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## ARTICLES

### “IN WHAT VISION OF THE CONSTITUTION MUST THE LAW BE COLOR-BLIND?”\*

LAURENCE H. TRIBE\*\*

My purpose in these brief remarks is not to recapitulate a body of doctrine whose major trajectory has yet to cross our constitutional firmament. Nor is it my aim to predict the path that trajectory will take after the Supreme Court has decided the teacher lay-off<sup>1</sup> and firefighter promotion<sup>2</sup> cases from the Sixth Circuit and the union membership case from the Second Circuit.<sup>3</sup> In this realm, whoever lives by the crystal ball must learn to eat ground glass, and I would rather seek more normal nourishment. Besides, we will all know soon enough<sup>4</sup> what the Supreme Court does in those three cases; what the opinions may or may not reveal is *why*.<sup>5</sup>

With that in mind, my focus today will be on the affirmative action controversy as a window into the constitutional and judicial vision — the philosophy of constitutional meaning and judicial role — of those who deem race-specific preferences for minorities to be

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\* This essay is essentially transcribed from an address to a Plenary Session of the Judicial Conference of the United States, May 19, 1986, in Williamsburg, Virginia.

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1. *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986). See *infra* note 4.

2. *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 3063 (1986).

3. *Local 28 v. EEOC*, 106 S. Ct. 3019 (1986).

4. Literally as I was delivering this address, the Supreme Court, by a 5-4 vote, held that the lay-off provision in the teachers' collective bargaining agreement violated the Equal Protection Clause. *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986).

5. Discussion of the several *Wygant* opinions, which leave numerous fundamental issues unresolved, is beyond my purpose here. Suffice it to say that, while none of those opinions proceeds from a premise of extreme constitutional hostility to all race-specific affirmative action, all of the opinions save those of Justices Marshall, *id.* at 1858 (Marshall, J., joined by Brennan and Blackmun, J.J., dissenting), and Stevens, *id.* at 1867 (dissenting opinion), leave unanswered the question of *why* such government programs should ordinarily be viewed as constitutionally suspect.

presumptively invalid, subject only to a narrow exception for judicial relief to identified victims of proven race discrimination.<sup>6</sup> I will call these the "race neutralists." My question is: Why do the race neutralists set themselves against the view, expressed by Justice Blackmun in his separate *Bakke* opinion, that "to get beyond racism, we must first take account of race . . . [a]nd . . . to treat some persons equally, we must . . . treat them differently."<sup>7</sup> In other words, what constitutional sources or theories can the race neutralists invoke?

## I.

To begin with, the race neutralists might invoke the notion that *all* racial classifications, the supposedly benign no less than the overtly malign, are "inherently suspect." Now that broad notion itself has a somewhat suspect source: it was given its first explicit articulation in the justly infamous 1944 decision — *Korematsu v. United States*<sup>8</sup> — upholding our government's forced relocation of Japanese-American citizens to concentration camps. Before announcing its result in *Korematsu*, the Supreme Court proclaimed that "*all* legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . Courts must subject them to the most rigid scrutiny."<sup>9</sup> It is noteworthy that the Court was speaking there of restricting "civil rights," and *not* of allocating state-created opportunities for individual advancement. More important still, even in *Korematsu* the Supreme Court held that the *point* of strict scrutiny for racial classifications is to detect whether they reflect "[p]ressing public necessity" or merely "racial antagonism."<sup>10</sup> Racial antagonism, of course, is hardly the motive of today's minority set-aside programs.

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6. This narrow an exception seems to have been rejected by nearly all the Justices in *Wygant*. See *id.* at 1850 (Powell, J., joined by Burger, C.J., and Rehnquist, J.) ("As part of this nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy."); *id.* at 1853 (O'Connor, J., concurring in part and concurring in the judgment) ("the Court has forged a degree of unanimity . . . that a plan need not be limited to the remedying of specific instances of identified discrimination"); *id.* at 1863 (Marshall, J., joined by Brennan and Blackmun, J.J., dissenting) ("the scope of [affirmative action] policies need not be limited to remedying specific instances of identifiable discrimination"). But cf. *id.* at 1857 (White, J., concurring in the judgment) ("The discharge of white teachers to make room for blacks, none of whom has been shown to be a victim of any racial discrimination, is quite a different matter.") (emphasis added).

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

8. 323 U.S. 214 (1944).

9. *Id.* at 216 (emphasis added).

10. *Id.*

## II.

Seeking a sounder source than *Korematsu*, the race neutralists often recur to the first Justice Harlan's dissent in *Plessy v. Ferguson*.<sup>11</sup> Indeed, Solicitor General Charles Fried's argument in *Wygant v. Jackson Board of Education* leans heavily on *Plessy*.<sup>12</sup> The Solicitor General says: "Whether a Plessy is ejected from a railroad coach because he is one-eighth black or laid-off because he is seven-eighths white, the concrete wrong to him is much the same."<sup>13</sup> That may seem counterintuitive, however. For those "wrongs" are *not* self-evidently the same: the actual wrong to Mr. Plessy was a denigration of his mortal worth, a perpetuation of slavery, and a reinforcement of his political exclusion; none of this, certainly, can be said of the hypothesized converse harm. Nonetheless, the race neutralists always offer the obligatory quotation from Justice Harlan: "Our Constitution is color-blind."<sup>14</sup> Those who quote the elder Justice Harlan with such abandon should consider the context of the preceding five sentences in that justly famous dissent:

The white race deems itself to be the dominant race in this country. *And so it is*, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind . . . .<sup>15</sup>

Perhaps it is anachronistic and even unfair to stress too heavily the manifest racism in Justice Harlan's full statement.<sup>16</sup> 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. To say that this particular vice is shared, automatically or presumptively, by race-specific minority set-asides strikes many as far-fetched.

So the question remains unanswered: *Why* would anyone equate laying off a white Plessy to make room for a black worker, and ejecting a black Plessy from a railroad coach to maintain white

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11. 163 U.S. 537 (1896).

12. See Brief of the United States as Amicus Curiae Supporting Petitioners, *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986).

13. *Id.* at 21.

14. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

15. *Id.* (emphasis added).

16. Like most Southern gentlemen of the nineteenth century, Justice Harlan—a former slave owner and originally, an opponent of the Thirteenth Amendment—was surely a product of his time. See FILLER, *John M. Harlan*, in 2 *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS* 1282 (L. Friedman & F. Israel ed. 1969).

supremacy?

### III.

The race neutralists' reply to that question sometimes involves a reference to the "original intention" of the Fourteenth Amendment's Framers.<sup>17</sup> But that argument faces an enormous stumbling block. I am not referring to the often-noted historical fact that those same Framers created a Freedman's Bureau to assist former slaves.<sup>18</sup> As the Solicitor General has pointed out, those pieces of nineteenth century legislation were at least partially, if not exclusively, designed to assist *actual victims* of slavery.<sup>19</sup> I am referring to the fact that we know, with as much certainty as such matters ever permit, that the Framers of the Fourteenth Amendment did not think "equal protection of the laws" made *all* racial distinctions in law unconstitutional; they did not intend, for example, to outlaw racially segregated public schools.<sup>20</sup> It involves quite a stretch, then, to take their original intentions as an argument that all race-specific distinctions, even those designed to facilitate practical equality, are either automatically or presumptively unconstitutional.

### IV.

The necessary response of the race neutralists is, of course, that the Supreme Court was right in *Brown v. Board of Education*<sup>21</sup> — and that the 1954 Court saw the "original intention" more clearly than its 1896 predecessor, when *Brown* rightly held that *all* official distinctions by race are presumptively unconstitutional. But *did* it so hold? That is only the most sweeping and "activist" of at least several equally plausible readings of *Brown*. I will focus upon two such readings, identified as "*Brown-A*" and "*Brown-B*."

*Brown-A* says that, more than a century after the Civil War, *all*

17. E.g., Reynolds, *Individualism v. Group Rights: The Legacy of Brown*, 93 YALE L.J. 995, 997 (1984) ("History faithfully records that the purpose of the [Thirteenth, Fourteenth and Fifteenth] Amendments was to end forever a system which determined legal rights, measured status, and allocated opportunities on the basis of race, and to erect in its place a regime of race neutrality."). Compare Bork, *Original Intent and the Constitution*, 7 HUMANITIES 22 (1986) with Tribe, *The Holy Grail of Original Intent*, *id.* at 23.

18. See Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 761, 772-73 (1985) (in practice, under the 1865 Act, most of the Bureau's programs applied only to black freedmen; in addition, the 1866 Act contained explicitly race-conscious measures).

19. Brief of the United States as Amicus Curiae Supporting Petitioners at 14-15, *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986).

20. See Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 56 (1955).

21. 349 U.S. 294 (1954).

race distinctions must now be banned as inherently "unequal;" in light of modern and more enlightened "values," courts must create a general Fourteenth Amendment right never to be disadvantaged by law on account of one's race, even if this is a right the Fourteenth Amendment's authors would not have endorsed.<sup>22</sup>

*Brown-B* says the Fourteenth Amendment's command of "equal protection of the laws" was *always* intended, at its most basic level, to ban the use of law to subjugate a racial group; we now see, as the 1896 Court did not, that racial segregation by law in public schools and other public facilities in fact subjugated blacks, despite its appearance of symmetry and equality, because it stood for white supremacy and therefore denied the minority "equal protection." Thus we are creating no *new* basic right the Fourteenth Amendment's authors would have rejected; it is not the law that has changed but only our relevant perceptions and understandings.<sup>23</sup>

On the face of it, *Brown-B* seems a more modest, less radical and less strained interpretation than *Brown-A*. Especially when a national, state or local representative body adopts an affirmative action program fully consistent with *Brown-B*, striking that program down as a violation of *Brown-A* seems hard to square with judicial deference to political majorities absent a textually or historically clear constitutional prohibition.<sup>24</sup>

The difficulty deepens when instrumental reasons are added to support the race-neutral position: arguments that racism and race resentments will be exacerbated, and racial stereotypes perpetuated, unless we demand that government be race-blind are properly ad-

22. See, e.g., Reynolds, *supra* note 17, at 997-98 ("The [*Brown*] Court acknowledged with eloquent simplicity that the Equal Protection Clause requires governmental race neutrality in all public activities."); Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 783 (1979) ("during the two years following *Brown* . . . a line of *per curiam* decisions appeared . . . to enact Harlan's view that the Civil War Amendments altogether 'removed the race line from out governmental systems'") (quoting *Plessy*, 163 U.S. at 555 (Harlan, J., dissenting)); Van Alstyne, *supra*, at 790-91 ("from 1954 to 1974, the Supreme Court's unambiguous 'lesson' . . . seemed to be that race was . . . constitutionally withdrawn from the incorrigible temptations of governmental use"); A BICKEL, *THE MORALITY OF CONSENT* 132-34 (1975); Posner, *The DeFunis Case and the Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 25.

23. After I delivered this address and before the discussion which followed, William Bradford Reynolds, the Assistant Attorney General of the United States in charge of the Civil Rights Division, who was presenting an opposing view, announced that the Supreme Court's decision in *Wygant* expressly and powerfully endorsed the Reagan Administration's embrace of *Brown-A*. At the time — and more than slightly on the spot — I responded that I felt a bit like the poor moviegoer in Woody Allen's "Annie Hall" but commented that, until I had had a chance to read the Court's *Wygant* opinion, I could not be certain that Mr. Reynolds had indeed, like Woody Allen, pulled his own Marshall McLuhan out of the air to refute me. Having now read the *Wygant* opinions, I am relieved to report that no Marshall McLuhan has been produced.

24. Cf. J.H. ELY, *DEMOCRACY AND DISTRUST* 171 (1980) ("Whether or not it is more blessed [for white majorities] to give than to receive, it is surely less suspicious.").

dressed to political bodies. For if government's actions violate no constitutional command, why are not arguments about their long-term effects best left to the political process?

## VI.

I can think of only one constitutional command that the race neutralists might invoke to fill this gap and justify their choice of *Brown-A*: a command that law and government must not restrict *any* innocent individual's "liberty," broadly enough defined to include job opportunities and the like, even when such a restriction is justified by a desire to protect others who are equally innocent. And to deprive someone of a benefit, or to impose a burden, merely because of that person's race (and not because of what that specific individual did wrong) violates this command no less when the deprived individual is white than when she is black. But before anyone gravitates to this view, let me make this observation: when the government exercises its power to single out wholly innocent individuals by taking their "private property . . . for public use,"<sup>25</sup> the race neutralists do not object that only the *guilty* should ever have to make such focused sacrifices. Indeed, they often *endorse* such property takings outside the affirmative action context — so long as the "innocents" who have been required to make special sacrifices receive "just compensation" for their losses.<sup>26</sup> In assessing the constitutionality and wisdom of affirmative action plans that impose similarly concrete and personalized costs on "innocent" white individuals — losses of seniority, for example — facing questions of just compensation<sup>27</sup> would offer the race neutralists a more moderate alternative to the extremism of *Brown-A*.

## VII.

So I end with a genuine puzzle: the race neutralists do not in fact put themselves forward, in other respects, as constitutional radicals. First, they purport to respect the historical intentions of the Framers, insofar as those intentions are knowable. Second, they regard basic constitutional norms as alterable only by constitutional amendment, and not by act of judicial improvisation. Third, they advocate deference to political majorities when a constitutional pro-

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25. U.S. CONST. amend. V. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 458-65 (1978).

26. U.S. CONST. amend. V. See generally L. TRIBE, *supra* note 25, at 463-65; Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 HARV. L. REV. 1165 (1967).

27. See, e.g., *Vulcan Pioneers v. N.J. Dep't of Civil Service*, 588 F. Supp. 716, *vacated*, 588 F. Supp. 732 (D.N.J. 1984).

hibition is at best arguable rather than clear. And fourth, they are reluctant to have courts fashion new rights by generalizing, even with the help of the Ninth Amendment, beyond the Constitution's text. Yet on all four of these dimensions, the race neutralists — the constitutional opponents of affirmative action — seem to look the other way.

What has yet to be produced, then, is a cogent explanation of *why* judicial modesty and constitutional strict construction<sup>28</sup> should be abandoned when the subject is affirmative action for racial minorities.<sup>29</sup>

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28. Although I have often criticized a knee-jerk preference for judicial passivity and for a "narrow" reading of open-textured constitutional phrases, I have repeatedly rejected the view that judges purporting to enforce federal constitutional norms need not regard themselves as bound by the Constitution's text, structure and history, but should instead feel free to impose their own political, moral or even legal philosophy upon the more representative branches. My opposition to most of the extant theories of the judicial role — theories that purport to remove doubts about the legitimacy of judicial activism but only within the boundaries offered by their theoretical constraints — has indeed been based largely upon a conviction that such theories, far from limiting courts to a non-controvertible sphere suitable to their institutional place, have the effect of creating an illusion that judges are merely enforcing the will of others and therefore need be less cautious about the necessarily contestible propositions that they enunciate. See generally L. TRIBE, *CONSTITUTIONAL CHOICES* vii-viii, 3-20, 267-68 (1985).

29. In posing this puzzle, I have not speculated about the motives of those opponents of affirmative action I have dubbed the race neutralists. For an account of the importance of carrying the inquiry to that level, see Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1337-41 (1986).

