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The Acontextual Illusion of a Color-Blind Constitution Book Review

Bryan K. Fair
University of Alabama - School of Law, bfair@law.ua.edu

Book Review

The Acontextual Illusion of a Color-Blind Constitution

The Color-Blind Constitution
By Andrew Kull*
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Reviewed by BRYAN K. FAIR**

I. Background: The Colorblindness Dilemma in the Twenty-First Century

A. The Significance of Race in the United States

Suppose there were a national referendum in which you were asked to honor the following pledge:

> I shall never tolerate in my life or in the life or practices of my government the differential treatment of other human beings by race. I shall never favor any person or treat anyone less well than another for being Black, White, Brown or Red.[1]

Would you agree to live by such a pledge? How would it change the way you live? Another way to ask the same questions is to ask, are you color-blind? Or, does race influence how you vote, where you live, who you date or wed, the schools you or your children attend, the church or social clubs with which you affiliate, or your employment opportunities?

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* Associate Professor of Law, Emory University School of Law.

** Assistant Professor of Law, University of Alabama School of Law; B.A., Duke University, 1982; J.D., U.C.L.A. School of Law, 1985.

1. I borrow the language for this pledge from William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809-10 (1979).

I have consistently employed the upper case when using the labels "Black" and "White." I believe that racial equality requires that we use proper nouns to designate all racial groups. Also, the term Black is frequently used interchangeably with the terms African-American and Negro, and the term White is frequently used in place of the terms Caucasian and Anglo-European. Finally, the labels seem to have significant meaning beyond chromatic colors.

I know I am not color-blind. I think colorblindness is antithetical to our achievement of racial equality. Indeed, I agree with Professor Cornel West that *Race Matters*.[2] I have known personally the extreme poverty and self-shame about which Professor West has so eloquently written. My cumulative life experience has occurred between Black and White communities. I have lived in segregated housing and attended segregated schools. I too have been left standing in the street by empty taxis, refused accommodations in motels with vacancies and turned away from dance clubs because it was not "my" night. I have learned through lived experiences that people are not color-blind.

Most of my experiences with color awareness relate to private conduct or custom which is too frequently beyond the reach of law. Indeed, our national race jurisprudence has embraced as real the distinction between public and private racial discrimination.[3] I think such a distinction is artificial. State action is arguably present whenever the state approves or fails to prohibit race-based acts or decisions by individuals that promote the subordinate status of others, or that place others in a position of a caste. As Professor Kenneth Karst has suggested, Blacks, or for that matter any other racial group, have the right to be treated by organized society as participating members who belong to the national community.[4] It seems illogical that we can see and act by race in the morning and then turn a blind eye to race in the afternoon.

Yet, even if I accept the public/private paradigm that has been part of our constitutional law since at least 1883,[5] that only leads to several related questions: Does the United States or your state have a constitutional tradition of colorblindness? Does the United States Constitution prohibit all racial classifications by government agencies, or just unreasonable racial classifications? Does the Constitution prohibit government agencies from taking affirmative steps to eliminate racial caste in the United States? These latter questions, which have faced this Nation since its inception, are

2. CORNEL WEST, RACE MATTERS (1993). Professor West correctly identifies Black poverty and self-hate as the essential targets of public policies if this nation is to halt the continuation of racial caste. *Id.* at 63-67.

3. *Compare* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) *with* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

4. Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 247-48 (1983). *See also* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1989).

5. The Civil Rights Cases, 109 U.S. 3, 13-14 (1883) (holding that several provisions of the 1875 Civil Rights Act were unconstitutional because they were directed at private individuals not the state).

the subject of Andrew Kull's important and fascinating new book, *The Color-Blind Constitution*.[6]

The book is important because it is the first to extensively examine the doctrine of colorblindness as a rhetorical theme in legal advocacy. Several notable law review articles have addressed the topic, including works by Neil Gotanda,[7] David Strauss,[8] Laurence Tribe,[9] William Van Alstyne,[10] Paul Brest,[11] John Hart Ely[12] and John Kaplan.[13] The book is fascinating because Professor Kull focuses the reader on the substantial irony in interpreting Fourteenth Amendment equality jurisprudence to prohibit remedial action on behalf of Blacks; yet he fails to resolve the irony or to explain why no solution is necessary. In other words, the colorblindness paradox remains.

The Color-Blind Constitution is also rich in historical detail and rigorous analysis of race law, and would therefore complement any examination of race and the Constitution. Professor Kull's most valuable contribution is his construction of the legal genealogy of colorblindness as a theme in the writing of some abolitionists, lawyers and state judges as early as the 1830s. Prior to his book, most writers began their analysis of the colorblindness doctrine with Justice John Marshall Harlan's famous dissent in *Plessy v. Ferguson*.[14]

Kull presents the book as a story in legal history rather than one about the contemporary affirmative action debate. Actually, Kull tells the legal history as a prelude to his views regarding the affirmative action debate. His critique is that colorblindness was a rhetorical theme articulated by civil rights activists for over 120 years until the late 1960s when they did an

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

7. Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 1-3 (1991) (examining the ideological content of the phrase "Our constitution is color-blind").

8. David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 100-13 (discussing the doctrinal consistency between affirmative action and antidiscrimination principles).

9. Laurence H. Tribe, *In What Vision of the Constitution Must the Law Be Color-Blind?*, 20 J. MARSHALL L. REV. 201, 203 (1986) (discussing Justice Harlan's view that the Fourteenth Amendment prohibited government laws enshrining White supremacy).

10. Van Alstyne, *supra* note 1, at 809 (arguing in support of colorblindness).

11. Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 1-2, 16-23 (1976) (arguing against the colorblindness standard).

12. John H. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974) (arguing against the use of a strict colorblindness model when a political or racial majority discriminates against itself).

13. John Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U. L. REV. 363 (1966) (arguing against the use of race as a basis for special treatment for Blacks in the employment context).

14. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954).

about-face and began to promote "compensatory racial preferences"[15] designed to "prevent discrimination being perpetuated and to undo the effects of past discrimination."[16]

Kull conjoins the efforts of abolitionists from the nineteenth century with efforts a century later by NAACP lawyers into a *continuous* civil rights movement that espoused a philosophy of nondiscrimination. This conjoining, I think, is generous to our history. Indeed, our history of civil rights reform has been cyclical and episodic at best.[17] Nonetheless, Professor Kull tells an interesting story about the struggle to define racial equality and the meaning of nondiscrimination in the United States. I agree with Kull that the issues raised in his book are likely to be a baseline for a significant portion of constitutional analysis and debate regarding the legitimacy of racial classifications well into the next century.[18]

B. The Supreme Court and the Modern Colorblindness Dilemma

The Supreme Court's decision last term in *Shaw v. Reno*[19] evidences that the questions raised by Professor Kull will occupy the Court for some time to come. In *Shaw*, five Justices held that a North Carolina reapportionment/redistricting plan, designed to create a second majority Black district out of the twelve districts in the state, was drawn "so extremely irregularly on its face that it rationally can be viewed only as an effort to segregate the

15. KULL, *supra* note 6, at viii.

16. KULL, *supra* note 6, at 181 (quoting United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 876 (5th Cir. 1966)).

17. Sometimes referred to as the First and Second Reconstruction, the periods between 1865-1875 and 1957-1968, respectively, mark the zenith of civil rights reform. Between 1865 and 1875, Congress enacted the Thirteenth, Fourteenth and Fifteenth Amendments, as well as the Freedmen's Bureau Act of 1865, and the 1866, 1870, 1871 and 1875 Civil Rights Acts. Between 1957 and 1968, Congress enacted the 1957 and 1964 Civil Rights Acts, the 1965 Voting Rights Act and the 1968 Fair Housing Act. Professor Kull writes precious little about these significant amendments and statutes and how the need for such laws undermines the argument of a colorblind legal tradition.

18. I too have recently analyzed the problem of colorblindness. *See* Bryan K. Fair, *Foreword: Rethinking the Colorblindness Model*, 13 NAT'L BLACK L.J. 1 (1993). Professor Kull's book was published as my article went to press. The theses of my article are that our legal history reflects intense color awareness rather than colorblindness, jurists and commentators have taken the colorblindness language of Justice Harlan out of context, and current expositions of the colorblindness principle are inconsistent with the meaning intended by Justice Harlan. While I will not restate my earlier argument here, I do not embrace Professor Kull's views regarding colorblindness or affirmative action policy. This review attempts both a summary and critique of Kull's principal arguments.

19. 113 S. Ct. 2816 (1993).

races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification."[20]

The majority, relying on *Gomillion v. Lightfoot*,[21] concluded that persons objecting to such racial gerrymanders could challenge the schemes under the Equal Protection Clause of the Fourteenth Amendment.[22] Yet the Court also acknowledged that it has never held "that race-conscious state decisionmaking is impermissible in *all* circumstances."[23] Thus, as recently as June 1993, the Court has reiterated that while governmental racial classifications are disfavored, they are *not* per se invalid.[24]

Four Justices dissented in *Shaw*, concluding that the majority had ignored controlling precedent wherein the Court had rejected a claim that creating a majority-minority district violated the Constitution.[25] The dissenters relied principally on the Court's 1977 decision in *United Jewish Organizations, Inc. v. Carey*[26] to argue that the notion that North Carolina's plan, under which Whites remained a voting majority in a disproportionate number of congressional districts, might have violated the appellants' constitutional rights, is both a fiction and a departure from settled equal protection principles.[27] Professor Kull would probably agree with the result reached in *Shaw*, but I am certain he would object to the Court's reasoning because he advocates a constitutional ban on all racial classifications, including benign racial classifications favoring previously disfavored racial minorities.[28]

Although it is clear from the final pages of his book that Professor Kull is sensitive to the persistence of racial caste in the United States and that he appreciates the irony in adopting race-neutral principles to eradicate such

20. *Id.* at 2824. Justice O'Connor delivered the opinion of the Court, joined by Chief Justice Rehnquist, and Justices Scalia, Kennedy and Thomas.

21. 364 U.S. 339 (1960). In *Gomillion*, the Alabama Legislature redefined the boundaries of the city of Tuskegee "from a square to an uncouth twenty-eight-sided figure" that excluded 99% of the Black voters from the city limits. *Id.* at 340-41.

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

23. *Id.*

24. *Id.* at 2825-28.

25. *Id.* at 2834-49. Justices White, Stevens, Blackmun and Souter each filed dissenting opinions.

26. 430 U.S. 144 (1977).

27. *Shaw*, 113 S. Ct. at 2834.

28. KULL, *supra* note 6, at 220-23. Thus, I believe Professor Kull would object to the Court's acceptance of the use of racial classifications in student and faculty assignments in public schools. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). In *Swann*, Chief Justice Burger, writing for a unanimous Court, explicitly rejected the contention that school authorities could not use racial classifications in assigning faculty to various schools. 402 U.S. at 19. *See also* Davis v. Board of Sch. Comm'rs, 402 U.S. 33, 35 (1971).

caste,[29] his book does not provide a way out of the colorblindness conundrum.[30] Kull's book would be far more significant if he had said directly what is to be done about racial caste in the United States. And if his answer is nothing, he should have said so explicitly and then explained why that is fair. Thus, while I benefitted from Kull's fine research, I expected and wanted more from the book.

I have tried to explain previously why I think constitutional colorblindness is unfair and should be rejected in constitutional theory.[31] I do not believe we will attain racial equality until we interpret our Constitution as proscribing racial caste and placing on government an affirmative duty to eradicate it. Below, I shall not repeat my prior argument, but instead critique Kull's theses. I proceed by the order of his chapters, although the headings are my own.

II. The Book Review

A. Introduction—The Genealogy of Colorblindness Rhetoric

The purpose of Kull's book is "to locate the sources of the constitutional argument for radical nondiscrimination, 'colorblindness,' and to trace its subsequent manifestations."[32] Kull has achieved his purpose better than any previous writer. By way of his Introduction, Kull makes a number of preliminary points. In the most significant of these, he finds the principal themes of the colorblindness dilemma in the brief of Charles Sumner, attorney for the plaintiff, and in the opinion of Chief Justice Lemuel Shaw in *Roberts v. City of Boston*[33] almost fifty years before the U.S. Supreme Court entertained the subject.[34] Thus, well before Justice John Marshall Harlan said, "Our constitution is color-blind,"[35] lawyers and jurists had

29. KULL, *supra* note 6, at 222-23.

30. The *Shaw* majority opinion illuminates the many methodological infirmities of the colorblindness principle advocated by Professor Kull. Neither the Court nor Kull provides a constitutional formulation to eliminate racial caste. Nor do they significantly address the factual contexts of segregation and racial discrimination by Whites against Blacks that provided the backdrop for calls of nondiscrimination or colorblindness. Thus, in *Shaw* the majority writes virtually nothing about grandfather clauses, all-White primaries, literacy tests, poll taxes or other schemes adopted to prevent Blacks from voting. Even worse, the Court's principal reference to an example of racial discrimination against Blacks, Gomillion v. Lightfoot, 364 U.S. 339 (1960), is now used to prevent the state from drawing districting lines in a manner likely to result in the election of a second Black congressional representative. The Court announces that *Shaw* and *Gomillion* are cut from the same cloth in the same way that Kull announces that segregation against Blacks and affirmative action "favoring" Blacks are the same, that is, unjust. Meanwhile, racial caste persists.

31. *See* Fair, *supra* note 18, at 64-73.

32. KULL, *supra* note 6, at 2.

33. 59 Mass. (5 Cush.) 198 (1849).

34. KULL, *supra* note 6, at 2-5.

35. *See infra* notes 120-123 and accompanying text.

given voice to arguments for and against the use of racial classifications.[36] Professor Kull writes, "The Supreme Court today exercises an unconstrained discretion in determining the permissible and impermissible uses of race."[37] Kull is right that this authority is the legacy of *Plessy v. Ferguson*,[38] yet he fails to acknowledge that it has been national orthodoxy since the middle of the seventeenth century.[39]

B. Chapter One—Color Awareness and the Constitution

Professor Kull correctly states that "[a] constitution that admitted Negro slavery did not make a promising charter of nondiscrimination . . . ."[40] But Kull further points out how in 1778, in the course of the debate over proposed amendments to the Articles of Confederation, delegates to the Continental Congress defeated a proposal to add the term "White" to the Comity Clause of Article IV.[41] Professor Kull further contends that the language in Article IV supports a restriction on the freedom of states to distinguish between citizens on the basis of race.[42] Yet, he acknowledges it would be an overstatement to conclude that the Comity Clause defeat shows a "majoritarian" devotion to interracial equality.[43] Indeed, other provisions of the Constitution clearly were drafted as compromises to slavery.[44]

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36. KULL, *supra* note 6, at 2-5.

37. KULL, *supra* note 6, at 5.

38. KULL, *supra* note 6, at 5-6.

39. Our racial traditions in this country began well before 1787 or 1850. Indeed, the first 20 Black indentured servants were sold at Jamestown in August of 1619. By 1660 perpetual slavery for Blacks was institutionalized. And for over 100 years before our Constitution was adopted, Black slavery was commonplace and flourishing. *See* Fair, *supra* note 18, at 11-31.

40. KULL, *supra* note 6, at 7. I do not think the Constitution was a glorious liberty document, and it clearly was not interpreted as such with respect to Blacks, slave or free, or women. KULL, *supra* note 6, at 7-9.

41. KULL, *supra* note 6, at 9. Article IV, Section 2 of the Constitution provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

42. KULL, *supra* note 6, at 9.

43. KULL, *supra* note 6, at 9.

44. The historian William Wiecek compiled the following list of direct and indirect accommodations to slavery contained in the Constitution:

> 1. Article I, Section 2: representatives in the House were apportioned among the states on the basis of population, computed by counting all free persons and three-fifths of the slaves (the "federal number," or "three-fifths," clause);
>
> 2. Article I, Section 2 and Article I, Section 9: two clauses requiring, redundantly, that direct taxes (including capitations) be apportioned among the states on the foregoing basis, the purpose being to prevent Congress from laying a head tax on slaves to encourage their emancipation;
>
> 3. Article I, Section 9: Congress was prohibited from abolishing the international slave trade to the United States before 1808;

Here, and throughout his book, Kull tries to prove too much by reference to an isolated example of apparent racial sensitivity. Given the numerous indirect references to Black slavery in the text of the Constitution,[45] it is surprising that a legal historian of Kull's stature would deny or minimize its pro-slavery origins. The Constitution was a "glorious liberty document" only for some of our citizens, and only after significant further amendment did it become a jurisprudential benchmark for much of the rest of the world.[46]

The Color-Blind Constitution illustrates how difficult it is to reconstruct historical records and interpret them in context and without omission. Kull scrutinizes congressional records relating to the adoption and amendment of the Constitution, as well as state statutory provisions restricting the civil rights of Blacks.[47] He reminds his readers that our first national charter left race matters and civil rights significantly to state fiat, and many states acted affirmatively to restrict the civil rights of Blacks with increasingly repressive laws.[48] One very visible form of such laws was the Negro Seaman Act, "providing that free black sailors aboard out-of-state or foreign vessels . . . should be seized and imprisoned until their ships were ready to depart."[49] Such laws were in no sense color-blind and they did not violate the Constitution.

Kull also reminds the reader of the various state responses to defining citizenship. In that context, no case has had more significance than *Dred*

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4. Article IV, Section 2: the states were prohibited from emancipating fugitive slaves, who were to be returned on demand of the master;

5. Article I, Section 8: Congress was empowered to provide for calling up the states' militias to suppress insurrections, including slave uprisings;

6. Article IV, Section 4: the federal government was obliged to protect the states against domestic violence, including slave insurrections;

7. Article V: the provisions of Article I, Section 9, clauses 1 and 4 (pertaining to the slave trade and direct taxes) were made unamendable; [and]

8. Article I, Section 9, and Article I, Section 10: these two clauses prohibited the federal government and the states from taxing exports, one purpose being to prevent them from taxing slavery indirectly by taxing the exported product of slave labor.

DERRICK BELL, JR., AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 34-35 (1987). *See also* DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 26-30 (3d ed. 1992).

45. See *supra* note 44 for a discussion of indirect references to Black slavery in the Constitution.

46. The late Supreme Court Justice Thurgood Marshall made this point more concisely in *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987). He wrote that "[w]hen contemporary Americans cite 'The Constitution,' they invoke a concept that is vastly different from what the framers barely began to construct two centuries ago."

47. KULL, *supra* note 6, at 11.

48. KULL, *supra* note 6, at 11.

49. KULL, *supra* note 6, at 11.

Scott.[50] Although Kull does not say it explicitly, he cannot deny that the *Dred Scott* decision clearly demonstrated that the Court's interpretation of the meaning of citizenship was not color-blind. Whites had rights and privileges simply not enjoyed by Blacks, whether slave or free.[51]

Was the United States Constitution color-blind at the outset? Professor Kull says, yes.[52] But, in his view, it made little difference because the Constitution imposed only marginal limitations on the freedom of the states, North and South, to treat their citizens differently on the basis of race simply because the federal compact did not restrict the authority of the states in those areas of the law where racial discrimination was imposed or tolerated.[53] Kull all but admits that our Constitution provided virtually no protection to Blacks, slave or free, from state-sanctioned discrimination. This admission severely weakens his contention of a color-blind Constitution.

Professor Kull's statement at the end of the first chapter, "The Constitution was color-blind from the outset" is perplexing.[54] He argues that the text of the Constitution did not use racial classifications or race labels, such as Black or White. But that is really beside the point. What matters is that since well before 1787, one's racial classification in the United States has had significant influence on one's status and rights in the community.[55] Thus, our national tradition has been one of *color awareness*, not *colorblindness*.

C. Chapter Two—The Rejection of Colorblindness Before the Civil War

Professor Kull asserts that suffragists, abolitionists and radical Republicans who challenged Black laws as early as the 1830s advocated a policy of colorblindness.[56] Kull, however, does not appear to interpret such challenges contextually. For example, Ohio's "Black laws" denied the vote, hindered immigration, prohibited testifying in court and excluded Black

50. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 403-04 (1857) (holding persons of African descent were not intended to be included under the term "citizens" in the Constitution). *See also* KULL, *supra* note 6, at 15-20.

51. I think *Dred Scott* is the most important race case ever decided because it, more than any other, expresses the extreme national, racial antipathy toward Blacks in this country and their official outsider status. I have discussed *Dred Scott* more fully elsewhere. *See* Fair, *supra* note 18, at 22-25.

52. KULL, *supra* note 6, at 20-21. I strongly disagree with Kull on this point and I have explained more fully elsewhere that I do not think our Constitution has been interpreted through a color-blind lens. *See* Fair, *supra* note 18, at 64-73.

53. KULL, *supra* note 6, at 20.

54. KULL, *supra* note 6, at 20.

55. Fair, *supra* note 18, at 11-31.

56. KULL, *supra* note 6, at 22-39.

children from public schools.[57] The arguments of abolitionists against such "Black laws" were made in a world infected with racial subordination of Blacks. If the Ohio laws were representative of those passed by other states, it seems improbable that many, if any, states have had a tradition of constitutional colorblindness.[58]

Kull does not prove then, that abolitionists or suffragists intended the term "colorblindness" as he uses it, i.e., as a strict rule banning racial classifications. Instead, he proves that a policy of constitutional colorblindness was repeatedly rejected in the courts and legislative chambers throughout the nation. In addition, calls for colorblindness, when placed in context, were actually calls for an end to the racial hegemony of Whites over Blacks. Kull's account, therefore, does not capture our history of racial domination.

Racial classifications have been the rule in the United States, not the exception. Thus, in 1839, after its anti-slavery fair in Lynn, Massachusetts, the Lynn Women's Anti-Slavery Society was vilified when it petitioned the Massachusetts legislature for repeal of "'all laws in this State, which make any distinction among its inhabitants, on account of *color*.'"[59] The ban on interracial marriages was the rule, and challenges to such rules led to public ridicule or ostracism.[60] Moreover, while it is true that Charles Olcott provided a catalogue of the anti-slavery principles[61] (including views that "the law should be equal for all,"[62] "it should abjure racial distinctions,"[63] and "the only sure guarantee of 'equal laws'. . . is to prohibit racial classifications"[64]) to suggest that such principles were embraced as the American ideal is an overstatement. In fact, some abolitionists were unopposed to legal restrictions on the civil rights of Blacks, even though they opposed slavery.[65] Kull acknowledges, for instance, how delicate interracial mar-

57. KULL, *supra* note 6, at 24-25.

58. There is ample evidence that Ohio had numerous role models for its Black codes. For a survey of such laws in Virginia, Massachusetts, New York, South Carolina, Georgia and Pennsylvania, see generally A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR (1978), and JOHN H. FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS (3d ed. 1967).

59. KULL, *supra* note 6, at 22, 23-26 (citation omitted). The apparent source of the ridicule was the fact that the primary Massachusetts law which contained a racial classification was the ban on interracial marriages. Thus, one group of males petitioned the legislature to permit their female counterparts "to marry . . . any Negro, Indian, Hottentot, or any other being in human shape, at their will and pleasure." KULL, *supra* note 6, at 23.

60. KULL, *supra* note 6, at 23.

61. KULL, *supra* note 6, at 27-29.

62. KULL, *supra* note 6, at 28.

63. KULL, *supra* note 6, at 28.

64. KULL, *supra* note 6, at 28.

65. A full exposition of the dissension among abolitionists regarding the civil rights of Blacks is beyond the scope of this review. However, one example of the division is the rift between Frederick Douglass and William Lloyd Garrison regarding Douglass' very public rela-

riage and school segregation issues were for abolitionists.[66] He correctly states that much of the contemporary argument against school desegregation dates at least to the 1840s.[67] Kull, however, does not demonstrate that abolitionists or suffragists were color-blind.

D. Chapter Three—The Prelude to *Plessy v. Ferguson*

Most analyses of the principle of colorblindness begin with a review of Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*, where he penned the phrase "Our constitution is color-blind."[68] Professor Kull has found the same nondiscrimination principle present in *Roberts v. City of Boston*,[69] the first judicial opinion on the lawfulness of segregation.[70] *Roberts* arose in Massachusetts after Sarah Roberts, a four-year-old Black child, was refused admission to the primary school nearest her home solely on the basis of her color.[71] Kull does not confront the profound implications of Roberts' exclusion. His failure to address issues of racial supremacy and racial caste weakens his critique.

Professor Kull writes:

> The ensuing debate over the lawfulness of segregation between Charles Sumner, attorney for the plaintiff, and Chief Justice Lemuel Shaw, author of the opinion for the Supreme Judicial Court [of Massachusetts], is more closely reasoned and more eloquently expressed than anything that lawyers and judges (Justice Harlan excepted) would again write on the subject; and it would prove to have defined, for a century and more thereafter, the constitutional arguments on either side of the question.[72]

According to Kull, Sumner was concerned with racial discrimination per se when he asked: "'Can any discrimination, on account of color or race, be made, under the Constitution and Laws of Massachusetts, among the children entitled to the benefit of our public schools?'"[73] Thus, in *Roberts*, Sumner focused on the unlawfulness and unreasonableness of segregation

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tionship with a White female friend. *See* WALDO E. MARTIN, JR., THE MIND OF FREDERICK DOUGLASS 40-48 (1984). Even some of the most ardent supporters of abolishing slavery could not envision a perfect equality between Blacks and Whites. *See* LAWRENCE LADER, THE BOLD BRAHMINS: NEW ENGLAND'S WAR AGAINST SLAVERY: 1831-1863, at 45-47, 117-19 (1961). *See generally* GARY B. NASH & JEAN R. SODERLUND, FREEDOM BY DEGREES: EMANCIPATION IN PENNSYLVANIA AND ITS AFTERMATH (1991).

66. KULL, *supra* note 6, at 23-24, 29-37.
67. KULL, *supra* note 6, at 37-39.
68. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
69. 59 Mass. (5 Cush.) 198 (1849).
70. KULL, *supra* note 6, at 40-41.
71. KULL, *supra* note 6, at 40.
72. KULL, *supra* note 6, at 40.
73. KULL, *supra* note 6, at 41 (citations omitted).

itself.[74] Because a system of segregated schools was in the nature of caste, it was unconstitutional, and compulsory segregation from the mass of citizens was itself an inequality according to Sumner.[75] Kull aptly demonstrates that many points articulated by later colorblindness advocates were marshalled by Sumner in 1850.[76]

Kull finds in Chief Justice Shaw's opinion for a unanimous Massachusetts Supreme Judicial Court the source of the "separate but equal" doctrine subsequently articulated by Justice Henry Brown in *Plessy*.[77] In addition, Kull argues that the essential legitimacy of reasonable racial classifications is traceable to Shaw's opinion in *Roberts*.[78] Chief Justice Shaw rejected a total ban on racial classifications, holding that governments must classify in order to legislate and that classifications need only be reasonable.[79] Chief Justice Shaw reasoned that because a school committee could teach children by age group or by sex, it could also provide for separate schools by race.[80] He rejected Sumner's implicit premise that "there is something uniquely bad about racial classification and that this form of discrimination . . . is inconsistent with American ideals."[81]

Professor Kull is correct that the Sumner-Shaw debate is substantially the same as that between Justices Brown and Harlan in *Plessy* four-and-one-half decades later. But he understates the significance of how resoundingly Chief Justice Shaw rejected colorblindness. Sarah Roberts lost. The Supreme Judicial Court of Massachusetts did not interpret the law as colorblind. Instead, Sarah's race could be used to exclude her from the local school. In context, *Roberts* means racial classifications are permissible, so long as they are reasonable. Therefore, *Roberts* is not a case establishing colorblindness as precedent.

Moreover, it is a mistake for Kull to suggest that Charles Sumner would have opposed racial classifications favoring former slaves. Indeed, Sumner and his comrade Thaddeus Stevens supported affirmative action legislation to give land confiscated during the Civil War to former slaves.[82]

74. KULL, *supra* note 6, at 41-43.
75. KULL, *supra* note 6, at 43, 45.
76. KULL, *supra* note 6, at 43-48.
77. KULL, *supra* note 6, at 48.
78. KULL, *supra* note 6, at 48.
79. KULL, *supra* note 6, at 50.
80. KULL, *supra* note 6, at 51.
81. KULL, *supra* note 6, at 51-52.
82. *See* MOORFIELD STOREY, CHARLES SUMNER (1972); DAVID DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN (1970). *See also* EDWARD B. CALLENDER, THADDEUS STEVENS: COMMONER (AMS Press 1972); RALPH KORNGOLD, THADDEUS STEVENS: A BEING DARKLY WISE AND RUDELY GREAT (1955). For specific references to Sumner's position on special treatment and protection of freedmen, see DONALD, *supra*, at 119-20, 177, 180, 287, 298-99, and 301; for Ste-

The "forty acres and a mule" legislation was ultimately rejected by Congress, but supported by both Sumner and Stevens.

Sumner knew a world where Whites used racial classifications to disfavor Blacks. His statements about colorblindness were presented in a case in which a Black plaintiff alleged that a state policy promoted racial caste. He believed racial caste violated the Massachusetts Constitution. Kull provides no proof that Sumner would have opposed programs to eliminate racial caste. Indeed, Kull merely proves that Sumner opposed school segregation as a kind of racial caste.[83]

Kull's discussion of *Roberts* is important because, although that decision preceded the adoption of the Equal Protection Clause of the Fourteenth Amendment,[84] it illustrates indisputably that in 1850 color awareness was the rule, not the exception. It is also interesting because Kull does not examine why it was necessary to separate a Black child from a White child in public schools. Despite Kull's superb skills as a historian, he demonstrates little understanding of the social and political consequences of race and racism in the United States. Nowhere does Kull acknowledge the doctrine of racial supremacy that undergirds the decision to cast Black children as unfit to associate with White children. Kull should know that the historical reservation of the best educational opportunities for Whites only has contributed to the continuing caste conditions of Blacks. Since I do not think racial caste is inevitable, I am still waiting for a new analysis of the colorblindness doctrine which explains how we can eliminate racial caste without considering race.[85]

E. Chapter Four—Radical Reconstruction and Racial Classifications

Professor Kull locates his colorblindness tradition in the work of Wendell Phillips, the statesman and abolitionist who delivered speeches at Boston and New York in 1863 urging Congress to initiate measures for an amendment that "Slavery shall henceforth have no place in any State within this Union."[86] He urged a prohibition of slavery and a prohibition on state laws that drew legal distinctions on racial lines.[87] Kull illustrates that Phil-

vens' views, see KORNGOLD, *supra*, at 281-90. Stevens believed that "[f]orty acres should be given to each adult male freedman, of whom there were about one million." KORNGOLD, *supra*, at 282.

83. KULL, *supra* note 6, at 42-46.

84. U.S. CONST. amend. XIV, § 1. The Amendment provides in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

85. I have previously attempted such an analysis, *see* Fair, *supra* note 18, at 73-81.

86. KULL, *supra* note 6, at 55.

87. KULL, *supra* note 6, at 55-56.

lips repeatedly asserted the need for the elimination of the idea of race or racial distinctions from American politics.[88] Kull, however, gives less significance to the fact that Phillips thought the Thirteenth and Fourteenth Amendments did not go far enough to protect former slaves.[89] Neither amendment eliminated the caste status of Blacks. Kull quotes Phillips as having said "'but it is our duty . . . to say that no civil, no social, no political right shall in any instance, in any part of the nation, be dependent on race; *especially that the negro race shall not be excluded from any right on account of their blood* . . . .'"[90]

Phillips' statement contains both colorblindness and color awareness rhetoric. The first part seems to be all that Kull says: unequivocally colorblind. But when the first clause is juxtaposed with the second, it is difficult to argue that Phillips would have opposed legislation to secure equal rights for Blacks. Indeed, Kull acknowledges briefly that Phillips endorsed the need to extend military reconstruction which ostensibly was established to protect former slaves from those who would wish to reestablish slavery or some like institution.[91] The Freedmen's Bureau was also an early form of affirmative action which had the support of a majority of Congress.

F. Chapter Five—The Thirty-Ninth Congress and Antidiscrimination Statutes

Kull provides a luminous analysis of the records of the Thirty-Ninth Congress relating to the drafting and ratification of the Fourteenth Amendment. He writes:

> The essential distinction between radical and moderate proposals for the federal protection of civil rights lay between a rule of nondiscrimination on the one hand and a guarantee of equality on the other . . . . Nondiscrimination was rejected in the successive contexts of Negro suffrage and the basis of representation; the civil rights bill; the proposed "Bingham Amendment"; and the Fourteenth Amendment itself. In each instance, Congress indicated that it preferred the more malleable notions of equality and "equal protection" to an unyielding rule of nondiscrimination.[92]

88. KULL, *supra* note 6, at 55-56.

89. KULL, *supra* note 6, at 58-64.

90. KULL, *supra* note 6, at 65 (citation omitted) (emphasis added).

91. KULL, *supra* note 6, at 64. Pursuant to its new constitutional power, Congress enacted the Freedmen Bureau Act of 1865, 13 Stat. 507 (1865). Section 2 provided: "That the Secretary of War may direct such issues of provisions, clothing, and fuel, as he may deem needful for the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen and their wives and children, under such rules and regulations as he may direct." For subsequent amendments, see 14 Stat. 173 (1866) and 15 Stat. 83 (1868).

92. KULL, *supra* note 6, at 69.

Kull thinks that a rule of nondiscrimination is less malleable than a rule of equality and he contends that Congress rejected as too "radical" a rule of nondiscrimination because the open-ended equality standard meant less than a rigid colorblindness standard.[93] Congress' preference "was to retain the discretion to discriminate by race as appropriate."[94]

I disagree with Kull that the terms "nondiscrimination" and "equality" have different levels of malleability. Moreover, I am not persuaded by Kull's argument that if nondiscrimination language had been adopted by Congress, racial discrimination would have ended. Racial discrimination has not ended because it has been extremely beneficial to some members of this society. It is not inevitable, but rather the result of conscious choices.

The Supreme Court has at times thought itself incompetent to control racial discrimination. Here I am reminded of the painful, yet time-honored words of Justice Oliver Wendell Holmes writing for a majority of the Court in *Giles v. Harris*,[95] the Montgomery voting discrimination case in which, under various provisions of the state constitution, virtually all White males were permitted to vote, while virtually all Blacks were excluded from voting. Justice Holmes suggested that if "the great mass of the white population intends to keep the blacks from voting,"[96] the Court was largely powerless to grant meaningful relief. Such relief instead would necessarily come from the state itself or the legislative and political departments of the federal government.[97] The past twelve decades are a monument of resistance to full equality for Blacks. Professor Kull does not sufficiently capture the pervasiveness of racial bias and racial subordination during the period he asserts was part of a colorblindness tradition.

G. Chapter Six—Home Rule and Expansion of the Race Line

Professor Kull observes that between 1873 and 1896 the courts and legislative councils of various states did not embrace colorblindness. Courts repeatedly found that the Fourteenth Amendment did not embody a rule of nondiscrimination.[98] Additionally, states adopted laws requiring separate but equal facilities or separate tax systems to fund schools for Black and White children.[99] Moreover, this period inaugurated the most

93. KULL, *supra* note 6, at 69-82.
94. KULL, *supra* note 6, at 82.
95. 189 U.S. 475 (1903).
96. *Id.* at 488.
97. *Id.*
98. KULL, *supra* note 6, at 88-89.
99. KULL, *supra* note 6, at 89.

rigid racial segregation of our history. Virtually no area of public meeting was free of a color line.[100] Professor C. Vann Woodward wrote:

> The phase that began in 1877 was inaugurated by the withdrawal of federal troops from the South, the abandonment of the Negro as a ward of the nation, the giving up of the attempt to guarantee the freedman his civil and political equality, and the acquiescence of the rest of the country in the South's demand that the whole problem be left to the disposition of the dominant Southern white people. What the new status of the Negro would be was not at once apparent, nor were the Southern white people themselves so united on that subject at first as has been generally assumed. The determination of the Negro's "place" took shape gradually under the influence of economic and political conflicts among divided white people—conflicts that were eventually resolved in part at the expense of the Negro. In the early years of the twentieth century, it was becoming clear that the Negro would be effectively disfranchised throughout the South, that he would be firmly relegated to the lower rungs of the economic ladder, and that neither equality nor aspirations for equality in any department of life were for him.[101]

Woodward wrote that the Jim Crow laws enacted in the late nineteenth century

> constituted the most elaborate and formal expression of sovereign white opinion upon the subject. In bulk and detail as well as in effectiveness of enforcement the segregation codes were comparable with the black codes of the old regime, though the laxity that mitigated the harshness of the black codes was replaced by a rigidity that was more typical of the segregation code. That code lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking. Whether by law or by custom, that ostracism extended to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons, and asylums, and ultimately to funeral homes, morgues, and cemeteries.[102]

The racial separation was not limited to the South. In the North, Woodward wrote:

> [T]he Northern Negro was made painfully and constantly aware that he lived in a society dedicated to the doctrine of white supremacy and Negro inferiority. The major political parties, whatever their position on slavery, vied with each other in their devotion to this doctrine, and extremely few politicians of importance dared question them. Their constituencies firmly believed that the Negroes were incapable of being assimilated politically, socially, or physically into white society. They made sure in numerous ways that the Negro understood his "place" and that he was severely confined to it. One of these ways was segregation, and with the

100. *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (3d ed. 1974).

101. *Id.* at 6-7.

102. *Id.* at 7.

> backing of legal and extra-legal codes, the system permeated all aspects of Negro life in the free states by 1860.[103]

State segregation codes were not color-blind. Race was the baseline for the exclusion of Blacks from myriad accommodations and opportunities.

Kull aptly notes that the Supreme Court opinions during this same period provided no exception to the tradition of color awareness. The Court consistently construed the Civil War Amendments narrowly so as not to protect civil rights under federal authority. For example, in the *Slaughter-House Cases*[104] the U.S. Supreme Court ruled that the privileges and immunities clause of the Fourteenth Amendment applied only to rights of national citizenship and did not encompass any of the fundamental rights of the individual. Those rights, according to Justice Miller, related only to state citizenship. For Justice Miller, rights of national citizenship included the right to travel to the national seat of government, the right to sue in federal courts and the right to protection on the high seas or abroad.[105] The Court has never overruled *Slaughter-House*. The decision mocks congressional efforts to nationalize protection of the basic civil rights of former slaves.

Several other opinions of the Court following the rationale of *Slaughter-House* specifically undermined the Civil Rights Acts of 1870, 1871 and 1875. In *United States v. Cruikshank*[106] the Court applied the theory of *Slaughter-House* to an alleged violation of two Blacks' right to assemble. The Court held that unless the purpose of the assembly had some connection to a person's relationship to the federal government, such as to petition the government for redress of grievances, the Civil Rights Act of 1870 provided no relief.[107] Therefore, the Court essentially held that the right to assemble was not one of the privileges and immunities of national citizenship. What the Court had done three years earlier to the Fourteenth Amendment, it had now repeated with the civil rights statutes.

The *Cruikshank* opinion went further and held that the Fourteenth Amendment gave the national government power only to see that states did not deny their citizens equality of rights.[108] The Court therefore further restricted the Fourteenth Amendment to "state" action. The Court again set out the state action doctrine three years later in *Virginia v. Rives*.[109] By

103. *Id.* at 18. *See also* LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860 (1961).

104. 83 U.S. (16 Wall.) 36 (1873).

105. *Id.* at 79.

106. 92 U.S. 542 (1876).

107. *Id.* at 548-55.

108. *Id.* at 554-55.

109. 100 U.S. 313 (1880), *overruled by* Greenwood v. Peacock, 384 U.S. 808 (1966).

reading a "state" action requirement into the civil rights statutes, the Court made it virtually impossible to use the civil rights acts to prosecute private individuals who most often violated the rights of former slaves.[110]

The Supreme Court delivered its greatest blow to the civil rights laws in the *Civil Rights Cases*.[111] There the Court invalidated the first two sections of the Civil Rights Act of 1875, which outlawed discrimination in public accommodations.[112] Again, extending the reasoning of *Slaughter-House*, the Court determined that because the provisions were directed at private individuals and not the state or its agents, the provisions were unconstitutional. Essentially, the Court found that private discrimination was beyond the reach of the Fourteenth Amendment and therefore also beyond the scope of laws that were derived from the Fourteenth Amendment. The Court specifically concluded that the fifth section of the Fourteenth Amendment gave Congress power to correct the effects of state laws that violated the first section of the amendment.[113] Justice John Harlan, presenting the lone dissent, wrote, "I cannot resist the conclusion that the substance and spirit of the recent [Civil War] amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism."[114] The Court clearly did not apply a colorblindness standard in deciding the *Slaughter-House Cases* and their progeny.

H. Chapter Seven—The Antithetical Relationship Between Separate But Equal and Justice Harlan's Color-Blind Constitutionalism

Professor Kull's review of *Plessy v. Ferguson*[115] in the context of Charles Sumner's work five decades earlier is insightful. Kull writes that "[t]he 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."[116] Kull contends that since 1896, the development of the doctrine has followed the ebb and flow of the Court's idea of what constitutes reasonable discrimination.[117] In addition, Kull suggests *Plessy* embodies both our constitutional law of racial discrimination and the doc-

110. *Id.* at 318. *See also* United States v. Harris, 106 U.S. 629 (1883) (concluding that the conspiracy section of the Ku Klux Klan Act of 1871 was void).

111. 109 U.S. 3 (1883).

112. *Id.* at 9-27.

113. *Id.* at 20-26.

114. *Id.* at 26 (Harlan, J., dissenting).

115. 163 U.S. 537 (1896).

116. KULL, *supra* note 6, at 118.

117. KULL, *supra* note 6, at 118.

trine of nondiscrimination as expressed by Harlan.[118] Kull also demonstrates that colorblindness was an alternative available to the Court in 1896 and that seven justices rejected its formulation.[119] Once again, what emerges from Professor Kull's excellent research is not a tradition of constitutional colorblindness, but rather a tradition of its rejection.

Professor Kull, like many other commentators, quotes the most famous lines of Justice Harlan's dissent:

> But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens.[120]

Kull asserts that Justice Harlan's dissent "added not only new rhetorical force but also a new and complementary legal analysis that avoided the familiar stalemate over 'separate but equal' by denying the authority of the courts to police the reasonableness of legislative classifications."[121]

Justice Harlan did not simply declare that our constitution is color-blind. Rather, he wrote that in the eye of the law there is no superior class or caste, and that our constitution does not tolerate classes among citizens.[122] If Justice Harlan's central concern was the elimination of caste and racial subordination, it is a significant stretch to interpret his dissenting opinion to prohibit racial classifications designed to eliminate such caste. Professor Kull places too little emphasis on the words surrounding the clause "Our constitution is color-blind . . . ." To be sure, Justice Harlan lived in a world in which the White race deemed itself to be the dominant race; I believe this context informed his statements regarding nondiscrimination.[123] If Justice Harlan meant what he wrote, then he did not construe

118. KULL, *supra* note 6, at 118.

119. KULL, *supra* note 6, at 118.

120. KULL, *supra* note 6, at 123 (quoting *Plessy*, 163 U.S. at 559).

121. KULL, *supra* note 6, at 113.

122. *Plessy*, 163 U.S. at 559.

123. *Id.* Justice Harlan was the first member of the Supreme Court to articulate the doctrine of colorblindness. This is ironic, in part, because Harlan himself was a former slaveholder in Kentucky who ultimately disavowed slavery. For biographical data on Justice Harlan, see generally LOREN P. BETH, JOHN MARSHALL HARLAN: THE LAST WHIG JUSTICE (1992), and FRANK B. LATHAM, THE GREAT DISSENTER: JOHN MARSHALL HARLAN 1833-1911 (1970). To understand what Justice Harlan meant in his dissent, it is instructive to note the text preceding his famous quote. Before writing that "Our constitution is color-blind," Justice Harlan wrote:

> The White race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind . . . .

Plessy, 163 U.S. at 559.

the Fourteenth Amendment to prohibit congressional efforts to end racial caste.

I. Chapter Eight—The Doctrine of Reasonable Racial Classifications

Professor Kull effectively illustrates how the reasonable racial classification standard evolved from a judicially deferential standard in *Plessy* to what we refer to as strict scrutiny in modern parlance.[124] Thus, in 1917, a unanimous Court held unconstitutional a Louisville ordinance that forbade the occupancy by a person of one race, White or Black, of residential property located on a city block predominantly populated by persons of the other race.[125] In 1938, the Court held unconstitutional a policy of excluding Blacks from the law school at the University of Missouri.[126] Finally, in 1943 Chief Justice Harlan Fiske Stone wrote, "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."[127]

Kull suggests that this one sentence, for a time, put the authority of the unanimous Court behind the colorblindness principle.[128] Yet, Chief Justice Stone referred to the doctrine of equality—the malleable, standardless doctrine that Kull argues should be replaced with a nondiscrimination policy. It seems that to Chief Justice Stone, the term "equality" meant nondiscrimination.[129] Kull's reference to Chief Justice Stone undermines his argument regarding a difference between the terms "equality" and "nondiscrimination."

I interpret Justice Harlan's dissent to mean that the Constitution prohibited Whites from using race as a basis for subordinating Blacks. Justice Harlan could not have meant that it was unconstitutional for government to take race into account. He acknowledged that the Civil War Amendments were in fact adopted to secure for the newly freed Blacks all the civil rights enjoyed by Whites, and he had written 13 years earlier that:

> If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this republic, any class of human beings in *practical* subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant.

The Civil Rights Cases, 109 U.S. 3, 62 (1883) (Harlan, J., dissenting) (emphasis added).

124. KULL, *supra* note 6, at 131-37.

125. KULL, *supra* note 6, at 138-41 (citing Buchanan v. Warley, 245 U.S. 60, 82 (1917)).

126. KULL, *supra* note 6, at 141-43 (citing Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 352 (1938)).

127. KULL, *supra* note 6, at 144 (citing Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

128. KULL, *supra* note 6, at 144.

129. KULL, *supra* note 6, at 144-45.

When Justice Hugo Black wrote that "legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and the] courts must subject them to the most rigid scrutiny,"[130] he also made clear that all racial classifications were not unconstitutional.[131] Professor Kull understands that "[t]here is, realistically, no constitutional guarantee that is not subject to qualification if a majority of the Court conceives that the country faces imminent peril."[132] Furthermore, he suggests that if racial classifications are permitted only during extreme emergencies, then the Constitution may fairly be described as color-blind.[133] The problem here, however, is Kull's failure to explain why a majority of the Court could or should not think that racial caste (and its attendant national crises) is a national emergency that imperils the country.[134] Kull says very little about the social costs of racial caste in the United States. However, Professor Andrew Hacker has recently suggested that the costs of such caste are enormous.[135]

J. Chapters Nine and Ten—Critiquing *Brown* and Its Progeny

Professor Kull examines the briefs of the NAACP Legal Defense Fund ("LDF") lawyers and again identifies statements espousing colorblindness policies.[136] Kull joins many others who have criticized Chief Justice Earl Warren for writing an opinion in *Brown v. Board of Education*[137] that did not explain its rationale and that was "historically and legally jejune."[138]

130. KULL, *supra* note 6, at 145 (citing Korematsu v. United States, 323 U.S. 214, 216 (1944)).

131. KULL, *supra* note 6, at 145.

132. KULL, *supra* note 6, at 144.

133. KULL, *supra* note 6, at 144.

134. Professor Andrew Hacker has recently written very persuasively about racial caste in the United States. ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992). Professor Hacker wrote, "Dividing people into races started as convenient categories. However, those divisions have taken on lives of their own, dominating our culture and consciousness, coloring our passions and opinions, contouring facts and fantasies." *Id.* at ix. Hacker presents by stark statistical references the reality of racial differences between Blacks and Whites in terms of education, income, crime and mortality. *Id.* at 17-49, 93-106, 134-46, 179-98. *See also* GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (20th anniversary ed., Harper & Row 1962) (discussing how the Negro problem is intertwined with all other social, economic, political and cultural problems in America and the author's optimism about future race relations in America); A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY (Gerald D. Jaynes & Robin M. Williams, Jr., eds., 1989) (discussing the unfinished agenda of a nation still struggling to come to terms with the consequences of its history of relations between Blacks and Whites).

135. HACKER, *supra* note 134, at 17-49, 93-106, 134-46, 179-98 (detailing the impact of caste in education, income, crime and mortality).

136. KULL, *supra* note 6, at 151-63.

137. 347 U.S. 483 (1954).

138. KULL, *supra* note 6, at 152-55.

Kull finds *Brown* unsatisfying because the Court did not disavow the constitutionality of segregation itself and because the opinion turned on social science research.[139] Moreover, Kull says, social science research can change, as suggested by the recent advocacy of all-Black-male immersion schools in places like Milwaukee.[140] Kull writes that *Brown* was followed by a series of memorandum decisions in which the Court held segregation in all other public contexts invalid, but that the Court never explained its rationale in terms of constitutional doctrine.[141]

My critique of *Brown* is quite different. Chief Justice Warren did explain in constitutional terms why segregation in public schools violated the Fourteenth Amendment's equality principle. He wrote: "To separate [Black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[142] The *Brown* opinion means that the state cannot remain true to the Fourteenth Amendment and legislate in ways that generate feelings of inferiority regarding a group's status in the society. *Brown* establishes a rule of anti-subordination.

In these two chapters, the reader receives the best view of Professor Kull's rationale for writing the book. Why write a story about the history of the idea of constitutional colorblindness? Because, Professor Kull believes, civil rights activists took a wrong turn, a turn away from the achievement of racial equality. Professor Kull writes, "For a brief period in the early 1960s, some members of the Supreme Court appeared to regard the colorblindness of the Constitution as a settled thing."[143] He cites *Anderson v. Martin*[144] as additional proof that the leading civil rights strategists of the day thought it was unconstitutional for Louisiana to require that nomination and ballot papers specify the race of candidates for office.[145] They argued, as Justice Harlan had eighty years earlier, that "[o]ur constitution is colorblind."[146] Yet, the evidence Kull adduces suggests that James M. Nabrit III and Jack Greenberg, among others, did not embrace a literal colorblindness. Indeed, they understood that some racial classifications might occasionally serve some useful purpose.[147] Interestingly, Kull agrees that it would be

139. KULL, *supra* note 6, at 154.
140. KULL, *supra* note 6, at 154 n.13.
141. KULL, *supra* note 6, at 161-62.
142. Brown v. Board of Educ., 347 U.S. 483, 494 (1954).
143. KULL, *supra* note 6, at 164.
144. 375 U.S. 399 (1964).
145. KULL, *supra* note 6, at 166.
146. KULL, *supra* note 6, at 166.
147. KULL, *supra* note 6, at 166.

difficult to contend for a *literal* application of a colorblindness rule without minimum qualifications; otherwise, the colorblindness idea might become an absurdity.[148] This argument strengthens the policy of the Supreme Court to permit reasonable racial classifications and undermines Kull's vociferous critique of that policy.

Kull's research makes quite plain that by 1964, lawyers and jurists battling segregation and race discrimination in voting understood that a strict colorblindness was impractical and an obstacle to eliminating racial caste.[149] Thus, Judge John Minor Wisdom wrote:

> The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose.[150]

For Professor Kull, Judge Wisdom's words mark the "moment at which the color-blind ideal was jettisoned by its former proponents."[151] Its abandonment was rationalized on the theory "that race-conscious measures might properly be employed 'to prevent discrimination being perpetuated and to undo the effects of past discrimination.'"[152] Professor Kull writes that Judge Wisdom banished colorblindness from contemporary constitutional law.[153]

Professor Kull asserts that the dramatic struggle to overturn legal inequality in the late 1950s and early 1960s had absorbed everyone's attention, so that only with victory was it apparent how little would change.[154] Professor Kull writes, "The problem was that residents of Harlem and Watts already enjoyed equality before the law."[155] Kull suggests that civil rights advocates sought only formal "legal" equality rather than substantive equality, and they discovered too late that formal equality "was equality in inadequate measure."[156]

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148. KULL, *supra* note 6, at 166-67.

149. KULL, *supra* note 6, at 180-81.

150. KULL, *supra* note 6, at 181 (citing United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 837 (5th Cir. 1966)).

151. KULL, *supra* note 6, at 181.

152. KULL, *supra* note 6, at 181 (citing *Jefferson County Bd. of Educ.*, 372 F.2d at 876).

153. KULL, *supra* note 6, at 181. I think nondiscrimination/colorblindness language still appears in decisions of the Supreme Court, but the meaning of the terms is not the literal meaning suggested by Kull. *See, e.g.*, City of Richmond v. Croson, 488 U.S. 469, 477-86 (1989); Metro Broadcasting v. FCC, 497 U.S. 547, 562-85 (1990); Shaw v. Reno, 113 S. Ct. 2816, 2820 (1993).

154. KULL, *supra* note 6, at 183.

155. KULL, *supra* note 6, at 183.

156. KULL, *supra* note 6, at ix, 183.

The implication is that civil rights strategists, including the late Supreme Court Justice Thurgood Marshall, were not clever enough to see that little would change by their efforts. This is offensive and misguided because it assumes that civil rights advocates throughout the nineteenth and twentieth centuries were not interested in reversing the racial caste of Blacks.[157] Moreover, it misses the point of the Civil War Amendments and successive civil rights struggles.[158] Professor Kull does not in fact prove that the attack on segregation between 1830 and 1965 was anything short of a struggle to ameliorate racial caste.

K. Chapter Eleven—Is Colorblindness a Solution for Eliminating Racial Caste?

Professor Kull's last chapter is the most intriguing and the most troubling. It begins with the celebration of the enactment of the 1964 Civil Rights Act and the 1965 Voting Rights Act.[159] Kull says each embraced a rule of nondiscrimination for all individuals, Black and White.[160] However, he concludes his book by writing the following:

> No one will contend, however, that a strict legal equality can of itself settle the score between the United States of America and the descendants of her slaves. Where race-specific measures direct benefits to persons whose ancestors were brought to this country in slavery, the sense that this discrimination works rough justice—unjust, but less unjust than doing nothing—cannot easily be dismissed.[161]
>
> No other racial or ethnic group among America's immigrants has a comparable claim to special treatment, and the moral awkwardness of asking black Americans to be content with nondiscrimination should not stop us from giving that answer to everyone else.[162]

Here, Kull seems to say that racial preferences for Blacks are morally defensible. If that is the point of his book, then I agree. Simply put, racial classifications designed to eliminate racial caste or subordination ought to be permissible under a constitution that neither knows nor *tolerates* caste. If Professor Kull is saying that the racial caste of Blacks can be addressed

157. Biographers are only beginning to assess the tremendous legal accomplishments of the late Associate Justice Thurgood Marshall. *See generally* CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS: THE WORLD OF THURGOOD MARSHALL (1993); MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH (1992); ROGER GOLDMAN WITH DAVID GALLEN, THURGOOD MARSHALL: JUSTICE FOR ALL (1992). When the record is more complete, I believe Marshall will stand as one of the most significant legal minds of the twentieth century.

158. *See* Fair, *supra* note 18, at 25-31.

159. KULL, *supra* note 6, at 182.

160. KULL, *supra* note 6, at 182.

161. KULL, *supra* note 6, at 222-23.

162. KULL, *supra* note 6, at 223.

with special preferences, he could have made that point more directly at the outset. If, instead, he is arguing that programs that favor formerly disfavored racial groups are as equally unjust as the kinds of segregation and discrimination against Blacks that he alludes to throughout the book, I strongly disagree.

Professor Kull's final chapter is an indictment against what he calls "benign racial sorting."[163] In this category he includes compensatory racial preferences relating to racial balance in public schools, economic affirmative action and voting rights policies designed to increase proportionately minority officeholding.[164] Professor Kull writes:

> 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 political 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 obligations to black citizens; and that such policies carry social costs that outweigh their benefits.[165]

Here, Professor Kull indicates many of his views regarding affirmative action. He thinks it is destructive to allocate social resources by racial and ethnic groups and that affirmative action policies carry social costs that outweigh their benefits. I think the social costs to our society are far greater to continue the illusion of colorblindness. Under that doctrine, racial caste will persist for most Blacks. Racial caste is the product of several centuries of discrimination against Blacks. It is now systemic and appears normative. The only way to eliminate it is to take account of race—to recognize the reality of race-based caste.

Moreover, Kull is incorrect to suggest the Court may reinstate a rule of colorblindness since his book seems to suggests that we have not had a tradition of colorblindness. The colorblindness standard preserves the historical advantages Whites have enjoyed over Blacks. For me, this makes the doctrine unfair and unsound.

163. KULL, *supra* note 6, at 182-224. This phrase is the title to the last chapter.

164. KULL, *supra* note 6, at 191-220.

165. KULL, *supra* note 6, at 221 (emphasis added).

III. Conclusion

Professor Kull has written an important book. He identifies colorblindness rhetoric much earlier than 1896. However, he does not establish a 125-year constitutional colorblindness tradition in American constitutional law. Instead, he demonstrates repeatedly how colorblindness was rejected at almost every turn by a majority of the Supreme Court and by state and federal legislative bodies.

The current Supreme Court does not follow Kull or the middle ground that I describe more fully in my colorblindness essay.[166] Instead, the Court adheres to its case-by-case judicial assessment of the reasonableness of racial classifications as set forth in *Shaw v. Reno*. Professor Kull probably believes *Shaw* was decided correctly, but under the wrong analysis. I believe *Shaw* was wrongly decided. The racial classification presented by the North Carolina reapportionment plan was designed to eliminate the racial caste and subordination of Blacks in political representation; the creation of the second majority-minority district did not place others in a caste-like, subordinate position.

While I hope Professor Kull's book will have broad readership and stimulate discussion, I do not think colorblindness is an answer to the contemporary crisis of racial caste. When the colorblindness doctrine is used to prohibit affirmative action as a violation of the Equal Protection Clause, the Fourteenth Amendment is turned against the very group it was designed to protect.[167]

Justice Blackmun expressed it best when he wrote:

> I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.[168]

166. *See* Fair, *supra* note 18, at 73-81.

167. As long ago as 1873 the Court wrote that the main purpose of the Civil War Amendments was to protect former slaves from continuing abuses against them. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 37-38 (1873). We should give our Constitution an interpretation that not just permits, but rather affirmatively requires government to eliminate the continuing effects of racial discrimination.

168. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., separate opinion).