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ESSAY

OF CONSTITUTIONAL SEANCES AND COLOR-BLIND GHOSTS

GARRETT EPPS*

In his book, The Color-Blind Constitution, Professor Andrew Kull asserts that the Constitution mandates “color blindness” on the part of government actors—that is, they cannot consider race as a factor in any decision-making process. Those who argue that government-sponsored affirmative action programs are based on unconstitutional race-based distinctions support the “color-blind” theory. In fact, litigants in the United States Supreme Court case of Shaw v. Reno, which concerned the state of North Carolina’s efforts to use race as a factor in drawing legislative districts, relied on Professor Kull’s book to uphold their arguments.

In this essay, Professor Garrett Epps challenges the legal, historical, and sociological bases on which Professor Kull rests his theories. Although Professor Kull’s research is extensive, Professor Epps finds that he misinterpreted the arguments of many of the individuals whom he believed supported a color blind constitutional theory and that he ignored or too easily discounted evidence contrary to the color blind conclusion.

In the alternative, Professor Epps offers a theory that better reflects the Constitution’s anti-racist meaning: the Constitution forbids any government action that creates or supports a “caste relationship.” He concludes that “opposition to caste does offer a principled, workable alternative to color blindness on the one hand and unprincipled racial spoilsmanship on the other.”

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I. INTRODUCTION

A visitor from Mars to the United States Supreme Court might be forgiven for believing that *Shaw v. Reno*,¹ the Supreme Court's most recent voting-rights case, was a dispute over the meaning of a book published by Andrew Kull,² Professor of Law at Emory University. The appellants in *Shaw*, white voters who claimed that being placed in a district with a fifty-four percent African American voting-age population³ violated their constitutional rights, cited *The Color-Blind Constitution* as a source for their argument of the leading precedent on the issue, *United Jewish Organizations of Williamsburgh, Inc. v. Carey*.⁴ Not to be outdone, the state appellees, defending the right of state legislatures to draw districts designed to enhance minority representation, cited Professor Kull's book to support their argument that the Fourteenth Amendment was never intended to prevent race-conscious remedial measures by government and added, "Professor Kull's evident sympathy on principle for a per se ban on race-consciousness . . . renders his historical conclusions about [the Amendment] . . . particularly persuasive."⁵ In their reply brief, the white voters countered by citing Professor Kull's book as evidence that the NAACP Legal Defense Fund had supported a "per se" rule rejecting all governmental classifications based on race.⁶

Scholars have long debated whether the Constitution, properly interpreted, mandates "color blindness" on the part of government, meaning that government may not classify citizens by race nor, under almost any circumstances, award differential treatment or benefits on racial grounds.⁷ The appellants in *Shaw* plainly regarded the case as an opportunity to move the idea of color blindness to the front of the Court's agenda, at least in voting rights cases. They heralded an important part of their argument with the heading "Our 'Color-Blind' Constitution Prohibits Creation of Major-

1. 113 S. Ct. 2816 (1993).

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

3. See *Shaw*, 113 S. Ct. at 2841 n.7 (White, J., dissenting).

4. 430 U.S. 144 (1977); see Appellants' Brief on the Merits at *16, *Shaw* (No. 92-357) (LEXIS, Genfed library, Briefs file).

5. State Appellees' Brief at *18, *Shaw* (No. 92-357) (LEXIS, Genfed library, Briefs file) (citation omitted).

6. Appellants' Reply Brief at *4 n., *Shaw* (No. 92-537) (LEXIS, Genfed library, Briefs file). For a discussion of Professor Kull's evidence about the historical position of the NAACP, see *infra* notes 229-56 and accompanying text.

7. See, e.g., Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 *STAN. L. REV.* 1 *passim* (1991); Laurence H. Tribe, "In What Vision of the Constitution Must the Law be Color-blind?," 20 *J. MARSHALL L. REV.* 201 *passim* (1986); William Van Alstyne, *Rites of Passage: Race, The Supreme Court, and the Constitution*, 46 *U. CHI. L. REV.* 775 *passim* (1979); J. Skelly Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 *U. CHI. L. REV.* 213 *passim* (1980).

ity-Minority Districts for the Purpose of Filling Racial Quotas in Congress."⁸ As Justice O'Connor noted in her majority opinion:

[A]ppellants did not claim that the [North Carolina] General Assembly's reapportionment plan unconstitutionally "diluted" white voting strength. They did not even claim to be white. Rather, appellants' complaint alleged that the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a "color-blind" electoral process.⁹

Justice O'Connor's opinion did not endorse color blindness as a constitutional mandate.¹⁰ But, in a controversial 5-4 decision, the Court held that the appellants' contention that North Carolina's "reapportionment scheme [is] so irrational on its face that it can be understood only as an effort to segregate voters into separate [voting] districts on the basis of race" stated a claim under the Equal Protection Clause of the Fourteenth Amendment.¹¹ In addition, the Court noted that the appellants had properly raised below, and could litigate on remand, whether section 2 of the Voting Rights Act of 1965¹² is itself unconstitutional if it mandates oddly shaped, noncontiguous

8. Appellants' Brief on the Merits, *supra* note 4, at *13. Appellants chose to characterize the state's interest in facilitating African American representation in Congress as a "racial quota."

9. *Shaw*, 113 S. Ct. at 2824.

10. "This Court never has held that race-conscious state decisionmaking is impermissible in all circumstances." *Id.*

11. *Id.* at 2818. The majority's use of the word "segregate" to describe a redistricting plan creating a district in which whites and blacks are nearly equal in numbers can only be said to represent a failure of historical memory. Segregation in the South was total separation and disfranchisement, not rough equality and political competition. *See id.* at 2841 n.7 (White, J., dissenting).

12. Pub. L. No. 89-110, tit. I, § 2, 79 Stat. 437, *redesignated* Pub. L. No. 91-285, § 2, 84 Stat. 314 (1970), *amended by* Pub. L. No. 94-73, tit. II, § 206, 89 Stat. 402 (1975); *and* Pub. L. No. 97-205, § 3, 96 Stat. 134 (1982) (codified as amended at 42 U.S.C.A. § 1973 (West 1981 & Supp. 1993)). Section 2 of the Act provides:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

districts in order to enhance minority voting strength.¹³ The appellants will likely make their "color-blind" argument to the District Court. With other important Voting Rights Act cases on the Court's docket for the current term,¹⁴ color blindness may have its hour before the Court again soon.

Professor Kull's book is a powerful and thorough amicus brief for the color blindness side of this debate. I call it an amicus brief for two reasons: first, it presents an advocate's view of history, selective in its reading of the record and argumentative in its interpretation of events; second, the book, which is very much a legal rather than a historical document, focuses for much of its length on decisions of the Supreme Court, which it analyzes without reference to the larger historical forces shaping those decisions or their practical effect.¹⁵

In calling *The Color-Blind Constitution* an amicus brief, I do not wish to seem unfairly dismissive. Professor Kull's research is extensive and his arguments have force. I do mean, however, to question the book's interpretation, which I think reads more into the historical record than is warranted. Professor Kull asserts that there has been, for more than 150 years, a strong, principled tradition, propounded mostly by advocates of equality for blacks, supporting the idea that the Constitution must be color-blind. As he puts it:

13. *Shaw*, 113 S. Ct. at 2831.

14. The Court has granted review of three Southern voting rights cases for the current term that may change completely the prevailing interpretation of the Voting Rights Act. *Hall v. Holder*, 955 F.2d 1563 (11th Cir. 1992), *rev'g* *Hall v. Holder*, 757 F. Supp. 1560 (M.D. Ga. 1991), *cert. granted in part*, 113 S. Ct. 1382 (1993), presents the question whether black voters may challenge a county's system of governance by a single commissioner on the ground that such a system dilutes the black minority's voting strength in violation of § 2 of the Voting Rights Act. *DeGrandy v. Wetherell*, 794 F. Supp. 1076 (N.D. Fla. 1992), *prob. juris. noted*, 113 S. Ct. 1249 (1993), held that electoral districts should be drawn to reflect the number of voting-age residents, since many Hispanics are non-citizens or unregistered voters. A companion case, *DeGrandy v. Wetherell*, 815 F. Supp. 1550 (N.D. Fla. 1992), *prob. juris. noted*, 113 S. Ct. 1249 (1993), represents an appeal of a District Court's adoption of a redistricting plan accommodating the competing interests of black and Hispanic minorities despite a challenge that would have further increased Hispanic voting strength at the expense of black voters. *United States v. Florida*, *prob. juris. noted*, 113 S. Ct. 1249 (1993), is the federal government's appeal, on behalf of the Hispanic voters, of the decision of the lower court to refuse to create a new Hispanic-majority district. 815 F. Supp. at 1576. Considering the Court's radical and surprising holding in *Shaw*, it seems possible that next term's work may leave the field of voting rights litigation almost unrecognizable. See Linda Greenhouse, *Justices Plan to Delve Anew Into Race and Voting Rights*, N.Y. TIMES, July 11, 1993, at A1.

15. But see Paul Finkelman, *Book Review, The Color of Law*, 87 Nw. U. L. REV. 937, 939 (1993) ("*The Color-Blind Constitution* is not a brief in the battle over affirmative action and civil rights policy."). Despite this disagreement, Professor Finkelman's analysis of *The Color-Blind Constitution* as constitutional history is not very different from my own. In particular, he criticizes Professor Kull's analysis of the framing and the text of the Constitution as embodying "color blindness from the outset," *see id.* at 947, and Kull's analysis of the Comity Clause of the Articles of Confederation as embodying a color-blind notion, *see id.* at 960-63. For a discussion of the Comity Clause arguments, *see infra* notes 25-29 and accompanying text.

"The unavoidable fact is that over a period of some 125 years ending only in the late 1960s, the American civil rights movement first elaborated, then held as its unvarying political objective a rule of law requiring the color-blind treatment of individuals."¹⁶ If accepted, the thesis is a powerful one, particularly because Professor Kull is careful not to claim too much for it. He does not argue that the Constitution has always been color-blind, or that it must be read that way, or that those who read it differently are dishonest. He does contend, though, that the color-blind interpretation has been a part of constitutional debate almost from the beginning, travelling in an unbroken chain from the federal period through today. The implications of this argument are that if a future Supreme Court were to enunciate a rule striking down all race-conscious measures designed to assist minority groups, whether in government hiring and contracts, school integration, or voting rights, the Justices would not be enunciating a radical, new (and presumptively illegitimate) constitutional doctrine, but simply returning constitutional law to a reading more in tune with the better angels of its nature.¹⁷ Professor Kull writes that the color-blind ideal "may yet prove, because of the limitations of human justice, to be the most effective contribution that *law* (as distinct from political action) can make to the achievement of racial equality in this country."¹⁸

That some scholars may believe such a result undesirable—I confess at the outset that I do—does not mean that it may not be valid as constitutional history. Nevertheless, it is precisely history that leads me to question some of Professor Kull's conclusions. In brief, I believe that Professor Kull places too much reliance on his own divinations of what now-dead thinkers and jurists must have meant by ambiguous language or even by silence. Indeed, without undue lack of charity, *The Color-Blind Constitution* might be described as a kind of constitutional seance. There is nothing illicit in such an inquiry; all legal scholars sometimes seek converse with the spirits of dead Justices. But each reader must decide whether Professor Kull has truly heard the spirits speak or simply misinterpreted the sound of the wind. If the latter, then his constitutional arguments for color blindness will come to seem more like legislative arguments, properly addressed not to courts but to Congress.

16. KULL, *supra* note 2, at viii.

17. For an argument that tradition is a poor source of constitutional authority for a rule disfavoring preferential treatment for minorities, see JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 61-62 (1980). Regrettably, Professor Kull does not deal with Professor Ely's criticisms of the color-blind concept; this omission is an example of his failure, in my judgment, to confront and grapple with much adverse authority. See *infra* notes 259-67 and accompanying text.

18. KULL, *supra* note 2, at 222.

Section II of my Essay will offer a summary of the historical thesis of *The Color-Blind Constitution*. I will then set out my chief criticisms in separate sections. In Section III, I argue that Professor Kull misreads the arguments proffered by Charles Sumner for the plaintiff in *Roberts v. City of Boston*,¹⁹ the first major school desegregation case in American history and a precursor of *Plessy v. Ferguson*,²⁰ the Supreme Court decision that announced the Court's approval of racial segregation. I argue that Sumner's attack on school segregation, read in full, supports as fully a policy of race-conscious remediation as it does an absolute rule of color blindness. In Section IV, I suggest that Professor Kull misconstrues the meaning of color blindness as Justice Harlan used the term in his famous dissent in *Plessy*,²¹ both as set forth in Harlan's text and as construed with other evidence of Harlan's views. In Section V, I take issue with Professor Kull's analysis of the Supreme Court's cases concerning race-conscious government action between *Plessy* and *The School Segregation Cases*²² when evaluated against the full record of the Court during those years, including cases involving Asian Americans. Section VI challenges Professor Kull's implicit charge that the civil rights movement itself advocated and then betrayed the principle of color blindness during the 1960s. In Section VII, I offer my own interpretation of the evidence Professor Kull adduces—one that sees the vital anti-discrimination principle not as a requirement of governmental color blindness but as a prohibition on government racial schemes that partake of caste. In Section VIII, I consider the appeal of the color-blind notion, and argue that although seductive, color blindness—if put into operation by judges—might prove at best an illusion and at worst a trap.

II. PROFESSOR KULL'S THREE KEY ARGUMENTS

Professor Kull begins his story with the arguments developed by Frederick Douglass, the former slave turned abolitionist spokesman. Douglass argued that because the framers of the Constitution avoided using the words "slave" and "slavery," the Constitution could be construed as an anti-slavery document.²³ Professor Kull suggests that "[t]he careful neutrality of the language [in the Constitution] implied that race and sex were, in some measure at least, disfavored grounds of legal distinctions."²⁴ His major historical evidence for this "careful neutrality" is the legislative his-

19. 59 Mass. (5 Cush.) 198 (1849).

20. 163 U.S. 537 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954).

21. *Id.* at 559 (Harlan, J., dissenting).

22. 347 U.S. 483 (1954), 349 U.S. 294 (1955).

23. KULL, *supra* note 2, at 7-8.

24. *Id.* at 8.

tory of the Comity Clause.²⁵ The Framers, he notes, drew this language from a similar clause in the Articles of Confederation.²⁶ In 1778, the Continental Congress rejected an attempt to amend the Articles' language by inserting "white" into the clause.²⁷ Professor Kull suggests that the resulting color-blind language made the Comity Clause a danger to the slaveholding states, which feared that they might be compelled to grant comity to black citizens of Northern states.²⁸ Kull believes that this perceived danger led Chief Justice Taney to overreach so grossly in *Dred Scott v. Sandford* by holding that black Americans were not and never could be citizens of the United States.²⁹

This perceived color blindness, however, was merely passive in nature. Professor Kull traces the active argument for a rule of law forbidding racial distinctions to the famous case of *Roberts v. City of Boston*,³⁰ in which abolitionist Charles Sumner, representing a black plaintiff whom the city school committee required to attend a segregated school, challenged the validity of segregation under the Massachusetts Constitution's explicit guarantee of equality before the law.³¹ This case, Professor Kull correctly writes, "would prove to have defined, for a century and more thereafter, the constitutional arguments on either side of the question [of school segregation]." ³² He summarizes Sumner's argument for the plaintiff as "the novel assertion that racial distinctions formed a special and impermissible category of government discretion."³³ Chief Justice Lemuel Shaw rejected Sumner's argument and upheld the racial segregation as a reasonable exercise of the School Committee's discretion.³⁴

25. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1. See KULL, *supra* note 2, at 9-10 (recounting debates in Congress over wording of Articles of Confederation).

26. "The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states . . ." U.S. ARTICLES OF CONFEDERATION, art. IV, cl. 1, 1 Stat. 4 (1778); see KULL, *supra* note 2, at 9.

27. KULL, *supra* note 2, at 9 (citing 11 JOURNALS OF THE CONTINENTAL CONGRESS 652-56 (Worthington Chauncey Ford ed., 1908) (proceedings of June 25, 1778); 1 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 126-27 (Merrill Jensen ed., 1976)).

28. *Id.* at 10.

29. KULL, *supra* note 2, at 15-20 (discussing *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857)). For a critique of this analysis, see Finkelman, *supra* note 15, at 960-63.

30. 59 Mass. (5 Cush.) 198 (1849).

31. KULL, *supra* note 2, at 40-52. The Massachusetts Declaration of Rights stated that "[a]ll men are born free and equal." Mass. Declaration of Rights, MASS. CONST. art. I, § 2 (amended in 1976 to remove gender-specific language).

32. KULL, *supra* note 2, at 40.

33. *Id.* at 48.

34. *Roberts*, 59 Mass. (5 Cush.) at 209-10.

After discussing Sumner, Professor Kull traces the color-blind idea to a proposed constitutional amendment that abolitionist Wendell Phillips wrote in the months before the Thirty-Ninth Congress framed the present Fourteenth Amendment. Phillips' draft, in one of its variants, would have provided that "no State shall make any distinction among its citizens on account of race and color."³⁵ Professor Kull writes that Phillips "presumably" dropped the proposed amendment as part of a tactical decision not to undercut proponents of the Civil Rights Act of 1866.³⁶ President Johnson had vetoed the Act, arguing that its ban on discrimination in public accommodations was unconstitutional;³⁷ proponents, who passed the Act over Johnson's veto, argued that the Constitution, newly amended to outlaw slavery,³⁸ already granted Congress the power to outlaw state-sponsored racial discrimination.³⁹ Phillips's campaign, short-lived though it was, represented "the high point of the campaign to fix a rule of nondiscrimination in the constitutional text."⁴⁰

Although color-blind language flickers in the legislative history of the Fourteenth Amendment, the Congressional framers explicitly rejected such language because it would require Northern states to abolish their own racially discriminatory laws and "might even have forbidden laws restricting interracial marriage."⁴¹ Nonetheless, one of the language's proponents, Radical Republican Representative Thaddeus Stevens, conducted an impassioned, and ultimately successful, campaign to force the Joint Committee on Reconstruction to drop language in the draft Amendment that would have explicitly recognized the practice of restricting the franchise by race.⁴² Professor Kull argues that this victorious struggle, like the rejection of racial language in the Comity Clause, preserves a color-blind rule as one "available meaning" of the Fourteenth Amendment: "If a rule of color blindness is one of those we may legitimately choose to see today in the language of the Fourteenth Amendment, that possibility exists in no small measure as a result of Charles Sumner's intransigence."⁴³

Color blindness ebbed during the years after Reconstruction, as the Supreme Court chipped away at the Civil War Amendments by restricting their scope. Professor Kull does note the expansive dicta addressing racial

35. KULL, *supra* note 2, at 58 (quoting *Nat'l Anti-Slavery Standard*, Jan. 9, 1864, at 1, col. 6).

36. KULL, *supra* note 2, at 63.

37. *Id.* (citing CONG. GLOBE, 39th Cong., 1st Sess. 1679-81 (1866)).

38. U.S. CONST. amend XIII.

39. KULL, *supra* note 2, at 63-64.

40. *Id.* at 63.

41. *Id.* at 68.

42. KULL, *supra* note 2, at 74-75 (citing CONG. GLOBE, 39th Cong., 1st Sess. 2459, 1289 (1866)).

43. *Id.* at 75.

equality in *Strauder v. West Virginia*⁴⁴ and *The Slaughter-House Cases*.⁴⁵ He also detects the color-blind argument in state-court cases considering the validity of school segregation, but scrupulously notes that most of these cases decided that the practice was constitutional.⁴⁶

Kull also comments that, when legal segregation came before the United States Supreme Court in *Plessy*, the Court's majority approved the laws segregating streetcars as a "reasonable" exercise of the police power.⁴⁷ Justice Harlan, however, revived and named the color-blind idea in his justly famous dissent, which Professor Kull quotes as follows:

But in the 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 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. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely on the basis of race.⁴⁸

44. 100 U.S. 303 (1879), *overruled by Taylor v. Louisiana*, 419 U.S. 522 (1975). The Court voided a murder conviction of a black defendant in a state court because a statute restricted jury service to whites; the statute was void because the purpose of the Civil War amendments was to "secur[e] to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy." KULL, *supra* note 2, at 93-94 (discussing *Strauder*, 100 U.S. at 306-08).

45. 83 U.S. (16 Wall.) 361 (1873). The Court declined to extend the benefits of the Equal Protection Clause of the Fourteenth Amendment to a group of white butchers challenging monopoly legislation because "the one pervading purpose" of the Civil War Amendments was "[t]he freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." KULL, *supra* note 2, at 90.

46. In one case, *Board of Educ. v. Tinnon*, 26 Kan. 1 (1881), the Kansas lower court had used color-blind language to strike down a school segregation ordinance, but the state supreme court affirmed the judgment on narrower statutory grounds. *Id.* at 20-23. Though nominally a rare defeat for segregation, Professor Kull notes, the case did not end segregation in the Ottawa, Kansas, schools; instead, in an eerie foretaste of the post-*Brown* strategy of some Southern school boards, the local schools were simply reorganized on a "freedom of choice" basis and continued precisely as before. KULL, *supra* note 2, at 105-06.

47. *Plessy v. Ferguson*, 163 U.S. 537, 550-51 (1896), *overruled by Brown v. Board of Educ.*, 347 U.S. 483 (1954).

48. KULL, *supra* note 2, at 123 (quoting *Plessy*, 163 U.S. at 559). The majestic paragraph in which these words appear begins as follows:

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

Professor Kull characterizes Justice Harlan's dissent as an argument that courts and legislatures are entirely disabled from using racial classifications, simply because neither judges nor legislators can be trusted with discretion in this area.⁴⁹ "With Justice Harlan's dissenting opinion," Professor Kull argues, "the color-blind Constitution became one of the available meanings of the Fourteenth Amendment."⁵⁰ More than that, even, Professor Kull maintains that the color-blind theory became, and remained, the *only* alternative to the "broad holding" of *Plessy*—that any racial classification will be upheld if it strikes the Justices as "reasonable":

The only logically distinct alternative [to the majority opinion] was that proposed in Justice Harlan's dissenting opinion: that legal distinctions on the basis of race be altogether prohibited. The broad holding of *Plessy* is its rejection of Harlan's alternative in favor of Shaw's [in *Roberts*]. Racial classifications, announced Justice Brown, 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. The true holding of *Plessy* is not "separate but equal" but the Supreme Court's refusal to deny to the state the option of treating citizens differently according to race. The whole development of the question since 1896 has been merely the ebb and flow of what constitutes reasonable discrimination.⁵¹

This contention—that between color blindness and unprincipled, ad hoc racial refereeing there is no principled middle ground for courts or legislatures—encompasses one significant part of Kull's argument. The second important element develops in his discussion of the black-white segregation cases the Court decided between *Plessy* and *Brown*. Professor Kull suggests that *Plessy* represented "an end rather than a beginning"⁵²—that after *Plessy* the Court retreated from its endorsement of segregation, but that political prudence prevented the Justices from enunciating that shift. Professor Kull suggests instead that the Court repeatedly invoked the doctrine of "separate but equal" only to *invalidate* segregation measures, but never to approve them. In fact, Kull argues that the color-blind Consti-

Plessy, 163 U.S. at 559. Read as a whole, therefore, the paragraph has a considerably different tone than does the careful redaction presented in Professor Kull's text. See Tribe, *supra* note 7, at 203. Professor Kull cites this inconvenient language only in a footnote. KULL, *supra* note 2, at 121 n.34. For a fuller discussion of Justice Harlan's ambiguous role as color-blind thinker, see *infra* notes 135-71 and accompanying text.

49. KULL, *supra* note 2, at 118, 123.

50. *Id.* at 118.

51. *Id.* (emphasis added).

52. *Id.* at 131.

tion was in place by 1914 with the Court's opinion in *McCabe v. Atchison, Topeka & Santa Fe Railway Co.*⁵³:

The Supreme Court's twentieth-century decisions on legally imposed racial segregation cannot be adequately explained without attributing to the Court the conviction that racial distinctions imposed by law, with or without ostensible 'equality,' were the particular though unacknowledged object of the Fourteenth Amendment's prohibitory language.⁵⁴

Having found color blindness in cases such as *McCabe*, *Korematsu v. United States*,⁵⁵ and *Sipuel v. Board of Regents*,⁵⁶ however, Professor Kull appears sorely disappointed by its absence in *Brown*, an opinion the wording of which he dismisses as "historically and legally jejune."⁵⁷ The Court, he states, surely operated under an assumption that color blindness was the new rule. The Court feared to announce the rule openly, he argues, because of its uncertainty over the political response to desegregation; an overt rule of color blindness would have made clear to everyone that the miscegenation laws were doomed.⁵⁸ However, by 1958, with Judge John Minor Wisdom's opinion in *Dorsey v. State Athletic Commission*,⁵⁹ the lower courts were openly interpreting *Brown* to mandate color blindness, and the Constitution began a brief period of explicit color blindness.⁶⁰ This period, during which "the formal contention of [the civil rights movement's] preeminent legal strategists was that state action to classify citizens by race, let alone treat them differently, was presumptively unconstitutional,"⁶¹ was short-lived. Judge Wisdom himself ended the era in *United States v. Jefferson County Board of Education*,⁶² which Professor Kull excoriates as an "overt attempt to rewrite legal history" by interpreting *Brown* as requiring "racial integration rather than nondiscriminatory assignment."⁶³

53. 235 U.S. 151 (1914). Professor Kull summarizes *McCabe* as "overturning an Oklahoma statute requiring segregated facilities for railroad travel." KULL, *supra* note 2, at 133. In fact, in *McCabe*, as in many of the other cases Professor Kull cites as evidence for his theory, the Court refused to strike down the segregation statute. *McCabe*, 235 U.S. at 164. For a discussion of *McCabe*, see *infra* notes 178-87 and accompanying text.

54. KULL, *supra* note 2, at 133.

55. 323 U.S. 214 (1944). For a discussion of the Japanese Relocation Cases as they bear on Professor Kull's thesis, see *infra* notes 200-21 and accompanying text.

56. 332 U.S. 631 (1948).

57. KULL, *supra* note 2, at 152.

58. *Id.* at 159. Professor Kull again insists that color blindness offered the only alternative rationale to *Plessy*, and that *only* a rule of color blindness would permit the Court to void the miscegenation laws. *Id.* at 160.

59. 168 F. Supp. 149 (E.D. La. 1958), *aff'd*, 359 U.S. 533 (1959).

60. KULL, *supra* note 2, at 163.

61. *Id.* at 166.

62. 372 F.2d 836 (5th Cir. 1966).

63. KULL, *supra* note 2, at 181.

By this time, Professor Kull argues, the advent of the formal civil rights machinery of the federal government and the realization that racial separation in schools would be less easily alleviated than some had hoped combined in 1954 to convince federal officials and civil rights advocates that they must move beyond arguing for mere nondiscrimination.⁶⁴ The Civil Rights Act of 1964 and the Voting Rights Act of 1965, he says, marked "the formal achievement of [the movement's] historical objectives."⁶⁵ Almost immediately, the movement abandoned its historic commitment to nondiscrimination and began demanding special measures to ensure statistical racial balance in education and equality of result for minorities in jobs and voting.⁶⁶ Professor Kull cites the famous Moynihan Report on the crisis in the Negro family as an example of the gathering liberal consensus that black Americans would not reach economic equality without massive government intervention to root out the causes of poverty.⁶⁷ The political consensus for such a program was gone, however, and the courts and federal bureaucracy were left to try to mandate equality without political support.⁶⁸ Lacking the consensus for anti-poverty programs, courts "could only try to contribute racially integrated schools—the educational advantages of which were already seen, by 1968, as marginal at best."⁶⁹ This top-down civil rights movement, Professor Kull argues, took three forms: first, "racial balancing of public schools;" second, "the economic preferences known as affirmative action;" and third, "the utilization of 'voting rights' to encourage proportional representation by race."⁷⁰

The rest of the story, to Professor Kull, reveals a scenario of the Court's betrayal: its disingenuous decisions in *Swann*⁷¹ and *Keyes*,⁷² which he argues retroactively and sub silentio changed the goal of *Brown* from nondiscrimination to a statistically balanced "unitary" school system;⁷³ the "crude . . . pork-barrel politics"⁷⁴ of *Fullilove v. Klutznick*,⁷⁵ and the judicial alchemy of *Allen v. State Board of Elections*,⁷⁶ which read into the

64. *Id.* at 182.

65. *Id.*

66. *Id.* at 183.

67. *Id.* at 186-87, citing U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965), reprinted in LEE RAINWATER & WILLIAM L. YANCEY, THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY 93 (1967).

68. *Id.* at 189.

69. *Id.*

70. *Id.* at 190.

71. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

72. *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973).

73. KULL, *supra* note 2, at 197.

74. *Id.* at 209.

75. 448 U.S. 448 (1980).

76. 393 U.S. 544 (1969).

Voting Rights Act a judicially created right "to elect a black candidate by a black majority."⁷⁷

Professor Kull's arguments, which hitherto have been offered with circumspection and care, have by the book's conclusion taken on a more urgent, not to say hyperbolic, tone:

Racial and ethnic classifications, with the underlying premise of entitlements for groups, are seen as presumptively relevant to an unprecedented range of social transactions. These include not only every distribution of benefits and burdens, public or private, but areas of intellectual activity to which the belief in a transcendent individualism once seemed central.⁷⁸

The only salvation for our newly fractured polity is the United States Supreme Court. In his preface, Professor Kull modestly states that "it is difficult to imagine how one could hope, by an analysis of what was thought and argued in the past, to conclude the profoundly political question of what we should do *now*; and I shall not attempt to do so."⁷⁹ However, by the book's peroration, few readers will doubt that Professor Kull hopes the Court will rescue us from the dismal drift toward racial balkanization he sees in current constitutional doctrine:

Part of the future argument for the color-blind Constitution will thus be that the Supreme Court, alone among American institutions, retains the power to deflect what will otherwise become an irreversible tendency toward the convenient and destructive practice of allocating social resources by racial and ethnic groups. Whether the Court in fact has that power will not be seen unless and until it makes the attempt. The likelihood that a future Supreme Court will attempt to reinstate a constitutional rule of color blindness depends, obviously enough, on the view of polit-

77. KULL, *supra* note 2, at 215.

78. *Id.* at 220-21. Race in the 1990s may subject citizens to occasional classification and differential treatment for purposes of affirmative action, school desegregation, and voting rights measures. One may object to some of these measures, or even object strenuously to the whole idea, and these objections are far from inconsiderable or unworthy; but one surely cannot argue that they make race relevant to an "unprecedented range of social transactions." *Id.* at 221. Until 1865 or so, race in this country determined whether a resident could be bought and sold as chattel; until the 1950s, it determined whether many citizens could vote, serve on juries, hold many jobs, and marry certain other citizens, or even (under some circumstances) whether long-time United States residents could become citizens at all; it determined where individuals could live, attend school, eat, stay in public lodgings, or attend public amusements. Compared to the oppressive daily character of segregation, the "unprecedented range of social transactions" Professor Kull sees as currently corrupted by race seems, while not insignificant, quite minor. In addition, it is well to be somewhat skeptical about the "transcendent individualism" that American intellectual life supposedly embodied during an era when many institutions of learning excluded students and faculty of color altogether, and many others tolerated them in numbers that might only with generosity of spirit be described as tokenism.

79. *Id.* at vii.

ical and social developments taken by the members of the Court over the next generation. As a minimum precondition to any announcement that the Constitution is color-blind, a majority of the Supreme Court would have to be persuaded that the racial preferences associated with school desegregation, affirmative action, and voting rights are not indispensable to the nation's discharge of its obligation to black citizens; and that such policies carry social costs that outweigh their benefit.⁸⁰

The book's overtly polemical tone at the end should not blind a reader to the extensive research and thought that have gone into constructing its historical base. Professor Kull's argument depends on three allied propositions for much of its force: first, that color blindness is the only logical and historically based alternative to ad hoc judicial legislation; second, that throughout American history serious thinkers about race have recognized these two alternatives as the only ones available; and third, that for a significant period the Supreme Court actually enforced such a rule, though without saying so. Professor Kull's plea for Court intervention to foreclose racial preferences thus appears to be an argument for reinstating a venerable tradition that, from the moment of framing onward, has been latent in the Constitution as the only alternative to racism. If any of the three contentions fails, however, Professor Kull's peroration might be seen as a naked call for judicial legislation, as a political advocate encouraging the Court to enact by fiat its own policy preferences. A close look at some of Professor Kull's most important evidence may suggest how strongly we should credit these three crucial claims.

III. THE SPIRIT OF SUMNER

Slavery—an organized, state-supported system of racial domination and exploitation—permeates the Constitution. It is reflected in the “three-fifths” compromise for representation in the House of Representatives,⁸¹ in the restrictions on Congress' power to limit the slave trade before 1808⁸² and in the Fugitive Slave Clause.⁸³ Perhaps more importantly, slav-

80. *Id.* at 221.

81. “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.” U.S. CONST. art. I, § 2, cl. 3, *superseded by* U.S. CONST. amend. XIV, § 2.

82. “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 . . .” U.S. CONST. art. I, § 9, cl. 1. The Constitution also forbade changing this rule by amendment, even if *all* states agreed to it: “[N]o Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first . . . Clause[] in the Ninth Section of the first Article . . .” U.S. CONST. art. V.

ery is reflected in the intricate compromises over Congress' power to tax exports and to apportion direct taxes⁸⁴ and in the Domestic Violence Clause, which guaranteed federal help to slaveholding states facing the nightmare of rebellion.⁸⁵ The text furnishes Professor Kull only two pieces of evidence for color blindness: first, the Continental Congress's rejection of explicit racial language in the Comity Clause of the Articles of Confederation;⁸⁶ and, second, "[t]he careful neutrality of the language" used to describe slavery, which he suggests "implied that race and sex were, in some measure at least, disfavored grounds of legal distinctions."⁸⁷ There are other, and perhaps more plausible, inferences to be drawn from the prim reticence of the Constitution's references to slavery. William Lee Miller suggests that

these verbose provisions reveal a bad conscience. As with Thomas Jefferson writing his long and wordy charge against the king about the "cruel war against human nature" in the draft of the Declaration [of Independence], so, in a quite different way, it may be here [in the Constitution]. A moral embarrassment, an inability from moral embarrassment to be quite straightforward, and perhaps also a moral confusion, produce a circling smoke of many words.⁸⁸

One of the central problems anyone seeking a color-blind principle in American constitutional tradition confronts is thus to distinguish the "circling smoke of many words" that betokens racial evasion from the pure fire of anti-racist passion. Reticence does not always betoken nonrecognition. Professor Kull is not always as cautious as he might in distinguishing the two, which leads him to exaggerate the evidence for his thesis. I certainly think this exaggeration creeps in when he speaks of "the Constitution's pristine colorblindness."⁸⁹ Reticent it was; color-blind, even in its text, it was

83. "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." U.S. CONST. art. IV, § 2, cl. 3, *superseded by* U.S. CONST. amend. XIII.

84. "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." U.S. CONST. art. I, § 9, cl. 4, *superseded by* U.S. CONST. amend. XVI. "No Tax or Duty shall be laid on Articles exported from any State." U.S. CONST. art. I, § 9, cl. 5.

85. "The United States shall . . . protect each [State] . . . on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. CONST. art. IV, § 4.

86. U.S. CONST. art. IV, § 2, cl. 1; *see supra* notes 25-29 and accompanying text.

87. KULL, *supra* note 2, at 8.

88. WILLIAM L. MILLER, *THE BUSINESS OF MAY NEXT: JAMES MADISON AND THE FOUNDING* 120 (1992).

89. KULL, *supra* note 2, at 21.

not; and few of even its warmest admirers would suggest that it was pristine.

Professor Kull also displays a tendency to give countervailing evidence shorter shrift than a balanced account properly should. This failing surfaces in his discussion of abolitionist thought. Certainly Frederick Douglass, the former slave turned abolitionist, would not have called the Constitution "pristine." As Professor Kull correctly notes, Douglass came to admire the Constitution for its liberal values and to consider it an anti-slavery document.⁹⁰ Professor Kull quotes a speech by Douglass in 1852 in which he said that

interpreted as it *ought* to be interpreted, the Constitution is a GLORIOUS LIBERTY DOCUMENT. Read its preamble, consider its purposes. Is slavery among them? Is it at the gateway? or is it in the temple? It is neither. . . . [I]f the Constitution were intended to be, by its framers and adopters, a slave-holding instrument, why [is it that] neither *slavery*, *slaveholding*, nor *slave* can be anywhere found in it?⁹¹

Professor Kull concedes that this view is "generous toward the framers,"⁹² and indeed it is—rather more generous than Douglass himself, on fuller consideration of his thought, was inclined to be. Douglass' nuanced position claimed that evidence of support for slavery by the Framers (as set out in Madison's *Notes*, for example) was simply irrelevant: Because "the Constitution is the record of its own intention," it was impossible to "know now, or a century hence, what were the motives and intentions of the various parties to the Constitution."⁹³ While Douglass's arguments are significant, a full history of the color-blind idea should have made clear that the older, and arguably more orthodox, strain of abolitionism was represented by individuals such as William Lloyd Garrison and Wendell Phillips. Garrison rejected the Constitution as "a covenant with Death and an agreement with Hell,"⁹⁴ and Phillips wrote that "willingly, with deliberate purpose, our fathers bartered honesty for gain and became partners with tyrants that they might share in the profits of their tyranny."⁹⁵

Similar failures of emphasis flaw Professor Kull's well-researched and intriguing discussion of Charles Sumner's arguments in *Roberts v. City of*

90. WALDO E. MARTIN, JR., *THE MIND OF FREDERICK DOUGLASS* 36-38 (1984).

91. KULL, *supra* note 2, at 227 n.4.

92. *Id.* at 8.

93. Frederick Douglass, *Is the United States Constitution For or Against Slavery, July 24, 1851*, reprinted in 5 *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS* 191, 198 (Philip S. Foner ed., 1975).

94. LINDSAY SWIFT, *WILLIAM LLOYD GARRISON* 307 (1911).

95. WENDELL PHILLIPS, *THE CONSTITUTION: A PRO-SLAVERY COMPACT: SELECTIONS FROM THE MADISON PAPERS, &C.* 6 (photo. reprint 1969) (1844).

Boston,⁹⁶ the first major case in American history to involve a challenge to segregation of African Americans in public schools. In *Roberts*, a black plaintiff challenged the authority of the Boston School Committee to require her to attend a special "African School" rather than the public elementary school nearest her home.⁹⁷ Charles Sumner, who argued the plaintiff's case, would two decades later help lead the Radical Republican forces in the Reconstruction Congress.⁹⁸ In his majority opinion in *Plessy*, Justice Brown cited *Roberts* for the proposition that school segregation was recognized as valid "even by courts of States where the political rights of the colored race have been longest and most earnestly enforced."⁹⁹ Professor Kull writes correctly that both Sumner's argument for the plaintiff and Chief Justice Lemuel Shaw's opinion upholding the segregated school system "would prove to have defined, for a century and more thereafter, the constitutional arguments on either side of the question."¹⁰⁰ In Sumner's argument he finds the true birthplace of the color-blind argument; and it becomes important, therefore, to understand just what the argument was.

Professor Kull describes Sumner as an advocate who argued that "the real problem of segregation is not about unequal facilities but about the drawing of class distinctions on racial lines."¹⁰¹ He adds that "Sumner had made the novel assertion that racial distinctions formed a special and impermissible category of government discretion,"¹⁰² and further notes that "Sumner's central contention was that the principle of equality before the law put racial discrimination beyond the reach of government power."¹⁰³ However, the text of Sumner's argument¹⁰⁴ is slightly more complex in its implications. Sumner discussed the right of racial equality at length and suggested that the Massachusetts legislature should not have the power to separate children by race.¹⁰⁵ Because of the posture of the case, though,

96. 59 Mass. (5 Cush.) 198 (1849).

97. KULL, *supra* note 2, at 40. A useful, compact account of the case is found in Leonard W. Levy (with Douglas Jones), *Jim Crow Education: Origins of the 'Separate but Equal' Doctrine*, in LEONARD W. LEVY, *JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* 316 (1972).

98. MOORFIELD STOREY, *CHARLES SUMNER* 332-35 (American Statesmen ed., 1972).

99. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

100. KULL, *supra* note 2, at 40. Though *Roberts* predated the adoption of the Fourteenth Amendment, the plaintiff rested her challenge on a comparable provision of the Massachusetts Declaration of Rights that "[a]ll men are born free and equal." *Id.* at 41.

101. *Id.* at 45.

102. *Id.* at 48.

103. *Id.* at 49.

104. Charles Sumner, *Argument of Charles Sumner, Esq. Against the Constitutionality of Separate Colored Schools, in the Case of Sarah C. Roberts v. the City of Boston, December 4, 1849*, reprinted in *ABOLITIONISTS IN NORTHERN COURTS: THE PAMPHLET LITERATURE* 493 (Paul Finkelman ed.) (Slavery, Race, and the American Legal System 1700-1872, Series III, 1988).

105. *Id.* at 512.

Sumner stated carefully that he was not asking the court to rule on the power of the Legislature, but solely on the discretion of the school board: "[T]he Court might justly feel great delicacy, if they were called upon to revise a law of the legislature. *But it is simply the action of a local committee that they are to overrule.*"¹⁰⁶ Sumner reasoned that the court need not reach the issue because the Legislature had not written statutory language requiring or permitting segregation by race.¹⁰⁷

The distinction between the constitutional power of a legislative body and the statutory discretion of an administrative agency, as students of contemporary administrative law know, is a crucial one.¹⁰⁸ The precise issue before the Court was not a state law but a local school committee regulation committing black children to special schools. Sumner argued that the spirit of the Massachusetts Constitution barred the state government from making racial discriminations:

"All men are *born* free and equal," says the Massachusetts Bill of Rights. . . . This is the Great Charter of every person who draws his vital breath upon this soil, whatever may be his condition, and whoever may be his parents. He may be poor, weak, humble, black—he may be of Caucasian, of Jewish, of Indian, or of Ethiopian race—he may be of French, of German, of English, of Irish extraction—but before the Constitution of Massachusetts all these distinctions disappear.¹⁰⁹

But Sumner clearly stated that, although he believed the Legislature could not set up a segregated school system, he was not asking Shaw to address the Legislature's power directly. In hornbook fashion, Sumner traced the power of the school board to the Massachusetts statute empowering it. That statute gave the committee only the explicit power to "'determine the *number* and the *qualifications* of the scholars to be admitted into the school;' thus, according to a familiar rule of interpretation, excluding other powers. *Mentio unius est exclusio alterius.*"¹¹⁰ Sumner then argued that race, unlike "age, sex, and moral and intellectual fitness," was not one of the "qualifications" the committee was empowered to consider.¹¹¹ He offered two reasons: first, that it "is not in harmony with the Constitution and laws," and, second, that the regulations "must be *reasonable*, or they are

106. *Id.* at 518 (second emphasis added).

107. *Id.* at 513.

108. "A primary purpose of judicial review is to ensure that agencies do not go beyond their statutory powers in carrying out their tasks." ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* § 13.1, at 435 (1993). While elected legislatures have plenary authority to legislate, agencies must restrict themselves to the powers granted by statute: "Agencies are to implement these statutes and neither amend nor ignore them." *Id.*

109. Sumner, *supra* note 104, at 502-03.

110. *Id.* at 513.

111. *Id.* at 513-14.

inoperative and void."¹¹² Racial segregation is unreasonable, he suggested, because it subjects black students to an inconvenience whites do not suffer¹¹³ and, more importantly, because it establishes "the heathenish relation of Caste."¹¹⁴

The caste argument (which Professor Kull dismisses as "somewhat literal-minded"¹¹⁵) is actually an important part of Sumner's brief, and one that echoes in Justice Harlan's dissent and anticipates the tradition of constitutional opposition to segregation.¹¹⁶ Professor Kull's inattention to this thread of the argument renders his reading at best partial. In a thirty-page document, Sumner devoted five printed pages¹¹⁷ to quotes from anthropological evidence about the nature and effect of caste relations (defined as "the doctrine of an essentially distinct origin of the different races, which are thus unalterably separated"¹¹⁸). This discussion is an eerie foreshadowing of the "social science" evidence that the Supreme Court would later rely upon in *Brown*—a reliance that Professor Kull considers "profoundly unsatisfactory" in the latter context.¹¹⁹

Sumner's argument thus consisted of three propositions put forth in the alternative: first, that the spirit of the Massachusetts Constitution opposed racial distinctions, or at least those that set up a caste relationship;¹²⁰ second, that even if the Court did not wish to reach the constitutional question, the school committee had no statutory power to set up separate schools for black students because the distinction drawn was not mentioned in the statute;¹²¹ and third, that even if the statute gave the school committee the power to make distinctions not mentioned in the statute, the challenged distinctions were void because they were not reasonable.¹²² The complex argument foreshadowed much more of the debate on race and the law over the next century and a half than Professor Kull perceives.¹²³ Perhaps most directly relevant to the contemporary affirmative-action debate is the argument's last paragraph, which Kull neglects to quote:

112. *Id.* at 514.

113. "The exclusion of colored children from the Public Schools, open to white children, is a source of practical inconvenience to them and their parents, to which white persons are not exposed, and is, therefore, a violation of Equality." *Id.* at 506.

114. *Id.* at 508.

115. KULL, *supra* note 2, at 43.

116. See *infra* notes 271-89 and accompanying text.

117. Sumner, *supra* note 104, at 508-12.

118. *Id.* at 508.

119. KULL, *supra* note 2, at 154. For a discussion of Professor Kull's criticisms of *Brown*, see *infra* notes 224-26 and accompanying text.

120. Sumner, *supra* note 104, at 502-03.

121. *Id.* at 512-13.

122. *Id.* at 514.

123. See *infra* notes 285-86 and accompanying text.

The vaunted superiority of the white race imposes upon it corresponding duties. The faculties with which they are endowed, and the advantages which they possess, are to be exercised for the good of all. If the colored people are ignorant, degraded, and unhappy, then should they be the especial objects of your care. From the abundance of your possessions you must seek to remedy their lot. And this Court, which is as a parent to all the unfortunate children of the Commonwealth, will show itself most truly parental, when it reaches down, and, with the strong arm of the law, elevates, encourages, and protects its colored fellow-citizens.¹²⁴

IV. "I AM THY FATHER'S SPIRIT":¹²⁵ COLOR BLINDNESS AND THE GHOST OF JUSTICE HARLAN

Sumner's views are important to Professor Kull's version of a strong color-blind tradition because of his role, twenty years after *Roberts*, in the framing of the Fourteenth Amendment. As a member of the Thirty-Ninth Congress, Sumner sought during the debates on the Amendment to pass a Joint Resolution providing that "there shall be no Oligarchy, Aristocracy, Caste, or Monopoly invested with peculiar privileges and powers, and there shall be no denial of rights, civil or political, on account of color or race."¹²⁶ As noted above,¹²⁷ Sumner also fought against language in the amendment that would have explicitly recognized the power of state government to restrict the franchise by law, proclaiming that such explicitly discriminatory language would drop into the Constitution's "text a political obscenity, and . . . spread on its page a disgusting ordure . . ."¹²⁸ Although his resolution failed, Sumner's fight left the Amendment's language as overtly race-neutral—albeit as clearly aware of the persistence of discrimination—as was the original Constitution.¹²⁹

Not only Sumner but Wendell Phillips and Thaddeus Stevens fought for an amendment explicitly barring government from making race-based distinctions.¹³⁰ Congress repeatedly rejected such a measure, however, choosing the far more ambiguous language of the present Fourteenth Amendment, which does not mention race and instead guarantees the nebulous concept of "equal protection of the laws" to all.¹³¹ The legislative

124. Sumner, *supra* note 104, at 524.

125. WILLIAM SHAKESPEARE, *HAMLET* act I, sc. 5.

126. KULL, *supra* note 2, at 252 n.27 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 674 (1866)).

127. See *supra* text accompanying note 43.

128. KULL, *supra* note 2, at 74 (quoting CONG. GLOBE, 39th Cong. 1st Sess. 1224-25 (1866)).

129. *Id.* at 75.

130. *Id.* at 62, 72.

131. U.S. CONST. amend. XIV, § 1.

history of the language clearly suggests that the lawmakers who wrote the Amendment envisioned a remaining power to make racial distinctions.¹³² Color blindness, then, was explicitly rejected as constitutional text; and, for the rest of his study, Professor Kull must find it in extratextual sources.

After the enactment of the Civil War Amendments, the Supreme Court interpreted their ambiguities to chip away at legal protection for blacks. The postbellum retreat from civil rights—embodied by the *Slaughter-House Cases*¹³³ and the *Civil Rights Cases*¹³⁴—might be considered a hiatus, even a dead end, in the history of the color-blind tradition. Professor Kull insists, however, that it is not. He traces the tradition as follows: The color-blind argument in *Roberts* was transplanted through Sumner's fight against race-conscious language into the Fourteenth Amendment; the segregationist logic of Chief Justice Shaw in *Roberts* inspired Justice Brown's majority opinion in *Plessy*; and Sumner's argument in *Roberts* foreshadowed Justice Harlan's dissent.

It is difficult to exaggerate the prescience and compassion of Justice Harlan's racial views, as well as of the clarity of his understanding of the massive political and social fraud wrought on his native region by segregation.¹³⁵ Professor Kull sees Justice Harlan as a principled advocate of something we today would recognize as color blindness: "The Constitution must be color-blind, according to Harlan, because the nation would be better served by forbidding the use of racial classifications altogether, rather than by permitting their use under judicial supervision."¹³⁶

There is evidence in the record to suggest, however, that Justice Harlan did not advocate legal race neutrality as consistently as Professor Kull describes. We have noted above that the full language of his dissent in *Plessy* included an explicit recognition that whites were dominant in society and were likely to stay that way.¹³⁷ In some of his other opinions while on the Court, Justice Harlan seemed to find no constitutional problem with separa-

132. KULL, *supra* note 2, at 68.

133. 83 U.S. (16 Wall.) 36 (1873).

134. 109 U.S. 3 (1883).

135. For a careful discussion of Justice Harlan's views on race while on the Court, see LOREN P. BETH, JOHN MARSHALL HARLAN: THE LAST WHIG JUSTICE 227-39. Beth notes that "it would be a delusion to think of [Harlan] as a twentieth-century liberal[,]" *id.* at 226, but concludes that Harlan's espousal of compassionate views toward black litigants was inspired by sincere belief as well as political expediency. *Id.* at 226-27. A recent analysis of Harlan's *Plessy* dissent finds its rhetoric rooted, not in a desire to forbid racial distinctions of any kind, but in a realistic attempt to forbid "a race-based caste system in which whites subjugated blacks." T. Alexander Aleinikoff, *Re-reading Justice Harlan's Dissent in Plessy v. Ferguson: Freedom, Antiracism, and Citizenship*, 1992 U. ILL. L. REV. 961, 969. Aleinikoff's persuasive reading thus situates Harlan as a founder of the caste-based analysis of race and the Civil War amendments. For a further discussion of caste, see *infra* notes 271-89 and accompanying text.

136. KULL, *supra* note 2, at 129-30.

137. See *supra* note 48.

tion of the races. His eloquent dissent in *Berea College v. Kentucky*¹³⁸ scorned the transparent formalism by which the majority managed to affirm a law making it a crime for private colleges to teach whites and blacks together.¹³⁹ Harlan clearly stated that he would strike the statute down,¹⁴⁰ but he was also careful to state that “[o]f course what I have said has no reference to regulations prescribed for public schools, established at the pleasure of the state and maintained at the public expense.”¹⁴¹ Such a qualification might easily have been mere political prudence; however, coupled with his earlier advocacy of school segregation as a Republican political candidate,¹⁴² it also supports an inference that Justice Harlan believed school segregation simply did not violate equal protection rights. That inference is stronger when we consider his majority opinion in *Cumming v. Richmond County Board of Education*,¹⁴³ which—together with *Plessy* and *Berea College*—formed the trilogy of cases that gave the Court’s imprimatur to segregation.¹⁴⁴

In *Cumming*, Justice Harlan, writing for the Court, rejected an equal protection challenge to a decision by a local school board to provide a high school for white students while discontinuing the similar school for black students.¹⁴⁵ Because the pleadings made no direct constitutional challenge to segregation as such, Justice Harlan noted that “we need not consider that question in this case.”¹⁴⁶ He added, however, that

while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.¹⁴⁷

Professor Kull insists that this language reveals nothing about Justice Harlan’s own views on the constitutionality of segregation for three rea-

138. 211 U.S. 45 (1908).

139. *Id.* at 65 (Harlan, J., dissenting).

140. *Id.* at 67 (Harlan, J., dissenting).

141. *Id.* at 69 (Harlan, J., dissenting).

142. KULL, *supra* note 2, at 268 n.48.

143. 175 U.S. 528 (1899).

144. For a discussion of the segregation trilogy, see, e.g., John E. Nowak, Book Review, *Attacking the Judicial Protection of Minority Rights: The History Ploy*, 84 MICH. L. REV. 608, 610 (1986) (reviewing RICHARD E. MORGAN, *DISABLING AMERICA: THE “RIGHTS INDUSTRY” IN OUR TIME* (1984)).

145. *Cumming*, 175 U.S. at 542-43.

146. *Id.* at 543.

147. *Id.* at 545.

sons: first, the plaintiffs did not challenge the legality of segregation as such;¹⁴⁸ second, “the existence or nonexistence of a ‘public high school’ for a given class of students did not have the practical significance it would today”;¹⁴⁹ and third, Justice Harlan could not have questioned segregation because, had he done so, he might have been forced into dissent, leaving the Court’s opinion to be written by another Justice, who might have given explicit approval to school segregation.¹⁵⁰ This argument is plausible, but it divines the thinking of a dead Justice without any positive historical evidence. The evidence available renders hyperbolic Professor Kull’s claim that there is “no evidence that Harlan, while a member of the Supreme Court, would have defended the constitutionality of school segregation.”¹⁵¹

For instance, one recent biographer of Justice Harlan, Loren Beth, has captured the ambiguities of *Cumming* more fully than Professor Kull:

[The denial of relief] is all perfectly straightforward in technical terms, but it still seems a little odd that Harlan wrote the opinion (let alone that he voted with the majority). When his emotions were involved, he seldom was satisfied with legalities. . . . An admirer of Harlan would at least wish that he had refused to be the Court’s spokesman in the case. There was an obvious injustice to the black students, and it was insensitive of him not to have seen this (if indeed he did not). No Justice, however, remains free of inconsistency if he stays on the Court very long, not even Holmes or Frankfurter. Indeed, the *Cumming* opinion could have been written by either of them, since they both frequently hid behind technicalities. Harlan, however, ordinarily did not, which makes his role in *Cumming* an enduring puzzle.¹⁵²

The puzzle deepens when one considers *Williams v. Mississippi*,¹⁵³ in which the Court upheld a death sentence imposed on a black defendant by an all-white jury.¹⁵⁴ The defendant challenged the provisions of the newly installed Mississippi Constitution that excluded potential jurors from service on the basis of such factors as education, property, and literacy; not by coincidence, these were characteristics black Mississippians often lacked.¹⁵⁵ Even though the defendant cited statements by delegates to the constitutional convention explicitly stating that the purpose of the provisions was the disfranchisement of blacks,¹⁵⁶ Justice McKenna refused to

148. KULL, *supra* note 2, at 127.

149. *Id.* at 128.

150. *Id.* at 127.

151. *Id.* at 126 (emphasis added).

152. BETH, *supra* note 135, at 235.

153. 170 U.S. 213 (1898).

154. *Id.* at 225.

155. *Id.* at 214-15.

156. *Id.*

disturb the conviction.¹⁵⁷ As Beth notes, “[S]trangely, Harlan lent his silent acquiescence to this farrago.”¹⁵⁸ Professor Kull also fails to mention the case.

Nor does Kull discuss Justice Harlan’s joining Chief Justice Fuller in dissent in *United States v. Wong Kim Ark*.¹⁵⁹ In that case, the majority held that a child of Chinese citizens living in the United States was a citizen by virtue of his birth, even though his parents were excluded from naturalization.¹⁶⁰ The government had opposed recognizing the citizenship of native-born children of Chinese parents.¹⁶¹ The dissenters would have upheld this profound racial discrimination against native-born Americans.¹⁶² In an opinion joined by Justice Harlan, Chief Justice Fuller wrote, “I am of opinion that the President and Senate by treaty, and the Congress by naturalization, have the *power*, notwithstanding the Fourteenth Amendment, to prescribe that *all persons of a particular race, or their children*, cannot become citizens”¹⁶³ As Beth notes, “Why Harlan followed [Fuller] is a minor mystery”¹⁶⁴—a mystery Professor Kull does not address.

None of this exposition denies that Justice Harlan was enlightened for his era, or that a strong tradition of opposition to racial discrimination flows through his opinions in ways that influenced later Justices. My quarrel is with framing Justice Harlan as an avatar of values formed since his time. None of Justice Harlan’s majestic language opposing the political subjection of blacks suggests that he would feel as outraged by contemporary measures designed to *empower* them; and some of his language suggests that he believed legislators and judges would do well to keep the grim facts of race clearly in mind.

That perception emerges from the clashing opinions in *Hodges v. United States*,¹⁶⁵ also not mentioned by Professor Kull. In *Hodges*, the majority held that the federal government could not prosecute private citizens who gathered in a mob to threaten and intimidate black citizens until they

157. *Id.* at 225.

158. BETH, *supra* note 135, at 238.

159. 169 U.S. 649 (1898) (Fuller, C.J., dissenting).

160. *Id.* at 705.

161. *Id.* at 652.

162. *Id.* at 732 (Fuller, C.J., dissenting).

163. *Id.* at 732 (Fuller, C.J., dissenting) (emphasis added). The language is significant because of Professor Kull’s assertion that Harlan believed that racial classifications and distinctions of *any* kind were beyond the power of government. Cases involving Asians and Asian Americans pose a serious challenge to the hypothesis that the Constitution, as interpreted by the Court, has ever contained a principled rule of color blindness. In my judgment, Professor Kull does not deal with these cases adequately. See *infra* notes 197-221 and accompanying text.

164. BETH, *supra* note 135, at 237. Harlan’s position in *Wong Kim Ark* is particularly surprising in light of his dissent from an earlier decision denying citizenship to non-tribal Indians. See *Elk v. Wilkins*, 112 U.S. 94, 110-23 (1884) (Harlan, J., dissenting).

165. 203 U.S. 1 (1906).

agreed to give up jobs at an Arkansas mill where they had been hired.¹⁶⁶ The Court held that the statute under which the whites had been prosecuted was not justified by the Thirteenth Amendment, since the Amendment, forbidding slavery, must be interpreted in a color-blind manner rather than as a special provision favoring blacks:

While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the nation. It is the denunciation of a condition and not a declaration in favor of a particular people. . . . It is for us to accept the decision [of Congress], which declined to constitute [black Americans] wards of the Nation or leave them in a condition of alienage where they would be subject to the jurisdiction of Congress, but gave them citizenship, doubtless believing that thereby in the long run their best interests would be subserved, they taking their chances with other citizens in the States where they should make their homes.¹⁶⁷

In dissent, Justice Harlan was far from suggesting that the Constitution forbade "the use of racial classifications altogether, rather than by permitting their use under judicial supervision."¹⁶⁸ Instead, he constructed an eloquent argument for awareness of the specific racial history that had led to the Amendment. Noting that the inability to contract was one of the specific "badges or incidents of slavery,"¹⁶⁹ Justice Harlan argued that the statute should be interpreted to protect those once subject to slavery from any of its disabilities:

I cannot assent to an interpretation of the Constitution which denies National protection to vast numbers of our people in respect of rights derived by them from the Nation. The interpretation now placed on the Thirteenth Amendment is, I think, entirely too narrow and is hostile to the freedom established by the supreme law of the land. It goes far towards neutralizing many declarations made as to the object of the recent Amendments of the Constitution, a common purpose of which, this court has said, was to secure to a people theretofore in servitude, the free enjoyment, without discrimination merely on account of their race, of the essential rights that appertain to American citizenship and to freedom.¹⁷⁰

This dialogue illuminates another contemporary feature of the color blindness debate. Rather than progress to a new level of abstraction, gener-

166. *Id.* at 3-4.

167. *Id.* at 16-20.

168. KULL, *supra* note 2, at 130.

169. *Hodges*, 203 U.S. at 35 (Harlan, J., dissenting).

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

alizing "neutral" rights for everyone, policy and law might better remain grounded in the specific facts of America's past. Justice Harlan argued that, if denying a black citizen the right to contract strongly recalled the treatment given to slaves, it made no sense to characterize the transaction as a private dispute.¹⁷¹ Similar history-based arguments might be advanced for minority set-asides, race-conscious school desegregation plans, and voting-rights provisions geared to overcome regional histories of racial disenfranchisement. It would be imprudent for advocates of these policies to claim Justice Harlan as their icon; yet surely it is nearly as inappropriate for advocates of color blindness to place him in their contemporary camp. Justice Harlan was an advocate of racial justice, within the limits of his time and experience; whether he is the fountainhead of a mighty tradition of pure color blindness is doubtful at best.

V. AFTER *PLESSY*: RAPS AND TAPS IN THE DARKNESS

The most powerful and intriguing part of *The Color-Blind Constitution* is its discussion of the racial segregation cases between *Plessy* and *Brown*. In important ways, this discussion is the heart of Professor Kull's argument for color blindness as a tradition. In essence, he says that *Plessy* was an orphan, "an end rather than a beginning"¹⁷² whose real authority was exhausted when it was announced.¹⁷³ The Court subsequently decided a series of challenges to segregated education by repeatedly finding the facilities unequal without addressing the lawfulness of separation.¹⁷⁴ Professor Kull argues that "[t]he Supreme Court's twentieth-century decisions on legally imposed racial segregation cannot be adequately explained without attributing to the Court the conviction that racial distinctions imposed by law, with or without ostensible 'equality,' were the particular though unacknowledged object of the Fourteenth Amendment's prohibitory language."¹⁷⁵ The decisions, he argues, "consistently misrepresented, by understating, the scope of the constitutional rule actually being applied."¹⁷⁶ Because of this prudentially motivated indirection, "the only intelligible basis of the decisions—the fact that racial classifications were increasingly,

171. See *id.* (Harlan, J., dissenting).

172. KULL, *supra* note 2, at 131.

173. *Id.* at 132.

174. *Sweatt v. Painter*, 339 U.S. 629, 635 (1950) (finding that a separate law school for black students that did not provide equivalent advantages violated the Fourteenth Amendment); *Sipuel v. Board of Regents*, 332 U.S. 631, 632-33 (1948) (holding that the Fourteenth Amendment required a state-supported law school to accept a black applicant when no separate law school for blacks existed in the state); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349-50 (1938) (holding that the validity of segregation laws in a state law school depends on equality of facilities provided).

175. KULL, *supra* note 2, at 133.

176. *Id.*

perhaps categorically, disfavored—left no explicit trace in the Court's decisions."¹⁷⁷

There is much to think about in this analysis; but there are serious flaws as well. As a skilled advocate, Professor Kull reads the anti-segregation cases more broadly than seems fully justified and correspondingly minimizes precedents that do not fit his thesis. Perhaps more seriously, he also ignores cases that directly conflict with it.

Professor Kull begins his discussion of the period with *McCabe v. Atchison, Topeka & Santa Fe Railway Co.*,¹⁷⁸ which he hails as announcing that “the requirement of ‘substantial equality of treatment’ would be aggressively employed to invalidate legal distinctions between black and white citizens—to the point of disregarding differences in circumstance that, in another context, might well be thought to justify differences in treatment.”¹⁷⁹ *McCabe* concerned an Oklahoma statute that required separate and equally comfortable railroad cars for the races but permitted the railway companies to serve one race (as a practical matter, whites) with sleeping-car service while providing the other with only coach facilities, depending on the differential volume in traffic.¹⁸⁰ The petitioners sought to enjoin the railroad from complying with the new statute, which went into effect a few days after their suit was filed.¹⁸¹ Justice Hughes, then new to the Court, included in his opinion language insisting that the petitioners’ right to equality of treatment could not depend on whether the number of black passengers would make service profitable:

[T]he essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws¹⁸²

Professor Kull lauds this language as “a brilliant tactical stroke” that made color blindness an “unacknowledged part of our constitutional law by 1914.”¹⁸³ Although the language is significant, the opinion is more troubling than Professor Kull is willing to admit. To begin with, Justice Hughes was careful to write that “there is no reason to doubt the correctness” of

177. *Id.*

178. 235 U.S. 151 (1914).

179. KULL, *supra* note 2, at 138.

180. *McCabe*, 235 U.S. at 158.

181. *Id.* at 162.

182. *Id.* at 161-62.

183. KULL, *supra* note 2, at 137-38.

Plessy.¹⁸⁴ If rhetoric is important, that dictum is nearly as important as the stirring “personal-rights” language cited above, for no one should doubt (though Professor Kull does not clearly point out) that dictum it was. In fact, *McCabe* was a solid victory for segregation: Justice Hughes, writing for a unanimous Court, refused to enjoin compliance on the grounds that the petitioners had not alleged any injury to themselves. Again using carefully color-blind language, Justice Hughes explained that:

[T]he complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons, who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial intervention.¹⁸⁵

Justice Hughes dismissed the petitioners’ arguments that segregation on the cars would lead to inequality in toilets, waiting rooms, and the quality of coach facilities as “altogether too vague and indefinite to warrant the relief sought by these complainants.”¹⁸⁶ Perhaps most important from a historical point of view, *McCabe* acted as a green light for segregation in Oklahoma railroad travel, a regime of legal apartheid that persisted until the 1940s.¹⁸⁷

One can only conclude that, as embodied in *McCabe*, the “unacknowledged” color-blind principle in constitutional law resembles the “blessing in disguise” Winston Churchill’s wife attempted to discern in his unexpected defeat for re-election in 1945: “At the moment,” Churchill replied, “it seems quite effectively disguised.”¹⁸⁸ In fact, it is impossible to discuss accurately the Court’s approach to the segregated system—then being locked into place across the former Confederate states¹⁸⁹—by seizing on equalitarian dicta and ignoring the decisions’ practical effect. In fact, during this period the Court faced numerous opportunities to void the key features of this radical new form of racial dictatorship; as in *McCabe*, it

184. *McCabe*, 235 U.S. at 160.

185. *Id.* at 162.

186. *Id.* at 163. By 1914, there was nothing indefinite or vague about the system of apartheid imposed upon the Southern states, and a Court that wished to be conscious of it could easily have taken notice that the petitioners’ allegations were all too likely to become fact. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 67-109 (3d rev. ed. 1974). One may applaud Justice Hughes’ determination to insert dictum in the opinion making the right to equal treatment under segregation a personal right, which unquestionably had implications for later litigation; but one should also note the Court’s refusal to grant effective relief or even to discuss honestly the facts of life in segregated states.

187. JIMMIE L. FRANKLIN, *JOURNEY TOWARD HOPE: A HISTORY OF BLACKS IN OKLAHOMA* 47 (1982). Black Oklahomans endured years of danger and indignity on the railroad trains after *McCabe*; as late as 1930, scientist and inventor George Washington Carver was denied a first-class ticket in Oklahoma. *Id.*

188. MARTIN GILBERT, *NEVER DESPAIR: WINSTON S. CHURCHILL, 1945-1965*, at 108 (1988).

189. See *supra* note 186.

ducked many of those chances, averting its eyes to the brutal racism of the Southern voting system,¹⁹⁰ the peonage system of semi-slavery,¹⁹¹ and the restrictive housing covenant,¹⁹² and even permitting Jim Crow states to impose segregated seating on the intrastate portions of interstate travel.¹⁹³ In many of these cases, the Court employed transparent evasions, including color-blind language, to disguise the issues.¹⁹⁴ Some readers may discern in them a hopeful march toward color blindness; I discern only "a circling smoke of many words"¹⁹⁵ designed to cover deference to majority racist sentiment.¹⁹⁶

Professor Kull ignores most of the decisions from this bleak period; others he glosses over. Of *Gong Lum v. Rice*,¹⁹⁷ Kull writes that Chief Justice Taft "leaves no doubt that he, at least, considered school segregation

190. See *Giles v. Harris*, 189 U.S. 475, 487-88 (1903) (refusing to enjoin operation of racist voting system on grounds that, if unconstitutional, system was beyond Court's jurisdiction).

191. See *Bailey v. Alabama*, 219 U.S. 219, 231, 245 (1911) (striking down a peonage statute but refusing to take note of the larger context in which it had been enacted); *Clyatt v. United States*, 197 U.S. 207, 219-22 (1905) (refusing to punish defendants who had captured a black man and taken him to fulfill a labor contract on the grounds that the statute forbade only "return" to slavery, not original placement therein).

192. See *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926) (holding that such covenants did not violate the Fourteenth Amendment because there was no state action).

193. See *South Covington & Cincinnati St. Ry. Co. v. Kentucky*, 252 U.S. 399, 404 (1920) (holding that segregation of white and black interstate railway passengers during intrastate portion of travel affects interstate commerce incidentally and does not subject it to unreasonable restrictions); *Cincinnati, Covington & Erlanger Ry. Co. v. Kentucky*, 252 U.S. 408, 410 (1920) (upholding conviction of railway for violating intrastate segregation statute).

194.

If a white man came here on the same general allegations [of unconstitutionality of the state's racist voting system], admitting his sympathy with the plan, but alleging some special prejudice that had kept him off the list, we hardly should think it necessary to meet him with a reasoned answer. But the relief cannot be varied because we think that in the future the particular plaintiff is likely to try to overthrow the scheme.

Giles, 189 U.S. at 486-87. See also *Bailey*, 219 U.S. at 231, in which Justice Hughes voided a peonage statute in language that now seems almost obsequiously designed to avoid challenging the segregated system head on:

We at once dismiss from consideration the fact that the plaintiff in error is a black man. While the action of a state through its officers charged with the administration of a law, fair in appearance, may be of such a character as to constitute a denial of the equal protection of the laws, such a conclusion is here neither required nor justified. The statute, on its face, makes no racial discrimination, and the record fails to show its existence in fact. *No question of a sectional character is presented*, and we may view the legislation in the same manner as if it had been enacted in New York or in Idaho.

Id. (emphasis added) (citation omitted).

195. MILLER, *supra* note 88, at 120.

196. An excellent summary of Justice Holmes' complicity in this farce is found in Yosal Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 254, 264 (1963) (characterizing Holmes' opinion in *Giles* as "a remarkable bit of Alice in Wonderland ingenuity, internal inconsistency, and practical absurdity.").

197. 275 U.S. 78 (1927).

to be permissible under the Fourteenth Amendment"¹⁹⁸ In fact, Taft left no doubt that he was writing for a *unanimous Court* that requiring a Chinese child to attend a "colored" school was "within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment."¹⁹⁹

Gong Lum introduces an interesting theme I found missing from *The Color-Blind Constitution*. Some of the Court's most significant twentieth-century race cases have concerned Asian Americans rather than blacks. A truly color-blind Constitution would forbid discrimination against Asians as well as blacks. Professor Kull ignores most of the record on this point, which is strongly adverse to his thesis.

In *Hirabayashi v. United States*²⁰⁰ and *Korematsu v. United States*,²⁰¹ the Court enunciated some of its most memorable antiracist dicta,²⁰² but it upheld the shameful relocation of Japanese and Japanese Americans from their homes on the West Coast to concentration camps in the interior of the country.²⁰³ Professor Kull again seizes on the dictum and minimizes the cases' shocking outcome:

There is, realistically, no constitutional guarantee that is not subject to qualification if a majority of the Court conceives that the country faces imminent peril. If racial distinctions are "irrelevant" and therefore inadmissible in all but such extreme circumstances as "the crisis of war and of threatened invasion," the Constitution may be fairly described as color-blind.²⁰⁴

But the distinction between whites and Japanese was by no means "irrelevant" in circumstances outside the wartime setting. The relocation cases took place in a historical context of which Professor Kull seems ignorant. To begin with, the Court had already upheld, during a time of peace, a provision of federal law that denied citizenship on purely racial grounds to immigrants from Japan.²⁰⁵ The Act in question,²⁰⁶ passed in 1870, extended the privilege of naturalization only to "white person[s]" and "per-

198. KULL, *supra* note 2, at 132.

199. *Gong Lum*, 275 U.S. at 87.

200. 320 U.S. 81 (1943).

201. 323 U.S. 214 (1944).

202. *Hirabayashi*, 320 U.S. at 100 ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."); *Korematsu*, 323 U.S. at 216 ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect.").

203. For a general account of this disgraceful episode, see PETER IRONS, *JUSTICE AT WAR passim* (1983).

204. KULL, *supra* note 2, at 144 (quoting *Hirabayashi*, 320 U.S. at 101).

205. *Ozawa v. United States*, 260 U.S. 178, 198 (1922).

206. Act of July 14, 1870, ch. 254, 16 Stat. 254, 256.

sons of African descent.”²⁰⁷ The Court declined to consider the Japanese “white” because of the lightness of their skins; its language suggested that, on this occasion at least, the Court’s color vision was 20/20:

Manifestly, the test afforded by the mere color of the skin of each individual is impracticable as that differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races. Hence to adopt the color test alone would result in a confused overlapping of races and a gradual merging of one into the other, without any practical line of separation.²⁰⁸

207. *Id.*

208. *Ozawa*, 260 U.S. at 197. For the background of *Ozawa*, see RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 208-09 (1989). The Court’s fear of “confused overlapping” of the races implies its concern to maintain racial caste distinctions. See *infra* notes 271-88 and accompanying text for a discussion of this theme. In the same term, the Court displayed similar chromatic acuity in holding immigrants from India ineligible to naturalize, even though ethnological evidence placed them within the “Caucasian” classification:

We are unable to agree with the District Court, or with other lower federal courts, in the conclusion that a native Hindu is eligible for naturalization under § 2169. The words of familiar speech, which were used by the original framers of the law, were intended to include only the type of man whom they knew as white. The immigration of that day was almost exclusively from the British Isles and Northwestern Europe, whence they and their forebears had come. When they extended the privilege of American citizenship to “any alien, being a free white person,” it was these immigrants—bone of their bone and flesh of their flesh—and their kind whom they must have had affirmatively in mind. The succeeding years brought immigrants from Eastern, Southern and Middle Europe, among them the Slavs and the dark-eyed, swarthy people of Alpine and Mediterranean stock, and these were received as unquestionably akin to those already here and readily amalgamated with them. It was the descendants of these, and other immigrants of like origin, who constituted the white population of the country when [the 1870 Act] was adopted; and there is no reason to doubt, with like intent and meaning.

United States v. Bhagat Singh Thind, 261 U.S. 204, 213-14 (1923). Fourteen years earlier, Judge Lowell had reached the opposite conclusion about four Armenian immigrants, “white persons in appearance, not darker in complexion than some persons of north European descent traceable for generations” and “lighter than . . . many south Italians and Portuguese.” *In re Halladjian*, 174 F. 834, 835 (C.C.D. Mass. 1909). The government sought to bar them from naturalization because they were not “persons of European descent.” *Id.* at 837. As they were “neither Chinamen nor Africans of any sort,” the court set out “to decide whether they [were] white or not.” *Id.* The court noted that the government’s argument that the petitioners belonged to “an Asiatic or yellow race, to which belong substantially all Asiatics,” *id.* at 838, was severely undercut by the government’s willingness to “make[] an extraordinary exception, viz., the Hebrews.” *Id.* at 839.

[B]oth Hebrew history and an approximation to general type show that the Hebrews are a true race, if a true race can be found widely distributed for many centuries. Their origin is Asiatic. Yet the United States admits that they do not belong to the ‘Asiatic or yellow race,’ and that they should be admitted to citizenship. If the ‘aboriginal peoples of Asia’ are excluded from naturalization . . . it is hard to find a loophole for admitting the Hebrew. Again, if Hindoos are to be excluded from naturalization, as contended by the United States, because many Englishmen treat them with contempt and call them

The denial of citizenship on purely racial grounds to Japanese immigrants had far-reaching consequences for Japanese living on the West Coast. Beginning in 1913, legislators in California had sought to prevent Japanese immigrants from owning farmland and competing with American citizens by barring acquisition of land title by "aliens ineligible to citizenship."²⁰⁹ When Japanese-born farmers began to acquire title in the names of their American-born children, the legislators tightened the laws to forbid that practice, and three years later forbade them to "enjoy, use, cultivate, [or] occupy" real property.²¹⁰ The consequences of this legalized racism were a catastrophic decline in Japanese land ownership²¹¹ and a rash of similar laws throughout the American West.²¹²

The Land Law did not come before the Supreme Court until 1948, well after the war. The Court declined to void the law in *Oyama v. California*.²¹³ That case arose from the confiscation, under the Alien Land Law, of property owned in the name of an American-born citizen of Japanese descent and held on his behalf by his father, a Japanese by birth.²¹⁴ To add to the poignancy of the appeal, the land had been taken while father and son were imprisoned in a relocation camp and unable to defend themselves.²¹⁵ Both father, as a resident alien, and son, as a citizen, lodged equal protection challenges.²¹⁶ The father contended that the Fourteenth Amendment should prevent the state from barring him from land ownership,²¹⁷ while the

"niggers," a like argument applies to those who have suffered most cruelly among all men on the earth from European hatred and contempt.

Id. Like "Hebrews," the court found, "Armenians have always been classified in the white or Caucasian race, and not in the yellow or Mongolian," *id.* at 840, and thus "are not to be excluded from naturalization by reason of their race." *Id.* at 841.

Various courts have engaged in such historical and ethnological inquiries. *See, e.g.*, *Besshor v. United States*, 178 F. 245 (4th Cir. 1910) (Japanese); *In re Najour*, 174 F. 735 (C.C.D. Ga. 1909) (Syrian); *In re Saito*, 62 F. 126 (C.C.D. Mass. 1894) (Japanese); *Ex parte Reynolds*, 20 F. Cas. 582 (C.C.D. Ark. 1879) (No. 11,719) (native Americans); *In re Ah Yup*, 1 F. Cas. 223 (C.C.D. Cal. 1878) (No. 104) (Chinese); *In re Charr*, 273 F. 207 (D. Mo. 1921) (Korean); *In re Geronimo Para*, 269 F. 643 (S.D.N.Y. 1919) (native South American); *In re Mohan Singh*, 257 F. 209 (S.D. Cal. 1919) (Hindu); *Ex parte Dow*, 211 F. 486 (E.D.S.C. 1914) (Syrian); *Ex parte Shahid*, 205 F. 812 (D.S.C. 1913) (Syrian); *In re Alverto*, 198 F. 688 (E.D. Pa. 1912) (Filipino); *In re Young*, 195 F. 645 (W.D. Wash. 1912) (half-German, half-Japanese); *In re Ellis*, 179 F. 1002 (D. Or. 1910) (Maronite Lebanese); *In re Mudarri*, 176 F. 465 (D. Mass. 1910) (Syrian); *In re Knight*, 171 F. 299 (E.D.N.Y. 1909) (half-British, half Chinese/Japanese); *In re Kumagai*, 163 F. 922 (D.C. Wash. 1908) (Japanese); *In re Gee Hop*, 71 F. 274 (N.D. Cal. 1895) (Chinese).

209. TAKAKI, *supra* note 208, at 203-05.

210. *Id.* at 205.

211. *Id.* at 205-06.

212. *Id.* at 206-07.

213. 332 U.S. 633, 644-45 (1948).

214. *Id.* at 637-38.

215. *Id.* at 638.

216. *Id.* at 634-36.

217. *Id.* at 635.

son objected to a portion of the law that set up a statutory presumption that land held in trust for a minor by a Japanese parent, unlike land held in trust by non-Japanese parents for their minor children, was actually owned by the parent with intent to evade the law.²¹⁸ The Court struck down the statutory presumption as a violation of the citizen son's rights but carefully evaded the "alien" father's equal protection challenge—thus leaving formally undisturbed the massive land law scheme that allowed white Californians to deprive Japanese of their land.²¹⁹ Justice Black—the author of *Korematsu*—scolded the Court in his concurrence for not invalidating the law, arguing that "the Fourteenth Amendment was designed to bar States from denying to some groups, on account of their race or color, any rights, privileges, and opportunities accorded to other groups."²²⁰ And Justice Murphy, in a separate concurrence, asked the Court to invalidate the law because of "the uncompromising opposition of the Constitution to racism, whatever cloak or disguise it may assume."²²¹

As we have seen, the color blindness Professor Kull discerns in the Court's jurisprudence during the post-*Plessy* period has an evanescent, almost ectoplasmic quality. As noted above, there is nothing illegitimate about a constitutional seance as such. But in this case, the medium asks us perhaps once too often to believe in the raps and taps he hears in the darkness, while ignoring that man behind the curtain. The record suggests that the Court during this period remained quite ready to uphold racial distinctions of the most invidious sort, albeit often in deceptive and even hypocritical language. That being true, I believe that Professor Kull's argument for the existence of a color-blind tradition as "an unacknowledged part of our constitutional law" from 1914 on²²² simply cannot stand. If that contention falls, much of the historical legitimacy of color blindness as a contemporary constitutional doctrine must be thrown into doubt.

218. *Id.* at 636.

219. The California Supreme Court ruled that the law was unconstitutional in 1952. *Tei Fujii v. State*, 242 P.2d 617, 630 (Cal. 1952); *Masaoka v. People*, 245 P.2d 1062 (Cal. 1952). The law was not removed from the statute books by statewide referendum until 1956. TAKAKI, *supra* note 208, at 413.

220. *Oyama*, 332 U.S. at 649 (Black, J., concurring).

221. *Id.* at 650 (Murphy, J., concurring). Justice Murphy, whose antiracist credentials cannot be doubted, said that the Equal Protection Clause might permit a state to single out ineligible aliens for "distinctive treatment" if the "characteristics of the class [are] such as to provide a rational justification for the difference in treatment." *Id.* at 663 (Murphy, J., concurring). However, he added that such a rational basis could never be found "where, as here, the discrimination stems directly from racial hatred and intolerance." *Id.* (Murphy, J., concurring). The Constitution, he said, demands that government "respect and observe the dignity of each individual, whatever may be the name of his race, the color of his skin, or the nature of his beliefs." *Id.* (Murphy, J., concurring).

222. KULL, *supra* note 2, at 137-38.

VI. AFFIRMATIVE ACTION AND THE SOUL OF CIVIL RIGHTS

As noted above,²²³ Professor Kull has little but scorn for *Brown*.²²⁴ He dislikes the Court's reliance on the famous social-science footnote,²²⁵ rather than a straightforward adoption of absolute color blindness:

That the unconstitutionality of school segregation should be explained on this basis was, for a number of reasons, profoundly unsatisfactory. Taken at face value, the opinion necessarily implied that there was nothing wrong with racial segregation in and of itself: "separate but equal" facilities, were they only attainable, would be as constitutional as ever. The constitutionality of racial segregation was left hostage, moreover, to modern authority in the social sciences. Should subsequent, more modern authority question the sociological wisdom of 1954—as has in fact occurred—the authority of the constitutional rule, were its basis really as described in the opinion, would be to that extent diminished.²²⁶

Nonetheless, he discerns a brief color-blind period of desegregation law, bounded by the Court's affirmance of Judge Wisdom's opinion in *Dorsey v. State Athletic Commission*²²⁷ at the beginning and by Judge Wisdom's opinion in *United States v. Jefferson County Board of Education*²²⁸ at the end. "The color-blind consensus, so long in forming, was abandoned with surprising rapidity," Kull writes,²²⁹ and he argues that the civil rights movement sounded the retreat. Here we encounter another key part of the argument of *The Color-Blind Constitution*: that the race-conscious remedial measures we lump together as "affirmative action" are a recent invention, which had been "rigorously excluded from the orthodox Civil Rights agenda" until the mid-1960s.²³⁰ Pure legal color blindness, he says, was "for approximately 125 years the ultimate legal objective of the American Civil Rights movement,"²³¹ only to be abandoned "with surprising rapidity" because of "a profound and sudden change in the views of liberal policy-

223. See *supra* note 57 and accompanying text.

224. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

225. *Id.* at 494 n.11 (citing, *inter alia*, GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944), for the proposition that legal segregation harmed the educational development of black children).

226. KULL, *supra* note 2, at 154. It is not entirely clear from the context what new "sociological wisdom" has emerged to suggest that legal segregation does not harm the education of the segregated group.

227. 168 F. Supp. 149, 153 (E.D. La. 1958) (striking down Louisiana statute banning racially mixed dancing, entertainment, and sports).

228. 372 F.2d 836, 847 (5th Cir. 1966) (stating that *Brown* requires a "school desegregation plan . . . that works").

229. KULL, *supra* note 2, at 183.

230. *Id.* at 182.

231. *Id.* at 1.

makers.”²³² This color-blind “classical Civil Rights movement”²³³ had, with the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, achieved all its “historic objectives,”²³⁴ only to return with a new and unfamiliar set of demands.

This historical contention carries an inevitable sting. The civil rights movement is the closest thing American history provides to a moral touchstone—at once profoundly American and nearly transcendent in its universality and appeal. Advocates of race-conscious remediation stand accused of bartering away this birthright in its moment of apotheosis, accepting in trade a mess of hypocritical pottage: “An argument designed to restrict the power of government to harm one’s client loses its attraction when one’s client begins to govern.”²³⁵ The moral cloak, thus lightly thrown away by its historic wearers, descends at once upon the shoulders of color-blind theorists, who become the heirs of Frederick Douglass, Martin Luther King, and the NAACP Legal Defense Fund.

Not to put too fine a point on it, Professor Kull has here crossed the historical line that separates interpretation from revisionism. To speak of a “classical Civil Rights movement” concerned with consistent demands from the abolitionists to the Southern Christian Leadership Council is historically indefensible. Many of the major actors in Professor Kull’s history favored race-conscious measures for blacks, including Wendell Phillips²³⁶ and Albion Tourgee, the attorney for Homer Plessy.²³⁷ The Freedmen’s Bureau, set up by the Reconstruction Congress, provided explicitly race-based assistance to freed slaves.²³⁸

Few would deny that for much of the twentieth century, legal representatives of major civil rights groups confined their initial aims to achieving formal equality before the law.²³⁹ At the same time, however, and long before *Brown* seemed even a faint possibility, community-based civil rights groups demanded forms of race-based economic redress that look remarka-

232. *Id.* at 183.

233. *Id.* at viii.

234. *Id.* at 182.

235. *Id.* at 6.

236. *See id.* at 246 n.19 (explaining that Phillips advocated special education programs for freedmen and distribution of confiscated land to former slaves).

237. *See id.* at 120.

238. For a rehearsal of the constitutional arguments over the power of Congress to create the Bureau, see GEORGE R. BENTLEY, *A HISTORY OF THE FREEDMEN’S BUREAU* 36-43, 46-49 (1955). One of the bill’s supporters was Charles Sumner. *Id.* at 48.

239. Those groups, however, were well aware that economic measures—and some degree of race-consciousness—would be needed at some point to remedy the effects of slavery and segregation. For an account of the economic debate that preceded the Garland Fund’s decision to underwrite the initial cost of the NAACP’s legal attack on segregation in education, see MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950*, at 10-21 (1987).

bly like contemporary affirmative action. The two demands coexisted within the movement (though sometimes uneasily), and mainstream figures were involved in both. In 1933, for example, an organization called the New Negro Alliance (NNA) began a campaign to end segregated employment in Washington, D.C.²⁴⁰ The group conducted elaborate statistical surveys to determine the percentage of black customers at specified retail stores, then organized boycotts in support of its demand "that blacks be hired in proportion to their patronage."²⁴¹ Legal counsel for the fledgling movement was William H. Hastie, the noted civil rights leader and later the first African American named to the federal bench.²⁴² Also assisting the movement in Washington was Charles Hamilton Houston, then dean of Howard Law School and later general counsel for the NAACP Legal Defense Fund.²⁴³ Thurgood Marshall organized a similar campaign in Baltimore.²⁴⁴ In Chicago, a colorful black organizer called Sufi Abdul Hamid led a successful campaign for similar hiring agreements in 1930.²⁴⁵ Succeeding there, he brought his campaign to Harlem, and by 1934 his followers, organized as the Negro Industrial Alliance (NIA), "were sent into 125 Street's largest stores and the managers were asked to employ a certain percentage of colored clerks."²⁴⁶ At least one store entered into a precise numerical agreement with the NIA.²⁴⁷

In 1950, the Supreme Court upheld a California state court injunction barring picketing by the Progressive Citizens of America (PCA) of a grocery store in Richmond, California.²⁴⁸ Because the PCA contended that fifty percent of the store's customers were black, it demanded that the store hire blacks as openings occurred until "the proportion of Negro clerks to

240. Gilbert Ware, *The New Negro Alliance: "Don't Buy Where You Can't Work,"* NEGRO HIST. BULL., July-Sept. 1986, at 3.

241. *Id.* Some black intellectuals criticized the NNA campaign in terms that also sound contemporary, arguing that "the movement represented an unwholesome racism certain to boomerang by alienating all recently won white sympathizers." CONSTANCE McLAUGHLIN GREEN, *THE SECRET CITY: A HISTORY OF RACE RELATIONS IN THE NATION'S CAPITAL* 229 (1967).

242. Ware, *supra* note 240, at 4.

243. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF Brown v. Board of Education and Black America's Struggle for Equality* 160-61 (1976). Neither Hastie nor Houston was counsel for the NNA when its boycott and picketing campaign appeared before the United States Supreme Court five years later. *New Negro Alliance v. Sanitary Groc. Co.*, 303 U.S. 552 (1938). In that case, which did not address the proportional-hiring issue, the Court held that the District Court was without power to enjoin the group from picketing in support of its demands. *Id.* at 562-63.

244. KLUGER, *supra* note 243, at 185.

245. CLAUDE MCKAY, *HARLEM: BLACK METROPOLIS* (1940), *reprinted in* NEGRO PROTEST THOUGHT IN THE TWENTIETH CENTURY 109, 110 (Francis L. Broderick and August Meier eds., 1965).

246. *Id.* at 113.

247. *Id.* at 114-15.

248. *Hughes v. Superior Court*, 339 U.S. 460, 469 (1950).

white clerks approximated the proportion of Negro to white customers."²⁴⁹ The NAACP filed an amicus brief supporting the PCA's right to picket; Robert L. Carter, Thurgood Marshall, Jack Greenberg, and Constance B. Motley all signed the brief.²⁵⁰ The document specifically noted the organization's discomfort at the concept of straight quota hiring: "[W]e are opposed to what has been alleged to be the ultimate objective of the petitioners in this action—proportional or quota hiring of Negroes."²⁵¹ The brief added, however, that the NAACP had joined the case to support "the right to peacefully picket in order to improve economic opportunities for Negroes."²⁵² In addition, the brief argued that PCA picket signs reading "LUCKY WON'T HIRE NEGRO CLERKS IN PROPORTION TO NEGRO TRADE—DON'T PATRONIZE"²⁵³ did not use "proportionate" as "a mathematical word of art," but displayed only an "interest[] in increasing employment opportunities for Negroes and eliminating discrimination against them."²⁵⁴

The contemporary civil rights movement often traces its beginning to Montgomery, Alabama, in 1955, when Rosa Parks refused to give up her seat to a white patron on a segregated municipal bus. After Parks' arrest, one of the first demands of the Montgomery Improvement Association called for black drivers to be hired for all black routes.²⁵⁵ This demand strongly resembles a similar demand made by Martin Luther King in 1966 during his campaign in Chicago: "Indenture of at least 400 Negro and Latin American apprentices in the craft unions."²⁵⁶

249. *Id.* at 461.

250. Brief of the NAACP as Amicus Curiae at 9, *Hughes* (No. 61). I am indebted to Professor Mark V. Tushnet for directing me to this case.

251. *Id.* at 2.

252. *Id.*

253. *Id.* at 7.

254. *Id.* Certainly, had Professor Kull merely claimed that the historical movement was dominated by a demand for formal equality, rather than economic redress, his point would be unquestionable and the NAACP's brief in *Hughes* would provide support for his thesis. But he has overstated his case, claiming that the formal-equality wing comprised the entire movement. In fact, in 1950, as today, the movement was split about the use of numerical targets to achieve racial justice; in 1950, as today, both demands coexisted within the movement's mainstream; and in 1950, as today, one person's "quota" is another person's demand for justice.

255. HARVARD SITKOFF, *THE STRUGGLE FOR BLACK EQUALITY* 45 (1981). E.D. Nixon formulated the demand for hiring of black drivers. HOWELL RAINES, *MY SOUL IS RESTED: MOVEMENT DAYS IN THE DEEP SOUTH REMEMBERED* 47 (1977). Nixon, a prominent black labor leader, was involved in the civil rights struggle well before Martin Luther King, Jr. emerged as the spokesman for the Montgomery Improvement Association. TAYLOR BRANCH, *PARTING THE WATERS, AMERICA IN THE KING YEARS 1954-1963*, at 121 (1988).

256. *Demands Placed on the Door of Chicago City Hall by Martin Luther King, Jr. (July 10, 1966)*, reprinted in *THE EYES ON THE PRIZE CIVIL RIGHTS READER: DOCUMENTS, SPEECHES AND FIRSTHAND ACCOUNTS FROM THE BLACK FREEDOM STRUGGLE, 1954-1990* 300, 302 (Clayborne Carson et al. eds., 1991)

That the movement underwent a shift of emphasis in the mid-1960s is undeniable. Many of the features that made the movement so appealing to white Americans—one of which was its apparent emphasis on formal, rather than economic, equality—were blurred or transformed during that period. The transformative events included the following: the continuing stream of martyrdoms in the South and elsewhere; the growing split between Martin Luther King, Jr. and the Southern Christian Leadership Council on the one hand and the young militants of the Student Non-Violent Coordinating Committee on the other; the near expulsion of Northern whites from the Southern movement; the adoption of civil rights rhetoric by President Johnson in his address to Congress urging adoption of the Voting Rights Act; the almost simultaneous abandonment by Johnson of his Great Society program in favor of the prosecution of war in Vietnam; the growing estrangement between Johnson and King arising over the latter's opposition to the war in Vietnam and the concomitant increase in the F.B.I.'s harassment of King; the creation of a civil-rights bureaucracy within the federal government, with a full quotient of bureaucratic infighting and obstructionism; and the beginnings of urban rioting in the ghettos of the North.²⁵⁷ Much of this history Professor Kull summarizes in one sentence, preferring to focus on the decisions of federal courts and the workings of the executive branch.²⁵⁸

Professor Kull performs a useful function by noting the shift that occurred during this period. Certainly, as a matter of policy, his preference for the formal-equality wing of the movement is legitimate. His attempt, however, to define a "classical civil rights movement" that only partially includes William H. Hastie, Charles Hamilton Houston, Thurgood Marshall, and Martin Luther King, Jr. represents significant historical overreaching and lessens considerably the analytical force of his critique.

A similar, equally troubling omission mars Professor Kull's discussion of the later Supreme Court cases that discussed the constitutionality of race-conscious remedial measures. Among the most powerful writing ap-

257. See SITKOFF, *supra* note 255, at 199-219. A useful contemporaneous account of 1965, the transformative year, with emphasis on both Washington and the movement itself, is found in JOHN HERBERS, *THE LOST PRIORITY: WHAT HAPPENED TO THE CIVIL RIGHTS MOVEMENT IN AMERICA? passim* (1970).

258. "[T]he background of recent events [in 1965] included not only the enactment of the Voting Rights Act and the Howard University address, but also the start of the Vietnam buildup, the commitment of American ground troops to combat, and the riot in Watts." KULL, *supra* note 2, at 187-88. Professor Kull relies for his history of this period chiefly on HUGH D. GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972 passim* (1990). Graham's book, by design, focuses on the executive branch, *see id.* at 7 ("[T]he Presidency dominates this volume."). Perhaps for this reason, Professor Kull seems to display little awareness that the movement itself—that is, the broad, unofficial network of protest that had kept racial equality at the front of the domestic agenda for more than a decade—was in crisis.

pearing in those cases were separate opinions by Justice Thurgood Marshall. Justice Marshall, more than any other single person, represents the legal thinking of the "classical civil rights movement." Both on and off the bench, he was its architect, its conscience, and its voice. That voice is oddly missing in *The Color-Blind Constitution*—and the omission cannot be because Justice Marshall had nothing apposite to say on this subject. In his separate dissent in *Bakke*,²⁵⁹ Marshall retraced the history of institutionalized, legal racism in the United States and noted that

had the Court been willing in 1896, in *Plessy v. Ferguson*, to hold that the Equal Protection Clause forbids differences in treatment based on race, we would not be faced with this dilemma in 1978. We must remember, however, that the principle that the "Constitution is color-blind" appeared only in the opinion of the lone dissenter. The majority of the Court rejected the principle of color blindness, and for the next 58 years, from *Plessy* to *Brown v. Board of Education*, ours was a Nation where, by law, an individual could be given "special" treatment based on the color of his skin. . . . I fear that we have come full circle. After the Civil War our Government started several "affirmative action" programs. This Court in the *Civil Rights Cases* and *Plessy v. Ferguson* destroyed the movement toward complete equality. For almost a century no action was taken, and this nonaction was with the tacit approval of the courts. Then we had *Brown v. Board of Education* and the Civil Rights Acts of Congress, followed by numerous affirmative-action programs. Now, we have this Court again stepping in, this time to stop affirmative action programs of the type used by the University of California.²⁶⁰

Drawing on the same history, in *Fullilove v. Klutznick*²⁶¹ Justice Marshall wrote that race-conscious remedies are

necessary to undertake the task of moving our society toward a state of meaningful equality of opportunity, not an abstract version of equality in which the effects of past discrimination would be forever frozen into our social fabric.²⁶²

Likewise, in *City of Richmond v. J.A. Croson Co.*,²⁶³ Justice Marshall wrote that

Congress' concern in passing the Reconstruction Amendments, and particularly their congressional authorization provisions, was that States would *not* adequately respond to racial violence or discrimination against newly freed slaves. To inter-

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

260. *Id.* at 401-02 (Marshall, J., concurring in part and dissenting in part) (citation omitted).

261. 448 U.S. 448 (1980).

262. *Id.* at 522 (Marshall, J., concurring in the judgment).

263. 488 U.S. 469 (1989).

pret any aspect of these Amendments as proscribing state remedial responses to these very problems turns the Amendments on their heads.²⁶⁴

Although Professor Kull discusses each of these cases, criticizing the results in *Bakke*²⁶⁵ and *Fullilove*²⁶⁶ and dismissing arguments that *Croson* signaled a retreat from affirmative action,²⁶⁷ nowhere does he quote Justice Marshall's opinions. Certainly Justice Marshall's views on the pedigree of color blindness, the effect of race-neutral measures on equality, and the history of the Civil War Amendments were not dispositive of any questions. He was, however, the one American who had most fully studied and shaped the history Professor Kull recounts in *The Color-Blind Constitution*. A scrupulous historian might find his arguments credible, or might dispute them as historically misinformed, as disingenuous, as meaningless ventriloquial utterances by over-reaching clerks, or simply as the products of a great intellect in sad decay. But an account of this question that seeks to characterize the history and moral vision of the "classical civil rights movement" without even discussing Marshall's arguments against the color-blind notion forfeits much of its persuasive force, and perhaps even its claim to be history at all.

VII. AN ALTERNATIVE TO COLOR BLINDNESS: THE CASTE PRINCIPLE

As noted above,²⁶⁸ Professor Kull asserts that the principle of color blindness offers "the only logically distinct alternative" to unprincipled judicial dispensation, on the basis of mere "reasonableness," of racial burdens and benefits.²⁶⁹ Much force flows from this contention. First, if color blindness is the *only* such alternative, then its flaws as a constitutional principle—the fact, for example, that it may leave much historical inequity unaddressed and unacknowledged and "forever frozen into our social fabric"²⁷⁰—are relatively unimportant, since it remains our only way out. Second, one can read every expression of dissent from the dominant policy of official racism as an explicit or implied endorsement of color blindness, since principled foes of racism may be assumed to have understood the choice history put to them. And third, color blindness may be identified with, and in fact subsume, the argument against racial discrimination.

264. *Id.* at 559 (Marshall, J., dissenting).

265. KULL, *supra* note 2, at 206-08.

266. *Id.* at 208-10.

267. *Id.* at 210.

268. See *supra* text following note 80.

269. See KULL, *supra* note 2, at 118.

270. *Fullilove v. Klutznick*, 448 U.S. 448, 523 (1980) (Marshall, J., concurring in the judgment).

I believe, however, that the record fully supports at least one alternative principle, which runs straight from *Roberts* through Justice Harlan to *Brown* and into the 1990s. To understand my disagreement with Professor Kull's thesis, we must first carefully distinguish, as *The Color-Blind Constitution* often does not, among four different ways of differentiating by race. Governments may *classify* citizens by race for purposes of public health data or civil-rights monitoring, among others; they may make *distinctions* by race, using the data assembled by classification to target specific actions; they may *discriminate* by race, targeting some racial group or groups for unequal treatment; and they may *separate* or *segregate* by race, requiring some racial groups to remain apart from others.

Professor Kull argues that opposition to discrimination requires color blindness and color blindness alone. No other principle provides a clear alternative to unprincipled discrimination. If so, the differences between classification, distinction, discrimination, and segregation are unimportant, indeed meaningless; once government has arrogated to itself the power to create racial classifications, it has no firm stopping point other than its own whim. Classification leads directly to discrimination and thus, by implication, to segregation. But I argue that opposition to *segregation*—that is, *separation implying a caste relationship*—is equally plausible as the vital principle in our anti-racist constitutional tradition. Thus, contrary to Professor Kull's theses, opposition to caste does offer a principled, workable alternative to color blindness on the one hand and unprincipled racial spoilsmanship on the other.

To illustrate this argument, let us return to the fountainhead of the tradition, as set forth by Professor Kull: Charles Sumner's masterful argument in *Roberts v. City of Boston*.²⁷¹ The longest part of that brief devoted itself to a denunciation of "the heathenish relation of Caste."²⁷² Drawing on the contemporary scholarship of the subject, Sumner defined caste as "'not only a distinction by birth, but [one] founded on the doctrine of an essentially distinct origin of the different races, which are thus unalterably separated.'"²⁷³ Sumner's attack on caste, which Professor Kull too readily dismisses,²⁷⁴ formed the heart of his argument that segregation of the races violated the Massachusetts Constitution.

Sumner's definition bears a striking relation to those put forward by more recent scholars. The eminent American anthropologist A.L. Kroeber defined caste as "an endogamous and hereditary subdivision of an ethnic unit occupying a position of superior or inferior rank or social esteem in

271. 59 Mass. (5 Cush.) 198 *passim* (1849); see *supra* note 114 and accompanying text.

272. Sumner, *supra* note 104, at 508.

273. *Id.* at 134 (citation omitted).

274. See *supra* note 115 and accompanying text.

comparison with other such subdivisions."²⁷⁵ In 1944, Gunnar Myrdal chose the concept of caste to describe black-white relations in the United States because the term implied "a relatively large difference in freedom of movement between groups," particularly in marriage relations.²⁷⁶ A person born into one American "race"²⁷⁷ was, at least in theory, never able to move into another, which Myrdal considered a defining characteristic of a caste system.²⁷⁸ Andre Beteille, an anthropologist at the University of Delhi, recently found American attitudes toward race still quite comparable to Indian views on caste.²⁷⁹ The similarities include an insistence that the separated groups differ in bodily substance, a desire to bar men of the subordinated group from access to women of the superior group,²⁸⁰ and a "prevalence of values and symbols relating to blood and natural substance, and beliefs regarding the strong constraints imposed by them on human character and conduct."²⁸¹

I believe that it is possible to divine a consistent opposition to this type of relationship—hereditary and lifelong, based on a pseudobiological belief in rigid racial differences, and requiring permanent physical separation of the races, particularly in marriage and sexuality—in the record Professor Kull has assembled to support color blindness. It begins in Sumner's argument that requiring separation of the races in schools implies a caste system. The caste theme carries through to Justice Harlan's dissent, in which he makes clear his opposition to enforced separation of the races in a context that implied the inferiority of one of them and the possibility that the dominant race would be "polluted" by contact with its inferiors: "There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."²⁸² As noted above, caste is the heart of Gun-

275. A.L. Kroeber, *Caste*, 3 *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 254 (1930). In 1968, Gerald D. Berreman wrote that "this definition has not been significantly improved upon." Gerald D. Berreman, *The Concept of Caste*, 2 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 333 (1968). Berreman, who had studied race relations in segregated Birmingham, Alabama, brought his insights to bear on the Indian caste system and found the two systems strikingly similar. Gerald D. Berreman, *Caste in India and the United States*, 66 *AM. J. SOC.* 120, 127 (1960).

276. MYRDAL, *supra* note 225, at 667-68.

277. "[R]ace' is . . . inappropriate in a scientific inquiry, since it has biological and genetic connotations which are incorrect in this context and which are particularly dangerous as they run parallel to widely spread false racial beliefs." *Id.* at 667.

278. *Id.* at 668.

279. Andre Beteille, *Race, Caste and Gender*, 25 *MAN* 489, 491-500 (1990).

280. *Id.* at 491-94.

281. *Id.* at 494.

282. *Plessy v. Ferguson*, 163 U.S. 537, 559 (Harlan, J., dissenting). Justice Harlan drew inspiration, in part, from the brief of Albion W. Tourgee, who, with Samuel Field Phillips, represented Homer Plessy. Segregation in transportation, Tourgee wrote, was "a discrimination intended to humiliate and degrade the former subject and dependent class—an attempt to perpetuate the caste distinctions on which slavery rested." Brief for Plaintiff in Error at 36, *Plessy* (No. 210).

nar Myrdal's conceptual scheme for understanding American segregation.²⁸³ The *Brown* Court's citation of Myrdal, then, does not represent a flimsy and historically contingent finding that racial groups cannot enjoy equal educations in separate schools, as Professor Kull suggests.²⁸⁴ Instead, the citation stands for the proposition that separation stamps the relationship between black and white as an unequal caste relation, to the lasting detriment of black children. Since *Brown*, the Court has repeatedly adverted to a prohibition of caste distinctions in American constitutional law.²⁸⁵ Constitutional scholars, too, have discerned this thread in our tradition.²⁸⁶

283. MYRDAL, *supra* note 225, at 667-88.

284. *See supra* note 226 and accompanying text.

285. *E.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 527 (1989) (quoting ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 133 (1975) ("[A] quota is a divider of society, a creator of castes."); *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 469 (1988) (stating that the "intent of Fourteenth Amendment was to abolish caste legislation"); *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 647 (1987) (citing Kathleen Sullivan, *The Supreme Court—Comment, Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 96 (1986), for the idea that employers might adopt affirmative action schemes to eliminate *de facto* systems of racial caste); *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 471 (1985) (observing that the Fourteenth Amendment prohibits "castes created by law along racial or ethnic lines"); *Plyler v. Doe*, 457 U.S. 202, 213 (1982) (arguing that the Equal Protection Clause was intended to abolish all caste-based legislation); *DeFunis v. Odegaard*, 416 U.S. 312, 343 (1974) (stating that a segregated admissions process creates suggestion of caste system despite its contrary intention); *Furman v. Georgia*, 408 U.S. 238, 255 (1972) (Douglas, J., concurring) (arguing that equal protection under the law precludes any caste aspect of law enforcement and comparing Hindu caste law where severity of sentencing is inversely proportional to accused's social rank); *Bell v. Maryland*, 378 U.S. 226, 288 (1964) (holding that denying Negroes of access to public accommodations would perpetuate a caste system prohibited under the Civil War Amendments); *Wright v. Rockefeller*, 376 U.S. 52, 62-64 (1964) (comparing racial gerrymandering of Manhattan's Seventeenth Electoral District—the so-called "silk stocking" district on the Upper East Side—to British electoral divisions along caste lines in colonial India).

286. The most consistent work on caste has come from Professor Kenneth Karst of the University of California at Los Angeles. *See* KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 43-49 (1989) [hereinafter KARST, *BELONGING TO AMERICA*]; *see also* Kenneth L. Karst, *Citizenship, Race and Marginality*, 30 WM. & MARY L. REV. 1, 2 (1988) (explaining that the aim of the Civil War amendments was to rid the nation of slavery and caste); Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 321 & n.112 (1986) (describing Jim Crow laws and private discrimination—including lynching—as a caste system); Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 511, 515 n.64 (1991) (stating that the function of white militia was to reinforce caste system); Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 466-67 (explaining how facially neutral legislation can reinforce a caste system). For other scholarly discussions of this concept in equal protection law, *see, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 350-51 & n.151 (1987) (stating that the underlying meaning of *Brown* was that segregation was a system designating castes); Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 770 (1991) (arguing that to claim discrimination is to seek elimination of caste-like system); Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 600 (1993) (stating that *de jure* and *de facto* discrimination contributed to maintenance of caste system). Much of this work was available when Professor Kull was

How would an anti-caste principle work in deciding racial cases? I believe it would ask certain key questions inherent in the concept of caste, including: Does the challenged measure require or strongly suggest the necessity of physical separation of the races? Does it carry with it the implication of inborn, biological differences between the races that might cause cross-racial contamination unless enacted into law? Does it aim to maintain the biological and social distinctness of racial groups, instead of facilitating assimilation? And does it imply a relationship of superior to inferior between the racial groups? I do not claim that the historical record compels such a test of race-conscious measures, nor that the test is the only working principle inferable from our history. But the test flows at least as clearly from the evidence assembled by Professor Kull as does his competing principle of color blindness. Needless to say, the two principles are not the same.

Consider how each would confront the question raised in *Shaw v. Reno*,²⁸⁷ discussed above.²⁸⁸ Color blindness would note that the redistricting plan took note of race and, without further inquiry, strike it down. Color blindness would permit state legislatures to use any criterion—economic factors, protection of incumbents, and explicitly partisan interests—except that of increasing the relative concentration of voters of either race in certain districts. Caste-consciousness would instead note that the plan embodied no presumption of permanence greater than any other such plan; that black and white voters were mingled within the district in roughly equal numbers; and that the plan was designed to facilitate the mixing of blacks and white both in the political process and within the state's previously all-white Congressional delegation. Caste-consciousness might even discern echoes of caste-based discrimination in the white appellants' argument that they are "injured" by being included in a district with a slight black majority. Note that a caste-conscious analysis does not necessarily answer the question posed by *Shaw*. Caste consciousness would not allow every race-conscious remedial plan: the more the plan embodied an idea of permanent entitlement to differing spheres of economic or political control, the more likely it would be to run afoul of the anti-caste principle. Caste consciousness, however, does mandate a different, and more complicated, judicial inquiry than does the per se rule of color blindness.

writing *The Color-Blind Constitution*. Of course, he is under no obligation to accept the anti-caste thesis as a valid alternative to color blindness, but his failure to grapple with it is similar to his failure, noted earlier, see *supra* notes 17-18, 259-67 and accompanying text, to admit the existence of alternatives to his thesis.

287. 113 S. Ct. 2816 (1993).

288. See *supra* notes 1-13 and accompanying text.

Such an approach, which takes account of history and of inequality, would provide a more flexible, and more just, approach to racial questions than a rigid rule of color blindness. At the very least, it offers an alternative to color blindness that cannot be considered a mere ad hoc set of policy preferences.²⁸⁹ Flexibility and discretion, however, are concepts that trouble Professor Kull. "A constitutional rule actually capable of constraining political results, not merely subjecting them to judicial oversight," he writes, "must either require the government to classify its citizens by race or else forbid the practice: there is no middle ground."²⁹⁰

The clarity of color blindness, I believe, forms the heart of its enduring appeal. In the next section, I will consider the durability, and illusory nature, of that appeal.

VIII. COLOR BLINDNESS AND THE WILL TO BELIEVE

The gas lamps flare anew; our seance is done. In the darkness we have heard a circling smoke of many words. Professor Kull insists the spirits were speaking of color blindness; I heard the word caste; others have heard other things, including race-conscious remediation and affirmative action. Yet even many skeptics must admit that, huddled hand in hand in the darkness, we felt the wish to hear what Professor Kull and others have heard. Color blindness may not be the command of our constitutional tradition; but how we wish it were! If, as I suggest, color blindness is not consistently embodied in the record, what then accounts for the persistence of its appeal?

Some critics dismiss the very idea of color blindness as disingenuous and hostile to racial equality: "[M]odern color-blind constitutionalism supports the supremacy of white interests and must therefore be regarded as racist."²⁹¹ And there can be no doubt that many of its more facile contemporary invocations support concealed racism. For example, James J. Kilpatrick, former arch-ideologue of segregation and white supremacy,²⁹² wrote early in 1993, "I worry about racial tensions, and I worry that all the posturing gestures of 'diversity' and 'multiculturalism' and 'affirmative action' are making bad matters worse. Our country ideally should be color-blind. We have become color obsessed."²⁹³ No one even remotely familiar with

289. *But see* ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (1975) (stating that all racial distinctions create caste distinctions).

290. KULL, *supra* note 2, at 223.

291. Gotanda, *supra* note 7, at 62-63.

292. *See, e.g.*, Garrett Epps, *The Littlest Rebel: James J. Kilpatrick and the Second Civil War*, 10 *CONST. COMMENTARY* 19 *passim* (1993) (recounting Kilpatrick's role as chief ideologist of Southern "massive resistance" to Brown).

293. *Id.* at 20 n.3 (quoting James J. Kilpatrick, *Columnist's (Kind of) Farewell*, *THE REGISTER-GUARD* (Eugene, Or.), Jan. 3, 1993, at B2).

Kilpatrick's earlier views²⁹⁴ can be deceived about his color-blind agenda.²⁹⁵ Other advocates of color blindness are simply ignorant—and, as so often follows from ignorance, to that degree contemptuous—of the history of subordination of non-white racial groups in the United States. In 1979, then-Professor Antonin Scalia wrote:

[M]any ethnic white groups that came to this country in great numbers relatively late in its history—Italians, Jews, Irish, Poles— . . . not only took no part in, and derived no profit from, the major historic suppression of the currently acknowledged minority groups, but were, in fact, themselves the object of discrimination by the dominant Anglo-Saxon majority.²⁹⁶

Although Professor Scalia admits that “in relatively recent years” these ethnic groups have benefitted from racism and practiced it themselves, he implies that because of this relative guiltlessness, these ethnic groups have no obligation to suffer any “deprivation” in order to facilitate affirmative action on behalf of African Americans:

[T]o compare their racial debt . . . with that of those who plied the slave trade, and who maintained a formal caste system for many years thereafter, is to confuse a mountain with a molehill. Yet curiously enough, we find that in the system of restorative justice established by the [Judge John Minor] Wisdoms and the [Justice Lewis F.] Powells . . . , it is precisely *these* groups that do most of the restoring.²⁹⁷

Professor Scalia then suggests sarcastically that the Court should devise a “Restorative Justice Handicapping System”²⁹⁸ in which the ethnic

294.

In terms of enduring values—the kind of values respected wherever scholars gather, in the East no less than in the West—in terms of values that last, and mean something, and excite universal admiration and respect, what has man gained from the history of the Negro race? The answer, alas, is ‘virtually nothing.’ From the dawn of civilization to the middle of the twentieth century, the Negro race, as a race, has contributed no more than a few grains of sand to the enduring monuments of mankind.

JAMES J. KILPATRICK, *THE SOUTHERN CASE FOR SCHOOL SEGREGATION* 49-50 (1962).

295. It is of these disingenuous advocates of color blindness that historian John Hope Franklin writes,

Neither the courts nor the Congress nor the president can declare by fiat, resolution, or executive order that the United States is a color-blind society. . . . Those who insist that we should conduct ourselves as if such a utopian state already existed have no interest in achieving it and, indeed, would be horrified if we even approached it.

JOHN H. FRANKLIN, *THE COLOR LINE: LEGACY FOR THE TWENTY-FIRST CENTURY* 45 (1993).

296. Antonin Scalia, *The Disease as Cure: “In order to get beyond racism, we must first take account of race,”* 1979 WASH. U. L.Q. 147, 152.

297. *Id.*

298. *Id.*

groups he sees as less guilty would bear lesser handicaps than “the English.”²⁹⁹

But, having discounted the strictures of the racist on the one hand and the ignorant or contemptuous on the other, we are left with a substantial body of opinion, held by those whose opposition to racism and discrimination cannot be faulted, arguing that color blindness acts as both the only moral and the only effective response to ongoing racism in our society. I believe there are two main reasons why color blindness has such appeal. First, its elegance as a principle—embodied in the title of the best single account of *Brown*, Richard Kluger’s *Simple Justice*³⁰⁰—makes it easy to understand. It seems so little for anyone to ask, and it embodies the wish Martin Luther King, Jr. expressed for his children during the 1963 March on Washington: “I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.”³⁰¹ This demand resounds powerfully with the American ideology of individualism—the idea that in this new land each individual is, or should be, judged only by his or her character and deeds, and not by color, race, religion, ethnicity, or class.³⁰² Flawed though we may concede this mythology to be, it is hard for Americans to give it up completely—nor is it certain that our country or the world would be a better place if we were to do so.

Allied with the argument of individualism is an argument more closely grounded in law as a tradition. That argument was summed up by Wendell Phillips in 1846, who wrote in rebuke to Peleg Chandler’s support for school segregation, “Let me tell this young official that the moment the element of color mingles in any question, no confidence can be replaced in any American court.”³⁰³ Professor Kull writes that the color-blind argument may be construed as

the product . . . of a radical skepticism about our political capabilities where race is concerned. Because neither legislators nor judges may be trusted to choose wisely in this vexed area, and because we know that racial classifications are often highly injuri-

299. *Id.* at 152-53. For a response to Professor Scalia’s “historical” account of racism, see KARST, *BELONGING TO AMERICA*, *supra* note 286, at 166-67 (recounting history of ethnic discrimination by recent groups of white immigrants to demonstrate that “Scalia’s attack . . . is folklore, not history”).

300. KLUGER, *supra* note 243.

301. SITKOFF, *supra* note 255, at 164.

302. See KARST, *BELONGING TO AMERICA*, *supra* note 286, at 167 (explaining that Scalia’s attack on affirmative action invokes the American individualist tradition that “I owe no man anything, nor he me, because of the blood that flows in our veins”).

303. LEVY, *supra* note 97, at 323 (quoting the *Report of the Minority of the Committee of the Primary School Board, on the Caste Schools of the City of Boston with some Remarks by Wendell Phillips on the City Solicitor’s Opinion* 29 (1846)).

ous, our only safety lies in foreclosing altogether a power of government we cannot trust ourselves to use for good.³⁰⁴

It would be hard to find racism in this argument. No one can scan the record of American legal sophism, hypocrisy, and deceit on racial matters—the Court eviscerating the Civil War amendments and closing its eyes to the brutal reality of segregation—without feeling a strong impulse to take lawyers and courts out of it forever. If courts can misread the Fourteenth Amendment to allow segregation, they can misread any guarantee of racial equality, no matter how explicit, circumstantial, and detailed. Thus, the argument runs, it would be better both for Americans of all races and for the internal integrity of law and courts to take the question away from law altogether.

The argument that courts cannot deal with racial classifications in a principled way, however, depends for its force on a reader's acceptance of Professor Kull's scornful summary of *Brown* and the post-*Brown* jurisprudence. For those who, like me, see the decisions of the Warren and (to a lesser but still significant extent) Burger Courts as well as many lower federal courts in this area as a proud span of American legal history, the argument is less convincing. Whether convincing or not, the argument is profoundly anti-legal, one that comes close to the "nihilism" of which adherents of critical legal studies are often accused.³⁰⁵ It also, undoubtedly unconsciously, echoes the arguments made by advocates of race-consciousness who contend that society can never "get beyond" race and therefore must make the racial nature of its rules explicit.³⁰⁶

Professor Kull dismisses the Supreme Court's civil rights and affirmative action decisions as merely embodying the standardless notions of any five Justices as to what is "reasonable."³⁰⁷ This dismissive description, however, can be applied to *any* area of constitutional law, or indeed of any kind of law. Courts, by and large, exist to make distinctions and interpretations based on the facts and law in individual cases. To dismiss those interpretations as empty and harmful because they do not fit a rigid per se rule challenges the very idea of a legal system. Unless one believes that the Court's past forty years of racial jurisprudence embody nothing but an unprincipled, politically driven, ad hoc commitment to racial spoilsmanship, one is obligated to dig more deeply into the cases to discern potential con-

304. KULL, *supra* note 2, at 5.

305. See, e.g., Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 *passim* (1984).

306. See, e.g., DERRICK A. BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM passim* (1992).

307. See KULL, *supra* note 2, at 5.

traditions and similarities than Professor Kull has done in *The Color-Blind Constitution*.

As a white American who came of age during the Southern civil rights movement, I feel the resonance of the arguments for color blindness. Whatever their merit as political or moral propositions, they are, as *constitutional* arguments, profoundly flawed. The color-blind argument, as summarized by Professor Kull, holds that "the United States Constitution prohibits (or should prohibit) racial classification by the agencies of government."³⁰⁸ Such a broad prohibition, if enunciated by the Court as doctrine, would be remarkable in any area of constitutional law; in this one, where it has absolutely no textual justification, it would be a bizarre act of isegesis.³⁰⁹ The Constitution does contain some prohibitory language almost as broad;³¹⁰ yet even such a seemingly categorical prohibition has been held not to prohibit the government from penalizing libel,³¹¹ obscenity,³¹² "fighting words,"³¹³ child pornography,³¹⁴ and many other exercises of speech. It would be extraordinary to find that racial classifications, nowhere forbidden in the document, were subjected by the emanations of constitutional spirits to a disability broader than that textually guaranteed for speech regulations.

As Professor Kull himself notes, "there is an undeniable irony . . . in applying a rule of nondiscrimination to frustrate measures designed (however imperfectly) to promote equality of condition for black Americans as a group."³¹⁵ The irony (akin to the familiar playground injustice of smiting a rival at tag just as the lunch bell sounds and then piously crying "no tag-backs" under the teacher's watchful eye) heightens when the history is summarized this way: Having, for more than two hundred years, found

308. *Id.* at vii.

309. See generally William Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209 (1983) (arguing, in a different context, that this sort of isegetical exercise should never form the basis for a constitutional decision by the Court).

310. "Congress shall make *no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I (emphasis added).

311. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (holding that although the First Amendment applies to libel actions, libelous speech directed at public officials is not protected if uttered with "actual malice").

312. *Miller v. California*, 413 U.S. 15, 23 (1973) (finding that obscene material is not protected by the First Amendment).

313. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (noting that states may punish expressions that injure or threaten the peace).

314. *New York v. Ferber*, 458 U.S. 747, 762-64 (1982) (holding that pornography depicting children is not protected by the First Amendment).

315. KULL, *supra* note 2, at ix.

permissible a wide variety of explicitly racial measures designed to maintain white supremacy, a white-dominated court system now draws from the ectoplasm a uniquely broad, non-textual prohibition on any race-conscious measure designed to break it down. Though trusting the courts with racial discretion carries with it an undeniable danger of social divisiveness, snatching discretion away at just this moment poses, I submit, a far greater peril to justice and domestic peace.

Even if a command of color blindness were adequately grounded in text and case law, I question whether it could prove workable in practice. Let us not beat, calling it color blindness, the straw argument that government might not collect racial data to assess whether discrimination was taking place in the private sector or to monitor public health. Principled color blindness would surely claim that government could not use racial data to distribute burdens and benefits—or would it? Consider the advent of a disease that affects racial groups differentially, and for which a vaccine is one hundred percent effective but highly costly. Would anyone suggest that race-based public health data could not be used to assess which citizens should be given the vaccine within the constraints of available funding? If members of one racial group were many times more likely to contract the disease, would it not make sense to make sure that they were immunized first? Would a color-blind court hold that the vaccine must be given to all, or that, failing the funds to do so, it must not be given to the affected racial minority? Surely color-blind advocates would not oppose such a vaccination program.³¹⁶ Such a program, they might admit, creates no invidious discrimination and does not invade any privilege to which the majority is entitled. It is, in short, reasonable; it is not discriminatory; it creates no caste distinction. At any rate, it passes whatever test may be proposed. Without being unnecessarily reductive, one can argue that the difference of opinion is not between those who advocate a true per se rule and those who favor a flexible test, but centers on what the flexible test should be. Color-blind advocates, so called, are those who would draw it most narrowly.

Professor Kull's argument that racial preferences are harmful to racial equality³¹⁷ is a strong and effective policy contention, and as such should be addressed to legislative bodies. Judicial adoption of the color-blind message from the spirit world to pre-empt public debate on these ideas

316. For a discussion of a similar racial conundrum involving public health, see DERRICK A. BELL, "AND WE ARE NOT SAVED": THE ELUSIVE QUEST FOR RACIAL JUSTICE 162-67 (1987).

317. "[V]isible and controversial affirmative action policies spend the limited political capital available for 'programs to help blacks' on measures that do little or nothing to improve the condition of those black Americans in whose name the modern civil rights agenda is consistently advanced." KULL, *supra* note 2, at 221.

would be wholly illegitimate, a kind of racial *Lochner*³¹⁸ that would retard, perhaps fatally, both racial equality and the legitimacy of the Court.

Professor Kull suggests that color blindness was abandoned in the 1960s, but that road was forsaken long before. It could have been chosen in 1619, or in 1787, or in 1865, or in 1897; but it was not. Had Justice Harlan's color blindness been the holding in *Plessy*, America today might be a more just and happy place. But we live today, as Justice Harlan did then, in a society shaped and created in countless ways by governmental decisions taking account, explicitly or silently, of race. Whatever the spirits may tell us during our seance, when the lights go on again, we find ourselves in today's America, where racial relations remain a nightmare from which we are trying to awaken.³¹⁹ Though, as with all nightmares, the temptation to do so is great, we cannot awaken by closing our eyes.

318. *Lochner v. New York*, 198 U.S. 45 (1905), *overruled by Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952).

319. "History is a nightmare from which I am trying to awake." JAMES JOYCE, *ULYSSES* 34 (New Random House 1961) (1922).

