

LENGTH: 6393 words

ARTICLE: Can Affirmative Action and Reparations Co-exist?

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BIO:

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SUMMARY:

... In contrast to the "pure" race ideology of the United States, Brazilian race relations are based on an ideology of mixed race, or *morenidade*. ... In the United States Black subordination is a product of multiple forces: the legacy of racial slavery, unequal laws, inequality before the law, white lawlessness in the form of lynching and mob violence, segregation, discrimination, political disenfranchisement, economic exploitation, and anti-Black prejudice. ... Moreover, as troublesome as the problem of the disappearing Negro in Brazilian society may be for the enforcement of effective affirmative action policies, the complete absence (negation) of slavery reparations discourse in Brazil is also a product of the Brazilian culture of *morenidade*, the tendency to assert national identity over race, class over race, and mixture over "pure" race. ... But unlike in Brazil, United States race relations provided fertile ground for the development of identity politics and historical consciousness (most of all among persons of African descent) of anti-Black oppression. ... Whereas race consciousness among whites was identified with racism, race consciousness among Blacks was identified with anti-racism and resistance to white supremacy. ... Specifically, by deploying the rhetoric of color-blind law that decries race consciousness of any kind as unjust and even racist, neo-conservative backlash politics have successfully campaigned against racial remedies to racial discrimination.

TEXT:

[*1] **Introduction**

The purpose of this essay is to show that the cultural meanings assigned to race shape the remedial responses to racial injustice. This thesis, while simple and straightforward, is sometimes overlooked or neglected in attempts to formulate universal solutions to the problem of racial oppression, as if there could be a "one size fits all" remedy to the seemingly intractable malaise of racism. Through cultural exchange and comparison, however, it becomes clear that even what the term "race" means will differ in different contexts. By contrasting affirmative action and reparations as remedies to racial injustice, and the social/political consensus regarding the appropriateness of each in different contexts that seem to share similar features and histories of racial injustice, the importance of context cannot be overlooked. The focus of the contrasted racial cultures is the United States and Brazil, both of which share a common history of African enslavement and Black subordination.

Brazil and the United States were the two largest slave societies of modern times. n1 Both depended on African slave labor for most of their respective histories. Despite this similarity, however, the white majority in [*2] the United States has always outnumbered the Black minority; whereas in the Brazilian context, those identified as white were outnumbered by those identified as Black until the early part of the twentieth century, when whitening (*branqueamento*) policies of mass European immigration began to erode this demographic. n2 Moreover, the customary and legal segre-

gation of Blacks and whites in the United States has no counterpart in Brazil. n3 As a Latin culture that accepted and even promoted race mixing, Brazilian race relations are markedly different from these same relations in the United States. In the United States, where slave owners felt compelled to develop racial justifications for the institution of African enslavement, an ideology of "pure" race took hold early on. One of the first so-called anti-miscegenation laws was passed in Virginia in 1691 under which interracial couples were banished from the colony within three months of their marriage ceremony. n4 Interracial marriage between Blacks and whites remained a crime in Virginia until the U.S. Supreme Court finally declared such laws unconstitutional in 1967 in the famous case of *Loving v. Virginia*. n5 Moreover, under the "pure" race ideology, many North Americans subscribed to the so-called "one drop rule," which holds that any measurable trace of African ancestry makes an individual part of the Black race. n6 In contrast to the "pure" race ideology of the United States, Brazilian race relations are based on an ideology of mixed race, or *morenidade*. Indeed, it may be said that Brazilian national identity is founded on the notion that its citizens are a product of racial mixture, including its African and native components, and that the ideal exemplar of this mixture is the "mulatto" (*moreno*). n7

Although Brazil and the United States differ markedly with respect to the post-emancipation status of the formerly enslaved African--the absence of legally enforced caste and the acceptance of interracial sexual relations being the most obvious differences--the phenomenon of Black subordination within both societies is still clearly discernable. In the United States Black subordination is a product of multiple forces: the legacy of racial slavery, unequal laws, inequality before the law, white lawlessness in the form of lynching and mob violence, segregation, discrimination, [*3] political disenfranchisement, economic exploitation, and anti-Black prejudice. In Brazil, there is discrimination and anti-Black prejudice, but unlike in the United States, what it means to be Black is not a matter of perceived ancestry or hereditary difference; rather, it is a matter of color, phenotype, hair texture, class status, and educational attainment. n8 In the Brazilian context, it is commonly held that "money whitens," n9 exemplifying the social preference not merely for whiteness itself, but a lighter shade of dark. The Brazilian association of Blackness with ugliness, filth, and degraded social standing or inferior educational attainment is normative and conceptual, rather than specific to individual representatives of the Black race who may in fact attain to a more privileged status in Brazilian society. n10 Whereas anti-Black prejudice in the United States has resulted in segregation, discrimination, and in many instances open racial violence based on perceptions of racial ancestry, Afro-Brazilians are stigmatized due to phenotype, thus limiting their social mobility, while nevertheless maintaining an escape hatch in the form of mulatto exceptionalism. n11 The Brazilian national culture of eliminating Black/white racial distinctions through race mixing, and promotion of a mulatto elite that is not considered Black, has been called "progressive Aryanization." n12 Within the critical race community in the United States, this policy would simply be called racist.

If it were possible to throw the stone of anti-Black racism--and then hide the hand guilty of the assault--it would involve a strategy in which denunciation of racially discriminatory acts were the social norm, where public assertions of racial pride or consciousness were considered retrograde and contrary to national unity, thus fostering the firm conviction, that color inequalities are natural, due to individual or class differences, or merely aesthetic, all the while rewarding whiteness as the most desirable human condition. n13 Neo-conservative backlash politics in the United States in the post-Civil Rights era have been very successful in this quintessentially Brazilian "racial democracy" strategy. n14 Especially in the [*4] arena of racial remedies such as affirmative action, neo-conservatives have skillfully deployed equal opportunity rhetoric that casts race conscious remedies for discrimination as anomalous, unjust, and unnecessary. n15 Reparations for historic racial injustice, including slavery, are likewise rebuffed in neo-conservative rhetoric as contrary to justice--and racist too. n16 This rhetoric has infected the decisions of the United States Supreme Court in interpreting landmark precedents involving racial desegregation of public schools, n17 affirmative action, n18 and public contracting opportunities. n19 Lower federal courts have joined this chorus in cases involving Black reparations that have challenged the racial wealth gap by asserting entitlement to the profits gained from slavery and racial discrimination. n20 The impact of the denial of race conscious remedies on neo-conservative grounds of colorblindness has had its intended effects: maintaining a racial status quo of social inequality, while permitting white privilege to project an image of racial egalitarianism, unimpeded by unambiguous acts of white racism.

Relative to the neo-conservative politics of the United States, the contemporary situation of race conscious remedies in Brazil appears to the North American observer as a near paradisiacal mirage of an earlier era of race relations in which the Great Society was fresh and new and full of promise. n21 The temptation to believe that the Brazilian consensus [*5] acceptance of affirmative action signifies a less virulent antipathy to racial remedies, and a greater acceptance of the burdens of past racial injustice, however, is tempered by other indicators of a troubled paradise, and an uncertain future of racial justice. The primary indicator, as mentioned above, is the Brazilian national culture of "progressive Aryanization," or whitening (*branqueamento*). In national census polls, this has led in part to dramatic reductions among those willing to identify themselves as "Negro." n22 Moreover, as troublesome as the problem of the disappear-

ing Negro in Brazilian society may be for the enforcement of effective affirmative action policies, the complete absence (negation) of slavery reparations discourse in Brazil is also a product of the Brazilian culture of *morenidade*, the tendency to assert national identity over race, class over race, and mixture over "pure" race. n23 As an Afro-Brazilian woman lawyer stated at the South/North Exchange conference in Brazil in response to the proposal of Black reparations, since we are all part African, reparations would not work here. The implication of her statement was that the beneficiary class would include all (or most) Brazilians.

There are a multitude of reasons that affirmative action and reparations could not co-exist in the United States or Brazil. But in Brazil, unlike in the United States, it seems improbable that even the discourse or movement for Black reparations could co-exist with the current policy of affirmative action for two reasons intrinsic to Brazilian culture. First, although both affirmative action and reparations are seen as racial remedies, the degree of race consciousness among Blacks necessary to support a movement for reparations is lacking among Brazilian slave descendants who do not identify themselves in racial terms. This is so despite the fact that "nonwhites remain clustered at the bottom of the social structure more than a century after abolition." n24 Second, further complicating the development of reparations discourse in Brazil, as a complement or counterpoint to affirmative action policies, is the fact that Brazilian [*6] *morenidade* obscures the historical relationship of racial hegemony and exploitation, and substitutes an ideology of "racial democracy" in place of consciousness of Black subordination. n25 These two cultural elements, identity politics and historical consciousness of anti-Black oppression, which have been key to the development of reparations discourse in the United States (as in other parts of the African diaspora), are elided and suppressed in the Brazilian context.

Common Histories, Different Cultures

Brazil

Suppression of historical consciousness of racial oppression in Brazil began soon after the abolition of slavery in 1888 when the post-emancipation government ordered the destruction of its records pertaining to slavery. n26 Because of this willful act of destroying the historical documentation of Brazilian complicity in the infamous trade, it is not possible to determine with certainty the number of African slaves who were brought to Brazil. However, most historians estimate that between 3.5 and 5 million African slaves were imported to Brazil. Although the majority of African slaves in Brazil were employed in plantation and mine labor for most of its history, scholarly emphasis on the mildness and humanity of African slavery in Brazil compared to the British colonies has been a traditional theme. n27 Supposedly, the Portuguese had longer and more extensive contacts with Africans that mitigated the violence of the institution of slavery, reinforced by their Catholicism, benign imperial legislation protecting the rights of slaves, and the lack of European women in the colony. This last factor in the myth of benign slavery under the Portuguese in Brazil became the basis of widespread interracial sexual contacts--not necessarily marriages--between Portuguese men and African women. n28 The mixed race children that resulted from these contacts were the foundation out of which grew Brazil's significant population of mulattos and free persons of African descent.

[*7] As in other Latin American countries where a culture of *mestisaje* n29 prevails, Brazil sought to promote national identity over racial origin identity through suppression of the collection of racial demographic data in the census. n30 In addition, Brazil began an aggressive policy of whitening the national population in the latter part of the nineteenth century through promoting the subsidized immigration of large numbers of European immigrants. n31 The policy of whitening entailed the rejection of an Anglo-American ideology of "pure" race, and creation of what historian Carl N. Degler calls "the mulatto escape hatch." n32 Creation of the mulatto escape hatch began even under the racially discriminatory imperial legislation of the colonial period, which, for reasons of necessity among others, was often ignored by Brazilians. In operation this meant that persons of African descent who nevertheless could produce identity papers that were deemed to establish their whiteness--primarily mulattos--could escape the proscriptions of laws that discriminated against Negroes. Under the Imperial Constitution, Negroes in colonial Brazil were openly denied suffrage as well as access to high offices in civil society and the Catholic Church, and racial segregation was the order of the day. After abolition of slavery, racially discriminatory laws in Brazil slipped for the most part into desuetude, but the social practice of racial hegemony did not. That hegemony was built on the articulation of multiple color distinctions or categories that were themselves an outcome of interracial sexual contacts. In the process of whitening the nation, those who had only partial African ancestry were not relegated to the Negro group, but permitted to form socially intermediate categories between Black and white. n33

In Brazil a Negro is a person with no known or discernable white ancestry. n34 Consistent with the national policy of whitening and avoidance of racial consciousness, it is considered insulting to call an unknown person a Negro. n35

Instead, Brazilians use the more polite term *preto* (Black) or *preto retinto* (dark Black). Other intermediate terms that I heard during my attendance at the South/North Exchange in Brazil included *pardo* and *moreno*, signifying someone of varying degrees of mixed Black and white ancestry. The term *mulatto* is also used, and a distinction is made between the so-called *mulato escuro* (dark mulatto) and *mulato claro* (light mulatto). [*8] On the scale of color just beneath *branco* (white) is the *branco de terra* (meaning "white of the land"). There are other terms as well, that are used to identify color and presumed racial mixture. A dark-skinned person of African and indigenous heritage is called *caboclo*. But the preferred euphemism for persons of obvious African ancestry (dark skin, kinky hair, thick lips), but uncertain racial mixture, is *moreno*, which generally implies a light skin color. n36 As a female Brazilian anthropologist in attendance at the South/North Exchange said to me in response to my question whether I would be considered Negro or preto, "I would never call you Negro. To me, you are Moreno." To this anthropologist, her comment to me was complimentary, but it clearly implies that even in the new millennium there is still something derogatory about being called Black in Brazil. The notion of Black pride--or that someone might prefer to be Black rather white--or some intermediate approximation thereof--is foreign to the Brazilian culture of *morenidade* as it has developed under the policy of whitening.

In truth, the color syncretism embedded in the Brazilian culture of *morenidade* has led to the phenomenon of the disappearing Black. From a post-emancipation starting point as a majority of Brazil's population, polls indicate a steady decline among respondents willing to identify themselves as "Negro" or even "*preto*." n37

United States

Common to the United States and Brazil, as has been noted, is a history of racial enslavement of persons of African descent. But unlike in Brazil, United States race relations provided fertile ground for the development of identity politics and historical consciousness (most of all among persons of African descent) of anti-Black oppression. Moreover, despite the racial diversity of North American demographics, for much of the history of the United States race relations have centered on the Black/white dichotomy, leaving non-Black, non-white groups unaccounted for. n38 But there is no room for doubt that the racial hierarchy in the United States embraces white supremacy over non-whites, and that the legacy of the racial defense of African enslavement, with only slight regional differences, permitted no social recognition of an intermediate group between Black and white. Under this bifurcated system, known racial ancestry became racial destiny, and pure race was the order of the day. In [*9] other words, persons who were known to have an African ancestor were considered to be part of the Black group, despite color or appearance. This is what North Americans refer to as the so-called "one drop rule."

Also unlike Brazil, Blacks in the United States have always constituted a numerical minority. Thus, democratic politics would at no time be sufficient to guarantee positive change in the racial social system without legislative support from the white majority. Garnering such support began with the abolitionist movement, and continued through the passage of the post-Civil War Amendments, until the promise of those provisions was nullified during the era of legal segregation. When the United States Supreme Court moved to end legal segregation of public schools in the case of *Brown v. Board of Education* in the 1950s, a new era of civil rights activism eventually led to passage of the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the institution of affirmative action policies. Neo-conservative backlash against affirmative action beginning in the 1970s has successfully limited the scope of this remedy to racial discrimination, and initiated a new phase of Black activism to restore affirmative action and seek reparations for slavery. n39 But dwindling white support for racial remedies has denied movement activists any significant victories.

Nevertheless, Blacks in the United States have historically been motivated by blatant acts of white racism to mobilize resistance movements. The development of a culture of resistance to white supremacy among Black Americans has sometimes been attributed to the caste-like divisions created by racial slavery and de jure segregation. Under the banner of Black is Beautiful and Black Power, Black Americans in the 1960s attempted to reverse centuries of subordination that infected many Blacks with low self-esteem and self-loathing. Black empowerment became the moral high road in the battle to defend human rights against the exploitation and oppression of white racism. Whereas race consciousness among whites was identified with racism, race consciousness among Blacks was identified with anti-racism and resistance to white supremacy.

In the post-Civil Rights era, neo-conservative backlash politics in the United States have turned the strategy of Black resistance on its head. Specifically, by deploying the rhetoric of colorblind law that decries race consciousness of any kind as unjust and even racist, neo-conservative backlash politics have successfully campaigned against racial remedies to [*10] racial discrimination. As one scholar has noted, the resemblance to the Brazilian ideology of "racial democracy" is striking. He writes,

Currently the insistence of some conservatives that racism has ended in the United States, thus making affirmative action unnecessary, may be performing a function similar to the myth of "racial democracy" in Brazil. Denying racial prejudice and discrimination when they in fact exist is sometimes called "the new racism" in the United States. In Brazil, it might be better described as the same old racism. What is apparent in both cases is that racial discrimination and inequality do not require Jim Crow laws and disenfranchisement. A combination of institutional patterns and the private acts of individuals can sustain a pattern of inequality quite effectively, unless mass protest movements can force strong governmental action to insure equal rights and opportunities. And such movements are more difficult to organize when the target is not a blatantly unjust law or government policy but relatively subtle private discrimination, de facto segregation, and the ethnocentric, if technically color-blind, norms or preferences of institutions, organizations, and enterprises to which blacks have previously had very limited access and to which they may often find it difficult to adjust. n40

To this statement, we might also add that where resistance movements based in identity politics are considered to be a form of retrograde racism, and historical consciousness of anti-Black oppression is lacking, especially among those subordinated by it, then the possibility of mass protest movements organized around these themes appears most unlikely.

Different Cultures, Distinct Remedies

As the preceding exposition of cultural differences and national ideologies may show, an aggressive grass-roots campaign for slavery reparations based on mass protest and mobilization around distinctive racial identity experiences and historical consciousness would probably not work in the Brazilian context as a strategy to overcome anti-Black racism. Even if such a campaign were possible, it would likely operate to further entrench [*11] social divisions without achieving the desired outcome. As a society in which the gap between rich and poor is even more stark than in the United States, Brazil is still struggling to develop effective affirmative action policies that do not exacerbate racial tensions, the very existence of which have long been denied, even among Afro-Brazilians, based on the national ideology of *morenidade*. More feasibly, in the Brazilian context, those who are doing the work of anti-racism must focus their efforts on institution and expansion of affirmative action policies, while continuing to promote identity politics and historical consciousness of anti-Black oppression. Both identity politics and historical consciousness of anti-Black oppression will be necessary instruments in anti-racism work in Brazil for the establishment of affirmative action policies, and their defense, once the inevitable backlash against such policies begins to take hold. Backlash against affirmative action in Brazil seems inevitable, not simply because of similar developments in the United States, but particularly because of the habit among Brazilian officials to refer to affirmative action as a "quota" system. n41

By contrast, racial conditions in the post-Civil Rights era in the United States are more conducive to the movement for reparations for slavery and Jim Crow and, as recent case law has shown, less conducive to continuation of affirmative action policies. n42 Under current interpretations of the role of race in governmental decision making by the conservative majority on the United States Supreme Court, race is both irrelevant and a dangerous factor that must satisfy strict scrutiny. This view encompasses remedial uses of race to achieve racial balance or diversity in schools and workplaces. The ultimate goal is to eliminate intentional racial considerations altogether, and impose a colorblind system. The so-called unintentional effects of this policy, which many predict will lead backwards to greater racial segregation, are considered to be beyond the scope of antidiscrimination law in the United States as a de facto result of private choices within civil society. Having declared unilateral victory over racial discrimination, the legal system in the United States has sought to convert affirmative action policies into a legal anomaly that potentially violates the equality rights of white Americans. By raising a distinct set of concerns about the injustice of white profiteering during the period in which Blacks were officially exploited as commodities for trade and treated as less than [*12] equal citizens under the law, demands for reparations resurrect the need for racial remedies, and disturb the neo-conservative discourse of colorblind jurisprudence.

Strictly speaking, as a social justice discourse, reparations, unlike affirmative action, are not dependent on the concept of race. Indeed, under a reparations remedial model racialization of the beneficiary class is part of the injury perpetrated against the class that is used to justify denial of reparations. This aspect of reparations discourse makes it particularly troublesome for neo-conservative strategies rooted in colorblind rhetoric to rebuff. In other words, as the argument goes, the requirements of justice dictate that *anyone*--regardless of color, as they say--subjected to similar oppression

and denial of human rights should be entitled to reparations. Thus, reparations, properly understood, while not necessarily a racial claim, when applied to slave descendants, have racial effects because slavery and oppression of African descendants was justified on a racial basis. It is in this sense, that Black reparations are considered a racial remedy.

Of course, for the time being, reparations in the United States for slave descendants remain a desideratum. And there are other powerful discourses within the law and civil society aligned against the achievement of reparations for slave descendants, most particularly the temporal claim that too much time has passed since the initial injury, and the identification of perpetrators and beneficiaries is too uncertain. n43 But the point here is that the conditions for the possibility of the movement for reparations in the United States--identity politics, historical consciousness of anti-Black oppression, affirmative action and civil rights retrenchment, and vast racial inequalities of wealth and opportunity--are firmly rooted and not expected to dissipate anytime soon.

Conclusion: Reconciling Time, Identity, and Social Justice Solidarity

Comparative social studies of transnational race relations indicate that superficial similarities can sometimes obscure substantial differences within the everyday lived realities of groups that might be expected to share solidarity of interest. At the opposite end of the spectrum, there is the temptation to submerge deep affinities in a discourse of difference that merely shields observation of the typical patterns of domination and subordination. While no national ideology can be accepted at face value--in the case of the United States, the myth of equality, liberty, and justice for [*13] all, and in the case of Brazil, the myth of racial democracy and general acceptance of *morenidade*--anti-racism work among oppressed national groups must focus on the emancipatory possibilities embedded within their respective national cultures, even as they seek to learn from the experience of other similarly situated groups. At the same time, it must be recognized that transnational solidarities, like racial identities themselves, are social constructions. They change over time as a result of shifts in local socioeconomic and demographic conditions, agency interventions, and international human rights developments. n44 Solidarity across the African descendant diaspora population, therefore, must be nurtured, and not presumed or taken for granted.

In Brazil, it may seem to many African descendants that they can find greater social justice solidarity among impoverished whites living in the *favelas* than between themselves and relatively well off Black Americans. Equally, there is a greater sense of identity that flows from national citizenship and belonging to the same linguistic community despite painful encounters in one's own society with race discrimination or color prejudice. Affirmative action policies, with their focus on social inclusion and diversity, may better suit the Brazilian context in which disparities of opportunity and wealth based on color are stark, and yet little has been done historically to improve the conditions of Afro-Brazilians due to the suppression of identity politics and historical consciousness of anti-Black oppression. Moreover, Brazil has yet to experience the virulence of neo-conservative anti-affirmative action backlash that is characteristic of law and politics in the United States. In the post-Civil Rights political environment of the United States, reparations discourse--with its focus on rectifying historical wrongs and identifying the ways in which Blacks continue to be subordinated--acts counter to neoconservative strategies to eliminate affirmative action, and thus impose a colorblind version of racial democracy that many have come to see as yet another form of white supremacy.

Comparative transnational race relations can reveal not only the ways in which histories of domination and subordination intersect with and diverge from one another, but also the ways in which the struggles of subordinated national groups follow varying temporal trajectories. Thus, Brazil's past of mythic racial democracy appears to be the present and future of race relations in the United States; just as the recent past of race relations in the United States appears to foreshadow the present and future [*14] of race relations in Brazil. Whether this will turn out to be the case in fact, and whether anti-racism movements will be able to sustain the struggle for social inclusion and rectification of historical wrongs through racial remedies, only time will tell.

Legal Topics:

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

Education Law
Discrimination
Racial Discrimination
Desegregation
Procedures
Governments
Federal Government
Elections
Labor & Employment Law
Discrimination
Racial Discrimination
Remedies
General Overview

FOOTNOTES:

n1 *See* CARL N. DEGLER, NEITHER BLACK NOR WHITE: SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES 3 (1971).

n2 *Id.* at 3-5. *See also*, ELISA LARKIN NASCIMENTO, THE SORCERY OF COLOR: IDENTITY, RACE AND GENDER IN BRAZIL 51-53 (2007).

n3 *Id.* at 5.

n4 *See* Robert Westley, *First-Time Encounters: "Passing" Revisited and Demystification As a Critical Practice*, 18 YALE L. & POL. REV. 297, fn. 87 (2000).

n5 *See Loving v. Virginia*, 388 U.S. 1 (1967).

n6 *See* Degler, *supra* note 1, at 101.

n7 *See* Nascimento, *supra* note 2, at 53-54.

n8 *See* Degler, *supra* note 1, at 102.

n9 *Id.* at 105.

n10 *See* Nascimento, *supra* note 2, at 61-63.

n11 *See* Degler, *supra* note 1, at 107.

n12 *Id.* at 191, quoting Roger Bastide, "Dusky Venus," RACE 12 (1961).

n13 *See* Nascimento, *supra* note 2, at 68-69.

n14 See e.g. Ian F. Haney Lopez, *A Nation of Minorities: Race, Ethnicity, and Reactionary Colorblindness*, 59 *Stan. L. Rev.* 985, (2007) (describing the history of reactionary colorblindness, meaning the current form of race blindness that principally targets affirmative action and is a neoconservative response to the civil rights movement).

n15 See, e.g., William Bradford Reynolds, *An Experiment Gone Awry*, in *THE AFFIRMATIVE ACTION DEBATE* 130-136 (George E. Curry ed., 1996).

n16 See JOHN TORPEY, *MAKING WHOLE WHAT HAS BEEN SMASHED: ON REPARATION POLITICS* 118-119 (2006) (discussing the exploitation of the reparations issue by conservative publicist David Horowitz in his advertisement entitled, "Ten reasons why reparations for slavery are a bad idea for black people--and racist too.")

n17 Parents Involved in *Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 *S. Ct.* 2738, 2765 (2007). See also, 127 *S. Ct.* at 2798 (Stevens, J., dissenting) ("There is a cruel irony in The Chief Justice's reliance on our decision in *Brown v. Board of Education*").

n18 *Grutter v. Bollinger*, 539 *U.S.* 306, 369-70 (Rehnquist, C.J., dissenting).

n19 See *Adarand Constructors, Inc. v. Peña*, 515 *U.S.* 200 (1995).

n20 See *In re African-American Slave Descendants Litigation*, 471 *F. 3d* 754 (7th Cir. 2006)

n21 In his speech at Howard University on June 4, 1965, President Lyndon Johnson said in defense of affirmative action, "[F]reedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'You are free to compete with all the others,' and still justly believe that you have been completely fair... We seek not just freedom but opportunity--not just legal equity but human ability--not just equality as a right and a theory, but equality as a fact and as a result." See Lyndon B. Johnson, *To Fulfill These Rights*, *THE AFFIRMATIVE ACTION DEBATE* 16, 17-18 (George E. Curry ed., 1996). For a description of President Johnson's Great Society program, designed to end poverty and social injustice, see John A. Andrew, *PRESIDENT JOHNSON AND THE GREAT SOCIETY* (1999).

n22 See Abdias do Nascimento & Elisa Larkin Nascimento, *Dance of Deception: A Reading of Race Relations in Brazil*, in *BEYOND RACISM: RACE AND INEQUALITY IN BRAZIL, SOUTH AFRICA, AND THE UNITED STATES* 105, 108 and 125 (Charles V. Hamilton et al., ed., 2001)

George M. Fredrickson, *Race and Racism in Historical Perspective: Comparing the United States, South Africa, and Brazil*, in BEYOND RACISM 1, 14 (Charles V. Hamilton et al. eds., 2001); and David J. Hellwig, ed., AFRICAN-AMERICAN REFLECTIONS ON BRAZIL'S RACIAL PARADISE 9 (1992).

n23 See Nascimento, *supra* note 21, at 125.

n24 See Hellwig, *supra* note 21, at 3.

n25 The application of the term "racial democracy" to Brazilian race relations is most closely associated with the work of Brazilian scholar Gilberto Freyre who in his major work, *The Masters and the Slaves*, praised race mixture and proposed to substitute the biological paradigm of race for an ethnocultural or anthropological one. See Nascimento, *supra* note 2, at 53, and ROBERT BRENT TOPLIN, *FREEDOM AND PREJUDICE: THE LEGACY OF SLAVERY IN THE UNITED STATES AND BRAZIL* 91 (1981).

n26 See Hellwig, *supra* note 21, at 3.

n27 *Id.* at 4.

n28 *Id.*

n29 *Mestisaje* is a Spanish word meaning mixed race.

n30 See Nascimento, *supra* note 2, at 17-18 and 49, especially fn. 27 (referencing the suppression of data by color in the Brazilian census of 1900, 1920, 1940, 1950, and 1970).

n31 See Nascimento, *supra* note 21, at 121-122.

n32 See Degler, *supra* note 1, at 226 *passim*.

n33 *Id.* at 213-222.

n34 *Id.* at 102.

n35 See Nascimento, *supra* note 21, at 125.

n36 See Degler, *supra* note 1, at 102-103.

n37 See *supra* note 21 and accompanying text.

n38 Juan F. Perea, *Death by English*, in THE LATINO/A CONDITION: A CRITICAL READER 583-96 (Richard Delgado & Jean Stefancic ed., 1998)

n39 California Civil Rights Initiative (Proposition 209), Cal. Const. art. I, § 31 (1996)

n40 See Fredrickson, *supra* note 21, at 13.

n41 See Nascimento, *supra* note 21, at 133.

n42 *Grutter v. Bollinger*, *supra* note 18, at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.")

n43 See *In re African-American Slave Descendants Litigation*, 471 F. 3d 754 (7th Cir. 2006)

n44 On international human rights developments, see Gay McDougall, *Racial Discrimination as a Violation of International Law: International Standards and Mechanisms*, in BEYOND RACISM, *supra* note 21, at 435.