Color and Caution

BY ALEX KOZINSKI

The Color-Blind Constitution by Andrew Kull

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"That the Constitution is color-blind is our dedicated belief."

—Plaintiffs' brief in *Brown* v. *Board of Education* (1954)

"The position that 'our Constitution is color-blind' has never been adopted by this Court."

—Justice Brennan, concurring in part in *Regents* v. *Bakke* (1977)

There's something profoundly appealing about the colorblindness principle. The notion that the government must treat people the same regardless of race is one of those simple ideas that can move mountains. For more than a century—from before the Civil War to the mid-1960s—the civil rights movement was largely devoted to this cause, and a fair measure of the movement's success was doubtless based on the moral force it commands. Well-meaning people of all political stripes, who might not agree on what the laws of the land ought to be, could nonetheless agree the laws should be equal for all races.

But colorblindness is also a most inconvenient idea. Taken seriously, it gets in the way of doing any number of things government might think wise and prudent: separate schools and preferential minority admissions; segregated streetcars and minority business set-asides; anti-miscegenation laws and racial gerrymandering. It is perhaps for that reason that the Supreme Court has never adopted colorblindness as an operative constitutional principle. Unwilling to foreclose the political branches (under its own supervision) from doing what they think necessary to ameliorate racial tensions, the Court has firmly rejected every suggestion that the law may never discriminate on the basis of race.

The colorblindness principle has nonetheless maintained a firm grip on our collective consciousness. The most obvious reason for this is moral: there's something inherently repugnant about judging people by their skin color. Partly it's because it seems wrong to punish or reward people for something over which they have no control. Partly it's because race is almost never relevant to a person's suitability for anything. Partly it's that the very ethic of individualism demands that we treat people as individuals, not as members of a group. From Justice John Marshall Harlan's "the law regards man as man, and takes no account of his color" in his 1896 *Plessy* v. *Ferguson* dissent, to Dr. King's dream that people "not be judged by the color of their skin but by the content of their character," colorblindness has carried a strong moral appeal.

Despite its intuitive power, this argument has its difficulties. We often do reward people on the basis of immutable characteristics: the smart, the beautiful, the talented usually beat out the stupid, ugly and dull. We also regularly make judgments about people because of the group to which they belong—for instance, we prohibit all 20-year-olds from buying alcohol because a few of them abuse it. Even as our moral sense tells us people are entitled to be treated as individuals, experience and expedience tell us that group judgments are often rational.

A second argument for colorblindness is political. Unlike intelligence, age or appearance, race and ethnicity are deeply divisive things. People draw lines based on these attributes, dividing the world into us and them. From the former Yugoslavia to Sri Lanka to Canada to South Africa, we see how easy, lasting and deadly the divisions can be. And, as Thomas Sowell demonstrated in *Preferential Policies*, government-enforced racial discrimination tends to exacerbate these tensions. In Harlan's words, colorblindness is the only "sure guarantee of the peace and security of each race," a means to put an end to the "conflict of races, the continuance of which must do harm to all concerned."

But this argument, too, has its limitations. Racial classifications might fuel racial hostility, but not making such classifications might fuel even more hostility. We live in a society only a generation or so removed from apartheid; racism is still a fact of life for many Americans. Blacks continue to share unequally in the bounty of our economy, quite likely because they continue to suffer the effects of discrimination visited on them and their ancestors. If we are going to achieve racial peace, and eventually a colorblind society, some have argued, we must adopt color-conscious remedies.

But there's a third argument for colorblindness, one that carries less emotional power yet may ultimately be the strongest. It's a profoundly pessimistic argument, an argument based on suspicion and mistrust. It contends that, where race is concerned, we cannot leave judgments of morality or prudence to legislatures, even to courts. It looks in large part to the past, to our sorry record of race-based decisions—enforced segregation, anti-miscegenation laws, the internment of Japanese-Americans during World War II—and of judicial approvals of all these decisions. But it also looks to the future, to a society where racial conflicts are rapidly progressing beyond the paradigm of whites oppressing blacks; to a society in which many racial and ethnic groups have economic and political power and the willingness to use it to benefit themselves at the expense of others.

Andrew Kull's *The Color-Blind Constitution* is a work of intellectual history. It is a history of the idea of colorblindness, of its evolution from before the Civil War, through the days of Jim Crow and *Brown*

v. *Board of Education*, to the present. It's a fascinating story, tightly written and often surprising. Few people know, for instance, about the first school desegregation lawsuit, filed in Boston more than 100 years before *Brown* and more than a decade before the Civil War. Few know how much force the colorblindness argument carried even in the dark days of separate but equal: in the decades before and after its *Plessy* v. *Ferguson* decision upholding segregated streetcars, the Supreme Court struck down many racist laws, from laws barring blacks from juries to those enforcing residential segregation. In the years immediately after the Civil War, state courts in Iowa, Kansas and Pennsylvania struck down school segregation laws. (The Kansas decision, as it happens, did not last; the segregationist Board of Education in *Brown* v. *Board of Education* was that of Topeka, Kansas.)

Being a work of history, Kull's book is primarily an objective summary of the past, rather than a blueprint for the future. But, as Kull admits, telling the story of race-based legislation supplies powerful ammunition for the colorblindness cause. Rather than dealing directly with the morality or the political wisdom of affirmative action, Kull's book casts into doubt the ability of legislators and judges to resolve these moral and political questions.

The willingness of the *Plessy* v. *Ferguson* Supreme Court to acquiesce in government-ordered segregation is one part of the story. This was not a Court too timid to stand up to state officials in matters of race: it had no difficulty striking down discriminatory jury service laws, racist business-licensing practices, residential segregation laws and the like. The Court simply decided that streetcar segregation was reasonable and therefore permissible. If people think that "the enforced separation of the two races stamps the colored race with a badge of inferiority," wrote a smug Justice Henry Brown, "it is solely because the colored race chooses to put that construction upon it." Today we condemn this way of thinking as wrong, and segregation as deeply unfair and unreasonable. But so long as courts have the power to determine which race-based laws are reasonable and which are not, we live with the risk that they'll make the wrong decision.

The Japanese-American wartime internment cases are another part of the story. Politicians from Earl Warren to Franklin Roosevelt supported internment, and six of the nine Supreme Court justices agreed. Perhaps the Court was only yielding to political necessity. Perhaps it was concerned that a decision many would see as undermining the war effort could badly damage the Court's authority. But the three dissenters, who doubtless had their share of political savvy—Justice Frank Murphy had been a mayor and a governor, as well as attorney general; Justice Owen Roberts is widely believed to have voted to uphold New Deal legislation in order to stave off Roosevelt's court-packing plan—must have thought otherwise. And, as Justice Robert Jackson pointed out, the Court went beyond approving of discrimination in time of war; its holding that "pressing public necessity" could justify race discrimination remained "a loaded weapon" usable in peacetime. Maybe courts will always hesitate to overturn governmental decisions made in the face of overwhelming necessity. But a court that views racial classifications as permissible if sufficiently justified will be much quicker to uphold invidious classifications than one that aspires to a rule of absolute colorblindness.

Finally, Kull aptly points to the little-known case of *United Jewish Organizations* v. *Carey* (1977), in which the Supreme Court upheld a racial gerrymander that eviscerated the voting power of Brooklyn's 30,000 Hasidic Jews in order to increase the electoral strength of black and Puerto Rican communities. Hasidic Jews, as Kull points out, are "one of the most discrete and insular minorities it is possible to imagine," and anti-Semitism in America is not exactly ancient history. Nonetheless, the Supreme Court serenely rejected their claim, noting that "whites in Kings County, as a group, were provided with fair representation," something akin to telling Puerto Ricans that they shouldn't worry about their voting strength because "Catholics as a group were provided with fair representation." This may not be an evil as great as segregation or the internment of Japanese-Americans, but it's profoundly troubling nonetheless: in the zero-sum game of racial redistricting, the ethnic group that got squeezed out was the one with its own long and painful history of oppression.

The most powerful reason, however, for pessimism about the ability of courts and legislatures to tell good racial classifications from bad is one that Kull only hints at, because it's rooted in the likely future more than in the historical past. One argument—a very plausible argument—in favor of affirmative action has been its likely motivation: while laws passed by whites that hurt blacks may seem motivated by hatred or prejudice, laws passed by whites that help blacks seem much more benign. One can question the political wisdom of such laws, or argue that they're morally wrong, but it seems more reasonable to defer to legislative judgments when they are motivated by altruism rather than self-interest.

But in large part thanks to the success of the civil rights movement, we're entering an era in which economic and political power is much more widely shared among races and ethnic groups. Chinese-Americans and Japanese-Americans are richer on average than whites (though they tend to be too dispersed to form electoral majorities). Cuban-Americans are the dominant political force in parts of Florida. And both blacks and Hispanics, despite their relative lack of economic power, form electoral majorities in many regions. Blacks, for instance, were a majority on the city council of Richmond, which enacted the racial preferences challenged in *Richmond* v. *J. A. Croson Co.* (1989); Mexican-Americans are a majority in many cities and counties in the Southwest.

It's an unpleasant but incontrovertible truth that all ethnic groups—from Anglo-Saxons to Italians to Irish to Jews—tend to help their own at the expense of others. Much of this is based on a feeling of identification with fellow group members and, ultimately, on raw economic self-interest: economic solidarity among people of the same ethnic background is a time-honored tradition. Nor are minorities immune from racism and prejudice; though one would hope that a consciousness of past oppression would teach empathy and tolerance, this has often not been so. White immigrant groups who were subject to vicious per-

secution in the Old World have had no compunctions about doing unto others as was done unto them.

We truly are not all that different from each other, warts and all. It would be improbably saintly for groups with newly acquired power to forbear from using it for their own ends. In a non-colorblind legal system, courts will have to deal with more and more color-conscious laws that may have more and more suspect motivations.

It's far from clear how courts can do this in any principled way. No one has yet proposed a satisfactory rule that distinguishes proper racial classifications—permissible exercises of the government's power to classify people for the common good—from those based on hatred, prejudice or a desire to help one's own at the expense of others. No one has explained how we can tell justified attempts to compensate for past wrongs apart from unjustified attempts to get the biggest slice of the pie. And the alternative to rules—making ad hoc intuitive decisions, as the Court has been doing recently—seems like a good solution only if you are the one appointing the judges.

Were racial discrimination always irrational, colorblindness wouldn't be very controversial. But there are times when the argument for color-consciousness is plausible; imposing colorblindness in those cases seems an extravagance. If our elected representatives really believe that interning Japanese-Americans may help win the war, or allocating university admissions by race may help produce a more just society, or reserving jury seats for each race may help avoid riots, why should an abstract principle stand in the way?

The answer to this question depends on whether you're an optimist or a pessimist. If you believe the branches of government, working together, can implement only (or mostly) the good race classifications and reject the bad ones, colorblindness will be at most an aspiration, a principle to be generally followed but scuttled when necessary. But if you're skeptical about the competence of lawmakers and judges in this area, you will choose colorblindness as a nearly ironclad prophylactic rule, to be breached only at great peril. Justice Harlan, whose brilliant dissent in *Plessy* gave us the phrase "colorblind," was a pessimist. "The experience of the intervening century," Kull contends, "has not yet proven Harlan wrong."

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