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ARTICLE: All Things Being Equal: The Promise of Affirmative Efforts to Eradicate Color-Coded Inequality in the United States and Brazil

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BIO:

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In addition to her law school teaching experience, Ms. Washington has taught Torts for the past six years as an Instructor in the Charles Hamilton Houston Preparatory Institute, which provides prospective law students of color with the skills and conceptual understanding of the law to ensure that they excel upon admission to law school. She has also worked closely with the faculty and administration at Howard University School of Law designing programs geared towards improving law graduates' performance on the essay portion of the Bar Examination.

This essay was inspired by her participation in the 2007 South-North Exchange on Theory, Culture and Law, which was held in Rio de Janeiro, Brazil. This article also formed the basis for a presentation in May 2008 at the EMARF Forum in Rio de Janeiro Brazil.

SUMMARY:

... Part III of this article contrasts colorblindness in the United States and Racial Democracy in Brazil and addresses how racial and color-based inequality are both masked and manufactured at the intersection of racial polarity and resistance to an acknowledgement of the legal relevance of race in both nations. ... Despite the historical realities of pervasive de jure and de facto racial discrimination, which produced significant color-coded social, economic and political disparities, the colorblind ideology ignores institutionalized structures that maintain the inertia and effect of racial discrimination. ... Despite different orientations towards "difference," both colorblindness and Racial Democracy subvert substantive equality in pursuit of formal equality, thereby maintaining the status quo of racialized inequality, as constructed by the white-to-black color hierarchy. ... His acknowledgment of racial inequality and recognition of race awareness as a prerequisite to substantive equality marked a significant departure from previous policies dictated by the myth of Racial Democracy. ... An educational diversity focused project that taps into Brazilians' relative comfort with cultural heterogeneity, coupled with curricular and media reforms that embrace and reflect the value of Afro-Brazilians, their culture and contributions may be able to disrupt normative whiteness and achieve some measure of substantive equality.

TEXT:

[*1] Introduction

The contrasted contexts of the United States and Brazil provide an intellectually fascinating framework for the consideration of race conscious remedies to racial inequality. "Any comparative examination of race relations hinges on the question of racial inequality: in what ways are blacks disadvantaged in relation to whites in each society . . . ?" n1 A casual observer may compare the United State's insistence on racial assignment and history of *de jure* and *de facto* racial discrimination with Brazilian historical aversion to racial classification and history of *de facto* [*2] discrimination and conclude that race and color enjoy more conceptual and legal relevance in the former context than in the latter. n2 This conclusion, in turn, would inform a judgment as to the relative necessity and efficacy of the administration of affirmative action in both nations. Instead of using the apparent differences between legal definitions of race and color in the two countries n3 as a reference point for comparing the utility of affirmative action as a means of eradicating color-coded inequality, this article uses as its point of departure, the similar ways that racial and color-based inequality have been manufactured in the United States and Brazil. n4 "Because they share the same battle against insidious systems of racial hierarchy, it is sensible for both Americas to . . . focus upon the commonality of the historical legacy of slavery and its outgrowth in the continuing societal efforts to . . . maintain privilege" n5 "North and South America . . . share a societal use of segregation for the promotion of supremacy. The segregation of education has been a key to this agenda of privilege." n6 Within the context [*3] of education, n7 this piece treats affirmative action as a crucible, revealing racialized narratives, polarities, hierarchies and constructs, which have created and maintained the color-coded inequality that characterizes both American and Brazilian social, political, and economic realities.

Affirmative action is under attack in the United States as constitutionally suspect and politically passe. n8 In *Parents Involved in Community Schools v. Seattle School District No. 1*, n9 the United States Supreme Court's most recent opinion on the use of affirmative action in the education context, a majority of the Court voted to strike down the use of race conscious school assignment programs designed to remedy the effects of historical and existing segregated housing patterns, achieve the pedagogical benefits offered by a racially diverse student body, and equalize educational opportunities for K-12 students. n10 There is significant disagreement on the Court as to what constitutes the constitutional and appropriate aims of affirmative action-- remediation, racial diversity, [*4] educational diversity, racial integration, democratization, or socialization. n11 However, colorblind ideology (i.e., the notion that race has no meaning as either identity or construct), n12 which the plurality in *Seattle School District* embraced, instructs that non-racialized remedies provide the only constitutional cure for racial discrimination. Chief Justice Roberts closes the majority opinion in *Seattle School District* with the statement, "The way to end discrimination based on race is to stop discriminating based on race," n13 an observation which indicts affirmative action, a race-conscious remedy to substantive inequality, as constituting and perpetuating racial discrimination and characterizes affirmative action as the functional equivalent of the *de jure* discrimination that makes it necessary. Using seductively simple logic, Chief Justice Roberts prioritizes formal equality over substantive equality--a paradigmatic choice with which this article is principally concerned. n14

[*5] A substantively different construction of affirmative action, called by the same name, is being implemented in Brazil. Brazil has historically been described as a Racial Democracy, a national ideology that shares with colorblindness a resistance to the legal relevance of race. n15 As this ideology yields to a national narrative that recognizes color-coded realities, n16 the Brazilian government is utilizing the most aggressive form of affirmative action, quotas, to both remedy significant racialized social, economic and political disparities and to achieve substantive economic, social and political equality for its citizens. Brazilians opposed to affirmative action practices and policies, echoing objections raised by affirmative action detractors in the United States, charge that racial assignment and classification for the purpose of including some and excluding others (i.e., the legalization of racial classifications) is divisive, n17 destabilizing, and impossible in a nation that has existed without categorical racial identities. n18 This article considers whether a diversity [*6] focused affirmative action policy would provide a more politically palatable framework for race-conscious governmental action, and offer a justification that is more concentric with the Brazilian orientation towards difference, than a remediation focused policy.

The growing awareness of racial disparities as a catalyst to and justification for efforts to achieve substantive equality in Brazil and the growing reticence in the United States to the use of race conscious means of facilitating substantive equality, provide a unique opportunity for a comparative analysis of the ways in which racism and colorism n19 construct social, economic and political inequality for Afro- Brazilians and Black Americans n20 and the extent to which affirmative action can provide an effective vehicle for reform in both nations. n21 Part I of this article begins with an examination of the history and evolution of the significance and uses of race and color that have informed the current climate of race-blindness in the face of racial inequality in both nations. This section explores the ways in which the legend of Racial Democracy continues to pervade perceptions of race and challenge efforts to remedy racial inequities

in Brazil and the ways in which the ideology of colorblindness has provided a jurisprudential framework inherently hostile to race-conscious efforts to achieve substantive equality in America.

Part II of this article highlights racial disparities in both nations and identifies racial polarity, which expresses fixed and diametrically opposed valuations of whiteness and blackness, reflected in white-to-black color hierarchies that operate in both the United States and Brazil, as their chief [*7] architect. n22 In keeping with this theme, race and color are considered throughout this piece within a binary (black/white) framework, which underscores the central thesis that black-white racial polarities, in concert with normative whiteness, create substantive social, economic, and political inequality in both countries. n23

Part III of this article contrasts colorblindness in the United States and Racial Democracy in Brazil and addresses how racial and color-based [*8] inequality are both masked and manufactured at the intersection of racial polarity and resistance to an acknowledgement of the legal relevance of race in both nations. This section of the article then focuses on the prospects of a Brazilian affirmative action project based on educational diversity and its transformative possibilities for creating substantive equality. It highlights how Brazil's Constitution and its affirmative action legislation accommodate and instigate responses to racial inequality that challenge normative whiteness. This article ends on an optimistic note, concluding that an educational diversity focused affirmative action project may be a more effective tool with which to disrupt racial polarity in Brazil and dismantle the consequent color hierarchy that creates and perpetuates substantive inequality.

Part I: A Brief History of Race

A. Tracing the Brazilian Color Line

While Brazil and the United States share a history of the enslavement of African captives and the conquest of indigenous populations, n24 the two nations had very different slavery and post-slavery experiences. n25 From 1532 to 1888 Brazil imported an estimated 4 million African captives, earning it the distinction as the largest slave economy in the world. n26 "The centrality of slavery to Brazil's economy gradually diminished with the ending of the slave trade in 1853." n27 The enactment of the Law of the Free Womb in 1871 hastened the end of slavery by freeing the children of slave women when they turned 21 years of age. n28 By 1888, [*9] when Brazil became the last nation to abolish slavery, n29 its slave population outnumbered whites by almost 2-to-1. n30 Foreshadowing Brazil's reputation as a Racial Democracy in which blacks, mulattoes and whites lived under conditions of equality; the key author of the 1891 Constitution "ordered the burning of all documentation related to the slave trade, thereby erasing what he considered to be a shameful chapter of Brazil's history" n31

The prospect of freedom for the slaves inspired insecurity among white Brazilians, and created the need for structures and policies that would maintain their status as the ruling elite. n32 Responding to this exigency, the Brazilian government engaged in large scale immigration of European whites n33 and encouraged miscegenation in order to improve the racial balance between blacks and whites. n34 The "whitening" of the Brazilian population, n35 through miscegenation, was believed to have a civilizing [*10] effect on the Brazilian population of observable African ancestry n36 and reinforced normative whiteness (i.e., whiteness as the value standard). n37 A popular slogan of the day, "Marry White to Improve the Race," n38 captured the pervasive sentiment.

Gilberto Freyre, credited with popularizing the idea of Racial Democracy in the 1930s and 1940s, n39 studied at Baylor University in Texas in the early 1900s and reacted with horror to the Jim Crow institutions and practices he witnessed during his visit, including a lynching. n40

The shock of Freyre's encounter with the racial hostility and segregation of the United States led him to construct a vision of Brazil's past (and, by extension, its present and future) that proved deeply appealing to many Brazilians. Scientific racism and its Brazilian variant, the whitening thesis, had viewed Brazil's history of slavery and miscegenation, and the racially mixed population which was its legacy, as shameful obstacles that had to be overcome if Brazil were to enter the community of civilized nations. Freyre . . . rehabilitated that past, recasting it as the basis of a new national identity independent, for the first time in Brazilian history, of European norms and models. . . . Freyre's writings thus became the basis of a new, semi-official ideology propagated in public proclamations, schools, universities, and the national media. n41

[*11] In Freyre's ideological construct, "miscegenation became the motor behind Brazilian racial dynamics and Racial Democracy," n42 but to be sure, miscegenation also ensured the creation and maintenance of color-based stratifications among non-white Brazilians that would discourage the adoption of a unified racial or color-based identity, centered on similar experiences of racial or color-based subordination. n43 Despite Freyre's declaration of independence from European norms, his version of Racial Democracy, which persists today despite credible challenges to its legitimacy, n44 did not disengage the norm of white supremacy, it merely obscured it. n45 Nor did the ideology correct social, economic and political disparities between Brazilians. n46 "The explanations of social inequalities earlier attributed to the races were replaced by explanations that used the concept of culture, thereby leaving intact the notion of white or European culture and civilization's superiority over black and African culture and civilization." n47 Importantly, miscegenation did not facilitate integration. While there were some laws that explicitly established racialized policies in Brazil, it was *de facto* segregation that choreographed segregation in the social sphere and calcified the divergent social, economic and political realities that white Brazilians and Afro-Brazilians continue to experience. n48

[*12] Today the Brazilian racial mosaic is comprised of a number of indeterminate color categories -- as many as 300. n49 The official color categories used by the Brazilian census are branco (white), pardo (mulatto / brown), and preto (black). n50 Despite the fact that Brazil is home to the largest black population outside of Africa, n51 only 7% of Brazilians self-identify as black. n52 "The whitening ideology has posed a demographic quandary by pressuring census interviewees to declare themselves in the lighter of the three official categories." n53 Forty-five percent of Brazilians identify as Afro-Brazilians, a racial-political classification that includes both black and brown Brazilians. n54 The meaning of race in Brazil is socially, economically and politically constituted, capricious, and operates most perceptibly as people negotiate within the context of their environments. n55 Neither the pervasive practice of miscegenation in Brazil, which allows most Brazilians to claim a combination of Portuguese, African and indigenous ancestry, nor the absence of *de jure* segregation has forestalled or eliminated substantive inequality between white Brazilians and Afro-Brazilians. n56 Notwithstanding the ambiguous meaning of color [*13] and race, it is clear that Afro-Brazilians are disadvantaged socially, economically, and politically, and that white Brazilians are correspondingly advantaged. n57

The concept of Racial Democracy continues to inform explanations for the existence of racial inequality in Brazil. "[R]eports of the ideology's death are greatly exaggerated. Its critics, vocal and effective though they may be, remain a minority in Brazilian society. . . . Thus Racial Democracy, and its dark underside of frank, unreflective racism, remain much in evidence in Brazilian society at both the elite and popular levels" n58 The mythology insists upon both an individualist explanation for color-coded disadvantage and the absence of racial discrimination. n59 It does not ignore the reality of political, social and economic inequities; rather, it acknowledges their existence but realizes them as a consequence of individual action or inaction. n60 "Therefore, it [is] concluded that if a black individual was differentially unsuccessful in improving his or her social position, that individual was primarily at fault." n61 The traction that the Racial Democracy myth continues to enjoy among a large cross-section of the Brazilian population generates substantial resistance to the acknowledgement of the structural causes of racial inequities and to [*14] transformative efforts to remedy existing substantive inequality. n62 The persistent attribution of racialized disparities to individual failings rather than to structural realities is proving to be a formidable obstacle to implementation of an affirmative action project focused on achieving substantive equality in Brazil. n63

B. The Color of Things in the United States

As has been noted, the United States shares with Brazil a history of the enslavement of millions of African captives and the post-slavery challenge of defining the freed slave's standing relative to that of his former master. n64 In the United States, miscegenation, n65 a feature of both slavery and post-slavery culture, was perceived as a threat to the maintenance of the white ruling class. n66 This threat was mitigated by adherence to the hypo-descent rule n67 (known as the one-drop rule), which legally classified anyone [*15] with African ancestry as slave or "colored", n68 no matter how imperceptible the phenotypical manifestation or how minute the quantity of African blood. n69 In adherence to normative whiteness, any white ancestry was believed to have a civilizing effect on the nature and character of a colored person, n70 but the ratio of white to African blood in an individual did not inform their racial classification. n71 Anti-miscegenation laws across the United States, the last of which was invalidated in Alabama in 2000, n72 and the hypo-descent rule conspired to allow for the continued "purity" of the white race n73 and secure positions of privilege for its membership. Post-slavery *de jure* and *de facto* segregation complemented this construct by [*16] calcifying the social, economic and political divide n74 between those the State classified as white and those the State classified as black. n75

In 1896, in *Plessy v. Ferguson* n76 the "separate but equal" doctrine, a legal fiction used to justify *de jure* discrimination, received its constitutional imprimatur from the Supreme Court. n77 Interestingly, while the *Plessy* majority revealed the limits of the Fourteenth Amendment n78 as a vehicle for the provision of substantive equality for newly freed slaves, Justice Harlan, [*17] in his dissent, contributed to constitutional lore the characterization of the U.S. Constitution as colorblind, which would become a significant impediment to the achievement of substantive equality. n79 Separate but equal remained the law of the land, and "the role of law in maintaining the nation's systemic racial hierarchy was unambiguous (citation omitted). The law sanctioned a clear system of white supremacy and black subordination. . . ." n80 The U.S. Supreme Court's unanimous decision in *Brown v. Board of Education* n81 delivered a crippling, though not fatal, blow to the armor of segregationist state policies and practices, n82 but did not disrupt the white supremacy that underwrote racial inequality. n83 The *Brown* Court's acknowledgement of the inherent inequality of racial segregation in the educational context, n84 despite the languorous implementation of its desegregation mandate n85, ushered in an era of increased activism in furtherance of substantive equality for African-Americans. The Court would extend the central holding of *Brown* to all forms of *de jure* segregation. n86 In 1961, six years after *Brown* was decided, President John F. Kennedy issued Executive Order 10925, which directed government contractors to "take affirmative action to ensure that applicants are employed, and employees are treated during employment, without regard to their race, creed, color, or national origin." n87 Three years later Congress enacted the Civil Rights Act of 1964, which provided for desegregation in public accommodations, n88 [*18] prevented discrimination in federally funded activities and programs, n89 and broadly made prohibitions against racial discrimination applicable to private sector employers. n90 To reinforce efforts to realize equality for racial minorities, President Lyndon B. Johnson issued Executive Order 11246 in 1965, which prohibited discrimination on the basis of race, color, religion, and national origin by recipients of federal contracts and subcontracts and required federal contractors to take affirmative action to promote equal opportunity for minorities. n91 The affirmative action project was off to a promising start. However, in the aftermath of *Brown* judicial interpretations of the equality mandate in the Equal Protection Clause n92 and implicit in the *Brown* holding would impair the effectiveness of race conscious efforts to remedy substantive inequities in three significant ways: 1) by treating *de jure* discrimination as a prerequisite for remedial state action 2) by characterizing *de facto* discrimination as constitutionally irrelevant and 2) by treating race-conscious, remedial state action as the equivalent of racially discriminatory state action for constitutional purposes.

The Equal Protection Clause, which provides the constitutional framework within which race-conscious efforts at remediation are tested, can be interpreted in two dramatically different ways and yield correspondingly drastically different outcomes with respect to creating equality. n93 Professor Robin West explains,

The Equal Protection Clause can have "a substantive meaning (or "substantive equality") and a formal meaning (or "formal equality"). . . . Under the formal definition, any state differentiation between whites and blacks is *prima facie* irrational -- the two groups are 'alike' for legal purposes and therefore should be treated alike. Race can't 'make a difference.' Benign distinctions between races are no more rational than malicious distinctions. Therefore, . . . affirmative action policies will often be unconstitutional, absent a strong showing of identified past discrimination that [*19] would constitute a difference between the two groups, and hence provide a justification for differential treatment (citation omitted). Under a substantive definition, however, affirmative action policies are surely permissible and may even be required (citation omitted). Whites generally are dominant in this society, blacks are generally subordinate, and the Equal Protection Clause's antisubordination mandate requires that states undertake affirmative obligations to equalize the two. Thus, what is clearly prohibited under one interpretation of the Equal Protection Clause is clearly permitted and perhaps required under another. n94

The Court's reading of *Brown* through a formal equality lens distorts the equalization emphasis of the case, which prescribes the provision of equal educational opportunities and resources, and severely diminishes the competency of race-conscious practices and policies to achieve substantive equality. n95 While a formal equality interpretation of the Equal Protection clause is preoccupied with the means by which inequity is produced (i.e., distinguishing between *de jure* and *de facto* discrimination), a substantive equality interpretation is focused upon the experience of inequality, with less concern for its causes. n96 Despite optimistic beginnings for affirmative action, "the Supreme Court's interpretation of the Equal Protection Clause . . . [*20] moved fairly consistently away from a substantive definition and toward a formal definition." n97

The Supreme Court's 1974 decision in *Milliken v. Bradley* n98, in which it established *de jure* discrimination as the *sine qua non* of race conscious remedial state action, effectively brought to an end twenty years of successful, post-

Brown, desegregation litigation. This analytic sleight of hand substantially impaired the ability of the State to address the substantive inequities experienced by Black Americans. Four years later, in *Univ. of Cal. v. Bakke*,ⁿ⁹⁹ the Supreme Court delivered another debilitating blow to affirmative action efforts in the education context by interpreting the Equal Protection Clause to regard race conscious practices targeting racial discrimination and race conscious practices facilitating racial discrimination with an equally jaundiced eye.ⁿ¹⁰⁰ Drawing equivalence between benign and malignant uses of race, justified the Court's use of the most exacting standard of constitutional reviewⁿ¹⁰¹ without distinguishing between state action designed to remedy inequality and state action that perpetuates inequality. The false symmetry that justified the Court's holdings in *Bakke*, and later in *City of Richmond v. Croson*,ⁿ¹⁰² prioritizes equality of process over equality of result, reveals the effectiveness of strict scrutiny as a tool of colorblind jurisprudence, and erects an impenetrable obstacle for state action designed to create substantive equality.ⁿ¹⁰³ As applied, "the Equal Protection Clause does not require an end to subordination . . . Affirmative action aimed at ending subordination is not [*21] only not required by the [F]ourteenth [A]mendment, it is prohibited by it."ⁿ¹⁰⁴

Justice Powell's opinion in *Bakke*, did provide a glimmer of hope for affirmative action efforts. The recognition of educational diversity (i.e., capturing the educational benefits that flow from racial heterogeneity in the classroom) as a constitutionally compelling state interest provided a life line to affirmative action efforts.ⁿ¹⁰⁵ In 2003, in *Grutter v. Bollinger*,ⁿ¹⁰⁶ a slim Supreme Court majority acknowledged the continuing, but "unfortunate[]" relevance of raceⁿ¹⁰⁷ and upheld the constitutionality of educational diversity, though limiting its use to 25 years.ⁿ¹⁰⁸

The diversity rationale provides the following justification for race conscious admissions practices and policies: higher order thinking is informed and enhanced by the cognitive disequilibrium that results when one is forced to reconcile divergent experiences, and because society has created and maintained divergent racial realities, classrooms reflective of diverse racial realities promote [enhanced] learning outcomes. . . . The Court reasoned that experiential heterogeneity, afforded by students who have experienced divergent and coeval racial realities, is essential to the synergy inherent to higher order thinking—a constituent element of legal education.ⁿ¹⁰⁹

[*22] The Supreme Court did not, however, adequately distinguish educational diversity centered affirmative action from its remedial counterpart.

While, concededly, racial diversity shares with remedial affirmative action a consequential increase in racial heterogeneity in classrooms across the nation, the focus of the diversity rationale is neither retributive nor restorative (citation omitted). As distinguished from [remedial] affirmative action programs and policies, diversity's underlying rationale is pedagogical and its orientation is prospective (citation omitted); it seeks to achieve an educationally relevant end. The racial diversity rationale is education policy that contemplates as its chief aspiration the provision of a learning environment enriched by the admission of a student body with multifarious experiences (citation omitted).ⁿ¹¹⁰

The diversity rationale offers a conception of the racial experience and racial differences, orchestrated by *de jure* and *de facto* discrimination, as valuable, rather than as something that requires a curative response; however, its future as a constitutional justification for race-conscious state action is not secure.

Seattle School District provides the U. S. Supreme Court's latest word on affirmative action. "The plurality opinion, authored by Chief Justice Roberts, turned to the rhetoric of colorblindness to reach its conclusion . . ." ⁿ¹¹¹ that the school districts' use of race based school assignment programs failed to meet the demands of strict scrutiny.ⁿ¹¹² The plurality opinion curtailed the applicability of *Grutter's* holding to elementary and secondary schoolsⁿ¹¹³ and read *Brown* solely as an antidiscrimination case without acknowledging the substantive equality emphasis of its holding.ⁿ¹¹⁴

[*23] For more than fifty years, *Brown* has been emblematic of substantive equality guarantees provided by the Equal Protection Clause in the education context.ⁿ¹¹⁵ Though Chief Justice Roberts acknowledges the relevance of the opinion to the decision in *Seattle School District*,ⁿ¹¹⁶ he ignores what Justice Kennedy refers to in his concurrence as "Brown's objective of equal educational opportunity,"ⁿ¹¹⁷ which is reflected in the most oft cited language from that opinion, "separate educational facilities are inherently unequal."ⁿ¹¹⁸ To read *Brown* as enforcing a substantive

equality mandate inherent in the Equal Protection Clause would require the plurality to depart from the orthodoxy of colorblind ideology, which embraces formal equality as its thesis. It would have to acknowledge the causal connection between current conditions of substantive inequality and historical and continuing racial discrimination. Instead, existing inequality is attributed to class differences and private, societal discrimination, without an acknowledgement that *de jure* discrimination constructed *de facto* discrimination and present-day conditions of substantive social, economic and political inequality. n119 The plurality's treatment of *Brown* as merely an [*24] anti-discrimination case rather than as a substantive equality case, n120 essentially renders affirmative action impotent to either correct racial inequality or create substantive equality in the United States.

Part II: Colorblindness and Racial Democracy: Masking and Manufacturing Inequality

A. The Blind Creating the Bind

It is not difficult to discern how a view of race through a colorblind lens would lead to a distortion of *Brown* and a focus on formal equality. n121 Despite the historical realities of pervasive *de jure* and *de facto* racial discrimination, which produced significant color-coded social, economic and political disparities, the colorblind ideology ignores institutionalized structures that maintain the inertia and effect of racial discrimination. n122 "Colorblindness as a moral ideal embodies a vision of a society in which race plays no role. The attainment of the moral ideal of colorblindness means that race would not constitute a meaningful social, political, or legal category and would not be the basis for either institutional or individual decision making. The moral ideal of colorblindness reflects the view that race is a morally irrelevant and therefore immaterial . . . characteristic of an [*25] individual." n123 Colorblind theorists ground their assertion as to the legal irrelevance of race, in their interpretation of the Fourteenth Amendment as establishing a constitutional limit on the use of race-conscious practices to remedy racial inequality. n124 Despite the prevalence of racialized disparities in the United States, colorblind theorists insist that racial inequality does not result from racial discrimination.

Racial and color-based inequality in the United States can be observed and understood as an individualist phenomenon or as a structural phenomenon. The individualist conception of racial inequality identifies the individual as the architect of the racial disparities she experiences. In contrast, the structural conception of racial inequality acknowledges the existence of structural and institutional forces that conspire to create and perpetuate the material inequality an individual experiences. Colorblind ideology, like the Brazilian myth of Racial Democracy, n125 subscribes to the individualist perspective, n126 thereby legitimizing inequality as a consequence of individual choice informed by cultural realities, and denying the existence of past and present racialized experiences and systemic realities. n127 By framing inequality as the product of individual choices that create experiences of disadvantage, rather than structurally constructed patterns dictated by the deeply ingrained legacy of white supremacy, n128 colorblind theorists position affirmative action as antithetical to equality (i.e., treating everyone the same), rather than as essential to the [*26] achievement of substantive equality (i.e., manifest equalization of material social, economic, and political realities). n129

A critical consideration of colorblind ideology requires consideration of whether it is a means of achieving equality or dismantling inequality, or an end unto itself. n130 Putting aside the desirability or realizability of colorblindness, does the ideology aspire to disable racialized and colorized constructs so that they no longer create inequality, or is its aim simply to eliminate all conceptions of color and race, without regard for the inequality that results from their operation as constructs? n131 Colorblind adherents opt for the status quo, n132 with all its color-coded inequity, over race-conscious change that could result in greater social, economic and political equality in the United States, even though the latter course of action could ultimately lead to a real, rather than aspirational, lessening of the significance of race and color. n133

[*27] B. Shared Racial Realities: Substantive Social, Economic and Political Inequality in the U.S. and Brazil

Despite the contrast between racial conceptions in the United States and the kaleidoscopic character of color categories in Brazil, it is the experiential realities constructed according to one's whiteness or blackness and the resistance to recognizing the character of these realities as color-coded that the two nations share. n134 These social, economic and political realities provide for racial or color-based identities which are reflective of common experiences of social, economic, and political inequality. In both the United States and Brazil people with darker skin and African features (i.e., African-Americans and Afro-Brazilians) experience higher rates of incarceration, poverty, unemployment, substandard education, subpar health care, and political disenfranchisement than their white compatriots. n135 [*28] Social, economic and political indicators in both countries reflect divergent, racialized realities that result in more privileged expe-

riences for those who are white and less privileged experiences for those who are not white. The comparative project reveals that though conceptions of race and color evolved along different trajectories in the United States and Brazil, a white-to-black color hierarchy, rooted in the orthodoxy of white supremacy, has faithfully constructed substantive, color-coded inequality in both nations. n136

Whiteness and blackness enjoy similar social and cultural meanings in Brazil and the United States. n137 An exploration of the lexicon and iconography of race in both nations reveals how the use of language, cultural norms and media portrayals of blacks and whites reinforce stereotyping by coding and communicating negative associations with blackness and positive associations with whiteness. n138 To be referred to as [*29] black in Brazil is generally regarded as an insult; n139 and though in America blacks embraced and redefined their "blackness" in the imagery of empowerment during the 1960's, in 2006 little black girls still preferred a white doll over one who shares their features. n140 The 'black as bad - white as good' motif produces a cultural and social norm that operates in both countries to justify and cultivate social, political and economic privilege for those who are classified as white and corresponding disadvantage for those who are not classified as white.

C. Racial Hierarchies and polarities in the U.S. and Brazil

The similarity between divergent realities experienced by black and white Brazilians and Americans is not coincidental. n141 The concordance provokes the following question: despite significant differences between the means by which the two countries have constructed and maintained color-based, hierarchical structures how can they produce such parallel disparities between their respective white and black citizens? The response to this [*30] inquiry identifies racial polarity (i.e., normative whiteness as a fixed construct anchoring one end of the color continuum and blackness anchoring the other end) as the architect of the generally disadvantaged status of black people and the generally privileged status of white people in both countries. Despite differences in the identity construct of race and color in Brazil and the United States, it is clear that the color continuum, along which constructions of blackness and whiteness serve as polar opposites and present diametrically opposed conceptions of value n142 persists as the governing reality in both nations.

"[B]oth societies were actively engaged in the African slavetrade, and skin-color in both societies continues to affect social mobility to the disadvantage of citizens with varying degrees of African descent (citation omitted)." n143 Both countries have fixed conceptions of black and white, which bookend the color continuum and fix a color construct that prioritizes and privileges whiteness over blackness. n144 As long as this polarity exists, racial and color-based discrimination will continue to perpetuate the social, economic and political inequities experienced by Afro- Brazilians and African Americans, thus creating an experiential based racial identity, without regard for whether the nations or its citizens acknowledge the racial polarity and the norms of white supremacy and black inferiority it enshrines. n145

Emphasizing the differences between how the United States and Brazil make sense of the shades of grey that lie between the white and black poles of the color hierarchy serves merely to obscure the fact that white supremacy continues to construct social, economic and political inequities informed by how closely one's skin color aligns them with one pole of the color continuum or the other. As long as black and white serve as diametrically opposed bookends of the color hierarchy, racial and color-based [*31] subjugation and domination will continue to manufacture substantive inequality in both Brazil n146 and the United States. As long as the two nations remain blind to the norm of whiteness that grounds racial polarity, they will remain ignorant of and unresponsive to the inevitability of inequality for those at the dark end of the color continuum. Any affirmative action project that does not disrupt the controlling color hierarchy and the foundation of white supremacy upon which it is built cannot successfully achieve substantive equality. n147

Colorblindness and Racial Democracy share a common aversion to an acknowledgement of race and color as identity relevant or operative in the construction of social, economic, and political inequality. The emphasis of this essay is not to explore whether race and color are "real" concepts; rather, it is to examine whether they are "real" constructs (i.e., whether race and color engineer "real" social, economic and political experiences) in Brazil and the United States. Those who subscribe to the ideologies of colorblindness and Racial Democracy generally acknowledge inequality along the social, political and economic divide but are reticent to identify these circumstances as an effect of racial or color-based discrimination, despite the uniform prevalence of certain "colored" people comprising the ranks of those experiencing the down side of those divides. n148 In this way, both ideologies operate as both a sword, perpetuating inequality by ignoring racialized realities, and as a shield, insulating inequality from critique as a manifestation of racial and color based discrimination. Colorblind adherents often regard race and color as aesthetic concepts without substantive significance. While concepts of race and color may be incompetent as identity determinant, as the colorblind assert, as

constructions they are not impotent. In both countries, race and color, like gravity, operate even if one does not see them. n149

[*32] Notwithstanding rhetorical changes to the racial narrative of both countries--nonracialism and Racial Democracy in Brazil, and integration, diversity and colorblindness in the United States-- the white-to-black color hierarchy that perpetuates racial and colorized inequality endures. Both colorblind ideology in the United States and Racial Democracy in Brazil profess an allegiance to an equality norm and prize the appearance of equality over its achievement. n150 Adherents of both ideologies prioritize the equality ideal -- that equality commands the irrelevance of race and color, over equality of result-- that equality requires a society of equals where neither color nor race are meaningful, experiential determinants. Accordingly, the aspiration (i.e., that race and color have no meaning) is mistaken for the reality, despite historical and present-day racial inequality confirming the continuing relevance of race and color in both Brazil and the United States.

Though colorblind ideology and Racial Democracy share the professed inability to appreciate the racialized character of inequality, they arguably differ in terms of how they reconcile "difference" and "equality." In the United States, colorblind theory embraces the belief that homogeneity is a prerequisite for equality, and the attainment of "sameness" is measured by the proximity to the norm of whiteness. n151 Any acknowledgment of racial difference or differential racial experience is perceived to threaten both the principle and achievement of formal equality. Accordingly, any use of race, whether it is to remediate harm or facilitate educational diversity is characterized as promoting inequality. In Brazil, where miscegenation has created a multi-racial, but unequal society, and where the national narrative embraces racial heterogeneity as a cultural commodity "difference" does not necessarily threaten equality. "In the sociology of race relations, Brazil has consistently occupied the position of that exceptional multiracial space, where miscegenation had prevented the operation of *race difference* as [a] mechanism of exclusion." n152 Rather, it is the attribution of inequality to racial or color discrimination that challenges the colorblind thesis at the [*33] heart of Racial Democracy. n153 Despite different orientations towards "difference," both colorblindness and Racial Democracy subvert substantive equality in pursuit of formal equality, thereby maintaining the status quo of racialized inequality, as constructed by the white-to-black color hierarchy. It is possible, however, that Brazil's orientation towards difference may allow for educational diversity, which embraces a conception of difference as valuable as its central thesis, to serve as a more effective tool for the construction of substantive equality.

Part III: Affirmative Action: A Policy of Substantive Equality?

The efficacy of affirmative action as a tool for achieving substantive equality and remedying past and present-day inequalities in Brazil and in the United States depends upon the answer to the following query: Can affirmative action eradicate the norm of whiteness that continues to construct racial and colorized disparities and achieve substantive equality, or will it operate to produce yet another rhetorical change that merely rearranges and redefines existing inequality?

A. "Equality Action" in Brazil

Brazil's current Constitution and the broad focus of its affirmative action project offer a more optimistic forecast for the efficacy of the policy as a vehicle for substantive equality. The policy suffers, however, because it advances under the name "affirmative action." Given the breadth, scope and orientation of the Brazilian policy it is more appropriately conceptualized and referred to as "equality action," thereby avoiding the politically charged rhetoric triggered by the term "affirmative action," and highlighting substantive equality as the focus of the policy. The equality [*34] emphasis of the affirmative action project in Brazil finds support in the language of the 1988 Constitution, which is interpreted as moving beyond passively announcing anti-discrimination policy n154 to instigating, some say even requiring, state action to achieve equality. In stark contrast to the passive authority of the Equal Protection Clause of the U.S. Constitution, which provides negative protection against governmental interference, the Brazilian Constitution presents equality as a positive constitutional mandate. n155

The Preamble of the Brazilian Constitution, which is often referred to as the Citizens' Constitution, n156 provides,

We the representatives of the Brazilian People, assembled in the National Constituent Assembly to institute a Democratic State for the purpose of ensuring the exercise of social and individual rights, liberty, security, well being, development, equality and justice as supreme values of a fraternal, pluralistic and unprejudiced society, based on social harmony and committed, in the internal and international spheres,

to the peaceful solution of disputes, promulgate, under the protection of God, this Constitution of the Federative Republic of Brazil. n157

The Constitution characterizes equality as an inviolable right; n158 authorizes government action to achieve equality; and establishes racial discrimination [*35] as a crime punishable by incarceration, for which bail may not be posted, and to which no statute of limitations applies. n159 The Constitution also characterizes education as a social right to which all are equally entitled. n160 Though it is possible that the equality referenced in the Brazilian Constitution will be given a formal rather than a substantive construction by Racial Democracy loyalists, the framing of the right to equality as an affirmative entitlement, provides great support for it being defined as a substantive, rather than a symbolic constitutional requirement.

Pursuant to the constitutional grant of authority, the Brazilian government began earnest efforts to carve out equality from a bedrock of cultural colorblindness and indifference to racial inequality. "In 1988, the Constitutional Congress approved several measures proposed by the Afro-Brazilian community through its black elected members. Among others, these provisions. . .determined the demarcation of the lands of contemporary Quilombo communities [communities established by runaway slaves and freed slaves](citation omitted); announced the pluricultural and multiethnic nature of the country, providing that the state would protect manifestations of Afro-Brazilian culture among others (citation omitted); preserved as national patrimony the sites of former Quilombos and their documents (citation omitted); and mandated inclusion of 'the contributions of different cultures and ethnicities to the formation of the Brazilian people' in history courses." n161 By highlighting the valuable contributions made by Afro-Brazilians and expanding the history of Brazil to include the Afro-Brazilian experience and culture, these enactments target normative whiteness in an effort to change, through education and exposure, the Brazilian perspective on the value of Afro-Brazilians, their contributions and their culture. Despite laws and constitutional mandates protecting against discrimination and establishing equality as a right, the relative lack of enforcement of these laws and these rights has impaired meaningful change in Brazil. n162

Former Brazilian President Cardoso, a sociologist whose scholarship included articles on racism in Brazil, is credited with instituting affirmative action as a national policy. n163 His acknowledgment of racial inequality and recognition of race awareness as a prerequisite to substantive equality [*36] marked a significant departure from previous policies dictated by the myth of Racial Democracy. n164 Under his administration and amidst much resistance to the use of racial quotas specifically, and affirmative action policy generally, the use of race-conscious admissions practices was voluntarily adopted by many public universities and government agencies, which continue to struggle with the challenges inherent to the administering the practice in the context of a complex racial landscape. n165

In 2003, President Luiz Inacio Lula da Silva assumed office determined to expand upon the foundation laid by his predecessor. n166 Most notably, he introduced legislation, the Racial Equality Statute, which was approved by the Brazilian Senate in 2005 and awaits approval by the lower house of the Brazilian legislature. n167 It provides for the use of quotas and other measures to ensure access and equality for Afro-Brazilians, indigenous people and the poor in areas such as education, culture, employment, health and the media. n168 The features of the Brazilian [*37] formulation of affirmative action, particularly the use of quotas by media outlets for casting calls and television programming, differ substantively and substantially from the American approach. Brazil's policies and practices are directed toward disrupting normative whiteness and dismantling the color hierarchy that creates social, economic and political inequality n169 by reconstituting the meanings and value of black and white.

Brazil's burgeoning awareness of the color-coded quality of inequality of conditions among its multi-colored population has prompted the government to take its most significant steps toward remedying inequity and promoting equal access, in the area of education, which is considered to be an avenue to social and economic mobility and political empowerment. n170 Brazil's public universities, which offer a free education superior to that offered by its private counterparts, n171 have been a lightning rod for the Brazilian affirmative action project. n172 The Racial Equality Statute and policy initiatives, which seek to activate constitutional guarantees of equality, have ignited a firestorm of controversy surrounding admission policies for Brazil's highly competitive, public institutions of higher education. In the shadow of both the controversy and stalled status of the Equality Statute, thirty percent of state universities have adopted affirmative action programs to ensure the admission of greater numbers of [*38] students from demographics that have historically experienced racial and economic discrimination.

As the nation awaits the fate of controversial legislation that could impose nationwide compliance with affirmative action practices and policies, opponents of affirmative action raise objections to affirmative action that challenge the

policy, its underlying ideology and its implementation. They insist that "U.S. styled affirmative action" will not work in Brazil, which, unlike the United States, has not experienced a history of *de jure* discrimination and racial classification. They challenge the policy as antithetical to Brazil's national narratives of multiracialism and colorblindness, which regard race as legally irrelevant, and they contend that pervasive miscegenation in Brazil makes it impossible to discern a definitive class of beneficiaries. The media is giving significant voice to these challenges and despite significant strides in implementing affirmative action programs in the education and employment contexts, as a policy initiative it appears to be losing ground in the sphere of public opinion among white and black Brazilians. Nevertheless, opponents of affirmative action are working against the momentum generated by an energized grass roots, anti-discrimination movement; a growing call for equality of access and opportunity across color, racial and economic lines; the adoption of laws, policies, and practices responding to a call for justice; and Brazil's emergence from its colorblind delusion.

While remediation of past inequities appears to be the predominant focus of the Brazilian affirmative action project, the concept of educational diversity, embraced by the U.S. Supreme Court in *Grutter*, may enjoy more success in Brazil because of the way in which the Brazilian narrative reconciles difference and equality as coeval concepts. The concept of educational diversity at its heart values experiential heterogeneity. Despite the continued operation of normative whiteness, the Brazilian narrative, informed by a rich history of miscegenation, has embraced, to a greater degree, multiracialism and, accordingly, values racial diversity as a cultural commodity. Additionally, proposed equality action policies require the acknowledgment and inclusion of Afro-Brazilian's and their history and culture in recognition of the multi-racial and multi-cultural character of Brazil. In light of these realities, Brazilians might be more receptive to an affirmative action theory, like diversity, that claims racial heterogeneity as its thesis.

B. Quantitative Affirmative Action in the United States

[*39] In the United States, the goal of the affirmative action project, in the education context, has been primarily limited to increasing the numbers of black students admitted to colleges and universities. For the most part, affirmative action has not addressed the need for meaningful curricular changes that would expose the United States' rich history of racial subordination and reveal the wealth of black contributions; nor has it called upon the media to offer more favorable portrayals of blacks to combat pervasive negative stereotyping. These measures, which are unique features of the Brazilian response to color-coded inequality, in addition to the increased admission of black students, could better challenge normative whiteness and thus, address the racial inequality that the white-to-dark color hierarchy produces. Despite the fervor with which it has been maligned in the United States as reverse discrimination and as antithetical to the colorblind emphasis on formal equality, affirmative action has simply rearranged social, economic and political inequality without disturbing normative whiteness which underwrites that inequality. In the United States affirmative action has been unable to bridge the continuing and widening divide between whites and blacks with respect to educational access and opportunity, it has failed to eradicate racial inequality, and it has not disrupted the normative value of whiteness.

n173

As one critic of U.S. affirmative action observes,

"All things considered, a conventional conception of affirmative action has been only moderately successful at achieving its objectives in the United States (citation omitted) The crucial drawback of affirmative action . . . is that it is only affirmative; it does not address the overarching structural forces that shape the environment in which affirmative action is crafted and implemented. Therefore, the racial hierarchy remains in force, privileging whites and subordinating nonwhites in often subtle ways that distort, if not significantly impede, the processes of change that affirmative action could represent. A more effective alternative for securing racial justice and meaningful democracy, then, must go a step further. This strategy must be both affirmative and transformative. Transformative in this context means exposing, directly challenging, and [*40] dismantling the racial hierarchy that legitimates and perpetuates the favoritism of whites and the subjugation of nonwhites." n174

The broader scope and equality emphasis of the Brazilian policy may mark it for greater success. As affirmative action in the United States faces increasing hostility, in Brazil, though not without its challenges, the project presents transformative possibilities for constructing substantive equality for Brazilian citizens of all colors. Brazil may be able to avoid the pitfalls and limitations of the American affirmative action project. An educational diversity focused project that taps into Brazilians' relative comfort with cultural heterogeneity, coupled with curricular and media reforms that embrace

and reflect the value of Afro-Brazilians, their culture and contributions may be able to disrupt normative whiteness and achieve some measure of substantive equality.

Despite significant differences between the conception of race and its role in the construction of the national narratives of Brazil and the United States, significant parallels abound. Chief among these similarities are the color hierarchy, which adheres to a norm of whiteness, and a pervasive ideology of colorblindness, which make the norm and the hierarchy invisible, as the architects of manifest racial inequality. Following the United States' lead, affirmative action has been identified as a means of addressing racial inequality in Brazil; however, opponents of the policy, prescribing to the tenets of colorblindness, echo the same chief objection offered by those who oppose the policy in the United States--that it constructs rather than remedies racial inequity.

Conclusion

It has been noted, "[w]hat is transpiring in Brazil . . . is not simply a dialogue about the merits of affirmative action. Rather, the current debate is reflective of a broader discourse on inequality [and] . . . race" n15 Ironically, colorblindness in the United States has deafened America to this discourse. The extent to which affirmative action in Brazil can dislodge the myth of Racial Democracy, disrupt racial polarity and promote substantive equality will determine its success. Only time will tell. What is clear, however, is that in light of the existence of color-coded inequality in both countries, achieving substantive equality requires that we see, not simply in color, but also in Black and White.

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law
Discrimination
Racial Discrimination
Desegregation
De Jure Segregation
International Trade Law
Imports & Exports
Valuation
General Overview
Labor & Employment Law
Discrimination
Racial Discrimination
Remedies
General Overview

FOOTNOTES:

n1 George Reid Andrews, Racial Inequality in Brazil and the United States: A Statistical Comparison, 2 Journal of Social History 26, 229 (1992).

n2 See Denise da Silva, *Facts of Blackness: Brazil is not Quite the United States . . . And Racial Politics in Brazil*, *Social Identities*, 4:2, 20, 206-07 (1998) ("Comparing the United States and Brazil . . . we would find that race has in general been a *far more* politicised category in the United States, that racial divisions have been *more absolute and explicit*, and that consequently racial conflict has been more fundamental and antagonistic.").

n3 Professor Cottrol offers a note of caution for those engaged in comparative analysis observing, "Comparative examinations can highlight differences. In fact, there is often a danger that they will exaggerate or magnify differences." Robert J. Cottrol, *The Long Lingered Shadow: Law, Liberation, and Cultures of Racial Hierarchy and Identity in the Americas*, 76 *TUL. L. REV.* 11, 69 -71 (2001). For a discussion of the ways in which race is constructed differently in North and South America see Tanya K. Hernandez, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Anti-Discrimination Laws, A United States-Latin America Comparison*, 87 *CORNELL L. REV.* 1093, 1106-1121 (2002). (distinguishing between prejudice of mark in Latin America and prejudice of origin in the United States she explains, "In Latin America, phenotype acts as a substitute for ancestry rather than as a determinant of ancestry, while in the United States, ancestry designations are a proxy for phenotype.").

n4 Professor Robert Cottrol describes the value of comparative analysis in this arena thusly, "The hard questions we are currently asking concerning inequality, the remedies for inequality, and the proper balance between devising ways of bringing members of historically disfavored groups into the mainstream, while recognizing the need for fundamental fairness toward members of historically disadvantaged groups, are questions that are being posed in nations around the world. Our discussions of policy alternatives and legal remedies need to be informed by parallel dilemmas in other societies." Robert J. Cottrol, *Brown and the Contemporary Brazilian Struggle Against Racial Equality: Some Preliminary Comparative Thoughts*, 66 U. PITT. L. REV. 113, 117 (2004).

n5 Tanya K. Hernandez, *Relearning Brown: Applying the Lessons of Brown to the Challenges of the Twenty-First Century: To Be Brown in Brazil: Education and Segregation Latin American Style*, 29 N.Y.U. REV. L. & SOC. CHANGE 683, 716 (2005).

n6 *Id.*

n7 "[T]he questions . . . of university admissions and employment can be fruitful avenues for cross-cultural and cross-national comparisons. Both areas are critical to discussions of racial inequality and social mobility. . . . The field of university admissions . . . provides an important contrast between contemporary Brazilian policy and U.S. policy with regard to race and remedy over the past generation." Cottrol, *supra* note 3, at 69-71.

n8 Anti-discrimination ballot initiatives, substantively similar to California's Proposition 209, a constitutional amendment approved in 1996 that prohibits state agencies from using race as a factor in college admissions, employment and contracting, have been successful in Michigan and Washington. See Ethan Bronner, *University of Washington Will End Race-Conscious Admissions*, N. Y. TIMES, Nov. 7, 1998; Peter Slevin, *Court Battle Likely on Affirmative Action Ban*, WASH. POST, Nov. 18, 2006, at A02. (discussing Michigan Proposition Two). Ward Connerly, business man, Chairman of the American Civil Rights Institute and an enthusiastic opponent of affirmative action, was unsuccessful at putting the issue to a vote in Florida in the 2000 election. See Rick Bragg, *Affirmative Action Ban Meets a Wall in Florida*, N. Y. TIMES, June 7, 1999.

n9 *Parents Involved in Community Schools v. Seattle School District*, 127 S. Ct. 2783, 2746 (2007). The Court consolidated two cases presenting challenges to the Seattle School District and the Jefferson County School District, which in the opinion of the Court, "present[ed] the same underlying question - whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments."

n10 Referencing the Respondent's brief Justice Kennedy points out, "The district has identified its purposes as follows: '(1) to promote the educational benefits of diverse school enrollments; (2) to reduce the potentially harmful effects of racial isolation by allowing students the opportunity to opt out of racially isolated schools; and (3) to make sure that racially segregated housing patterns did not prevent non-white students from having equitable access to the most popular over-subscribed schools (citation omitted).'" *Id.* at 2791 (Kennedy, J., concurring in part and concurring in the judgment).

n11 Chief Justice Roberts observes in the majority opinion, "[O]ur prior cases, in evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling. The first is the compelling interest of remedying the effects of past intentional discrimination (citation omitted) . . . The second government interest we have recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education upheld in *Grutter* (citation omitted). The specific interest found compelling in *Grutter* was student body diversity 'in the context of higher education.'" *Id.* at 2752. *Compare*, Justice Kennedy's statement, "A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue . . . The decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds." *Id.* at 2797 (Kennedy, J., concurring in part and concurring in the judgment). *Compare also*, the interest which Justice Breyer identifies as compelling and which he describes as being comprised of three elements in his dissent. He states, "First, there is a historical and remedial element: an interest in setting right the consequences of prior conditions of segregation. . . . Second, there is an educational element: an interest in overcoming the adverse educational effects produced by and associated with highly segregated schools (citation omitted) Third, there is a democratic element: an interest in producing an educational environment that reflects the 'pluralistic society' in which our children will live. (citation omitted)." *Id.* at 2820-21 (Breyer, J., dissenting).

n12 "The allure of colorblindness is strong. It is rooted in the dissenting opinion of the case that ratified American apartheid (citation omitted). And it fits with liberal, individualistic principles that each person should be assessed on individual merits, not upon the basis of group membership. Color-consciousness, under this account, is irrational and immoral (citation omitted) because it is so rarely relevant to acceptable purposes." T. Alexander Aleinikoff, *A Case for Race-consciousness*, 91 *COLUM. L. REV.* 1060, 1076 (1991).

n13 *Seattle School District*, *supra* note 11, at 2768.

n14 "Modern courts and commentators have identified two dramatically different meanings the equal protection clause of the fourteenth amendment might have: a substantive meaning (or 'substantive equality') and a formal meaning (or 'formal equality'). The formal meaning of equality, or of 'equal protection,' is that legislators must treat like groups alike, and the laws they make must reflect this mandate by being 'rational (citation omitted).' Thus, if two groups are alike in some relevant respect, a law may not prescribe different treatment of them. Put somewhat differently, to meet the formal criterion of equality, the distinctions a law creates must be rationally related not only to a legitimate end but also to preexisting differences between the affected groups. If a law fails to meet this standard, then the state has denied 'equal protection of the law.' The substantive meaning of equality, or of equal protection, is that legislators must use law to insure that no social group, such as whites or men, wrongfully subordinates another social group, such as blacks or women (citation omitted). Thus, if one group wrongfully dominates another -- whether economically, physically, socially or sexually -- then the legislature must at least attempt to use legal means to bring an end to that wrongful relation of domination and subordination. For a state to fail to do so is to 'deny' the subordinated group 'equal protection of the law.' Robin West, *Symposium on Statutory Interpretation: The Meaning of Equality and the Interpretive Turn*, 66 *CHI.-KENT. L. REV.* 451, 469-70 (1990).

n15 Cottrol, *supra* note 3, at 39 ("A generation or two ago, historians and social scientists, partly influenced by the contrast with the Jim Crow United States, were likely to described racial interactions in Latin America in terms of the concept of '*Racial Democracy*,' attributing the different conditions under which blacks and whites lived to class differences, not racial discrimination.").

n16 *Id.* at 40 ("Today there is a much greater willingness in the literature to recognize the extent of Latin American racial discrimination in areas like employment, public accommodations, receipt of government services, and even areas like public stereotyping and racial insult (citation omitted).").

n17 "Individuals are overtly discouraged from identifying along racial lines (citation omitted). The rationale underlying such a societal approach is the cultural conviction that a focus on race and distinctive racial identification is socially divisive and without a redeeming value." Hernandez, *supra* note 3, at 1108.

n18 "[A] manifesto signed by 114 academics and cultural figures called on lawmakers to reject these laws, which would determine rights 'according to the shade of one's skin,' deny the constitutional equality of citizens, and possibly fuel 'conflict and intolerance' instead of eliminating racism, by giving 'legal backing to the concept of race.'" Mario Osava, *Brazil: Race Quotas - Accused of Racism*, I. P.S., (2006), <http://ipsnews.net/news.asp?idnews=34111> (last visited Sept. 16, 2008).

n19 As Professor Angela Harris observes, "Racism involves discrimination against persons based on their racial identity, which in turn is traditionally designated through a complex mix of self-identification and other-identification through appearance (including color) and ancestry. Colorism involves discrimination against persons based on their physiognomy, regardless of their perceived racial identity. The hierarchy employed in colorism, however, is usually the same one that governs racism: light skin is prized over dark skin, and European facial features and body shapes are prized over African features and body shapes. (footnotes omitted)." Angela P. Harris, *From Color Line to Color Chart?: Racism and Colorism in the New Century*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 52, 54 (2008).

n20 In this article I use the terms African-American and Black American interchangeably.

n21 For some examples of contemporary scholarship focused on the comparative frameworks of the United States and Brazil see, Benjamin Hensler, *Noa Vale a Pena? (Not Worth the Trouble?) Afro-Brazilian Workers and Brazilian Anti-discrimination Law*, 30 HASTINGS INT'L & COMP. L. REV. 267 (2007); Hernandez, *supra* note 5; Hernandez, *supra* note 3; Cottrol, *supra* note 2; Ricardo Rochetti, *Not as Easy as Black and White: The Implications of the University of Rio de Janeiro's Quota-Based Admissions Policy on Affirmative Action Law in Brazil*, 37 VAND. J. TRANSNAT'L L. 1423 (2004).

n22 As Professor Hernandez pointedly observes, "When we strip away the historical variations in social and political constructions of race in the Americas, one glaring commonality remains: general social discrimination based on skin color. While the U.S. and Latin American race models may appear different on the surface, upon closer inspection the two models evince a disturbing commonality. Both models esteem Whiteness and maintain racial hierarchy." Hernandez, *supra* note 3, at 1118.

n23 Concededly, using the binary racial construct here deliberately avoids a great deal of the complexity inherent to an analysis of race in the United States, but the simplicity of the approach is not without analytic utility.

Professor Cheryl Harris explores the usefulness of the binary racial framework in analyzing colorblindness, observing, "The Black/White binary persists as a feature of everyday life and is crucial to the commonsense understanding of racism By explicitly focusing on Black/White inequality, the authors implicitly challenge the critique that the Black/White paradigm is a faulty description of racial hierarchies in the United States (citation omitted). Their approach accepts that the Black/White paradigm may not accurately reflect racial demographics, because, in part, it does not seek to do so. Instead, it describes racial power (citation omitted). Within the Black/White binary that undergirds prevailing social relations, 'Black' and 'White' signify ideological concepts and do not operate as phenotypic markers, nor even as racial categories in the sense of creating socially constructed communities. Rather, Black and White are relationally constructed. Whiteness is the position of relative privilege marked by the distance from Blackness; Blackness, on the other hand, is a legal and social construction of disadvantage and subordination marked by the distance from White privilege (citation omitted) This is not to say that "Yellow," "Red," and "Brown," are not also oppositionally positioned vis-a-vis Whiteness. Rather the point is that "Yellow," "Red," and "Brown," are often explicitly situated within the racial frames of "Black" and "White." Indeed, "Black" or "colored" have historically functioned within the law to include Chinese and Japanese immigrants, and others who have struggled to escape the chains of Blackness (citation omitted). At the same time, "White" has expanded and contracted to both include and exclude Mexicans (citation omitted) and Arabs (citation omitted). . . . Thus, by focusing on Black/White inequality [. . .] does not uncritically affirm the Black/White paradigm that excludes or marginalizes the experiences of other racially subordinated groups, but instead self-consciously chooses to frame its analysis within this dominant view. Here the project is to attack colorblindness, a reductionist view of race and racism that is intimately linked to asserting a relationship between racial inequality and social pathology, of which Black people are the paradigm case (citation omitted). While racial subordination impacts all persons, and particularly all persons of color, the point the authors make is that, given the strength of the Black/not Black paradigm, it is crucial to focus on Blackness, precisely because it is materially and phenomenologically defined relative to White advantage." Cheryl I. Harris, *Whitewashing Race: Scapegoating Culture*, 94 CALIF. L. REV. 907, 916 -17 (2006).

n24 See generally, Cottrol, *supra* note 3, at 26-27.

n25 Professor Cottrol compares and contrasts several aspects of the slavery and post-slavery experience in Brazil and the United States observing, "The two American Republics have had similarities in their racial histories- African and Afro-American slavery, the virtual continuation or attempt at continuation of the master-slave relation in some regions after formal emancipation, industrial competition between Afro-American populations and later immigrants from Europe and Asia, often- significant regional differences in race relations, and negative stereotyping of people of African descent. (footnote omitted). But still, there were significant differences. . . . If Brazilian slavery was physically harsher than slavery in the United States, Brazil as a slave society was nonetheless more comfortable with its free Negro population and more willing to recognize free Afro-Brazilians as citizens entitled to the rights of other citizens. (footnote omitted).". Cottrol, *supra* note 4, at 119.

n26 DONNA GOLDSTEIN, LAUGHTER "OUT OF PLACE": RACE, CLASS, VIOLENCE AND SEXUALITY IN A RIO SHANTYTOWN 49-50 (2003).

n27 *Id.* at 51.

n28 *Id.*

n29 *Id.*

n30 "In 1872 in Brazil, blacks numbered 6.1 million compared to 3.7 million whites." Abdias do Nascimento & Elisa Larkin Nascimento, *Dance of Deception: A Reading of Race Relations in Brazil*, BEYOND RACISM: RACE AND INEQUALITY IN BRAZIL, SOUTH AFRICA AND THE UNITED STATES 105, 121 (Charles V. Hamilton et al. eds., 2001).

n31 *Id.* at 51.

n32 "The conversation began in the late 1800s with the arrival in Brazil of the North Atlantic doctrines of scientific racism, Social Darwinism, and in its most extreme form, white racial supremacy. . . . 'Whitening thesis' revisionists . . . [believed] that the scientific racists had too little faith in the power of white genes (or, in the language of the time, white 'blood'). In cases of racial mixture, they argued, the white genetic component would tend to dominate; and if such mixture were repeated over several generations, the end result would be a 'whitened' population in which African and Indian ancestry was overcome and neutralized. The whitening thesis saved Brazil from the gloomy prospect of racial degeneration . . ." George Reid Andrews, *Brazilian Racial Democracy, 1900-90: An American Counterpoint*, 31 J. CONTEMP. HIST. 483, 485 (1996).

n33 "The 1891 constitution prohibited African and Asian immigration into the country, and the federal and state governments of the First Republic (1891 -- 1930) made concerted efforts to attract European immigration. These efforts bore fruit in the form of 2.5 million Europeans who migrated to Brazil between 1890 and 1914, 987,000 with their steamship passage paid for by state subsidies. After a lull during the first world war, another 847,000 Europeans arrived during the 1920s (citation omitted)." *Id.* at 485-6.

n34 *Id.* ("The whitening thesis . . . formed a powerful incentive to Brazilian policy-makers to speed up the process of whitening, or branqueamento, by excluding non-whites from Brazil's genetic pool and increasing the European component."). Professor Hernandez describes the whitening campaign as "a mechanism for buffering the numerical minority of White-identified elite Brazilians from the discontent of the persons of African descents vast majority (citation omitted)." Hernandez, *supra* note 5, at 685.

n35 This practice was pervasive in Latin American countries in the late nineteenth and early twentieth century. Harris, *supra* note 19, at 56 ("[S]everal Latin American nations embarked on self-conscious 'whitening' campaigns in the late nineteenth and early twentieth century, as a form of nation building (citation omitted).").

n36 "It is important to note that white Brazilians viewed themselves as 'improving' nonwhite Brazilians through whitening (citation omitted). This was based on a white supremacist view that nonwhites tainted whites as a result of racial mixture. 'In the process of intermixing Brazil's three founding races, the white race would 'pre-dominate through natural selection until it emerges pure and beautiful as in the Old World (citation omitted).'" Zaid A. Zaid, 20 *NAT'L BLACK L.J.* 42, 60-1 (2007). "[W]hitening orders the outcome of . . . mixture, placing

superior value on white features." Stanley R. Bailey, *The Race Construct and Public Opinion: Understanding Brazilian Beliefs about Racial Inequality and Their Determinants*, 108 AMER. J. Soc. 406, 411-12 (2002).

n37 It is possible to conceive of a project to rehabilitate *Racial Democracy* so that it values miscegenation without adhering to the aspiration of "whitening." This conception of miscegenation would not reinforce the white supremacy construct or turn a blind eye to racial disparities. "[An] alternative approach views the *Racial Democracy* orientation as a moral high ground that produces a clear awareness of racial discrimination . . . (i.e., support for a structuralist stance)." Bailey, *supra* note, at 415.

n38 Nascimento, *supra* note 30, at 121.

n39 "*Racial Democracy* was originally conceived as part of a larger ideological effort to justify authoritarian, oligarchical rule in Brazil." Andrews, *supra* note 32, at 483-84.

n40 *Id.* at 487.

n41 *Id.* at 487-8.

n42 Bailey, *supra* note 36, at 409.

n43 "[T]he myth [of *Racial Democracy*] is specifically charged with neutralizing antidiscrimination strategies, as well as with discouraging black identity formation (citations omitted). The end result is the perpetuation of the status quo (citations omitted)." *Id.* at 407.

n44 "[O]ver the course of the second half of the century, a number of external influences combined to undermine the ideological hegemony of *Racial Democracy* in Brazil. . . . The racial inequalities documented in [the 1980 census] . . . provided additional ammunition for attacks on what was increasingly termed the 'myth' of *Racial Democracy*. As a result of those attacks, during the 1980s *Racial Democracy* lost its unquestioned dominance in Brazilian national life. . . [but] will continue to exercise influence over that society for some time to come (citation omitted)." Andrews, *supra* note 32, at 498-97.

n45 "[E]ven after whitening was no longer in vogue 'the official national discourse of *Racial Democracy* had been one of assimilation,' an image 'the IBGE historically helped further' (citation omitted). The census, particularly in the late 1800s and early 1900s, was an active participant in promoting the dominant racial discourses of 'whitening' and '*Racial Democracy*' (citation omitted)." Zaid, *supra* note 36 at 59.

n46 "[W]hile asserting the equality of all races, *Racial Democracy* simultaneously expressed a clear preference for racially mixed mulattoes over people of completely African ancestry (citation omitted)." Andrews, *supra* note 32, at 489.

n47 Antonio Sergio Alfredo Guimaraes, *The Misadventures of Nonracialism in Brazil*, BEYOND RACISM: RACE AND INEQUALITY IN BRAZIL, SOUTH AFRICA AND THE UNITED STATES 157, 165 (Charles V. Hamilton et al. eds., 2001).

n48 "[N]ational censuses have documented persistent disparities between the white and non-white populations in education, vocational achievement, earnings, and life-expectancy. Survey research has shown racist attitudes and stereotypes concerning blacks and mulattoes to be widely diffused throughout Brazilian society and Afro-Brazilians report being the victims of subtle, and sometimes not so subtle, racism and discrimination." Andrews, *supra* note 32, at 483.

n49 Nascimento, *supra* note 30, at 125 (Brazilians self-identified using more than 136 color categories in interviews with census takers.)

n50 *Id.*

n51 Jon Jeter, *Affirmative Action Debate Forces Brazil to Take a Look in the Mirror*, WASH. POST FOREIGN SERV., June 16, 2003, at A01.

n52 Guimaraes, *supra* note 47, at 177. The unwillingness of Afro-Brazilians to self-identify as black presents a unique challenge for those seeking to target Afro-Brazilians as the intended beneficiaries of affirmative action programs and policies.

n53 Nascimento, *supra* note 30, at 125 ("Statisticians recognize the resulting distortion of population statistics, in which 'the *preto* group loses a great deal, the *pardo* group gains much more than it loses, and the white group gains a lot and loses nothing' (citation omitted)").

n54 Larry Rohter, *Racial Quotas in Brazil Touch off Fierce Debate*, NEW YORK TIMES, April 5, 2003.

n55 Hernandez, *supra* note 3, at 1106 ("To a certain extent, prejudice-of-mark practices . . . permit economic and social status to mediate a formal racial designation (citation omitted). . . In Latin American settings, social status informs formal racial classification . . .").

n56 The predominant source of inequality in Brazil arises at the intersection of race, color and class. Further confounding the issue is the fact that racial identity in Brazil is a social, economic and political construct that is informed by phenotypical characteristics and socioeconomic status and education. As Professor Hernandez explains, "[I]ndividuals with identical racial heritage are often identified socially or informally by distinct racial designations based on their pheon-type[sic]. For this reason, Brazilian . . . racial classification practices have been termed a 'prejudice of mark,' in contrast to the 'prejudice of origin' which has traditionally guided racial classification in the United States, with its focus on familial and ancestral origins as the determination of racial identification (footnote omitted). To a certain extent, prejudice of mark practices also permit economic and social status to mediate the determination of racial classification. As a result, dark-skinned Afro-Brazilians with higher socioeconomic standing may be able to choose a racial classification invoking greater Whiteness than more impoverished individuals with the same skin color (footnote omitted)." Hernandez, *supra* note 5, at 686.

n57 "The overall differences between Brazilian 'Whites' compared to 'Browns' and 'Blacks' have been recently summarized in a new quality of life measure using the United Nations index of Human Development (IDH). The IDH includes illiteracy, rate of schooling, income, life expectancy and other health factors. According to recent figures, Brazilian Whites enjoy the equivalent standard of living as Costa Ricans (48th in the world) and Blacks and Browns enjoy the equivalent standard of living as Argelians (108th in the world) (citation omitted). Further, these vast racial inequalities were found within Brazilian states and therefore are not explainable by regional concentration." Seth Racusen, *Making the "Impossible" Determination: Flexible Identity and Targeted Opportunity in Contemporary Brazil*, 36 CONN. L. REV. 787, 793 - 4 (2004).

n58 Andrews, *supra* note 32, at 496-97.

n59 Bailey, *supra* note 36, at 409 (explaining, "racial inequality is due to blacks themselves (a type of victim-blaming) and is associated with inaction regarding that inequality.").

n60 *Id.* (explaining, "the black-white gap must be primarily due to other factors, such as an epiphenomenon of class (citation omitted).").

n61 *Id.*

n62 *Id.* at 410 ("[W]hite Brazilians deny racial discrimination. . . . [B]razilians classified as black also continue to deny discrimination due to the confounding effects of *Racial Democracy*.").

n63 *Id.* at 408 ("The structuralist category holds that there are external factors systemically disfavoring the disadvantaged individual, for example racial discrimination. This latter category is linked to support for transformative actions.").

n64 Cottrol, *supra* note 3, at 43-44 ("Every slaveholding society had a body of law regulating manumission and the status of free or freed persons of color. The relative receptivity or hostility of different slaveholding societies to free Negro populations provided an important indicator of the kind of formal racial barriers that would develop, or fail to develop, after general emancipation.").

n65 "The very word 'miscegenation' was, after all, an American contribution to the English language." David A. Hollinger, *Amalgamation and Hypodescent*, *AMER. HIST. REV.*, 1363, 1365 (2003).

n66 "The governments of the slave-intensive colonies and their successors did not try very hard to prevent the birth of children with black mothers and white fathers, but they did act to make it difficult for the children of such unions to achieve any right to inheritance. . . . [T]he history of the United States [is] among other things, a story of amalgamation, however episodic and however given to the greater bonding of some elements than others. To speak of 'amalgamation' as a major theme in U.S. history is to reclaim the vocabulary of Wendell Phillips and Frederick Douglass and Ralph Waldo Emerson, to renounce the Jim Crow distinction between miscegenation and the melting pot, to integrate the story of black-white mixing with the story of other kinds of mixing, to escape the implications of Anglo-conformity often historically associated with the figure of the melting pot, to recognize a dynamic interaction not captured by the more limited concept of assimilation, and to deny at long last the legitimacy of the principle of hypodescent." *Id.* at 1379 -- 86.

n67 Professor Cheryl Harris describes this rule as a "racial identity ... governed by blood." Cheryl I. Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1709, 1738 (1993).

n68 Americans of African ancestry have been classified under a number of names including: Negro, Black, Afro-American, and African-American (with and without the hyphen). Importantly, despite changes as to what people of African ancestry are called or call themselves, the category 'white' remains unchanged.

n69 Professor Cottrol explains, "The Jim Crow ritualistic separation of the races was part of an effort to maintain the system of racial hierarchy that had developed from slavery. (citation omitted) . . . That culture of race often demanded the exclusion of black people from many of the major, and very often minor, institutions of American society . . . Our notions of who is black and who is white, the idea that any traceable African ancestry, however attenuated, makes an individual black, stems from the historic caste system in the United States (citation omitted)." Cottrol, *supra* note 4, at 114-15; *See also*, Zaid, *supra* note 36, at 47 (discussing *Wall v. Oyster*, where a District of Columbia court identified as black a child who was one sixteenth black but who presented as white, and instructed that the "proper test is not the outward appearance of the individual so much as his associates and general racial status (citation omitted).").

n70 As Professor Hernandez observes, "Historically, the United States has had geographic diversity with respect to the relative rigidity or fluidity of approach to racial designation. For instance, both antebellum South Carolina (footnote omitted) and Louisiana (footnote omitted) sometimes used the existence of African ancestry to designate individuals as Mulatto, as opposed to Black (footnote omitted)." Hernandez, *supra* note 3, at 1096-97.

n71 "[B]lackness in the United States is an ascribed status, imposed on a spectrum of color shades and descent percentages, rather than a category of nature (footnote omitted)." Hollinger, *supra* note 65, at 1370.

n72 In 2000 the following language was removed from the Alabama Constitution pursuant to Amendment 2, "Article IV, Section 102 of the state's Constitution of 1901 decrees: 'The legislature shall never pass any law to authorize or legalize any marriage between any white person and a negro, or descendant of a negro.'"

n73 "[I]n the 1920s and into the 1930s powerful segments of U.S. society, including the courts and legislatures, remained committed to biological theories of innate and meaningful difference. During this period, the naturalistic conception of race evolved into eugenics, biological race theory's most virulent expression. Under this ideology, not only did nature place races along a continuum of intelligence, capacity, and worth, but racial mixing inevitably led to racial degeneration, thus warranting aggressive efforts to maintain supposed racial purity." Ian F. Haney Lopez, *A Nation of Minorities: Race, Ethnicity, and Reactionary Colorblindness*, 59 *STAN. L. REV.* 985, 997 (2007).

n74 "[M]any states expanded segregation laws, or Jim Crow laws, with damning results (citation omitted). Racial segregation extended to residential areas, parks, hospitals, theatres, waiting rooms and bathrooms (citation omitted). Segregation also extended geographically since northern, as well as southern states implemented Jim Crow (citation omitted). In fact, the federal government practiced widespread segregation as separate desks, bathrooms, and cafeteria tables were established according to race (citation omitted). Segregation extended to the military where African-Americans, for the most part, were confined to separate units during both World War I and World War II (citation omitted). President Truman ordered an end to military segregation in 1948, (citation omitted) and segregation in secondary, undergraduate and graduate education came to an end after a series of court decisions in the mid-20th Century (citation omitted)." Christopher J. Schmidt, *Caught in a Paradox: Problems with Grutter's Expectation that Race-Conscious Admissions Programs Will End in Twenty-Five Years*, 24 *N. ILL. U. L. REV.* 753, 777 (2004).

n75 "Prior to the 1800s, the federal government only recognized four races: white, black, mulatto, and Indian. Though mulatto has been understood to refer to people who are the children of both a black and white person, the mulatto category was capacious and included people who were born of black/white unions, white/Indian unions, black/Indian unions, or a combination of all three. Many people who were counted as mulatto were not necessarily biracial or multiracial but were defined as such because other Census Bureau categories did not accurately describe them. In this way, people who had not necessarily been recognized as part of any of the four specified races had race imposed upon them by the census (citation omitted). This process of racing continued as the censuses evolved." Zaid, *supra* note 36, at 50.

n76 163 *U.S.* 537 (1896).

n77 "Louisiana state law required separation of the races on railroad cars, though it also required those facilities to be of equal quality. Adolphus Plessy (footnote omitted) was arrested for trying to ride in the first-class car reserved for white passengers. Plessy sued; his lawyer argued that the Thirteenth and Fourteenth Amendments prohibited this sort of state-sponsored state-sponsored stigmatization of African-Americans (footnote omitted). .

. . [T]he Court gave constitutional sanction to the doctrine of 'separate but equal,' and incredibly suggested that if there was any stigma attached to forced separation, it was entirely a function of the psychological insecurity of African Americans (footnote omitted)." Robert J. Cottrol, Raymond T. Diamond and Leland B. Ware, *Special Feature: The Fiftieth Anniversary of Brown v. Board of Education: Book Review: Brown v. Board of Education: Caste, Culture, and the Constitution*, 96 *LAW LIBR. J.* 229, 232-33 (2004).

n78 The Fourteenth Amendment to the U.S. Constitution provides in pertinent part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

n79 "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy*, *supra* note 76, at 559 (Harlan, J., dissenting).

n80 Cottrol, *supra* note 3, at 18-19.

n81 *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

n82 "There are two *Brown v. Board of Education* cases. The first (*Brown I*) established the right of schoolchildren to attend schools with whites and held that *de jure* segregation was a violation of the Equal Protection Clause of the Fourteenth Amendment. The second case (*Brown II*) addressed the remedy, holding that school desegregation must begin 'with all deliberate speed.'" Cottrol et al., *supra* note 77, at 237.

n83 One could argue that the *Brown* decision, focused as it was on the harm segregation caused to Black children without consideration for the harm segregation caused to White children, reinforced rather than challenged White supremacy.

n84 "[I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." *Brown*, *supra* note 82, at 495.

n85 For a thoughtful discussion of the manner in which the *Brown* decisions were implemented see Charles J. Ogletree, Jr., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION (2004).

n86 See e.g., *Gayle v Browder*, 352 U.S. 903 (1956) (per curiam) (segregated city buses); *Holmes v City of Atlanta*, 350 U.S. 879 (1955) (per curiam) (municipal golf courses); *Mayor of Baltimore v Dawson*, 350 U.S. 877 (1955) (per curiam) (public beaches).

n87 Exec. Order No. 10,925, 26 *Fed. Reg.* 1977 (Mar. 6, 1961).

n88 42 *U.S.C.* 2000a-3.

n89 42 *U.S.C.* 2000d-2000d-7 (2000).

n90 42 *U.S.C.* 2000e-2000e-17.

n91 Exec. Order No. 11,246, 3 C.F.R. 202 (1964-1965), reprinted as amended in 42 *U.S.C.* 2000e.

n92 The Fourteenth Amendment to the U.S. Constitution provides in pertinent part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

n93 West, *supra* note 14, at 469-71.

n94 *Id.* at 470.

n95 As Professor West insightfully observes, "*Brown v. Board of Education* (citation omitted) can readily be read, perhaps must be read, as embracing a substantive account of the Equal Protection Clause: separate and unequal educational facilities produce unequal educational opportunities, contributing directly to the subordination of blacks and dominance of whites in an already white-dominated society (citation omitted) . . . however, the meaning of both the Equal Protection Clause and *Brown* [would change] dramatically. . . . [T]he substantive, antisubordinationist meaning of *Brown* [would begin] to erode as it came to be possible to read the clause as conveying only a formal, antidiscrimination meaning." *Id.* at 471.

n96 The Supreme Court's current equal protection jurisprudence essentially requires, "racial neutrality in governmental decision-making ." *Miller v. Johnson*, 515 *U.S.* 900, 904 (1995). "Commentators have portrayed this requirement as one 'that promote[s] equality as a process' rather than one 'that promote[s] equality as a result (citation omitted).' Thus, the Court's current colorblind jurisprudence has been described as 'an approach to constitutional equality under which *actual outcomes are largely irrelevant* Therefore, rather than representing an idyllic vision of equality, color-blindness represents nothing more than a laudable goal elevated, to protect the racial status quo, into a formal rule of law (citation omitted).'" Daniel Steuer, *Another Brick in the Wall: Attor-*

ney's Fees for the Civil Rights Litigant after *Buckhannon*, 111 *GEO. J. POVERTY LAW & POL'Y* 53, 68 (2004)(quoting, Derrick Bell, *RACE, RACISM AND AMERICAN LAW* 136 (4th ed. 2000)).

n97 West, *supra* note 14, at 470.

n98 418 U.S. 717 (1974).

n99 438 U.S. 265 (1978).

n100 "We thus reaffirm the view . . . that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification." *City of Richmond v. Croson*, 488 U.S. 469, 494 (1989).

n101 In *Korematsu v. United States*, the Supreme Court first announced strict scrutiny as the appropriate standard of review for state race-based classifications. 323 U.S. 214 (1944). The standard requires that the state action in question be narrowly tailored to achieve a compelling governmental interest.

n102 488 U.S. 469 (1989).

n103 Cedric Merlin Powell, *Blinded By Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 51 *U. MIAMI L. REV.* 191, 212 (1997). The Court's holdings in *Bakke* and *Croson* fail to appreciate "profound difference [that] separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism, or to prevent neutral governmental activity from perpetuating the effects of such racism." 488 U.S. 469, 551-52 (1989) (Marshall, J., dissenting).

n104 West, *supra* note 14, at 471 (emphasis added).

n105 *Bakke*, *supra* note 100, at 312-15. "This rationale, which received its constitutional imprimatur from a reticent Supreme Court majority (footnote omitted), distinguishes itself from traditional remedial affirmative action as a theory that fully acknowledges and embraces the existence and value of divergent racial realities and utilizes race-conscious admissions to maximize the intellectual value of diversity (footnote omitted). It does not, as remedial discrimination theories forcefully and convincingly do, assert a need to ameliorate racial disparities." Tanya M. Washington, *Loving Grutter: Recognizing Race in Transracial Adoptions*, 16 *GEO. MASON U. CIV. RTS. L.J.* 1, 7-8 (2005).

n106 539 U.S. 306 (2003).

n107 *Id. at 333*. ("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.").

n108 Justice Ginsburg commented on the 25 year sunset provision observing, "From today's vantage point, one may hope but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action." *Id. at 346* (Ginsburg, J., concurring).

n109 Washington, *supra* note 105, at 7-8.

n110 Tanya Washington, *The Diversity Dichotomy: The Supreme Court's Reticence to Give Race a Capital "R"*, 72 *UNIV. CIN. L. REV.* 977, 984 (2004).

n111 Robert S. Chang and Catherine E. Smith, *A Tribute to Professor John O. Calmore: John Calmore's America*, 86 *N.C.L. REV.* 739, 741 (2008).

n112 *Seattle School District*, *supra* note 9, at 2768.

n113 Chief Justice Roberts explained, "The Court in *Grutter* expressly articulated key limitations on its holding--defining a specific type of broad-based diversity and noting the unique context of higher education--but these limitations were largely disregarded by the lower courts in extending *Grutter* to uphold race-based assignments in elementary and secondary schools. The present cases are not governed by *Grutter*." *Id. at 2754*.

n114 Chief Justice Roberts explains his interpretation of *Brown* thusly, "In . . . (*Brown I*) we held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because government classification and separation on the grounds of race themselves denoted inferiority (citation omitted). It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954." *Id. at 2767*. This quote reflects a distortion of the emphasis of the *Brown* decision. Desegregation was the means of achieving the Court's ultimate goal of remedying the inequality of educational access and opportunity caused by racial discrimination.

n115 West, *supra* note 96.

n116 In his dissenting opinion, Justice Stevens comments on the Chief Justice's reliance, stating, "There is a cruel irony in THE CHIEF JUSTICE's reliance on our decision in *Brown v. Board of Education* (citation omitted). The first sentence in the concluding paragraph of his opinion states: 'Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin.' (citation omitted). This sentence reminds me of Anatole France's observation: '[T]he majestic equality of the la[w], forbid[s] rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.'" *Seattle School District*, *supra* note 9, at 2798 (Stevens, J., dissenting).

n117 Justice Kennedy characterizes this substantive equality goal as a constitutional aspiration of school districts, stating, "School districts can seek to reach *Brown*'s objective of equal educational opportunity." *Id.* at 2791 (Kennedy, J., concurring).

n118 *Brown*, *supra* note 82, at 495.

n119 As Justice Breyer observes in his dissent in *Seattle School District*, "[T]he distinction between *de jure* segregation (caused by school systems) and *de facto* segregation (caused e.g., by housing patterns or generalized societal discrimination) is meaningless in the present context The histories [of the two school districts] also make clear the futility of looking simply to whether earlier school segregation was *de jure* or *de facto* in order to draw firm lines separating the constitutionally permissible from the constitutionally forbidden use of 'race-conscious' criteria [O]ur precedent has recognized that *de jure* discrimination can be present even in the absence of racially explicit laws (citation omitted)." *Seattle School District*, *supra* note 9, at 2802-10 (Breyer, J., dissenting).

n120 Justice Breyer charges that the plurality in *Seattle School District*, "distorts precedent, it misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools, it threatens to substitute for present calm, a disruptive round of race-related litigation, and it undermines *Brown*'s promise of integrated primary and secondary education that local communities have sought to make a reality." *Id.* at 2800 (Breyer, J., dissenting).

n121 "The Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, THE CHIEF JUSTICE rewrites the history of one of this Court's most important decisions." *Id.* at 2798 (Stevens, J., dissenting).

n122 As Professor Powell explains, "The jurisprudence of colorblindness functions on three levels: (i) as a historical myth advancing the counterintuitive notion that the Civil War Amendments, the accompanying civil rights enforcement statutes, and the legislative history of these enactments are devoid of any conception of race; (ii) as a definitional myth advancing the fallacy that racism is not systemic, but merely a series of unconnected individual responses beyond the reach of the ameliorative powers of the courts and legislatures; and (iii) as a rhetorical myth focusing the affirmative action debate not on the victims of systemic racism and caste, but on a generalized class of "innocents" (citation omitted) who are arbitrarily punished." Powell, *supra* note 103, at 200.

n123 Melvin L. Oliver & Thomas M. Shapiro, "Nondiscriminatory": *Perpetuation Of Racial Subordination*, 76 *B.U.L. REV.* 669 (1996).

n124 Powell, *supra* note 103, at 196.

n125 Bailey, *supra* note 59.

n126 "Colorblindness recognizes racial discrimination as a private, individual, or episodic aberration detached from public or structural explanations (citation omitted)." Osagie K. Obasogie, *Anything but a Hypocrite: Interactional Musings on Race, Colorblindness, and the Redemption of Strom Thurmond*, 18 *YALE J.L. & FEMINISM* 451, 491 (2006).

n127 "Underlying the conception [of colorblindness] is a belief that the civil rights movement has achieved its goals and that laws protecting civil rights have largely ended racial inequality and discrimination. To the extent that residual racial inequality remains, it is not because of the persistence of racism or the current effects of past discrimination, but because Blacks have failed to fully exploit their opportunities and, in fact, seek to benefit from opportunities they have not earned. Racial inequality, therefore, is the result of Black failure, in particular Black cultural pathologies." Harris, *supra* note 23, at 919.

n128 "A color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans." Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 *STAN. L. REV.* 1, 2-3 (1991).

n129 "Colorblindness in toto is premised on a rigid formalism that requires a uniform application of the law across racial lines. Equality, therefore, is achieved only with an unwavering symmetry; a legal calculus of which race plays absolutely no part (citation omitted). Any deviation from this baseline unequivocally merits illegality and unfairness, regardless of the idiosyncratic (legal or sociopolitical) experience of a particular individual, racial group or ethnic community. Keepers of the colorblind brain trust, of which sociologist Shelby Steele is a part (citation omitted), contend that affirmative action is an egregious affront to this vision. Furthermore, advocates of colorblindness steadfastly hold that access to higher learning, employment, and societal halls of power should exclusively be achieved by measurable rulers, devoid of any consideration of social context." Khaled Ali Beydoun, *Without Color Of Law: The Losing Race Against Colorblindness In Michigan*, 12 *MICH. J. RACE & L.* 465, 487-8 (2007).

n130 "Colorblindness is merely a rule or a policy prescription; one must distinguish colorblindness as a means and as an end, for as a method it utterly lacks a transcendent moral quality, and instead takes on political and social significance only by virtue of its instant application (citation omitted)." Lopez, *supra* note 73, at 995.

n131 "Equality no longer means that systems of subordination will not be tolerated, it now means that the systemic manifestations of racism will be ignored in the name of colorblindness. Thus, individualized notions of liberty displace the moral claims of oppressed groups; Fourteenth Amendment analysis is doctrinally paralyzed by a futile effort to disconnect it from its historical moorings; and contextual analysis is abandoned in favor of a fairy-tale depiction of American society. In this inverted reality play, everyone is already equal - we must avoid considering race lest we all return to our horrible "past" of racial discrimination." Powell, *supra* note 104, at 199.

n132 "Colorblindness is employed to maintain a status quo based on the exploitation of oppressed minorities" *Id.* at 271.

n133 "A colorblind society need not be one in which people literally do not notice race. But it would be a society not structured or stratified on the basis of race. In that society, race would be much less meaningful. It would not so heavily influence where one resides, what one achieves, who one loves, or how long one lives." R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 *UCLA L. REV.* 1075, 1123 (2001).

n134 Hernandez, *supra* note 3, at 1169 (cautioning against, "becoming enmeshed in the intricacies of skin-color differentiation . . . [rather than] focus[ing] on the ways in which racial status and hierarchy are asserted and who is harmed as a consequence . . .").

n135 In Brazil, "[t]his vast difference in the quality of life for "Whites" compared with "Blacks" and "Browns" begins at birth. Brazilian "Black" and "Brown" children are nearly twice as likely as "White" children to die during childbirth (62.3 to 37.3 per 1000) or before age five (76.1 to 45.7 per 1000) (citation omitted). Brazilian "Black" and "Brown" children are nearly twice as likely as "White" children to have left school (22.4% of "Blacks," 19.2% of "Browns," and 12.1% of "Whites") and much more likely to have entered the labor force by age 10 (20.6% of "Blacks," 20.0% of "Browns," 12.1% of "Whites") (citation omitted). Because they enter the labor market earlier and with less education, Brazilian "Black" and "Brown" children comprise a disproportionately large part of Brazil's vulnerable street children. Finally, among all Brazilians aged 10 and over, "Blacks" and "Browns" have attained two-thirds the schooling of "Whites" (6.2 years to 4.2) (citation omitted). The differential in the educational achievement of Brazilian "Whites" compared to "Browns" and "Blacks" translates into a wider labor market differential. "Blacks" and "Browns" occupy less skilled and more vulnerable labor market positions, earn less and encounter more unemployment than do "White" Brazilians (citation omitted). As of 1998, "Browns" and "Blacks" were between 8% and 19% more likely to occupy vulnerable occupations and were unemployed at rates between 3% and 7% higher than "Whites" in six major Brazilian cities (citation omitted). Even "Blacks" and "Browns" who attain greater education are much less likely than their "White" cohorts to be able to translate their educational gain into economic return (citation omitted). Finally, median family income for all "Black" and Brown families is 42% of that for "White" families (1.32 to 3.12 minimum salaries) (citation omitted). Brazilian "Browns" and "Blacks" live under lower sanitary conditions than "Whites" in the nation and most regions. "Brown" and "Black" households were twice as likely to be without treated water, (35.3% to 19%) or sewage (50.3% to 26.4%) as "White" households (citation omitted). Further, an older study showed that "Browns" and "Blacks" were twice as likely to live in neighborhoods without garbage collection as "Whites" ("Browns" 39.5%; "Blacks" 34.1%; "Whites" 18.3%) (citation omitted)." Racusen, *supra* note 57, at 793-4. *See also*, Washington, *supra* note 105, at 4-5. ("Despite proclamations that we don't see race, racism continues to construct divergent social, political and economic realities in America. We still live in a society where Black and Latino (citation omitted) drivers are subject to a comparatively disproportionate number of police stops and searches (citation omitted), black consumers pay more and receive diminished customer service as

compared to their white counterparts (citations omitted), people of color experience diminished health care services (citation omitted), residential segregation (citation omitted) and educational discrimination (citation omitted) continue as the norm rather than the exception, Blacks and Latinos continue to comprise disproportionate members of imprisoned and impoverished populations (citation omitted), zero tolerance policies are enforced disproportionately against children of color (citation omitted), disproportionate numbers of children of color are the victims of tracking toward vocational training rather than college (citation omitted), disproportionate numbers of juveniles of color are certified as adult defendants, and trading on popular, racial stereotypes continues to enjoy traction in both criminal investigations (citation omitted) and media portrayals of people of color (citation omitted). Despite the pretense of a colorblind society, people of color experience a very color-based reality").

n136 Hernandez, *supra* note 3, at 1125-28 ("Another point of correspondence between Latin America and the United States is that the legacy of White supremacy is deeply ingrained. . . . Thus, both the U.S. and Latin American models of race are constructed to prize Whiteness and devalue non-Whiteness.").

n137 "[D]iscrimination [should be understood] not as a phenomenon of individual conscious intent, but of shared cultural norms, which are enforced through social interactions and often nonconscious behavior [R]ace does not exist in the body but rather is the product of socially-produced understanding." Harris, *supra* note 19, at 68 (citing Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317 (1987)).

n138 "An elaborate iconography of color in which light is good and dark is bad goes back a long time in European history, and it is unlikely that colorism and other kinds of discrimination based on racialized appearances or behaviors can be extinguished by an act of will (citation omitted). Indeed, my continued worry is the persistence of certain kinds of fantasy images that lie deep in American society, despite our efforts to denature and neutralize them." Harris, *supra* note 19 at 69. *See also*, Hernandez, *supra* note 3, at 691 ("Racialized attitudes are . . . manifested in the textbooks children are assigned, in which Black people are consistently depicted as animal-like, as socially subordinate, and in other stereotyped manners (citation omitted)."). In a recent incident reported on the front page of a Brazilian newspaper, an angry, White soccer fan referred to a dark skinned referee as a monkey whose skin was the "color of excrement." Larry Rohter, "Soccer Skirmish Turns Spotlight on Brazil's Racial Divide," *NEW YORK TIMES* (February 6, 2007). "Brazilian racism has almost always operated through mechanisms of impoverishment, i.e., cultural and economic destitution of blacks and mechanisms of verbal abuse based on class and color. (citation omitted) In general, Brazilian racism, when publicly expressed, is done so in discourse on the cultural inferiority of African peoples and the low cultural level of their traditions and descendants." Guimaraes, *supra* note 47, at 167.

n139 Ironically, however, terms of affection which include references to "blackness" are also commonly used in everyday language. For example, a white Brazilian man may refer to his girlfriend (also white) as his "minha nega" or little black girl. That this irony occurs does not undermine the pervasive negativity associated with blackness in Brazil. For a detailed accounting of incidences of racialized interactions between Brazilian's *see* Racusen, *supra* note 57, at 803-6.

n140 A Girl Like Me, Kira Davis (2006), <http://www.npr.org/templates/story/story.php?storyId=6181729> (last visited Sept. 22, 2008). "The most perverse effect of stereotyping may be on persons of varying degrees of African descent: 'Naturally, the hierarchical ordering of people in terms of their proximity to whiteness helped in the

disdain that darker-colored people show of their African origin. (citation omitted)." Andrews, *supra* note 36, at 412.

n141 "If the anti-caste understanding of *Brown* were used as a vehicle for revealing the ways in which racial disparity and hierarchy arise from segregation and other tools of social exclusion, then it might help to debunk the notion that racial hierarchy is accidental and beyond the purview of the law to address." Hernandez, *supra* note 5 at 711.

n142 Harris, *supra* note 23, at 916.

n143 Andrews, *supra* note 33, at 412.

n144 "Color is lived as a continuum (citation omitted) and the darker end of the continuum is considered unflattering. It is associated with low-status traits: lack of education, crime, violence, sexual promiscuity, laziness, and a general lack of civility. Much of this dynamic is attributable to the ideology of 'whitening'." *Id.* at 411.

n145 "[R]acial formation supported the notion that [] groups were by nature unequal and could be ranked on a continuum of superiority and inferiority. . . . The first and most basic ingredient of 'race' was the universal classification of human groups as discrete, mutually exclusive biotic pluralities. Racial classifications were based not on objective variations of color but on subjective and arbitrary judgments that reflected superficial assessments of phenotypic and behavioral variations. A second ingredient was an inegalitarian ethos that ranked these biotic pluralities hierarchically, with white Aryan Europeans at the top of the pyramid." G. Reginald Daniel with Josef Castaneda-Liles, *The U.S. and Brazilian Racial Orders: Changing Points of Reference*, 24-6.

n146 "Brazil's black and mulatto populations do not differ greatly from each other on most social and economic indicators--life expectancy, earnings, education--while both groups are clearly differentiated from whites." Andrews, *supra* note 32 at 499.

n147 "Even a struggle against the supremacist usage of segregation to subordinate might very well result in mere facial integration without the necessary substantive change and the reallocation of resources that must occur to divorce the notion of inferiority from Blackness." Hernandez, *supra* note 5, at 715.

n148 "The gradual ascendancy of colorblindness means that racial disadvantage (manifested, for example, in disparities in wealth and educational outcomes between Whites and Blacks) is a function of something other than racism." Harris, *supra* note 23, at 912.

n149 "[T]he major problem for combating racism in Brazil is its invisibility." Guimaraes, *supra* note 47, at 167. As Professor Harris observes, "[D]espite the emergence of anti-race public discourse, racism has not disappeared, but instead has retreated into individual cognitive processing systems, where it is inaccessible to legal intent tests (and, often, the individual's own conscious mind), yet continues to shape the life chances of persons according to race (citation omitted)." Harris, *supra* note 19 at 53.

n150 "This colorblind ideal is preoccupied with formal equality without looking at the context and consequences of real world inequality (citation omitted)." Obasogie, *supra* note 129, at 491.

n151 "Whiteness in the United States has never been simply a matter of skin color. Being White is also a measure, as Lani Guinier and Gerald Torres put it, 'of one's social distance from Blackness.' (citation omitted)." Harris, *supra* note 23 at 916.

n152 Denise Ferreira Da Silva, *Towards a Critique of the Socio-logos of Justice: The Analytics of Raciality and the Production of Universality*, Social Identities, Vol. 7, pgs. 1-35, 7 (2001).

n153 [N]onracialism, an integral part of the building of modern Brazilian nationality, was ingeniously and mistakenly equated with antiracism. So in Brazil, to deny the existence of races means to deny racism as a system. On the other hand, to recognize the idea of race and promote any antiracist action based on this idea, even if the author is black, is interpreted as racism. Indeed, many manifestations of discrimination based on race are peremptorily denied as having any racial motivation, since races do not exist only colors, seen as objective, concrete characteristics, independent of the idea of race. Such manifestations are more easily recognized as having class motivation. In this way, the illegitimate character of segregation or discrimination is taken away." Guimaraes, *supra* note 47, at 166. "The *Racial Democracy* thesis insists that the disproportionate impoverishment of blacks and their absence among elites is due to class discrimination and the legacy of slavery, and that the absence of state-sponsored segregation, a history of miscegenation, and social recognition of intermediate racial categories have upheld a unique racial order. (citation omitted)." Zaid, *supra* note 36, at 61.

n154 Brazil's many Constitutions map the evolution of its national policy on discrimination and equality. "The trajectory of Brazilian state policy on race in the twentieth century can be described as a transition from anti-discrimination to affirmative action." Mala Htun, *From "Racial Democracy" to Affirmative Action: Changing State Policy on Race in Brazil*, 39 LATIN AMER. RESEARCH REV. 60, 65 (2004).

n155 See C.F. art. 5 ("All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property. . . .").

n156 "In 1988, Brazil drafted one of the most advanced and sophisticated constitutions in the world, but, (citation omitted) the law 'provides a framework for understanding both the possible and the actual'. . . The constitution is a fundamental step toward providing protection for citizens in a number of areas, but in the face of the

unequal application of the rule of law, it loses its ability to deliver on its promises." Goldstein, *supra* note 26 at 55-6.

n157 C.F. Preamble. <http://pdba.georgetown.edu/Constitutions/Brazil/btitle.html> (last visited Sept. 16, 2008).

n158 *Id.* at art. 3 ("The fundamental objectives of the Federative Republic of Brazil are: . . . to eradicate poverty and substandard living conditions and to reduce social and regional inequalities; [and] to promote the well-being of all, without prejudice as to origin, race, sex, colour, age and any other forms of discrimination.").

n159 *Id.* at art. 5, § 42.

n160 *Id.* at art. 6.

n161 Nascimento, *supra* note 30, at 131.

n162 "Despite the often stern language of Brazilian antidiscrimination statutes, indications are that these measures have had a rather minimal effect." Cottrol, *supra* note 3, at 74.

n163 For a detailed description of the implementation of affirmative action policy under the Cardoso Administration see, Racusen, *supra* note 58, at 811 - 814.

n164 "The move to reexamine racial inequality in the 1990s was spurred on by stronger activism among Afro-Brazilians and by the election of President Fernando Henrique Cardoso, who has made addressing issues of racial inequality a governmental priority (citation omitted). . . Still, affirmative action, more effective antidiscrimination, and other racial remedies are beginning to be debated within the context of a society with strong traditions of hierarchy, deference, and limited social mobility." Cottrol, *supra* note 3, at 76. *See also*, Nascimento, *supra* note 30, at 133 ("That the need for affirmative action is being discussed in government circles is an enormous step forward. . . . This notion is foremost in Brazilian society's resistance to antidiscrimination policy.").

n165 Hernandez, *supra* note 5 at 698 ("Brazil began instituting affirmative action policies in 2001, when the Minister of Agriculture issued an executive order mandating that twenty percent of his staff be Black, that twenty percent of the state of firms contracting with the agency be of Afro-descent, and that another twenty percent of each firm's staff be women (citation omitted). Thereafter, the Federal Supreme Court and all other cabinet agencies instituted affirmative action policies as well (citation omitted). The Senate's establishment of quotas at public universities proved to be controversial, however (citation omitted). Lawsuits challenging the educational affirmative action policies soon followed (citation omitted).").

n166 President Lula da Silva, "promised to make wide-ranging changes to racial policies in Brazil (citation omitted)." Zaid, *supra* note 36, at 67. *See also*, Hernandez, *supra* note 5, at 697 ("President Luiz Inacio "Lula" da Silva has dedicated his presidency to focusing on conditions of the poor and those subordinated by race (citation omitted). Evidence of the racial justice component of Lula's priorities include his appointment of longtime activist Matilde Ribeiro as the first ever Minister for the Promotion of Racial Equality (citation omitted).").

n167 Public Law 6264/2005.

n168 "Lula proposed a Racial Equality Statute that goes far beyond most race-conscious policies in other countries. The statute would institute racial quotas in universities, civil service employment, and even television commercials, programs, movies, the theater, and soap opera, in an attempt to alleviate Afro-Brazilians' status as almost nonexistent players in the popular media. In addition, the proposal would also require 30 percent of all candidates for public office to be black." Zaid, *supra* note 36, at 67; Nascimento, *supra* note 30, at 135 ("The racist tendencies of Brazilian telecommunications programming were graphically underscored in 1979, when Angola's state television corporation sought partnership with Brazil. The new African state was forced to decline the offer of one of Brazilian educational TV's most popular programs . . . because its racist stereotyping rendered it unfit for viewing by children in Africa. Most Brazilians take the stereotyping so much for granted that they hardly understood the problem. . . . The current federal administration has a stated policy to include in its publicity images [of] all groups making up the Brazilian multiracial population.").

n169 "Evidence of racism aside, demographic statistics paint a grim picture for blacks in Brazil that is hard to square with the notion of a society that allegedly treats all people equally. . . . The distribution of wealth in Brazil is more uneven than almost any other place in the world." Zaid, *supra* note 36, at 68.

n170 Hernandez, *supra* note 5, at 696 (noting, "Brazil's intellectual history of viewing education as a mechanism to help the oppressed (citation omitted).").

n171 "Public universities, which offer the best quality higher education in Brazil are accessible almost exclusively to upper-class students who have had access to private (paid) primary and secondary education." Guimaraes, *supra* note 47, at 173. For a detailed description of the admissions process to Brazilian universities *see* Cottrol, *supra* note 3, at 71-72.

n172 Racusen, *supra* note 58, at 815 (reporting that more than 300 lawsuits have been filed against public universities in Brazil that implemented affirmative action practices).

n173 John A. Powell, *Transformative Action: A Strategy for Ending Racial Hierarchy and Achieving True Democracy*, BEYOND RACISM: RACE AND INEQUALITY IN BRAZIL, SOUTH AFRICA AND THE UNITED STATES 371, 402 (Charles V. Hamilton et al. eds., 2001).

n174 *Id.*

n175 Daniel, *supra* note 145 at 291