more easily evaluated for subordination,[173] an important point which divides the reactionary and non-reactionary visions of colorblindness. For example, Justice Thomas's contempt in *Parents Involved* for what he calls "forced" or "coerced" "racial mixing"[174] or "racial balancing"[175] is palpable. He derides integration as a "faddish social theor[y]."[176] He pronounces himself "unwilling to delegate [his] constitutional responsibilities to local school boards and allow them to experiment with race-based decision-making on the assumption that their intentions will forever remain as good as Justice Breyer's."[177] It is significant that he quotes in full Justice Harlan's approving remark, so often omitted in favor of "our constitution is color-blind,"[178] that "[t]he white race deems itself to

167. *Cf. id.* at 108 (The "antidiscrimination principle embodies a very limited conception of equality, one that is highly individualistic and confined to assessing the rationality of means.").

168. *Id.* at 119.

169. *Id.* at 120–23.

170. *Id.* at 127.

171. Forde-Mazrui, *supra* note 8, at 2375.

172. *See supra* Part IV.B.

173. *See* Forde-Mazrui, *supra* note 8, at 2375.

174. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2776 ("coerced"), 2776 n.11, 2777, 2778 ("forced"), 2780, ("state-compelled racial mixing"), 2781 n.17, 2788 n.29 ("force") (2007) (Thomas, J., concurring).

175. *Id. passim.*

176. *Id.* at 2787.

177. *Id.* at 2788 n.30.

178. *See, e.g.*, *id.* at 2758 n.14 (plurality opinion) (quoting Plessy v. Ferguson, 163 U.S.

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 . . . ."[179] Justice Thomas's reactionary colorblindness, too, can see nothing wrong with continued white dominance, so long as government remains formally neutral, a situation Ian Haney López calls "colorblind White dominance."[180] So, too, does the plurality, even as it prescribes strict scrutiny only "when the government distributes burdens or benefits on the basis of individual racial classifications."[181] The clear implication of its broad statement that what it calls "racial balancing" is not only not a compelling interest but flatly "is not permitted"[182] is that the Constitution perversely *requires* us to ignore *de facto* segregation.

Justice Kennedy will have none of it:

> The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent [it] suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.[183]

Even without the option of racial adjudication, we nonetheless may—indeed, must—"take account of race";[184] our consideration is animated by anti-subordination principles. It is for *this* reason that the courts may not only permit placement of Justice Kennedy's school in the third site for the sole purpose of integration, but also forbid placement of the school in one of the first two if the

537, 559 (1896) (Harlan, J., dissenting)); *id.* at 2782–83 (Thomas, J., concurring) (same); Grutter v. Bollinger, 539 U.S. 306, 378 (2003) (Thomas, J., concurring in part and dissenting in part) (same); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (same). *But see* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 272 (1995) (Ginsburg, J., dissenting) (quoting language about the dominance of the white race in full).

179. *Parents Involved*, 127 S. Ct. at 2787 (Thomas, J., concurring) (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).

180. HANEY LÓPEZ, *supra* note 56, at 147–48.

181. *Parents Involved*, 127 S. Ct. at 2751 (plurality opinion).

182. *Id.* at 2758.

183. *Id.* at 2791 (Kennedy, J., concurring in part and concurring in judgment).

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

placement was even "in part 'because of'"[185] the purpose of maintaining segregation.

B. Affirmative Action

Race-based affirmative action, of course, is the classic modern racial adjudication, and has driven this Article so far. It should be clear that most instances of affirmative action, as commonly understood, are impermissible racial adjudications. By contrast, most (if not all) facially neutral affirmative action programs that implement a race-conscious policy ("alternative action," in one pithy phrase) are entirely permissible.[186] These would include not only the Texas ten percent plan, or a class-based affirmative action patterned after the California model, but also even more aggressive targeting of certain historical- and culture-races. What goes for affirmative action goes as well for the voluntary integration measures at issue in *Parents Involved*. As Justice Kennedy's concurrence makes clear, aggressive measures of racial remediation are still possible at the policymaking level.[187] A commitment to colorblind adjudication should have no problem, for example, with admissions factors like:

- "[D]emonstrated ability to overcome hardship and demonstrated commitment to social justice"[188]
- Use of English as a second language[189]
- Having a parent in prison or a gang[190]
- Experience with overt racial discrimination, or residence in a neighborhood or attendance at a school populated largely by one race[191]

185. Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979).

186. Forde-Mazrui, *supra* note 8, at 2332; Primus, *supra* note 8, at 539.

187. *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in judgment) ("In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition."); *see also id.* at 2792–93 (giving examples of such policies).

188. Spann, *supra* note 8, at 650.

189. Forde-Mazrui, *supra* note 8, at 2332.

190. *Id.*

191. Roithmayr, *supra* note 8, at 7–10.

- Ability to offer perspectives on racial justice that are typically missing from predominantly white institutions[192]

- The likelihood that an individual will provide resources to minority communities during school or after graduation[193]

We could go further still, however. The factors above, while motivated largely by race, are still facially race-neutral. Non-reactionary colorblindness does not require that our *policies* be facially race-neutral—only that our *adjudications* be. We could adopt what Olatunde Johnson calls "disparity rules," that make explicit reference to race and require actors to modify policies in the presence of racially disparate impacts.[194] The Voting Rights Act is such a rule, as is Title VII as interpreted in *Griggs v. Duke Power Co.*[195] and ratified by the 1991 Civil Rights Act.[196] A policy may thus *refer explicitly* to race and racial classification—it just may not do so in adjudication.[197]

Moreover, colorblind adjudication would still permit far more sweeping changes to traditional ideas of "qualifications" and "merit" to encompass nonetheless valuable qualities associated with excluded groups. Indeed, one of the most powerful of the radical critiques of affirmative action is that it serves to mask a legacy of racial oppression inherent in those very criteria.[198] The abandonment of racial adjudication would force us to look far more at our college admissions processes, the distribution of primary school resources, the way we evaluate and hire employees, and other structural causes of racial disparity, rather than allowing affirmative action to delude us into thinking the problem is solved.

192. *Id.*

193. *Id.* at 9.

194. *See* Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 374 (2007).

195. 401 U.S. 424, 431 (1971).

196. Pub. L. No. 102-166, 105 Stat. 1071, 1074 (1991); *see also infra* Part V.D.

197. *See infra* Parts V.C.2 (disparate impact), V.D (voting rights).

198. *See, e.g.*, Daniel A. Farber, *The Outmoded Debate over Affirmative Action*, 82 CAL. L. REV. 893, 894 (1994); Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 940 (2001) (critiquing that liberal defense for "leav[ing] no room for deeper criticisms of the racial hierarchy—a hierarchy that produces unequal secondary education as well as past and ongoing racism, both deliberate and unconscious, at institutions of higher learning"); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 956 (1996) ("[A]ffirmative action, as it is currently practiced, supplements an underlying framework of selection that is implicitly arbitrary and exclusionary.").

Neither would a commitment to colorblind adjudication require any kind of "subterfuge" to accomplish race-conscious goals. One of the most dispiriting aspects of the current affirmative action regime is the structural dishonesty it forces on us: code words like "diversity"[199] and "plus factor," the opacity of decisionmaking, the Zen distinction between "critical mass" and "quota,"[200] and the general state of denial we must enter when we adjudicate race.[201] The hope of the distinction I am advocating is to remove that hypocrisy, to allow us to be honest in both policymaking and adjudication: openly taking race into account at the one level, while refraining from sneaking it in at the other. As Heather Gerken notes, "The 'don't ask, don't tell' approach to race is the compromise of a pragmatist. But Justice Kennedy has always been an idealist, and his concurrence in *Parents Involved* is an idealistic opinion."[202] Some, however, believe that the Court's race jurisprudence would prohibit too tight a fit: "As the racial proxy becomes more transparent, . . . the Supreme Court may be more likely to view its use as an unconstitutional effort to promote racial balance."[203] An understanding of colorblindness as applied only to adjudication removes this problem entirely.

C. Employment Discrimination

Up until this point, this Article has focused mostly on race-conscious remedies like affirmative action. But there are other race-

199. Sanford Levinson quotes Jack Balkin as stating, "In the context of educational affirmative action, I understand 'diversity' to be a code word for representation in enjoyment of social goods by major ethnic groups who have some claim to past mistreatment." Levinson, *supra* note 94, at 601.

200. *Compare* Grutter v. Bollinger, 539 U.S. 306, 318 (2003) (quoting the director of admissions describing "critical mass" as simultaneously "meaningful numbers" or "'meaningful representation,' which she understood to mean a number that encourages underrepresented minority students to participate in the classroom and not feel isolated" and as having "no number, percentage, or range of numbers or percentages that constitute critical mass"), *with id.* at 335–36 ("The Law School's goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota.").

201. *See supra* notes 103–06.

202. Gerken, *supra* note 107, at 105. Gerken identifies a different "ideal" at the heart of *Parents Involved* than the one I describe here, and explicitly discounts as "anti-essentialism boilerplate" Justice Kennedy's expressions of distaste for racial adjudication. *Id.* at 113–15.

203. Spann, *supra* note 8, at 651. *See also* Forde-Mazrui, *supra* note 8, at 2390 (suggesting that "an inference might be drawn that such programs are being used as a proxy for race rather than instead of race," thereby triggering strict scrutiny).

conscious policies in American law. The Civil Rights Act of 1964,[204] for example, while largely embodying an antidiscrimination principle in its actual workings, is nevertheless a profoundly race-conscious policy. Adopted in response to the civil rights movement, it was meant explicitly to overcome racial oppression against particular groups. That it is applicable to plaintiffs and defendants of all races, including black defendants and white plaintiffs,[205] should not obscure the fact that it was passed, at least in part, because of its anticipated impact, most particularly on African Americans. A reactionary colorblind principle, which dictates that government may never consider race in crafting even generally applicable policies and invalidates those policies created with racial motives, would thereby invalidate antidiscrimination laws themselves.[206] A non-reactionary colorblindness, however, finds them not only unobjectionable, since they do not adjudicate on the basis of race (see below), but in fact laudable or even necessary in order to realize the antisubordination values which should drive our racial policies.

Two aspects of current employment discrimination doctrine bear examination in particular, however—one in each of the two principal ways of establishing a prima face case of racial discrimination in employment. Looking at how these race-conscious policies work can show how policies with colorblind adjudication can nonetheless help redress racial imbalances. To see that, however, we must first demonstrate that these policies do not, in fact, entail true racial adjudications.

1. Disparate treatment

The doctrine of "disparate treatment" was established in *McDonnell Douglas Corp. v. Green*:

204. 42 U.S.C. § 2000e (2000).

205. *E.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 275–79 (1976) (hearing a suit brought by two white employees who alleged they were treated less favorably than a black co-worker guilty of the same misconduct).

206. Taken to an extreme, reactionary colorblindness would, of course, annihilate even itself, since even the most aggressive advocates of colorblindness state that they have adopted it, at least in part, because of race's pernicious role in a system of white supremacy and subordination. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2768 (2007) (Thomas, J., concurring); *supra* notes 127–37 and accompanying text. In this sense, colorblindness is itself "race-conscious because it singles out race as a special characteristic and forces people to become conscious of race in a way they would not otherwise be." David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 111.

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing
>
> (i) that he ***belongs to a racial minority***;
>
> (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
>
> (iii) that, despite his qualifications, he was rejected; and
>
> (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[207]

Establishing element (i) would, at first glance, seem to require a racial adjudication.[208] Of course, it has long been established that one need not be a racial *minority* in order to qualify for Title VII protection—members of the "majority" race may also allege racial discrimination.[209] But while the circuits are split as to the showing required of a person of the majority category, whether under a purely symmetrical scheme[210] or under a requirement where the "majority" plaintiff must meet a stricter "background circumstances" test,[211] *McDonnell Douglas* still requires the plaintiff to allege his race in order to establish his case.

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207. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (emphasis added) (list format not in original).

208. This point could also apply more broadly, outside of employment discrimination, to Title II public accommodations discrimination actions, or indeed to almost all actions alleging some kind of intentional race discrimination. Such proceedings, for obvious reasons, often appear to involve the race of the plaintiff. For example, the plaintiff class certified in *Grutter v. Bollinger*

> . . . was defined as "all persons who (A) applied for and were not granted admission to the University of Michigan Law School for the academic years since (and including) 1995 until the time that judgment is entered herein; and (B) were members of those racial or ethnic groups, including Caucasian, that Defendants treated less favorably in considering their applications for admission to the Law School."

539 U.S. 306, 317 (2003). Element (B) in *Grutter* seems about as racially adjudicatory as element (i) in *McDonnell-Douglas*, and my argument with respect to element (i) applies to element (B) as well.

209. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 78 (1998); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 290–96 (1976).

210. *See, e.g.*, Bass v. Bd. of County Comm'rs, 256 F.3d 1095, 1105 (11th Cir. 2001); Iadimarco v. Runyon, 190 F.3d 151, 161 (3d Cir. 1999).

211. Gore v. Ind. Univ., 416 F.3d 590, 592 (7th Cir. 2005); Woods v. Perry, 375 F.3d 671, 673 (8th Cir. 2004); Harding v. Gray, 9 F.3d 150, 153 (D.C. Cir. 1993); Murray v.

To see why the first element is not a racial adjudication, look not at how the *plaintiff* would plead the requirement ("John Smith is a 26-year-old African American, domiciled in New York City . . ."), but at how the defendant would *rebut* the charge. While it is imaginable that one would deny the charge by alleging that John Smith is *not really* an African American, the way the Malone brothers' racial self-designation was challenged, this sort of claim has not met with resounding success.[212] For example, in *Perkins v. Lake County Department of Utilities*, the court confronted a plaintiff of indeterminate racial origin.[213] He claimed to be of American Indian descent, and to have been discriminated against on that basis. The employer contested whether he was, in fact, a Native American, going so far as to hire a genealogist to testify to that effect.[214] The court held that "it is the employer's reasonable belief that a given employee is a member of a protected class that controls this issue," not the "[p]laintiff's ability to prove lineage."[215]

What *is* frequently adjudicated, however, is whether the defendant *knew* the plaintiff's race. Indeed, there are several cases that have treated *defendant's knowledge* of the plaintiff's race as being at the heart of the required showing for element (i), and dismissing upon a failure to properly allege and prove it.[216] In other words, element (i) considers the plaintiff's "subjective" race, in the eyes of his employer, not his "objective" race, what he "really is." We should distinguish, then, the defense of "objective mistake"-that John Smith *really was* white even though his employer thought he was black, and therefore he could not be fired because he was black-from the defense of "subjective mistake"-that the defendant thought John Smith was white when others consider him black, so

Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985).

212. *See generally* Ken Nakasu Davison, Comment, *The Mixed-Race Experience: Treatment of Racially Miscategorized Individuals Under Title VII*, 12 ASIAN L.J. 161 (2005).

213. Perkins v. Lake County Dep't of Utils., 860 F. Supp. 1262, 1264 (N.D. Ohio 1994).

214. *Id.* at 1264–68.

215. *Id.* at 1277. This is an especially strong case, since there are comparatively rigid criteria for Native American identity dictated by tribal governments.

216. *See, e.g.*, Robinson v. Adams, 847 F.2d 1315, 1316 (9th Cir. 1987); Jackson v. Kenney, 762 F. Supp. 863, 866 (W.D. Mo. 1991) (holding that a plaintiff could not establish a prima facie case "where it cannot reasonably be inferred that the defendant knew the plaintiff's race"); Gibson v. Frank, 785 F. Supp. 677 (S.D. Ohio 1990), *aff'd*, 946 F.2d 1229 (6th Cir. 1991).

he could not have been fired because he was black. Only objective mistake, which requires proof of what the plaintiff "really is," would require a racial adjudication.

The recognition of race as a construction requires us to acknowledge that there is no "race" independent of how one is regarded. To be "regarded as black" is fundamentally a redundancy, since one is only black (or whatever) insofar as one is regarded as black, in a way fundamentally different from, say, being blind.[217] It is at least arguable that if a person in a position of power over another regards that individual as being of a certain race, then the individual is, for all intents and purposes, a member of that race, at least with respect to that person and their relationship.

That person, the defendant in the racial discrimination lawsuit, is the one who has, in effect, racially adjudicated the plaintiff. We need not subject the plaintiff to a second racial adjudication; we need only present evidence of the defendant's previous classification-with-effect—an action that effectively constitutes the action of the tort. Pleading element (i) does not adjudicate the plaintiff's race any more than a personal injury plaintiff's display of his broken leg to the jury refractures the limb.

One might ask, then, why this argument does not apply globally: the *adjudicator* is not racially adjudicating the affirmative action applicant, but merely recognizing *society's* classification-with-consequences. This, of course, is the classic defense of affirmative action, rejected by the Supreme Court in *Croson*.[218] But this is precisely the point at which the "subjective" standard (what did the defendant think Smith's race was?) becomes an "objective" standard (what would a reasonable, ordinary, average, etc., person think it was?). And at that point, a true racial adjudication becomes unavoidable.

Courts are willing to adopt the bigots' various schemata—that some group of anthropologists considers Middle Easterners to be Caucasians is not controlling on the federal judiciary, any more than

217. The postmodernist, of course, could point out that "blindness" is constructed in many different ways, as with (to take an easy case) the millions of "legally blind" persons who are nonetheless able to collect and process visual information to varying degrees. Suffice it to say, however, that there is a degree of objectivity in characterizing blindness that is entirely lacking in, say, whiteness. As with the drinking age or the speed limit, the *line* may be arbitrary, but the spectrum on which it is drawn is not.

218. City of Richmond v. J. A. Croson Co., 488 U.S. 469, 506 (1989).

it controls those who discriminate against Middle Easterners because they are not "white."[219] To the extent there is an "objective" element, it might be with its resemblance to historical beliefs about race. A racial division that places Arabs in a different class from Europeans but is otherwise generally congruent with historical beliefs and prejudices might be recognized; a scheme that divides humanity into "races" that bear absolutely no resemblance to our traditional notions of race (e.g., the exalted "blue race" and the degraded "orange race") might not. Similarly, the court in *Perkins* mentions the employer's "reasonable belief," based on objective indicia of racial belonging, such as "physical appearance, language, cultural activities, or associations," to allege element (i).[220] Such a requirement makes sense—anti-discrimination law is meant to address specific historical circumstances, not irrational hiring practices generally. At any rate, such a determination takes us far afield of deciding what the plaintiff "really is."

This subjective view of discrimination law is not unprecedented in antidiscrimination law. The text of the Americans with Disabilities Act explicitly protects not only those who *are* disabled, but also those "regarded as" disabled.[221] Two commentators have suggested that such a requirement should in fact be read into Title VII in the case of a "mistake" of racial identity (their example is a white applicant with an African American-sounding name).[222] This understanding of element (i)[223] would not require any great doctrinal changes; I have found few cases involving "objective mistake," while the cases on "subjective mistake" are more common.[224] I do not claim that this understanding of doctrine reflects how courts would apply the disparate treatment doctrine; I claim only that, properly

219. *See* Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 605 (1987).

220. *Perkins*, 860 F.Supp. at 1278.

221. 42 U.S.C. § 12102(2)(c) (2000).

222. Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded As" Black, and Why Title VII Should Apply Even if Lakisha and Jamal are White*, 2005 WIS. L. REV. 1283, 1325–29 (2005).

223. Or, once again, any litigation alleging intentional discrimination. For example, had the University of Michigan Law School made the same mistake with respect to law-school applicant Stephen Carter that Harvard did, *see supra* notes 151–57 and accompanying text, Carter ought to have satisfied element (B) of the *Grutter* class definition, *see supra* note 208.

224. *Supra* note 216 and accompanying text. "Objective mistake" and "subjective mistake" are my terms, and do not appear in the cases.

understood, restricting racial adjudication should not substantially change it.

2. Disparate impact

By contrast with disparate treatment, the doctrine of disparate impact relies on aggregate statistical inferences. In a way, it operates as one of Johnson's "disparity rules"—a mandate that employers engage in their own race-conscious policymaking when deciding on job qualifications. Indeed, the disparate impact doctrine is a perfect example of how racial classification need not necessarily entail racial adjudication. "A plaintiff cannot bring a disparate impact claim without a statistical showing that sorts employees or applicants into groups, and neither the EEOC nor a court can assess a disparate impact claim without deciding whether the classification system the plaintiff used is accurate."[225] And yet it is not *those persons'* rights and liabilities being adjudicated—it is the plaintiff's. And, in a disparate impact action, do we really need to know her race?

Imagine a company that requires that all applicants take a qualification test—one that has a disproportionate impact on certain minorities. A white individual applies for a job, takes the test, and fails. Can she sue to enjoin use of the test?

I find nothing in the law that says she cannot. That our hypothetical applicant has "Article III standing"—injury-in-fact, causation, and redressability[226]—ought to be clear enough. The applicant has suffered a harm (being disqualified from a job by a wrongful test), and can show traceability (it was the test that disqualified her) and redressability (were the test enjoined, she would be able to continue to compete for the job)—all to the same extent that a member of the harmed race does. The statute, meanwhile, specifies merely that the plaintiff must "demonstrate[] that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin."[227] Nowhere in the definition of disparate impact does the statute say that the impact must be on the basis of *that individual's*

225. Primus, *supra* note 8, at 508.

226. *See generally* 15 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE §§ 101.40–101.42 (detailing the three prongs of the constitutional test for standing).

227. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

race, color, etc.—unlike virtually every other paragraph of the statute.[228]

A knockout statutory-interpretation argument it's not[229]—but neither is it wholly ridiculous. One court has already upheld the standing, for example, of a man whose injury was alleged to be on the basis of *others'* race and his association with and advocacy for them—a greater departure from the text than my reading. In *Johnson v. University of Cincinnati*, the court stated that "the fact that Plaintiff has not alleged discrimination because of *his* race is of no moment inasmuch as it was a racial situation in which Plaintiff became involved."[230] So too could we say that the white plaintiff who gets caught in a net disparately trapping blacks finds herself in a "racial situation"—and this reading has at least some support in the plain language of the statute.

Such an interpretation of standing would also avoid requiring the court to adjudicate the race of the plaintiff. For without it, the plaintiff's "objective" race would matter; the employer's intent is not an element of disparate impact,[231] and, accordingly, there is no "subjective" race to take into account. We would have to decide, then, not only what groups to measure, but whether the plaintiff really can claim membership in the discriminated-against group—in other words, if she "really is" one race or another. And a negative finding would warrant dismissal. In other words, whether our plaintiff, as opposed to an otherwise identical minority, can sue depends *entirely* on her race. The law would accord a cause of action—for the *exact same set of circumstances*—to a black plaintiff where it would not to a white, a Hispanic, or an American Indian. The current Court might not stand for such a "discriminatory"

228. *E.g.*, *id.* § 2000e-2(a)(1) ("to discriminate against any individual . . . because of *such individual's* race, color, religion, sex, or national origin"); § 2000e-2(b) ("to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of *his* race, color, religion, sex, or national origin"); § 2000e-2(c)(1) ("to exclude or to expel from its membership . . . any individual because of *his* race, color, religion, sex, or national origin") (emphases added).

229. A counterargument might be that the "disparate treatment" process in paragraph (k) is merely a *method of proof* of the discrimination forbidden in some of the other paragraphs, which, in turn, would require that the discrimination be on account of the plaintiff's own race.

230. Johnson v. Univ. of Cincinnati, 215 F.3d 561, 575 (6th Cir. 2000).

231. "[G]ood intent . . . does not redeem employment procedures or testing mechanisms that operate as 'built-in head-winds' for minority groups and are unrelated to measuring job capability." Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

interpretation and would be left with two options: invalidate disparate impact as a violation of Equal Protection, or read it to allow anyone to sue.[232]

Again, such a reading is not unprecedented. The closest thing to "disparate impact" in Equal Protection jurisprudence would likely be the prima facie inference of discrimination in jury venires announced in *Batson v. Kentucky*.[233] *Batson*, too, was initially limited to proof that members *of the defendant's race* were unfairly excluded.[234] The result, potentially, would have been a racial adjudication: to determine if the defendant's race was the same as that of the challenged jurors. In *Powers v. Ohio*, however, Justice Kennedy, writing for a seven-Justice majority, rejected such a principle and stated that the defendant *need not* be of the same race as the challenged jurors.[235] Justice Kennedy might someday choose again to expand a civil rights remedy rather than require the lower courts to adjudicate on the basis of the plaintiff's race.

232. This is a separate question from whether practices that disproportionately impact whites, or, relatedly, men, should also be subject to disparate impact scrutiny. Oddly enough, this apparently doesn't come up often; one article, written three years ago, found only two cases, both from 1986, that presented the issue. *See* Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1530–32 (2004). One involved a "maximum height" requirement that allegedly disparately impacted men, Livingston v. Roadway Express, 802 F.2d 1250 (10th Cir. 1986); the other concerned a historically black college's preference for internal candidates that allegedly harmed whites, Craig v. Ala. State Univ., 804 F.2d 682 (11th Cir. 1986). Sullivan also identified a third candidate, an ironic twist on the *Washington v. Davis* facts that involved a police civil service test that rejected candidates that scored "too high." Sullivan, *supra*, at 1508–09 & nn.19–20 (citing Jordan v. City of New London, 225 F.3d 645 (2d Cir. 2000)).

Reactionary colorblindness, of course, would find such an asymmetry unacceptable—we must treat the races "equally," both individually and in the aggregate. But a non-reactionary colorblindness, which scrutinizes only racial adjudication, would not—we still allow white plaintiffs into court, just not to assert the rights of whites in general. There might be valid anti-subordination reasons to cover only disparities that harm minorities and women, and a non-reactionary colorblindness would have no difficulty yielding to those priorities.

233. 476 U.S. 79, 95 (1986).

234. *Id.* at 94.

235. Powers v. Ohio, 499 U.S. 400, 402 (1991). Notably, however, Justice Scalia, joined by Chief Justice Rehnquist, reacted with horror to the idea that it violated a white defendant's rights to strike blacks from a jury venire. *Id.* at 417 (Scalia, J. dissenting). Justice Scalia's objection, which would have limited *Batson* to same-race juror challenges, would have *necessitated* a process of racial adjudication to assert standing. It is likely that skepticism of *Batson* in general led Justice Scalia to want to limit it, even at the cost of requiring racial adjudication. It is unclear how Justice Scalia's skepticism of disparate impact doctrine in Title VII, *see* Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (Scalia, J., joining in majority opinion), would influence his vote in this hypothetical case.

Once again, however, this is not a prediction of how the Supreme Court would decide such a hypothetical case (it would, alas, not be surprising if the current Court opted to invalidate disparate impact, rather than expand it). The foregoing is simply to show that a ban on racial adjudication would not be inconsistent with—and could conceivably strengthen[236]—a major part of our civil rights jurisprudence.

D. Voting Rights

The most powerful objection to the importance of the adjudication/policymaking distinction lies in the racial redistricting cases of the last two decades.[237] Indeed, this line of cases, which deals with what the Court characterizes as facially neutral race-conscious policymaking,[238] has convinced at least two commentators that race-neutral affirmative action would also be impermissible,[239] and has given at least one other writer pause before deciding that race-conscious policies are okay after all.[240]

There is no reason, in light of the Court's invalidation of certain race-based districts, to abandon our adjudication-antidiscrimination/policymaking-antisubordination distinction entirely. As stated earlier, the line between adjudication and policymaking is not always clear, and some governmental actions may indeed contain aspects of both. In the modern age of computerized gerrymandering, where districts may be drawn not only neighborhood-by-neighborhood, but block-by-block and house-by-house, the racial determination of individuals begins to have more and more effect not on the global policy, but on the district to which ***that individual*** is assigned. Filling out one's census,

236. Disparate impact, under this reading, becomes a much more powerful tool for ferreting out discriminatory practices. If persons of any race could sue to enjoin policies that harm any race—not just their own—it would only expand the class of plaintiffs, allowing rejected whites to act, in effect, as private EEOCs. Such a reading could even conceivably strengthen cross-racial solidarity, as many whites come to realize that they are hurt by the same practices that disproportionately injure minorities. The worst-case scenario, however, is things remaining the way they are now.

237. Hunt v. Cromartie, 526 U.S. 541 (1999); Shaw v. Hunt, 517 U.S. 899 (1996) (*Shaw II*); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993) (*Shaw I*).

238. *Shaw I*, 509 U.S. at 643.

239. *See* Fitzpatrick, *supra* note 8, at 301–07; Cimino, *supra* note 8, at 1297–1301.

240. *See* Roithmayr, *supra* note 8, at 22–24.

therefore, becomes not a mere informational tool for race-conscious policymaking, but an input into adjudication—more like a college or job application than like an anonymous survey. It is for this reason that the Court emphasizes the bizarre shapes of the voting districts, their twisted contours and appendages[241]—not so much as proof of "racial motive," but as proof of racial *adjudication*.

Recognizing that modern redistricting is adjudication-like in some regards, however, is not to ignore the fact that it is also policymaking-like in others. The Court did not want to draw upon the same antidiscrimination-implementing doctrinal tools that it uses for purer instances of racial adjudication, or the antisubordination-implementing tools used for malign race-conscious policymaking. So it invented a new test. The test announced in *Arlington Heights* and *Feeney* was essentially a "but-for" test: a policy is invalid if adopted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[242] The test announced in *Miller v. Johnson* was different: race must not be the "predominant" motive.[243] As some commentators have already noted,[244] this is a markedly less restrictive test. Race may still be a motive, and the policy *may* be adopted "*in part* 'because of'"—just not *predominantly* because of—race.

This intermediate test is not without problems. It seems unlikely that redistricting, even in the modern age, is so close to adjudication as to require a test of such strictness. The language of the cases, too, is far too redolent of the irrelevant formal-race categories under review in the affirmative action cases, ignoring the historical-race reality of racial bloc voting. The requirement that "the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class"[245] in the context of creating voting districts is, on its face, ludicrous. How exactly is the government supposed to group people into congressional districts "as individuals"? It is also unclear whether the plaintiffs in these suits were themselves racially adjudicated—if *their* race had not been taken into account, was there even a potential that they would have been

241. *Miller*, 515 U.S. at 910.

242. Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979).

243. *Miller*, 515 U.S. at 916.

244. Karlan, *supra* note 18, at 1581–85 (2002); Fitzpatrick, *supra* note 8, at 310–12.

245. *Miller*, 515 U.S. at 911 (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting)) (quotation marks omitted).

placed in a different district?[246] Finally, the fact that "elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole,"[247] is one unfortunately endemic to any plurality voting system—since all votes for the loser are, by definition, wasted (the winner is just as much so with 50.1% of the vote as with 90.1%), the representative represents, necessarily, only those in the district who voted for him.[248]

We should nore, too, that the racial redistricting cases occur in the shadow of the Voting Rights Act, an explicitly race-conscious policy that, in turn, mandates *further* race-conscious policymaking on the part of state legislatures and administrators, a variant on the "disparity rules" endorsed above. Nowhere does the majority in *Shaw* explicitly state that the Voting Rights Act is unconstitutional—even the portions that seem to have put the legislature in such a bind. It is true that Justice Kennedy's concurrences in some Voting Rights Act cases seem to express skepticism about the Act's constitutionality.[249] Recently, however, his thinking on voting rights seems to have changed. Justice Kennedy's most recent opinion in *League of United Latin American Citizens v. Perry*[250] (*LULAC*) was notable for striking down Tom DeLay's mid-decade gerrymander not on political but on racial and ethnic grounds—the first time Justice Kennedy had found a district to violate the Voting Rights Act.[251] Contrary to his earlier skepticism of the constitutionality of the Act's requirement of race-consciousness, his opinion cites with approval the culture-race fact that "[t]he Latinos in District 23 had found an efficacious political identity,"[252] and recognizes the

246. A plaintiff living on the boundary of districts might be analogous to the "tipping-point" student, *supra* note 63, for whom a different personal designation could bring a different outcome for her school, and by extension, herself.

247. *Shaw I*, 509 U.S. 630, 648 (1993).

248. Contrast this, for example, with a multiple-winner cumulative voting system, where electoral minorities are able to aggregate their votes to ensure representation, or a proportional voting system, where 30% of the vote gives 30% of the representation to the list.

249. *See, e.g.*, Georgia v. Ashcroft, 539 U.S. 461, 491–92 (2003) (Kennedy, J., concurring); Miller v. Johnson, 515 U.S. 900, 926–27 (1995); Chisom v. Roemer, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting).

250. 126 S. Ct. 2594 (2006).

251. Gerken, *supra* note 107, at 109.

252. *LULAC*, 126 S. Ct. at 2619.

historical-race reality of racially polarized voting[253] that the majority so assiduously ignored in *Shaw* and *Miller*. It may be that, as in *Parents Involved*, Justice Kennedy's opinion in *LULAC* is another sign of a turn away from reactionary colorblindness and toward a new, more subtle conception of the role of race in American law.

VI. CONCLUSION

This Article attempts to explain something that has puzzled many about an implication of Equal Protection colorblindness: is the use of race at every level equally objectionable? Is race-neutral "alternative action" just as objectionable as race-based affirmative action, in the same way that race-neutral efforts to maintain segregation were found to be as objectionable as explicit segregation by race? To answer this question, I emphasize the distinction between racial ***adjudication***, individual racial classifications with immediate effect on the persons classified, and race-conscious ***policymaking***, the process of crafting generally applicable policies while taking into account the race of those the policies will affect. Only in adjudication is colorblindness required, because antidiscrimination values are uniquely suited for adjudication. By contrast, race-conscious policymaking is entirely appropriate, as long as it is driven by anti-subordination values.

As some have pointed out, Justice Kennedy's concurrence in *Parents Involved*, which seems to make precisely this adjudication/policymaking distinction, may play a role similar to Justice Powell's opinion in *Bakke*: the narrow opinion that will control lower courts for the foreseeable future.[254] Given Justice Kennedy's apparent emphasis on the distinction between racial adjudication and race-conscious policies, it would seem that at least five Justices would agree, at the very least, that race-conscious policymaking should not be subject to the same degree of scrutiny as racial adjudications. It is also a workable distinction. Requiring colorblind adjudication, while permitting race-conscious policies, would address the harms the Supreme Court has identified with

253. *Id.* at 2616.

254. *See* Gerken, *supra* note 107, at 104–05; Jack Balkin, *The* Parents Involved *decision—*Swann *Song or* Bakke *for our times?*, http://balkin.blogspot.com/2007/06/parents-involved-swan-song-or-bakke-for.html; Posting of various authors to SCOTUSblog in response to Tom Goldstein, *Analysis: Justice Kennedy and a Warning Against Overreading the School Cases*, http://www.scotusblog.com/movabletype/archives/2007/06/analysis_justic.html.

racial classification, while still preserving the government's ability to redress our nation's dark legacy of racial injustice.

It has been suggested, not without evidence, that the measures permissible under "alternative action" will not be as effective in increasing minority numbers[255] as those that incorporate racial adjudication.[256] This may be true, but the conversation must not end there. As Kim Forde-Mazrui observes, "a fair critique of race-neutral affirmative action . . . should also compare its effects with those of absolute colorblindness," a colorblindness not just in adjudication, but in policymaking as well.[257] One could also object that the more sweeping changes envisioned by the radical critics of affirmative action—greater redistribution, changing boundaries, and redefinition of "merit"—are politically unfeasible. What this argument amounts to, however, is a proposal to adopt only the *least* effective measures, to prove correct Derrick Bell's interest convergence thesis.[258]

Race-conscious policymaking may not be as "efficacious" without the racial adjudication arrow in its quiver. But all broad policies must bow, to some degree, to individual rights,[259] and it has been apparent for a generation—as early as *Croson*, if not *Bakke*—that the "right" not to be racially adjudicated is certain to be factored into our nation's race policies. The question is not *whether*, but *what kind* of colorblind future we face. I suggest that the adjudication-policymaking distinction is an appropriate place to draw

255. This is conceived, of course, in categorical, formal-race terms. It should not surprise us if the formal-race minorities who benefit most under affirmative action tended to be the most "white" in historical- and culture-race terms.

256. *E.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2827–28 (2007) (Breyer, J., dissenting). This is ground I am not willing to cede entirely. There is an irony in Justice Breyer's moving defense of racial adjudication in *Parents Involved*: even as he demonstrates the majority's categorical colorblindness to be a break with precedent, *id.* at 2811–20; 2830–31, he cites statistics that show that de facto resegregation was on the rise well before categorical colorblindness became law, *id.* at 2799, 2837–42.

257. Forde-Mazrui, *supra* note 8, at 2377.

258. DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 7 (1992) ("When whites perceive that it will be profitable or at least cost-free to serve, hire, admit, or otherwise deal with blacks on a nondiscriminatory basis, they do so. When they fear—accurately or not—that there may be a loss, inconvenience, or upset to themselves or other whites, discriminatory conduct usually follows.").

259. To take a more cartoonish example, one might well ask why domestic violence cannot be addressed more "directly" by installing video cameras in everyone's home. Such a solution might have a tremendous deterrent effect, as well as avoid the problem of victims who are reluctant to report and testify about crimes. I hope the reader will agree with me that it would also be absolutely unacceptable.

the line: adjudication must be colorblind, but our broader polices must not be. I think this distinction is one that should prove acceptable to a Supreme Court majority, as well as preserve the constitutionality of some of the most *meaningful* (if not always the most optically effective) remedies, if only we can summon the courage to adopt them.