COLORBLIND REMEDIES AND THE INTERSECTIONALITY OF OPPRESSION:
POLICY ARGUMENTS MASQUERADING AS MORAL CLAIMS*

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* Batson, in my view, depends upon this Nation's profound commitment to the ideal of racial equality, a commitment that refuses to permit the State to act on the premise that racial differences matter. . . . We ought not delude ourselves that the deep faith that race should never be relevant has completely triumphed over the painful social reality that, sometimes, it may be. That the Court will not tolerate prosecutors' racially discriminatory use of the peremptory challenge, in effect, is a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact.1

INTRODUCTION

One of the myths we tell children and law students is that the law is or can be colorblind. This myth posits colorblindness, or inattention to race, as a moral requirement of all "right" thinking people and all good law. The truth, however, is that racial justice and colorblindness are not the same thing. Race-neutral policies are only as good or bad as the results they produce. No one thinks that economic efficiency or the labor theory of value are moral requirements independent of their impact on the components of justice.2 In like manner, to assume that

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2 See, e.g., Richard A. Posner, The Economics of Justice (2d ed. 1983) (arguing that wealth maximization describes a form of justice). Posner does not assume that he can justify his position without showing that justice will result from choosing an economic efficiency system that maximizes wealth. Accordingly, though he thinks economics is justice, he spends three hundred pages proving it. He seems, however, to have rejected aspects of this view in a more recent book. See Richard A. Posner, The Problems of Jurisprudence 356-92 (1990) (arguing that pragmatic concerns rather than overarching legal principle are better for resolving legal disputes).
ignoring race in making social policy will bring about justice or achieve morality is legal fantasy.

There are several reasons that Americans nonetheless have come to mythologize colorblindness as racial justice. First, many people believe that participants in the Civil Rights Movement\(^3\) sacrificed their blood, sweat, and tears for a colorblind world. This view of the Civil Rights Movement is best captured by Martin Luther King, Jr.'s famous exhortation that people ought "not to be judged by the color of their skin but by the content of their character."\(^4\) If colorblindness was good enough for Martin Luther King, many argue, then it ought to be good enough for a society that still aspires to the movement's goals of equality and fair treatment.

A second reason people see colorblindness as a moral requirement is that it is easy: the colorblind principle permits judges to decide difficult issues without discussing the kind of moral system to which we aspire. In a colorblind world of mythic justice, will black people be assimilated or remain distinct? Will racial distinctions be seen as interesting flavoring in the melting pot or as important components of an individual's personality? How are race and culture connected? Rather than providing answers to these important questions, colorblindness permits us to avoid any discussion of the morality or justice of assimilation, nationalism, or cultural difference. Instead, its proponents simply assert that justice and morality are vested within colorblindness.

A final and related reason for the persistence of the colorblind myth is that Americans simply do not have a concept of justice that can take account of racial difference. Colorblindness, therefore, is thought to embody racial justice fully. Black leaders are in part to blame for this state of affairs. In fashioning policy prescriptions to

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\(^3\) I capitalize the Civil Rights Movement in order to distinguish its mythic stature in the discourse of colorblindness from the reality. The real civil rights movement originated long before the Montgomery bus boycott. Given that the history of blacks in America has been one of consistent struggle for racial equality, the Underground Railroad and the work of 19th century abolitionists must be considered part of the civil rights movement. See Henrietta Buckmaster, Let My People Go 59 (1992) (describing Underground Railroad as proving unquenchable desire of blacks for freedom); Aldon D. Morris, The Origins of the Civil Rights Movement: Black Communities Organizing for Change 277-86 (1984) (arguing that civil rights movement was not accidental production of individuals for justice, but part of larger structure of demands for racial justice). The real movement also included women, whose contributions are often ignored in discussions of civil rights. See generally Steven F. Lawson, Running for Freedom: Civil Rights and Black Politics in America Since 1941 (1991); Women in the Civil Rights Movement: Trailblazers & Torchbearers, 1941-1965 (Vicki L. Crawford et al. eds., 1990).

\(^4\) Martin Luther King, Jr., I Have a Dream: Writings and Speeches that Changed the World 104 (James M. Washington ed., 1992).

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end racial oppression, many civil rights leaders criticized the policy of racial separation for limiting the economic, legal, and social opportunities of blacks. Some people have used that criticism to bolster a claim that attention to color is always and everywhere evil, and that colorblindness is always and everywhere a moral good.

These justifications for colorblindness are all overly simplistic. Dismantling Jim Crow does not require an acceptance of colorblindness. And, as our history shows, colorblindness has often not been a defense against the oppressive effects of racism. Martin Luther King, Jr., worked for civil rights for almost fifteen years. Much of his work required black people to become more, rather than less, race-conscious in their thinking in order to achieve change, and much of his program included race-conscious responses to the existing evil of racism. Still, people have created a mythic Martin Luther King, Jr., and associated him with a fictional notion of colorblindness. In a similar fashion, the Supreme Court has adopted colorblindness as a legal watchword, even as it systematically limits the access of blacks to jobs and jury duty, and permits racially disparate and onerous police

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5 See, e.g., McCleskey v. Kemp, 481 U.S. 279, 314-19 (1987) (denying black petitioner’s claim and reasoning in part that if courts were to take account of race in capital sentencing then they would have to take account of race and gender in wide array of problems). For a similar approach taken by the Court more than 100 years ago, see Blyew v. United States, 80 U.S. (13 Wall.) 581 (1871). In Blyew, a Kentucky statute prohibited black citizens from testifying in court against white defendants charged with a terroristic murder of a black woman. Id. at 583. The Court held that the woman’s murder did not affect the interests of the witnesses claiming a right to be heard because it involved neither their person nor their property. Id. at 593. The Court stated that to assert federal jurisdiction in this case would effectively oust the state courts from resolving every case involving black Americans, including those involving white victims and black witnesses to the crime. Id. at 592. The Court concluded that Congress could not possibly have intended this result. Id.

6 For example, the Southern Christian Leadership Conference (SCLC), which King helped to found, attempted to use the black church as a political base for change. This targeted effort, while not racially exclusionary, was clearly race-conscious. See Adam Fairclough, To Redeem the Soul of America: The Southern Christian Leadership Conference and Martin Luther King, Jr. 1-2 (1987) (pointing out that SCLC was product of the black church that grew into political organization demanding social justice and equality).


interrogation and investigation of black Americans.\textsuperscript{10}

Myths are often created to fill a necessary psychological space. Colorblindness has been created to help us get over the difficulty of race in a society where race is particularly powerful. In our post-civil rights legal world, race is like the nakedness in the fairy tale of the emperor’s new clothes—something only the bold or the unsophisticated are willing to acknowledge.\textsuperscript{11} The “grownups” tell us that we are clothed with a nonracial reality; indeed, we are told by many that we too could see that “race doesn’t matter” if only we were appropriately committed to individual achievement and liberal justice.\textsuperscript{12} Many individuals argue that if we simply were to extend principles of colorblindness to all aspects of our private lives, the issue of race would go away as an important legal and social phenomenon.\textsuperscript{13} Some would extend this principle to a whole array of concerns, from gender to appearance.\textsuperscript{14} However, this effort to make the world colorblind (or blind to


\textsuperscript{12} See, e.g., Shelby Steele, The Content of Our Character: A New Vision of Race in America 109 (1990) (advising those in black middle class to ignore racism that they face and move on to help create colorblind system); Walter E. Williams, False Civil Rights Vision and Contempt for Rule of Law, 79 Geo. L.J. 1777, 1777 (1991) (arguing that race-sensitive policies destroy rule of law that a person’s status characteristics such as race are immaterial in eyes of the law).

\textsuperscript{13} See, e.g., Lino A. Graglia, Racial Preferences, Quotas, and the Civil Rights Act of 1991, 41 DePaul L. Rev. 1117, 1118 (1992) (arguing that use of race-conscious remedies is the adoption of the immoral for a good purpose). Even when people urge that colorblindness ought to govern all activities, they do not urge that we require colorblindness in private arenas. Instead, we are to develop racial blindness voluntarily. See, e.g., William Van Alstyne, Rites of Passage: Race, the Supreme Court, and the Constitution, 46 U. Chi. L. Rev. 775, 808-09 (1979) (arguing that government should never tolerate differential treatment on basis of race). But see Derrick Bell, Faces at the Bottom of the Well: The Permanence of Racism 197-200 (1992) (arguing that racism is endemic to American society); Richard Delgado, Norms and Normal Science: Toward a Critique of Normativity in Legal Thought, 139 U. Pa. L. Rev. 933, 945-46 (1991) (arguing that traditional jurisprudence does not create justice or the possibility of change).

\textsuperscript{14} See Cook v. Rhode Island, 10 F.3d 17 (1st Cir. 1993). In Cook, the court held that section 504 of Rehabilitation Act prohibits discrimination based on obesity. Id. at 28. The employer claimed that the plaintiff’s morbid obesity put her at risk of higher absenteeism and potential worker compensation claims. Id. at 27. The court said in conclusion:
any number of issues) has to confront the fact that, in general, we refuse to limit private actions that produce consequences in both the private and public sphere. Proponents of colorblindness call for restrictions on the legal use of race in public policy, even though they know that private actors will continue to use race for negative purposes. In short, race-neutral principles cannot prevent covert, oppressive uses of race.

This Essay argues that the colorblind principle is not a moral requirement, but rather a policy argument resting on several invalid as-

In a society that all too often confuses “slim” with “beautiful” or “good,” morbid obesity can present formidable barriers to employment. Where as here, the barriers transgress federal law, those who erect and seek to preserve them must suffer the consequences.

Id. It is, of course, not possible to be neutral about everything. Most commentators stop at culture or some other limit that they would like to enforce. These limits raise the question of how to define particular categories like race or gender when they intersect. Feminists have been raising the issue of this intersection in important and powerful ways. See, e.g., Caldwell, supra note 8, at 374-76 (arguing that intersection of race and gender is important but has been given little credence by judges or antidiscrimination laws); Trina Grillo & Stephanie M. Wildman, Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or other -isms), 1991 Duke L.J. 397, 401-10 (describing how racism and sexism perpetuate patterns of racial domination); Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581, 592 (1990) (arguing that monolithic feminism ignores the black woman’s voice). The complex interaction of race, culture, and gender has recently been raised in an interesting way by Martha Chamallas, Racial Segregation and Cultural Domination: A Rubin Trilogy on Title VII, 52 La. L. Rev. 1457, 1475-76 (1992) (observing that Judge Rubin’s recent employment discrimination decisions indicate his inability to see cultural oppression as form of race discrimination).

Despite changes in societal attitudes, race is still likely to be used for negative purposes. See, e.g., Howard Schuman et al., Racial Attitudes in America: Trends and Interpretations 74-75, 118-19 (1985) (finding that 66% of white Americans still opposed intermarriage in 1982 and that more whites had positive views of the Ku Klux Klan in 1979 than in 1965); Thomas F. Pettigrew, Advancing Racial Justice in Opening Doors: Perspectives on Race Relations in Contemporary America 173-76 (Harry J. Knopke et al. eds., 1991) (describing how racial prejudice has changed from overt bigotry to subtle, indirect, and ostensibly nonracial resistance to racial change).

See, e.g., Neil Gotanda, A Critique of “Our Constitution is Color-Blind,” 44 Stan. L. Rev. 1, 16 (1991) (arguing that colorblind model for governmental decisionmaking actually allows racial discrimination to continue). Feminists have been among the first to challenge the traditional public/private distinction in law. See, e.g., Katharine T. Bartlett, Gender and the Law 48-69, 527-29 (1993) (surveying cases and essays on relegation of women to the private sphere); Ruth Gavison, Feminism and the Public/Private Distinction, 45 Stan. L. Rev. 1, 1 (1992) (“Although my main purpose is to discuss the specific feminist challenge to this distinction, feminists have not been the only critics of this distinction.”). This issue, however, has been raised previously. See, e.g., Ira Nerken, A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory, 12 Harv. C.R.-C.L. L. Rev. 297 (1978) (rejecting as outmoded contractual distinction, introduced in The Civil Rights Cases, between public and private sphere and advocating analysis that looks at scope of private power enforced by state).
sumptions. In particular, I want to advance the seditious idea that we will not change the racial present until we adopt an effective program of race-conscious policies, for only race-conscious policies can alter the racial status quo in this country. I contend that the argument for colorblindness ultimately argues in favor of a racialized status quo that leaves black people and other racial minorities in an unequal position.17 By the phrase “racial status quo,” I mean the economic reality that African Americans are twice as likely to be unemployed18 and are more likely to be fired than are white Americans.19 They are also less likely to be employed in positions that provide status or higher income.20 Despite the many antidiscrimination laws passed since 1964, black Americans still earn substantially less income than whites.21 Indeed, even in pure market transactions where the race of the purchaser would not seem to matter—such as the purchase of an automobile—there is significant evidence that it does: black purchasers are treated very differently than are white purchasers by sales staff.22

Several other scholars and at least one Supreme Court Justice seem to have embraced, at least partially, the notion that race-conscious policy is necessary to rectify this situation. None, however, has examined the full implications of this truth. For example, David

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Changes in family structure have not been a major cause of continuing high poverty rates since the early to mid-1970s; rather, lower real wages of men and women have increased the difficulty of rising from poverty through employment. . . . After the early 1970s, black gains in relative earnings and incomes slowed and then deteriorated for many indicators of average status. . . . In particular, men’s earnings and other aggregate measures of black income were, relative to white measures, lower in the mid-1980s than in 1970 and in many cases no greater than the levels reached in the 1960s.

Id. at 323.

18 Id. at 310.

19 See Bureau of Labor Statistics, U.S. Dep’t of Labor, Employment and Earnings, May 1992, at 23 tbl. A-14 (reporting that, as percentage of civilian labor force in April 1991 and April 1992, blacks were nearly twice as likely to have lost their jobs as whites).

20 A Common Destiny, supra note 17, at 312 ("[L]arge occupational differences remain [between whites and blacks], and blacks are still greatly overrepresented in low-wage, low-skill jobs.").


22 See Ian Ayres, Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, 104 Harv. L. Rev. 817, 819 (1991) (discussing study showing that retail car dealerships offered substantially better prices on identical cars to white men than to black men).
Strauss has called colorblindness a “slogan” and “myth” and has argued powerfully that one cannot attack discrimination without hurting “innocent” people and drawing attention to race. Professor Strauss argues persuasively that the antidiscrimination principle is a double-edged sword and, properly understood, may require some race-conscious hiring to get around the economic and legal difficulties of enforcing antidiscrimination legislation. Kathleen Sullivan has argued that we ought to focus race-conscious policies on remedying future inequalities that are likely to exist rather than look for past “bad” actors. Louis Michael Seidman has made the interesting observation that Brown v. Board of Education and Miranda v. Arizona both enforce a false sense of equality by suggesting that people have consented to their oppression. Professor Neil Gotanda has argued that colorblindness is a multifaceted thing when used by the courts, but that it cannot, as presently formulated, achieve its goal of equality. None of these important and thoughtful scholars has attempted to deconstruct the widely accepted notion of colorblindness as morality. When Justice O’Connor laments that “[w]e ought not delude ourselves that the deep faith that race should never be relevant has completely triumphed over the painful social reality that, sometimes, it

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The prohibition against racial discrimination prohibits—and must necessarily prohibit—the use of accurate racial generalizations that disadvantage blacks. But to prohibit accurate racial generalizations is to engage in something very much like affirmative action. Specifically, a principle prohibiting accurate racial generalizations has many of the same characteristics as affirmative action; and the various possible explanations of why accurate racial generalizations are unconstitutional lead to the conclusion that failure to engage in affirmative action may also sometimes be unconstitutional. . . . I am not suggesting at this point that it is impossible to draw a common sense distinction between affirmative action and nondiscrimination. But critics of affirmative action attack it on the ground that it causes innocent people to suffer, and that instead of enforcing colorblindness, it draws attention to race. . . . [T]he prohibition against discrimination has precisely these characteristics as well.

Id. at 100-01.

24 See id. at 100, 118-34; Strauss, supra note 8, at 1654-56 (arguing for race-conscious hiring through use of numerical standards).


28 Louis M. Seidman, Brown and Miranda, 80 Calif. L. Rev. 673, 752 (1992) (“Brown and Miranda created a world where we need no longer be concerned about inequality because the races are now definitionally equal and a world where we need no longer be concerned about official coercion because defendants have definitionally consented to their treatment.”).

29 See Gotanda, supra note 16, at 63.
may be," she seems to assume both that colorblindness is the moral imperative—our long-term goal—and that it is simply human folly that prevents such a glorious eventuality. Even though Justice O'Connor's assumption is shared across the political spectrum, I believe her conclusion concerning the moral status of colorblindness is not only wrong, but dangerous, because it removes whole questions from the legal discourse, questions that we desperately need to ask. In addition, I want to emphasize that racial oppression is constituted of multiple oppressions that exist in our society—including gender, class, sexual orientation, and ethnic oppressions—all intersecting to create a complicated reality that simplistic dictates of "race-neutrality" can never hope to address.

Accordingly, I conclude that colorblindness—far from a moral principle that ought to govern everywhere—is an inadequate policy prescription for altering the racial status quo. In Part I, I discuss historical treatment of the concept of colorblindness and distinguish moral arguments from policy arguments. In Part II, I examine the major public policy arguments made in defense of colorblindness and argue that there are better ways to pursue racial justice. I also contend that, for reasons that are understood elsewhere but not applied against the race-neutral argument, it is generally impossible to attack racism without dealing with race. In Part III, I turn to the Court's recent decision in Shaw v. Reno\(^{31}\) to show how the application of colorblind principles is itself often an impossible proposition in a world where the temptation to "peek" at race is compelling.

I

A Brief History of the Colorblind Principle

[The question is simply how to create a legal system that considers blacks to be] white men with black skins, nothing more and nothing less.\(^{32}\)

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\(^{31}\) 113 S. Ct. 2816 (1993).

\(^{32}\) Kenneth M. Stampp, The Peculiar Institution viii (1956). This phrasing of the issue caused some controversy among historians. Stampp notes,

I did not, of course, assume that there have been, or are today, no cultural differences between white and black Americans. Nor do I regard it as flattery to call Negroes white men with black skins. It would serve my purpose as well to call Caucasian men with white skins. I have simply found no convincing evidence that there are any significant differences between the innate emotional traits and intellectual capacities of Negroes and whites.

Id. at ix.
I would like to distinguish between policy arguments, which make claims about the impact of a particular decision upon concerns measurable in some particular way, and moral arguments, which make claims about justice. The statement in the Declaration of Independence that all men are created equal is a moral claim based on notions of justice embedded in Jeffersonian language. The argument for market economies in Eastern Europe is a policy argument based on the “failure” of communism and the “success” of capitalism. The claim by Justices Marshall and Brennan that the death penalty is immoral is obviously a moral claim, as is the claim by Justices Scalia and Rehnquist that some crimes are so heinous that they require the state to respond by taking the offender’s life. The argument that the death penalty will reduce the number of murders is a policy argument about the efficacy of capital punishment that is used to enhance the moral claim for the penalty’s necessity.

Neither side of a moral debate is likely to be persuaded by proof that the policy claims support or discredit their moral positions. Policy arguments can be disproved by empirical evidence and challenged by showing that in some situations the policy does not work or has contrary results. To refute a moral claim, however, first requires some agreement on the moral framework. Only then can one discuss whether the moral policy advocated conforms to the agreed-upon framework.

Of course, these two different kinds of claims are connected. People enhance their moral claims with arguments about the social efficacy of a particular policy. And policy arguments presume some implicit moral code for valuation. Those in favor of free markets ar-

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34 This is a comparison made of the relative worth of the two systems of government and economic activity. It is possible that both are failures or successes when measured against other systems.

35 See, e.g., Furman v. Georgia, 408 U.S. 238, 360 (1972) (Marshall, J., concurring) (“[E]ven if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States . . . .”); id. at 295 (Brennan, J., concurring) (“Although pragmatic arguments for and against the punishment have been frequently advanced, . . . [a]t bottom, the battle has been waged on moral grounds.”); Simmons v. South Carolina, 114 S. Ct. 2187, 2202-03 (1994) (Scalia, J., dissenting) (“I am sure it was the sheer depravity of [the crimes], rather than any specific fear for the future, which induced the South Carolina jury to conclude that the death penalty was justice.”); Roberts v. Louisiana, 431 U.S. 633, 648 (1977) (Rehnquist, J., dissenting) (“[C]ertain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.”) (quoting Gregg v. Georgia, 428 U.S. 153, 184 (1976)).
gue that they have produced and will produce a more moral society because individual economic freedom supports the general ability of individuals to become "complete" citizens. Here, the moral argument reinforces the policy claim for the efficacy of markets.

It is because of the differences between the two types of arguments that policy claims masquerading as moral claims can be so powerful. Since the only way to refute a moral claim is to question the framework of valuation, these policy claims tend to force their opponents to argue with and lose to strawmen. It therefore becomes important to distinguish between the moral arguments and the policy arguments embedded in social discourse.

The genuine moral goal associated with race is to end race-based oppression. Colorblindness may sometimes accomplish this moral goal, but it is not the goal itself. Therefore, the colorblind principle in modern constitutional discourse must be seen as a policy argument and not a moral precept.

It is easy to see that the colorblind ideal is not sufficient to protect us from moral dilemmas if one examines early efforts of our citizens to be colorblind. The white men who adopted the Constitution refused to put the words "race," "color," or "slavery" anywhere in its text. The Constitution was thus formally "neutral" toward race, slavery, and color. This conscious decision to be colorblind, of course, did not prevent the creators of the American constitutional order from accepting the pernicious American form of slavery. The Constitution was, in modern constitutional parlance, facially neutral while protecting racial subjugation by private parties and even governmental entities.

Moreover, the Constitution is colorblind in a particularly inapt and improper way. Although the text's silence on race might allow the superficial appearance of racial "equality," in fact the colorblindness serves to enforce the racial present. By denying the law the

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36 See Friedrich A. Hayek, The Road to Serfdom 147 (1976) ("The principle that the end justifies the means is in individualist ethics regarded as the denial of all morals. In collectivist ethics it becomes necessarily the supreme rule.").

37 The Constitution does refer to "Indians not taxed" to denote Native Americans residing on tribal lands. See U.S. Const. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not Taxed, three fifths of all other Persons."). See generally Jerome M. Culp, Jr., Toward a Black Legal Scholarship: Race and Original Understandings, 1991 Duke L.J. 39 (discussing history of legal scholarship and its exclusion of, and need for, a black legal scholarship); Anthony Cook, The Temptation and the Fall of Original Understanding, 1990 Duke L.J. 1163 (reviewing Richard H. Bork, The Tempting of America: The Political Seduction of the Law (1989)) (critiquing Bork's originalist constitutional philosophy).
power to take account of and, therefore, to rectify the status quo, colorblind morality sustains a racially subordinate present for African Americans.

When courts and commentators argue for colorblindness, they implicitly are making both a public policy claim and a moral statement. The policy assertion is that colorblindness will achieve social goals effectively, and the moral claim is that the society so produced will be an objectively good one. If we understand, however, that the public policy claim ultimately reinforces the status quo of a society that is racially oppressive, then it is clear that the moral claim actually defends the white supremacy reflected in existing social arrangements. In such a “race-neutral” world, subordination of black people becomes the natural state unchangeable by public policy or other efforts by governmental agents.38

I want to acknowledge at this point that there are reasons for wanting to protect the status quo. For the white majority in this country, the status quo may seem to represent powerful property and status rights that are difficult to forsake.39 I have some stake in the status quo as a member of the middle class, a tenured law professor who owns a house and an automobile and enjoys a well-paid, highly regarded job. While it may be morally right to provide some level of stability and protection to interests such as these, stability itself does not represent universal fairness. In a system of racial inequality, the moral claim of colorblindness is, in reality, an enforcement and defense of a status quo that leaves blacks and many other racial minorities at the bottom of the economic ladder.

38 The Supreme Court’s decisions in Croson, Wygant, and Bakke may be understood only as pursuing this colorblind status quo. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505-06 (1989) (“To accept Richmond’s claim that past societal discrimination alone can serve as the basis for rigid racial preferences ... would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.”); Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 276 (1986) (plurality opinion) (“Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.”); id. at 274 (“This Court has never held that societal discrimination alone is sufficient to justify a racial classification.”); Regents of the Univ. of California v. Bakke, 438 U.S. 265, 310 (1978) (Powell, J.) (“The purpose of helping certain groups [who are] perceived as victims of ‘societal discrimination’ does not justify a classification that imposes disadvantages upon persons ... who bear no responsibility for whatever harm the beneficiaries of the program ... are thought to have suffered.”).

When I speak of the status quo, I do not mean an absolutely fixed relationship between blacks and whites, but rather a range of positions responsive to the relative power of blacks and whites in American society. At various points, African Americans have made progress relative to whites in various ways (though not as much as some believe). Their progress has been greatest during periods associated with race-conscious public policies such as the activities of the Freedman’s Bureau during Reconstruction and the race-conscious policies of the government during World War II and the Vietnam War.

One remaining question is whether I have minimized the benefits that colorblind morality can produce. Take, for example, Loving v. Virginia, the 1967 decision which struck down a Virginia statute prohibiting interracial marriages because the statute violated the due process and equal protection clauses of the fourteenth amendment. Proponents of the colorblind principle would certainly contend that the advantages black citizens gained from the elimination of a race-conscious statute (prohibiting all nonwhites from marrying whites with the exception of descendants of Pocahontas, are a direct result of the Court’s implementation of the colorblind principle. Many would say that colorblindness served the goal of equality and morality by freeing interracial couples from the threat of criminal prosecution.

Unfortunately, this view of the racial reality is stunted and inexact. The real moral duty in Loving is not simply to permit those who wish to marry interracially to escape criminal prosecution, but rather to be able to choose whomever they wish to marry, free from social and political violence. The Court’s overturning of the Virginia statute did not make Virginia safe for the Lovings (a black woman and a

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40 See A Common Destiny, supra note 17.
41 See, e.g., Freeman, supra note 21, at 269-84 (attributing changes in relative position of blacks in late 1960s to advances partially wrought by government policy); see also William Cohen, At Freedom’s Edge: Black Mobility and the Southern White Quest for Racial Control, 1861-1915, at 48-49 (1991) (discussing Freedmen’s Bureau’s function as equalizer of labor supply and labor demand, “assisting planters who wanted labor and freedmen who needed jobs”). I would contest the largely unsupported theory of market-driven racial progress advanced by Thomas Sowell. See Thomas Sowell, Markets and Minorities (1981). Rather, I believe that the market provides relatively narrow opportunities for economic progress outside of race-conscious efforts of individual groups and corporations.
42 388 U.S. 1 (1967).
43 See id. at 5 n.4 (quoting §§ 20-54 of the Virginia Code, prohibiting whites to marry “any save a white person, or a person with no other admixture of blood than white and American Indian,” and attributing this exception to, in the words of the Registrar of Virginia’s State Bureau of Vital Statistics, “the desire of all [Virginians] to recognize as an integral and honored part of the white race the descendants of John Rolfe and Pocahontas . . . ”).
white man), nor did it change the racial status quo in which an individual’s status is changed because of a mixed marriage. The Court could not truly believe that it would be safe for an interracial couple to seek to marry in Virginia after this decision. The Court could have adopted a racially conscious policy that would truly protect the interests of people in racially mixed marriages, but it did not, primarily because the colorblindness principle does not aim to change the status quo; it simply asserts that colorblindness is morality. Black people who marry white people gain status, and some envy, both before and after the constitutional change. Whites who marry blacks continue to lose social status and family inheritances. Nothing in this

44 See id. at 3 (noting trial judge’s statement that God “placed [the races] on separate continents” because “he did not intend for the races to mix”).

45 See, e.g., John F. Dovidio & Samuel L. Gaertner, Changes in the Expression and Assessment of Racial Prejudice in Opening Doors: Perspectives on Race Relations in Contemporary America 119, 126 (Harry J. Knopke et al. eds., 1991). Dovidio and Gaertner found that:

Nationwide polls also indicate that personal acceptance of blacks is far from complete. Relatively high proportions of respondents continue to show racial biases on items involving some degree of intimacy between blacks and whites. A Harris Poll in 1978 revealed that only 35 percent of whites favored full integration (another 42 percent favored integration in some areas). In 1981, 31 percent of whites surveyed preferred not to have blacks as neighbors; in 1988, one-third of white respondents preferred to live in “a neighborhood with mostly whites.” Although in 1982 the majority (66 percent) of whites opposed laws prohibiting interracial marriage, in 1983, the majority of whites (60 percent) personally did not approve of interracial marriage.

Id. (emphasis added) (footnotes omitted).

46 Virginia, after all, is the place where Nat Turner’s and Gabriel Prosser’s revolts took place. See generally Stephen B. Oates, The Fires of Jubilee: Nat Turner’s Fierce Rebellion 16-18 (1975). Notably, the black female/white male miscegenation presented in the Loving case did nothing to dislodge the patriarchal “defense” of white womanhood that was so central to the construction of racial politics in Virginia and many other southern states. See, e.g., Calvin C. Hernton, Sex and Racism in America xi-xii (1988). Hernton stated:

[The] abusive insults and violent acts committed against interracial couples in our daily lives on a local level are seldom brought to public attention. One learns of such happenings by word of mouth, from friends and acquaintances, or by chance, from being on the scene when they are perpetrated. In Chattanooga, Tennessee, a white woman was horse-whipped by white men for “carrying on” with a black lover.

Id. Thus, even after Loving, interracial couples would still be subject to potential threats and private harm for breaking the miscegenation taboo. Was it an accident that the Supreme Court ruled in a case involving a black woman and a white man? This situation was least likely to inflame the passion of southern society.

47 For example, the Court could have granted some direct remedy, or at least ordered the state affirmatively to protect the interests of interracial couples. After all, the State of Virginia had helped to create this very climate of fear and danger for such couples. The trial judge in Loving, for example, had suspended their one-year prison sentence on the condition they leave the state for 25 years. See Loving v. Commonwealth, 147 S.E.2d 78, 82-83 (Va. 1966) (vacating sentence and remanding to trial court); see also Howard Schuman et al., Racial Attitudes in America: Trends and Interpretations 83 (1985) (reporting that fewer than 50% of white residents of the South opposed laws against intermarriage).
principle of colorblind treatment alters the stereotypes associated with the miscegenation taboo. Rather, those rules have changed, to the extent they have, primarily as a result of concerted efforts of individuals to attack the racial stereotypes directly. In short, the colorblind principle does not eliminate the problem of racial subordination in our society or its social and economic consequences for African Americans.

Some proponents contend that colorblindness is the appropriate public policy given the traditional roles of the state and the private sector. This view holds that the government’s job is to do no harm, and colorblindness fulfills this function because discrimination perpetrated by governmental action is more pernicious and because the government will always have difficulty determining what is correct or appropriate. Under this division of labor, the private sector is then free to create a new and different racial status quo if it wishes. The problem is that like most evolutionary processes, private individuals can produce change, but that change may not produce justice. What colorblindness does in the case of interracial couples, for example, is to assert a moral claim but nevertheless allow private parties to discriminate against people in both legal and illegal ways. Therefore, although colorblindness may be the correct policy in an appropriate situation, the proponents of colorblindness cannot simply “assume” that race-neutrality is synonymous with morality. Rather, they must convince us of a moral result.

Some of you who know your history better than the average law student and law professor will protest at this point that the colorblind argument was used most forcibly before the Civil War by “free” blacks seeking to extend the rule of law to themselves and others.48 I believe that their claims support rather than defeat my point, for ultimately what these early advocates argued for and what they got—in the limited instances in which they were successful—is protection of their own privilege, with little change in the racial order. Racial sub-

48 See Celeste M. Condit & John L. Lucaites, Crafting Equality: America’s Anglo-African Word 69-98 (1993) (discussing public rhetorical efforts of African Americans in antebellum period to expand usages of concepts such as equality and liberty in order to fight against their status as a politically constituted people). Such efforts were only part of the discourse of African Americans in the antebellum period. Some of the arguments for abolition were deemed too radical to publish, and some people, like David Walker who published such ideas, subsequently disappeared or were killed. See Jane H. Pease & William H. Pease, They Who Would Be Free: Blacks Search for Freedom, 1830-1861, at 108-11 (1990).
ordination did not end in Massachusetts just because blacks were finally admitted to the railway car.49

In thinking and talking about how to deal with race, courts and commentators often confuse the notion of colorblindness—the removal of race from the legal and governmental discourse—with the antidiscrimination principle—the elimination of deprivations based on race.50 The antidiscrimination principle can be read in a colorblind way; i.e., we could have written Title VII to require, for example, that people be hired on production and merit-based grounds. The statute would not mention race, but would implicitly eliminate racial choices in an employer’s “meritorious” and “production-based” decisions.51 However, Congress did not adopt this approach in passing the fourteenth amendment and Title VII of the 1964 Civil Rights Act. Instead, the Reconstruction amendments and the Civil Rights Acts of the modern era mandated the elimination of social and economic race privilege.52

This aspect of the antidiscrimination principle is explicitly color-conscious. Thus, race is a salient issue for courts when deciding whether the thirteenth or fourteenth amendments apply in constitutional interpretation. The antidiscrimination principle aims to change the present by enforcing different norms on some decisionmakers. However, the antidiscrimination principle cannot fulfill this aim when it is colorblind, precisely because it cannot then acknowledge the racial present. Although a colorblind antidiscrimination principle would perhaps prevent an increase in racial subordination, it cannot hope to

50 See Paul Brest, The Supreme Court 1975 Term, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 53 (1976) (arguing that there are more direct ways of identifying needy people than by race).
51 This proposal assumes, of course, that such race-neutral standards exist and that there are no hidden racial considerations buried within the choices made through the use of production and merit.
52 The thirteenth amendment states that “[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.” U.S. Const. amend. XIII, § 1. The fourteenth amendment states that “[n]o State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Title VII of the Civil Rights Act of 1964 states that “[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual’s race, color, religion, sex or national origin.” 42 U.S.C. § 2000e-2(a)(1) (1988).

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change the status quo. The antidiscrimination principle therefore loses its power to effect real societal change when it becomes colorblind.

II

COLORBLINDNESS AND MULTI-OppRESSIONS: THE PUBLIC POLICY DEFENSE OF COLORBLINDNESS

Even the proponents of colorblindness must acknowledge that the racial status quo is at present unfair to black Americans. Accordingly, the policy argument most frequently advanced in defense of the colorblind principle is that race is a poor proxy for addressing economic inequities. Proponents argue that there is always a different, indeed better, proxy that will be colorblind while permitting the government or decisionmaker to move us closer to a just society.

This view of the power of colorblind remedies is held by a wide spectrum of people. Judge Richard Posner, for example, argues that race was the wrong measure in DeFunis v. Odegaard, a pre-Bakke challenge to affirmative action in university admissions. Posner states:

Furthermore, the impact of eliminating racial preference is easily exaggerated. The preferred groups [who would benefit from affirmative action] could be redefined as the underprivileged, the deprived, etc.—classifications not based upon race or ethnic origin. The constitutional objection to preferential treatment would thereby be removed, without substantial impairment of the purposes of such treatment.

Likewise, Paul Brest, a leading liberal thinker and scholar, argues in his influential article on the antidiscrimination principle that “[r]ace is, at best, a weak proxy for need; there are more direct and accurate ways of identifying needy people.” The Supreme Court ultimately took this same approach when it “solved” the problem of affirmative action in Bakke. In the opinion for the Court, Justice Powell wrote that the use of race as a factor in admissions decisions might be valid as long as its use merely effectuates some neutral policy of diversity

53 See Jerome M. Culp, Jr., Diversity, Multiculturalism and Affirmative Action: Duke, the NAS, and Apartheid, 41 DePaul L. Rev. 1141, 1144-52 (1992) (arguing that racial oppression is a box created by the way we define ourselves and the way in which we are defined by others).
57 Id.
58 Brest, supra note 50, at 53.
not directly connected to racial justice.\textsuperscript{59} Justice Powell's indirect support for this "Harvard Plan" approach has embedded within it a policy argument that the current racial status quo will eventually, if slowly, produce parity in educational admissions. Justice Powell's opinion seems to argue that, by implementing the kind of multiple-factor balance of Harvard's admission program, the neediest, most underprivileged individuals will make it to medical school.

In fact, educational affirmative action plans often take from the pool of minorities those applicants with the smallest intersection of race and poverty because such choices require the least investment in seeking out and preparing people to be students in these institutions. We could find students from among those with more diverse backgrounds to admit to our schools, but ultimately we choose not to because this brand of race consciousness is financially and ideologically expensive. We prefer the mildly race-conscious policy because it is cheaper and likely to change us the least. I think such efforts are important in order to break down stereotypical views about race and performance, but I do not want to suggest that such efforts will eliminate intraracial class disparities. Most affirmative action policies are blind to the intersection of race and poverty and thus support this intraracial version of the status quo. Unfortunately, colorblindness in no way addresses this particular problem. Nonetheless, the critique of race-based affirmative action and defense of colorblindness on this point endures.

For example, in \textit{City of Richmond v. J. A. Croson Co.},\textsuperscript{60} Justice O'Connor reiterated this familiar policy argument. She wrote:

Even in the absence of evidence of discrimination, the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect. . . . Their elimination or modification would have little detrimental effect on the city's interests and would serve to increase the opportunities available to minority business without classifying individuals on the basis of race.\textsuperscript{61}

\textsuperscript{59} See \textit{Bakke}, 438 U.S. at 320 ("In enjoining petitioner from ever considering the race of any applicant, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program [like Harvard's] involving the competitive consideration of race and ethnic origin.").

\textsuperscript{60} 488 U.S. 469 (1989).

\textsuperscript{61} Id. at 509-10.
Justice O'Connor assumes, as did Judge Posner and Professor Brest, that race is an empty box into which other things, like poverty and oppression, are added and that if we take out those other attributes no important difference connected to race remains.

This assumption is overly simplistic for two reasons. First, the issue of race derives much of its importance from what other things are added to the box. Taking the most obvious example, in our society being poor and black is extremely different from being poor and white. Not only are poor whites likely to start with greater wealth, they are also less likely to remain in poverty as long as poor blacks do.62 Similar results emerge from data on the employment and other experiences of workers in the job market.63 These data indicate that race is not simply a proxy for something else. Poverty, unemployment, and even social status are often poor estimates of the costs imposed on blacks by differential treatment, as indicated by the high degree of imperfection in all of our social scientific measures of poverty, income, class, and disadvantage.64 Therefore, although efforts to solve the problem of racism by reducing65 poverty are bound to achieve some admirable goals, they will almost never "resolve" the issue of race. Racism can be destroyed only by attacking the system that produces it. If we do not alter that system, racism will return again and again to plague our efforts.

62 See Culp & Loury, supra note 21, at 125-26 (concluding that blacks have lower permanent income than whites).

63 See Bureau of Labor Statistics, supra note 19, at 20 tbl. A-11 (reporting that unemployment rates of blacks age sixteen and over is more than twice that for whites age sixteen and over for years ending April 1991 and 1992).

64 This is an issue that can be thought of as a problem in measurement. Assume that as a court or legislature you want to know the value x, but that you cannot measure x directly. For example, it is difficult to measure disadvantage. Income, wealth, social background, education, and a host of other factors enter into this equation, but there is no direct measure of disadvantage. In order to make the claim that race-neutral policies are most effective, one must show that the error associated with race is always larger than the error associated with other variables. This is an almost impossible task. In this situation we are measuring race, and any estimates of race, whether by measuring income, size of business, or personal background, are always likely to have significant errors associated with their use. See generally Edward E. Leamer, Specification Searches 226-59 (1978) (discussing extent of possible inferences about theoretical parameters when hypothetical variables are measured with error).

65 It might be possible to remove all income differences of importance and therefore eliminate the racial differences, but no policy that is being discussed plans to accomplish that task. Indeed, it may be the existence of racism that prevents our society from imagining strategies which would truly eliminate poverty and social differences. But see Paul M. Sniderman & Thomas Piazza, The Scar of Race 21-22 (1993) (reporting that white Americans favor programs to ameliorate racial difference until mention is made of affirmative action).
Second, in trying to use something other than race to create change, the practitioners of colorblindness have assumed that all oppressions are parallel; i.e., that these oppressions do not intersect to alter and change their individual natures. We know from empirical data, however, that these oppressions often overlap. The interaction of race and poverty is so great that it creates a separate and distinct existence for many African Americans.66 Worrying about class in such situations does not eliminate the intersections between race and class. As I have argued, even worrying about class as a subset of race may be insufficient to deal with the subordination and oppression created by these intersections.

The claim made by the proponents of colorblindness ultimately becomes an argument about the worth of race relative to other categories of oppression. Those who believe that colorblind policies will be effective are contending that these other categories (class, income, age, status, etc.) are better measures of disadvantage than race. I would argue that this contention is generally not true. If we eliminate poverty, we will not eliminate racism for the precise reason that racism was not the focus of the attack. Indeed, we will not even eliminate the intersections between race and class in such situations, because they are likely to be resistant to purely class-based attacks. Programs to eliminate poverty, for example, may reach “poor” people, but may not always help the truly disadvantaged in the inner cities.

Indeed, every time the Supreme Court has argued that a race-conscious policy was incorrect, it has done so in ways that support the continuation of the racial status quo. When Justice Powell’s concurring opinion became the opinion of the Court in Bakke, the Justices enshrined in the public discourse the view that the race-conscious remedies adopted by the University of California were unconstitutional and incorrect. Subsequent adoption of the Harvard multiple-factor approach,67 however, has produced (and continues to produce) opportunities for precisely the kind of white people who, had they been black, would have been described as undeserving or not among the truly disadvantaged; i.e., students with paralegal backgrounds who have, at the moment, nothing in their bank accounts. The Harvard policy only changes the current opportunity structure if the operators of the system are, in fact, race-conscious. Because of the income and

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66 For the groundbreaking study in this field, see generally William J. Wilson, The Truly Disadvantaged: The Inner City, The Underclass, and Public Policy (1987).
67 See text accompanying note 60 supra.
class factors, there are always many white people who will appear to be disadvantaged but who are not "truly disadvantaged." 68

Take, for example, Justice O'Connor's assertion in Croson that the City of Richmond could have addressed the problem of too few minority contractors by trying, among other things, to help small businesspeople obtain credit. 69 This suggestion sounds good, but programs making credit more obtainable are likely to help disproportionately those white contractors who, for all of the reasons that race matters, are better able to take advantage of such programs. Moreover, past experience and economic constraints suggest that many governmental programs lack the resources needed to influence enough black small businesses to create meaningful change. Like every other governmental endeavor, such programs have limited funds. The more money that is allocated to white contractors, the fewer resources that will be spent changing the circumstances of racial minorities. The program that Justice O'Connor urges will effect little change in the relative position of black- and white-owned businesses. Although those who oppose race-conscious policies acknowledge this point, they contend that race-conscious policies suffer similar problems because only "wealthy" or "suburban" blacks will benefit from such programs, while those who are "truly disadvantaged" will be ignored. 70 This critique of affirmative action is widely heard, but its implications for colorblind policy are generally ignored.

In the end, almost all policies create change through imperfect instruments. As a result, there is an error in measurement associated with their implementation. Nevertheless, I would contend that race is

68 The Court failed in a similar way to deal with the issue of "the disadvantaged" in Wygant v. Jackson Bd. of Ed., 476 U.S. 267 (1986). In Wygant, the Jackson school board had negotiated a collective bargaining agreement that provided superseniority protection for newly hired black teachers who had been recruited with great difficulty to the school district. See id. at 270 (plurality opinion). A plurality of the Court concluded that the greater protection for the recruited black teachers violated the equal protection rights of the white incumbent teachers despite the fact that the Jackson school district had many black children but few black teachers. See id. at 283-84 (plurality opinion). In contrast, when a court eliminates a negotiated protection for black teachers in a union contract, the beneficiaries of the race-neutral seniority policy will most likely not be deemed the "truly disadvantaged," but rather white representatives of the status quo.


70 See Christopher Jencks, Rethinking Social Policy: Race, Poverty and the Underclass 57-58 (1992) (suggesting that affirmative action will not increase the number of jobs for blacks but will only raise wages of those who have jobs); Thomas Sowell, Civil Rights: Rhetoric or Reality? 51-52 (1984) ("Those blacks with less education and less job experience—the truly disadvantaged—have been falling farther and farther behind . . . under affirmative action, during the very same years when blacks with more education and more job experience have been advancing economically . . . .").
a more accurate criterion for making policy decisions than other, non-racial characteristics.

III
"Peeking" and Other Vices of Colorblindness:
SHAVERO

The most difficult problem of the colorblind principle is raised by "peeking," when social actors use race covertly in making decisions. The potential for racial injustice exists when decisionmakers at all levels consider race covertly; it also exists when courts and legislatures decide who should be allowed to consider race covertly. The Supreme Court's controversial decision in Shaw v. Reno presents this issue clearly.

It is no accident that the nomination of Lani Guinier to be Assistant Attorney General for Civil Rights was blocked by a coalition of people concerned about voting rights issues. A series of court battles over the years has created a stir about voting rights and black voters. The key concern seems to surround the 1982 amendments to section 2 of the Voting Rights Act, which eliminated the previously required showing of intent to discriminate in voting rights suits under the Supreme Court's test in City of Mobile v. Bolden. In 1986, the Supreme Court in Thornburg v. Gingles held that blacks and other racial minorities must be given the opportunity to challenge legislative decisions that substantially reduce their chances of election.

In 1992, these legal developments, together with the reapportionment of congressional districts in 1990, led to the largest number of African Americans and Hispanics ever elected to Congress. The number of black congresspersons increased from twenty-six to thirty-nine, and the number of Hispanic congresspersons rose as well.

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72 See Patricia J. Williams, Lani, We Hardly Knew Ye, The Village Voice, June 15, 1993, at 25 (discussing myth that Guinier was a "quota queen").
74 446 U.S. 55 (1980).
76 One of the most interesting aspects of Shaw is its complete neglect of this history. No mention is made in Justice O'Connor's opinion that the new district in North Carolina elected the first black representatives to Congress in almost a century or that the 1982 amendments to the Voting Rights Act had the desired result of increasing the opportunities of African Americans and Hispanics to seek and win congressional seats.
77 See Marla Puente, Hispanics Debating Their 'Destiny' in USA, USA Today, July 16, 1993, at 10A (reporting increase in number of Hispanics to nineteen); Monte R. Young, Feeling Their Votes Black Caucus Gains Clout in Congress, Newsday, Sept. 20, 1993, at 19.
Some of the newly elected African American representatives came from districts that had been deliberately reapportioned to produce African American majorities. Some of these districts were shaped oddly in order to meet the apportionment requirements of the Supreme Court as laid out in *Reynolds v. Simms*. Two of the newly redrawn districts in North Carolina elected an African American to Congress. When Melvin Watt and Eva Clayton took the oath of office in January 1993, they became the first African Americans to sit in Congress from North Carolina in nearly a century.

The Wall Street Journal described the congressional district in which I vote, the one that stretches along I-85, as “political pornography.” This Twelfth Congressional District, the one at issue in *Shaw*, runs from Durham, along I-85, to Charlotte. In some places, the district is the width of the highway. The United States Attorney General had previously invoked his power under the Voting Rights Act to reject an earlier plan produced pursuant to the 1990 redistricting. He suggested that although the state should have produced two districts that were predominantly minority in order “to give effect to black and Native American voting strength in this area,” the original plan had produced only one. North Carolina decided not to appeal this use of federal power and instead produced the requested second black majority district. Five white residents of Durham then challenged this

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78 I say “oddly” somewhat advisedly. The districts were no more odd than some of the other districts created by a court that requires almost absolute precision in district drawing and by legislatures that redistrict to maximize partisan advantage and incumbency. Computers permit legislatures to include more factors in their analysis. See Shaw v. Hunt, No. 92-202-CIV-5-BR, slip op. at 100-02 (E.D.N.C. Aug. 1, 1994) (describing new capabilities for redistricting provided by technological developments). It is, therefore, hard to say that the choices made by legislatures differ impermissibly from choices based on race.

79 377 U.S. 533, 568 (1964) (holding that equal protection clause requires that state legislative districts be apportioned on population basis); see also Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964) (holding that under article I, § 2, congressional districts must be apportioned on population basis).


83 *Shaw*, 113 S. Ct. at 2820 (citations omitted).
second district in federal court, alleging that the district was an unconstitutional gerrymander under the fourteenth amendment.84

Justice O'Connor concluded that the plaintiffs had been affected adversely by North Carolina's use of race-conscious redistricting to create a black voter majority.85 She explained that these five white plaintiffs were not claiming a dilution of white voter strength, or even claiming to be white; they were just "citizens" adversely impacted by being unable "to participate in a 'color-blind' electoral process."86 Just citizens? What angered my colleagues (two of the five plaintiffs teach law at Duke University School of Law) and led them to fight this case long past the point when the expense might have deterred others, was not the shape of the district, but the fact that race was taken into account.87

The Court is caught in a box of its own making and does not understand the nature of the dilemma it has created. The Court first says that we must make no assumptions about how particular groups will vote, and that it therefore will not peek at the reality of racial bloc voting in North Carolina.88 If that is true, however, then these districts cannot possibly violate the rights of the white plaintiffs because the decisions that the redrawn districts produce could not be discriminatory. If these plaintiffs have no race, then how can race matter? The Court claims that it wants to make no invidious assumption about the way that black voters will vote. If indeed black voters vote like everyone else, without regard to the racial identity of the candidates, then how could the rights of the five white plaintiffs have been injured? What is the injury to citizens who have no race?

84 Id. at 2821.
85 See id. at 2828. A particularly bewildering aspect of Justice O'Connor's decision is her failure to acknowledge that these districts could elect white candidates without any change in the current pattern of black and white voting because the two districts only barely achieve black majorities. White candidates are still likely to win at least some elections in the challenged district. See Shaw v. Hunt, No. 92-202-CIV-5-BR, slip op. at 140 (E.D.N.C. Aug. 1, 1994) (noting narrow African American majority and election of three white candidates in districts with minority-race voting majorities); see also note 100 infra. As Lani Guinier has pointed out, these are the two most integrated districts in the state. See Guinier, supra note 11, at 1590.
86 Shaw, 113 S. Ct. at 2824.
87 See Shaw v. Hunt, No. 92-202-CIV-BR, slip op. at 23 (E.D.N.C. Aug. 1, 1994) (citing claim by two plaintiffs that they are injured by redistricting because they doubt quality of their representation and feel "'disenfranchised.'").
88 "Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters . . . ." Shaw, 113 S. Ct. at 2832.
The reason the Court wants to treat these five white plaintiffs as raceless is to avoid the difficulty of admitting that there is no injury.\textsuperscript{89} Instead, the decision states that these plaintiffs have a right to live in a colorblind world, where redistricting does not upset their racial expectations. Despite Justice O'Connor's effort to claim that such a world is possible, she does not and cannot suggest how the State of North Carolina might actually achieve race-neutrality, given the myriad of redistricting policies that implicitly take account of race.\textsuperscript{90}

Indeed, Justice O'Connor attempts to distinguish between permissible peeking and impermissible peeking. She points to the political redistricting in \textit{Wright v. Rockefeller}\textsuperscript{91} as an example of legitimate peeking in the legislative process.\textsuperscript{92} The comparison implies that attention to race is legitimate in order to realize "compact" and "contiguous" districts, or the continuance of the integrity of political subdivisions.\textsuperscript{93} Yet, the legislatures' attention to race so as to create black majority districts is impermissible peeking. Justice O'Connor reasons that such districts constitute impermissible peeking because districts with irregular shapes give the appearance of unfairness and appearance ought to matter.\textsuperscript{94} Appearance matters because "[i]t rein-

\textsuperscript{89} Perhaps Justice O'Connor was trying to fashion an argument for standing similar to the one articulated by Justice Thomas in Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, 113 S. Ct. 2297 (1993). As Justice Thomas explained in that case:

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.

Id. at 2303. The problem with applying this standing argument to \textit{Shaw} is that, unlike a contracting process whereby some competitor is excluded, in the voting rights context no white candidate is excluded. Indeed, if the Court is right that there is no such thing as racial-bloc voting, white candidates have just as good a chance of winning as black candidates. The injury to the five white plaintiffs is the same as if, for example, the State had divided Durham into several districts, thus reducing the chances that someone from Durham could be elected. Could a group of Durham people challenge the redistricting program because as a group they were adversely affected? I think not. The real injury that the Court refuses to acknowledge is the blow to white supremacy.

\textsuperscript{90} Justice O'Connor writes:

\[\text{Redistricting differs from other kinds of state decisionmaking in that the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination. ... The district lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions.}\]

\textit{Shaw}, 113 S. Ct. at 2826 (second emphasis added) (citations omitted).

\textsuperscript{91} 376 U.S. 52 (1964).

\textsuperscript{92} \textit{Shaw}, 113 S. Ct. at 2826.

\textsuperscript{93} Id.

\textsuperscript{94} See id. at 2826-27.
forces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls."^{95}

The risk that Justice O'Connor runs is, of course, that her view can be interpreted as a call for enforced white supremacy. The traditional enforcement of race-neutral standards in drawing political districts—like age, education, and economic status—has left North Carolina without a black congressional representative for over a century, even in a state that still has a significant number of counties covered by the Voting Rights Act.^{96} Justice O'Connor, recognizing the difficulty of her position with respect to this issue, responds in two different ways. First, she argues that the creation of such districts sends the wrong message to congresspersons elected from those districts by suggesting that "their primary obligation is to represent only the members of that group, rather than their constituency as a whole."^{97} Second, she contends that the Court's prior gerrymandering decisions apply a similar principle of prohibiting racial peaking to exclude blacks in redistricting.^{98} Both arguments demonstrate that the Court will manipulate doctrine to avoid the racial implications of its decisions.

Justice O'Connor's contentions about the destructive impact of peaking are invalid on a number of grounds. She cannot support her argument with any empirical evidence to suggest that members of Congress elected from a majority black district ignore their white constituents. Her argument is particularly wrong-headed when the white minority still retains substantial control over the choice of representatives, as is the case with both of the North Carolina districts at issue (as well as districts in other states under challenge after Shaw).^{99} In-

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^{95} Id. at 2827.
^{96} Section 5 of the Voting Rights Act of 1965 requires certain "covered" jurisdictions—mainly those in the South—to obtain judicial or administrative preclearance before enforcing any new voting qualification, standard, practice, or procedure with respect to voting. See 42 U.S.C. § 1973c (1988).
^{97} Shaw, 113 S. Ct. at 2827.
^{98} Id. at 2826-27; see Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (ruled that municipal boundaries that excluded blacks entirely could be challenged under fifteenth amendment); id. at 349 (Whittaker, J., concurring) (arguing that judgment should be based on equal protection clause of fourteenth amendment).
^{99} Suits have been filed challenging other districts that have elected black congresspersons in Texas, Louisiana, Florida, and Georgia. See Ana Puga, Minority Electability at Stake in N.C. Trial, Boston Globe, Apr. 4, 1994, at 6. Only one of these suits has been decided. See Hays v. Louisiana, 839 F. Supp. 1188, 1209 (W.D. La. 1993) (finding z-shaped district unconstitutional "racial gerrymandering"), vacated and remanded, 114 S. Ct. 2731 (1994). The Supreme Court stayed the lower court's decision on remand pending appeal. 1994 U.S. LEXIS 5207 (Aug. 11, 1994).
Indeed, the fact that white candidates ran in both of these districts indicates that whites obviously believe they can still win in such a district (which, given its barely 50% black population, is better described as a racially integrated district than a black-majority one). Justice O'Connor ignores the power that greater wealth and superior political connections provide to white communities in these districts, power that continues to influence the representatives they elect to Congress. In at least one congressional election, white voters cast the votes that decided which of two black candidates would represent an overwhelmingly white district.

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100 See Shaw v. Hunt, No. 92-202-CIV-5-BR, slip op. at 140 (E.D.N.C. Aug. 1, 1994) ("[T]he two districts have but narrow African-American voting majorities: in the First District, 50.5% of the registered voters; in the Twelfth District, 53.5% of the registered voters.").

101 See Thomas B. Edsall, Whites Learn Minority Politics Like Any Other Group's, Their Support Can Be Crucial In a Tight Race, Wash. Post, Nov. 2, 1986, at C2 ("In the Atlanta congressional fight between civil rights leaders John Lewis and Julian Bond, Lewis, who in the past had run on the local 'Black Slate,' this year pointedly ran on 'the people's slate.' Lewis won because of the strong majorities he received in the white community."). (emphasis added). Indeed, some have suggested that the need to create cross-racial coalitions has the potential to break down the racial divide because if the bloc vote is divided between two candidates, the white vote becomes decisive, and the candidate with the "coalition" platform will generally win:

While biracial coalitions are emerging in both parties, they are likely to have far more impact on the Democrats. The restored importance of whites in majority black districts and cities has the potential to ameliorate the racial tensions that have severely undermined the Democratic Party coalition in the South and in urban centers of the North.

The resurgence of white voting strength is forcing politicians to adopt biracial electoral strategies, lessening racial tensions. This, in turn, should have the effect of slowing the steady drift of whites in many southern communities to the Republican Party.

"This brings whites back into the ball game," a Democratic consultant said. "When politics is all black, then the whites are going to move over to the Republican Party. This way, they get a piece of the action. It's black action, but still, whites have a piece of it."

....

"It can be argued that blacks are not getting their premier choice," said Williams of the Joint Center, "but in a sense, it seems that whites are doing what blacks have done for years."

Id; see also Luix Overbea, Black Caucus Hopes to Increase Its Numbers in U.S. House, Christian Science Monitor, Nov. 8, 1988, at 5 (reporting that most black incumbents in predominantly black districts are confident of victory, but some black candidates seeking new seats need white votes); Paul Ruffins, Interracial Coalitions' "New Moderation" Doesn't Account for the Dramatic Gains That Black Politicians Made in the Last Elections, Atlantic, June 1990, at 28, 30:

The point is that there is no new, more moderate generation of black politicians. Most have been moderate all along. There have been angry civil-rights leaders and black activists, but the angry black politician is a stereotype of conservatives. "What I think happens," Congressman Ed Towns, of Brooklyn, recently told me, "is that peo-
The Court’s argument ultimately assumes that when whites are in power because of politically-determined (and race-infected) policies, it is constitutional, but when those majorities are redefined through race-conscious measures, it is not. The Shaw decision, in effect, asserts that existing political majorities are race-neutral, and therefore it enforces the status quo. Justice O’Connor allows legislatures to “peek” as long as they do not violate the white supremacy existing in North Carolina.

Her position is revealed clearly when she cites nonracial examples of legitimate considerations in redistricting. She assumes that political subdivisions can somehow be achieved neutrally. In fact, Durham County is a direct product of Reconstruction Era opposition to black political control of Orange County, out of which Durham was created. No one who has lived through a political annexation fight in the South believes that those decisions are made free of race- and class-based interests. All five plaintiffs live in a racial atmosphere pervaded by this history. Similarly, the assertion that “compactness” or “contiguosity” are themselves non-subjective concepts assumes that the white majority is race-neutral, when we know that the legislature often manipulates these standards so as to create congressional majorities that just happen to be white. It may be that these white-majority districts can be deemed race-neutral. But, if so, then the same assumption must be applied to the black-majority districts at issue in Shaw.

Similarly, Justice O’Connor’s contention that she has continued a tradition of race-neutral jurisprudence in her ruling is wrong. She reaches this conclusion only by distorting the Court’s opinion in Gomillion v. Lightfoot. In Gomillion, the City of Tuskegee created an “uncouth,” twenty-eight-sided municipal boundary that excluded all but four or five of the 400 black voters and none of the white voters. The purpose of the exclusion was to limit services and other benefits principally to the white populace. Losing city services in a largely rural county is a significant issue. Justice O’Connor’s invocation of Gomillion to create symmetry between the Court’s treatment of blacks and whites in districting questions suggests a serious miscon-
derstanding of the reality that precipitated *Gomillion*. O'Connor's lifeless recitation of the facts of that case reads as if written by law clerks out of a hornbook. She refers to Tuskegee only as a municipality or "the city," and she misses the crucial point that in *Gomillion* none of the white voters were excluded.\(^{106}\)

In actuality, the Court in *Gomillion* might well have concluded that the City of Tuskegee's redistricting plan constituted impermissible racial pecking precisely because a powerful, entrenched white power structure had made a conscious effort to deny blacks their right to participate in the political system. If so, then the plaintiffs in *Shaw* bear a much stronger resemblance to *Gomillion*'s defendants than to its plaintiffs. Like the defendants in *Gomillion*, the *Shaw* plaintiffs insist on whites keeping control of the political process. Justice O'Connor and a majority of her colleagues permit the white plaintiffs in *Shaw* to make a case without ever having to prove a concrete injury; unlike the plaintiffs in *Gomillion*, the *Shaw* plaintiffs have not been deprived of anything.\(^{107}\)

The Court's anxiety for the rights of my colleagues in *Shaw* was, unfortunately, not in evidence two terms ago when the real right of voter participation was altered by political theft. In *Presley v. Etowah County Commission*,\(^{108}\) the Court refused to find a violation of the rights of black voters in Alabama under section 5 of the Voting Rights Act.\(^{109}\) Black voters in Etowah County had challenged successfully the electoral districts for county commissioners and thereby succeeded in electing a black representative to the County Commission.\(^{110}\) In response to that election, four holdover members of the commission transferred the most politically important duties of the commissioner to another office, effectively denying the black representative any power.\(^{111}\) The Court said that this divestment did not constitute a change "with respect to voting" under section 5, and thus

\(^{106}\) The fact that no white voters were excluded in *Shaw* makes it clear that it was white supremacy, and only white supremacy, that was at stake in *Gomillion*. The City of Tuskegee was unwilling to sacrifice even one white family to the ignominy of a black district. Whatever is happening in *Shaw*, it is not a form of the total exclusion evident in *Gomillion*.

\(^{107}\) See Guinier, supra note 11, at 1593:

By this definition, the majority in *Shaw* misuses the term gerrymandering to describe a 54% black district that, as the majority concedes, was drawn to remedy a century of racial exclusion and that, as the majority also acknowledges, did not arbitrarily enhance or diminish the political power of any group.


\(^{110}\) *Presley*, 112 S. Ct. at 822.

\(^{111}\) Id.
did not need to be reviewed and precleared by the federal court or the United States Attorney General.\textsuperscript{112}

Comparing the claims advanced by my colleagues and those by the black plaintiffs in \textit{Presley}, it is difficult to see how the injury to the five white plaintiffs in \textit{Shaw} could be deemed more significant constitutionally. After all, the constitutional interests in \textit{Presley} require the least judicial gamesmanship to protect. They are a product of the Congress’s power to enforce statutes under the fourteenth and fifteenth amendments to prevent discrimination in voting.\textsuperscript{113} The Court nevertheless held that the voting rights statute, meant to protect black voters from just such political theft, did not provide a meaningful avenue of attack.\textsuperscript{114} Yet in \textit{Shaw}, “citizens” without a race, and parties without any article III injury, were found to have been aggrieved by North Carolina’s race-conscious remedy.\textsuperscript{115}

In describing the Twelfth District of North Carolina, Justice O’Connor cited to the dissent in the district court case,\textsuperscript{116} the amicus brief of the Republican National Committee,\textsuperscript{117} and a comment by a state legislator reported in the Washington Post that “if you drove down the interstate with both car doors open, you’d kill most of the people in the district.”\textsuperscript{118} The last was clearly a joke.\textsuperscript{119} But the Court was so intent on vilifying this minority-majority district that it seemed to miss the humor in the description and instead took the statement seriously. The question of how to use race in fashioning remedies is an important one, and one on which Justice O’Connor and I are likely to disagree. But there is no doubt that the question deserves more

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\item \textsuperscript{112} Id. at 832.
\item \textsuperscript{113} See U.S. Const. amend. XIV, § 2 (allowing for proportional reduction in representational power when portion of a state’s citizens are denied right to vote); id. § 5 (granting Congress enforcement powers); id. amend. XV, § 1 (prohibiting discriminatory abridgement of citizens’ voting rights); id. § 2 (granting Congress enforcement powers).
\item \textsuperscript{114} \textit{Presley}, 112 S. Ct. at 832 (holding that county’s changes did not violate § 5 of Voting Rights Act).
\item \textsuperscript{115} I am waiting for this Court to extend its policy to any issue that black plaintiffs might raise in constitutional discourse. I am willing to bet that as long as the current majority on the Court exists, no black plaintiff will ever get standing to challenge a decision of a municipality or state based upon this principle of violation of constitutional right.
\item \textsuperscript{116} \textit{Shaw}, 113 S. Ct. at 2821 (stating that district “winds in snake-like fashion . . . ‘until it gobbles in enough enclaves of black neighborhoods’” (quoting Shaw v. Barr, 808 F. Supp. 461, 476-77 (E.D.N.C. 1992) (Voorhees, C.J., concurring in part and dissenting in part))).
\item \textsuperscript{117} Id. (citing Brief for Republican National Committee as Amicus Curiae at 14-15, Shaw v. Reno, 113 S. Ct. 2816 (1993) (No. 92-357)).
\item \textsuperscript{118} Id. (quoting Joan Miskupic, N.C. Case to Pose Test of Racial Redistricting, Wash. Post, Apr. 20, 1993, at A4.)
\item \textsuperscript{119} The Washington Post story reported the statement this way: “State Rep. Mickey Michaux often joked about the meandering North Carolina 12th Congressional District that happened to track Interstate 85: ‘If you drove down the interstate with both car doors open, you’d kill most of the people in the district.’” Miskupic, supra note 118, at A4.
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serious attention from the Court than Justice O'Connor gave it in Shaw. In the final analysis, the plaintiffs have attempted to argue that the use of race-consciousness by the legislature is inappropriate if the result is to produce districts that would help black candidates. The Court accepted that argument and contended that a race-neutral policy must be applied.\textsuperscript{120}

It is clear, however, that the legislature can and will continue to peek at race in making redistricting policy.\textsuperscript{121} The only way to prevent such peeking would be if all information about race and party were excluded from the deliberations. But such exclusion is not required and, as a practical matter, will not occur. The race of the voters matters in North Carolina precisely because the black voters have voted consistently against the racial politics of North Carolina's Congressional Club\textsuperscript{122} and Republican Party. Saying that the legislature has created racial divide in North Carolina, given the history of racist campaign appeals by white candidates,\textsuperscript{123} is an insult to black voters.

Indeed, the Shaw case has nothing to do with race neutrality and everything to do with partisan politics. Republicans have joined in litigation over race-conscious districting in the hope of forcing state legislatures to concentrate the black vote in urban districts, leaving the white suburbs more heavily Republican.\textsuperscript{124} This interest convergence

\textsuperscript{120} See Shaw, 113 S. Ct. at 2830-32.

\textsuperscript{121} As Justice O'Connor herself points out, a legislature is always "aware of race when it draws district lines, just as it is aware of age, economic status, religious and . . . a variety of other demographic factors." Id. at 2826.

\textsuperscript{122} The Congressional Club is a political action network in North Carolina that has been the principal support for Senator Jesse Helms. See Alan McConaghia, Inside Politics, Wash. Times, Feb. 23, 1994, at A7 (noting that Club proclaims itself "[f]ounded in 1973 to support Senator Jesse Helms and the conservative cause").

\textsuperscript{123} For example, the Jesse Helms campaign sent an election eve mailing intended to intimidate black voters away from the polls in the 1990 senatorial race against black candidate Harvey Gantt. See Helms Campaign Signs Deedee on Racial Postcards, N.Y. Times, Feb. 28, 1992, at A18 (reporting that Helms campaign signed consent decree to settle Justice Department charge of intimidating black voters). It is difficult not to see the Shaw challenge to the 1990 districting plan as part of a larger scheme to "take back" political power in the City of Durham. In October of 1991, Chester Jenkins, Durham's first black mayor, see Bill Nichols, Agenda, Politics Different for Newest Black Mayors, Gannett News Service, Apr. 3, 1990, available in LEXIS, News Library, Arcnews File, was defeated, see Myron Struck et al., From the Field, Campaigns & Elections, January 1992, as part of a conservative attack on the black political establishment. Despite the fact that Durham is over 45% black, see Bureau of the Census, U.S. Dep't of Commerce, 1990 CP-1-35, General Population Characteristics, at 35 tbl. 6 (1990), blacks historically have exercised little political control. Shaw's effort to require "race neutrality" can be read as part of a larger scheme to restore this imbalance of political power.

\textsuperscript{124} See GOP, Minorities Share Redistricting Agenda, Chi. Trib., Apr. 25, 1991, at C32 (noting that Republicans favor new minority-dominated districts because their own candidates become more competitive once surrendering districts are stripped of Democratic minority voters).
between black voter advocates and the GOP may seem to indicate that the sole concern in districting is race, but this interpretation is wrong: race is only one factor in redistricting cases.\textsuperscript{125} When North Carolina gained a congressional seat after the 1990 census, many Republicans thought that seat should have belonged to them. The fact that the North Carolina legislature was able to create two districts that could elect a black congressperson without at the same time reducing the total number of districts likely to remain Democratic seemed to anger many Republicans in the state.\textsuperscript{126} Their claim was not, of course, that they could not vote, or that there were too many black districts (after all, the North Carolina General Assembly created the second black-majority district only after a Republican Attorney General had refused to approve the first plan with only one black-majority district),\textsuperscript{127} but that their own partisan interests had been injured. The five plaintiffs in Shaw were Democrats, but their challenge to this particular district is likely to benefit Republicans, if anyone.\textsuperscript{128}

The biggest problem with the Court's argument for colorblindness is that no factors that a redistricting plan might consider are truly race-neutral. For example, any plan that considers whether a district is likely to vote Democratic can generally use such information as a proxy for race. No procedure—not even geography—is completely raceless.\textsuperscript{129} Furthermore, all "colorblind" methods for drawing congressional districts will tend to enforce the status quo, insofar as blacks can be elected to Congress only if they are able to convince a disproportionately large number of whites to vote for them.\textsuperscript{130}

\textsuperscript{125} The majority opinion in Shaw cites Bernard Grofman, Would Vince Lombardi Have Been Right If He Had Said: “When it Comes to Redistricting, Race Isn’t Everything, It is the Only Thing”? 14 Cardozo L. Rev. 1237 (1993). See Shaw, 113 S. Ct. at 2821. However, the last sentence of Professor Grofman’s article says: “Thus, Vince Lombardi would have been wrong if he had said: ‘With respect to redistricting, race isn’t everything, it’s the only thing.’” Grofman, supra at 1276.

\textsuperscript{126} This anger seems to prove Professor Grofman’s point that, “[t]he view that Republicans are seeking to use the Voting Rights Act for partisan gain—a view that is accurate—must not be confused with the much stronger claim that the Republicans have actually been able to use the Voting Rights Act in that way.” Grofman, supra note 125, at 1256.

\textsuperscript{127} See Shaw, 113 S. Ct. at 2817-18.

\textsuperscript{128} Members of the Republican party were permitted to intervene in the case on remand in the lower court. See Shaw v. Hunt, No. 92-202-CIV-5-BR, slip op. at 13 (E.D.N.C. Aug. 1, 1994) (“We . . . permitted eleven persons registered to vote as Republicans in North Carolina . . . to intervene as plaintiffs . . . .”).

\textsuperscript{129} Even geography is problematic if, as is the case in North Carolina, black voters are highly concentrated in a few towns and neighborhoods. Pervasive racial segregation in the United States makes not pecking at race particularly difficult.

\textsuperscript{130} Bernard Grofman tries to introduce neutral criteria consistent with his Affidavit in Opposition to District 12, filed in Pope v. Blue, 809 F. Supp. 392, 394 (W.D.N.C. 1992) (dismissing with prejudice Republican challenge to congressional redistricting plan), aff’d, 113 S. Ct. 30 (1992). See Grofman, supra note 125, at 1261. Professor Grofman suggests
Race-consciousness does not, of course, require proportional representation; after all, under such a system the black citizens of North Carolina would be entitled to three representatives, not merely the two that were elected.\textsuperscript{131} Justice O'Connor's opinion, however, effectively concludes that a legislature's traditional practice of protecting the constituencies of its (white) incumbents violates no cognizable constitutional right. At the same time, any effort to change that situation affirmatively in order to allow a black candidate the potential to win an office runs afoul of strict scrutiny. Only a Court as hostile to civil rights as the current majority could conclude that the latter effort approximates "political apartheid,"\textsuperscript{132} or white supremacist attempts to disenfranchise black voters in the wake of the Civil War.\textsuperscript{133} The point is that in a world where race matters, as it does in North Carolina, it is wrong to ignore its effect on our choices.\textsuperscript{134}

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that we ought to use community cognizability as a neutral standard in this context. He suggests that District 12 fails this test. See Grofman, supra note 125, at 1262-63. The truth is that Grofman's notion is arbitrary and nondefinable precisely because it is meant to defend the status quo. In some ways the Twelfth District is easily definable. It encompasses one of the most important economic forces in North Carolina—the east/west highway. It also meets the standard that many other seemingly contiguous districts do not: it is easily traversed. But the problem with Grofman's analysis is more profound than that; it is not necessary. The more "cognizable" a district is as a community, the more difficult it will be for an incumbent congressman or a partisan majority to maintain power. Geographically indistinct districts will, therefore, tend to make incumbents beatable any time a controversial issue arises, or make them more responsive to all their constituent's interests.

\textsuperscript{131} See Shaw v. Hunt, No. 92-202-CTV-5-BR, slip op. at 105 (E.D.N.C. Aug. 1, 1994) (noting that African Americans are 22% of total state population and that North Carolina has total of twelve districts).

\textsuperscript{132} See Shaw, 113 S. Ct. at 2827 ("A reapportionment plan that includes in one district individuals who belong to the same race, but who . . . may have little in common with one another but the color of their skin, bears . . . an uncomfortable resemblance to political apartheid.").

\textsuperscript{133} See id. at 2822-23 (describing states' attempts to circumvent requirements of fifteenth amendment during century following Reconstruction).

\textsuperscript{134} Another example of the irresistible temptation to peek at race is the peremptory challenge, despite the colorblind rule of Batson v. Kentucky, 476 U.S. 79 (1986) (holding that state cannot exclude members of jury venire because of race), and its progeny. Take, for example, United States v. Uwaezohoke, 995 F.2d 388 (3d Cir. 1993), cert. denied, 114 S. Ct. 920 (1994). In that case, the Third Circuit upheld a trial judge's ruling that a black woman postal worker was excluded properly on a peremptory challenge despite evidence that the challenge was racially based. In support of its decision, the court stated:

The prosecutors, at the time they exercised the peremptory challenge, knew that Ms. Lucas was a single parent of two children who was making the salary of a postal worker with four years of seniority and renting an apartment in Newark, New Jersey. It is, we believe, fair to infer that the prosecutors, in the absence of any more detailed information concerning Ms. Lucas, speculated that she might live in low income housing in Newark. Having so speculated, the prosecutors inferred that Ms. Lucas was more likely to have had direct exposure to drug trafficking than someone who did not live in low-income housing in Newark. While this conclusion may or may not be empirically correct, we cannot say that it exhibits racially discriminatory
peek when they redistrict, and, as is becoming increasingly clear, this Supreme Court peeks when it decides whose rights to protect.\textsuperscript{135}

**Conclusion**

The proponents of racial blindness have often viewed race-conscious policies as unidimensional. Even commentators who distinguish between different types of race-conscious remedies do so inconsistently.\textsuperscript{136} The Supreme Court seems to have fallen into that trap as well. In a number of its cases involving race, the Court has written about race-conscious policies without adequately distinguishing their uses. There are, however, many kinds of race-conscious poli-

\textsuperscript{135} See Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 113 S. Ct. 2297, 2304 (1993) (granting standing to white contractors to challenge set-aside program for minority contractors without any showing that they would have been awarded the contract in absence of program); Wisconsin v. Mitchell, 113 S. Ct. 2194, 2198-2202 (1993) (upholding enhancement of penalty for black defendant convicted of racially motivated assault and distinguishing R.A.V. on ground that the Wisconsin statute involved conduct only, while R.A.V. ordinance targeted first amendment-protected speech); R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992) (overturning conviction of white defendant for violating municipal statute prohibiting cross-burning on ground that ordinance discriminated against content-based speech); Patterson v. McLean Credit Union, 491 U.S. 164, 171 (1989) (denying black woman claiming racial harassment protection under 42 U.S.C. § 1981 because statute, despite much conflicting judicial opinion, does not cover post-contract employment relations); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989) (holding that pattern of job category separation by race did not make out prima facie case of disparate impact discrimination under Title VII); City of Richmond v. J. A. Croson Co., 488 U.S. 469, 498-500 (1989) (invalidating Richmond's set-aside plan for minority subcontractors as lacking compelling governmental interest, despite fact that few black enterprises received city contracts).

\textsuperscript{136} See text accompanying notes 23-30 supra.
cies. As I have defined them, race-conscious policies extend from antidiscrimination policies to fixed numerical requirements. All of these terms of race-consciousness can, in some situations, help to alter the status quo. They use the best proxy we have for race-based disadvantage—race—to try to alter its presence in the body politic. Of course, not all race-conscious policies are born equal, and it is possible for them to backfire. But it is not possible for change to occur without such policies.

The question many of you must be asking is: do we know how to use race consciousness to eliminate the status quo? The answer is that it depends on the circumstances. The appropriate race-conscious policy will depend on how deeply entrenched racial subordination is in a particular context. The intersection of race and other issues of oppression, like gender and class, also means that fashioning an appropriate race-conscious policy is more complicated than some have assumed; it requires ultimately that policymakers and judges apply practical policy, instead of simple bright-line rules, to eliminate the consequences of racial subordination.

Traditionally, courts and commentators have assumed that colorblind policies are superior because they are effective policies which will lead to morally just results. If, as I have shown, such a view is incorrect, and if indeed colorblind policies cannot alter the status quo, then Professor Derrick Bell’s argument that racism is a permanently entrenched feature of American politics becomes more obvious. If Professor Bell is describing accurately the racial present, this reality is precisely attributable to our refusal to acknowledge that positive change depends fundamentally on race-conscious, not race-neutral, policies.

I should end by pointing out that not all race-conscious policies need to occur through government action. When blacks create communities of influence to alter the existing structure of life, those communities are engaging in a form of race-conscious policymaking. The eradication of the racial present ultimately requires a careful balancing of sophisticated programs that rely neither on the formalism of colorblindness nor on the naive notion that the status quo is easily remediable.

**EPILOGUE**

When my nephew visits me in the summer, I read to him from a collection of African folktales. One of his favorites is the story of the

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137 See D. Bell, supra note 13, at 197-200 (arguing that racism is endemic to American society).
lizard and the turtle. This old African story concerns a lizard who believed in rules. The lizard saw a turtle in the road dragging some fruit attached to the turtle’s tail. The lizard jumped on the fruit and claimed it because he had found it in the road. The turtle complained that, since he had harvested the fruit and dragged it along the road, it rightfully belonged to him. The dispute was submitted to the legal authorities. The judges, a group of lizards, came back with the decision that the fruit should be divided in half and given to the two claimants. The turtle felt cheated, but took his fruit home and thought. The next day the turtle waited by the side of the road. When the lizard came by, he jumped on his back and said, “Look what I found!” The lizard complained that he could not possibly belong to the turtle, and they submitted the complaint to the legal authorities. Based upon the previously adopted rule, the authorities ordered that the lizard be divided in half with half to be given to each claimant. The turtle went home happy.

The moral of the story is that formalistic rules seldom lead to justice. The colorblind principle is such a formal rule, and the likelihood that its implementation will lead to justice is just as problematic and contingent. Adjusting color-conscious policies to reflect justice and to achieve our policy goals has the potential to alter the racial present in more appropriate ways.\(^{138}\)

\(^{138}\) If we were to analogize this story to the current Supreme Court jurisprudence on race, the results would have been different. If the turtle were black and the lizard white, the Court would have ruled for the lizard in the first action to divide the fruit, and would have said in the second action that we must adhere to our formally adopted rule. The Court, however, would also conclude that the formal rule’s application must be left to the sound neutral discretion of a local board of lizards, who should take into account the appropriate prior precedents and policy concerns, including the fact that lizards lie in roads. Indeed, in upholding the lower court’s later decision not to divide the lizard in half, the Court might have concluded with language something like this:

Nothing this Court does today should be construed to indicate that we have at any point failed to adhere to our policy of species-neutrality crucial to the just application of the law. The dissent’s suggestion that somehow we have failed to adhere to the requirement that the law be fair to turtles simply ignores our long and successful effort to rid our society of every aspect of discrimination.