Failure of the Color-Blind Vision: Race, Ethnicity, and the California Civil Rights Initiative*

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I. Introduction

A persistent theme in the campaign for the California Civil Rights Initiative[1] has been its claim of moral superiority. CCRI advo-

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1. Bill Jones, Secretary of State, Proposition 209, *in* CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION, NOV 5, 1996 (forthcoming Sept. 1996) [hereinafter CCRI]. The full text reads as follows:

> PROPOSED AMENDMENT TO ARTICLE I
>
> Section 31 is added to Article I of the California Constitution as follows:
>
> SEC. 31. (a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> (b) This section shall apply only to action taken after the section's effective date.
>
> (c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.
>
> (d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.
>
> (e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal

cates argue that the CCRI embodies racial neutrality. They call for a color-blind America, and they invoke the name of Martin Luther King. The proponents of the CCRI loudly proclaim that it is they who seek racial justice, and it is the defenders of affirmative action who are reinforcing racial discrimination.[2] Race color blindness has been presented as a progressive, forward-looking "vision" of racial justice.

> program, where ineligibility would result in a loss of federal funds to the state.
> (f) For the purposes of this section, "state" shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.
> (g) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law.
> (h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United State Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

Id.

2. These sentiments can be seen in almost every statement issued on behalf of the CCRI. Exemplary are the introductory comments at the CCRI World Wide Web site. As of this writing, the California Civil Rights Initiative maintains a Homepage on the World Wide Web at http://www.publicaffairsweb.com/ccri/. The introduction on the Homepage is as follows:

> Thanks for visiting CCRI's World Wide Web Site. The two of us have worked together for four years on this issue. We are enlisting the help of as many people as possible for the California Civil Rights Initiative. We hope you will join us in supporting CCRI.
>
> We are not politicians—one of us (Glynn) is a professor, and the other (Tom) heads the California Association of Scholars. We spent months trying to get the California State Legislature to put CCRI on the ballot for voters to decide, but powerful Assembly leader Willie Brown used his political muscle to kill it.
>
> Willie Brown left us with no other choice—we have to gather over 1 million signatures to put our initiative on the ballot—with Brown fighting us all the way. That's why we hope you will respond to the request from Governor Wilson you'll find here at our site.
>
> . . . .
>
> So, please join us in the fight to end racial and gender preferences and to realize Dr. Martin Luther King's dream of a color-blind society. Thank you for your support.
>
> Sincerely,
>
> Glynn Custred & Tom Wood
> Co-authors California Civil Rights Initiative

This statement charges that Willie Brown, former speaker of the California Assembly, left them "no other choice" but to go forward with the signature initiative process. Earlier versions of the CCRI had been presented for legislative approval, but were never approved in the California legislature's committees. Brown is African-American and a longtime ad-

I believe that this is a total distortion of race color blindness. Far from being a view to the future, race color blindness is a vision rooted in nineteenth century conceptions of race. In its strong versions, race color blindness is not only out of date and condemned to failure as a program for racial justice, but race color blindness actively blocks efforts to address conscientiously the multitude of issues surrounding race.

This argument is in three parts. First, I will make a close technical examination of race color blindness, focusing on "racial nonrecognition."[3] This is the technique used to implement race color blindness in the public sphere.[4] We will then see how the technique of racial nonrecognition has been transposed into the realm of private conduct—the private sphere. In this manner, I will demonstrate how denying race in nongovernmental social interactions works to undermine efforts to achieve social justice. The color-blind vision is exposed as a vision of denial, instead of a truly open and just vision for the future for America.

In the second section, I will look at the language of the recent Fifth Circuit decision, *Hopwood v. Texas*.[5] Sections of the majority opinion will be examined as a text. I will review the court's language as a narrative to see the implicit assumptions and understandings situated within the court's portrayal of the University of Texas School of Law's admissions process. Special attention is paid to the meaning of "diversity" in constitutional equal protection jurisprudence as established by the Supreme Court's decision in *Regents of the University of California v. Bakke*.[6] It is this conception of "diversity" which the court aggressively rejected in *Hopwood*. From that analysis, I will argue that the Fifth Circuit panel has pursued an extremist approach to the color-blind vision.

The third section takes a close and critical look at the language of the California Civil Rights Initiative.[7] I will show that the CCRI debated in the media is *not* the same CCRI presented on the ballot. The CCRI as written contains dramatic language which could radically al-

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vocate for maintaining existing affirmative action programs, including minority set-asides in public contracting, race-conscious college admissions, and minority outreach programs.

Brown is implicitly accused of fighting CCRI's efforts to "realize Dr. Martin Luther King's dream of a color-blind society." *Id.*

3. This analysis will draw upon my earlier work in Neil Gotanda, *A Critique of Our Constitution is Colorblind*, 44 STAN. L. REV. 1 (1991).

4. *See id.* at 68 n.77.

5. 78 F.3d 932 (5th Cir. 1996).

6. 438 U.S. 265 (1978).

7. *See supra* note 1.

ter California civil rights law and the structure of California education. This analysis will demonstrate that, like the *Hopwood* decision, a strong interpretation of the CCRI reveals an implementation of an extreme interpretation of the color-blind vision.

Consider, first, constitutional color blindness and its racial vision.

II. What Is the Color-Blind Vision?

The color-blind social vision that I will describe is an interpretation derived from past Supreme Court decisions and our modern understanding of race. As part of that vision, I will suggest two models. There is a "sensitive" version which leads to self-contradiction in application. There is also an extreme or radical version which would deny any validity to a racial experience.

The color-blind vision is often equated with the Supreme Court's use of the strict scrutiny standard of judicial review under the Equal Protection Clause of the Fourteenth Amendment. However, while they are related, they are not the same. The color-blind vision sweeps much more broadly. The color-blind vision includes a decisionmaking technique related to strict scrutiny which incorporates private as well as governmental decisions. Even beyond such a technique, the color-blind vision is presented as the articulation of the future American society that we seek to build.

This broad and sweeping understanding of the color-blind vision has never been adopted by a majority of the Supreme Court. In recent cases, the Court has clarified its judicial review of governmental use of race. *City of Richmond v. J.A. Croson & Co.*[8] addressed state-level government contracting; *Shaw v. Reno*[9] dealt with voting rights; and most recently, *Adarand Constructors, Inc. v. Pena,*[10] reviewed a congressional enactment. In all of these cases, the Court adopted a strict scrutiny standard of review.[11] The Supreme Court addressed these issues incrementally and with great caution. The Court is divided, with a multitude of concurring and dissenting opinions.

The most significant limitation to the Court's consideration of issues arising under equal protection has been the requirement of government action. The presentation of color blindness as a social vision or even as a moral imperative goes far beyond the constitutional doc-

8. 488 U.S. 469 (1989).
9. 509 U.S. 630 (1993).
10. 115 S. Ct. 2097 (1995).
11. *See, e.g.*, the discussion in Miller v. Johnson, 115 S. Ct. 2475, 2482 (1995).

trine of equal protection. Under modern equal protection doctrine, it is only government action which is being reviewed.

For many important governmental rights and powers in the public sphere, the use of strict scrutiny to review race-based decisionmaking is intuitively attractive. If a court were to strike down a race-based denial of the right to vote, there would be little dissent today. In these situations, where granting an individual a right—for example, the right to vote—does not involve the simultaneous decision to deny someone else their right to vote, we could develop a strong consensus that such a governmental racial restriction should be subject to strict scrutiny. In these areas, the color-blind vision has its greatest power and meaning. No one, on the basis of race, should be denied access to the basic civil rights under law: the right to cast a ballot, defend oneself in court, seek redress from the government.

In such open-ended governmental rights, we do not face our current disagreements. At issue in most of the current debates about affirmative action are those decisions in which granting one party a contract means denying the contract to someone else; where admission of one qualified student ultimately means denial of admission to another qualified student; or where hiring one applicant means denying another applicant a job.

When invoked as a moral imperative, the color-blind vision assumes that race color blindness is race-neutral as a process and embodies a valid and positive racial social vision. I argue that this assumption is not only false, but that race color blindness when applied to the complexities of civil society—to actual decisionmaking in such areas as contracting, employment, and admissions—is not race-neutral. Instead, it is a disguised form of racial privileging.

Consider the mechanics of using color blindness in an employment decision. Suppose an employer says, "Our last job applicant was an African-American female, but I didn't take that into consideration." For that statement to be coherent, several steps must be taken. First, societal understandings of gender and race must already exist. Then, at the job interview, that societal understanding must be applied to the candidate. The candidate's gender and race are recognized as applicable categories. Then, as part of the process, all femaleness and blackness are *eliminated* from consideration.

Take careful note of the last step. Whatever our job interviewer understood to be the significance of being female and African-American was discounted to zero and removed from consideration.

Color blindness is often described as a race-neutral process. However, "racial nonrecognition," the technique at the heart of our understanding of color blindness, is by its nature not a "neutral" process, since certain characteristics were recognized, calculated, and then discounted.

The traditional sense of medical color blindness is instructive. For those whose vision is not impaired, colors do exist. Colors can be seen. By contrast, a medically color-blind person cannot see certain "colors." For a majority-vision person to pretend to be color-blind, he or she would first "see" the color, then pretend that the colors could not be seen. It is the process of taking something that one knows to exist—colors—and then consciously discounting their existence.

Returning to racial color blindness, any meanings that might attach to being African-American, Asian, or Latina or Latino are all to be ignored completely. Consider the life experiences that might be attributed to being African-American. There are an infinite variety of possibilities of such experiences, some of which have been captured in stereotyped representations. No particular set of characteristics is present for every African-American individual, and only a few may be relevant to a particular decision. However, for this theory of color blindness, the social value of any characteristic linked to race is reduced to zero. This process is under the sole and invisible control of the decisionmaker. Even if such a decisionmaker is sensitive to the complexities of race and even if he or she consciously attempts to discount only "skin color" or racial identification in an effort at racial neutrality, substantial complications remain.

Imagine a "sensitive" decisionmaker who feels that meeting the challenges of adversity is a positive characteristic for an employee. This decisionmaker would have to review our hypothetical African-American female candidate, discount racial identifications and gender, but still determine whether she has had to overcome the adversity of racial discrimination *without thinking about her race.* If we allow for unconscious stereotyping or prejudice, there is even greater room for discounting on the basis of race.

Beyond the sensitive version, there is the strong version of race color blindness. For the extreme version of race color blindness, all race-related characteristics are to be discounted. There would be none of the difficulties involved in assessing the merits of overcoming individual racial adversity. Such individual experiences are race-related, and thus should not be considered. In short, in the extreme version of racial non-recognition, the charge of "essentialism"—that

all members of a particular category will share certain characteristics—is directly relevant. All of these assumed social considerations of race are discounted to zero.

As a social vision—the color-blind vision—this extreme version provides similar guidance. Since any racial understandings are discounted as valueless, they are accorded little or no social merit. Such notions as the historical or cultural contributions of race are discarded. In the color-blind vision, all individuals are socially "de-raced" or "de-racinated."

Anyone who faces the prospect of being "de-raced" under racial nonrecognition has few positive choices. He or she might accept "de-racing" and follow an assimilationist approach, seeking adaptation to majority society. Yet, if the color-blind vision does not come to pass and racial discrimination continues, such efforts will only end in frustration. Alternatively, a person choosing not to assimilate would be constitutionally condemned to a marginal existence in the future society whenever racial recognition is applied. Instead of being a fully human candidate, the target of nonrecognition in the color-blind vision enters decisionmaking with an automatic handicap.

As a social vision, race color blindness requires all individuals in any decision of significance to predecide and to prejudge. As applied to African-Americans, the vision of race color blindness suggests that we will regard someone's identity as an African-American to be without value or worth. The meanings of African-American identity would be discounted to zero and any consideration of them would be deemed illegitimate. If ethnicity—especially those ethnicities traditionally considered as non-white—is subsumed as racialized, the color-blind vision applied to these ethnicities discounts their identities as equally valueless to society.

III. *Hopwood v. Texas*[12]

When I first wrote about constitutional color blindness several years ago,[13] I thought of the color-blind vision as an extreme extrapolation of themes present in existing Supreme Court decisions. But what I had projected as near-caricature has come into full view as the majority opinion in *Hopwood v. Texas.*[14] In that opinion, the discussion which has attracted the most attention is the Fifth Circuit panel's

12. 78 F.3d at 932 (5th Cir. 1996).
13. *See* Gotanda, *supra* note 3.
14. 78 F.3d at 932.

rejection of the *Bakke*[15] decision as precedent for the use of racial diversity in the admissions process in higher education.

I would like to proceed by examining portions of the Fifth Circuit's opinion as "text." I will look at the language of the majority opinion for assumptions, categories, and hidden meanings. As a methodology, this is similar to more traditional legal analysis using analogy or precedent. Besides those more traditional methods, I am looking for the relations and patterns of power and subordination—especially those of race, gender, and economic power.

To explore the *Hopwood* opinion, let us look first at Justice Powell's lead opinion in the 1978 *Bakke*[16] decision. Though Powell wrote only for himself and was not joined by another justice in that opinion, Powell's understanding of the importance of "diversity" in higher education emerged as the dominant constitutional understanding.

Powell's opinion lauded the "Harvard Plan," whereby race could be one factor, with other admissions considerations, as a school sought to select from among many qualified applicants. Under Powell's reasoning, the presence of at least a few racial minorities would add "something" to the student body. As a result, total educational process would be enhanced. Since the selection was to be made on a racial basis, the Court's approach in *Bakke* acknowledged that there was some recognizable social merit or value to being African-American or Latina or Latino.

Nationally, leading institutions of higher education have adopted such race-conscious programs in admissions. Outside of education, the importance of diversity has been embraced by corporate America. To succeed in today's economy, a business must be lean and mean as well as international *and* multicultural. Even if a company chooses not to expand outside U.S. borders, employees and customers may well speak English as a second language. Sensitivity to racial and cultural diversity is simply a part of the domestic and world market.

Even with this level of acceptance, one can still adopt a critical viewpoint and note that diversity programs are minimal programs. The goal of diversity programs in higher education is quality education for the entire student body. Since racial minorities are, by definition, a minority of the student body, diversity seeks the admission of the minimum number of racial minorities whose contribution will result in a quality education for the majority. Restated in *Hopwood's* black-white terms: Diversity seeks to admit the smallest number of

15. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978).
16. *Id.*

African-American students needed to educate properly the white students.[17]

As an affirmative action program, the goal of diversity is much reduced from those of such measures as Executive Order 11,246.[18] That executive order and related government programs sought minority workforce participation that matched some larger reference target, such as the percentage of minorities in the population, or the number of qualified minorities in a defined employment market. Those goals and timetables were far more ambitious goals than that which is contemplated by a diversity program.

Returning to the language of the *Hopwood* decision, we can quickly see that even such a limited notion as academic racial diversity was unacceptable to the *Hopwood* court. Consider the following language:

> Within the general principles of the Fourteenth Amendment, the use of race in admissions for diversity in higher education contradicts, rather than furthers, the aims of equal protection. Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals. It may further *remedial purposes* but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility.[19]

The court's use of "remedial" rather than educational purposes, is revealing. The court chose not to recognize that racial diversity has any educational merit. Stated positively, the court essentially found that the African-American experience has nothing to contribute to education. This is not an overstated interpretation. The court went on to say:

> The use of race, in and of itself, to choose students simply achieves a student body that *looks different.* Such a criterion is no more rational on its own terms than would be choices based upon the *physical size or blood type of applicants.* Thus, the Supreme Court has long held that governmental actors cannot justify their decisions solely because of race. See, e.g., *Croson*, 488 U.S. at 496 (plurality opinion); *Bakke*, 438 U.S. at 307 (opinion of Powell, J.).[20]

In this paragraph, the court is saying that it is irrational to consider race as having any social value, and that racial diversity is attributable

17. There is no discussion of race or ethnicity beyond black and white. The panel either ignored or failed to conceive of the possibility of complications arising outside of the black-white racial paradigm. *See Hopwood*, 78 F.3d at 932.

18. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965), *reprinted as amended in* 42 U.S.C. § 2000e (1994).

19. *Hopwood*, 78 F.3d at 945 (emphasis added).

20. *Id.* (emphasis added) (citations omitted).

only to "looks" or other arbitrary physical characteristics. "Accordingly, we see the caselaw as sufficiently established that the use of *ethnic diversity* simply to achieve *racial heterogeneity,* even as part of the consideration of a number of factors, is unconstitutional."[21] Again, racial diversity for the *Hopwood* court is not a question of contributions to the social mix of higher education, but one of "heterogeneity"—a collection of difference without meaning or purpose.

The use of "ethnic diversity" leading to "racial heterogeneity" is confusing if one is trying to distinguish ethnicity from race. The *Hopwood* majority seems to have given little thought to that distinction and uses ethnicity and race synonymously, subsuming ethnicity into race. The suggestion that this usage makes all "ethnic" diversity impermissible is never discussed by the court.

The court also articulates a racial vision for the Fourteenth Amendment. According to the *Hopwood* court, the Equal Protection Clause carries no vision of racial fairness or racial justice for society; it is only a prohibition upon governmental use of race. Thus, the court continues to emphasize:

> The *central purpose* of the Equal Protection Clause "is to prevent the *States* from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630 (1993) (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)). It seeks *ultimately* to render the issue of race irrelevant in *governmental decisionmaking.* See *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) ("A *core purpose* of the Fourteenth Amendment was to do away with all *governmentally* imposed discrimination.")[22]

There is a prohibition only upon the states, and no suggestion at all of any promise for a better racial future. If there are problems of race in civil society, they must be secondary to the demand that government not soil its hands in those disputes. Issues of racial injustice? According to this court, the Equal Protection Clause simply does not care about such questions.

The *Hopwood* court thus embodies both a weak and strong moral response to both the sensitive and extreme versions of the "color-blind vision." The weak response is the one just described: On issues of racial injustice, "We don't care." The strong moral response is the one that corresponds to the extreme color-blind vision. Is there any socially redeeming value to being African-American, Asian, Latina, or Latino? No, there is no social merit worth considering, and therefore

21. *Id.* at 945-46 (emphasis added).

22. *Id.* at 939-40 (emphasis added) (citation omitted) (footnote omitted).

a diversity program is only a remedial program under an irrational disguise.

With a social focus, the *Hopwood* court sees education as a unicultural, nonracial enterprise. It sees no place in education for recognition of racial diversity. Such recognition would thus be irrational and violate the basic tenets of the Equal Protection Clause.

IV. California Civil Rights Initiative

One of the peculiar aspects of the debate over the California Civil Rights Initiative[23] has been the large gap between the CCRI as written and the issues under discussion. To date, most of the attention has been focused upon public contracting, public employment, and college admissions. Yet the language of the CCRI goes far beyond those areas. Consider the text of subdivision (a) of the CCRI:

> (a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.[24]

In this form, there are several distinct areas in which the CCRI diverges substantially from existing California civil rights laws.

First, to the traditional prohibition "shall not discriminate against," there is added the phrase "grant preferential treatment." This suggests the evolution of a new cause of action: "preferential treatment." The change emphasizes that in affirmative action programs, someone else has been granted a benefit, not that another individual was denied some right or privilege. Thus, a women's center, or an Hispanic theme dormitory, would be viewed as granting preferential treatment, regardless of whether anyone else has been denied a right or benefit.

Next, the protections extend not just to individuals but to "groups." This adds two possibilities. The harm could be extended from the individual to an entire group, giving rise to individuals' as well as groups' claims for harm. The second possibility arises out of allegations of preferences given a group *without* any proof of harm. This type of activity would still violate the law as set out in the CCRI. Consider, then, whether a state college or public library celebration of African-American History Month would thus violate the CCRI.

The CCRI adds "ethnicity" to the more traditional laws proscribing race, sex, color, and national origin. While this follows in the anti-

23. *See supra* note 1.
24. *See supra* note 1.

discrimination tradition, the addition of "preferential treatment" would make any benefit to an "ethnic group"—for example, Italians on Columbus Day—a violation of the CCRI.

The CCRI is not limited to public employment and public contracting but extends to "public education." Further, the CCRI is *not* limited to admissions and employment, but covers "the operation" of education. This may include the entire range of functional education, including administration, funding, admissions, programs, outreach, and employment.

To appreciate the significance of some of these differences, consider first the question of racially targeted outreach programs. Advocates of the CCRI have vigorously argued that outreach programs will not be affected. For example, William A. Rusher argued in the *San Diego Union-Tribune*:

> Moreover, the ad described CCRI as an "initiative designed to eliminate affirmative action," which is a blatant lie. The initiative has no effect whatever on such desirable aspects of affirmative action as outreach and job training.[25]

Similarly, Eugene Volokh of UCLA Law School has stated:

> Current law lets government discriminate in favor of some people based on their race or sex, to the disadvantage of others who aren't eligible for such preferences . . . . The CCRI would effectively prohibit these, while leaving intact outreach and other nonpreferential forms of affirmative action.[26]

I am mystified by these assertions. An outreach program that spends money to recruit students from a particular racial or ethnic community, or an apprenticeship program that prepares citizens of a particular community for entry into the job market, both clearly fall within the plain language of the prohibitions of the CCRI. Volokh and Rusher both argue that the CCRI is essentially limited to admissions and employment. But it is not—it applies quite broadly to "the *operation* of public employment and public education."[27]

To further explore the language of the CCRI, let us examine the results of one extreme interpretation, using as an example the teaching of high school French. Under the CCRI, what would be the outcome of a challenge to such instruction if another group—Vietnamese

25. William A. Rusher, *Using Women in Civil Rights Fight*, SAN DIEGO UNION-TRIB., May 23, 1996, at B10.

26. Sally Pipes and Eugene Volokh, *Women Need Not Fear the Civil Rights Initiative; CCRI: Its Language Strengthens Rather Than Weakens Laws Against Sex Discrimination*, LA TIMES, Jan. 24, 1996, at B9.

27. *See supra* note 1 (emphasis added).

students, for example—sought to have "their" language taught in school. In interpreting this problem under the "new" CCRI provisions, the ruling body might well regard teaching French classified as an ethnicity or a national origin as preferential treatment of a group. To distinguish French in this case, it would be necessary to invent some legal distinction which would exclude French from "preferential treatment" or "group" or "operation of public education." Unfortunately, while the desired outcome is clear—the continuation of teaching French—the method of achieving this goal is by no means simple.

Under traditional civil rights law, I could not have made this claim, because only individuals who are in fact harmed can raise a claim of discrimination. Thus, if I argued that I am Vietnamese and that I am not being allowed to study Vietnamese, the response would be that I am completely free to take the French course. It is open to all. The new language of the CCRI, however, makes "preferential treatment to a group" the basis for a claim. And it seems to follow logically that teaching someone's own ethnic language is a benefit to that particular ethnic group.

Even if one moves away from the teaching of a "foreign" language, consider academic programs such as Ethnic Studies or African-American Studies. In Ethnic Studies, it is not a language but an ethnicity itself which is being studied and taught. Even more broadly, if we consider "national origin," American Studies (American *is* a national origin) could arguably be covered by CCRI prohibitions.

Even if one developed some distinction between "administration" and "content" of public education, difficulties would still arise in such things as museum programs. Several years ago, UCLA's Fowler Museum presented a program called "Irangeles: Iranians in Los Angeles." Under the CCRI such a program would be considered preferential to an ethnic group. Even if the program were not prohibited, the ability of the Museum to do outreach or fund-raising within the Iranian community would arguably be curtailed by provisions of the CCRI under "administration."

Finally, even if one posits a theory that argues "operation of" includes administration and excludes course content, problems still arise with college admissions and diversity programs. Both the *Bakke* and *Hopwood* courts clearly believed that the selection of students was a significant part of the educational process. Thus, admissions is directly related to the content of university education. Using this hypothetical content-administration rule, it then would follow that if the student admissions procedure is related to the content of public edu-

cation, student admissions would then be excluded from coverage of the CCRI. This would put us in the odd position of saying that state public education outside of the U.C. system could operate racial diversity programs.

Alternatively, if student admissions is labeled "administration" and not "content" and thereby governed under the CCRI, the application of this distinction to educational programs creates further difficulties. For example, if course content were exempt from the CCRI, the "selection" of courses would be analogous to the admission of students. In our first example of the Vietnamese who petitioned for Vietnamese instead of French class, the choice of French over Vietnamese would be covered, even if the content of the course was itself exempt.

These problems, however, might be seen as part of the difficulty of working on a controversial issue in a committee setting. However, I would argue that these problems are not accidental; rather, they reflect some of the same considerations I articulated as part of the color-blind vision.

How can CCRI advocates assert distinctions which are plainly not in the written initiative? I suggest that this gap between the text of the CCRI and its advocates can be seen as the gap between the extreme and sensitive color-blind visions. Under the extreme color-blind vision, racial minorities as such have nothing to contribute to education. The loss of racial or ethnic centers or outreach programs to ethnic communities would be of minimal concern if such minorities had nothing to contribute to American society.

Similarly, a narrow understanding of the new categories contributes to the failure to recognize the problems caused by adding ethnicity, groups, and preferential treatment to the CCRI. Ethnicity and national origin are seen as simply substitutes for race. As such, they have no independent validity. Thus, the plain language of the CCRI implements this extreme color-blind vision.

In contrast, the authors of the CCRI argue that they wish to maintain outreach programs which will help to build a better society. They advocate a "sensitive" color-blind version of the CCRI, yet must hurdle the plain language of the CCRI. The implementation of such a "sensitive" version of the CCRI encounters numerous textual difficulties. It is difficult to maintain the "sensitive" interpretation given the internal contradictions of the color-blind vision added to the contradictions in the actual language of the CCRI. The plain language wholly discounts and eliminates any consideration of race or ethnicity

in the operation of public education, employment, and contracting. There are no textual limitations here.

The vision embedded in the actual language of the CCRI, with its call for the elimination of all considerations of race, ethnicity, and national origin, embodies the most extreme interpretation of the color-blind vision. It calls for a society in which only an invisible majority will have a place in California government, education, and public life.

V. Conclusion—The Bankruptcy of Color Blindness

The *Hopwood* decision and the California Civil Rights Initiative are informed by similar color-blind visions—a uniform American culture, in which the culture of racial minorities and nonwhite ethnicities are peripheral to mainstream life. Far beyond any other recent legal decisions or enactments, the CCRI and the *Hopwood* decision embody this extremist version of the color-blind vision.

I believe that this vision of race color blindness fails on all counts as a moral prescriptive for racial justice. As illustrated by the *Hopwood* opinion, advocacy of race color blindness requires blatant manipulation to establish its political objectives. The *Hopwood* court chose to ignore history, manipulate doctrine, ride roughshod over precedent, and, as applied specifically to education, ignore obvious social issues.

This year—1996—is the centennial year of *Plessy v. Ferguson*.[28] It was one hundred years ago that Justice Harlan, dissenting, articulated his "color-blind" vision. As a statement of social policy at the turn of the century, Harlan presented a position on race preferable to the majority's embrace of segregation.[29] But his position was positive only against the standards of the nineteenth century. We should keep in mind the full context of Harlan's racial position. He was not arguing for racial social equality. To the contrary, Harlan was confident in the continuance of white dominance in American society.

Consider the text of the entire paragraph containing Harlan's famous language:

> *The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty.* But in view of the constitution, in the eye of the law, there is in this country no superior,

28. 163 U.S. 537 (1896).
29. *Id.*

> dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guarant[eed] by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusions that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.[30]

His position was far from a belief in what we would today consider racial justice. He was arguing that the white race was clearly superior to the black race in civil society—in private, social relations—and did not need the government support of Jim Crow segregation laws to maintain white racial hegemony.

Harlan was not calling for a vision of America where all Americans will find fairness and social justice. Instead, he was confident of the continued maintenance of the dominant position of "the white race . . . in prestige, in achievements, in education, in wealth, and in power."[31] He was content to allow racial privilege to continue, so long as basic civil rights were maintained on a nonracial basis. Justice Harlan's vision of racial justice is hardly consistent with our modern understandings of racial justice. And Harlan's vision is literally a century removed from the content and tone of Dr. Martin Luther King's vision in his famous "I Have a Dream" speech.[32]

Today, the call to return to Harlan's vision of racial color blindness is set in a vastly altered America. The pressing political and social issues of racial division turn on whether to continue and maintain white privileges in civil society. At issue is whether America will fulfill its promise to become a truly open society. Nothing less than the future of our democratic ideals is at stake. We must strive for an America which goes beyond Harlan's restricted vision of equality in the formal avenues of government. We should seek honest multiracial and multicultural openness in the full fabric of our society—not only government—but also interpersonal and private relations between and among all Americans.

It is deeply illogical and counterintuitive that the *Hopwood* court and the CCRI should pose race color blindness as both program and

30. *Id.* at 559 (emphasis added).

31. *Id.*

32. Ellen Warren, *Thirty Years Ago; "I Have a Dream"; King's Famous Words Almost Weren't Spoken*, HOUSTON CHRON., Aug. 27, 1993, at A1.

moral vision for racial justice. As a program—as a means to address America's racial divisions—the color-blind vision seeks to solve a problem by forbidding us from talking about the problem. It seems trivial to restate the obvious, but if racial divisions are an American problem, then they deserve to be addressed by our governments. And if we prevent our own governments from taking race into account—whether through constitutional prohibition or through state enactments—we tie our own hands and prevent any genuine attempt to address these issues.

As a moral vision, the invocation of color blindness at the end of the twentieth century should be seen for what it truly is—a reactionary call to return to the race relations of the nineteenth century. Our responsibility is to look forward—to the twenty-first century—an era when border and boundaries, cultures and races, will mix and interpenetrate on a global scale at a velocity which is unmatched in human history. Nostalgia is entertaining, but looking backwards for political guidance can be dangerous. It is time that we move forward, of necessity, through our legal system. Our laws and our courts, through their cumbersome institutions of precedent and procedure, will impose upon us needed caution as we negotiate these difficult and highly charged issues. Yet we must go forward not backwards. That is our obligation and our duty.