
Illusions of Antidiscrimination Law

NELSON LUND

SLAVERY IS RESPONSIBLE for the most serious and intractable political problems the United States has faced. Along with the poisonous legacy of that thoroughly un-American institution, we must also face its intersection with the very American tendency to conduct political struggles in the form of legal controversies.

Opponents and proponents of racial preferences have alike fixed their hopes largely on the courts. Advocates of reform focus on a series of recent decisions that evince an increasingly firm commitment to the norm of color-blind laws.¹ Defenders of the pervasive and well-entrenched system of racial and ethnic preferences have for their part noted how narrowly divided the Supreme Court is and have desperately sought to delay further developments in the hope that new appointments will shift the balance in their favor.²

As a matter of tactics, both sides are probably right to view the Supreme Court as the decisive center of power. Although public opinion polls have for many years shown overwhelming opposition to racial preferences, Congress has done virtually nothing to curtail them. The legislature itself has

created numerous preference programs, and there are no indications that this is likely to change soon.³

This has nothing to do with the merits of the issue but is entirely the result of interest group politics. In spite of the public sentiment opposing racial preferences, elected politicians have found that relatively few voters are so intensely repulsed that they will vote against candidates merely because they support these devices. Politicians also understand that a relatively small group of voters and activists, consisting largely of those who expect to benefit from preferences, will invest enormous resources in defense of the status quo. Just as with sugar quotas, racial quotas generate large economic bonuses for a narrow class of beneficiaries, who are therefore easily mobilized, while the corresponding economic losses are distributed, often invisibly, among a large and diffuse population. If sugar quotas cost each consumer a few cents a year, they can generate millions of dollars for a small group of sugar producers without generating meaningfully strong opposition from consumers; in those circumstances, elected politicians will naturally respond to the producers, who alone threaten to take political action in defense of their interests. The same calculations work against the reform of other special interest laws, including racial preferences.⁴

This public-choice analysis suggests two corollaries. First, that the courts (because of their relative insulation from interest group politics and their heightened commitment to reason and principle) are the right place to thresh out the issues of racial preferences and affirmative action. Second, that we have no alternative forum for the vindication of enduring principles because the Congress is a hopeless lackey of special interests. Although I accept the public-choice analysis, I do not believe the corollaries are necessarily valid. On the contrary, the history of antidiscrimination law shows that the Supreme Court has often been a more malignant and unprincipled practitioner of racial politics than Congress and that the Court's political activism in this area has had a corrupting influence on the Court's own capacity for adhering to reason and principle.

Though I believe that the moral and political arguments against racial

preferences are overwhelming on the merits, I do not claim that principled disagreements are impossible. In any event, whatever one's views on the merit of racial preferences, one might expect that the political decisions about that issue reflected in the Constitution and in the statutes adopted by Congress ought to be adhered to until they are changed by constitutional amendment or by new congressional legislation. The Supreme Court has not accepted that proposition, choosing instead to replace the law with its members' personal views of sound policy virtually at will. This usurpation of power has made a mockery of the vigorous and impassioned debates that led up to our major civil rights laws. And the Court's history hangs like a slyly grinning specter over the current disputes about affirmative action. Whatever Congress may choose to do, is it likely to mean more than it has meant in the past?

A Very Short Sketch of the History of Antidiscrimination Law

The law affecting racial discrimination is by now so extensive and complex that no brief summary can offer more than a few illustrations, inadequately explained. The two main sources of genuine law, the Constitution and statutes, form the smallest portion of this body of law: they are far outweighed in bulk and importance by thousands of judicial decisions that provide what are taken as their authoritative interpretation. The development of this law has occurred primarily in three great phases: first during the antebellum period, then during and after Reconstruction, and finally during the modern civil rights era that began after World War II. For all their differences, the three periods have been remarkably similar in certain respects. First, Congress has in almost all the most important cases acted to reduce racial discrimination. Second, the Supreme Court has frequently ignored the Constitution and the statutes enacted by Congress, often preferring instead to protect and promote discrimination while indulging itself in an airy presumption of superior wisdom.

THE *DRED SCOTT* PHASE

The original Constitution ceded to the new federal government several important powers, but not the power to establish or abolish slavery in the states. The Constitution acknowledged the existence of slavery in three somewhat awkward locutions. First, it established an apportionment rule that treated “free Persons” differently from “all other Persons.”⁵ Second, it specified a twenty-year moratorium on congressional interference with state choices about which persons to admit through “Migration or Importation.”⁶ Third, the Constitution required each state to deliver up escapees who had been “held to Service or Labour” in another state.⁷

The most famous case construing the original Constitution’s position on slavery is *Dred Scott*, which is familiar to everyone as a politically disastrous and morally offensive exercise of judicial power.⁸ That was indeed atrociously shameful, though not exactly for the reasons commonly assumed. If Chief Justice Roger B. Taney could come back to defend the decision, he would have to argue that he should not be blamed, for he was merely enforcing the Constitution. If that is what he was doing, we should indeed blame those who adopted the Constitution (rather than Taney and his colleagues) for the decision in *Dred Scott*.

But this defense of Taney fails. Recall the case. Scott’s master took him from the slave state of Missouri to the Upper Louisiana Territory (where slavery had been outlawed by the Missouri Compromise) and then back to Missouri. When Scott sued for his freedom, the Supreme Court turned him down, first because Congress had no power to forbid slavery in the territories, and second because a black person was in any case ineligible for American citizenship under the Constitution.

Taney’s first conclusion was based on a theory that the right of property in slaves was “distinctly and expressly affirmed in the Constitution” and therefore protected by the Fifth Amendment’s Due Process Clause.⁹ This theory has multiple fatal errors. Taney provided no support for his counterintuitive claim that due process protects substantive (as opposed to procedural) rights. Even if it did, no right in slaves was distinctly or ex-

pressly affirmed in the Constitution, and even the slave states did not pretend that slavery had any basis outside state law. Taney's second, and even more outrageous, conclusion was based on the theory that blacks had not been considered eligible for citizenship when the Constitution was adopted. But this was factually incorrect, and Taney knew it: Justice Benjamin R. Curtis presented the evidence in his dissenting opinion, just as he demolished Taney's due process theory.¹⁰ Taney was not interpreting the Constitution, or even misinterpreting it. He was simply lying.¹¹

RECONSTRUCTION AND RETROGRESSION

Dred Scott's jurisprudence of the barefaced lie did not prove unique. That technique was to resurface in future Supreme Court opinions, along with noxious blends of legalistic sophistry and unsupported ex cathedra pronouncements.

Once the Union was restored, Congress sent constitutional amendments to the states abolishing slavery, forbidding the states to violate certain fundamental rights of equality and nondiscrimination and outlawing racial discrimination in connection with the right to vote.¹² Congress also passed several statutes to help safeguard these new constitutional guarantees, which were enforced fairly vigorously for a time.¹³ In 1877, however, the Republicans agreed to stop protecting black rights in a corrupt political deal that settled a disputed presidential election.¹⁴ The Jim Crow era was born.

The most famous of the Jim Crow cases is *Plessy v. Ferguson*, in which the Supreme Court considered the constitutionality of a Louisiana statute that required railroads to furnish "equal but separate accommodations" for white and black passengers and forbade breaches of the required separation.¹⁵ Because the statute made it equally illegal for blacks to travel in "white" compartments and for whites to travel in "black" compartments, it was not entirely obvious whether the Constitution was violated by this formally equal treatment of the races.

The Court did not find the answer to this question because it never

asked it. Justice Henry Billings Brown's majority opinion simply declared that the Fourteenth Amendment permits every regulation that is "reasonable."¹⁶ Arguing that Louisiana's statute could not stamp blacks with a badge of inferiority unless they foolishly chose to read something into it, Brown found that the law was reasonable because "legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation."¹⁷ To emphasize the Court's total commitment to this utterly political judgment, Brown concluded that "if one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."¹⁸ Brown's dishonest assertion about the degrading implications of the statute is matched only by his breathtaking insinuation that the Constitution is powerless to forbid regulations that the Supreme Court considers reasonable. Nor can the Court be defended by drawing a distinction between "social" inferiority (allegedly immune from legal controls) and "legal" inferiority (presumably curable by law). The statute at issue in the case forbade the *voluntary* mixing of the races on trains and was thus a *legal* effort to *promote* "social" inferiority.

Justice John Marshall Harlan wrote an eloquent dissent, which has come to be very highly regarded.¹⁹ Unlike the majority, Harlan had no interest in lying about the statute's degrading intent, which he thought was likely to inflame racial animosity rather than keep the peace. But his legal analysis was little better than the majority's, for he declared that the Constitution forbids "discrimination by the General Government or the States against any citizen because of his race."²⁰ This is a lie of its own, in two ways. First, the Constitution contains no language forbidding racial discrimination by the federal government, except in the area of voting rights. Second, although the Fourteenth Amendment forbids the states from violating certain civil rights, the broad and somewhat mystifying description of those rights does not contain any explicit or self-evidently general ban on racial discrimination. Harlan may well have been right that the Louisiana statute violated the Constitution, but he did not give a single good reason for his conclusion.²¹ Like the *Plessy* majority, Harlan simply assumed that

the Constitution reflected what he considered good policy without attending in the least to what the Constitution says.²²

THE MODERN ERA BEGINS

Plessy established the terms for the modern era's constitutional debates over race discrimination, which has consisted of an elaborate series of decisions applying Justice Brown's "reasonableness" standard.²³ This process has been punctuated by occasional evocations of Justice Harlan's color-blind constitutional vision, but the Supreme Court left the Constitution itself aside so long ago that the document has become little more than a curio in this field.

The Court's most revered decision on racial discrimination illustrates the pattern. Without any analysis of the Constitution's text, *Brown v. Board of Education* dismissed the legislative history of the Fourteenth Amendment as "inconclusive" and unanimously declared separate educational facilities for black and white children "inherently unequal."²⁴ This conclusion was based entirely on a theory about childhood education: at least in the context of public schools, separating children from others of similar age and qualifications solely because of their race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."²⁵

Whatever its merits as pedagogical theory, this rationale proved to be merely a cover story. *Brown* was followed by a series of decisions declaring unconstitutional many disparate forms of segregation while refusing to strike down laws dealing with the sensitive subject of miscegenation, and all without any explanation whatsoever.²⁶ Because the rationale on which *Brown* was ostensibly based applied only to primary and secondary education, the real basis unifying that decision with its immediate progeny could hardly have been anything but political intuitions about what was "reasonable" at the moment.²⁷ As in *Dred Scott* and *Plessy*, the Constitution that was supposedly being interpreted was simply ignored. A few years

later, the Court took the logical next step by declaring its own opinion in *Brown* to be the “supreme law of the land.”²⁸

CONGRESS STEPS UP AND THE COURT HITS BACK

It would be easier to understand the reverence for *Brown* if the Court’s contemptuous disregard for judicial obligations and limits had accomplished some great and salutary political effect that could not otherwise have been achieved. In fact, however, the Court could have arrived at the same result that *Brown* reached had it been willing to engage in standard legal research and standard legal reasoning, rather than in pedagogical theorizing and nonjudicial politicking.²⁹ Furthermore, *Brown* did not even begin the process of school desegregation in the Deep South, which began to occur only after Congress armed the federal government with real enforcement powers ten years later.³⁰

The Civil Rights Act of 1964 and subsequent statutes deserve the principal credit for desegregating the schools and for the abolition of Jim Crow generally. In addition to provisions giving the federal government meaningful school-desegregation tools, the 1964 Act contained elaborate statutory provisions outlawing racial discrimination in public accommodations, by recipients of federal funding, and in private employment. The following year, Congress enacted strong provisions for enforcing the voting rights guaranteed by the Fifteenth Amendment, which had been notoriously flouted for many decades. In 1968, legislation aimed at reducing discrimination in the housing markets was enacted, and four years later Congress extended the ban on employment discrimination to the state and federal governments.

Although the principal provisions of these statutes were generally written with considerable clarity, the Supreme Court has frequently treated them with cavalier disregard, as it had previously treated the Constitution itself. Consider, for example, the statutory language banning employment discrimination:

It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.³¹

To eliminate any doubt about the meaning of this straightforward language, Congress added:

Nothing contained in this [statute] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.³²

The Supreme Court quickly began turning this statute from a straightforward prohibition against discrimination into a device for promoting discrimination. In its unanimous 1971 *Griggs* decision, the Court relied on a series of factual misstatements, logical non sequiturs, and sophomoric philosophizing to write into law a wholly new and different statute.³³ Under the *Griggs* law, an employer who does *not* intentionally discriminate because of race can nevertheless be held liable if the failure to discriminate produces a workforce with too few minorities, unless the employer's selection criteria meet an undefined, judicially created standard of "business necessity."³⁴ This new law encourages nondiscriminating employers with numerically unbalanced workforces to avoid potentially ruinous litigation by hiring more of the underrepresented minorities. Taking that step will often require

discriminating against whites (and/or other minorities), in violation of the law that Congress actually wrote.³⁵

That dilemma for employers was ameliorated by the Court's 1979 *Weber* decision, which held that Congress's prohibition against discrimination actually permits employers to adopt intentional and overt racial quotas if they are "designed to break down old patterns of racial segregation and hierarchy" and do not "unnecessarily trammel the interests of the white employees."³⁶ Acknowledging that this conclusion is inconsistent with the "literal" language of the statute, Justice Brennan's majority opinion claimed to rely on the law's "spirit."³⁷ As Justice Rehnquist's dissent conclusively proved, however, the debates in Congress about the statute's meaning did not contain a shred of evidence for the existence of any such spirit. Those debates, moreover, included overwhelming evidence that the spirit of the statute was perfectly embodied in its "literal" language.³⁸

Though the Supreme Court decisively rewrote the Civil Rights Act to permit and encourage racial discrimination, it has had more difficulty in deciding what standard of reasonableness it should implant in the Constitution. To this day, the Court has been unable to settle on the rules under which governments may and may not discriminate. The *Bakke* case, which involved a minority set-aside for seats in a state medical school, set the pattern. Four Justices concluded that the Civil Rights Act of 1964 forbade such discrimination, relying on the following provision: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."³⁹ Four other Justices broadly concluded that both the statute and the Constitution permit racial quotas to be used to overcome minority underrepresentation in the medical profession. Justice Powell concluded that the statute and the Constitution forbid blatant quotas but allow more subtle systems of discrimination.

Justice Powell's *Bakke* opinion (with which none of the other Justices agreed) came to be widely regarded as the law. Powell recommended the Harvard admissions approach: conceal your discrimination by treating race and ethnicity as one factor along with many others, thus making it difficult

to prove which whites are being rejected because they are white and which are being rejected for other reasons. Because it is obviously meaningless to treat anything as a “factor” unless it will sometimes be the deciding factor, the Harvard-Powell approach is really just the application of a public relations gimmick.⁴⁰ Because constitutional law itself had long since become a game of legerdemain where race is concerned, there is poetic justice in Powell’s solitary embrace of disguised discrimination being taken as if it were a holding of the Court.⁴¹

In the years since *Bakke*, the Court has sustained some constitutional challenges to racial preferences and rejected others, but without reaching agreement on the rationale for deciding such cases.⁴² The most recent decision is in some ways the most peculiar. This case, known as *Adarand*, was brought by a white-owned construction company that submitted the low bid on a federal highway contract but lost out because of a federal minority preference program.⁴³ The company claimed that the preference violated the constitutional guarantee of “equal protection of the laws.”

For someone familiar with the Constitution, the most obvious obstacle facing the white plaintiff might seem to be that the Equal Protection Clause applies only to the state governments, not to the federal government.⁴⁴ Many years ago, however, the Justices had decreed that the Constitution as written was in this respect “unthinkable” (by which they could only have meant “intolerable”) and therefore invented a fictitious new provision correcting the Constitution’s insufferable oversight.⁴⁵ Accordingly, the *Adarand* plurality opinion for four Justices set the Constitution aside and launched instead into an extended consideration of the Court’s own precedents.⁴⁶

From those hopelessly confusing and conflicting precedents, a new rule was distilled: federal racial classifications, like those of a state’s, would henceforth be subject to strict scrutiny, which was said to mean that they must be narrowly tailored measures serving “compelling governmental interests.”⁴⁷ This rule, however, is almost completely uninformative without a definition of “compelling” government interests. Not only did the Justices provide no such definition, they were incapable even of applying their rule to the very case before them. Rather than make a decision, they voted to

send it back to the lower courts, which were expected to investigate whether the flagrant, racial spoils systems at issue serve a compelling government interest.⁴⁸ Because it is quite obvious that the Court would have had no such uncertainty in a case where the government used similar means to favor whites (or, for that matter, such minorities as Jews or Irish Americans), *Adarand* leaves unresolved the issue first raised in *Bakke*.⁴⁹

In a particularly bizarre touch, Justice Scalia joined the plurality opinion (thereby making it a majority opinion) “except insofar as it may be inconsistent” with his own separate statement. That statement featured his declaration that “government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction.”⁵⁰

Justice Scalia was quite right that it is impossible to discern whether his declaration is consistent with the plurality opinion or not, which highlights the essential meaninglessness of the Court’s decision in the case. What is even more interesting, however, is the basis for Scalia’s own view. Citing four provisions of the Constitution that prohibit specific forms of discrimination *other than* racial discrimination by the federal government, Scalia seemed to make the illogical suggestion that they somehow provide grounds for finding in the Constitution a fifth prohibition that is not there. Undoubtedly aware that this would violate his whole approach to interpreting the law, and that he had previously commented on the “sound distinction” that the Constitution created between the state and federal governments on matters of race, this apostle of adherence to the Constitution’s original meaning rested in the end on manifestly Harlanesque policy grounds: “To pursue the concept of racial entitlement (even for the most admirable and benign of purposes) is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.”⁵¹

This is a very good policy, and one that Congress has already enacted in a variety of contexts.⁵² Unfortunately, the Supreme Court has stubbornly refused to accept that congressional decision in some of the most important

areas, including employment discrimination and discrimination by recipients of federal funding (which include virtually all private colleges and universities, as well as all public schools). The statutes enacted by Congress remain on the books, and the only obstacle to their enforcement is the Court's continuing refusal to overrule its own willfully erroneous precedents. Although the Court seems incapable either of attending to the language of the Constitution or of saying what the Reasonableness Clause it invented means these days, it should not be impossible to apply at least the clearest of the color-blind statutory commands. And if a majority of the Justices decide that those commands are politically desirable, they no doubt will apply them.

Conclusion

The Supreme Court sometimes follows the Constitution and statutes when adjudicating matters involving racial discrimination. But the frequency and insouciance with which it has refused to do so makes it very difficult to believe that it ever follows them *because* they are the law. Rather, the Court has arrogated to itself the privilege of enforcing whatever policy it believes is best.

Does this mean that we should admit the irrelevance of Congress, except to the extent that the Senate might be persuaded to reject judicial nominees who have policy views with which we disagree? Perhaps not. First, *Adarand* bespeaks at least a temporary inability or unwillingness of the Court to choose a policy for the nation. While this lasts, the Court may be likely to accept an unambiguous congressional reaffirmation of the principles embodied in the 1964 Civil Rights Act. And such a reaffirmation is not completely unthinkable. It is true that Congress is notoriously inclined to respond with inaction (or with hopelessly ambiguous legislation) when faced with a conflict between popular and enduring principles like governmental color blindness and the pressure of politically powerful special interests.⁵³ But enduring principles are sometimes vindicated, as so conspicuously happened when the 1964 Act was adopted.

In one respect, it should be easier to overcome the resistance to principle today than it was thirty-five years ago. For all their obstinate resistance to change, the forces seeking to preserve racial preferences are not nearly so powerful as those that were arrayed in defense of Jim Crow, and they do not have nearly as much at stake. And yet the stubborn fact remains that our current regime of racial preferences is not as brutally inconsistent with American principles as Jim Crow, let alone chattel slavery. Although the revival of color-blind laws would certainly advance the principles to which the Declaration of Independence first committed our nation, it would be an exaggeration to claim an advance comparable to that entailed in the destruction of Jim Crow. Thus, with less at stake now than in 1964, it should come as no surprise if Congress continues to temporize in the hope that someone else will somehow make the whole issue go away.

The most likely candidate for this role, of course, is the Supreme Court. But whatever Congress does or fails to do, and whatever further steps the Court itself decides to take, we may already have lost the possibility of resolving the issue through law. As Justice Curtis presciently noted in his *Dred Scott* dissent:

When a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who *for the time being* have power to declare what the Constitution is, according to their own views of what it ought to mean.⁵⁴

Notes

For helpful comments on a preliminary draft of this essay, the author is grateful to Roger Clegg, Neal Devins, Stephen G. Gilles, Mara S. Lund, and John O. McGinnis.

1. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (racial classifications by federal government are presumptively unconstitutional); *Miller v. Johnson*, 515 U.S. 900 (1995) (racial gerrymandering is presumptively unconstitutional); *City of Richmond v. Croson*, 488 U.S. 469 (1989) (municipal set-aside program for minority contractors violated Fourteenth Amendment); *Taxman v. Board of Education of Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1996) (employer with a racially balanced

workforce violated Civil Rights Act of 1964 when it granted a nonremedial racial preference in order to promote “racial diversity”), cert. granted, 117 S. Ct. 2506 (1997), cert. dismissed, 118 S. Ct. 595 (1997); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (preference program for minority applicants to state law school violated Fourteenth Amendment), cert. denied, 518 U.S. 1033 (1996); *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994) (state university scholarship program open only to black students violated Fourteenth Amendment), cert. denied, 514 U.S. 1128 (1995).

2. See, e.g., Steven A. Holmes, “A Dilemma Led to a Deal Over Hiring Tied to Race,” *New York Times*, November 23, 1997, sec. 1, p. 37.

3. See, e.g., Congressional Research Service, *Compilation and Overview of Federal Laws and Regulations Establishing Affirmative Action Goals or Other Preferences Based on Race, Gender, or Ethnicity*, Feb. 17, 1995 (identifying some 160 preferential laws and regulations) (reprinted in 141 *Congressional Record* S3930-3938 (daily ed., March 15, 1995)). This study included preferences based on sex and ethnicity as well as race. This essay will not deal with sex discrimination, and it will seldom distinguish between race and ethnicity. Though some exceptions exist (especially in the area of voting rights), the law generally treats race and ethnicity alike.

4. Whereas sugar quotas impose a very small cost on everyone, racial quotas will tend to impose on everyone a small risk of suffering a large loss (such as a job or promotion denied). This difference between the two phenomena does not significantly affect the analysis presented in the text.

5. U.S. Const., art. 1, sec. 2, cl. 3: “Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”

6. *Ibid.*, sec. 9, cl. 1: “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”

7. *Ibid.*, art. 4, sec. 2, cl. 2: “No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”

8. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

9. *Ibid.*, p. 451. The Fifth Amendment provides in relevant part that no person shall be “deprived of life, liberty, or property, without due process of law.”

10. See *Dred Scott*, pp. 572–75, 626–27 (Curtis, J., dissenting).

11. For a somewhat more detailed summary of the issues in *Dred Scott*, see Nelson Lund, “The Constitution, the Supreme Court, and Racial Politics,” *Georgia State University Law Review* 12 (1996): 1129, 1132–36.

12. Abolishing slavery: U.S. Const., amend. 13, providing in relevant part: “Neither slavery nor involuntary Servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”

Nondiscrimination: *ibid.*, amend. 14, providing in relevant part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Much of modern constitutional law purports to be based on the due process and equal protection provisions of the Fourteenth Amendment. Very little of this law, however, or of the constitutional scholarship that typically aims to influence the development of the law, is based on any coherent and defensible analysis of the constitutional text. For an important exception, see John Harrison, “Reconstructing the Privileges and Immunities Clause,” *Yale Law Journal* 101 (1992): 1385.

Right to vote: *ibid.*, amend. 15, providing in relevant part: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”

13. Significant elements of the statutory matrix enacted during Reconstruction for the enforcement of these protections were held unconstitutional, in whole or in part, by the Supreme Court. The Civil Rights Act of 1875, for example, was struck down in the *Civil Rights Cases*, 109 U.S. 3 (1883). Among the most important enactments that survived judicial review were the Civil Rights Act of 1866 (codified as amended at 18 U.S.C. sec. 242; 42 U.S.C. secs. 1981–83); the Enforcement Act of 1870 (codified as amended at 18 U.S.C. sec. 241); and the Ku Klux Klan Act of 1871 (codified as amended at 42 U.S.C. secs. 1983, 1985(c)). Eventually, the Supreme Court swung in the opposite direction and began broadening the reach of the surviving statutes in highly questionable ways. See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Runyon v. McCrary*, 427 U.S. 160 (1976); *Monell v. Dept. of Social Serv. of the City of New York*, 436 U.S. 658 (1978).

On early enforcement practices, see: Frank J. Scaturro, *President Grant Reconsidered* (Lanham, Md.: University Press of America, 1998), pp. 63–100; Robert J. Kaczorowski, “Federal Enforcement of Civil Rights During the First Reconstruction,” *Fordham Urban Law Journal* 23 (1995): 155.

14. C. Vann Woodward, *Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction*, 2d rev. ed. (Garden City, N.Y.: Doubleday, 1956); Michael W. McConnell, “The Forgotten Constitutional Moment,” *Constitutional Commentary* 11 (1994): 115, 123–40.

15. 163 U.S. 537 (1896).

16. *Ibid.*, p. 550.

17. *Ibid.*, p. 551.

18. *Ibid.*, p. 552.

19. See, e.g., Nathaniel R. Jones, “The Harlan Dissent: The Road Not Taken—An American Tragedy,” *Georgia State University Law Review* 12 (1996): 951.

20. 163 U.S. at 556 (quoting *Gibson v. Mississippi*, 162 U.S. 565 (1896)). To similar effect, see 163 U.S. at 554, 563.

21. A central purpose of the Fourteenth Amendment’s Privileges or Immunities Clause was apparently to outlaw state restrictions of basic civil rights—like the right to contract—on the basis of race. See Harrison, “Reconstructing the Privileges and Immunities Clause.” Like antimiscegenation laws, the statute at issue in *Plessy* imposed just such a restriction, and the fact that it imposed symmetrical racial restrictions on whites and blacks alike would seem merely to have rendered it unconstitutional in its application to both classes of citizens. See *ibid.*, pp. 1459–60, 1462.

22. For further analysis of *Plessy*, see Lund, “The Constitution, the Supreme Court, and Racial Politics,” pp. 1141–48.

23. See Andrew Kull, *The Color-Blind Constitution* (Cambridge, Mass.: Harvard University Press, 1992), p. 118: “Racial classifications, announced Justice Brown (in *Plessy*), are like every other sort of classification, and those racial classifications will be constitutional that a majority of the Supreme Court considers to be ‘reasonable.’ That rule of constitutional law, and no other, will explain every Supreme Court decision in the area of racial discrimination from 1896 to the present.”

24. 347 U.S. 483, 489, 495 (1954).

25. *Ibid.*, p. 494.

26. *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (per curiam) (desegregating public beaches and bathhouses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam) (desegregating public golf courses); *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (desegregating public buses); *New Orleans City Park Improvement Ass’n. v. Detiege*, 358 U.S. 54 (1958) (per curiam) (desegregating public parks); *Turner v. City of Memphis*, 369 U.S. 350 (1962) (per curiam) (desegregating municipal airport restaurant); *Naim v. Naim*, 350 U.S. 891 (1955) (per curiam), 350 U.S. 985 (1956) (per curiam) (refusing to accept mandatory appellate jurisdiction over state supreme court decision upholding antimiscegenation statute).

27. Eventually, the Court got the feeling that the time was right to invalidate antimiscegenation laws. See *Loving v. Virginia*, 388 U.S. 1 (1967).

28. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958): “The interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land.” The Constitution, by way of contrast, provides: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land.” U.S. Const., art. 6, cl. 2.

29. For a powerful and detailed presentation of legal arguments (too complicated to summarize here) that support the result in *Brown*, see Michael W. McConnell, “Originalism and the Desegregation Decisions,” *Virginia Law Review* (1995): 947. Had

the Court adopted an argument along the lines of Professor McConnell's, *Brown* would have been an ordinary and respectable (if not unchallengeable) act of constitutional interpretation. The Court might have had to wait until someone developed an argument like McConnell's, but it is hard to believe—in light of the extraordinary industry and resourcefulness that the modern civil rights bar has displayed—that it would have had to wait forty years. In any event, the Supreme Court was unwilling to wait for such an argument and perhaps had already created an intellectual climate that discouraged the kind of research and analysis set forth in McConnell's work.

30. There is a controversy about the exact nature of *Brown*'s ultimate and indirect effects. Compare, e.g., Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991), pp. 39–174 (emphasizing evidence suggesting that *Brown* contributed little to the modern civil rights revolution), with Neal Devins, "Judicial Matters," *California Law Review* 80 (1992): 1027, 1039–46 (accusing Rosenberg of exaggeration and arguing that *Brown* both helped energize the civil rights movement and produced important direct effects beginning in 1964). Although it is probably impossible to eliminate all doubt about the nature of *Brown*'s indirect effects, or to know for sure what would and would not have happened without that decision, it is agreed that no significant desegregation took place until after the Civil Rights Act of 1964. In addition to the sources cited above, see Gary Orfield, *The Reconstruction of Southern Education: The Schools and the 1964 Civil Rights Act* (New York: Wiley-Interscience, 1969), pp. 356–57; Neal Devins and James Stedman, "New Federalism in Education: The Meaning of the Chicago School Desegregation Cases," *Notre Dame Law Review* 59 (1984): 1243, 1245–51.

31. 42 U.S.C. sec. 2000e-2(a). The statute contains certain exceptions to this general rule against discrimination, the most important of which is an exemption for small, private employers. See *ibid.*, sec. 2000e(b). Only one of the other exceptions arguably authorizes racial discrimination, and that is limited to preferences for American Indians living on or near Indian reservations. See *ibid.*, sec. 2000e-2(i). One other exception appears to authorize certain forms of discrimination based on national origin (but not race); this rarely litigated exception has been construed narrowly. See *ibid.*, sec. 2000e-2(e); *Avigliano v. Summitomo Shoji America, Inc.*, 638 F.2d 552, 559 (2d Cir. 1981) ("bona fide occupational qualification" ('bfoq') exception of Title VII is to be construed narrowly in the normal context" (citing *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977)), vacated on other grounds, 457 U.S. 176 (1982).

As applied to the state and federal governments, the prohibition of employment discrimination is unquestionably constitutional. The Supreme Court's broad reading of Congress's power under the Commerce Clause has been assumed to eliminate any doubt about the constitutionality of prohibiting discrimination by private employers. See, e.g., *EEOC v. Ratliff*, 906 F.2d 1314, 1315–16 (9th Cir. 1990).

32. 42 U.S.C. sec. 2000e-2(j).

33. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

34. For a detailed discussion of the *Griggs* opinion, see Nelson Lund, "The Law of

Affirmative Action in and After the Civil Rights Act of 1991: Congress Invites Judicial Reform,” *George Mason Law Review* 6 (1997): 87, 91–101.

35. The *Griggs* opinion was in several respects highly confused and ambiguous, and it left considerable uncertainty about the *extent* to which employers with “too few” minorities were thereby exposed to legal liability. In a series of later decisions, culminating in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the Supreme Court eventually interpreted *Griggs* in a manner that seemed to insulate employers from liability in most cases involving normal business practices that are not intentionally discriminatory. In 1991, Congress codified a version of the *Griggs–Wards Cove* theory of liability, apparently preserving most of the employer protections established in *Wards Cove* but using language that was highly ambiguous in several important respects. See Nelson Lund, “Retroactivity, Institutional Incentives, and the Politics of Civil Rights,” *Public Interest Law Review* (1995): 87, 109–10; Lund, “The Law of Affirmative Action in and After the Civil Rights Act of 1991,” p. 116 and n. 149. The Supreme Court has not yet interpreted these provisions of the 1991 statute, but some lower courts have adopted highly questionable interpretations of the law, which seem likely to create new incentives for quotas. See, e.g., *Lanning v. SEPTA*, 181 F.3d 478 (3d Cir. 1999); *Bradley v. Pizzaco of Nebraska, Inc.*, 7 F.3d 795 (8th Cir. 1993).

36. *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979).

37. *Ibid.*, p. 201.

38. For a brief discussion of the legal arguments in *Weber*, see Lund, “The Law of Affirmative Action in and After the Civil Rights Act of 1991,” pp. 101–6.

39. 42 U.S.C. sec. 2000d. Justice Stevens’s opinion, which was joined by Chief Justice Burger and by Justices Stewart and Rehnquist, included a detailed demonstration of the congruence between this language, which Stevens correctly described as “crystal clear,” and the congressional intent reflected in the debates leading up to passage of the 1964 Act.

40. Justice Powell implicitly recognized the gimmickry when he explained that the advantage of the Harvard approach was that applicants are not “foreclosed from *all* consideration” because of their race or ethnicity (438 U.S. at 318, *emphasis added*). He nonetheless assured would-be discriminators that the gimmick would work because “a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system.”

41. Justice Stevens pointed out that the only issue before the Court was the validity of the set-aside program challenged in the *Bakke* litigation. See 438 U.S. at 408–11 (Stevens, J., dissenting). Five Justices having voted to hold that program invalid under the 1964 Act, the remarks of Justice Powell about the validity of materially different affirmative action programs should not properly be considered part of the Court’s holding. See, e.g., Alan J. Meese, “Reinventing *Bakke*,” 1 *Green Bag* 2d 381 (1998).

42. The Court has issued one majority opinion, in *Metro Broadcasting, Inc. v. FCC*,

497 U.S. 547 (1990), a decision that was later overruled by *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 225–27 (1995).

43. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

44. See U.S. Const., amend. 14.

45. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

46. One subsection of the opinion, which dealt with the doctrine of *stare decisis*, expressed the views of only two Justices. Four Justices concurred in the remainder of the opinion, which (as explained below) was also joined to some indeterminate extent by a fifth Justice.

47. 515 U.S. at 227.

48. *Adarand* expressly refused to overrule *Fullilove v. Klutznick*, 448 U.S. 448 (1980), which had upheld a minority preference program almost identical to the one at issue in *Adarand*. As the chief congressional sponsor of the *Fullilove* program had explained, its purpose was to make sure that “minority businesses get a fair share of the action.” 123 *Congressional Record* 5327 (1977) (remarks of Rep. Parren Mitchell).

49. Although the plurality opinion declared that the Constitution required the courts to treat all races “consistently” when applying equal protection analysis (515 U.S. at 224), it nevertheless concluded that the constitutionality of a law might well depend on which race it disfavored: “The principle of consistency simply means that whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection. It says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny. The principle of consistency explains the circumstances in which the injury requiring strict scrutiny occurs. The application of strict scrutiny, in turn, determines whether a compelling governmental interest justifies the infliction of that injury” (*ibid.*, pp. 229–30). Thus does the Supreme Court render consistency and inconsistency consistent. For a detailed discussion of *Adarand*’s place in the Court’s lengthy exercise in issue avoidance, see Neal Devins, “*Adarand Constructors, Inc. v. Peña* and the Continuing Irrelevance of Supreme Court Affirmative Action Decisions,” *William and Mary Law Review* 37 (1996): 673.

50. 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment).

51. *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment). This passage was clearly inspired by Harlan’s words: “In view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. . . . State enactments, regulating the enjoyment of civil rights, upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretense

of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned.” *Plessy v. Ferguson*, 163 U.S. at 559–61 (Harlan, J., dissenting). On the “sound distinction” between the state and federal governments, see *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 521–24 (1989) (Scalia, J., concurring in the judgment).

52. See the summary, earlier in this essay, of the main provisions of the Civil Rights Act of 1964. Congress’s departures from the policy of governmental color blindness have occurred mostly in the discrete and relatively limited context of set-aside programs like the one at issue in *Adarand*.

53. Examples of particularly excruciating ambiguity can be found in the Civil Rights Act of 1991 and the Voting Rights Act amendments of 1982. For a thorough discussion of the 1982 amendments, see Abigail N. Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights* (Cambridge, Mass.: Harvard University Press, 1987).

54. 60 U.S. (19 How.) at 620–21; emphasis added.