

that all citizens are equal, with very little variation from life to life or from lifetime to lifetime; even when there is differentiation among some, the remainder are not implicated in any necessary way.

The other conception holds that no one of us is the same and that although we can be grouped according to our similarities, difference and similarity are not exclusive categories but are instead continually evolving. Equal opportunity is not only about assuming the circumstances of hypothetically indistinguishable individuals, but also about accommodating the living, shifting fortunes of those who are very differently situated. What happens to one may be the repercussive history that repeats itself in the futures of us all.

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**David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99 (1986)\***

Sometimes great slogans make bad law, or, more precisely, misunderstood law. For decades, colorblindness was the great slogan of the civil right movements. That made it natural to believe that the movement's victories, such as *Brown v. Board of Education*, established colorblindness as the central principle of the law governing racial discrimination. It was also natural for the notion of colorblindness to set the terms of the debate over affirmative action.

Opponents of affirmative action, unsurprisingly, assert that *Brown* mandates colorblindness and that affirmative action is inconsistent with that mandate. Proponents of affirmative action seem to be put on the defensive by the invocation of colorblindness. In general, they acknowledge that there is a tension between affirmative action and *Brown's* prohibition against racial discrimination, but they insist that the tension can be adequately resolved, at least so that affirmative action is not always unconstitutional.

Both approaches mistake a slogan for an analytical insight. The prohibition against discrimination established *Brown* is not rooted in colorblindness at all. Instead, it is, like affirmative action, deeply race-conscious; like affirmative action, the prohibition against discrimination reflects a deliberate decision to treat blacks differently from other groups, even at the expense of innocent whites. It follows that affirmative action is not at odds with the principle of nondiscrimination established by *Brown* but is instead logically continuous with that principle. It also follows that the interesting question is not whether the Constitution permits affirmative action but why the Constitution does not require affirmative action.

Reduced to its simplest terms, my argument is as follows. The prohibition against racial discrimination prohibits—and must necessarily prohibit—the use of accurate racial generalizations that disadvantage blacks. But to prohibit accurate racial generalizations is to engage in something very much like affirmative action. Specifically, a principle prohibiting accurate racial generalizations has many of the same characteristics as affirmative action; and the various possible explanations of why accurate racial generalizations are unconstitutional lead to the conclusion that failure to engage in affirmative action may also sometimes be unconstitutional.

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## I

In *Palmore v. Sidoti*, decided three terms ago, the Supreme Court, unanimously and with no apparent difficulty, overturned a Florida state court decision that took custody of a white child away from the divorced mother when she remarried a black man. *Palmore* is a particularly good illustration of certain essential features of the prohibition against discrimination, features that are present in racial discrimination cases generally. But *Palmore* also shows that affirmative action and nondiscrimination are, in important ways, the same thing. On the one hand, what the Supreme Court did in *Palmore* was plainly demanded by *Brown*; on the other hand, what the Court did in *Palmore* is indistinguishable from affirmative action in certain important respects. I am not suggesting at this point that it is impossible to draw a common-sense distinction between affirmative action and nondiscrimination. But critics of affirmative action attack it on the ground that it causes innocent people to suffer, and that instead of enforcing colorblindness, it draws attention to race. *Palmore* shows that the prohibition against discrimination has precisely these characteristics as well.

## A

Linda and Anthony Sidoti are both white. When they were divorced, Linda was awarded custody of their three-year-old daughter, Melanie. About eighteen months after the divorce, Linda married Clarence Palmore, who is black. Anthony sued for custody of Melanie in the Circuit Court of Hillsborough County, Florida.

Florida law required Judge Buck of the county court to apply the traditional standard: he was to act in the best interests of the child. After hearing testimony, Judge Buck ordered that Anthony be given custody of the child. Judge Buck apparently regarded Anthony and Linda as equally fit parents. But he explained that notwithstanding "the strides that have been made in bettering relations between the races in this country," racial prejudice was still so pervasive, at least in central Florida, that a child raised by an interracial couple was "sure" to "suffer from . . . social stigmatization." Because Melanie would be adversely affected if she were raised in an interracial household, Judge Buck concluded that his obligation to act in the best interests of the child required him to divest Linda of custody and to award custody to Anthony.

Although, as the Supreme Court noted, a child custody determination by an inferior state court is "not ordinarily a likely candidate for review by this Court," the Supreme Court granted certiorari, and, in a brief opinion delivered only two months after oral argument, unanimously reversed the Florida court. The Supreme Court did not question Judge Buck's factual conclusion that Melanie would suffer psychological harm if she were raised by an interracial couple. Nor could the Court reasonably have questioned that determination; after all, Judge Buck was far closer to the facts of life in central Florida, and his finding was entirely plausible. Indeed, the Court explicitly acknowledged that it was subjecting Melanie to potential psychological harm "It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. There is a risk that a child living with a step-parent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin."

The Court nonetheless thought it entirely clear that Judge Buck's decision had to be reversed.

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The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.

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The principle of *Brown*, therefore, required the Supreme Court to reverse the Florida courts' decision in *Palmore*. At the same time, the reversal of the Florida decision was indistinguishable from affirmative action in important respects.

1. The principal argument used in litigation against affirmative action measures is that they violate the rights of innocent white victims. The Court's decision in *Palmore* also created an innocent victim. Both by hypothesis and in fact, Melanie, the child, will suffer psychological harm because of the Supreme Court's decision that she would not have suffered if Judge Buck's decision had been allowed to stand. It will not do to brush this harm aside as speculative or insignificant: nothing in the Court's opinion suggests that it is either.

2. The Supreme Court in *Palmore* rejected an action—Judge Buck's decision—that was, in an important sense, colorblind and race neutral. To understand why this is so, consider the matter from Judge Buck's point of view. It was no part of the Supreme Court's reasoning that he was in any way prejudiced against blacks or interracial couples. The Court assumed that he had applied a race-neutral standard—the best interests of the child criterion—as straightforwardly and as conscientiously as he could. In a custody dispute, the fact that a child will suffer psychological damage with one parent but not another is a highly material fact, and a judge would be derelict in his duty if he did not take that fact into account. Judge Buck, acting in a colorblind fashion, treated *Palmore* exactly like every other case: he took into account the prospective psychological damage to the child.

That, the Supreme Court told him, violated the Equal Protection Clause. In *Palmore*, unlike every other case, the Constitution required him to ignore that material fact. Why was he to ignore that fact? One can give a variety of refined and complex answers, but they all derive from one pivotal circumstance—*Palmore* involved a black person. Judge Buck could say, in his own defense, that the import of the Supreme Court's ruling is that he violated the Constitution by treating a case involving a black person in the same way he would have treated every other case.

Obviously, that statement is imprecise. The fact that a black person was involved is only part of the story. But one can make this argument—that Judge Buck acted in a colorblind fashion, and the Supreme Court held that race-conscious action was required—more rigorously and abstractly as well. Suppose we design a thought experiment in which a judge is literally blind to the races of the parties before him. In particular, suppose the only evidence to which a family court judge has access is a crystal ball that reveals nothing whatever about race. It only tells the judge what the future of every child will be under alternative arrangements. In a case like *Palmore*, Judge Buck's crystal ball will tell him that Melanie will be happier with her father than with her mother. The cause of her unhappiness will be related to race, but we are supposing that judge Buck—being ignorant of everyone's race—does not know that; all his crystal ball allows him to know is that Melanie will be happier with her father.

Suppose further that on the same day that a case like *Palmore* comes before him, Judge Buck must also decide a case in which a divorced father seeks to regain custody of a child from a mother who remarried, say, a notoriously ruthless industrialist who had made many enemies among members of the local community. Judge

Buck's crystal ball will look exactly the same in this case as it would have in *Palmore*. In each instance, he will see that allowing the mother to retain custody will be likely to cause the child to be ostracized by her peers and, as a result, to suffer psychological damage. In each case, therefore, Judge Buck will give the father custody of the child. When the mothers seek review in the Supreme Court, the mother who remarried the industrialist has no claim at all. But in a case like *Palmore*, the exact opposite is true: the Court would quickly and unanimously reverse Judge Buck, holding that he misunderstood a fundamental principle of the law of the Equal Protection Clause.

Judge Buck will surely be bewildered by the difference in the treatment of the cases. After all, they appeared absolutely identical to him: the crystal balls looked exactly alike. There is only one way that the Supreme Court will be able to explain its varying results to Judge Buck: the Court will have to introduce race into the picture. It will have to tell him that *Palmore* is different for some reason having to do with race. It will have to tell him that his error was that he did not take race into account. He made the mistake of focusing exclusively on his crystal ball, which revealed nothing about race. In other words, he should have been race-conscious. Judge Buck was colorblind; it was the Supreme Court that was race-conscious, and it held, in an important sense, that race-conscious action was constitutionally required.

3. The Court's justifications for its decision in *Palmore* closely resemble some of the standard justifications of affirmative action. Specifically, the Court seems to have relied on both (1) the unfairness of causing blacks (or those who associate with blacks, such as Linda Sidoti) to suffer disadvantages solely because others in society are prejudiced against them, and (2) the need to strike a blow against racial prejudice. But one common argument for allowing blacks with lesser credentials into universities, for example, is that their deficiencies were caused by racial prejudice—either prejudice against them or prejudice against their ancestors that had an adverse effect on them.

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In sum, the Supreme Court's decision in *Palmore* declared that the colorblind application of a race-neutral standard was unacceptable. The Court ruled that benefits had to be given to blacks that would not be given to similarly situated whites (such as the industrialist). Such action was needed in order to prevent people from suffering the consequences of societal racial prejudice and to help bring about better race relations. These objectives warranted inflicting real harm on an innocent victim. This sounds exactly like conventional affirmative action. And the Supreme Court said that the Constitution requires this result.

I am not suggesting that it is impossible to distinguish between affirmative action and what the Court did in *Palmore*. Nor am I claiming to have proved, at this point, that the Constitution requires affirmative action. But *Palmore* does show that affirmative action and nondiscrimination have much in common. Specifically, those aspects of affirmative action that its critics most frequently invoke are characteristics of the prohibition against discrimination as well.

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### III

#### A

What this discussion principally demonstrates is the error of thinking that the law governing racial discrimination can be captured in a simple, comforting, easy-to-use term such as "colorblindness." This should not be surprising. Professor Wechsler's famous article on neutral principles argued that no principled foundation for *Brown* could be identified. Others answered him, but the one point he established is that it is not easy to articulate the principle underlying *Brown*. One cannot say that the principle is simply colorblindness. If the answer were that easy, surely Professor Wechsler and those who debated with him would have discovered it.

There are fundamental similarities between nondiscrimination and affirmative action. Moreover, while we have no fully satisfactory theory of why the Constitution forbids racial discrimination, the theories we do have suggest that affirmative action may sometimes be constitutionally required. And despite the theoretical uncertainty, my analysis has several clear implications about the kinds of arguments that can be used in the debate over affirmative action.

1. It is superficial and essentially incorrect to attack affirmative action on the ground that it is a step away from the colorblind society, or that it forces race back before our eyes. . . .

The prohibition against discrimination forces us to recognize that race is different from other bases for classifying people and forces us to act differently toward other characteristics. There is accordingly no basis for saying that affirmative action increases the consciousness of race.

2. The intense concern with the rights of innocent white victims that often characterizes the affirmative action debate is misplaced. Obviously one should never ignore the burden that any measure places on any person. But there is unquestionably an undertone in the affirmative action debate that affirmative action is different from nondiscrimination because affirmative action causes innocent people to suffer. The assertion that there is a difference is incorrect. Prohibiting discrimination also causes, and has caused, innocent people to suffer. And so far as I am aware, no one has justified the suffering of these victims of nondiscrimination in a way that would not also justify the suffering of victims of affirmative action.

3. There is no basis for asserting that affirmative action is the moral equivalent of discrimination against blacks. This assertion reflects the myth of colorblindness at its worst: it assumes that an ill-defined notion of colorblindness is the correct state of affairs from which any deviation is wrong. I know of no theoretical justification for that view. There is, to be sure, a coherent (if unpersuasive) argument that the only principle that can be judicially administered is a prohibition against all racial generalizations. But as I noted, this argument does not explain why affirmative action is morally equivalent to discrimination against blacks.

The supposed justifications for the view that they are equivalent generally seem to assert that racial generalizations are intrinsically evil. Intrinsically, however, race is just another characteristic. One must provide some explanation of why racial generalizations are so bad. The explanations that have been given all seem to suggest, if anything, not that racial classifications are always unacceptable but the opposite: that sometimes race-neutral measures are equally bad.

It follows from this that the proponents of affirmative action should not bear the burden of proof. While there is theoretical uncertainty in this area, there is more reason to believe that deviations from race-neutrality are required than that they are forbidden. The proponents of affirmative action should not have to explain why they are

not betraying *Brown's* supposed principle of colorblindness; there is more reason to place the burden on the opponents of affirmative action to explain why maintaining a system in which there are dramatic economic and social disparities between the races is not destructive of the principles underlying *Brown*.

## B

The conclusion that affirmative action may sometimes be constitutionally required is less novel than it appears. At one point, the position that the Fourteenth Amendment requires states to eliminate the racially disproportionate effects of at least certain measures was accepted, in one form or another, by several courts of appeals. Indeed, in the late 1960s and early 1970s, the position that de facto school segregation was unconstitutional—or at least, that it was to be treated in the same fashion as de jure segregation—gained considerable support. De facto segregation is segregation—a racially disproportionate effect—that results from racially neutral measures. To say that a school board must eliminate de facto segregation is to say that it must engage in affirmative action. Racial neutrality is not enough. The school board must ensure that the results are at least somewhat proportional.

In this connection, it is a mistake to suppose that constitutionally required affirmative action would mean rigid proportionality in every area. Both the areas in which affirmative action would be required and the extent to which it would be required depend on the underlying theory—that is, the theory, of what it is that makes even explicit racial discrimination wrong. If, for example, the point of prohibiting discrimination is to prevent blacks from being branded as inferior, then race-neutral measures need only be abrogated to the extent necessary to prevent that kind of stigmatization. There is no reason to believe that any form of strict proportionality would be necessary.

Finally, the close relationship between affirmative action and nondiscrimination tends to reinforce an argument used by opponents of affirmative action: the familiar argument that race-conscious measures intended to aid blacks can stigmatize them as much as old-fashioned segregation did. Perhaps this argument should have little weight in litigation brought by a white person, or in debates over legislation supported by blacks. . . .

Obviously this uncertainty about the explanation of why discrimination is wrong is unsatisfactory. Perhaps its effects can be mitigated by recalling that not all constitutional obligations need be enforced by courts. In view of the difficulty of determining with any degree of certainty when the application of race-neutral criteria is as unacceptable as the use of racial generalizations, there may be something to be said for imposing this obligation on the legislature alone. Courts could continue to enforce the principle that racial generalizations that disadvantage blacks are unlawful. Courts would still face the task of determining which racial generalizations those were, but in view of the infrequency with which blacks have challenged measures that arguably aid them, this task does not seem intractable.

It is frequently said that affirmative action is a difficult issue. It is important to be clear about why that is true. By common agreement, few institutions in our history have been as clearly wrong as the regime of racial discrimination against blacks. But it remains annoyingly difficult to articulate why it was wrong. As a result, it is sometimes difficult to identify with precision the objectives that the law in this area should pursue. And when we attempt to pursue those objectives, we inevitably impose burdens on innocent people.

These difficulties were, however, inherent in the prohibition against discrimination from the start. They did not begin with affirmative action. Only the myth of colorblindness says that they did.