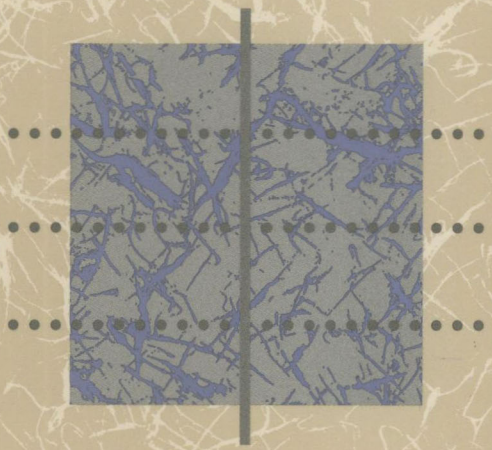
The Color-Blind Constitution



Andrew Kull

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To Dana Kull

Preface

My object in this book is to discover the history of the argument that the United States Constitution prohibits (or should prohibit) racial classification by the agencies of government. That history inevitably implicates, in its most recent episodes, the modern debate over government-sponsored racial preferences; indeed, the perspective it affords on the affirmative-action dilemma accounts in part for the story's compelling interest. But I will discuss affirmative action in order to complete the account of color blindness, not the other way around. While I believe that the history of the color-blind contention illuminates the affirmative-action debate at a number of points, I make no claim that it decides that issue. Short of a demonstration that the Fourteenth Amendment was intended by its framers to require color blindness on the part of government—and the evidence I adduce tends strongly to refute any such contention—it is difficult to imagine how one could hope, by an analysis of what was thought and argued in the past, to conclude the profoundly political question of what we should do *now;* and I shall not attempt to do so.

I offer this disclaimer because a number of people to whom I described this project while working on it plainly assumed that the only reason to write a history of the color-blind Constitution would be to develop history-based arguments against affirmative action. When I responded that my purpose was not so much to advance a thesis as to tell a story, they were visibly skeptical. The reader may share their skepticism. It seems unlikely that anyone would bother to write a history of the color-blind Constitution unless he found the idea an attractive one; and the ideal of nondiscrimination epitomized by the color-blind proposition is obviously antithetical to a policy that recognizes proportional entitlements for racial and ethnic groups. The fact remains that the best arguments against

affirmative action are not to be found in the history of the color-blind idea. Its relative lack of utility for partisan purposes is surely one of the reasons why this interesting history has not previously been explored.

But while history cannot decide the issues, it can illuminate the ongoing (if covert) debate over the policy of racial preferences. The story that follows is rich in "implications," one way and another. Let me suggest two.

Most obviously, perhaps, the history of the color-blind Constitution gives the lie to those who would explain the idea away: who deny the reality of any "color-blind" constitutional tradition, disparaging "race neutralism" as merely a self-regarding strategy devised to resist policies of redistribution. The unavoidable fact is that over a period of some 125 years ending only in the late 1960s, the American civil rights movement first elaborated, then held as its unvarying political objective a rule of law requiring the color-blind treatment of individuals. Not only did nondiscrimination hold out the promise of black social and economic advancement, but the right of the individual to be treated without regard to race was strenuously defended as a moral and political end in itself. The extraordinary shift of a generation ago, in which "civil rights" became associated with a demand for compensatory racial preferences, has yet to be openly avowed. It is the older civil rights, not the new, that prevails in public opinion; and if the public debate over the conditions of racial equality is one day reopened, the adversary with which the modern civil rights movement may ultimately be forced to compromise will be not the old enemy of racism but its own liberal tradition.

From the same history one might draw contrasting lessons. The color-blind proposition was first discovered, and was employed throughout the classical civil rights movement, in the pursuit of a more nearly perfect equality for black Americans. At a time when the law frequently imposed explicit disabilities on racial grounds, the natural starting point was to demand "equality before the law." Antebellum civil rights lawyers, whose claim to legal "equality" was conceded by the courts in a state like Massachusetts, derived the color-blind argument as the means to defend their clients against the inequality that resulted when supposedly equal treatment was provided in segregated facilities. A rule of color blindness, as men like Charles Sumner and Wendell Phillips correctly perceived, was the only means to ensure a perfect legal equality. But it took the nation more than a century to reach the point at which "equality before the law" could reasonably be thought to have been achieved; and only then could

we finally perceive the extent to which a purely legal equality was equality in inadequate measure. It does not follow that policies of racial preference are an appropriate response: liberal egalitarians including Bayard Rustin and William Julius Wilson have argued that they are not. But there is an undeniable irony, which close attention to the color-blind history will only underscore, in applying a rule of nondiscrimination to frustrate measures designed (however imperfectly) to promote equality of condition for black Americans as a group.

I place these observations here, outside my text, because of my conviction that such considerations are largely extraneous to the interest of the story that follows. The history of the color-blind Constitution offers, I believe, a new, rewarding, and frequently surprising perspective on the development of the American constitutional law of race. Its relevance to present-day policy choices lies in the familiar premise that we can better understand what we are doing if we understand how we got here. Whether these claims are made good the reader must decide.

For their kindness in reading all or part of this work at different stages, and for the helpful comments and corrections they offered, I am grateful to Jennifer Arlen, Harold J. Berman, George Forgie, John P. Frank, Richard W. Hulbert, Marc L. Miller, Robert C. Post, Geoffrey R. Stone, Nathan S. Tarcov, and Timothy P. Terrell, as well as to several anonymous readers for Harvard University Press. William Marshall and his colleagues at a Case Western Reserve University Law School faculty seminar gave me many useful suggestions as well as a cordial reception. John F. Burleigh, Jonathan Entin, Jack Greenberg, James Lindgren, Charles A. Lofgren, Phil C. Neal, LaDean Sypher, and Alan F. Westin provided valuable information and assistance in various forms, for which I thank each of them sincerely. I am indebted to Aida Donald and Ann Hawthorne for their perceptive and bracing editorial guidance.

The following narrative incorporates, at two points, the fruits of others' unpublished research. The correspondence in 1829 between Mayor Williams of Savannah and Governor Gilmer of Georgia on the subject of *David Walker's Appeal,* with the governor's subsequent communication to the legislature (reproduced in notes to Chapter 1), were discovered through the tireless efforts of Rhonda Philopoulos, Emory Law School J.D. 1991. Philip Hamburger very kindly brought to my attention the Ohio House and Senate reports of 1834 (discussed in notes to Chapter 2), rejecting petitions

that sought the repeal of state laws making a distinction between persons on the basis of color. My own research has benefited from the assistance of Daniel Conaway, Mary Lynn Hawkins, Sung Hui Kim, Matthew Minelli, Lisa Mantz, and Daniel P. Rader, and from the financial support of the Emory Law School.

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The unfailing help and encouragement provided in connection with this work by Robert Dawidoff are but a small part of what I owe to his generosity and friendship.

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The Color-Blind Constitution

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Introduction

The notion of a Constitution that is "color-blind" is recognizable, even familiar, thanks to the majestic language of John Marshall Harlan's famous dissenting opinion in *Plessy v. Ferguson.* In that 1896 decision, the Supreme Court of the United States upheld the constitutionality of a Louisiana statute requiring that railway passengers be segregated by race. The other Justices found such a regulation reasonable under the circumstances. Harlan, the sole dissenter, denied that reasonableness was the proper standard:

> In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. . . . There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.

The comfortable metaphor stands for an austere proposition: that American government is, or ought to be, denied the power to distinguish between its citizens on the basis of race. A blanket prohibition of racial classifications is impossible to locate in a literal reading of the constitutional text, and it has never been acknowledged by the Supreme Court as a requirement of the "equal protection of the laws" guaranteed by the Fourteenth Amendment. Yet the color-blind idea persists nevertheless, forming a seemingly indispensable theme in the constitutional law of race.

The moral and political attractiveness of a rule of nondiscrimination made it for approximately 125 years the ultimate legal objective of the American civil rights movement. From the 1840s to the 1960s, the profoundest claim of those who fought the institution of racial segregation was that the government had no business sorting people by the color of their skin, regardless of the equality with which they were treated. By some

point in the mid-1960s—the enactment of the Civil Rights Act of 1964 makes a convenient benchmark—this once-radical idea had become part of the governing liberal consensus of American political life. But the achievement at long last of "equality before the law" revealed a harsh truth that the long struggle for civil rights had tended to obscure: the fact that guarantees of legal equality would be inadequate to redress the inequality of condition afflicting black Americans as a group. Almost at once, the field of debate shifted; and the older civil rights ideal has since stood as the most widely voiced objection to the race-conscious methods by which, in the post–civil rights era, a fuller measure of equality has generally been sought.

The arguments for and against affirmative action, except as they may be illuminated by legal history, are not the subject of this book. Its purpose is to explore the history of a legal argument: to locate the sources of the constitutional argument for radical nondiscrimination, "color blindness," and to trace its subsequent manifestations. The events of the last quarter-century are an important part of that story, but they comprise—in the perspective here adopted—only its most recent chapter.

The color-blind argument was a product of the struggle for legal equality for black Americans—"equality before the law," in Charles Sumner's phrase—and it was discovered nearly at the outset. The Massachusetts constitution of 1780 contained, in effect, the guarantee of legal equality that was added to the U.S. Constitution only in 1868. In consequence, issues of racial discrimination that would occupy the nation during the hundred years following the Civil War were addressed in Massachusetts during the twenty years that preceded it. Massachusetts did not exclude free Negroes from coming within her borders, as did Indiana; nor provide public schools for white children only, as did Ohio; nor restrict her black citizens' exercise of the franchise, as did New York. Some cities in Massachusetts, however, provided education for black and white children in separate schools; and a state statute forbade interracial marriage. The arguments that proved significant for the future were developed in the context of the school segregation controversy. Because the Massachusetts constitution promised "equality," the familiar task facing the nation's first civil rights lawyers was to explain that racially segregated schools with theoretically equal facilities nevertheless denied equality of treatment; and that racial segregation had this effect although segregation by age or sex did not.

Seen in retrospect, the exploration of this question by Charles Sumner

(as attorney for the plaintiff) and Chief Justice Lemuel Shaw in *Roberts v. City of Boston*, a school desegregation case decided in 1850, established a number of points that are still being rediscovered. The implications of Sumner's argument and Shaw's decision introduce the principal themes of the color-blind history.

Sumner (and the other lawyers, like Wendell Phillips, on whose ideas he drew) had discovered that a perfect legal equality between persons might require that they not be separately classified at all. The reason lay in the adverse consequences, under certain circumstances, of the bare fact of classification. But such an argument was bound in subtleties, and it was a weak answer to the inevitable rejoinder that "equality" did not mean "identity."

Even more awkward was the fact that segregation of schoolchildren by age and sex was evidently unobjectionable. There is, as Shaw pointed out, scarcely an act of government that does not make or depend on some classification of persons; yet it could not be the case that all citizens of the commonwealth were thereby denied the equality of treatment to which all were admittedly entitled. Simply stated, the right to equal treatment cannot mean a right to the same treatment accorded one's neighbor. Shaw solved this problem in the context of *Roberts* by declaring, in effect, that legal equality consists in affording like treatment to those situated alike. A constitutional guarantee of "equality" becomes therefore, and necessarily, a guarantee of reasonable classification. Shaw found segregation of Boston's primary schools a reasonable policy.

These conclusions (save the last) are among the fundamental elements of the constitutional law of "equal protection"; they were worked out sixteen years before the Fourteenth Amendment was written. For the opponents of segregation, the natural if paradoxical lesson of *Roberts* was that true legal equality was only weakly protected by an explicit guarantee of equal treatment; while the constitutional rule that would best secure an unqualified legal equality was, by contrast, a guarantee of nondiscrimination. At the close of the Civil War, when the nation briefly debated the terms on which civil rights for the Negro would be brought under federal protection, Wendell Phillips and Thaddeus Stevens campaigned strenuously for precisely the latter guarantee. (The vast literature on the framing of the Fourteenth Amendment—the most thoroughly worked ground in American constitutional history—entirely ignores Phillips's efforts to promote an amendment based on nondiscrimination.) Phillips's views, at the time, were as widely publicized as those of any Republican leader; and

the rejection of his ideas in favor of John Bingham's "privileges and immunities," "due process," and "equal protection" carries unmistakable implications for the "original understanding" of the words ultimately adopted.

The Phillips/Stevens Fourteenth Amendment would have prohibited state and federal governments from distinguishing between persons on the basis of race, no more and no less: it would thus have made the Constitution color-blind in so many words. Bingham's sibylline phrases were the conservative alternative: since Bingham's proposal, whatever it meant, promised less interference with those forms of racial discrimination with which the Republicans of the Thirty-ninth Congress felt comfortable. Phillips and Stevens would have prohibited all racial classifications; Bingham wished to prohibit only the unreasonable ones. The difference has dominated our constitutional law of race ever since.

A constitutional standard of "reasonableness" gives the final say to judges. The real choice made by the Thirty-ninth Congress thus lay between a rule permitting the legislature to employ racial classifications in its discretion, subject to judicial veto; and a rule forbidding such classifications altogether. Once the Fourteenth Amendment had been ratified, and its meaning entrusted to the judiciary, proponents of color blindness were in the anomalous position (whether they realized it or not) of asking judges to declare that the judges' own determination of the reasonable uses of race afforded an inadequate safeguard. They had to argue, in other words, that an arbitrary, prophylactic rule was preferable to a wise and flexible judicial discretion that would strike down the bad uses of race while allowing the good ones. Precisely that self-denying assertion forms the heart of Harlan's opinion in *Plessy v. Ferguson,* though it is not usually so understood. Harlan's argument is the more noteworthy, especially from the perspective of the present day, because he nowhere asserts that the use of racial classifications must in every instance be bad policy.

It is not surprising that few judges have wished to relinquish the ultimate power to rule on policy, in this or any other area of their competence. During the 1950s and early 1960s, it is highly doubtful that the members of the Supreme Court foresaw any use of racial classifications that would be thereafter upheld against a claim of unconstitutional discrimination. In an era when the NAACP Legal Defense Fund never lost a case before the Supreme Court, its lawyers repeatedly argued to the justices that the Constitution was already color-blind—as the Court's decisions seemed to indicate—and urged them to declare that politically and historically gratifying fact. What restrained the Court from doing so, well before the advent

of what it would later consider to be "benign" uses of race, was a political reflex that counseled against the gratuitous relinquishment of power.

The Supreme Court today exercises an unconstrained discretion in determining the permissible and impermissible uses of race. By a well-known irony, the rule of constitutional law that grants this authority is the direct legacy of *Plessy v. Ferguson:* a rule that those racial classifications are permissible that a majority of the justices find to be reasonable and appropriate under the circumstances. That rule decided *Plessy v. Ferguson* in 1896, *Brown v. Board of Education* in 1954, the most recent affirmative action cases, and everything in between; with equal authority, it could justify a return to color blindness should the Court someday be persuaded of its advantages. From *Plessy* onward, in fact, it is impossible to identify in the opinions of the Supreme Court of the United States a constitutional law of racial classifications that may usefully be distinguished from the ad hoc policy preferences of a majority of the Court. The chance to establish a rule that would constrain judges, instead of merely authorizing them, died in the Joint Committee on Reconstruction of the Thirty-ninth Congress.

In the era of affirmative action as in the era of segregation, the idea of color blindness stands in radical contradistinction to a constitutional orthodoxy that at every stage of our history has permitted the government to classify by race so long as—by contemporary standards—it classified reasonably. The benefits to be gained from one or another form of racial discrimination have usually appeared self-evident to those who write and administer laws, and the renunciation of this powerful tool of government has accordingly been favored only by a relative few. The conventional view reflects an optimistic political conception: that legislators, subject to the oversight of wise judges, may be trusted to govern in accordance with standards of equality, reasonableness, and justice. Contemporary arguments for affirmative action are politically optimistic—in this sense among others. The color-blind proposition, in Phillips's as in Harlan's version, is the product instead of a radical skepticism about our political capabilities where race is concerned. Because neither legislators nor judges may be trusted to choose wisely in this vexed area, and because we know that racial classifications are often highly injurious, our only safety lies in foreclosing altogether a power of government we cannot trust ourselves to use for good. Such an argument may yet have force; but it must await the outcome of a political debate, still far from resolution, over the utility of the race-conscious policies currently being employed.

The history that follows is legal history, and the story to be told is largely

preoccupied with lawyers and lawyers' arguments. The emphasis on a legal and judicial perspective is not intended to suggest that the history of American ideas about racial equality is best understood in legal terms. The law can be the instrument, but never the source, of social change; the most momentous legal judgments only give effect to conclusions that others have already reached. As it happens, however, the color-blind conception is notably the work of lawyers, and the characteristic product of a lawyer's effort to obtain a result for a client. Like every other appeal to constitutionally protected rights, the argument attempts to prevail over an adverse political consensus by reading the law to deny to those who exercise power the discretion to act as they see fit. The party that dominates the consensus, by contrast, has no interest in constitutional constraints; so it is hardly surprising, from this point of view, that the adoption of civil rights objectives as federal policy in the 1960s was followed so quickly by the repudiation of the color-blind ideal. An argument designed to restrict the power of government to harm one's client loses its attraction when one's client begins to govern.

Even within the narrow perspective of a legal history, the recurring argument for color blindness has been only one strand of a broader argument for racial equality. The present attempt to isolate the color-blind argument is new, and until relatively recently it might not have been comprehensible. So long as black citizens were denied a simple legal equality, it would not have occurred to many people to distinguish an argument against racial classifications from an argument in favor of equal treatment. Both sought the same practical ends, and the former could usually be seen (correctly) as a tactical variation on the latter. So long as enforcement of the antidiscrimination principle served to correct the nation's historic racial inequality, the contours of this particular contention could not, in fact, be accurately distinguished from the surrounding argument for racial justice. The advent of affirmative action, by contrast, has caused the old argument for color blindness to stand forth in sharp relief, while inviting new attention to its historical rationale.