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Rhetorical Neutrality: Colorblindness, Frederick Douglass, and Inverted Critical Race Theory

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RHETORICAL NEUTRALITY: COLORBLINDNESS, FREDERICK DOUGLASS, AND INVERTED CRITICAL RACE THEORY

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I. INTRODUCTION

Amidst all of the celebratory notes,[1] there is a disconcerting resonance about the U.S. Supreme Court's decision in *Grutter v. Bollinger*.[2] The decision affirms, for the first time in a majority opinion, the principle of diversity.[3] However, this affirmation underscores the Court's ambivalence in race cases; race is to be viewed skeptically[4] through a colorblind lens, but wholeheartedly embraced to contribute to diversity in educational institutions and society as a whole.[5] This is the same

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[1]Linda Greenhouse, *Justices Back Affirmative Action by 5 to 4, but Wider Vote Bans a Racial Point System*, N.Y. TIMES, June 24, 2003, at A1 ("The Supreme Court preserved affirmative action in university admissions today by a one-vote margin but with a forceful endorsement of the role of racial diversity on campus in achieving a more equal society."); Joan Biskupic & Mary Beth Marklein, *Court Upholds Use of Race in University Admissions*, U.S.A. TODAY, June 24, 2003, at 1A ("The decision in the law school case is key because it sets in stone a much-debated principle that first was articulated by the late Justice Lewis Powell in a 1978 ruling: that a state university's 'compelling' interest in having a diverse student body justifies consideration of race in admissions.") (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978)); June Kronholz, Robert Tomsho, Daniel Golden, & Robert S. Greenberger, *Race Matters: Court Preserves Affirmative Action—Preferences in Admissions Survive, but Justices Condemn Point System—Win for Business and Military*, THE WALL ST. J., June 24, 2003, at A1 ("Viewed broadly, the decision endorsed a hotly disputed policy that has launched millions of blacks and Hispanics into the middle class but has alienated some whites and Asians."). *See, e.g.*, Neal Devins, *Explaining* Grutter v. Bollinger, 152 U. PA. L. REV. 347, 381-82 & nn. 164-66 (2003) (cataloguing enthusiastic endorsements of the *Grutter* decision); Goodwin Liu, Brown, Bollinger *and Beyond*, 47 HOW. L.J. 705, 705 (2004).

[2]539 U.S. 306 (2003).

[3]*Id.* at 325 ("[W]e endorse Justice Powell's view [in *Bakke*] that student body diversity is a compelling state interest that can justify the use of race in university admissions.").

[4]*See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 219 (1995) ("Any preference based on racial or ethnic criteria must necessarily receive a most searching examination. . . .") (quoting Fullilove v. Klutznick, 448 U.S. 491 (1980)); *Grutter*, 539 U.S. at 326 ("We apply strict scrutiny to all racial classifications to 'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.") (alteration in original) (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).

[5]*Grutter*, 539 U.S. at 329-33.

doctrinal schizophrenia that was present in *Bakke*,[6] and it is directly traceable to the Court's tortured race jurisprudence[7] and its substantively incomplete decision in *Brown v. Board of Education*.[8] The Court, on some occasions, has actively participated in the maintenance of a system that oppresses, subjugates, and devalues African-Americans and other people of color.[9] When the Court does articulate a "substantive" conception of racial justice, it does so tepidly. Rhetorical Neutrality refers to the middle ground approach adopted by the Court in its race jurisprudence. This Article examines rhetorical neutrality as evinced in the narratives espoused in the opinions of Justices O'Connor and Thomas. In *Grutter*, both Justices employ

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[6]Cedric Merlin Powell, Hopwood: Bakke II *and Skeptical Scrutiny*, 9 SETON HALL CONST. L.J. 811, 862 (1999) ("The *Bakke* paradigm rests on two conflicting prongs—race is inherently suspect, but it is a 'plus' factor in admissions decisions.").

[7]*See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404-05 (1856) (holding that slaves were property, not citizens, and, therefore, could not sue as citizens in the federal courts; slaves "had no rights or privileges but such as those who held the power and the Government might choose to grant them"); United States v. Stanley (*The Civil Rights Cases*), 109 U.S. 3, 20, 22 (1883) (while Congress could abolish "all badges and incidents of slavery," it could not use its enforcement power under the Thirteenth Amendment to eradicate private discrimination); Plessy v. Ferguson, 163 U.S. 537, 550-51 (1896) (upholding separate, but equal facilities in public conveyances and rejecting the claim that separate facilities lead to stigmatization and a badge of inferiority for African-Americans); Berea Coll. v. Kentucky, 211 U.S. 45, 58 (1908) (affirming conviction of private college that violated Kentucky Law (the "Day law") that required separation of the races). "Some scholars have argued that equal protection jurisprudence intentionally sustains social justice hierarchy. Reva Siegel, for example, contends that in its equality doctrine, the Court engages in 'preservation-through-transformation:' it maintains social hierarchy by shifting its jurisprudence to weaken social justice efforts. *Plessy* and the *Civil Rights Cases* neutralized Reconstruction . . . ." Darren Lenard Hutchinson, *"Unexplainable on Grounds Other Than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. REV. 615, 698 (2003) (quoting Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Statutes Enforcing State Action*, 49 STAN L. REV. 1111, 1113 (1997)).

[8]347 U.S. 483 (1954). The promise of *Brown* has remained largely unfulfilled. *See* GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT HARVARD UNIVERSITY, BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE? 2-3 (2004), http://www.civilrightsproject.ucla.edu/research/reseg04/brown50.pdf. *Brown* did not provide the doctrinal roadmap of how dual school systems would be dismantled—the decision lacked a remedial framework. Other than the amorphous, internally contradictory pronouncement of "[w]ith all deliberate speed," see *Brown v. Board of Education* (*Brown II*), 349 U.S. 294, 301 (1955), and the assertion that federal courts have broad equitable powers to shape remedies, *Brown* and its progeny illustrate a retreat from the anti-subordination principle. Indeed, some scholars have suggested that *Brown* is rooted not so much in the anti-subordination principle but in interest convergence. *See, e.g.*, Derrick A. Bell, Brown v. Board of Education *and the Interest Convergence Dilemma in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 20 (The New Press 1995). That is, whatever is beneficial to white interests will inform the Court's decision-making on race. If the interests of subjugated Black school children happen to converge, or overlap with white interests, then there will be a brief, transitory gain for the Black school children. *Id.*; DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 49-58 (2004) [hereinafter SILENT COVENANTS].

[9]*See supra* note 7 and accompanying text.

neutral approaches, rooted in colorblindness. However, the underlying rhetoric, or how their reasoning is expressed in their respective opinions, is strikingly distinct. Neither Justice advances a remedial approach; both Justices start with the premise that race is inherently suspect,[10] but their approaches diverge because they view colorblind neutrality in fundamentally distinct ways.

Justice O'Connor advances a modified conception of the anti-discrimination (anti-differentiation) principle[11]--race matters sometimes, depending on the context[12]--and overemphasizes a forward-looking approach[13] to eradicate caste. This essentially means that the core of the Equal Protection Clause is gutted—the anti-subordination principle[14] is displaced by a doctrinal shift to First Amendment process values.[15] This approach virtually guarantees that systemic inequalities will remain in place in varying degrees for many years to come.

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[10]*Compare Grutter*, 539 U.S. at 326-27 (O'Connor, J.) *with* 539 U.S. at 351-54 (Thomas, J., concurring in part and dissenting in part).

[11]"No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Group classifications based on race are strictly prohibited by the Equal Protection Clause because the amendment "'protects persons, not groups,'" *Grutter*, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 227), and all individuals are entitled to equal treatment without regard to race. Justice O'Connor concludes, however, that in the context of education, there may be compelling reasons for treating individuals differently based on race: attaining a diverse student body is one such reason (or institutional interest). *Id.* at 328-32. This modified approach is not literal in its application; the colorblindness principle is not absolute, but the underlying rationale of Justice O'Connor's opinion preserves colorblindness.

[12]*Grutter*, 539 U.S. at 327.

[13]*See, e.g.*, Cedric Merlin Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 51 U. MIAMI L. REV. 191, 241-60 (1997) (critiquing forward-looking approach); *see generally* Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 COLUM. L. REV. 60 (2004).

[14]Advancing an inversion thesis, Professor Darren Lenard Hutchinson describes the anti-subordination theory of equal protection:

> "Antisubordination," "antisubjugation," and "anticaste," . . . theories of equality all emphasize the impact of governmental actions upon historically subordinate groups. Under the antisubordination construction of equality, the constitutionality of a law is not determined by simply examining whether it differentiates among similarly situated classes [as under the anti-differentiation principle]; instead, a law unlawfully discriminates if it reinforces the marginalized social, economic, or political status of historically disadvantaged classes. Antisubordination equal protection theories advance substantive equality over the achievement of formal equality norms.

Hutchinson, *supra* note 7, at 622-23 (footnotes omitted). *See also* Powell, *supra* note 6, at 930-32 (discussing substantive equality).

[15]Here, I mean to suggest that the marketplace of ideas paradigm, where diverse ideas are exchanged and students learn through embracing their differences, is ill-suited to deal with questions of race. *See, e.g.*, Cedric Merlin Powell, *The Mythological Marketplace of Ideas: R.A.V., Mitchell and Beyond*, 12 HARV. BLACK LETTER L.J. 1, 35 (1995). This appears to be the unifying principle in the Court's forward-looking approach—universities occupy a "special niche" in society because they promote essential values that are the essence of the American polity. *Grutter*, 539 U.S. at 329-33. The classroom prepares students, not only to understand racial and cross-cultural differences within the context of the university, but to

By contrast, Justice Thomas overemphasizes colorblindness and the anti-discrimination (anti-differentiation principle)—race never matters. Justice Thomas characterizes the Court's decision in *Grutter* as little more than "aesthetic window dressing,"[16] a heavy handed attempt by the Court to create a class of students that "look the right way." The two doctrinal poles, represented by Justice O'Connor's opinion for the Court in *Grutter* (modified colorblind constitutionalism) and Justice Thomas' concurring dissent (literal colorblind constitutionalism), are the central focus of this Article.

Adopting colorblind constitutionalism (an acontextual, ahistorical, forward-looking approach that disconnects the anti-subordination principle underlying the Fourteenth Amendment), the Court chooses a conception of equality that is internally

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embrace diversity in the larger world. *Id. Grutter* expands the notion of diversity. *See* Joel K. Goldstein, *Beyond* Bakke*:* Grutter-Gratz *and the Promise of* Brown, 48 ST. LOUIS U. L.J. 899, 946-47, 952-53 (2004). Without a historical perspective, which focuses on the present day effects of past discrimination, the forward-looking approach is severely limited in its efficacy. The forward-looking approach is doctrinally compatible with the Process Theory espoused by Professor John Hart Ely. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). The Process Theory, or representation-reinforcement rationale, does not address the present day effects of past discrimination—there is no substantive conception of equality because the Process Theory's primary focus is on those "rare" process malfunctions that impede access to the political process. Professor Hutchinson describes the representation-reinforcement rationale:

> Ely accepts the proposition that judicial activism can present a countermajoritarian dilemma, as courts replace legislative judgment with their own values. Nevertheless, according to Ely, there are certain circumstances in which the democratic process operates unfairly, or where there is a "process failure." Of particular significance to Ely are laws that impede rights closely connected to the political process, like speech and suffrage. Ely, however, also argued that a malfunctioning political process—particularly legislative action tainted by bald prejudice—likely explains why laws burden certain politically vulnerable classes. Under such circumstances, courts should apply a more probing analysis to "reinforce" the political representation of these despised classes.

Hutchinson, *supra* note 7, at 634 (footnotes omitted).

The Process Theory is a pluralist conception of polity—the democratic process generally works well because most groups have access to the process—which seeks to provide a rationale for the countermajoritarian impact of judicial review on the democratic process. Courts should not function as "super legislatures," but there are instances where the process malfunction is so severe that judicial intervention is essential to a full representational polity. *See* ELY, *supra*, 135-39. While not as optimistic as the traditional pluralist conception of polity, *see* ROBERT A. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY 1-8 (2d ed. 2005), Ely's process theory rests in the middle of the optimism of pluralism and the inherent skepticism of the process in anti-pluralism. *See* GRANT MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY 3-8 (Knopf 1966). Because the First Amendment is an unifying theme in both *Bakke* and *Grutter*, these decisions can be properly understood as process decisions: *access* (representation) is the touchstone, not eradicating deeply rooted systems of caste.

[16]539 U.S. at 354 n.3 (Thomas, J., concurring in part and dissenting in part) ("Because the Equal Protection Clause renders the color of one's skin constitutionally irrelevant to the Law School's mission, I refer to the Law School's interest as an 'aesthetic.' That is, the Law School wants to have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them.").

inconsistent. Race is viewed skeptically and positively at the same time. Specifically, *individuals* should not be discriminated against because of a difference in their race,[17] but *difference* in race (diversity) should be embraced because it is a compelling interest in the educational and societal marketplace.[18] *Gratz v. Bollinger*[19] and *Grutter* are paradigmatic mirror images, with the same conflicting rationales, of the *Bakke* decision:[20] "The *Bakke* paradigm rests on two conflicting prongs—race is inherently suspect, but it is a 'plus' factor in admissions decisions. By including *all* differences in the quest for educational pluralism, diversity becomes an arbitrary litmus test for inclusion or exclusion."[21]

Doctrinally, the Court has sidestepped the issue of race in higher education since the *Brown* decision: *Brown* focused on the *process* value of access through integration; *Bakke* crystallized the integration value by advancing the diversity rationale (race has a positive presumption when it adds to the marketplace of ideas, a First Amendment value); and *Grutter* expanded the diversity concept yet again moving from diversity in the classroom to the broader world. *Brown*, *Bakke*, and *Grutter* are all essentially decisions about process, not the substantive contours of race and equality.

A central problem in the Court's race jurisprudence is how to define "equality." The Equal Protection Clause is based on several distinct interpretive strands.[22] Notwithstanding the history and purpose of the Fourteenth Amendment to adopt the anti-subordination principle, the Court chooses the neutral anti-differentiation principle, submerging the anti-subordination principle and fundamentally shifting the foundation of its race jurisprudence from the Fourteenth Amendment to the First Amendment. In any context, it is becoming increasingly clear that the First

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[17] *Id.* at 326-27.

[18] *Id.* at 327-33.

[19] 539 U.S. 244, 270 (2003) (applying strict scrutiny, and holding that "the [University of Michigan's] policy which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.")

[20] The automatic distribution of 20 points, based solely on an applicant's race, is akin to the setting aside of 16 out of 100 seats in the University of California at Davis Medical School class for African-Americans only. The Court found this university admissions practice unconstitutional. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315-20 (1978) (Powell, J.). However, the Court, in a fragmented plurality opinion, also concluded that race could be used as one of many positive factors in evaluating candidates to the medical school. *Id.* at 320. *Gratz* and *Grutter* follow the doctrinal structure of *Bakke*—race cannot be used to insulate a candidate from comparison with other candidates, but race may be used to promote diversity, cross-cultural understanding, and inclusion. Justice Scalia, in dissent, refers to the Court's decision as a "split double header." Grutter, 539 U.S. at 348 (Scalia, J., concurring in part and dissenting in part). This cynical appellation captures the doctrinal duality of the Court's affirmative action decisions.

[21] Powell, *supra* note 6, at 862.

[22] Hutchinson, *supra* note 7, at 619-27 (discussing anti-differentiation, anti-subjugation, distributive justice, equal citizenship, and stigmatic harm theories of "equal protection").

Amendment marketplace of ideas paradigm is ill-suited to deal with problems of race.[23]

Justice O'Connor's affirmative action decisions are central to this analysis[24] because, for most of the last twenty years, she has authored the Court's major pronouncements on race. For example, Justice O'Connor's majority opinion in *Grutter* makes no mention of history; it is a purely a prospective decision (diversity benefits us all because it is an institutional value). Ironically, Justice Thomas, a constitutional originalist and proponent of literal colorblind constitutionalism, in his *Grutter* concurring dissent, uses "history," but he comes to the wrong conclusion because he manipulates and revises the historical meaning of Frederick Douglass.

To be sure, it is no accident that Justice Thomas chooses to quote Frederick Douglass, the preeminent Black Nationalist of the late nineteenth century[25] and the precursor to modern Black intellectual radicalism,[26] to support his *colorblind* rationale. Adopting an Inverted Critical Race Theory where he uses the familiar doctrinal devices of rhetorical narrative ("counter storytelling"), history, and a "critical" approach to the question of race,[27] Justice Thomas does not deconstruct the existing paradigm of racial subjugation; he seeks to preserve it through neutral principles. Critical Race Theory is turned inside out and used to advance formalized (literal) conceptions of equality. This rhetorical device of inversion fits squarely within the Court's colorblind jurisprudence. Just as the Fourteenth Amendment has

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[23]Powell, *supra* note 15, at 35; Jeannine Bell, *O Say, Can You See: Free Expression by the Light of Fiery Crosses*, 39 HARV. C.R.-C.L. L. REV. 335, 339 (2004) (arguing for a context based, victim-centered approach to the regulation of hate speech which moves away from the marketplace of ideas paradigm which overprotects hate speech because of the presumption against content-based regulation of *any* speech by the state).

[24]"Take almost any of the most divisive questions of American life, and Justice O'Connor either has decided it or is about to decide it on our behalf." Jeffrey Rosen, *A Majority of One*, N.Y. TIMES, June 3, 2001, § 6 (Magazine), at 32. Before her majority opinion for the Court in *Grutter*, Justice O'Connor authored majority opinions in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 476 (1989) and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 204 (1995). She also joined in the plurality opinion of Justice Powell in Wygant v. Jackson Board. of Education, 476 U.S. 267, 284 (1986), and she authored a dissent in *Metro Board v. F.C.C.*, 497 U.S. 547, 602 (1990), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), which, five years later, would become the law in affirmative action cases as *Adarand* overruled *Metro Broadcasting* (and by implication, *Fullilove v. Klutznick*, 448 U.S. 448 (1980)). Justice O'Connor retired from the Court on July 1, 2005. None of these decisions have been ringing endorsements of affirmative action.

[25]*See* WALDO E. MARTIN, JR., THE MIND OF FREDERICK DOUGLASS 25 (1984).

[26]"It has been more than 100 years since the death of Frederick Douglass, yet his spirit still moves over the debates around race and gender. He is still cited as the model of a progressive thinker on racial and gender issues." Bill E. Lawson, *Introduction* to FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 7, 15 (unbar. Ed. Humanity Books 2002) (1855).

[27]RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 6-9 (2001). Perhaps it is a bit of a stretch to term Justice Thomas' use of rhetorical narrative as "critical" since he does not seek to dismantle any feature of the existing racist hierarchy, but "Inverted Critical Race Theory" seeks to delineate how Justice Thomas has "borrowed" from Critical Race Theory to advance colorblind constitutionalism.

been inverted to protect white privilege rather than historically subjugated African-Americans,[28] so too has Critical Race Theory.

Justice Thomas uses Frederick Douglass metaphorically to neutralize the doctrinal tenets of Black Nationalism and self-determination, and Frederick Douglass is transformed into an apologist for any person who receives the "tainted fruit" of affirmative action. Frederick Douglass, as a potent symbol of Black radicalism, is emasculated and neutralized. Justice Thomas' historical misrepresentation does not challenge, in any way, existing systems of caste. This is precisely the purpose of his Inverted Critical Race rhetoric.[29]

Thus, under either approach, whether Justice O'Connor's forward-looking, ahistorical approach or Justice Thomas' revisionist historical approach, colorblind constitutionalism guarantees that questions of race are either simplified prospectively or ignored.

Section II develops the theme of Rhetorical Neutrality. First, a series of underlying myths—historical, definitional, and rhetorical—are analyzed. Next, the Article focuses on Justice O'Connor's affirmative action decisions. The *Grutter* decision is analyzed as a component of rhetorical neutrality constructed in previous affirmative action decisions authored by Justice O'Connor. *Brown* and *Bakke* are critiqued as process decisions that lead inevitably to *Grutter*. These decisions also illustrate the doctrinal shift from the Fourteenth Amendment's anti-subordination principle to the First Amendment's marketplace of ideas paradigm. The First and Fourteenth Amendments are read as the wellsprings of complementary constitutional rights—the anti-subordination principle embodies both the underlying process concerns of the First Amendment (diversity and freedom of expression) and the *substantive* normative principle of the Fourteenth Amendment's prohibition on a racial caste system. Indeed, the First Amendment is not merely about process (or access to the marketplace of ideas); it embraces substantive equality and *Brown*'s constitutional prohibitions against racial stigmatization. The First Amendment is an articulation of the anti-caste and anti-subordination principles underlying the Fourteenth Amendment.

Section II.C.2 also explores the doctrinal underpinnings of the Court's decision in *Grutter*, particularly how these themes are neutral and reinforce colorblind constitutionalism. Critiquing the colorblind historical myth, this section advances an argument for the inclusion of history in the Court's analysis of race cases. To illustrate this point, Justice Thomas' concurring dissent is critiqued with a special emphasis on his use of Frederick Douglass.

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[28]*See* Hutchinson, *supra* note 7, at 642.

[29]"Mass media have presented us with images that represent specific eras of African American history. Often these representations reflect not the African American reality but the wishful thinking of the larger [w]hite society." Ella Forbes, *Every Man Fights for His Freedom: The Rhetoric of African American Resistance in the Mid-Nineteenth Century*, *in* UNDERSTANDING AFRICAN AMERICAN RHETORIC CLASSICAL ORIGINS TO CONTEMPORARY INNOVATIONS 155 (Ronald L. Jackson, II & Elaine B. Richardson eds., 2003). Justice Thomas' use of Frederick Douglass in support of his argument for colorblind constitutionalism falls in this vein. Justice Thomas' "wishful" depiction of Frederick Douglass is far from the *real* Frederick Douglass, who advocated "a worldview that sanctioned redemptive violence as a necessary part of Black axiology—only in that way could the survival of the African community be assured and its manhood redeemed." *Id.* at 159. *See infra* Section II.D.2.

Section III concludes with an argument for adding substance to the Court's doctrinal approach in race cases. Given the permanence of racism,[30] and the Court's deeply embedded adherence to colorblind constitutionalism in one form or another, the real challenge is for educational institutions and state governments to move beyond neutral conceptions of equality to substantive equality.

II. RHETORICAL NEUTRALITY

A. The Underlying Myths

Rhetorical Neutrality is the linchpin of the Court's colorblind jurisprudence. Three underlying myths—historical,[31] definitional,[32] and rhetorical[33]—all serve to shift the interpretative (doctrinal) framework on questions of race from an analysis of systemic racism to a literal conception of equality where the anti-differentiation principle is the guiding touchstone. "The traditional fonts of Fourteenth Amendment jurisprudence—the anti-subjugation and anti-caste principles—have been effectively replaced by an anti-differentiation principle."[34] Literal equality, without regard to context or history, is the unifying principle of the Court's race jurisprudence.

1. The Historical Myth

Professor Cass Sunstein explains the doctrinal shift from the anti-caste principle to the literal equality standard embodied in the anti-differentiation principle:

> Originally the Fourteenth Amendment was understood as an effort to eliminate racial caste—emphatically not as a ban on distinctions on the basis of race. A prohibition on racial distinctions would excise all use of race in decisionmaking. By contrast, a ban on caste would throw *discriminatory effects* into question and would allow affirmative action.

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[30]DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 98-99 (1992) (articulating theory of racial realism, and noting that "there has been no linear progress in civil rights[,]" only a series of progress and inevitable regression).

[31]The historical myth, underlying rhetorical neutrality, essentially erases any connection between the legislative history of the Civil War Amendments (the Thirteenth, Fourteenth, and Fifteenth Amendments) and race. These constitutional amendments were debated, drafted, and ratified in the context of race—the newly emancipated slaves had to be brought into the American polity and society as full fledged citizens. To do so, the racial caste system had to be dismantled, and these constitutional amendments did just that. *See* Powell, *supra* note 13, at 201-10; Bryan K. Fair, *The Acontextual Illusion of a Color-Blind Constitution*, 28 U.S.F. L. REV. 343, 348 (1994) [hereinafter *The Acontextual Ilusion*] (reviewing ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992)); Bryan K. Fair, *Foreword: Rethinking the Colorblindness Model*, 13 NAT'L. BLACK L.J. 1 (1994).

[32]The definitional myth disconnects race from its social context. Thus, formal-race, or the classification labels of "Black" and "white" are unconnected to the social realities of caste based oppression. *See* Powell, *supra* note 13, at 210 n.98 (quoting Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 6 (1991)).

[33]The rhetorical myth consists of a series of affirmative action critiques rooted in the overarching principle of neutrality. Specifically, the process functions well when race is not a consideration. *See* Powell, *supra* note 13, at 214-15.

[34]Powell, *supra* note 6, at 883.

> In any case the question for the anticaste principle would be: Does the practice at issue contribute to a system with castelike features? *It would not be*: *Have the similarly situated been treated differently?*[35]

This shift also signals something fundamental about the Court's race jurisprudence: "the similarly situated" must be treated the *same*, so the rhetoric of neutrality becomes especially appealing. Because everyone is the "*same*," or similarly situated, history can be ignored (or submerged) in the name of colorblindness (history is neutral); race can be decontextualized so that it becomes an *institutional value*[36] rather than a complex social construct,[37] and neutrality is preserved through a series of doctrinal tenets which invert the central meaning of the anti-subordination principle.[38]

Because the present day effects of past discrimination are constitutionally irrelevant to the Court,[39] history has no significance in the Court's race jurisprudence in the absence of a clearly identifiable discriminatory actor.[40] The Court articulates two doctrinal tenets to deemphasize history: societal discrimination is too amorphous to remedy[41] and the Constitution protects *individuals*, not groups.[42] No reference to

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[35]CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 340 (1993) (emphasis added). "The anticaste principle was transformed into an antidifferentiation principle. No longer was the issue the elimination of second-class citizenship. Instead it was the entirely different question whether those similarly situated had been treated similarly. This was a fundamental shift." *Id.*

[36]Grutter v. Bollinger, 539 U.S. 306, 328-29 (2003) (holding that "Law School has a compelling interest in [attaining] a diverse student body[;]" and, noting that the important purpose of public education and the freedom of speech place universities in a "special niche," in our constitutional framework, in which educational judgments are accorded deference).

[37]Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 2-5, 43-48 (1991); *see generally* Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. REV. 1 (1994). I do not mean to suggest that race does not exist; rather, the point is that race is taken out of context so that neutrality functions in a manner that maintains deeply rooted systemic oppression.

[38]Hutchinson, *supra* note 7, at 638 (positing that "the Court's affirmative action jurisprudence treats whites (who possess racial privilege) as politically vulnerable and persons of color (who are socially subordinate) as politically dominant, thereby inverting the concepts of privilege and subordination"). This inversion is achieved through the doctrinal manipulation inherent in Rhetorical Neutrality.

[39]This is why the Court, in decisions authored by Justice O'Connor, adopts a forward-looking approach to racial discrimination. For example, in *Croson*, Justice O'Connor rejected congressional findings that the effects of past discrimination stifled Minority Business Enterprises nationally and, in turn, in Richmond, Virginia. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499-500. Without particularized findings of discrimination (some form of discrimination by the City of Richmond itself), this was merely amorphous, "societal discrimination" which could not be remedied. *Id.* at 497-500. *See also* Karst, *supra* note 13, at 64.

[40]*Croson*, 488 U.S. at 497; Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986).

[41]Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 313 (1990) ("'Societal discrimination' never is defined with any precision in the white rhetoric, but it suggests an ephemeral, abstract kind of discrimination, committed by no one in particular and committed

the racist past (and its present day manifestations) is needed if discrimination is viewed as some ephemeral phenomena that is out of our reach. If the focus is on the *individual*, race does not have to be considered because any consideration of it is supplanted by an analysis premised on individualized harms and benefits. This is the hallmark of the anti-differentiation principle and the fundamental doctrinal shift from the anti-subordination principle to the non-substantive principle of colorblindness.[43]

The historical myth ignores the legislative history of the Civil War Amendments[44]—the Thirteenth,[45] Fourteenth,[46] and Fifteenth Amendments[47]—and

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against no one in particular, a kind of amorphous inconvenience for persons of color. By this term the white rhetorician at once can acknowledge the idea of unconscious racism but by giving it a different name, give it a different and trivial connotation.").

[42]*See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 230 (1995) ("Consistency *does* recognize that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be.") (emphasis in original); Miller v. Johnson, 515 U.S. 900, 904 (1995) (noting that the central mandate of the Fourteenth Amendment is race neutrality); *Croson*, 488 U.S. at 493 (stating that "the rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights" (quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948))); *Wygant*, 476 U.S. at 283-84 (emphasizing the effect of layoffs on innocent *individuals*, and holding race-based layoff system designed to preserve diversity in the faculty teaching ranks unconstitutional); *Bakke*, 438 U.S. at 289-90 ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.").

[43]*See supra* notes 14, 35 and accompanying text.

[44]For a detailed discussion of the legislative history of the Thirteenth, Fourteenth, and Fifteenth Amendments, and the underlying civil rights statutory framework enacted pursuant to the enforcement power to these constitutional amendments, *see The Acontextual Illusion*, *supra* note 31, at 355-57; Powell, *supra* note 13, at 201-210; *see generally* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985); Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952). All of these articles argue that the Reconstruction Amendments were color-conscious, group rights based constitutional amendments. The constitutional trilogy of the Thirteenth, Fourteenth, and Fifteenth Amendments were enacted to eradicate the badges and incidents of slavery which previously shackled African-Americans to an existence of subordination; to make African-Americans equal citizens before the law; and to enfranchise the newly emancipated slaves so that they could participate, as full citizens, in the American polity.

[45]"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States . . . ." U.S. CONST. amend. XIII, § 1.

"Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII, § 2.

[46] "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

instead focuses on the neutral principle of colorblindness. The rhetorical move here is to recast the Fourteenth Amendment in liberal individualist terms and to literally ignore the primacy of the Thirteenth and Fifteenth Amendments in eradicating the racial caste system that was the hallmark of Nineteenth Century America. In advancing the historical myth, the Court continuously emphasizes the language of personage (essential individualism) in the Fourteenth Amendment,[48] and this serves to disconnect the Fourteenth Amendment from the anti-caste[49] and anti-subjugation principles[50] underpinning the Thirteenth and Fifteenth Amendments. Personal rights

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[47] "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

"Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XV, § 2.

[48] *See* sources cited *supra* notes 11, 46; Powell, *supra* note 13, at 229-31 (arguing that the Thirteenth and Fourteenth Amendments should be read together in efforts to eradicate racial caste). Professor Morrison writes:

> Essential individualism demands proof that a particular individual participated in the discriminatory culture by overtly discriminating. If evidence of affirmative participation is forthcoming, Euro-Americans will offer up the participant as proof of their own innocence because they were not similarly offered up. Individuality is thus self-congratulating.
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> . . .
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> Essential individualism enables Euro-Americans to identify the responsible individual. This understanding of individuality allows the transfer of guilt to another without asking about the relationship between the "other" and "us." Individuality also allows Euro-Americans to acknowledge the racial polarization of society while ironically shifting the blame and guilt from a racist society to affirmative action programs.

John E. Morrison, *Colorblindess, Individuality and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 328-29 (1994) (footnotes omitted).

[49] "[T]he Civil War Amendments were designed specifically to eradicate the American caste system based on color." Powell, *supra* note 13, at 227; *see, e.g.*, Loving v. Virginia, 388 U.S. 1, 10 (1967) ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."); Strauder v. West Virginia, 100 U.S. 303, 307-08 (1880) ("[T]he law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the [Fourteenth] amendment was primarily designed, that no discrimination shall be made against them by law because of their color[?]").

[50] *Strauder* stands for the proposition that the Equal Protection Clause prohibits racial subjugation:

> In *Strauder v. West Virginia*, the first postbellum racial discrimination case to reach the Supreme Court, Justice Strong recognized for a unanimous Court that subjugation was the very evil that the equal protection clause was meant to remedy: the clause is an "exemption from legal discriminations implying inferiority," which are "steps toward reducing [blacks] to the condition of a subject race."

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-21, at 1516 (2d ed. 1988) (quoting *Strauder*, 100 U.S. at 308). *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) (footnotes omitted) ("Congress has the power under the Thirteenth Amendment

displace the rights of the oppressed. This is far from the legislative mandate underlying the Thirteenth, Fourteenth, and Fifteenth Amendments:

> First, the Court focuses on the principle of "color-blindness," rather than racial equality, as the goal of equal protection. The principle of color-blindness for some justices has become more important than achieving racial equality. . . .
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> . . .
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> Second, by ignoring this nation's history of racism, the justices reframe the Reconstruction Amendments' specific purpose of ending whites' oppression of African Americans into a generalized prohibition of "race discrimination." This abstracted conception of discrimination led the justices to oppose affirmative action on the grounds that it "discriminates" against innocent third parties predominantly white males who have benefited from this nation's exclusionary employment policies. Current equal protection interpretation thereby rejects the historical justification for affirmative action remedies: a response to centuries of excluding people of color from educational opportunities and better-paying professional and skilled jobs.[51]

The abstracted conception of discrimination referenced above is at odds with the history of the Civil War Amendments:

> The anti-subjugation principle is faithful to the historical origins of the Civil War amendments. Under *Dred Scott v. Sandford*, blacks were not deemed citizens—as though they were not counted among the "People of the United States" in the Constitution's preamble—because they were "a subordinate and inferior class of beings, who had been subjugated by the dominant race." The Civil War amendments were drafted specifically to overturn that odious hierarchy. The notion that one race is, or ought to be, subordinate to another is "at war with the one class of citizenship created by the thirteenth, fourteenth, and fifteenth amendments."[52]

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rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.").

[51]Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 33-34 (1995) (footnotes omitted). Rejecting the Court's shift to colorblind constitutionalism and its facile dismissal of the legislative history of the Civil War Amendments, Professor Tribe notes that:

> Each of these amendments authorized Congress to enforce "by appropriate legislation" the rights the amendment recognized. Immediately after each amendment's ratification, Congress adopted enforcing legislation. The Supreme Court restrictively construed or simply invalidated much of this legislation, acting to preserve in law the autonomy that the states had largely lost politically in the wake of the Civil War. Following its initial flurry of legislation, Congress, reflecting the changed political climate of the post-Reconstruction era, ceased for three quarters of a century its efforts to enforce the Civil War Amendments.

TRIBE, *supra* note 50, § 5-12, at 330-31 (footnotes omitted).

[52]TRIBE, *supra* note 50, § 16-21, at 1516 (quoting Bell v. Maryland, 378 U.S. 226, 252 (1964) (Douglas, J., concurring)).

Nevertheless the historical myth proceeds along a literal, ahistorical interpretation of Justice Harlan's dissent in *Plessy v. Ferguson.* The result is to read the anti-caste and anti-subordination principles out of the Civil War Amendments. This is not surprising, however, because Justice Harlan's dissent evinces the same contradictory ambivalence that the Court displays in its modern race jurisprudence.

In *Plessy*, the U.S. Supreme Court upheld a Louisiana law that required railroad companies to provide separate but equal accommodations for whites and Blacks; the train coaches were separated by a partition (a "colorline") based on race. The Court concluded that:

> [W]e cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.[53]

Adopting a deferential approach premised on the rationality of the Louisiana law, the Court rejected a central tenet of the Fourteenth Amendment—state legislation cannot be based upon the presumption that African-Americans are inferior and deserve to occupy a subordinate position in American society. Interestingly, the Court recognized race, but it did so in a manner that perpetuates caste:

> [w]e consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.[54]

Thus, the Court's inverted reasoning is not of recent vintage. One hundred and nine years ago, the Court embraced a "neutral" construction of the racist law it upheld in *Plessy.* Because the state's actions toward the "colored race" and whites were *equal* and *neutral*—the colorline separated both races in Louisiana's railroad cars—then there was no subordination or caste. It was all in the subjugated race's imagination.

This leads to the Historical Myth that is at the core of *Plessy.* What happens when we read Justice Harlan's colorblind dissent in its entirety? Justice Harlan's dissent is always abbreviated and decontextualized; the majestic, ringing endorsement of the anti-caste principle contained in one sentence is always the highlighted section of Justice Harlan's dissent. Placed in context, there is a disconcerting resonance in the colorblind dissent; it is part and parcel of the rhetoric of neutrality, and neutrality perpetuates racial caste:

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

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[53]Plessy v. Ferguson, 163 U.S. 537, 550-51 (1896).

[54]*Id.* at 551.

> liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. *There is no caste here. Our Constitution is color-blind* . . . .[55]

While this is not a ringing endorsement of white privilege and supremacy[56] because it is muted by Justice Harlan's resounding proclamation that "[t]here is no caste here," it is nevertheless a tacit endorsement of the anti-caste and anti-subordination principles because neutrality is premised on the *dominance* of the white race. "[*Plessy*] embraces two theories: racial subjugation in the majority opinion and the elimination of caste based on Black skin in Justice Harlan's dissent. Both theories are color conscious, not colorblind. The striking difference between the two theories is how color is used to fashion a theory of equality."[57]

Building upon the color-conscious legislative history of the Civil War Amendments,[58] Justice Harlan advances three doctrinal themes that are bedrock elements of the Fourteenth Amendment: (i) there is "no . . . dominant, ruling class";[59] (ii) "[t]here is no caste here";[60] and (iii) "[o]ur Constitution is color-blind."[61] Taken together, these themes explain the essence of the anti-subordination and anti-caste principles—white supremacy and domination of a subject class based on race are prohibited by the Constitution. There can be no racial caste system premised on hierarchies of color.

However, it is this colorblind mandate, with its anti-subordination and anti-caste underpinnings, that has been inverted and distorted by the Court. This is an inevitable doctrinal progression because Justice Harlan's dissent has some disconcertingly racist undertones steeped in white supremacy. "While 'there is no caste here,' there is certainly the widely held [post-Reconstruction] view that Blacks are subordinate to the dominant [white] race."[62]

Today, subordination is maintained through neutrality. The hallmark of rhetorical neutrality is its inversion of normative, substantive constitutional principles, like the eradication of caste and the rejection of subordination premised

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[55]*Id.* at 559 (Harlan, J., dissenting) (emphasis added).

[56]"Perhaps it is anachronistic and even unfair to stress too heavily the manifest racism in Justice Harlan's full statement. But even for this late nineteenth-century proponent of white dominance, the color-blind ideal, it turns out, was only shorthand for the concept that the Fourteenth Amendment prevents our law from enshrining and perpetuating white supremacy." Laurence H. Tribe, *"In What Vision of the Constitution Must the Law Be Color-Blind?,"* 20 J. MARSHALL L. REV. 201, 203 (1986) (citations omitted).

[57]Powell, *supra* note 13, at 202 nn. 55-57.

[58]*See supra* notes 44-52 and accompanying text.

[59]Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Bd. of Educ., 347 U.S. 438 (1954), *rev'd*, 349 U.S. 294 (1955).

[60]*Id.*

[61]*Id.*

[62]Powell, *supra* note 13, at 201 n.54 (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)); *see also* W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 1860-1880 711-12 (1935) (citations omitted) (discussing racist notions surrounding the Reconstruction era with Black legislators characterized as ignorant, lazy, incompetent, and irresponsible).

on race, into neutral non-substantive principles. History is displaced in this analysis, and the Court's decisions reflect the historical myth. Once the Court embarks on the rhetorical path of neutrality and ignores the overwhelming historical evidence against colorblind constitutionalism, it employs two additional myths—the definitional and rhetorical myths.

2. The Definitional Myth

Just as the historical myth strips the historical core from the Civil War Amendments, particularly the Equal Protection Clause of the Fourteenth Amendment, the definitional myth reinforces this historical distortion by disconnecting race from its social context. Colorblindness is buttressed by a definitional model that advances white supremacy. "A color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans."[63]

Discrimination is defined in a manner that perpetuates systemic racism. Without history or context, "Black" or "white"[64] are simply societal labels through which the government, by its actions, distributes benefits or burdens.[65] In this vein, Professor Neil Gotanda posits the concept of formal race and unconnectedness: "Under color-blind constitutionalism, references to 'race' mean formal-race. Formal-race implies that 'Black' and 'white' are mere classification labels, unconnected to social realities."[66] *Plessy v. Ferguson's* constitutionalization of "separate but equal" is a compelling illustration of formal race and unconnectedness. Because race is neutral since "Black" and "white" are simply classification labels without history or context, the fact that Blacks were a subordinate class was not constitutionally cognizable.[67] This is why it was so easy for the Court to casually note that any stigma of

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[63]Gotanda, *supra* note 37, at 2-3.

[64]Of course, racism is not confined to a two race—Black or white—paradigm. *See, e.g.*, Lopez, *supra* note 37; IAN F. HANEY LOPEZ, WHITE BY LAW:THE LEGAL CONSTRUCTION OF RACE (1996); FRANK WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE (2001). Here, I mean to suggest that the definitional myth is an integral component of how colorblind constitutionalism perpetuates caste—discrimination is defined in terms of absolute, literal fairness. So, affirmative action becomes a justification for why white privilege (or entitlement) has been negatively impacted, and the Court's race decisions are striking examples of moderate narrative approaches crafted to advance "equality" and colorblind constitutionalism at the same time. *See infra* Section II.B and C. The Court has never accomplished this doctrinal feat, and its jurisprudence reflects a neutral approach that is at odds with a substantive conception of equality. Race-conscious remedial approaches are presumed to be constitutionally noxious and are struck down. See, for example, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), where the Court tacitly endorses a substantive conception of equality through a hybrid, process-oriented interest, like diversity, which is derived from the First Amendment. *See* Grutter v. Bollinger, 539 U.S. 306, 329 ("In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy. . . . ").

[65]*See infra* Section II.B.

[66]Gotanda, *supra* note 37, at 6.

[67]*Id.* at 38 ("Turning a blind eye to history, the Court maintained that the segregation statute said nothing about the status of Blacks, indeed, that the statute was racially 'neutral.'").

inferiority did not emanate from constitutionally invalid state action, but from the minds of "the colored race" because they "[chose] to put that construction upon it."[68] In this astounding passage, the Court is actually saying, quite clearly, that discrimination is in the minds of the oppressed.

The public-private distinction[69] is the foundation upon which this contorted reasoning is built. If the state is acting in a "neutral" manner toward both races (Black and white), then the only discrimination that is left is "private" discrimination which cannot be reached by the Fourteenth Amendment.[70] Indeed, in the absence of some specific evidence of state-mandated racial discrimination, the Court is free to assume (and it invariably does) that the alleged discrimination is illusory or irremediable because it is merely societal discrimination.

The segregationist law in *Plessy* was "neutral" because it segregated *both* races "equally" and the state action in question merely enforced a well-settled societal convention.[71] The Court applied rational basis review to this intrinsically racist law.[72] Of course, the "separate but equal" doctrine was overturned in *Brown*,[73] and the meaning of neutrality changed at that point. However, the Court's conception of neutrality would still control how discrimination was defined and identified. Specifically, formal discrimination was eradicated with the *Brown* decision, but there would be (and still are) lingering vestiges of de jure discrimination.[74]

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[68]Plessy v. Ferguson, 163 U.S. 537, 551 (1896); *accord* Gotanda, *supra* note 37, at 38.

[69]"Race discrimination is unconstitutional only in the realm marked out by the doctrine of state action." Gotanda, *supra* note 37, at 5.

[70]ERWIN CHMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 6.4.2, at 489-92 (2002).

[71]*Plessy*, 163 U.S. at 550-51.

[72]*Id.*

[73]Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

[74]*See supra* note 8 and accompanying text. As Professor Charles Ogletree observes:

> *Brown I* should be celebrated for ending *de jure* segregation in this country—a blight that lasted almost 400 years and harmed millions of Americans of all races. Far too many African-Americans, however, have been left behind, while only a relative few have truly prospered. For some, the promise of integration has proved ephemeral. For others, short-term gains have been replaced by setbacks engendered by new forms of racism. School districts, briefly integrated, have become resegregated. . . . As we stand near the end or the transformation of affirmative action, things look set to get worse, not better.

Charles J. Ogletree, Jr., *The Integration Ideal: Sobering Reflections*, *in* BROWN AT 50: THE UNFINISHED LEGACY 167, 181 (Deborah L. Rhode & Charles J. Ogletree, Jr., eds., 2004). Noting the systemic and structural nature of American racism, Professor Kim Forde-Mazrui concludes that:

> America practiced slavery for two and a half centuries and enforced a regime of legal and social caste for at least another hundred years. Throughout all of those years, voices of protest were raised and ignored. . . . [S]ociety's efforts to address the effects of a long history of discrimination have been minimal and halting.

In adjudicating Equal Protection Clause claims, the Court had to determine whether to embrace a substantive conception of equality[75] or a formulaic, anti-differentiation model that preserves the *status quo* while incrementally offering small portions of substance. The Court has consistently chosen the latter.[76]

Colorblind constitutionalism and the rhetorical device of neutrality literally define discrimination out of existence. The historical myth is employed to rewrite the legislative history of the Civil War Amendments,[77] so that *individual rights*[78] are elevated over those of the descendents of the newly emancipated slaves for whom the amendments were passed by the Reconstruction Congress.[79] Since the Equal Protection Clause protects individuals, not groups, then finding state-sponsored racial discrimination is an almost insurmountable task. In a manner eerily reminiscent of the *Plessy* decision, the Court has "privatized" discrimination.

Exploring the underlying discourses of the affirmative action debate, Professor Barbara Flagg critiques the rhetoric of white innocence and places this victim rhetoric in context, stating "the costs to whites imposed by affirmative action

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Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 683, 742-43 (2004).

[75]Powell, *supra* note 6, at 846-74; Powell, *supra* note 13, at 226-31, 268-71; Hutchinson, *supra* note 7, at 681-96 (arguing for an anti-subordination theory of equality that rejects the current Equal Protection model of colorblindness and the inversion of privilege and subordination).

[76]*See* SILENT COVENANTS, *supra* note 8, at 49-58 (2004); ("Black rights are recognized and protected when and only so long as policymakers perceive that such advances will further interests that are their primary concern."). The primary concern is the maintenance of white privilege.

[77]*See supra* Part II.A.1.

[78]*See supra* notes 48-52 and accompanying text.

[79]*See supra* Part II.A.1. Professor Derrick Bell makes a powerful point in this context. While the Reconstruction Amendments were enacted to eradicate slavery, and give equal citizenship and voting rights to African-Americans, Bell posits that the amendments were a product of interest convergence. Specifically, it was in the (white) Republican Party's interest to advance the rights of African-Americans because this would translate into the maintenance of political power of the Republicans over the defeated South. SILENT COVENANTS, *supra* note 8, at 57-58. Professor Bell cites the *Civil Rights Cases* as an example of interest convergence:

> With the political benefits to powerful political and corporate interests in maintaining Republican control in Congress secured, blacks over time became victims of judicial interpretations of the Fourteenth and Fifteenth Amendments and legislation based on them so narrow as to render the promised protection meaningless in virtually all situations. For example, in the *Civil Rights Cases*, the Supreme Court found the amendment inadequate to protect Negroes' entitlement to nondiscriminatory service in public facilities. The Reconstruction amendments, particularly the Fourteenth's guarantee of equal protection and due process, wrought a major reform of the Constitution with measurable benefits for every citizen. And yet, when policymakers' interests no longer aligned with those of the recently freed blacks, the protection was withdrawn from those blacks, who needed them more than ever.

Id. at 58 (footnotes omitted).

measures are costs borne by 'innocent white victims.'"[80] This is significant because all of the Court's affirmative action decisions start with the proposition that the Fourteenth Amendment "protect[s] *persons*, not *groups*[.]"[81] All racial group classifications are constitutionally irrelevant, and strict scrutiny is employed "to ensure that the *personal* right to equal protection of the laws has not been infringed."[82] The effect is that legitimate discrimination claims, advanced by injured racial *groups*, are ignored under the guise of neutrality while individualized reverse discrimination claims are presumed to be constitutionally relevant.

Privatization, then, means that the personal rights of innocent whites are protected whenever the state uses race to their "disadvantage," unless the use of race can be legitimated in context.[83] This is what distinguishes *Grutter* from decisions like *Croson* or *Adarand*. The benefit to whites in the *Grutter* decision is the "cross-racial understanding"[84] that is the product of having a critical mass of African-American students in the classroom[85]; while in economic marketplace cases, like *Croson* and *Adarand*, the Court goes to great lengths to preserve the personal rights, or the personal entitlements of whites,[86] in the economic marketplace. There is more

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[80]Barbara J. Flagg, *Diversity Discourses*, 78 TUL. L. REV. 827, 829 (2004) (quoting Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 300 (1990)).

[81]Grutter v. Bollinger, 539 U.S. 306, 326 (alteration in original) (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995)).

[82]*Id.* (quoting *Adarand*, 515 U.S. at 227).

[83]"Context matters when reviewing race-based governmental action under the Equal Protection Clause." *Id.* at 327. "Strict scrutiny is not 'strict in theory, but fatal in fact.'" *Id.* at 326 (quoting *Adarand* 515 U.S. at 237). *See also* Flagg, *supra* note 80, at 835 (noting that "diversity" is an institutional concept that imposes no cost on whites).

[84]*Grutter*, 539 U.S. at 330 (quoting Grutter v. Bollinger, 137 F. Supp. 2d. 821, 850 (E.D. Mich. 2001), *rev'd by* Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002)).

[85]*Id.* at 329-30. Unfortunately, the number of enrolled students at the University of Michigan School of Law has dropped dramatically. *See News and Views; Nationwide Black Enrollments in Law School Up But Most High Ranking Law Schools Show a Decline in Black Students*, 46 THE J. OF BLACKS IN HIGHER EDUC. Jan. 2005, 34 (noting that "[a]t 11 [high-ranking schools] black enrollments [are down] by 10 percent or more"). It is interesting to note that "critical mass" refers to a *substantial number* of African-American students to avoid tokenism, isolation, or the "spokesperson for the race" syndrome—this is a racial group which, under the Court's decisions, is antithetical to the conception of *personal rights* under the Fourteenth Amendment. This is why the First Amendment value of diversity is coupled with critical mass; specifically, it is not a "racial group" that is receiving a benefit that negatively impacts whites. Rather, there is a broad benefit to be shared by all (cross-racial understanding has positive institutional benefits). Derrick Bell would explain this as a function of interest convergence. *See* SILENT COVENANTS, *supra* note 8, at 149-51.

[86]*See supra* note 42 and accompanying text. As Professor Cheryl Harris notes:

> The assumption that whiteness is a property interest entitled to protection is an idea born of systematic white supremacy and nurtured over the years, not only by the law of slavery and 'Jim Crow,' but also by the more recent decisions and rationales of the Supreme Court concerning affirmative action.

Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1768 (1993). The hallmark of the Court's economic marketplace cases (*Wygant*, *Croson*, and *Adarand*) is that the "the expectation of white privilege is valid, and that the legal protection of that expectation is

of a "burden" on innocent whites in these cases because there is competition in a limited marketplace. Individual self-interest[87] is the distinguishing factor in cases like *Croson* and *Adarand*; the broad, process-based themes of the First Amendment do not resonate well here. Nevertheless, it is the manner in which discrimination is defined that determines whether a race-conscious remedial approach will be upheld by the Court.

The Court, in light of its preference for process-based values and rights, has defined discrimination virtually out of existence. Thus, in order to establish a cognizable Equal Protection Claim under the Fourteenth Amendment, there must be clearly identified discriminatory intent by the state or an actor connected to it.[88] Disparate impact, while not constitutionally irrelevant, is not enough to establish an Equal Protection claim; discriminatory intent must exist.

The Court has defined discrimination in narrow terms, and much of the systemic nature (and its devastating impact) is left undisturbed.[89] This is the hallmark of the definitional myth. *Washington v. Davis* is the analytical linchpin of the definitional myth.

The *Washington v. Davis* intent requirement[90] segments discrimination into a myriad of discrete, individualized occurrences. This approach preserves liberal individualism[91] at the expense of eradicating racial subjugation in all facets of American life.

Plessy and *Washington v. Davis* are a disconcerting doctrinal tandem: *Plessy* literally erases the history of subjugation and subordination,[92] and *Washington v. Davis*, building upon the historical myth, defines discrimination so narrowly that it only exists in a few, discrete instances.[93] Certainly, *Washington v. Davis* is not as

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warranted." *Id.* at 1769; *accord* STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 141 (1996).

[87]"This is a discourse of difference and self-interest. It resonates deeply with concepts of 'us' and 'them;' affirmative action is seen by whites as problematic just because the 'other' is receiving something 'we' [whites] are not." Flagg, *supra* note 80, at 830. "Affirmative action is framed as a process that makes a gift of something that otherwise might (perhaps 'should') have been 'mine' to a different and seemingly unqualified other." *Id.* at 831.

[88]Washington v. Davis, 426 U.S. 229, 238-48 (1976).

[89]As Professor Stephanie Wildman writes:

> Systemic privileging and oppression remain invisible and undiscussed, in accordance with the unwritten rules of our society. The rule of law does nothing to end this invisibility and may even contribute to its continuation. Thus the very act of seeing that the rule of law and systems of privilege undermine justice is itself problematic. A full attack on privileging and oppression can begin in earnest only when the legal profession recognizes the privileging dynamic. But this reality—privilege—that we must see has not even found articulation in legal vocabulary.

WILDMAN, *supra* note 86, at 141.

[90]426 U.S. at 242 (discriminatory impact, standing alone, is not enough to establish a constitutionally cognizable Equal Protection claim).

[91]Powell, *supra* note 13, at 242-43.

[92]*See supra* notes 66-79 and accompanying text.

[93]*See supra* text accompanying note 90.

odious as *Plessy*; it at least acknowledges that discrimination is not imaginary, but it shares a common doctrinal thread with *Plessy* since it neutralizes discrimination. *Plessy* was a direct response to the broad prospective societal change mandated by the Reconstruction Amendments, while *Washington v. Davis* was an implicit response to the broad prospective societal change, grounded in the anti-caste and anti-subordination principles, mandated by *Brown v. Board of Education*.[94] As Professor Cheryl I. Harris observes:

> [T]he Court's current conceptualization of neutrality mirrors that of the *Plessy* Court and produces a similar result: racial inequality is virtually irremediable under the Constitution. While the line has moved with regard to what counts as racial discrimination—rules of equal prohibition based on race now look plainly unconstitutional—the prevailing logic has reconstituted a conception of race which renders the asymmetrical allocation of power, access, and rights by race as constitutional and consistent with the equal protection guarantee. The *Plessy* Court relied on formal race—the idea that race has no social meaning or relevance—in deciding that the Louisiana statute requiring racial separation in public carriers was consistent with the Equal Protection Clause. So, too, does the prevailing majority of the current Court rest its analysis upon the assertion that race is fundamentally irrelevant and signals nothing more than skin color.[95]

Professor Harris pinpoints the very essence of the definitional myth: "discrimination" is defined so that it legitimizes racial inequality[96]; the Court's

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[94]David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 954-55 (1989) (noting that *Plessy* "adopted the narrowest possible interpretation of the Reconstruction understanding, and *Washington v. Davis* adopted the narrowest plausible interpretation of *Brown*").

[95]Cheryl I. Harris, *In the Shadow of* Plessy, 7 U. PA. J. CONST. L. 867, 897-98 (2005). Justice O'Connor adopts a hybrid approach on race. That is, if race can be justified as beneficial to white majoritarian interests, then race can be acknowledged as an institutional goal. *See* Grutter v. Bollinger, 539 U.S. 306, 327-33 (2003) (noting the institutional benefits of a diverse educational experience and rejecting the contention that a "critical mass" of students of color is little more than a racial quota); *infra* Parts II.B-C. Professor Daria Roithmayr concludes that:

> [T]he decision in *Grutter* appears to serve white interests more than it does the interests of communities of color. The diversity rationale itself symbolically reproduces racial inequality by prioritizing white interests. In addition, the Court's opinion endorses meritocracy as a compelling government interest, notwithstanding the fact that conventional meritocratic standards privilege white applicants and exclude people of color. Diversity-oriented affirmative action also conceals the racially disparate impact of conventional admissions standards, and permits institutions to represent such a process as neutral and fair.

Daria Roithmayr, *Tacking Left: A Radical Critique of* Grutter, 21 CONST. COMMENT. 191, 207 (2004). This should come as no surprise because Rhetorical Neutrality advances colorblindness, the intent requirement of *Washington v. Davis*, and anti-differentiation as normative principles.

[96]*See* SUNSTEIN, *supra* note 35, at 340 (noting the fundamental doctrinal shift of the Court from an anti-caste Fourteenth Amendment principle to anti-differentiation; this literal

neutral rhetoric masks stark inequalities by relying on the discriminatory intent requirement[97]; and the absence of history and context ultimately leads to jurisprudence which preserves centuries of racial oppression.[98] The final component of Rhetorical Neutrality is the rhetorical myth. Once the history of racial oppression has been erased,[99] and discrimination has been decontextualized so that it means *any* encroachment on an *individual* right,[100] then there has to be some neutral explanation

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interpretation of "equality" perpetuates systemic racism); *supra* note 86 and accompanying discussion.

[97]Powell, *supra* note 13, at 242-43 (discussing how the *Washington v. Davis* intent requirement is manipulated by the Court depending on the race of the plaintiff); Powell, *supra* note 6, at 907-12; Mark Strasser, *The Invidiousness of Invidiousness: On the Supreme Court's Affirmative Action Jurisprudence*, 21 HASTINGS CONST. L.Q. 323, 402-03 (1994); David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?*, 91 COLUM. L. REV. 790, 799 (1991); K.G. Jan Pillai, *Neutrality of the Equal Protection Clause*, 27 HASTINGS CONST. L.Q. 89, 152 (1999) (arguing for judicial scrutiny of facially neutral laws with disproportionate impact on racial minorities and concluding that "[n]eutrality operates as a concept of convenience—lenient toward facially neutral laws having a racially disproportionate impact and highly intolerant toward laws advantageous to racial minorities"); Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. 1, 27-32 (2005). *See also id.* at 30 ("While whites and men who challenge remedial usages of gender and race receive heightened judicial scrutiny of their discrimination claims, women and persons of color who seek judicial solicitude, but who lack proof of specific intent, or the elusive 'smoking gun,' only receive rational basis review.") (footnotes omitted).

[98]*See* Bryan K. Fair, *Re(Caste)ing Equality Theory: Will* Grutter *Survive Itself by 2028?*, 7 U. PA. J. CONST. L. 721, 722 (2005) ("The Supreme Court has never dismantled educational caste. It has provided no remedy to restore those persons mired in caste to the positions they would occupy absent discrimination.").

[99]*See supra* note 31 and accompanying text.

[100]Reginald Oh, *Discrimination and Distrust: A Critical Linguistic Analysis of the Discrimination Concept*, 7 U. PA. J. CONST. L. 837, 859-66 (2005) (discussing how the Court has narrowly defined discrimination without reference to context and history so that the focus of the Equal Protection Clause is anti-differentiation, not anti-caste); Reginald Oh, *A Critical Linguistic Analysis of Equal Protection Doctrine: Are Whites a Suspect Class?*, 13 TEMP. POL. & CIV. RTS. L. REV. 583, 608-10 (2004) (critiquing the linguistic structure of the Court's Equal Protection jurisprudence, focusing on the "doctrinal move from suspect classification/suspect class to suspect classification" in which the Court preserves liberal individualism (the anti-differentiation principle), conflates the terms—"suspect classification" and "suspect class"—so that there is no difference between positive, race based remedial efforts and invidious discrimination, and presumes that formal equality exists in American society); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1005 (1986) ("[T]he anti-differentiation perspective focuses on the specific effect of the alleged discrimination on discrete individuals, rather than on groups."). A related concept in this context is the theory of racial politics: because the Fourteenth Amendment protects individuals, not groups, then any racial decisionmaking based on group membership is constitutionally prohibited. Interestingly, the Court only employs this rationale when people of color have some semblance of power. Colorblindness is inverted—the Court explicitly acknowledges race in this context—and *Washington v. Davis* is used selectively (when the claim is a reverse discrimination claim brought by whites, the intent requirement vanishes; conversely, any claim of disparate impact is casually dismissed by the Court when the claim is advanced by Blacks). *See supra* note 97 and accompanying text; *see, e.g.*,

for the glaring inequalities which persist but cannot be remedied. The rhetorical myth supplies the dubious explanation through a series of affirmative action critiques.

3. The Rhetorical Myth[101]

The Rhetorical Myth is the final prong of Rhetorical Neutrality. It functions on a thematic level as a justification for any "burden" on white privilege, and, embracing the First Amendment's marketplace of ideas paradigm, it serves as the doctrinal foundation of the forward-looking approach.[102] Thus, race-conscious remedial approaches to the eradication of caste are supplanted, and the central focus is on the future benefits to individuals (and institutions), not on race. *Grutter* is squarely in this doctrinal vein.[103] Diversity is particularly appealing because race can be

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Reginald Oh, *Re-Mapping Equal Protection Jurisprudence: A Legal Geography of Race and Affirmative Action*, 53 AM. U. L. REV. 1305, 1308 (2004) [hereinafter Oh, *Re-Mapping*] (noting how the Court re-mapped race relations, in the *Croson* decision, in light of the fact that African-Americans were in the political majority in Richmond, Virginia, the former government seat of the Confederacy; the Court paradoxically claims to be espousing colorblind constitutionalism while it focuses on the *racial composition* of the municipal government of Richmond). In reverse discrimination cases, that is, cases where the claim is centered on a burden on white interests, the *Washington v. Davis* intent requirement is conspicuously absent—disproportionate impact is enough. *See* Powell, *supra* note 13, at 242-43; Strasser, *supra* note 97, at 402-03 (addressing that in Equal Protection claims advanced by African-American plaintiffs, "the Court bends over backwards not to impose penalties for intentional discrimination, by presuming that intentional discrimination is not present unless the evidence establishes otherwise[; yet, o]n the other hand, the Court presumes invidious intentional discrimination when examining benign discrimination policies [in reverse discrimination cases brought by white claimants]"). The Court's "neutrality" should be viewed skeptically.

[101] *See supra* note 15, 33 and accompanying text.

[102] The forward-looking approach essentially rejects a race-conscious remedial approach to eradicate systemic racial oppression. Instead, the focus is on some *future* value that can be shared by all individuals, not racial groups. Justice Stevens has been the leading proponent of the forward-looking approach. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 313 (1986) (Stevens, J., dissenting) (rejecting a remedial approach focused on the "sins [of] the past," and arguing that there is a "public interest in educating children for the future[;]" and there is, then, "a legitimate interest in employing *more black teachers in the future*") (emphasis added); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511-12 (1989) (Stevens, J., concurring in part and concurring in the judgment); Metro Broad., Inc. v. FCC, 497 U.S. 547, 601-02 (1990) (Stevens, J., concurring) (embracing race as a factor in reaching future diversity), *overruled by* Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995). "The forward-looking approach is merely a variation on colorblind constitutionalism—it ignores race when it is convenient to do so. . . ." Powell, *supra* note 13, at 255-56. The forward-looking approach is selective in its reach—it only accommodates some *future* remedial (colorblind benefit)—because it eschews any consideration of the *present day effects* of past racial discrimination, a large portion of systemic racial subjugation is left unchecked. The forward-looking approach is ill-equipped to deal with systemic racial discrimination. *Id.* at 241-60. *See also supra* note 15 and accompanying text; Patricia J. Williams, Metro Broadcasting, Inc. v. FCC: *Regrouping in Singular Times*, 104 HARV. L. REV. 525 (1990).

[103] Grutter v. Bollinger, 539 U.S. 306, 327-33 (2003) (noting the institutional benefits of diversity).

neutralized, and the rhetorical move that accomplishes this is the Court's articulation of several seminal, reinforcing myths. These myths actually "explain" why race is irrelevant to the Court.

Paradoxically, to ignore race, the Court must first recognize it.[104] Indeed, the rhetorical myth's primary function is to articulate how race is fungible. It is like the "diversity" that is derived from having a tuba player from Idaho in the first year law class,[105] while simultaneously justifying the consideration of race so that a "critical mass" of the historically subjugated has substantive access to the gateways of American opportunity.[106] This inherent tension illuminates the deeply embedded incongruity of colorblind constitutionalism.

Examining the rhetoric against affirmative action as a manifestation of white guilt,[107] Professor John E. Morrison identifies eight colorblind doctrinal themes underlying the Court's affirmative action jurisprudence:

> [1.] Affirmative action is not colorblind, because it intentionally invokes racial classifications.[108]
>
> [2.] Affirmative action is not based on individuals, but on groups.[109]
>
> [3.] Affirmative action is not based on merit.[110]
>
> [4.] Affirmative action leads to racial politics and backlash in the form of white extremists.[111]
>
> [5.] Affirmative action is exploited by middle-class African-Americans.[112]
>
> [6.] Affirmative action stigmatizes its intended "beneficiaries."[113]

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[104]Powell, *supra* note 13, at 214-20 (discussing the doctrinal avoidance inherent in colorblind constitutionalism).

[105]*See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 316 (1978) (noting that "'[a] farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer.'" (quoting Brief for Columbia Univ. et al as Amici Curiae Supporting Petitioner-Appellant at 40, The Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811))).

[106]*See Grutter*, 539 U.S. at 327-33; *supra* note 95 and accompanying text.

[107]Morrison, *supra* note 48, at 314. *See also id.* at 356-66.

[108]*Id.* at 314-24.

[109]*Id.* at 314-30.

[110]*Id.* at 314, 330-34.

[111]*Id.* at 314, 334-40.

[112]*Id.* at 335-37.

[113]*Id.* at 340-44.

> [7.] Affirmative action is social engineering, demanding equal results rather than equal opportunity.[114]

> [8.] Affirmative action victimizes innocent (white[s]).[115]

What is striking about all of the colorblind themes listed above is that they all strain to ignore race, while simultaneously acknowledging it to offer a critique on why it is antithetical to equality.[116] These literal interpretations of "equality" are rooted in the anti-differentiation principle.[117] All of the preceding colorblind conceptions are ahistorical—the present day effects of past discrimination are irrelevant (this is amorphous societal discrimination)[118]—and these forward-looking themes reinforce Rhetorical Neutrality. All of the preceding themes shift the focus from historical discrimination, with present day effects, to individuality and merit.[119] The substantive core of the Equal Protection Clause is turned inside out. This inversion preserves entrenched, systemic racism. Professor Darren Lenard Hutchinson notes that:

> Colorblindness also reflects majoritarian interests because it freezes existing social, economic, and political inequities that result from racism. No serious advocate of colorblindness disputes the reality that a history of racial subordination has caused enormous inequalities of wealth, political power, educational opportunity, and inequities in many other measures of well-being. Colorblindness advocates, however, demand neutrality now that formal, overt efforts to subjugate persons of color have dissipated. The decontextualized, undifferentiated demand for colorblindness in a society marked by vast racial inequity accepts current conditions as a legitimate baseline; it compels prospective equal treatment, but prohibits affirmative steps to dismantle historical and present-day maltreatment. *In*

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[114]*Id.* at 314, 344-51.

[115]*Id.* at 314, 335-37, 351-55.

[116]Exposing this "blindness" to the realities of race, Professor Morrison writes:

> This choice of colorblindness reflects a desire to avoid facing race in two different ways. First, it reflects a desire to avoid the painful revelations that may be lurking in an examination of either racial history or the current racial disparities in society. Second, colorblindness advances a formal test that strikes down racial classifications without acknowledging what lead to the need for such strictures. Euro-Americans thus choose to blind themselves rather than face their past.

Id. at 324 (footnotes omitted). *See also* Powell, *supra* note 13, at 219 ("It is striking that in order to avoid any consideration of race, it must first be recognized and then ignored.").

[117]*See supra* notes 35-43 and accompanying text.

[118]*See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 296 n.36, 301 (1978); City of Richmond v. J.A. Croson Co., 488 U.S. 469, (1989); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 223-27 (1995); Grutter v. Bollinger, 539 U.S. 306, 322-24(2003); Powell, *supra* note 6, at 872 n.271.

[119]Morrison, *supra* note 48, at 314-15.

> *other words, colorblindness preserves status quo racial inequity. Only whites benefit from such an approach to equality.*[120]

This approach to equality is embedded in the Court's affirmative action jurisprudence, and all of the colorblind themes serve to preserve the status quo. Indeed, the historical[121] and definitional myths[122] inevitably lead to a doctrinal narrative of colorblindness and white victimization.[123] All of the colorblind themes share this narrative foundation.

For example, colorblind themes—affirmative action is not colorblind[124] and affirmative action is not based on individuals, but on racial groups[125]—are essentially statements of colorblind constitutionalism and the complementary doctrine of liberal individualism. Doctrinally, the Court has eschewed a substantive, race-conscious remedial approach for one that obscures the significance of race and rejects history.

Diversity is an aspirational goal with First Amendment underpinnings. This is a significant shortcoming in the eradication of caste.[126] Diversity fits squarely within

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[120]Hutchinson, *supra* note 97, at 26-27 (emphasis added) (footnotes omitted). *See also* Hutchinson, *supra* note 7, at 640 ("The Court has deployed a narrative of white victimization and oppression to justify the application of strict scrutiny in litigation challenging race-based affirmative action, which has resulted in the dismantling of policies designed to mitigate racial subordination.").

[121]*See supra* Part II.A.1.

[122]*See supra* Part II.A.2.

[123]*See supra* notes 115, 120 and accompanying text.

[124]The Court's race decisions emphasize the proposition that there is no two-race theory under the Equal Protection Clause. *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224 (1995) ("[A]ny *person*, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.") (emphasis added); *see id.* at 235. Thus, any race-conscious remedial approach is subject to strict scrutiny and must be justified by a compelling state interest. While the Court concluded that diversity was such an interest in *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003), affirmative action is still viewed as counterintuitive to the principle of colorblind constitutionalism. Diversity, then, serves as a mediating principle; it is neutral, in one sense, because *everyone* can benefit from difference as an institutional value, *see id.* at 328-33, and it is race-conscious in another sense, because race can be used as one of many factors in assessing candidates for positions in a law school class. *Id.* at 334.

[125]The Court has consistently embraced liberal individualism—there is no racial group theory under the Equal Protection Clause. *See Grutter*, 539 U.S. at 326; *Adarand*, 515 U.S. at 227. Powell, *supra* note 6, at 849-55 (critiquing liberal individualism as unsupported by the history of the Civil Rights Amendments and the anti-subjugation principle).

[126]Powell, *supra* note 6, at 888-906 (arguing that diversity, notwithstanding its positive attributes, lacks a substantive core, and is therefore, ill-equipped as a doctrinal approach in the eradication of systemic oppression); Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity,"* 1993 WIS. L. REV. 105, 133-35; *id.* at 138 (critiquing diversity as without substance: "predicating the prospective value of diversity on the inclusion of under-represented "viewpoints" dooms it as an effective tool to promote equality because it potentially assumes the existence of an "essential" minority viewpoint and

the canon of Rhetorical Neutrality because it is forward-looking and embraces neutrality to the exclusion of all other substantive values. Under the Fourteenth Amendment, diversity is ahistorical,[127] partially acontextual,[128] and inherently procedural (rather than substantive).[129] The focus is on preliminary access and inclusion; difference is embraced (rather than the eradication of race based caste).

There is a presumption against content-based discrimination under the First Amendment.[130] Therefore, the content of messages, whether political speech or racist hate speech, must be ignored to protect the free flowing ideological marketplace.[131] This fits nicely with the illusion of neutrality—race must be ignored at all costs to preserve colorblind neutrality. Content neutrality and colorblindness are reinforcing doctrinal concepts. Both types of "blindness" (to content under the First Amendment) and to race (under the Fourteenth Amendment) lead to the same result.[132] The First Amendment's prohibition against content-based discrimination by the state, as applied to hate speech and colorblind constitutionalism both serve to preserve the status quo. Deeply rooted systemic discrimination remains undisturbed: racist messages that ultimately lead to racial harassment and violence are left to be remedied by "more speech"[133] and colorblindness prohibits any consideration of

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ignores the more significant forward-looking value of including formerly excluded individuals on all levels of society").

[127]*See* Powell, *supra* note 6, at 857-60; Michel Rosenfeld, *Affirmative Action, Justice and Equalities: A Philosophical and Constitutional Appraisal*, 46 OHIO ST. L.J. 845, 898 (1985) (stating that a historical perspective is needed in analyzing the constitutional legitimacy of affirmative action plans); *supra* note 126 and accompanying text; *see supra* Part II.A.1.

[128]Here I mean to suggest that "[d]iversity is a malleable concept[,]" Powell, *supra* note 6, at 888, therefore, context is acknowledged or discarded by the Court based upon its perception of how the state action in question burdens white interests. *See id.* at 857-61; *see also supra* Part II.A.2.

[129]*See supra* note 15 and accompanying text.

[130]CHEMERINSKY, *supra* note 70, § 11.2.1 at 902 ("The Supreme Court frequently has declared that the very core of the First Amendment is that the government cannot regulate speech based on its content."). This included hate speech as well. *Id.* ("The Court has declared that '[c]ontent-based regulations are presumptively invalid.'" (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992))). *But see* Virginia v. Black, 538 U.S. 343, 361-63 (2003) (holding that the First Amendment does permit some content-based discrimination and concluding that Virginia's ban on cross burnings "done with the intent to intimidate" passed constitutional muster).

[131]Powell, *supra* note 15, at 21 (discussing that "although 'fighting words'" and by extension racist hate speech "are constitutionally proscribable, any ordinance or statute that addresses such unprotected speech should nevertheless be content-neutral."). *See* R.A.V. v. City of St. Paul, 505 U.S 377, 391-96 (1992). This is a theory of colorblindness as well because the Court ignores the present day effects of past discrimination and overprotects racist hate speech in the name of neutrality.

[132]*See* Morrison, *supra* note 48, at 324 n.84 ("There is an uncanny parallel between Oedipus blinding himself after discovering his guilt and Euro-Americans' colorblinding themselves after making a similar discovery.").

[133]Marjorie Heins, *Banning Words: A Comment on "Words That Wound,"* 18 HARV. C.R.-C.L. L. REV. 585, 592 n.39 (1983) ("Tolerating ugly, vicious speech is a small but necessary price to pay for the freedom to advocate social change and justice."); Nadine Strossen,

race-conscious remedial approaches designed to eradicate the present day effects of past discrimination. This is directly attributable to how discrimination is defined. The definitional myth[134] reinforces Rhetorical Neutrality, and, since discrimination is a rare occurrence,[135] then the remaining critiques ((3) – (8)) of affirmative action all focus on "neutral" standards in the distribution of societal benefits or the impact of race-conscious remedial efforts on white interests.

Colorblind theme (3) (affirmative action is not based on merit) is a "neutral" articulation of white privilege.[136] While no mention of "race" is made when the analysis focuses on "merit," the racial underpinning could not be clearer—people of color do not measure up under any quantifiable (or qualitative) standard,[137] so admitting them will unjustifiably exclude whites who are *entitled* to take their place in *elite* institutions.[138] The reference to elite institutions is instructive because Justice Scalia noted, during oral argument of the *Grutter* case, that the issue of fairness could be resolved by simply *lowering* the standards of admission to the University of Michigan School of Law:

> I find it hard to take seriously the State of Michigan's contention that racial diversity is a compelling state interest, compelling enough to warrant ignoring the Constitution's prohibition on the basis of race. . . . [T]he problem is a problem of Michigan's own creation, that is to say, it has decided to create an elite law school, it is one of the best law schools in the country. Now, it's done this by taking only the best students with the best grades and the best SATs or LSATs knowing that the result of this will be to exclude to a large degree minorities.
>
> It is—it's not unconstitutional to do that, because it's—that's not—not the purpose of what Michigan did, *but it is the predictable result*. . . .

Regulating Racist Speech on Campus: A Modest Proposal?, 1990 DUKE L.J. 484, 493-94 (1990) ("[E]quality will be served most effectively by continuing to apply traditional, speech-protective precepts to racist speech, because a robust freedom of speech ultimately is necessary to combat racial discrimination."). *Id.* at 562-70.

[134]*See supra* Part II.A.2.

[135]Through the historical and definitional myths, the Court has narrowly defined when actionable discrimination exists—amorphous "societal discrimination" is not enough:

> The Supreme Court has repeatedly asserted that the goal of reducing systemic or "societal discrimination" is a constitutionally impermissible goal for race-conscious affirmative action. The Court believes that the pursuit of such a goal would authorize affirmative action programs that were too vast, *and too burdensome on innocent whites*. . . . Therefore, the Court has historically limited race-conscious affirmative action to narrowly tailored remedies for *particularized acts of past discrimination* that were supported by reliable legislative, judicial or administrative findings.

Giradeau A. Spann, *The Dark Side of* Grutter, 21 CONST. COMMENT. 221, 229-30 (2004) (emphasis added). *See supra* Parts II.A.1-2 (discussing the historical and definitional myths).

[136]*See* Roithmayr, *supra* note 95, at 214 ("The Court's opinion in *Grutter* favors white interests . . . by endorsing and protecting elite meritocracy, despite the fact that meritocratic admissions standards disproportionately exclude applicants of color.").

[137]*Id.* at 214-17.

[138]*Id.*

> Now, considering [Michigan] created this situation by making that decision, it then turns around and says, oh, we have a compelling state interest in eliminating this racial imbalance that [we] ourselves have created.
>
> Now, if Michigan really cares enough about that racial imbalance, why doesn't it do as many other state law schools do, *lower the standards*, not have a flagship elite law school, it solves the problem.[139]

This seemingly neutral rationale is breathtaking in its cynicism, for it assumes a stereotypical view of the abilities of people of color.[140] Under the "neutral" meritocratic standards, it is "predictable" that people of color will not be admitted to the law school in large numbers. It is also predictable, under the same twisted reasoning, that whites will naturally do better than people of color. So, admission standards must be "lowered." The assumption underlying Justice Scalia's query is buttressed by the historical, definitional, and rhetorical myths. His question is specifically forward-looking (it does not take into account the present day effects of generations of fundamentally inadequate school systems for people of color)[141]; there is no particularized indicia of discrimination proffered by Blacks here (so "societal discrimination" is easily ignored and "discrimination" is inverted so the focus is on the impact on white victims)[142]; and the "solution" underlying the question is not

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[139]Transcript of oral Argument at 30-31, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) (emphasis added).

[140]Roithmayr, *supra* note 95, at 214-17 (noting that, among other things, the Court ignores the discriminatory impact of purportedly neutral meritocratic standards (*e.g.*, the LSAT and GPA); it forecloses any future challenges to the disproportionate impact of such standards; and it preserves the status quo with only a slight impact on the white privilege that meritocracy serves); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 969-97, 1022-34 (1996).

[141]DERRRICK A. BELL, *Bell, J., Dissenting*, *in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 185, 187-99 (Jan. 2002) ("dissenting" from the Court's holding in *Brown* and noting that the opinion fails to address the pervasiveness and permanence of systemic racism).

[142]*See* Roithmayr, *supra* note 95, 211-18 (positing that the *Grutter* decision privileges white interests on three levels: (i) the diversity rationale focuses on the "added value" that African American students will bring to white students' education; (ii) the opinion endorses "meritocratic decisionmaking that privileges the admission of white applicants and excludes people of color[.]" and (iii) the discriminatory impact of traditional admissions standards, when coupled with the diversity rationale, makes it easier to privilege white students' interests over those of historically excluded students of color). GIRARDEAU A. SPANN, THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES 190 (2000) (noting that since strict scrutiny applies to all race conscious remedial approaches, "[t]his has allowed the Supreme Court to invalidate affirmative action programs on the grounds that they are unfair to the white majority, *even when the white majority has made a political decision to impose affirmative action burdens on itself*") (emphasis added). Thus, the process theory has been inverted—discrete and insular minorities become whites who are "victims" of affirmative action. *See supra* notes 14-15 and accompanying text; Oh, *Re-Mapping*, *supra* note 100, at 1323.

neutral (or colorblind) because it implicitly embraces white privilege as the guiding principle in the distribution of societal resources.

Colorblind theme (4) (affirmative action leads to racial politics) builds upon the meritocracy concept discussed above, but this theme is an explicit attempt to prohibit the use of race in the distribution of benefits (societal resources). Just as meritocratic arguments seek to "explain" why there is a "neutral" (colorblind) rationale for the disproportionate under representation of people of color in elite institutions,[143] the racial politics rationale employs "colorblindness" to strike down race-conscious remedies that are inaccurately classified as the product of a racial spoils system[144]— students should not be admitted to law school on the basis of race alone[145] and benefits should not be distributed in a system (or process) skewed toward race.[146]

Advancing a powerful critique of the racial politics rationale of *Croson* and its use of the Process Theory[147] as a tenet of Equal Protection neutrality, Professor Reginald Oh highlights the doctrinal inversion that is at the center of the decision:

> Justice O'Connor flipped Ely's [Process Theory] on its head. . . . Justice O'Connor reasoned that "[t]he concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against the application of heightened judicial scrutiny. . . ." In other words, under the facts of this case, where a *black* majority City Council enacted an ordinance that harmed the interests of Whites to seemingly provide an economic boon to its black constituents, Justice O'Connor used Ely's political process theory to imply that the white minority in Richmond were a suspect class who needed the courts to protect its rights and interests from the "racial tyranny" of the new black political majority.[148]

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[143]*See* Roithmayr, *supra* note 95, at 214-17 (critiquing the Court's endorsement of meritocracy and its use of affirmative action to avoid the "hard choice" between "academic excellence" and "the importance of admitting applicants of color (whose scores are not as high on measures of excellence[,]" and further noting that "[i]n this putative dichotomy, excellence is equated with (disproportionately white) success on the LSAT and in GPAs; admitting applicants of color is equated with sacrifice of standards").

[144]*See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495-96 (1989) (noting the racial composition of the City Council of Richmond, Virginia, the population of the city, and the fact that Blacks were in the political majority, and applying *strict scrutiny* because the political majority could act to disadvantage minority (white) interests); Fullilove v. Klutznick, 448 U.S. 448, 541-42 (1980) (Stevens, J., dissenting); Grutter v. Bollinger, 539 U.S. 306, 326 (2003); *see* Powell, *supra* note 13, at 239, 249-51.

[145]*Grutter*, 539 U.S. at 329-43 (concluding that race can be considered, along with other factors, in a holistic admissions process that compares all applicants as individuals and does not insulate applicants from comparison based on race).

[146]*Croson*, 488 U.S. at 495-96; *see supra* note 144 and accompanying text.

[147]*See supra* note 15 and accompanying text.

[148]Oh, *Re-Mapping*, *supra* note 100, at 1323 (quoting *Croson*, 488 U.S. at 495-96) (emphasis added).

Professor Oh points to the essence of inversion—whenever white interests are "burdened," then colorblind constitutionalism becomes doctrinally irrelevant. "Neutrality" gives way to inversion. In *Croson*, Justice O'Connor uses the Process Theory to produce a narrative of oppression for whites. This rhetorical myth simply preserves white privilege. While this appears perfectly "neutral" on its face (Blacks and whites should receive the same benefits from a colorblind political process), this is nothing more than a bald assertion of white privilege.[149] Because the history of systemic racial oppression is ignored, it is easy to take the next step in reasoning that African-Americans will become the new "oppressors." There is a disconcerting parallel between the racial politics rationale and the racist rhetoric underlying the revisionist history of the Reconstruction Era.[150] Whiteness is equated with competence and thoughtful policy initiatives for the benefit of all, while on the other hand, people of color (specifically, African-Americans in this case) are viewed as legislative buffoons who enact policies for their own selfish ends.[151]

This is an interesting rationale because it assumes that African-Americans with "political power"[152] will engage in the *same* racist practices that have been the linchpin of white supremacy for over four hundred years. One might ask, how can African-Americans engage in "turnabout" when they only have access to a small (perhaps insignificant) piece of the game?[153] This question is part and parcel of the doctrine of inversion—neutrality is employed to obscure the real and enduring quality of racism.

Another "neutral" critique of affirmative action is that it is exploited by middle-class African-Americans who do not need "preferential treatment"[154] (colorblind

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[149]*See id.*

[150]*See* W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880, 711 (1935).

[151]*Id.*; *see* Oh, *Re-Mapping*, *supra* note 100, at 1325 (referring to Justice Stevens' dissent in *Fullilove* in which he noted that the Congressional Black Caucus wanted "a piece of the action,"and concluding that by applying the same rhetorical device, Justice O'Connor "use[s] . . . historical racial discrimination for self-serving purposes" (quoting Fullilove v. Klutznick, 448 U.S. 448, 536 (1980) (Stevens, J., dissenting))). This purpose is the preservation of white privilege. *Id.* at 1325-30 (critiquing how the Court views race-conscious remedies as "turnabout" for centuries of oppression by whites against African-Americans (quoting *Croson*, 488 U.S. at 524 (Scalia, J., concurring))).

[152]The Court has been consistently skeptical of Black political power when it impacts on white interests and political strength. *See, e.g.*, Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993).

[153]*See* Charles R. Lawrence, III, *Forward Ace, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 835 (1995) (noting how inter-ethnic conflict is a product of white supremacy and positing that a transformative approach to equality would recognize that affirmative action is merely a "[fight] over the crumbs thrown from the master's table"); Maurice R. Dyson, *Racial Free-Riding on the Coattails of a Dream Deferred: Can I Borrow Your Social Capital?*, 13 WM. & MARY BILL OF RTS. J. 967, 975 (2005); *see also* Anthony E. Cook, *The Death of God in American Pragmatism and Realism: Resurrecting the Value of Love in Contemporary Jurisprudence*, 82 GEO. L.J. 1431, 1503 (1994).

[154]Recently, Bill Cosby has added fuel to the debate on black self-sufficiency. *See* JUAN WILLIAMS, ENOUGH (2006).

theme 5). This is the doctrinal analog of the racial politics and meritocratic critiques. In a racial spoils system, neutrality is circumvented so that preferential treatment is dispensed based on race; thus, many undeserving (Black) recipients receive the tainted fruit of affirmative action.[155] Without any reference of history or context, this make-weight rationale gains currency. But we should not be confused by this rationale's simplistic allure:

> [E]ven the most complex measure of class would have difficulty capturing all the significant class effects of being born black in America. One can measure the racial and income composition of a neighborhood, butwithout [sic] considering race, there is no way to capture the fact that blacks do not gain the full social benefits of having better-off white neighbors. One can look at the racial composition of schools, but if only black students suffer stereotype threat within those schools, the differences between the schooling process for blacks and whites will be ignored. Stated simply, the social processes through which the black middle class becomes and remains economically disadvantaged are driven by and mediated through race. Ignoring race missed the point and distorts the results.[156]

It may be pushing the thematic connection too far to suggest that there are disconcerting similarities between *Plessy*'s narrative—that there comes a time when African-Americans should no longer be "special favorite[s] of the [law]"[157]—and the rhetorical myth of exploitation of affirmative action by African-Americans. It can be said, however, that a common thread runs through both rationales—Blacks are receiving a benefit that they do not deserve.

Building upon this formal equality paradigm of just deserts (of course, historical racism and its present day effects are irrelevant here), colorblind constitutionalists, like Justice Thomas, argue that affirmative action stigmatizes its intended

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[155]*See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 369-70 (2003) (Thomas, J., concurring in part and dissenting in part) ("[N]o modern law school can claim ignorance of the poor performance of blacks, relatively speaking, on the Law School Admission Test (LSAT). Nevertheless, law schools continue to use the test and then attempt to 'correct' for black underperformance by using racial discrimination in admissions so as to obtain their aesthetic student body."); *id.* at 372 (arguing that students of color are mismatched when they attend elite institutions through the largesse of affirmative action).

[156]Deborah C. Malamud, *Affirmative Action: Diversity of Opinions: Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 992-93 (1997).

[157]*See, e.g.*, *The Civil Rights Cases*, 109 U.S. 3, 25 (1883) ("When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws[.]"). This neutral critique is not of recent vintage. There has always been an attempt to "minimize" the harm on whites, usually by limiting any race-conscious remedies to particularized harm within a specific time period. *See, e.g.*, *Grutter*, 539 U.S. at 343 (O'Connor, J.) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."). It is interesting to note that the Court advanced a similar rationale in the *Civil Rights Cases* only *eighteen* years after the Civil War.

beneficiaries.[158] Thus, under colorblind theme 6, merit matters, not race. But this is an illusory world buttressed by the rhetorical myth of neutrality. Indeed, the concern seems to be the reaction of *whites* to affirmative action rather than the eradication of caste.[159] This notion is rooted in liberal individualism[160]; the Constitution protects individuals, not groups, and to "single" out members of a racial group for "special treatment" is constitutionally illegitimate.[161] Thus, any "benefits" that racial minorities receive have a stigmatizing effect on them and harms whites who had no part in any discrimination against people of color.[162] Of course, this ignores how white privilege functions in society.[163]

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[158]*See, e.g.*, *Grutter*, 539 U.S. at 371-72 (Thomas, J., concurring in part and dissenting in part); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment) (critiquing affirmative action as a "racial paternalism" exception to the Fourteenth Amendment); Keith R. Walsh, *Color-Blind Racism in* Grutter & Gratz*: Racism Without Racists Color-Blind Racism and the Resistance of Racial Inequality in the United States*, 24 B.C. THIRD WORLD L.J. 443, 462-63 (2004) (book review) ("[C]ritics of affirmative action often couch their opposition to the policy in terms of concern over how affirmative action makes blacks feel about themselves. The style of color-blind racism, and in particular, the linguistic tool of projection is illustrated by various of Justice Thomas's assertions in *Grutter* . . . . [T]he style of color-blind racism allows individuals to maintain a color-blind image as they advance positions that perpetuate racial inequality and white privilege. In reality, however, whites are the ones who receive preference based upon their race because . . . the market is so heavily titled in their favor.") (footnotes omitted). *Id.* at 463.

[159]Erwin Chemerinsky, *Making Sense of the Affirmative Action Debate*, 22 OHIO N.U. L. REV. 1159, 1173 (1996) ("To describe the injury of whites as an argument against affirmative action is to assume that whites are presumptively entitled to what they have and that their loss is a harm to be avoided. The entitlement, however, must be established in each context and cannot be assumed.")

[160]*See supra* notes 42, 48, 100 and accompanying text.

[161]*See Grutter*, 539 U.S. at 350 (Thomas, J., concurring in part and dissenting in part) ("Racial discrimination is not a permissible solution to the self-inflicted wounds of this elitist admissions policy. . . . The majority upholds the Law School's racial discrimination not by interpreting the people's Constitution, but by responding to a faddish slogan of the cognoscenti.").

[162]*See* Morrison, *supra* note 48, at 340-41 ("[Stigma] is a cluster of related arguments[F]irst, others see affirmative action beneficiaries as inferior; second, the beneficiaries themselves feel inferior; and third, others will perceive all members of the racial group as inferior, even if all members of the group are not beneficiaries of the affirmative action plan.") (footnotes omitted); Andrew F. Halaby & Stephen R. McAllister, *An Analysis of the Supreme Court's Reliance on Racial "Stigma" as a Constitutional Concept in Affirmative Action Cases*, 2 MICH. J. OF RACE & L. 235, 282 (1997) (discussing the Court's use of racial stigma and noting the effect of rhetorical inversion and neutrality: "[T]he Court has conferred constitutional significance on an entirely new strain of stigma. This new 'racism' strain is one in which inferiority is not the 'mark' conferred upon the group at issue" where the Fourteenth Amendment should be employed to eradicate stigmatization per *Brown*, "but rather is one where the issue is perceived past racism of the powerful nonbeneficiary group (i.e., Whites)"). So, affirmative action is "illegitimate" and should be abandoned because *whites* will view *all* members of the racial group as inferior. The authors reject this "other-stigma" rationale:

> [I]t seems at least odd and at most duplicitous to assign legal, and especially constitutional, significance to opinions that others may hold. Doing so is certainly a departure from precedent. Also, in the same way that beneficiaries ought to be

The neutral critique of social engineering (colorblind theme 7) is rooted in liberal individualism, which is essential to the preservation of white privilege. That is, because the Fourteenth Amendment protects individuals (persons), not groups, it is constitutionally impermissible to guarantee results based on race. This is another formulation of the Process Theory[164]—the Constitution guarantees equal access, not equal results. Professor Kathleen Sullivan advocates moving away from a "sins of the past" retributive approach to a prospective approach which answers the critiques of race-based social engineering and unwarranted harm to innocent whites. She writes:

> Uncovering the Court's focus on sins of discrimination helps tell why both sides have always been left still standing at the end of affirmative action showdowns in the Court. Trapped in the paradigm of sin, the Court shrinks, even in upholding affirmative action plans, from declaring that the benefits of building a racially integrated society for the future can be justification enough. . . . And hemmed in by the quandary of harm to innocents that a sin-based rationale inevitably creates, the Court continues to caution, even in upholding affirmative action, that it is but a necessary evil. Not surprisingly, affirmative action's proponents and opponents both find reason to triumph: its proponents in the declaration of its necessity; its opponents, in its definition as evil. While thus doomed to partial success, a focus on sins of discrimination is understandable. Expunging past wrong has an urgency about it that other justifications might not, and that urgency lends force to claims that affirmative action serves "compelling" purposes. *But as long as whites displaced by affirmative action are not being subordinated on the basis of their race—as it is especially clear they are not when white-dominated governments, unions, or employers choose affirmative action—any important purpose for affirmative action should be justification enough. Such a purpose may*

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considered the primary authorities on whether they are stigmatized, the controlling type of stigma ought to be that experienced by beneficiaries themselves, not that experienced by others. If all that is required to invalidate a program is others' disfavor, then the program's opponents have an easy task indeed. . . . It seems a novel proposition that the opinions of those "others" should be considered determinative or even germane as to whether the classification is constitutionally valid.

Id. at 277 (footnotes omitted).

[163] *See supra* notes 136-42 and accompanying text.

[164] *See supra* note 15 and accompanying text. On some level, the Process Theory is not much help in eradicating systemic racism because it is premised on the illegitimacy of judicial review (the problem of counter-majoritanism), and it presumes that the process generally works well without acknowledging the significant problem of liberal individualism. *See, e.g.*, Erin E. Byrnes, Note, *Unmasking White Privilege to Expose the Fallacy of White Innocence: Using a Theory of Moral Correlativity to Make the Case for Affirmative Action Programs in Education*, 41 ARIZ. L. REV. 535, 558 (1999) ("Further complicating the so-called white innocence claim is liberalism's focus on the individual. . . . So long as dominance, and the benefits flowing therefrom, remain invisible to whites, white society can continue to enjoy the rights and privileges that are conferred by their racial identity while staunchly opposing the allocation of rights to blacks under redistributive affirmative action theories. And all of this can be achieved while whites maintain the cloak of meritocracy and strict equality.").

> *look forward as well as back. Looking forward does not forget sins of discrimination; it just sees them as less in need of remedy than redemption.*[165]

There are certainly doctrinal limitations to the forward-looking approach,[166] but Professor Sullivan pinpoints the interrelatedness of the social engineering and burden on innocent whites' rationales of the dismantlement of affirmative action. Rather than neutralizing (or turning inside out) substantive conceptions of equality, the rhetorical move away from perpetrator, victim, and sin means that discrimination is not particularized. The *Washington v. Davis* intent requirement is abandoned because it selectively privileges white reverse discrimination claims over those of people of color.[167]

Finally, under colorblind theme 8, a conscious attempt is made to minimize the impact on white majoritarian interests.[168] This is a doctrinal signpost of the Court's race jurisprudence. Indeed, the possibility of an all-encompassing, substantive approach to the eradication of systemic racism is undermined by the Court's insistence on particularized discrimination. Oftentimes, there is no injury to whites. As Professor Erwin Chemerinsky observes:

> [I]t should be noted that affirmative action does not in all circumstances injure others. For example, if affirmative action takes the form of aggressive advertisement of positions in minority communities and active recruitment of minority applicants, it is difficult to see how any one can claim an injury deserving of consideration. . . .
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> Moreover, in matters such as employment, education, or government contracting, benefiting minorities inevitably means taking away something from whites. To describe the injury of whites as an argument against affirmative action is to assume that whites are presumptively entitled to what they have and that their loss is a harm to be avoided.[169]

The claim of white privilege or entitlement is rooted in the underlying myths of Rhetorical Neutrality[170] and racist stereotypes.[171] It is an easy step to ignore the real injury to oppressed people of color when they are characterized as debased and lazy. These labels were applied quite openly in our Nation's sordid racial past, but now

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[165]Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 98 (1986) (emphasis added).

[166]Powell, *supra* note 13, at 234-60.

[167]*See supra* Section II.A.2; *see also supra* notes 98-107 and accompanying text.

[168]*See supra* Section II.A.2; *see also supra* notes 98-107 and accompanying text.

[169]Chemerinsky, *supra* note 159, at 1173.

[170]*See supra* Section II.A.

[171]Ross, *supra* note 41, at 314-15 (discussing the rhetoric of innocence and how it is based on the stereotypical depictions of blacks as the "defiled taker," an undeserving person who reaps the benefits of affirmative action and "[t]he lazy black [who] seeks and takes the unearned advantages of affirmative action."). These stereotypes function, on some level, as a product of unconscious racism. *Id.* at 313-14.

they are part and parcel of an intricate set of implicit understandings about people of color.[172]

Several distinct conceptual propositions emerge from Rhetorical Neutrality:

1. The reinforcing myths (historical, definitional, and rhetorical) underlying Rhetorical Neutrality all serve to invert bedrock Fourteenth Amendment principles so that the maintenance of white privilege is the touchstone of the Court's race jurisprudence.[173]

2. The historical myth constitutionalizes liberal individualism so that history is not the collective experience of an oppressed people,[174] but simply the colorblind admonition that the Fourteenth Amendment protects (individuals), not racial groups. The Civil War Amendments are recast as merely articulations of the anti-differentiation principle.[175]

3. Building upon colorblind neutrality and liberal individualism, the definitional myth defines discrimination so narrowly that whites become the new "discrete and insular minorit[y]" (systemic oppression against African-Americans and people of color is so amorphous that it cannot be specifically identified (or remedied), and individualized reverse discrimination claims are presumptively valid).[176]

4. The rhetorical myth, with its varying colorblind critiques of affirmative action, serves to constitutitonalize formalized notions of equality so that substantive equality[177] becomes, at best, a secondary consideration when compared to the cognizable "burden" on innocent whites.[178]

5. The Process Theory,[179] rather than providing a rationale for principled judicial review, becomes a justification for leaving entrenched systems of discrimination in place.[180]

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[172]Professor Charles Lawrence refers to this as "unconscious racism." *See* Charles R. Lawrence III, *The Id, the Ego, and Equal protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 333 (1987); Ross, *supra* note 171, at 313-15.

[173]*See supra* note 95 and accompanying text.

[174]*See* JUAN F. PEREA, ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 5-50 (2000).

[175]*See supra* notes 35-43 and accompanying text.

[176]United States v. Carolene Products, Co., 304 U.S. 144, 153 n.4 (1938); Hutchinson, *supra* note 97, at 30; Ross, *supra* note 41, at 313; *Re-Mapping*, *supra* note 100, at 1323; *see supra* notes 143-53 and accompanying text.

[177]Powell, *supra* note 6, at 846-70.

[178]Oh, *Re-Mapping*, *supra* note 100, at 1322-23; Roithmayr, *supra* note 95, at 211; *see supra* notes 164-71 and accompanying text.

[179]*See supra* note 15.

[180]Oh, *Re-Mapping*, *supra* note 100, at 1322-23.

6. These narrow conceptions are the foundation of the Court's race jurisprudence. The disconcerting conclusion is that even when the Court reaches a "good" result in decisions like *Bakke* and *Grutter*, there is "something missing."[181]

B. Justice O'Connor's Doctrinal Approach

Without question, Justice O'Connor is the jurisprudential architect of the Court's post-*Bakke* affirmative action jurisprudence.[182] She has been widely hailed as the "center of the [C]ourt[,]" [183] a justice who adopted a moderate approach in resolving difficult societal problems.[184] This moderate approach extends to Justice O'Connor's unique brand of colorblind constitutionalism. When her brand of colorblind jurisprudence is placed alongside that of Justice Thomas' literal (absolute) colorblind constitutionalism, it is clear that neither doctrinal approach holds much promise for people of color. Both, in varying ways, maintain white privilege.

Conceptually, Justices O'Connor and Thomas offer doctrinally distinct approaches to neutrality. On the one hand, Justice O'Connor adopts a hybrid colorblind approach and uses race selectively[185]; that is, race is viewed prospectively

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[181]*See* Walsh, *supra* note 158, at 465-66 ("The Court's reluctance to recognize the scope of racial inequality, and its insistence on couching its decisions in race-blind terms, assures wide-spread public approval and, unfortunately, assures blacks a second-class status."). This public approval oftentimes translates into state ballot initiatives, framed in rhetorically neutral terms, to prohibit the use of race in all public decisionmaking. *See, e.g.*, Jodi Miller, *"Democracy In Free Fall:" The Use of Ballot Initiatives to Dismantle State-Sponsored Affirmative Action Programs*, 1999 ANN. SURV. AM. L. 1, 1-2 ("In 1996, California citizens approved . . . Proposition 209, by 54% of the vote. Two years later, the citizens of Washington passed an identical measure, Initiative 200, by 58%. Both of these initiatives were put on the ballot after their proponents gathered the requisite number of citizen signatures."); Tamar Lewin, *Colleges Regroup After Voters Ban Race Preferences*, N.Y. TIMES, Jan. 26, 2007, at A1 ("Currently four states with highly ranked public universities—California, Florida, Michigan and Washington—forbid racial preferences, either because of ballot propositions or decisions by elected officials. Texas banned affirmative action for seven years. The University of Texas resumed consideration of race after the 2003 United States Supreme Court ruling.").

[182]Linda Greenhouse, *Consistently, A Pivotal Role Groundbreaking Justice Held Balance of Power*, N.Y. TIMES, July 2, 2005, at A1. ("Just two years ago, she wrote the opinion for the 5-to-4 majority that upheld affirmative action in university admissions. Earlier, in a series of decisions interpreting the Constitution's guarantee of equal protection, she led or joined 5-to-4 majorities that viewed with great suspicion government policies that took account of race in federal contracting, employment and electoral redistricting.").

[183]*Id.*

[184]Jennifer R. Byrne, *Toward a Colorblind Constitution: Justice O'Connor's Narrowing of Affirmative Action*, 42 ST. LOUIS U.L. J. 619, 619 (1998).

[185]*See* Adarand Constructors, Inc., v. Peña, 515 U.S. 200, 237 (1995) (O'Connor, J.) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact[,]'" and noting that race-conscious remedies are permissible when they satisfy a compelling state interest and are narrowly tailored (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring))); *supra* note 95 and accompanying text.

as one of many components of diversity (a neutral and malleable term)[186] and as a justification for "burdening" white interests.[187] On the other hand, Justice Thomas adopts a pure colorblind approach—race is never relevant because any reference to race has stigmatizing effects.[188] Both justices reject a remedial or redistributive justice approach, ignoring the anti-caste and anti-subordination principles and focusing on neutrality. What is revealing about both approaches is that neither approach addresses the systemic nature of racism. This is because there is common agreement on the concept of liberal individualism.[189] Substantive equality[190] has no place in the Court's race jurisprudence.

Essentially, the Court's race jurisprudence, as illustrated by Justice O'Connor's affirmative action opinions, is a paradigmatic example of what Professor Derrick Bell terms interest convergence:[191]

> The law school decision [in *Grutter*], in particular Justice O'Connor's opinion is a prime example of interest-convergence in action.
>
> . . . O'Connor has usually been an opponent of affirmative action . . .
>
> O'Connor's affirmative action jurisprudence illustrates her negative attitude to racial preferences and racial classifications. She has repeatedly pronounced her concern about how affirmative action plans may affect whites. She is worried about "trammel[ing] on the interests of nonminority employees." Given these concerns, it is surprising that she supported the law school's diversity-oriented admissions policy. She evidently viewed it as a *benefit* and not a burden to nonminorities. In addition, it was a boost to a wide range of corporate and institutional entities with which she identifies.[192]

The Court never adopts a substantive approach to race; the concern is not the eradication of caste under the Fourteenth Amendment. The unifying theme in *all* of its race decisions is either the accommodation of white interests through neutral rhetoric[193] or the outright preservation of white privilege.[194] Rhetorical Neutrality,

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[186]Powell, *supra* note 6, at 888; *supra* note 128 and accompanying text.

[187]*See supra* notes 135-42 and accompanying text; *see supra* notes 86-98 and accompanying text.

[188]*See supra* notes 158-62 and accompanying text.

[189]*See supra* note 164.

[190]Powell, *supra* note 6, at 846-75; Hutchinson, *supra* note 7, at 682-700 (articulating a substantive, transformative theory of the Fourteenth Amendment that would give deference to state legislative approaches designed to eradicate caste).

[191]SILENT COVENANTS, *supra* note 76, at 149-55 (discussing Justice O'Connor's affirmative action opinions and noting the limited use of race in those opinions).

[192]*Id.* at 149-51 (quoting Juan Tarpley, *A Comment on Justice O'Connor's Quest for Power and its Impact on African American Wealth*, 53 S.C. L. REV. 117, 119 (2001) (alteration in original) (emphasis added).

[193]*See supra* Section II.A.

[194]Roithmayr, *supra* note 95, at 198-208.

with its underlying myths, serves to reinforce white privilege and to provide justifications (or some "legitimacy") when these interests are impacted by race-conscious remedies for African-Americans (or other people of color). The Court's decisions read like tepid defenses of some ill-advised policy initiative rather than a powerful endorsement of the Fourteenth Amendment's anti-subjugation principle. Justice O'Connor's uniform doctrinal approach in *Wygant*, *Croson*, *Metro-Broadcasting*, and *Adarand* illustrates how Rhetorical Neutrality is the doctrinal linchpin of colorblind constitutionalism.

Justice O'Connor incorporates race into her colorblind approach to the Fourteenth Amendment, but only if it does not substantively impact white interests and can be explained in a broader context as a benefit to all. This is interest convergence.[195] Thus, where the case involves some distribution of an economic benefit premised on race, the state action is viewed as unconstitutional.[196] While *Grutter* is rooted in the broad First Amendment principle of diversity, Justice O'Connor, while acknowledging the impact on white interests,[197] nevertheless concludes that the state action is permissible because it can be explained as *forward-looking* and *limited* in scope.[198] By contrast, Justice Thomas rejects this benefit-burden distinction as unconstitutional; it is merely an impermissible device for state-created "racial aesthetics."[199] The injury is the same because race is used to classify and categorize individuals based on race.[200] This explains Justice O'Connor's and Justice Thomas' doctrinal approaches in *Grutter*. Their approaches overlap in *Grutter* because both are rooted in colorblind constitutionalism to varying degrees. In direct contrast to her modified colorblind constitutionalism in *Grutter*,[201] Justice

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[195] SILENT COVENANTS, *supra* note 76, at 149-55.

[196] *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 270, 284 (1986) (invalidating a race-based layoff system agreed upon by the Jackson, Michigan Board of Education and the teacher's union); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 476, 505 (1989) (applying strict scrutiny to invalidate a minority business enterprise ("MBE") program enacted by the City of Richmond and patterned after a federal program that had previously passed constitutional muster in *Fullilove*); Adarand Constructors, Co. v. Peña, 515 U.S. 200, 204-10, 227 (1995) (invalidating a federal disadvantaged business enterprise ("DBE") program, which used race as a factor in the distribution of contracts, concluding that strict scrutiny applied to local, state, and federal race-conscious initiatives).

[197] Grutter v. Bollinger, 539 U.S 306, 342 (O'Connor, J.) (plurality opinion) ("The requirement that all race-conscious admissions programs have a termination point 'assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.'" (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 510 (1989))).

[198] *Id.* at 341-43.

[199] *Id.* at 355 (Thomas, J. concurring in part and dissenting in part). *See id* at 354 n.3, 354-62 (critiquing the Court pursuit of "racial aesthetics" in violation of the Equal Protection Clause).

[200] *Id.*

[201] *Grutter*, 539 U.S. at 326-27 (O'Connor, J.) (in analyzing race-based remedial measures, strict scrutiny is not always fatal and context matters).

Thomas becomes a "[C]ritical [R]ace [T]heorist"[202] by focusing on the racial liberation rhetoric of Frederick Douglass. He uses this rhetoric to neutralize race; he repositions Frederick Douglass in the Black historical canon. The next section of the Article briefly traces Justice O'Connor's jurisprudence from *Wygant* to *Grutter* and offers a contrast to Justice Thomas' Inverted Critical Race Theory.

1. *Wygant*: Rejection of the Role Model Theory

"In *Wygant v. Jackson Board of Education*,[203] the Court analyzed a race-based layoff system agreed upon in the collective bargaining agreement between the Jackson, Michigan Board of Education and the Jackson Education Association (teacher's union), the Court concluded that such a system is constitutionally invalid . . . ."[204] While acknowledging that "there has been serious racial discrimination in this country[,]" the Court nevertheless held that societal discrimination was too amorphous to remedy, particularly when the remedial impact would be on innocent (white) people.[205] "In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future."[206]

Justice O'Connor joined the plurality opinion in *Wygant*, and her concurrence focused on several propositions that are based in Rhetorical Neutrality: concern with innocent white interests[207]; societal discrimination, in the absence of identifiable discrimination by the state itself, is not constitutionally cognizable[208]; and the role model theory of diversity is not sufficiently compelling to pass constitutional muster.[209] To Justice O'Connor, the plan was not sufficiently narrowly-tailored as there was no discernible harm to the minority students (or minority teachers).[210] "The plan in *Wygant* would displace nonminority teachers with greater seniority 'in

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[202]Guy-Uriel E. Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Crits?*, 93 GEO. L.J. 575, 577 (2005).

[203]476 U.S. 267 (1986).

[204]Powell, *supra* note 13, at 241.

[205]*Wygant*, 476 U.S. at 276.

[206]*Id.*

[207]*Id.* at 287 (O'Connor, J., concurring in part and concurring in the judgment) ("[A] public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose and which implements that purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan's racial preference.").

[208]*Id.* at 288.

[209]*Id.* at 287.

[210]*Wygant*, 476 U.S. at 294 (O'Connor, J., concurring in part and concurring in the judgment) ("The disparity between the percentage of minorities on the teaching staff and the percentage of minorities in the student body is not probative of employment discrimination; it is only when it is established that the availability of minorities in the relevant labor pool substantially exceeded those hired that one may draw an inference of deliberate discrimination in employment.").

order to retain minority teachers with less seniority.'"[211] This doomed the plan to constitutional oblivion; it was too arbitrary in its reach without constraining its broad impact. Indeed, if a white teacher (like Wendy Wygant) was going to be laid off, there had to be a more compelling reason than mere societal discrimination or providing role models to minority students.[212] The layoffs would impact white or Black teachers (the students would not be displaced in any way, as they would simply have a white teacher because the race-based retention plan was rejected). Thus, a hiring goal that was tied to the percentage of minority school students, and not the percentage of qualified minority teachers, was constitutionally overbroad.[213] There was no particularized injury with respect to minority teachers; the retention plan was, in effect, a race-based "windfall" for minority school teachers with less seniority than white school teachers. "Because the layoff provision . . . acts to maintain levels of minority hiring that have no relation to remedying employment discrimination, it cannot be adjudged 'narrowly tailored' to effectuate its asserted remedial purpose."[214]

Justice O'Connor's approach is ahistorical[215] because it ignores substantive allegations of systemic racism and decades of "last hired, first fired" practices which resulted in a "substantial underrepresentation of minority teachers."[216] A striking illustration of inversion lies in the fact that, through Justice O'Connor's use of neutral colorblind rhetoric, a collective bargaining agreement, negotiated between the Board and the teachers' union, is transformed into a reverse discrimination claim.[217] Because of the overemphasis on the protection of white interests, Justice O'Connor's concurrence short circuits a meaningful attempt, by all of the relevant stakeholders, to ensure diversity through a negotiated plan.[218] Rejecting Justice

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[211]Powell, *supra* note 13, at 241 (quoting *Wygant*, 476 U.S. at 282).

[212]*Wygant*, 476 U.S. at 288-94 (O'Connor, J., concurring in part and concurring in the judgment).

[213]*Id.* at 294.

[214]*Id.*

[215]*See supra* Section II.A.1.

[216]*Wygant*, 496 U.S. at 298, 306 (Marshall, J., dissenting). As Justice Marshall notes:

> [T]he Board's obligation to integrate its faculty could not have been fulfilled meaningfully as long as layoffs continued to eliminate the last hired [minority school teachers] . . . . In addition, qualified minority teachers from other States were reluctant to uproot their lives and move to Michigan without any promise of protection from imminent layoff. The testimony suggests that the lack of some layoff protection would have crippled the efforts to recruit minority applicants. Adjustment of the layoff hierarchy under these circumstances was a necessary corollary of an affirmative hiring policy.

Id. at 307 (internal citations omitted).

[217]Justice Marshall rejects this doctrinal switch in his dissent: "There is also no occasion here to resolve whether a white worker may be required to give up his or her job in order to be replaced by a black worker." *Id.* at 300.

[218]*Id.* at 296 (Marshall, J., dissenting) ("[A] public employer, with the full agreement of its employees, should be permitted to preserve the benefits to a legitimate and constitutional

O'Connor's reasoning, Justice Marshall's dissent highlights the fact that this is a negotiated burden with an impact on all stakeholders:

> When an elected school board and a teachers' union collectively bargain a layoff provision designed to preserve the effects of a valid minority recruitment plan by apportioning layoffs between two racial groups, as a result of a settlement achieved under the auspices of a supervisory state agency charged with protecting the civil rights of all citizens, that provision should not be upset by this Court on constitutional grounds.[219]

Here, "the white majority has made a political decision to impose affirmative action burdens on itself."[220] This is a step forward and should be viewed deferentially by the Court. In other words, the political process has functioned not to impede rights but to guarantee inclusion. There is something decidedly counter-majoritarian[221] when the Court overturns an agreement reached by all concerned parties. The Court discredits the decision of the predominantly white union membership[222] and holds the plan unconstitutional. The fact that Justice O'Connor embraces this approach leads to a compelling incongruity—she appears to construct different conceptions of diversity based upon its impact on whites.[223] Moreover, she rejects the contextual, forward-looking analysis that she would later employ in *Grutter*.[224]

Doctrinally, there is no discernible distinction between Justice O'Connor's rejection of the role model (diversity) rationale in *Wygant*[225] and her endorsement of critical mass diversity in *Grutter*.[226] The "bright line" between *Wygant* and *Grutter* appears to be that in *Wygant*, there is a concrete injury on innocent whites,[227] while in *Grutter*, any burden can be explained in terms of a broad institutional benefit to all.[228] It is easier to frame *Grutter* as a First Amendment case—everyone is competing to "get in," and the law school, in its academic judgment, can admit or

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affirmative-action hiring plan even while reducing its work force."); *see also id.* at 309-12 (Marshall, J., dissenting).

[219]*Id.* at 312 (Marshall, J., dissenting).

[220]*See* SPANN, *supra* note 142, at 190.

[221]*See supra* note 15 and accompanying text.

[222]*Wygant*, 476 U.S. at 299 (Marshall, J., dissenting) (stating the Union was "at least 80%" white).

[223]*See supra* note 95 and accompanying discussion.

[224]*Grutter*, 539 U.S. at 336-43 (O'Connor, J.).

[225]*Wygant*, 476 U.S. at 288 (O'Connor, J. concurring in part and concurring in the judgment).

[226]*Grutter*, 539 U.S. at 335-36 (O'Connor, J.)

[227]*Wygant*, 476 U.S. at 294 (O'Connor, J., concurring in part and concurring in the judgment).

[228]*Grutter*, 539 U.S. at 332-33 (O'Connor, J.).

deny students based upon a holistic review of their files to ensure diversity.[229] Race is one of many factors in this process. On the other hand, in *Wygant*, race is the sole criterion that determines who is laid off or not.[230] For Justice O'Connor, this burden is too great for non-minority teachers in the absence of an injury. Since there is no "injury" to remedy in *Wygant*, it is unconstitutional to impose a burden on innocent non-minority school teachers. This reasoning misses the essential point that, in education, context matters.[231] Just as it is important for students in a law school class to receive a variety of viewpoints from people of all races in the marketplace of ideas, so too is it important that, in the pipeline that is the entry point to this marketplace, students interact on a day-to-day basis with teachers who come from different racial and experiential backgrounds. Stereotypes are eradicated in both contexts by those who have been previously excluded. This public purpose transcends any "harm" to innocent parties.[232] There is a *future* benefit to the students.[233]

This future benefit is unpersuasive to Justice O'Connor because the hiring goal impermissibly focuses on the connection between minority students and minority teachers, not *eligible* teachers who have been discriminated against.[234] The discrimination, then, is merely societal in origin. This narrow definition of discrimination serves as the doctrinal foundation to Justice O'Connor's decision in *Croson*.

2. *Croson*: Particularized Discrimination and Racial Politics

While the Rehnquist Court is known for shifting power from Congress to the states under its New Federalism jurisprudence,[235] it is striking that Justice O'Connor

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[229] *Id.* at 336-43 (noting that the law school admissions program does not unduly harm white applicants).

[230] *Wygant*, 476 U.S. at 294 (O'Connor, J., concurring in part and concurring in the judgment) (noting that the plan was not narrowly tailored because it was a race-based retention program for less senior minority teachers in the absence of a remedial purpose).

[231] *See, e.g*, *Grutter*, 539 U.S. at 327 (O'Connor, J.) ("Context matters when reviewing race-based governmental action under the Equal Protection Clause.").

[232] *See Wygant*, 476 U.S. at 317-320 (Stevens, J., dissenting). Powell, *supra* note 13, at 244 ("Obviously, there would be a burden placed on whites; however, Justice Stevens defined this burden as a future benefit defined in the public interest."). This approach moves away from "sins of the past," (*see supra* note 175 and accompanying text) and focuses on the future. *See* Powell, *supra* note 13, at 244-45.

[233] *Wygant*, 476 U.S. at 313 (Stevens, J., dissenting).

[234] *C.f.* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501-03 (1989) (emphasizing that "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities *qualified* to undertake the particular task") (emphasis added).

[235] *See generally* MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 249-78 (2006) (addressing the Rehnquist Court's federalism revolution).

turns this concept on its head when she summarily rejects the City of Richmond's minority business enterprise ("MBE") program:[236]

> *Croson* is a particularly devastating opinion because the Court, for the first time, adopted a strict scrutiny standard that narrowly constrains governmental power. In many ways, *Croson* is the mirror image of *Fullilove* [a federal MBE program that was upheld by the Court], but the Court here began the doctrinal course that inevitably led to *Adarand*—colorblind constitutionalism displaced constitutional analysis of caste. In a 6-3 opinion, Justice O'Connor . . . invalidated the City of Richmond's Minority Business Enterprise (MBE) program. Specifically, Justice O'Connor rejected the five factual predicates underlying the City of Richmond's MBE program: (i) the ordinance was remedial in nature[237]; (ii) there was ample evidence of past discrimination in the construction industry[238]; (iii) minority businesses received 0.67% of prime contracts from the city while minorities constituted 50% of the city's population[239]; (iv) there were only a small number of minority contractors in local and state contractors' associations[240]; and (v) in 1977, Congress had made a determination that the effects of past discrimination stifled MBEs nationally.[241]

What is striking about Justice O'Connor's summary rejection of each of the factual predicates[242] is how race is manipulated—colorblindness is "flipped on and off" to reach a particular result.[243] In rapid succession, the Court concludes that: the City of Richmond did not demonstrate a compelling interest in its use of race to apportion contracts[244]; past societal discrimination is too amorphous to remedy[245]; there must be identifiable discrimination by the city (or state) itself[246]; and that, consistent with *Washington v. Davis*, it would be impermissible to constitutionalize an unmeasurable claim that cannot be connected to a specific discriminatory entity (or perpetrator).[247]

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[236]Of course, *Croson* precedes the jurisprudential revolution referred to above, but it is instructive because it ultimately leads to Justice O'Connor's opinion in *Adarand* in 1995, which is squarely within this period.

[237]Powell, *supra* note 13, at 247; *accord Croson*, 488 U.S. at 499.

[238]Powell, *supra* note 13, at 247; *accord Croson*, 488 U.S. at 499.

[239]Powell, *supra* note 13, at 247; *accord Croson*, 488 U.S. at 499.

[240]Powell, *supra* note 13, at 247; *accord Croson*, 488 U.S. at 499.

[241]Powell, *supra* note 13, at 247; *accord Croson*, 488 U.S. at 499.

[242]Powell, *supra* note 13, at 248-49.

[243]*See supra* notes 89-100 and accompanying text.

[244]*Croson*, 488 U.S. at 500.

[245]*Id.* at 497.

[246]*Id.*

[247]*Id.* at 505-07.

Critiquing the rhetorical devices employed by the Court, Professor Patricia J. Williams illustrates how Rhetorical Neutrality functions to make substantive claims of systemic oppression merely illusory. Unpacking the misleading neutrality of Justice O'Connor's *Croson* decision, Professor Williams notes how Justice O'Connor's choice of terms sets up an arbitrary game with competing racial claims that are "'inherently unmeasurable.'"[248]

Professor Williams concludes that:

> These themes are reiterated throughout the opinion: Societal discrimination is "too amorphous"; racial goals are labeled "unyielding"; goals are labeled "quotas"; statistics are rendered "generalizations"; testimony becomes mere "recitation"; legislative purpose and action become "mere legislative assurances of good intention"; and lower-court opinion is just "blind judicial deference[.]" This adjectival dismissiveness alone is sufficient to hypnotize the reader into believing that the "assumption that white prime contractors simply will not hire minority persons is completely unsupported."[249]

Croson is anything but a neutral decision. The rhetorical handiwork of Justice O'Connor erases any trace of "discrimination" and preserves white interests. Not only is a thirty percent "quota" too much of a "burden" on white contractors' interests in the marketplace, this quota is unsupported by any evidence of discrimination.[250] The Court literally ignores documented evidence, compiled by Congress, which clearly established the existence of wide-ranging national discriminatory patterns with particularized impact in state and local construction marketplaces.[251] This was not enough to support the MBE program. *Croson*, then, is a paradigmatic example of Rhetorical Neutrality. History is ignored (it is ironic that the former seat of the Confederacy is taking steps to eradicate caste in its construction industry, and the Court views this skeptically)[252]; discrimination is defined out of existence[253]; and the literal rhetoric of "equality" is used to invert the anti-subjugation and anti-caste principles into anti-differentiation principles premised on the preservation of white privilege.[254]

After making discrimination "vanish," the colorblind theme of racial politics[255] gains currency, because, if discrimination does not exist, then a political majority should not enrich itself by conferring benefits based on race. This is contrary to

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[248]PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 105 (1991) (quoting *Croson*, 488 U.S. at 506).

[249]*Id.* at 105-06 (quoting *Croson*, 488 U.S. 492, 497, 499, 500-01).

[250]*Id.* at 106.

[251]*See Croson*, 488 U.S. at 504 (ignoring Congress' findings). *But see Croson*, 488 U.S. at 528-61 (Marshall, J., dissenting) (recognizing Congress's findings of discrimination).

[252]*Id.* at 528-36 (Marshall, J., dissenting); *see supra* Part II.A.1.

[253]*See supra* Part II.A.2.

[254]*See supra* Part II.A.3; *supra* note 35 and accompanying discussion.

[255]Again, the underlying myths of Rhetorical Neutrality reinforce each other, so that the MBE program in *Croson* appears to be "racist," rather than remedial. *See supra* Part II.A.

"equality." "It seems an extraordinarily narrow use of equality, when it excludes from consideration so much clear inequality."[256] Just one term later, Justice O'Connor moves to an even narrower definition of equality in her *Metro Broadcasting* dissent—the normative concept of diversity is manipulated so that its core First Amendment underpinning is replaced by what Justice O'Connor refers to as base racial stereotyping.[257] Justice O'Connor does not treat the facts of *Metro Broadcasting* as arising under the First Amendment. Thus, substantive access to the broadcast airwaves is ignored by Justice O'Connor because this case does not "fit" within the First Amendment diversity model she would later endorse in *Grutter*. This explains the doctrinal unevenness of many of the Court's decisions on race.[258]

3. *Metro Broadcasting*: Diversity in the Marketplace?

In what would be his last opinion for the Court, Justice Brennan authored a 5-4 decision upholding the use of race in awarding broadcast licenses under an FCC policy:

> [A]pplicants for broadcast licenses alleged that FCC policies favoring minority firms violated the equal protection component of the Fifth Amendment. Under one policy, the FCC considered "minority ownership as one factor in comparative proceedings for new licenses." Under the other "distress sale" policy, an exception was created to the general rule that "a licensee whose qualifications to hold a broadcast license [came] into question may not assign or transfer that license until the FCC resolved its doubts in a noncomparative hearing." The exception "allowed a broadcaster . . . whose renewal application has been designated for hearing, to assign the license to an FCC-approved minority enterprise.[259]

Rejecting colorblind constitutionalism, Rhetorical Neutrality, and its underlying myths, Justice Brennan makes a bright line distinction between benign and malign race-based remedial measures[260]; he adopts a deferential approach based upon the

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[256]WILLIAMS, *supra* note 248, at 106. This is an inversion of the Process Theory. *See* Oh, *Re-Mapping*, *supra* note 100, at 1323; *see generally* Powell, *supra* note 13, at 199-220, 242-43 (discussing the myth of colorblindness). *See also supra* note 15 and accompanying text.

[257]*See* Metro Broad. Inc. v. FCC, 497 U.S. 547, 603-04 (1990) (O'Connor, J., dissenting).

[258]It should be noted that Justice Stevens has taken a nuanced approach on issues of race. "Justice Stevens was the only Justice to join the judgment of the Court in *Croson*, and the majority opinion in *Metro Broadcasting*[.]" T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1061 n.10 (1991). Justice Stevens also dissented in *Fullilove*; he draws a bright line between governmental action that can be deemed impermissible racial patronage (*Croson* and *Fullilove*), and permissible state action that is forward-looking and based on race ("broadcast diversity" in *Metro Broadcasting*). *See generally* Powell, *supra* note 13, at 234-60 (discussing the jurisprudence of Justice Stevens); SPANN, *supra* note 142, at 48.

[259]Powell, *supra* note 13, at 256 (quoting *Metro Broad.*, 497 U.S. at 556-57).

[260]*Metro Broad.*, 497 U.S. at 564-65 & n.12.

expertise and institutional competence of the Congress and FCC[261]; and he explicitly uses middle-tier scrutiny to evaluate the federal government's actions under the Fifth Amendment.[262] This is because, like gender, race may be used impermissibly, but it may be used appropriately as well.[263] Here, the appropriateness of the use of race is rooted in the First Amendment—race is one of many factors that contributes to broadcast diversity. The focus is on *inclusion*, not stereotypes:

> The judgment that there is a link between expanded minority ownership and broadcast diversity does not rest on impermissible stereotyping. . . . Rather, both Congress and the FCC maintain simply that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity. A broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogenous group.[264]

Drawing upon the First Amendment marketplace of ideas paradigm employed in *Bakke* and the positive effects of a "'robust exchange of ideas,' Justice Brennan concludes that broadcast diversity is no different than the diversity of ideas in the classroom, and therefore, race-conscious remedial approaches are constitutionally permissible in both contexts because both serve "important First Amendment values."[265] Moreover, there is only a "slight" burden on innocent nonminorities because there was "no settled expectation that [nonminority] applications [would] be granted without consideration of public interest factors such as minority ownership[,]"[266] and the policies did not contravene any protected rights or interests."[267] The minority ownership policies were also "appropriately limited in extent and duration"[268] because they were subject to consistent "reassessment and reevaluation by the Congress prior to any extension or re-enactment."[269]

In hindsight, it is quite ironic, given Justice O'Connor's pronouncement that "[c]ontext matters"[270] and that diversity (academic freedom) is a "special concern of the First Amendment[,]"[271] that she would dissent so forcefully in *Metro*

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[261] *See generally id.* at 563-600 (discussing Congress mandating FCC minority ownership programs).

[262] *Id.* at 564-65, 600.

[263] *Id.* at 565 n.12.

[264] *Id.* at 579.

[265] *Metro Broad.*, 497 U.S. at 568 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978)).

[266] *Id.* at 597.

[267] Powell, *supra* note 13, at 258; *accord Metro Broad.*, 497 U.S. at 597.

[268] *Metro Broad.*, 497 U.S. at 594 (quoting Fullilove v. Klutznick, 448 U.S. 448, 489 (1980)).

[269] *Id.* (quoting *Fullilove*, 448 U.S. at 489).

[270] Grutter v. Bollinger, 539 U.S. 306, 327 (2003).

[271] *Id.* at 324 (quoting *Bakke*, 438 U.S. at 312).

Broadcasting.[272] Here, the First Amendment does not accord the federal government the deference enjoyed by the University of Michigan School of Law in Justice O'Connor's *Grutter* opinion.

What is striking about *Metro Broadcasting* is its First Amendment underpinning—the diversity concept is rooted in the notion of viewpoint expression. This rationale is constitutionally noxious to Justice O'Connor because non-minority interests are burdened[273] in the name of an essentialist conception of what it means to be Black (or minority) and the correlating viewpoints associated with ethnicity.[274] Race, then, is a proxy,[275] it is over-inclusive because it embraces an essential Black viewpoint, and it is under-inclusive because it fails to acknowledge non-racial (neutral) approaches to inclusion in the broadcast marketplace.[276] This racial "aggregation"[277] is premised on racial stereotypes. This highlights something very troubling in Justice O'Connor's reasoning; instead of focusing on the eradication of caste and substantive equality, she embraces the very stereotypes she purportedly rejects. She assumes that there is an essential Black viewpoint that is missing from the marketplace and concludes that the policies of the FCC "impermissibly value individuals because they presume that persons think in a manner associated with their race."[278] This inside-out use of race is the hallmark of Inverted Critical Race Theory. It is not that there is an essential Black viewpoint,[279] but that *many* Black viewpoints are represented in the media marketplace.[280] It is ironic that Justice O'Connor rejects this rationale in *Metro Broadcasting* because this is a favorite argument of conservatives,[281] and an argument that she readily employs in *Grutter* to highlight the constitutionality of critical mass in the classroom.[282]

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[272]Justice O'Connor's *Metro Broadcasting* dissent is the doctrinal link between *Croson* and *Adarand*; it would only be a few short years before the Court overruled *Metro Broadcasting*, gutted the doctrinal edifice of *Fullilove*, and constitutionalized skepticism, consistency, and congruence. Powell, *supra* note 13, at 263 & n.389. *See infra* Part II.B.4.

[273]*Metro Broad.*, 497 U.S. at 615-21 (O'Connor, J., dissenting).

[274]Authenticity has been the subject of many books on identity. *See generally* STANLEY CROUCH, THE ARTIFICIAL WHITE MAN: ESSAYS ON AUTHENTICITY (2004); DEBRA J. DICKERSON, THE END OF BLACKNESS (2004); KWAME ANTHONY APPIAH, COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS (2006).

[275]*Metro Broad.*, 497 U.S. at 621 (O'Connor, J., dissenting).

[276]*Id.* at 621, 623; SPANN, *supra* note 142, at 49.

[277]*Metro Broad.*, 497 U.S. at 620 (O'Connor, J., dissenting).

[278]*Id.* at 618; *see, also id.* at 618-20 (discussing this presumption).

[279]*See generally* CROUCH, *supra* note 274.

[280]*See generally* Williams, *supra* note 102, at 533-39 (discussing how Justice O'Connor's dissenting opinion disaggregates racial groups into individuals thereby de-emphasizing the significance of culture and preserving the status quo of systemic oppression as natural). Thus, while there may be a myriad of Black viewpoints, there is a shared cultural and historical dimension that was missing from the media marketplace. Justice O'Connor's dissent misses this point.

[281]For example, Justice Thomas constantly asserts his "right to think for [himself], [and] to refuse to have [his] ideas assigned to [him] as though [he] was an intellectual slave because

This raises an important question: how is it that "broadcast diversity" is unconstitutional to Justice O'Connor, while "pedagogical (classroom) diversity" is constitutional per her majority decision in *Grutter*? Both are theories of aggregation—more people of color need to get into the marketplace (either through media ownership or in the classroom), yet she characterizes the broadcast programs as unconstitutionally stereotypical[283] and "critical mass" as constitutionally permissible.[284]

Perhaps in *Metro Broadcasting* it is easier, from the perspective of Rhetorical Neutrality, to categorize the broadcast programs as racially essentialist quotas,[285] while in *Grutter*, race does not "burden" white interests (or impact their privilege) in any quantifiable way.[286] Competition and participation are unencumbered when race is one of many factors that can be considered in the admissions process. Per Justice O'Connor's analysis, and in light of *Grutter*, *Metro Broadcasting* is distinguishable because the broadcast programs there were pure racial set-asides,[287] while "attaining a critical mass of underrepresented minority students does not transform [the University of Michigan School of Law's] program into a quota."[288] This doctrinal move fits squarely in the canon of interest convergence.[289]

This doctrinal incongruity is a result of the Court's use of Rhetorical Neutrality: history is erased, discrimination is defined "inside out" and so narrowly that whites become "oppressed minorities," and neutral themes are employed to devalue the magnitude of systemic caste-based oppression.[290] Justice O'Connor's doctrinal approach embodies all of the central tenets of Rhetorical Neutrality, as she employs all of the underlying myths[291] in her opinions and consistently inverts race so that white privilege is preserved. To Justice O'Connor, in order to preserve the public

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[he is] black." KEVIN MERIDA & MICHAEL A. FLETCHER, SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS 11 (2007); *see generally* CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR (2007).

[282]Grutter v. Bollinger, 539 U.S. 306, 333 (2003) (O'Connor, J.) ("Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.").

[283]*Metro Broad.*, 497 U.S. at 619-20 (O'Connor, J., dissenting).

[284]*Grutter*, 539 U.S. at 333.

[285]*Metro Broad.*, 497 U.S. at 619-20 (O'Connor, J., dissenting).

[286]*See* Roithmayr, *supra* note 95, at 211.

[287]*Metro Broad.*, 497 U.S. at 630 (O'Connor, J., dissenting).

[288]*Grutter*, 539 U.S. at 335-36.

[289]*See supra* notes 79, 85, 135, 140, 143 and accompanying discussion.

[290]*See* Williams, *supra* note 102, at 540-41 (critiquing Justice O'Connor's *Metro Broadcasting* dissent and stating that "the dissents are peppered with inexplicably inverted agency, demonstrating that any language of reform may be turned inside out by conflating it with historical tropes of negativity, even as its substance is being relentlessly dehistoricized").

[291]*See supra* Part II.A.

interest in a free-flowing marketplace of ideas, the federal government cannot selectively choose which Black viewpoint is represented in the name of diversity.[292]

The choice is not as stark as Justice O'Connor perceives it. If "varied views on issues of public concern"[293] are constitutionally permissible under the First Amendment, then so too should be previously excluded Black broadcasters who would present varied perspectives on the public interest and its relationship to African-Americans in the broader society. The government would not search for the essential racial viewpoint; rather, it would facilitate inclusion in the marketplace of ideas. This is not content regulation (or viewpoint discrimination); this is viewpoint inclusion. Oddly, Justice O'Connor does not recognize this as a "neutral" approach to race—expanding the ideological marketplace to include a variety of viewpoints. If "[c]ontext matters[,]"[294] then certainly a substantive approach to increasing perspectives in media should be embraced by the Court. Justice O'Connor's doctrinal approach ensured that the Court would ultimately reject any reference to context in contracting cases like *Croson* and *Adarand*, and that a brightline would be drawn to separate economic benefit cases from diversity cases, like *Bakke* and *Grutter*.

4. *Adarand*: Skepticism, Consistency, and Congruence

Building upon the rationales that she articulated in the *Croson* decision, Justice O'Connor extends the application of strict scrutiny to federal governmental programs under the Fifth Amendment. Thus, local, state, and federal race-conscious remedial approaches are subject to strict scrutiny.[295] In terms of its rhetorical structure, *Adarand* is the culmination of Justice O'Connor's doctrinal approach. Essentially, *Adarand* accomplishes three rhetorical objectives: it neutralizes race so that any state or federal actor's use of it is presumptively unconstitutional (skepticism)[296]; it disaggregates the concept of race-based group oppression by emphasizing the individual (consistency)[297]; and it fundamentally alters the Court's conception of federal power under section 5 of the Fourteenth Amendment (congruence).[298]

Unlike *Croson*, the racial politics rationale[299] does not work in *Adarand* because Congress, exercising an amalgam of its powers under section 5 of the Fourteenth Amendment,[300] enacted a federal Disadvantaged Business Enterprise ("DBE") program based on race and economic status.[301] In other words, inversion of the

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[292]*See* SPANN, *supra* note 142, at 49; *Metro Broad.*, 497 U.S. at 615 (O'Connor, J., dissenting).

[293]*Metro Broad.*, 497 U.S. at 616 (O'Connor, J., dissenting).

[294]Grutter v. Bollinger, 539 U.S. 306, 327 (2003).

[295]Powell, *supra* note 13, at 260-63.

[296]Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 223 (1995).

[297]*Id.* at 224.

[298]*Id.*

[299]*See supra* notes 144-53 and accompanying text.

[300]*Adarand*, 515 U.S. at 254-55 (Stevens, J., dissenting).

[301]*Id.* at 205-10.

Process Theory does not work here because the DBE program cannot be categorized as the product of a racial spoils system. It would seem to follow that race, as one of many factors, could be used to award contracts to minority contractors who have been systematically excluded from the lucrative construction market. The *Croson* rationale that Blacks are simply uninterested in the construction business,[302] which is the same essentialist notion of Blackness that Justice O'Connor employs in *Metro Broadcasting*, should have been rejected in *Adarand.*

Although the program in *Adarand* had a neutral component (economic status), the Court ignored this factor and instead focused on the applicability of the strict scrutiny standard to federal governmental power.[303] The rhetorical devices employed by Justice O'Connor in *Croson* are expanded to cramp the federal government's section 5 powers in enacting race-based affirmative action plans.

The doctrinal tropes of skepticism, consistency, and congruence serve as unifying narratives for the rhetorical myths previously discussed: skepticism means that there is no constitutionally cognizable racial history in the United States because race is neutral; consistency denotes the fact that, since race is neutral, all individuals should be treated consistently without reference to race; and congruence restructures federal governmental power so that section 5 of the Fourteenth Amendment is limited by the prohibition against state discrimination in section 1 of the Fourteenth Amendment. In her last race opinion for the Court, Justice O'Connor draws upon all of the underlying doctrines of Rhetorical Neutrality to uphold the University of Michigan School of Law's affirmative action program. As the following sections illustrate, the *Grutter* decision is a mixed blessing.

C. Grutter: *Colorblindness and the Forward-Looking Approach*

Embracing the diversity principle articulated in *Bakke* twenty-five years earlier, the Court, in Justice O'Connor's last race opinion, held that "the Equal Protection Clause does not prohibit the [University of Michigan Law School's] narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body."[304] The Court, for the first time, authoritatively stated that diversity was a compelling interest and that an admissions program that was designed to promote holistic review of all applicants, with race as one of many diversity factors, would pass constitutional muster.[305]

The rhetoric embodied in *Grutter* is strikingly aspirational: the decision embraces the marketplace of ideas[306]; it celebrates the special place of education in our society[307] and notes that strict scrutiny analysis must be contextualized within this

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[302]City of Richmond v. J.A. Croson Co., 488 U.S. 469, 503 (1989); Powell, *supra* note 13, at 248.

[303]SPANN, *supra* note 142, at 54.

[304]Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

[305]*Id.* at 325, 336-43.

[306]*Id.* at 324.

[307]*Id.* at 331.

"special niche"[308]; it reaffirms the power of educational institutions to chart their own destiny[309]; and it sets a temporal limit on the impact of race-based programs on white interests.[310] All of these decidedly neutral themes are, in some fashion, laudatory, but they are severely limited as steps in the eradication of caste. These themes focus on the First Amendment, not the eradication of systemic race-based discrimination. *Grutter* completes the doctrinal shift from the substantive mandate of the Fourteenth Amendment to the process values embodied in the First Amendment.

1. The Doctrinal Shift from the Fourteenth to the First Amendment

"The First Amendment cannot be viewed in isolation. It must be read in conjunction with the Fourteenth Amendment's guarantee of equal protection of the law."[311] The First and Fourteenth Amendments share a common doctrinal core[312]—a well-functioning democracy must have no barriers of caste or subjugation. Both amendments complement each other and explicitly reject neutrality as a unifying principle. Since Rhetorical Neutrality and colorblind constitutionalism are premised on acontextual and ahistorical approaches to issues of race, it is not surprising that there has been a marked shift in the Court's race jurisprudence. Moving from a substantive, non-neutral conception of the Fourteenth Amendment in its early race decisions,[313] the Court now emphasizes neutrality by focusing almost exclusively on minimizing the impact on white privilege if race-conscious remedies are permitted, or on the marketplace paradigm of the First Amendment as a substitute for the anti-caste and anti-subjugation principles. In many ways, *Brown* was the Court's last "substantive" attempt at eradicating the present day effects of centuries of racial oppression. Even *Brown* has its doctrinal limitations because its neutral conception of integration has been overemphasized by the Court.[314] It is not enough to formally dismantle dual school systems; desegregation gains substantive meaning by moving toward substantive integration and equality. As Professor Charles Ogletree, Jr. notes:

> The challenge of *Brown* was not only to achieve integration but also to recognize that once integrated, all of us are diverse: we have all given up something to gain something more. Integration does not simply place people side by side in various institutional settings; rather, it remakes America, creating a new community founded on a new form of respect and tolerance. Implicit in that challenge was the recognition that white society had to change to acknowledge in substantive ways the

[308] *Id.* at 327-33.

[309] *Grutter*, 539 U.S. at 328-29.

[310] *Id.* at 343.

[311] Powell, *supra* note 15, at 11.

[312] *Id.* at 11 (footnotes omitted). *See also id.* at 11-15; Akhil Reed Amar, *The Case of the Missing Amendments:* RAV v. City of St. Paul, 106 HARV. L. REV. 124, 153-54, 158-60 (1992).

[313] *See supra* notes 49-50 and accompanying text.

[314] JACK M. BALKIN, *Brown as Icon*, *in* WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID, 3, 21-22 (Jack M. Balkin, ed., 2001).

> achievements of African-American society. It was not enough simply to admit African-Americans to the table, or even to let them dine, but to partake of the food they brought with them.[315]

The same is no less true of the Court's overemphasis of diversity in *Grutter*. Diversity and integration, without a substantive remedial mandate, are hollow concepts because they are disconnected from the substantive content of the Fourteenth Amendment.[316]

a. Brown*: Substance and Process*

Proclaiming the racist separate but equal doctrine unconstitutional, *Brown* interred, at least on a doctrinal level, the message of inferiority that was the centerpiece of slavery, Jim Crow, and modern day oppression. *Brown* is not only a Fourteenth Amendment decision; it is a *substantive* First Amendment decision.[317]

On this level, it is not an endorsement of the Process Theory;[318] rather, it focuses squarely on the message of stigmatization that is rooted in separate, inferior facilities for Blacks. The sociological-psychological component of *Brown* should not be dismissed – a Black child preferring to play with a white doll means that racism is so ingrained that its stigmatizing effects has undermined a child's self-worth and development.[319]

It is not enough to say that everyone gets some education; this neutral proposition simply preserves caste. Education must be "available to all on equal terms."[320] Education "is the very foundation of good citizenship."[321] Thus, *Brown* embraces both the Fourteenth Amendment and the substantive content of the First Amendment in the eradication of caste. As Professor Lawrence posits:

> The key to this understanding of *Brown* is that the practice of segregation, the practice the Court held inherently unconstitutional, was *speech*. *Brown* held that segregation is unconstitutional not simply because the physical separation of Black and white children is bad or because

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[315]CHARLES J. OGLETREE, JR., *The Integration Ideal: Sobering Reflections*, *in* ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 294, 295 (2004).

[316] CHARLES J. OGLETREE, JR., *Reversing the* Brown *Mandate: The* Bakke *Challenge*, *in* ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 147, 162-66 (2004). *See also id.* at 163 ("The new era would focus on diversity and color-blindness and significantly slow the process of reaching the goal of actual equal treatment under the law that *Brown* had promised.").

[317]Powell, *supra* note 15, at 32-34 (citing MARI J. MATSUDA, ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993)).

[318]*See supra* note 15 and accompanying text.

[319]Brown v. Bd. of Educ., 347 U.S 483, 494 (1954) ("To separate [minority children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

[320]*Id.* at 493.

[321]*Id.*; *accord* Grutter v. Bollinger, 539 U.S. 306, 331-33 (2003).

> resources were distributed unequally among Black and white schools. *Brown* held that segregated schools were unconstitutional primarily because of the *message* segregation conveys—the message that Black children are an untouchable caste, unfit to be educated with white children. . . . It stamps a badge of inferiority upon Blacks, and this badge communicates a message to others in the community, as well as to Blacks wearing the badge, that is injurious to Blacks. Therefore, *Brown* may be read as regulating the content of racist speech.[322]

Yet *Brown*, in the more than fifty years since it dismantled the infamous *Plessy* decision, has not been an opinion of substance[323]; rather, the Court has focused on the process underpinnings of *Brown*. The Court embraces integration as a process value, but the hard work of implementation, monitoring, and enforcement was left to the equitable powers of federal courts.[324] Over the years, the Court has hastily retreated from the substantive mandate of *Brown*.[325] The substantive contours of *Brown* are conspicuously absent in all of the Court's race decisions, particularly in *Bakke* and *Grutter*.

b. Bakke*: The First Amendment Value of Diversity*

Perhaps the most striking feature of Justice Powell's plurality opinion in *Bakke* is that it rejects all of the substantive rationales[326] for the challenged U.C. Davis affirmative action program, and instead focuses on diversity (a process value) as the appropriate constitutional ground for race-conscious remedies. By focusing almost singularly on procedural access (diversity), and not the continuing effects of past discrimination, the Court charts a course of minimalism rooted in the First

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[322]MATSUDA, *supra* note 317, at 59.

[323]ORFIELD, *supra* note 8; GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION (1996).

[324]*See supra* notes 8, 74 and accompanying text; GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW, 479-81 (5th ed. 2005); *id.* at 490-500 (discussing *Brown*'s unfulfilled legacy); DERRICK BELL, AND WE ARE NOT SAVED 111-13 (1987) (rejecting integration and arguing for a substantive approach to dismantling unequal school systems).

[325]*See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 100-03 (1995) (holding that interdistrict remedy of increased spending to bring whites into the school district was invalid in the absence of an interdistrict violation); Freeman v. Pitts, 503 U.S. 467, 490-91, (1992) (holding that federal courts should return supervisory control to local authorities as soon as possible; indeed, federal control may be withdrawn completely or partially based on good-faith compliance with the desegregation decree); Bd. of Educ. v. Dowell, 498 U.S. 237, 250 (1991) (explaining that based on a good faith finding of compliance, a district court may dissolve a desegregation order where the vestiges of de jure segregation had been eradicated "to the extent practicable"); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436-37 (1976) (stressing a temporal limit on federal court intervention, the Court concluded that once a court implemented a racially neutral attendance plan, in the absence of intentional racially discriminatory actions by the school board, the court could not adjust its desegregation order to address population shifts in the school district); Milliken v. Bradley, 418 U.S. 717, 745, 752 (1974) (holding that interdistrict remedies must be specifically tailored to address interdistrict violations).

[326]Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306-11 (Powell, J.) (1978).

Amendment.[327] This doctrinal move is only accomplished by employing all of the underlying myths of Rhetorical Neutrality[328] and by completely disconnecting history from the present day effects of past discrimination.[329]

As Justice Marshall observes:

> It is unnecessary in 20th century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in American has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.
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> These differences in the experience of the Negro make it difficult for me to accept that Negroes cannot be afforded greater protection under the Fourteenth Amendment where it is necessary to remedy the effects of past discrimination. In the *Civil Rights Cases* . . . the Court wrote that the Negro emerging from slavery must cease "to be the special favorite of the laws." . . . *We cannot in light of the history of the last century yield to that view.* Had the Court in that decision and others been willing to "do for human liberty and the fundamental rights of American citizenship, what it did . . . for the protection of slavery and the rights of the masters of fugitive slaves," . . . we would not need now to permit the recognitions of any "special wards."[330]

Striking at the heart of colorblind constitutionalism and Rhetorical Neutrality, Justice Marshall reasserts the primacy of the Fourteenth Amendment's anti-subjugation principle. He also highlights the limitations inherent in analyzing issues of race exclusively through the prism of diversity.[331] Thus, colorblind constitutionalism is the wrong path for the Court's race jurisprudence. Diversity, with its First Amendment process underpinnings, is ill-suited to deal with systemic oppression.[332] The Court's "neutral" approach privileges white interests through a doctrinal shift in Fourteenth Amendment analysis—the anti-caste principle (the

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[327]*Id.* at 311-15 (stating that universities have the "right to select those students who will contribute the most to the 'robust exchange of ideas,'" which is a First Amendment interest (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967))).

[328]*See supra* Part II.A.

[329]*See Bakke*, 438 U.S. at 387-402 (Marshall, J., concurring in part and dissenting in part).

[330]*Id.* at 400-01 Marshall, J., concurring in part and dissenting in part) (quoting The Civil Rights Cases, 109 U.S. 25, 53 (1883) (emphasis added) (internal citations omitted).

[331]*Id.* at 400; OGLETREE, *supra* note 315, at 162.

[332]*See* Powell, *supra* note 15, at 35 (arguing that the marketplace of ideas paradigm, where diverse ideas are exchanged and students learn through embracing their differences, is ill-suited to deal with questions of race).

substantive component of the Fourteenth Amendment) is transformed into the anti-differentiation principle (a process based doctrinal concept).[333]

Several themes emerge from this discussion:

1. Justice O'Connor's doctrinal approach fits squarely within the shift from the substantive core of the Fourteenth Amendment to a marketplace of ideas paradigm premised on the First Amendment value of diversity.[334]

2. *Brown* and *Bakke* are First Amendment decisions.[335] However, the substantive content of the First Amendment is read out of them by the Court's use of diversity—the concern is not the eradication of systemic racial oppression and its underlying message of inferiority, but inclusion of *all* difference.[336]

3. *Grutter*, then, becomes the natural doctrinal progression in this shift from substantive Fourteenth Amendment normative principles to a process-based conception of equality.

4. While Justice O'Connor's opinion in *Grutter* appears to give "substance" to diversity as a compelling state interest, the Court's "split the difference" approach to complex issues of race,[337] all but guarantees that issues of race will continue to be submerged (or completely ignored) in the Court's race jurisprudence.

What is particularly striking about *Grutter* is that, although it is hailed as a "victory," there are serious doctrinal limitations inherent in the decision. There is no mention whatsoever of historical racial oppression.[338] This is particularly ironic

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[333]SUNSTEIN, *supra* note 35, at 340.

[334]Rhetorical Neutrality serves as the foundation for this shift. Race, or more specifically, a race-conscious remedial approach designed to ensure transformative justice, is a secondary consideration in Justice O'Connor's *Grutter* opinion. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 341 (2003) ("[I]n the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm nonminority applicants.").

[335]*See supra* notes 322, 327 and accompanying text.

[336]The rationale is that there is an educational benefit to all rather than a specific "preference" for minority students based on their race.

[337]*See Grutter*, 539 U.S. at 348 (Scalia, J., concurring in part and dissenting in part). While Justice O'Connor's modified colorblind constitutionalism is not nearly as radical as Justice Scalia's literal colorblind constitutionalism and orginalism, her approach nevertheless preserves the status quo.

[338]By contrast, Justice Marshall consistently highlighted the present day effects of past discrimination in his opinions. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 387-402 (1978) (Marshall, J., concurring in part and dissenting in part); Milliken v. Bradley, 418 U.S. 717, 782-815 (1974) (Marhsall, J., dissenting) ; City of Richmond v. J.A. Croson, Co., 488 U.S. 469 528-61 (1989) (Marshall, J., dissenting). *See also id* ("It is a welcome

because *Grutter* was decided in the shadow of the fiftieth anniversary of *Brown v. Board of Education*. *Bakke*, the jurisprudential precursor to *Grutter*, is not much better in its analysis of history and its significance in light of present day oppression.

Brown, on some level, loses its constitutional meaning as a font of the substantive Fourteenth Amendment. Moreover, the substantive core of *Brown*'s First Amendment mandate to eliminate not only separate facilities, but the *message* of inferiority and stigmatization that they convey, is lost. In place of these normative constitutional principles, the Court substitutes neutral themes.

2. Doctrinal Themes

In *Brown*, the Court took great pains to avoid constitutionalizing education as a fundamental right.[339] While *Brown* eradicated the Jim Crow doctrine of "separate but equal," it did not substantively define the right of equal access.[340] *Brown* opened the school house door to all without a remedial framework rooted in the substantive content of the Fourteenth and First Amendments. By extension, *Grutter* does not go much farther because its doctrinal premise, like that of *Brown*, is anchored in neutrality. This is best illustrated in the central themes embodied in the *Grutter* decision: (a) liberal individualism[341]; (b) "cross-racial understanding" as a benefit to (white) majoritarian interests[342]; (c) fact-specific application of strict scrutiny[343]; (d) contextualized analysis of race-conscious remedies[344]; (e) institutional deference as a touchstone of First Amendment autonomy[345]; and (f) the twenty-five year aspirational limit.[346] Because these themes are directly related to Rhetorical Neutrality and its underlying myths, they reinforce each other and invert questions of race so that historically oppressed minorities become "privileged." Rhetoricians refer to this as inverted counterstories;[347] that is, there is a rhetorical move after Critical Race Theory deconstructs neutrality and race. The inverted counterstory is a

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symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst.").

[339]Hans J. Hacker & William D. Blake, *The Neutrality Principle: The Hidden Yet Powerful Legal Axiom at Work in* Brown v. Board of Education, 8 BERKELEY J. AFR.-AM. L. & POL'Y 5, 41-47 (2006); *see id.* at 47 ("[T]he decisions in *Brown* and *Bolling* employ the logic of inequitable access to a personal right of education using a government neutrality framework.").

[340]*See generally* john a. powell & Marguerite Spencer, Brown *is not* Brown *and Educational Reform is not Reform if Integration is not a Goal*, 28 N.Y.U. REV. L. & SOC. CHANGE, 343 (2003) (arguing that educational reform efforts are inconsistent with *Brown*'s holding if they do not seek to achieve true integration within our schools).

[341]*Grutter*, 539 U.S. at 326.

[342]*Id.* at 330 (citation omitted).

[343]*Id.* at 326-27.

[344]*Id.* at 327-29.

[345]*Id.* at 329.

[346]*Grutter*, 539 U.S. at 343.

[347]Annette Harris Powell, Mobilizing Identity in Civic Discourse: Obama as a Trope for the *New* Black (2007) (unpublished manuscript, on file with author).

conservative response to the progressive race-centered narrative of Critical Race Theory; it constructs equality in literal terms so that privilege is turned inside out. Thus, affirmative action has to be explained so that white privilege remains intact (and if white privilege is burdened, it is done in a manner that benefits white interests, and the "burden" is strictly limited in time and scope).

Grutter, then, is as much a reaffirmation of the diversity principle in *Bakke* as it is an explanation for why white privilege must be "burdened" in the context of professional (or graduate) education. Upholding the University of Michigan law school's admissions program, the Court concludes that "the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the *educational benefits that flow from a diverse student body*."[348] This holding is decidedly race-neutral; the doctrinal themes that support this holding are all neutral themes. Rhetorical Neutrality serves as the narrative linchpin unifying all of these themes.

a. Liberal Individualism[349]

In the Court's jurisprudence, the first step in neutralizing race is to declare that the Fourteenth Amendment "protect[s] *persons*, not *groups*."[350] Without a historical and definitional context for an analysis of discrimination against oppressed groups, particularly the descendents of the emancipated slaves, the Court's cramped focus is on the anti-differentiation principle.[351] Arguing for a "normative vision of the democratic state that carves out critical space within liberal theory for the public recognition of racial identity" as a group dynamic,[352] Scott Cummings notes that:

> The very hostility and exclusion that has made the national community inhospitable to people of color has helped to form racial communities as vital centers of spiritual resistance, political activism, and individual empowerment. An attempt, therefore, to obscure the significance of racial identity behind a façade of nationalism would undermine the liberal ideal by forcing people of color to accept a distorted picture of themselves that cannot equip them with the moral resources necessary to act as democratic citizens. In contrast, recognizing racial groups as critical sites of individual self-determination and political participation advances liberalism by allowing identity-formation among people of color to proceed in contexts that provide tangible and attainable images of

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[348]*Grutter*, 539 U.S. at 343 (emphasis added).

[349]*See* Scott Cummings, *Affirmative Action and the Rhetoric of Individual Rights: Reclaiming Liberalism as a "Color-Conscious" Theory*, 13 HARV. BLACKLETTER L.J. 183, 187 (1997) (describing liberal individualism as the doctrinal basis for colorblind constitutionalism).

[350]*Grutter*, 539 U.S. at 326 (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995)).

[351]*See supra* note 35 and accompanying text.

[352]Cummings, *supra* note 349, at 186.

> different paths while simultaneously affirming their humanity and sense of self-worth.[353]

Since the history of African-Americans and other people of color is characterized by group exclusion from society, then the Fourteenth Amendment's legislative history supports a group rights-anti-subordination theory.[354] While the Court's race decisions emphasize the literal denotation of *person* in the Fourteenth Amendment, this interpretation not only obscures history but disconnects the *individual* from the political *community*. This reading of the Equal Protection Clause is at odds with our conception of polity:

> While it is true that the Equal Protection Clause states that no *person* shall be denied "equal protection of the laws," an affirmative action policy that takes racial group affiliation into account does not offend the principles of individualism embodied in that clause. A person can only be treated equally in our society if her community is also treated equally. This is because an individual acquires her sense of self-worth through interactions with significant others in a community of shared values. If a person's community is not in some way protected and affirmed, then her *individual* identity will be damaged and her *individual* ability to make moral choices and muster the courage and conviction to pursue her goals will be undermined. The individual right to equal protection, then, necessarily involves the protection of communities of colors. Without community protection, an individual legal right is an empty shell incapable of granting moral strength, an essential prerequisite for effective individual action.[355]

Under this reading, the Court's race decisions, including *Grutter*, are outside of the constitutional mainstream because they fail to acknowledge the significance of racial groups in the political process. This should not be confused with a defense of pluralism; rather, it is the recognition that a race-based approach to the Fourteenth Amendment is not at odds with its structure and meaning. Perhaps conceding this inescapable tension between the literal rhetoric of individualism and the substantive mandate of the Thirteenth[356] and Fourteenth Amendments, which are built on a foundation of group rights, Justice O'Connor incorporates liberal individualism into a neutral group rights theory. That is, strict scrutiny is designed to "smoke out" illegitimate uses of race by the state[357] so that the rights of individuals are preserved

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[353]*Id.* at 233 (footnotes omitted).

[354]Powell, *supra* note 13, at 201-10.

[355]Cummings, *supra* note 349, at 236.

[356]*See* ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM, A LEGAL HISTROY (2004).

[357]*Grutter*, 539 U.S. at 326 (quoting City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 493 (1989)).

under the Fourteenth Amendment. There may be, however, rare instances when race may be used to eradicate discrimination that has harmed racial groups.[358]

b. Strict Scrutiny Is Not Always "Fatal in Fact"

On some level, the Court must acknowledge, even implicitly, that individuals do not exist in isolation—individuals are part of the political community. The history of discrimination in America is not one of a series of discrete "indignities" against individuals; rather, systemic oppression from the Middle Passage to Slavery to Jim Crow and the Black Codes to today's systemic oppression is grounded in a theory of racial group subjugation.[359] So, the Court recognizes that "race-based action [may be] necessary to further a compelling governmental interest" in either remedying past discrimination or in pursuing the compelling interest of a diverse student body.[360] In relative terms, *Grutter* actually "broadens" the permissible justifications for the use of race—diversity is now a compelling interest.[361] This is why context matters.

c. Context Matters

Straining to distinguish its past pronouncements on the use of race, the Court, in Justice O'Connor's majority opinion, posits that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause."[362] This seems paradoxical in light of the Court's strict adherence to colorblind constitutionalism and Rhetorical Neutrality. Yet, this rhetorical move is quite predictable when it is placed "in context" of the Court's race jurisprudence. The impact on white interests (or privilege) can be explained broadly in the context of education—there is a benefit to all if diverse viewpoints are offered in the classroom.[363] This is not substantive equality, but an affirmation of difference as a pedagogical benefit found in the process values of the First Amendment. Context matters much less when there is a burden on white interests that cannot be explained in terms of difference.[364] Because "universities occupy a special niche in our constitutional tradition[,]"[365] there is something distinct about *Grutter* when it is placed alongside decisions like *Wygant*, *Croson*, *Metro Broadcasting*, and *Adarand*.[366] Interestingly, it would appear that the diversity rationale would work well in decisions like *Wygant* and *Metro Broadcasting*. The marketplace of ideas paradigm is directly applicable to the

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[358]*Id.* ("[G]overnment may treat people differently because of their race only for the most compelling reasons." (quoting Adarand Constructors, Inc. v. Peña, U.S. 200, 227 (1995))).

[359]A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978).

[360]*Grutter*, 539 U.S. at 327-29.

[361]*Id.* at 328 ("[W]e have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination.").

[362]*Id.* at 327.

[363]*Id.* at 328-33.

[364]*See supra* notes 83-89 and accompanying text.

[365]*Grutter*, 539 U.S. at 329.

[366]*See supra* notes 64, 83-89 and accompanying text.

absence of minority teachers in the public schools and the lack of minority broadcasting outlets in the electronic media market, but the Court explicitly rejects the diversity rationale in *Wygant* and ultimately abandons the deferential mode of analysis used to uphold the broadcast diversity programs in *Metro Broadcasting*. Depending on the context (and the impact on white interests), the Court shifts from a Fourteenth Amendment literal colorblind analysis to a First Amendment hybrid colorblind analysis with an emphasis on diversity. Race simply becomes one of many decisional factors in the admissions process; it can be acknowledged and ignored simultaneously.

d. Diversity as a First Amendment Value

It seems odd that diversity is a compelling state interest while education is not. Certainly, education is "important," but it is not compelling under the Court's jurisprudence. This underscores a central problem with the Court's race jurisprudence—process is elevated over substance. The First Amendment's substantive mandate in *Brown*—that the message of racial inferiority and stigmatization inherent in separateness is unconstitutional—is rejected in favor of the "compelling" process value of diversity.[367]

Building upon this deferential model, the Court notes that there is no specified constitutional percentage in assembling a diverse class with a critical mass of viewpoints.[368] This is central to the law school's mission in ensuring the promotion of "cross-racial understanding"[369] in the marketplace of ideas of the classroom and in the society beyond the classroom.[370] If the process is "open," then everyone is treated the same. This is the anti-differentiation principle, not the anti-subjugation principle—the substantive cores of the First and Fourteenth Amendments are displaced by the Court's conception of neutrality.

While "race unfortunately still matters[,]"[371] Justice O'Connor's opinion makes no attempt at analyzing the present day effects of past discrimination. Instead, Justice O'Connor focuses on access to individuals,[372] each of whom carries a distinct viewpoint that contributes to the compelling interest of diversity.[373] Thus, "critical mass" is not a quota because it does not presuppose any specific numerical percentage based upon the viewpoints of a racial group.[374] By focusing on individual access, Justice O'Connor achieves a tenuous compromise between liberal individualism and group rights theories of social justice. She can disaggregate group

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[367] *Grutter*, 539 U.S. at 329-33.

[368] *Id.*

[369] *Id.* at 330 (citation omitted).

[370] *Id.* at 331 ("This Court has long recognized that 'education . . . is the very foundation of good citizenship' . . . . For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.") (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

[371] *Id.* at 333. *See also* CORNEL WEST, RACE MATTERS (1993).

[372] *Grutter*, 539 U.S. at 332-33.

[373] *Id.* at 333.

[374] *Id.* at 335-38.

rights claims by noting that "the path to leadership [must] be visibly open to talented and qualified individuals of every race and ethnicity[,]"[375] and by noting that "a 'critical mass' of underrepresented minorities is necessary to further [the Law School's] compelling interest in securing the educational benefits of a diverse student body."[376] A substantial number of viewpoints must be represented to ensure diversity and non-stereotypical learning. The university has the power to promote diversity because the Court defers to its decision-making power. But how is this power defined?

e. Institutional Deference

Perhaps the most striking feature of Justice O'Connor's *Grutter* decision is its deferential posture towards university decision-making power in the admissions process.[377] The university has the right, grounded in "the expansive freedoms of speech and thought associated with the university environment,"[378] to determine its own institutional destiny. Within these doctrinal boundaries, the Court defers to the university's judgment.

Relying on the "special niche" that universities occupy in our constitutional tradition, Professor Paul Horwitz constructs three possible doctrinal and thematic readings of *Grutter* under the First Amendment.[379] Essentially, Professor Horwitz advances a critique of the Court's Rhetorical Neutrality under the First Amendment. In its First Amendment jurisprudence, the Court has adopted a neutral-categorical approach to virtually all speech without reference to *institutional* or *societal* context.[380] This "institution-indifferent approach[,]"[381] as Professor Horwitz aptly terms it, limits the Court's ability to critically analyze all of the dimensions of the First Amendment. Neutrality, again, undermines substantive analysis.

Rejecting neutrality, Professor Horwitz argues for "an institution-sensitive First Amendment that defers to the practices of particular kinds of First Amendment actors[.]"[382] He concludes that:

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[375]*Id.* at 332.

[376]*Id.* at 333.

[377]*Grutter*, 539 U.S. at 329.

[378]*Id.*

[379]Paul Horwitz, Grutter's *First Amendment*, 46 B.C. L. REV. 461, 467-72 (2005) (discussing rationales of institutional autonomy and academic freedom as substantive components of First Amendment doctrine, and concluding that a third rationale, that the Court "takes institutions seriously in the First Amendment," is the best way to describe *Grutter*'s First Amendment implications despite "the potential pitfalls of an institution-sensitive approach").

[380]*Id.* at 564-67.

[381]*Id.* at 565.

[382]*Id.* at 570. Professor Horwitz' theory is concerned primarily with the rationales for judicial deference in an institution-centered approach to the First Amendment. He posits six central themes to support deference: (i) "the Court should [acknowledge] the special importance to public discourse[,]" *id.* at 571, of universities and other First Amendment institutions; (ii) the Court should accord "substantial deference to these organizations," Horwitz, *supra* note 379, at 571; (iii) "the boundaries of the Court's deference" will be

> *Grutter*'s First Amendment can be read as a First Amendment that finally and fully takes First Amendment institutions seriously. This reading counsels a particular sort of deference to a wider range of institutions than universities alone. It suggests that the Court ought to recognize the unique social role played by a variety of institutions whose contributions to public discourse play a fundamental role in our system of free speech. Equally, it suggests that the Court ought to attend to the unique social practices of these institutions, allowing the scope of its deference to be guided over time by the changing norms and values of these institutions . . . . Just as important, this approach acknowledges that constitutional law is not the sole preserve of the courts. It is a shared activity, in which legal and nonlegal institutions alike are engaged in a cooperative attempt to build a constitutional culture that is responsive to the real world of free speech.[383]

Marbury v. Madison[384] may lead the Court to stay its neutral course under both the First and Fourteenth Amendments, but the Court's willingness to defer (without explicitly setting the limits of that deference) to universities in this narrow context offers some hope. Unfortunately, hope here is undermined by all of the underlying myths discussed above, Justice O'Connor's doctrinal approach, and *Grutter*'s colorblind constitutionalism. It appears that the flame of hope will be extinguished in twenty-five years.

f. Twenty-Five Years?

In sweeping language, Justice O'Connor proclaims the end of racism; or, at the very least, the end of the use of race-conscious remedies whether systemic caste-based oppression has been eliminated or not:

> It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased . . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.[385]

One might ask, how we can overcome, as a society, 400 years of caste-based oppression[386] in twenty-five years? By ignoring history (and the present day effects

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tempered by the Constitution and the institutions themselves as they develop normative approaches to fulfill their institutional mandate, *id.* at 572; (iv) the First Amendment institutions will not exceed the boundaries of their power because "[they] are defined and constrained by their own institutional culture[,]" *id.* at 572-73; (v) the Court should adopt a flexible approach to its deference, given the fact that institutional norms constantly change, *id.* at 573; and, finally, (vi) "taking First Amendment institutions seriously entails the recognition that constitutional law is not simply a creature of the courts." *Id.*

[383]Horwitz, *supra* note 379, at 589.

[384]5 U.S. (1 Cranch) 137 (1803).

[385]*Grutter*, 539 U.S at 343.

[386]Joe R. Feagin, *Documenting the Costs of Slavery, Segregation, and Contemporary Racism: Why Reparations Are in Order for African Americans*, 20 HARV. BLACKLETTER L.J.

of past discrimination), it is quite easy for the Court to adopt a forward-looking approach with a definitive sunset date.[387] This is a key feature of Justice O'Connor's jurisprudence. She "oversells" equality by pretending that substantive progress has been made in the twenty-five years since *Bakke*. Certainly, there has been "progress," but this progress is transitory and relative. Things are not as bad as they once were, but progress disappears when white privilege is threatened or when it no longer is beneficial to white interests.[388] Thus, *Grutter* can be explained as a decision of contradictions that maintains white privilege. As Professor Bryan Fair notes:

> *Grutter* maintains the status quo primarily benefiting whites, and rests on an empty idea of equality. It accomplishes no substantive improvement in the elimination of educational caste. It does not open the schoolhouse door. *Grutter* treats all racial classifications as presumptively invidious, even those designed to restore people of color to the position they would have occupied absent so much discrimination favoring whites. Such reasoning renders most remedial strategies or policies unconstitutional.[389]

The twenty-five year time limit focuses exclusively on the impact on whites without an acknowledgment of the effects of systemic oppression. This has been a consistent theme in the Court's race jurisprudence. It will take much longer than twenty-five years to unravel the inherent contradictions in *Grutter* and to overcome centuries of racist oppression against African-Americans and all similarly situated people of color.[390]

The previous sections critiqued the narrative framework of the Court's decisions. Essentially, Justice O'Connor's approach is not rooted in substantive constitutional principles; rather, she employs neutrality to create normative principles of equality. Whatever progress is made is directly attributed to broader goals that either advance or preserve white privilege. While Justice O'Connor places a time limit on race-conscious remedies, Justice Thomas would prohibit their use altogether. He advances this view through Inverted Critical Race Theory. In a perverse twist of fate, Justice Thomas has become the Court's "expert" on race.[391] He uses historical

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49, 52-62 (2004) (chronicling exploitation and oppression of African-Americans since the mid-1600s); Kevin Brown, *From* Brown *to* Grutter*: Affirmative Action and Higher Education in the South: The Racial Gap in Ability: From the Fifteenth Century to* Grutter *and* Gratz, 78 TUL. L. REV. 2061, 2065 (2004); *see also* Fair, *supra* note 98, at 728-30 (noting the absence of history and context in the Court's race decisions).

[387]*Grutter*, 539 U.S. at 343; Fair, *supra* note 98, at 728-30.

[388]*See supra* notes 30, 76 and accompanying text.

[389]Fair, *supra* note 98, at 761.

[390]*See* Joel K. Goldstein, *Justice O'Connor's Twenty-Five Year Expectation: The Legitimacy of Durational Limits in Grutter*, 67 OHIO ST. L. J. 83, 139-44 (2006).

[391]Charles, *supra* note 202, at 577 ("[I]n a delectable and ironic twist in, [*Virginia v.*] *Black*, the Court's conservatives essentially accepted the intellectual framework and the mode of analysis suggested previously by the critical race theorists. Indeed, the Justice in *Black* whose view most closely resembles that of the critical race theorists is none other than Justice Thomas.").

revisionism to "educate" the Court on race. Indeed, from his epistemological vantage point, he speaks with authority about race. It is *how* Justice Thomas uses his authority that is so perplexing. He rejects any use of race to address the present day effects of past discrimination and yet, uses race selectively to highlight the systemic nature of racism. He concurs in Justice O'Connor's imposition of a twenty-five year time limit for race-conscious remedies (although it is twenty-five years too late for him), but he nevertheless adopts a race-conscious approach to history. He acknowledges the present day effects of past discrimination when he emphasizes the *meaning* of the burning cross to African-Americans.

Professor Guy Uriel-Charles highlights the doctrinal shift from *R.A.V.*, which held that the state could not engage in viewpoint discrimination even if it was trying to regulate unprotected speech and symbols, like the Nazi swastika or burning cross, to *Virginia v. Black* where the Court held that the state could regulate the burning cross as a true threat:[392]

> To understand why *R.A.V.* and *Black* came out so differently, one must come to grips with the role that Justice Thomas played in *Black*. Anyone who listened to or witnessed the Supreme Court oral arguments in *Black* could not help but be struck by the manner in which Justice Thomas's comments on the meaning of cross burnings single-handedly changed the nature of the proceedings. What is most remarkable about Justice Thomas's participation in *Black* (other than the fact that he spoke out at all), especially when considered in contrast to his participation in *R.A.V.*, in which he joined Justice Scalia's majority opinion, is that Justice Thomas analyzed the harm caused by cross burning from his perspective as a person of color. Justice Thomas brought sensitivity to the issue that he had acquired on the basis of his experiences as an African-American.[393]

In some ways, what Professor Charles describes above is the "easy" case; that is, epistemologically, both the radical and conservative share the same common experience—neither would dispute the significance of the burning cross or lynching to the Black experience of oppression in America. State-sponsored violent terror is certainly distinguishable from progressive affirmative action, but colorblind constitutionalists have difficulty distinguishing the two. This is why Justice Thomas can write impassioned dissents in *Black*[394] and *Grutter*[395] without reconciling the central tension between colorblind constitutionalism and transformative (race-based) equality.

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[392]R.A.V. v. St. Paul, 505 U.S. 377 (1992); Virginia v. Black, 538 U.S. 343, 358-63 (2003). The Court concluded in *Black* that "[t]he First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation."

[393]Charles, *supra* note 202, at 608 (footnotes omitted).

[394]538 U.S. at 388-90 & n.1 (Thomas, J., dissenting) (rejecting majority's conclusion that cross burning has an expressive component and arguing that such an act is intimidating conduct and fully proscribable).

[395]539 U.S. at 349-78 (Thomas, J., concurring in part and dissenting in part).

D. Justice Thomas and Frederick Douglass

It is striking that, in limited instances, Justice Thomas adopts a *race-based* approach that is doctrinally distinct from Justice O'Connor's modified colorblind neutrality. This offers an intriguing contrast; Justice Thomas, a pure colorblind constitutionalist, actually employs the narrative techniques of Critical Race Theorists.[396] He tells a story, but he never actually deconstructs race so that its underlying complexities can be analyzed. Justice Thomas' Inverted Critical Race Theory, then, is both colorblind and race-conscious. He categorically rejects the admissions program in *Grutter* as unconstitutional, and he does so by using Frederick Douglass to "speak" against the stigmatizing effects of affirmative action.

1. The Significance of Black Historical Narrative

Frederick Douglass has a distinct narrative and metaphorical meaning for Justice Thomas. It is no accident that he chooses Frederick Douglass for his quote. He chooses, Douglass, one of the most radical Black Nationalists of his time,[397] and then de-emphasizes this militancy by selectively quoting Douglass to support the proposition that affirmative action has stigmatizing effects and Blacks should be "left alone":

> [I]n regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply *justice*. The American people have always been anxious to know what they shall do with us. . . . I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played mischief with us. Do nothing with us! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! . . . And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! . . . [Y]our interference is doing him positive injury.[398]

This manipulative technique is the hallmark of Rhetorical Neutrality. As a constitutional originalist, Justice Thomas should reject his very own selective use of history because he has failed to grasp the true meaning of Frederick Douglass and his historical legacy.[399] Justice Thomas omits a key passage between "Let him alone" and "your interference is doing him positive injury." This omission is quite telling, for if the ellipses are taken away, and the passage is included, Frederick Douglass is

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[396]Charles, *supra* note 202, at 608-613.

[397]STERLING STUCKLEY, THE IDEOLOGICAL ORIGINS OF BLACK NATIONALISM 26-27 (1972) (emphasizing that Douglass was indeed a nationalist).

[398]*Grutter*, 539 U.S. at 349-50 (Thomas, J., dissenting) (quoting Frederick Douglass, What the Black Man Wants (Jan. 26, 1885), *reprinted in* THE FREDERICK DOUGLASS PAPERS 59, 68 (John W. Blassingame & John R. McKivigan, eds., 1991)).

[399]SAMUEL MARCOSSON, ORIGINAL SIN: CLARENCE THOMAS AND THE FAILURE OF THE CONSTITUTIONAL CONSERVATIVES (2002); andré douglas pond cummings, Grutter v. Bollinger, *Clarence Thomas, Affirmative Action and the Treachery of Orginalism: "The Sun Don't Shine Here in this Part of Town,"* 21 HARV. BLACKLETTER L.J. 1, 47-48, 47 & n.354 (2005).

transformed from an apologetic accommodationist begging to be "let alone" to the powerful advocate of Black Nationalism who speaks to us to this day:

> If you see him on his way to school, let him alone, don't disturb him! If you see him going to the dinner table at a hotel, let him go! If you see him going to the ballot-box, let him alone, don't disturb him! (Applause.) If you see him going into a work-shop, just let him alone,—your interference is doing him positive injury.[400]

It is not surprising that Justice Thomas' historical revisionism discards the major applause line of Frederick Douglass' address. Douglass is not pleading for the government to "let him alone" so that African-Americans will be free from the "stigmatizing" effects of race-conscious remedies. Douglass is arguing for Black self-determination in its truest sense. Douglass' statement is particularly prescient because he delivers it several months before the end of the Civil War and before the ratification of the Reconstruction Amendments (the Thirteenth, Fourteenth, and Fifteenth Amendments of the Constitution), and he evokes themes that are essential to equality: the ability to go to school, to enjoy public accommodations on an equal basis, to participate in the American polity, and to pursue a livelihood. Justice Thomas conveniently ignores this, and he disconnects Frederick Douglass from his historical moorings.

As early as 1852, some twelve years before the heavily edited quote used by Justice Thomas in his *Grutter* dissent, Douglass advocated for armed struggle: "Every slave-hunter who meets a bloody death in this infernal business, is an argument in favor of the manhood of our race. Resistance is, therefore, wise as well as just."[401] One gets a sense that this is closer to what Douglass meant when he said, "Let him alone," than Justice Thomas's sanitized interpretation. "Mid-nineteenth-century Black rhetoric gives voice to the militant mindset of the African American community and debunks the Eurocentric notion of an agentless, passive, docile African."[402] The real Frederick Douglass rejected Justice Thomas' colorblind constitutionalism—he was a true Black Nationalist.

2. The *Real* Frederick Douglass

Justice Thomas' use of the Douglass quote is at odds with the historical understanding of Douglass' political ideology:

> Douglass comprehended that merely leaving the Negro alone was neither adequate nor fair. He was not against benevolence toward the Negro. But, he added, "in the name of reason and religion, we earnestly plead for justice above all else. Benevolence with justice is harmonious and beautiful; but benevolence without justice is a mockery.

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[400]Frederick Douglass, What the Black Man Wants: An Address Delivered in Boston Massachusetts (Jan. 26, 1885), *in* 4 THE FREDERICK DOUGLASS PAPERS 59, 68 (John W. Blassingame & John R. McKivigan eds., 1991).

[401]Forbes, *supra* note 29, at 161.

[402]*Id.* at 169.

> The tragic shortcoming of the pervasive shibboleth, "Give the Negro fair play and let him alone," Douglass fully knew, was that while whites never tired of letting the Negro alone, they consistently denied him an equal opportunity in the "race of life." He declared that "it is not fair play to start the Negro out in life, from nothing and with nothing, while others start with the advantage of a thousand years behind them." An accurate assessment of the Negro's progress in civilization, moreover, required that "he should be measured, not by the heights others have obtained, but from the depths from which he has come." In light of the enormous disparity between the relative positions of whites and blacks in America, consequently, it would be difficult, if not impossible, to equalize completely their starting points in the "race of life." The undeniable injustices and resulting inequalities the Negro endured in the past, he suggested, deeply impressed an inauspicious legacy on the Negro's present and future: a legacy that a truly progressive republic would not allow to persist.[403]

Justice Thomas has a fundamentally different understanding of the "race of life" than Frederick Douglass. By contrast, even after slavery was formally abolished, Douglass recognized the permanence of racism. A few months after the address discussed above, Douglass focused on suffrage for the newly emancipated slaves: "Slavery is not abolished until the black man has the ballot."[404] This is far removed from the "let me alone" Douglass that Justice Thomas invokes.[405]

3. Justice Thomas' "Nationalism"

It is a stretch to call Justice Thomas a Critical Race Theorist or a Black Nationalist, but he uses narrative to navigate the gulf between liberal individualism and his group identification as a Black Man in America.[406] Justice Thomas is a *contextual* Black Nationalist; he only espouses the principles of Black self-determination and transformative social change when it is in his own self-interest, as in his confirmation hearings,[407] or when it serves to preserve a long-standing Black

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[403]WALDO E. MARTIN, JR., THE MIND OF FREDERICK DOUGLASS 70-71 (1984).

[404]Frederick Douglass, In What New Skin Will the Old Snake Come Forth?: An Address Delivered in New York, New York (May. 10, 1865), *in* 4 THE FREDERICK DOUGLASS PAPERS 83 (John W. Blassingame & John R. McKivigan eds., 1991).

[405]*Id.*; *see also supra* notes 397-98 and accompanying text.

[406]*See generally* Mark Tushnet, Essay, *Clarence Thomas's Black Nationalism*, 47 HOW. L.J. 323 (2004) (suggesting that Justice Thomas uses black nationalism as a strategy to advance social policies embracing liberal individualism).

[407]THOMAS, *supra* note 281, at 271:

> This is a circus. It is a national disgrace. And from my standpoint, as a black American, as far as I am concerned, it is a high-tech lynching for uppity blacks who in any way deign to think for themselves, to do for themselves, to have different ideas, and it is a message that, unless you kowtow to an old order, this is what will happen to you, you will be lynched, destroyed, caricatured by a committee of the U.S. Senate rather than hung from a tree.

Justice Thomas well knew the power of this racially charged historical narrative. *Id* at 268-72.

historical tradition that does not threaten white interests.[408] For example, in *United States v. Fordice*,[409] Justice Thomas emphasized the "sound educational justification" for maintaining "historically black colleges *as such* . . . ."[410] This is a direct and glaring counterpoint to his professed adherence to colorblind constitutional originalism.

Notwithstanding his assertions to the contrary, Justice Thomas is not a constitutional orginalist.[411] His steadfast adherence to colorblind constitutionalism graphically illustrates how he employs Inverted Critical Race Theory[412]; that is, after the neutral themes underlying Rhetorical Neutrality are unpacked, he repackages them by using race as a trope in support of his inside-out view of racial subordination. Whites become discrete and insular minorities, Blacks are stigmatized victims of misguided race-based state largesse, and Frederick Douglass is a champion for colorblind constitutionalism. To construct this inside-out world of inverted critical race narrative, Justice Thomas must assume the role of "originalist," while simultaneously adopting the narrative techniques of Critical Race Theorists.[413] This is the hallmark of inversion.[414]

Essentially, Justice Thomas lives in two worlds—he is a colorblind constitutionalist and a race-conscious contextual nationalist. This shared duality or double-consciousness is a dominant thread in Black historical narratives.[415] He chooses, however, to neutralize the significance of race through Rhetorical Neutrality. That is, he embraces all of the underlying myths articulated in the Court's race jurisprudence and rejects Justice O'Connor's modified colorblind approach. Justice Thomas selectively uses history, context, and narrative to "educate" the Court on the Black experience, while at the same time, arguing for colorblindness whenever he concludes that the use of race has "stigmatizing" effects. To Justice Thomas, the use of race by the state is never appropriate. This creates a complex doctrinal dilemma for Justice Thomas for he must reconcile the colorblind concept of liberal individualism and his very personal affirmation of Black pride (and self-determination). Professor Mark Tushnet refers to this as Justice Thomas' "ambivalent black nationalism."[416] It can be suggested that Justice Thomas is not

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[408]United States v. Fordice, 505 U.S. 717, 745 (1992) (Thomas, J., concurring).

[409]505 U.S. 717 (1992).

[410]*Id.* at 748-49 (Thomas, J., concurring) (emphasis added).

[411]*See* MARCOSSON, *supra* note 399.

[412]Charles, *supra* note 202, at 625-26.

[413]*Id.*

[414]*See generally* Angela Onwuachi-Willig, *Using the Master's "Tool" to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. 113 (2005) (arguing that Justice Thomas' professional career makes the case for forward-looking affirmative action).

[415]*See* W.E.B. DUBOIS, THE SOULS OF BLACK FOLK (1903); RALPH ELLISON, THE INVISIBLE MAN (1952); Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 932, 978-96 (2005).

[416]Tushnet, *supra* note 406, at 323.

totally ambivalent—he knows when to be race-conscious. He identifies, however, with liberal individualism because this colorblind tenet rejects all race-based group theories of transformative equality. The Fourteenth Amendment's anti-caste principle is replaced with the anti-differentiation principle. This is precisely the objective of colorblind constitutionalists; yet, it does not resolve the tension between individualism and nationalism. As Professor Tushnet explains:

> Justice Thomas's opinions make out a powerful case for some public policies and against others. Yet, they are not without their internal tensions. The opinions contain a black nationalist strand. It can be seen in the importance that Justice Thomas places on the policies that would really benefit African Americans as well as the indifference the opinions display as to whether the policies benefit whites, even non-elite whites. It can also be seen in Justice Thomas's approval of references to historically black colleges and universities. Nationalism, though, is precisely the kind of group identity that Justice Thomas's individualism rejects.[417]

Justice Thomas alternates between concern for the plight of African-American students in the inner city schools,[418] to outright rejection of affirmative action because of its stigmatizing effects,[419] to support of the historically Black colleges and universities.[420] He moves from race-conscious, group based theories of equality to a liberal individualist conception of equality. Within this interpretive and doctrinal framework, it is impossible to move toward race-conscious remedial approaches that will address ingrained problems of systemic racism.

III. RECLAIMING THE ANTI-SUBORDINATION THEORY IN THE FIRST AND FOURTEENTH AMENDMENTS

The race jurisprudence of Justices O'Connor and Thomas combine to form the doctrinal core of the Roberts Court's colorblind jurisprudence. As the previous sections illustrate, Justice O'Connor constructs the analytical framework of Rhetorical Neutrality by using a compromise approach which seeks to neutralize race while simultaneously applying it to promote diversity or to eradicate identifiable discrimination, and Justice Thomas adopts a literal colorblind approach by employing inverted narratives to preserve neutrality. Their approaches overlap

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[417] *Id.* at 330-31.

[418] *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 681-84 (2002) (Thomas, J., concurring) (concurring in the Court's opinion upholding the use of vouchers for students in Cleveland, Ohio, and quoting Frederick Douglass to emphasize the power of education to emancipate and stating that "failing urban public schools disproportionately affect minority children most in need of educational opportunity").

[419] See, *e.g.*, Grutter v. Bollinger, 539 U.S. 306, 350 (2003) (Thomas, J., concurring in part and dissenting in part) ("The Majority upholds the Law School's racial discrimination not by interpreting the people's Constitution, but by responding to a faddish slogan of the cognoscenti."); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in judgment) ("[G]overnment-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.").

[420] *Fordice*, 505 U.S. at 745-49 (Thomas, J., concurring).

because, in varying degrees, both are committed to colorblind constitutionalism. Justice O'Connor seeks to explain the impact on white majoritarian interests through diversity in the *context* of education, while she rejects the use of race in other contexts where the impact on white privilege cannot be explained in neutral terms. Conversely, Justice Thomas rejects the use of race altogether, unless it can be repackaged to preserve neutrality or to support his revisionist version of Black Nationalism. Under either approach, race is used when it fits the overarching goal of neutrality: Justice O'Connor celebrates the broad institutional and societal importance of diversity in *Grutter* while imposing a twenty-five year limit on the use of race; Justice Thomas, while "concurring" with the temporal limit set by Justice O'Connor, concludes that the use of race has stigmatizing effects in the admissions process in higher education. His view is markedly different when the use of race is employed to preserve historical self-determination.

In many ways, this Article has catalogued what could be termed a disconcerting "prequel" to the Roberts Court's race jurisprudence. All of Justice O'Connor's affirmative action decisions lead inevitably to the Court's recent decision in *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Public Schools*,[421] where the Court held that the cities of Louisville and Seattle's voluntary desegregation plans were unconstitutional because race was a predominant consideration in student school assignments.[422] Justice O'Connor's decision in *Grutter* draws a bright line around the university—it is special, the paradigmatic marketplace of ideas where race is one of many factors. On the other hand, public elementary and high schools are different because the state is not accorded the same deference when the context is secondary education. The First Amendment does not provide a rationale of inclusion here. These disparate results highlight the need to reclaim the anti-subordination theory in the Fourteenth Amendment and the substantive mandate against racial stigmatization in the First Amendment.

The Court should adopt a new approach to its First and Fourteenth Amendment jurisprudence in relation to race:

1. First, the Court should re-conceptualize diversity as a *normative* constitutional principle. The concern should be substance, not access. This means that diversity is not simply identifying everything that is "different" and throwing race in the mix; rather, the First Amendment complements the Fourteenth Amendment. The First Amendment stands for the proposition that systemic racism sends a message of inferiority that must be eradicated, and the Fourteenth Amendment mandates race-conscious remedies to eradicate caste and subjugation.

2. The Court should abandon colorblind constitutionalism because neutrality preserves inequality and obscures the enduring historical connection to the present day effects of past discrimination.

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[421] 127 S. Ct. 2738 (2007).

[422] *Id.* at 2768.

3. The Court should reject the requirement of discriminatory intent announced in *Washington v. Davis* and acknowledge that racial discrimination is broad, shifting, permanent, and systemic.

4. The Court should reject artificial categories of discrimination, like the *de jure-de facto* discrimination in school desegregation cases, and adopt a broad view of discriminatory impact and its interlocking components, like segregated residential housing patterns in school integration efforts.

5. There should be a positive presumption, based upon the First Amendment, that institutions from elementary schools to graduate and professional schools have the power and expertise to use race in a manner that serves their pedagogical and institutional identity.

6. When political communities decide to use race to substantively integrate or address the present day effects of past discrimination, the Court should not exercise judicial review to disturb these legitimate political outcomes.[423]

Of course, given the current doctrinal inclinations of the Court, this is unlikely to occur. This is particularly so since Justice Kennedy has assumed Justice O'Connor's position as the "center" of the Court. He is much closer to Justices Scalia, Thomas, Alito, and Chief Justice Roberts than the more "liberal" bloc of the Court. Justice Kennedy's doctrinal journey on race remains to be charted with the Roberts Court.[424]

IV. CONCLUSION

We must dismantle colorblind constitutionalism and reject the allure of neutrality. It is certainly appealing to imagine a world where race no longer matters. We will reach that day much sooner if we confront our fears, our hopes, and our dreams and acknowledge that they all are intertwined with race. We must use a new rhetoric—a rhetoric of inclusion that does not insist on colorblindness, but embraces the substantive core of the First and Fourteenth Amendments. In this way, Justices O'Connor and Thomas would honor the historical significance and true legacy of Frederick Douglass, and the Court would take an important step in discarding Rhetorical Neutrality.

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[423]Girardeau A. Spann, *The Future of School Integration in America: The Supreme Court Decision in* Meredith v. Jefferson County Board of Education, 46 U. LOUISVILLE L. REV. (forthcoming).

[424]john a. powell & Stephen Menendian, *Parents Involved: The Tenuous Ascendancy of Colorblindness in the Roberts Court*, 46 U. LOUISVILLE L. REV. (forthcoming).