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The New Racial Preferences

Devon W. Carbado
Cheryl I. Harris†

INTRODUCTION

Michigan’s Proposal 2 and California’s Proposition 209 both prohibit their state governments from discriminating or granting "preferential treatment . . . on the basis of race."¹ Both initiatives were aimed at eliminating state promulgated race-based² affirmative action programs.³ For advocates of
Proposal 2 and Proposition 209, affirmative action is the quintessential example of a preference on the basis of race; the policy benefits blacks and Latinos and

of those affirmative action programs for women and minorities run by the state or local governments in the areas of public employment, contracting and education." Coal. for Econ. Equity, 122 F.3d at 696 (quoting the California Ballot Pamphlet). Instead, the point is that public debates about affirmative action rarely ever focus on women, even though white women are the principal beneficiaries of the policy. See African American Policy Forum, Myth 5: Affirmative Action is an African American Entitlement Program, http://aapf.org/projects/myths/myth-5-affirmative-action-is-an-african-american-entitlement-program (last visited July 28, 2008) ("Affirmative action benefits a broad range of people and communities that continue to face discrimination in this country, including Latino, Native, Arab, Asian and African Americans. The primary beneficiaries, however, have been white women."); see also Sumi Cho, Understanding White Women's Ambivalence Towards Affirmative Action: Theorizing Political Accountability in Coalitions, 71 UMKC L. Rev. 399, 400-01 (2002).

3. See Girardeau A. Spann, Proposition 209, 47 DUKE L.J. 187, 201 (1997) (noting that "[i]t the point of [Proposition 209] was to eliminate affirmative action in response to political disenchantment with the direction in which it had developed"). Whether this objective has been completely achieved is not entirely settled. Because both initiatives ban "preferences" as distinct from affirmative action per se, questions remain regarding whether particular practices characterized as affirmative action are subject to the initiatives' proscriptions on preferences. See, e.g., Hi-Voltage Works, Inc. v. City of San Jose, 12 P.3d 1068 (Cal. 2000) (considering whether outreach programs are preferences within the meaning of Section 31 of the California Constitution). For a recent iteration of the debate regarding whether practices characterized as race-neutral in fact constitute racial preferences, see Coalition to Defend Affirmative Action v. Regents of the University of Michigan, 539 F. Supp. 2d 924 (E.D. Mich. 2008) (litigation over whether university admission policies eliminating considerations of race, while continuing to consider other diversity factors such as geography, socioeconomic status, alumni connections and athletic ability, effectively confer racial preferences for some applicants over others). Indeed, it has been argued that race-based affirmative action is not proscribed by the initiatives if it does not constitute "discrimination" or "preferential treatment." See Mich. Civil Rights Initiative Comm., Proposal 2, Actual Ballot Language 16, http://www.michigancivilrights.org/media/Actual%20Ballot%20Language.pdf (last visited May 27, 2008); see also Hi-Voltage Works, 12 P.3d at 1092, 1097 (George, C.J., concurring and dissenting) (noting ballot pamphlet language indicating that affirmative action programs would be eliminated "to the extent they involve 'preferential treatment' based on race"). Not only is the concept of "preferences" contestable; the concepts of "discrimination" and "preferences"—both of which are prohibited—are not equivalents and may in some instances push in different directions. See Spann, supra note 3, at 210 (noting that with respect to "discrimination" and "preferences," "[e]ach may prohibit what the other requires").

4. Proponents of both initiatives consistently characterize affirmative action as an unfair racial preference. See, e.g., Ward Connerly, Michigan Win: Lessons in a Victory Over Racial Preferences, NAT'L REV. ONLINE, Jan. 30, 2007, http://article.nationalreview.com/?q=WJyZTlhMGNjZmE3OTE4ZjBmMzQ0YTBkNzZkNzA0YWE ("In the view of most Americans, 'affirmative action' has become synonymous with race preferences. There is no longer any need to distinguish between the two and doing so will most likely lead only to confusion."); Ward Connerly, Vote Yes to Restore Equal Treatment Under Law and Fairness in Michigan; Should Voters Ban Racial Preferences?, DETROIT NEWS, Oct. 19, 2006, at A17 (arguing that Proposal 2 would end the preferential treatment reflected in "lowered standards for college admissions, minority and women set-asides in contracting, and quotas in hiring"); Gail Heriot, Racial Preferences Are Wrong, SAN DIEGO UNION-TRIB., Dec. 27, 2002, at B7 (equating affirmative action programs with preferences for racial and ethnic groups). As we discuss more in Part III, whether a particular action or policy counts as a preference depends upon whether the existing status quo is neutral or asymmetrical. If it is the former, then considerations of race, gender, or other factors might fairly be considered a preference. On the other hand, if the
Supporters of both measures insisted that the state should not be in the business of allocating benefits and burdens along racial lines, particularly when doing so undermines another core American value: meritocracy. More
generally, they argued that state policy should not be based on race at all but rather should embody the principles of colorblindness and race neutrality, concepts they deployed interchangeably to mean the non-utilization of race. Under this argument, Proposition 209 and Proposal 2 became a necessary means to a realizable and desirable colorblind end—the elimination of racial preferences. This racial logic made both ballot initiatives the heirs of Brown and affirmative action policies the heirs of Plessy.

This Article neither defends affirmative action—though we support the policy—nor critiques anti-affirmative action initiatives—though we oppose such measures. Instead, our project is to take Proposition 209 and Proposal 2 seriously by engaging in something of a thought experiment: What concretely does it mean to make institutional processes colorblind or race neutral? We believe it particularly productive to explore this question in the context of school admissions policies, where selection procedures have been highly scrutinized and debated. The broad and interdisciplinary discourse on university admissions provides a rich context for considering the possibility and desirability of formally race-free admissions regimes.

College and university admission policies typically require an evaluation of “objective” measures of academic achievement, such as standardized test

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scores and grade point averages. The admissions process also includes an assessment of letters of recommendation and personal statements. While race is implicated in each of the foregoing criteria, we are most interested in the personal statement, which plays a particularly important role in an applicant's file but is rarely discussed in debates about race and admissions. Admissions

14. There is a broad literature that questions whether standardized testing and the notion of merit more generally is objective. See Luke Charles Harris & Uma Narayan, Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate, 11 HARV. BLACKLETTER L.J. 1, 13 (1994) (arguing that the "transition to greater inclusiveness has provoked, among other things, some rethinking about the traditional criteria of 'merit' for admission to and promotion within various American institutions, and some reexamination of assessment procedures once thought to be unquestionably 'neutral'"; Lani Gunier, Reframing the Affirmative Action Debate, 86 KY. L.J. 505, 511–13 (1998) (providing examples of how the "SAT, the LSAT, and the GRE" are "coachable tests" and revealing that "[e]xamples like these show clearly that we're using certain aptitude tests to credentialize a social oligarchy and we're mistakenly calling it merit"); Daria Roithmayr, Deconstructing the Distinction Between Bias and Merit, 10 LA RAZA L.J. 363, 366–67 (1998) (observing that merit has been conceptualized as "ahistorical, objective measures of ability," and arguing that this understanding of merit obscures that "what constitutes ability itself is subjective and constructed under particular historical circumstances by particular social groups;"); see also Charles R. Lawrence III, Two Views of the River: A Critique of the Liberal Defense of Affirmative Action, 101 COLUM. L. REV. 928 (2001); Phoebe A. Haddon & Deborah W. Post, Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit, 80 ST. JOHN'S L. REV. 41 (2006) (focusing specifically on the LSAT).

15. We do not presume that all admissions programs accord the same weight to personal statements. Indeed, many colleges and universities utilize basic screening mechanisms for undergraduate admissions under open admissions policies. See generally Bowen & Bok, supra note 13.

16. See William C. Kidder & Jay Rosner, How the SAT Creates Built-in Headwinds: An Educational and Legal Analysis of Disparate Impact, 43 SANTA CLARA L. REV. 131, 145 (2002) (questioning the implications of race in standardized testing); Timothy T. Clydesdale, A Forked River Runs Through Law School: Towards Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage, 29 LAW & SOC. INQUIRY 711, 737 (2004) ("Something intrinsic to the structure or process of legal education affects the grades of all minorities."). While scholars and the judiciary have not focused on the way in which the letters of recommendation process is racialized, some have explored how both access to and the substance of mentoring is often related to race. See Gratz v. Bollinger, 539 U.S. 244, 304 (2003) (Ginsburg, J., dissenting) ("One can reasonably anticipate, therefore, that colleges and universities will seek to maintain their minority enrollment—and the networks and opportunities thereby opened to minority graduates . . . . In turn, teachers’ recommendations may emphasize who a student is as much as what he or she has accomplished."); see also Daria Roithmayr, supra note 14, at 368–69 (arguing that the preferences for certain academic criteria "are necessarily subjective and race-conscious; they are developed in a historically contingent social context and are authored by members of groups who have enough social power—which historically has been based in part on their race and ethnicity—to define what counts as social value").

17. See ESSAYS THAT WORKED FOR LAW SCHOOLS I (Boykin Curry & Emily Angel Baer, eds., 2003) ("For some law schools, the essay is crucial: a great essay can make admissions officers discount poor grades or scores; a bad essay can ruin an otherwise sterling application."). The editors of Essays That Worked for Law Schools provide a graph illustrating the relative importance of the personal statement at selective law schools, including Harvard, Columbia, Yale, University of Michigan, Berkeley, UCLA, and Stanford. See id. at 2–3. Most of these law schools considered the role of the personal statement to be an important, if not vital, component of the law school application. Id. Given the increasingly intense competition for admissions to selective
officers read these statements to ascertain whether applicants can distinguish themselves and demonstrate that their potential contributions to the school extend beyond the applicants’ numbers. Applicants, for their part, employ the personal statement as a way to quite literally inscribe themselves into and personalize the application. Given the significance of the personal statement in the application process, we will explore how “anti-preference” initiatives like Proposal 2 and Proposition 209 affect that role. To that end, this Article asks: what do “anti-preference” mandates require with respect to personal statements?

While it is clear that post-affirmative action admissions criteria exclude or omit race from consideration, what that means for evaluating the personal statements is likely to assume even greater importance since there are hundreds of applicants with very high academic qualifications. See Alan Finder, *Elite Colleges Reporting Record Lows in Admissions*, N.Y. TIMES, Apr. 1, 2008, at A16 (reporting that admissions rates are hitting record lows due to the high volume of applicants and thousands of applicants with perfect SAT verbal and math scores).

18. For example, the University of California, Los Angeles explains that the personal statement “[a]dds clarity, richness, and meaning to the information presented in other parts of your application” and “[a]llows you to make your best case for why you should be admitted to UCLA.” UCLA, PERSONAL STATEMENT: FALL 2008, http://www.admissions.ucla.edu/Prospect/PersonalStatement.pdf (last visited Feb. 1, 2008). Moreover, in explaining the importance of the personal statement in graduate and professional school admission, a website from Dartmouth College explains, “The personal statement can be the factor that differentiates you from the other candidates. It gives the admissions committee a chance to get a glimpse of you as a person rather than as a set of numbers.” Career Services, The Personal Statement, http://www.dartmouth.edu/~csrc/students/gradschool/artsci/statement.html (last visited Feb. 1, 2008);

19. The University of California initially stopped considering race in making individual admissions decisions pursuant to Regents Resolution SP-1 which provided that effective January 1, 1997, the University of California “shall not use race, religion, sex, color, ethnicity or national origin as criteria for admission to the University or to any program of study.” Office of Equal Opportunity and Diversity, UC Irvine, A Brief History of Affirmative Action, http://www.eod.uci.edu/aa.html (last visited May 27, 2008) (quoting Regents Resolution SP-1). Each campus was charged with revising its own admissions policies to eliminate consideration of race. See Univ. of Cal., UNDERGRADUATE ACCESS TO THE UNIVERSITY OF CALIFORNIA AFTER THE ELIMINATION OF RACE CONSCIOUS POLICIES 8 (2003) available at http://www.ucop.edu/outreach/aa_finalcx%202.pdf. The policies took effect for students seeking graduate and undergraduate admissions in the fall of 1998. *Id.* These policies also presumptively met the requirements of Proposition 209. While SP-1 instituted a ban on racial preferences in admissions policy only, Proposition 209 has been interpreted more broadly to also outlaw race-conscious outreach and financial aid programs. See *id.* at 7. Outreach policies were then created to comply with SP-1 and Proposition 209. See *id.* at 24 (“Consistent with Proposition 209, UC’s outreach programs operate in a race-neutral fashion.”); see also JOHN AUBREY DOUGLASS, THE CONDITIONS FOR ADMISSION: ACCESS, EQUITY AND THE SOCIAL CONTRACT OF PUBLIC UNIVERSITIES 193 (2007) (discussing the emergence of a four-pronged outreach effort; “as in admissions, each needed to be race neutral.”).

While each UC campus has developed and refined its approach to admissions, all either explicitly exclude race as a criterion for admissions or do not include it as an admissions criteria. See UC Berkeley, Office of Undergraduate Admissions, UC Berkeley Freshman Selection Process, http://students.berkeley.edu/admissions/freshmen.asp?id=56&navid=N (noting that race is excluded from the selection criteria) (last visited Apr. 10, 2008); Berkeley Law, Application
statement is decidedly less than clear. Surprisingly, this issue has received little scholarly attention. Most commentators have focused on the demographic


20. One article does note controversy over whether UC Berkeley was improperly continuing to consider race through consideration of various racial identifiers in the application including the personal statement. See Daniel N. Lipson, Embracing Diversity: The Institutionalization Of Affirmative Action As Diversity Management At UC-Berkeley, UT-Austin, And UW-Madison, 32 LAW & SOC. INQUIRY 985, 1015 (2007) ("[T]he line between race-based and race-blind policy making can be quite blurry and that this leads some antiaffirmative action activists to accuse these university officials of failing to fully comply with the bans. Jack Citrin and Ward Connerly have both put forth and later partially retracted accusations that the admissions officials at UC-Berkeley were 'slipping' race in through the back door via individual assessment (e.g., by preferring applicants from school districts that are predominantly African American or Hispanic, by preferring applicants with names that are predominantly African American or Hispanic, and/or by preferring applicants who identify or give clues that they are African American or Hispanic in their personal statements") (emphasis added). Another noted the potential uncertainty that anti-preference mandates created for applicants. See Garner K. Weng, Look at the Pretty Colors! Rethinking Promises of Diversity as Legally Binding, 10 LA RAZA L.J. 753, 806 (1998) (discussing criticism of steps taken by Boalt Hall to promote diversity in response to SP-1 and Proposition 209: "[S]tudents believe that printing the text of Resolution SP-1 near the instructions for the personal statement made applicants believe they could not discuss race even in the context of overcoming obstacles"). However, the articles do not provide an in-depth discussion of what the ban on racial preferences requires in terms of the personal statement. The personal statement is usually mentioned in discussions of how applicant characteristics other than race can be used to increase enrollment of underrepresented minorities. See Rachel F. Moran, Diversity and its Discontents: The End of Affirmative Action at Boalt Hall, 88 CALIF. L. REV. 2241, 2248 (2000) (discussing changes implemented in response to recommendations of the law school's Admissions Policy task force, including "expand[ing] its use of the personal statement to make subjective judgments about applicants"); see also Herma Hill
consequences of prohibiting admissions personnel from expressly utilizing race as one factor among many in making admissions decisions. They have paid virtually no attention to the mechanisms colleges and universities employ to effectuate that prohibition. Nor, for the most part, have scholars engaged the question of whether race can in fact be eliminated from admissions processes. The assumption seems to be that eliminating the express consideration of race and eliminating race itself from the admissions context are one and the same thing—and that effectuating either of those racial erasures is easy institutional business.

But this is not so. Focusing on the personal statement, we will demonstrate that excising race from admissions is far from simple. Indeed, so long as the personal statement is part of the admissions process, implementing the colorblind imperative of Proposition 209 and Proposal 2 might not even be

Kay, The Challenge to Diversity in Legal Education, 34 IND. L. REV. 55, 65 (2000) (discussing Boalt Hall’s new post-Proposition 209 admissions policy: “We also expanded the personal statement our applicants are asked to submit from two pages to four pages and invited them to ‘separately discuss how [their] interests, backgrounds, life experiences and perspectives would contribute to the diversity of the entering class.’”).

21. See, e.g., DOUGLASS, supra note 19, at 184–213 (2007) (analyzing the aftermath of SP-1 and Proposition 209 in California, including the decline in applications and admission rates for underrepresented minority students, the subsequent implementation of various strategies to increase underrepresented minority enrollment without violating the ban on racial preferences, and the statistical impact of these strategies); Moran, supra note 20, at 2249 (assessing through a survey of Berkeley Law students how changes in admissions in the wake of Proposition 209 affected the educational and social climate of the law school); see also D. Frank Vinik, Laura Cumin & James P. O’Brien, Jr., Affirmative Action in College Admissions: Practical Advice To Public and Private Institutions for Dealing with the Changing Landscape, 26 J.C. & U.L. 395 (2000) (providing practical advice for strategies to increase diversity without violating the law, including a discussion of “pitfalls” that may lead to violation, none of which mention the personal statement).

22. See Ralph J. Bunche Center for African American Studies at UCLA, Research: College Access Project for African Americans, College Access Project for African Americans (CAPAA), http://www.bunche.ucla.edu/frames/index.html (follow “CAPAA” hyperlink) (last visited May 27, 2008). The goal of the CAPAA is to examine the operations question of how the admissions procedures at different UC campuses are structured to not include racial preferences. E.g. RALPH J. BUNCHE CENTER FOR AFRICAN AMERICAN STUDIES AT UCLA, “MERIT” MATTERS: RACE, MYTH & UCLA ADMISSIONS (2006), available at http://www.bunche.ucla.edu/publications/BuncheResearchReport952006.pdf (arguing that an overly narrow definition of “merit” limits African American access to UCLA and that UCLA’s supposedly “neutral” admissions process, by disproportionately denying admission to high-achieving African American students, is an example of institutional racism); RALPH J. BUNCHE CENTER FOR AFRICAN AMERICAN STUDIES AT UCLA, ADMISSIONS & OMISSIONS: How “THE NUMBERS” ARE USED TO EXCLUDE DESERVING STUDENTS (2006) (examining how the most selective UC campuses have implemented the post-209 strategy of “comprehensive review,” which considers academic achievement, personal achievement, and life challenges); RALPH J. BUNCHE CENTER FOR AFRICAN AMERICAN STUDIES AT UCLA, (E)RACING RACE, ERASING ACCESS I (2005) (“Concerns for equity and access have been replaced by a rigid reliance on supposedly objective and ‘colorblind’ indicators of merit . . . ”). While these reports provide a more textured account of how the UCs changed their admissions policies in the wake of Proposition 209, none specifically addresses the personal statement.
possible. There are at least three reasons to explain why. First, an applicant’s file can contain not only direct or explicit racial signifiers (e.g., “As a young Latina . . .”), they can also contain indirect or implicit racial signifiers (e.g., “My name is Maria Hernandez and I lived all my life in East Los Angeles . . .”). Because race can be embedded in an applicant’s name, geographical connections, and other non-race specific references, eliminating explicit and direct references to racial categories or racial group membership is not the same thing as eliminating race altogether.

Second, the fact that an admissions officer understands that she is not supposed to take race into account, does not mean that she is in a cognitive position to comply with that command. Studies in social psychology suggest that, notwithstanding best efforts on her part to ignore race—indeed, in part precisely because of those efforts—race will remain an elephant in her mind. How this will impact her reading of any given file, is hard to know. The broader point is that preventing the explicit consideration of race is not the same thing as preventing any consideration of race.

The third reason to query whether race can be completely removed from the admissions process also draws on developments in social psychology. Assuming that an admissions file contains no racial markers whatsoever (i.e., no implicit or explicit racial signifiers), at least one line of research in social psychology provides a basis for concluding that an admissions officer’s default presumption will be that the applicant is white. To the extent that this is the case, race remains a part of the admissions process.

Significantly, our claim that likely race cannot be excised from the admissions process—and that elimination of the express consideration of race is not the elimination of race—only half of the story. As we will show, again drawing on the personal statement, the other half of the story is that prohibiting explicit references to race in the context of admissions does not make admissions processes race neutral. On the contrary, this racial prohibition installs what we call a “new racial preference.”

Our point of departure for describing this new racial preference is the standard definition of preferential treatment: the “‘giving of priority or advantage to one person over . . . others.’” While this might seem

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23. One could make a similar point about letters of recommendation—namely, that to the extent that letters of recommendation are a part of the process, implementing the colorblind imperative of Proposal 2 and Proposition 209 might not be possible. Indeed, many of the arguments we make about the personal statement are applicable to the letters of recommendation process.
24. See infra notes 70–71, 144 and accompanying text.
25. See infra note 145 and accompanying text.
26. See infra notes 146–147 and accompanying text.
27. Hi-Voltage Works, Inc. v. City of San Jose, 12 P.3d 1068, 1082 (Cal. 2000) (citing WEBSTER’S NEW WORLD DICTIONARY 1062 (3d college ed. 1988)) (holding the language of Section 31 of the California Constitution, formerly Proposition 209, was meant to prohibit minority outreach programs for government contractors since such programs amount to favoring
paradoxical, the formal removal of race from admissions can do just that. To appreciate how, it is helpful to conceptualize admissions from both the applicant's and the institution's side of the process. Consider first the applicant's side.

Colorblind admissions regimes that require applicants to exclude references to race in order to preclude institutions from considering them on the basis of race create an incentive for applicants to suppress their racial identity and to adopt the position that race does not matter in their lives. This incentive structure is likely to be particularly costly to applicants for whom race is a central part of their social experience and sense of identity. The problem is compounded by the fact that the life story of many people—particularly with regard to describing disadvantage—simply does not make sense without reference to race. Consequently, should these applicants attempt to transcribe their experiences in race-neutral terms, they risk that they will be disadvantaged because their lives will be unintelligible to admissions officials and unrecognizable to themselves.

Of course, the question of how one presents oneself in the context of any admissions process is ultimately a question of choice. In this respect, one might reasonably argue that applicants can ultimately choose whether to make their racial identity essential or inessential, salient or insignificant. We do not quarrel with this observation. Our point is simply that a formally colorblind admissions process exerts significant pressures and incentives that constrain that choice and inhibit the very self-expression that the personal statement is intended to encourage. This is at least one sense in which, in a colorblind admission process, applicants are neither similarly situated nor competing on a level field. The dissimilarity among applicants and the unevenness of the field is a function of the racial preference colorblind admissions regimes produce. This racial preference benefits applicants who (a) view their racial identity as irrelevant or inessential and (b) make no express mention of it in the application process. These applicants are advantaged vis-à-vis applicants for whom race is a fundamental part of their sense of self.

The racial preference of colorblind admission regimes is also discernible from the institutional side of the application process. To see it, assume that despite the disincentives for an applicant to do so, the applicant describes herself in explicitly racial terms. Stipulate that she does so because her racial identity and experiences are an important part of who she is. That applicant is further disadvantaged in a colorblind admissions process in a two ways. First,

28. See infra notes 68–71 and accompanying text.
29. Authors of letters of recommendation are under a similar incentive structure. That is, they have to decide whether to make the applicant’s race salient in their characterization of the applicant’s accomplishments. More fundamentally, they have to ascertain whether not doing so diminishes the applicant’s profile or makes it incomprehensible or incomplete.
readers of admissions files who encounter a personal statement from an applicant who asserts her racial identity confront the dilemma of whether they can legitimately consider the statement as it stands, whether doing so would constitute "cheating," or whether the statement can or should be racially cleansed. Whichever option is pursued, the reader must wrestle with whether and how this racial information can be processed. Because of uncertainty about the way racially marked information should be managed, the file risks being classified as problematic; files without explicit racial references do not pose such difficulties.

Secondly, to read the file in a "colorblind" way, the admissions officer would likely have to ignore highly relevant information, without which the applicant’s personal statement might literally not make sense. Candidates whose personal statements avoid references to race do not face these same risks. This is another sense in which colorblind admissions processes are tilted to prefer applicants who subordinate or suppress their race.

As should already be apparent, the new racial preference that formally race-free admissions processes create is not a preference for a racial category per se. Nor is this preference “on the basis of skin color,” which is how opponents of affirmative characterize the policy. The new racial preference rewards a particular way of relating to and expressing one’s racial identity.

30. See Lipson, supra note 20 (discussing controversy regarding whether Berkeley was improperly considering race through the personal statement).
31. The reader is in a similar position with respect to letters of recommendations that explicitly invoke the applicant’s race or racial experiences.
32. In employing the language of “a new racial preference” we do not mean to suggest that affirmative action polices are “old” racial preferences. As we explain more fully later, whether or not one conceptualizes affirmative action as a preference turns, at least in part, on whether one thinks racial groups are similarly situated with respect to their access to colleges and universities. See infra notes 204–218 and accompanying text. Our aim here is to broaden the terms upon which the notion of a racial preference is debated.
33. Whether and how we express our identities is racially communicative. How an applicant negotiates her identity in her personal statement can convey information about her sense of racial identity, her conception of racial community and her commitments with respect to racial politics. For example, at times when racial minorities engage in strategies to make their racial identity less salient, questions may arise about whether the person is “acting white.” Devon W. Carbado & Mitu Gulati, Acting White? (forthcoming Oxford University Press) (manuscript on file with authors). For some, presidential hopeful Barack Obama engenders that very question. See, e.g., Roddie A. Burris, Jackson Criticizes Obama, Presidential Candidate’s Response to Jena, La., Case Called Too Weak, The State, Sept. 19, 2007, at B3 (reporting that at a speech given at Benedict College, Jesse Jackson “sharply criticized presidential hopeful and Illinois Sen. Barack Obama for ‘acting like he’s white’ in what Jackson said has been a tepid response to six black juveniles’ arrest on attempted-murder charges in Jena, La.”); Satya Sarmah, Is Obama Black Enough?, Columbia Journalism Rev., Feb. 15, 2007, available at http://www.cjr.org/politics/is_obama_black_enough.php (debating the significance of 60 Minutes correspondent Steve Kroft asking Senator Obama why he considered himself black when he was raised in a white household); Lynne Varner, Black Enough to Invite Hope, Seattle Times, Aug. 15, 2007, available at http://seattletimes.nwsource.com/html/opinion/2003836366_lynnel5.html (reporting that in Senator Obama’s address to the National Association of Black Journalists he said, “you guys keep asking whether I am black enough”). For a discussion on race as
More specifically, the preference gives a priority or advantage to applicants who choose (or are perceived) to suppress their racial identity over those who do not (or are not perceived to) so choose.

One might think of this preference as a kind of racial viewpoint discrimination—analogous to the viewpoint distinction or preference that the First Amendment prohibits. Race is the "content" and colorblindness and racial consciousness are competing "viewpoints." Just as the government's regulation of speech must be content neutral and cannot be based upon the viewpoint expressed, a university's regulation of admissions should be content neutral and should not burden or prefer applicants based upon the racial viewpoint their personal statements express.

To be clear, we are not employing "content" and "viewpoint" in their strict First Amendment sense. We deploy them more as heuristics. Doing so here helps to demonstrate that racial viewpoints are expressed not only at the level of ideas, but at the level of identity. In this respect, it bears mentioning that most people believe that race exists as a social relation, but they differ as to its meaning, its social and legal significance, as well as how it should be expressed and embodied. None of the Supreme Court Justices, for example, would quarrel with the assertion that the late Justice Thurgood Marshall was the first black person to sit on the Supreme Court. They would differ, though, on what that blackness means and whether Marshall's racial identity should be either explicitly expressed or considered in a hypothetical selection process. In performance, see generally Devon W. Carbado & Mitu Gulati, Working Identity, 85 CORNELL L. REV. 1259 (2000) [hereinafter Carbado & Gulati, Working Identity]; Devon W. Carbado & Mitu Gulati, The Fifth Black Woman, 11 J. CONTEMP. LEGAL ISSUES 701 (2001); Devon W. Carbado & Mitu Gulati, The Law and Economics of Critical Race Theory, 112 YALE L.J. 1757 (2003) (book review) [hereinafter Carbado & Gulati, The Law and Economics of Critical Race Theory].

34. See generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.2.1, at 932 (3d ed. 2006) (stating that "[t]he Supreme Court has frequently declared that the very core of the First Amendment is that the government cannot regulate based on its content").

Moreover, content neutrality requires that government "cannot regulate based on the ideology of the message," making a distinction among speakers based on the viewpoint they express or on the topic they address. Id.

35. The distinction between permissible content neutral regulation and impermissible distinctions between viewpoints and subject matter is of course complex. See id. Thus, we do not intend by this analogy to argue that the problem we describe here necessarily rises to the level of a First Amendment violation. This is an issue we plan to take up in our future work.

36. This is not the same thing as saying that race is real in some pre-social or biological sense. Indeed, most scholars across disciplines now agree that race is a social construction. See, e.g., MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S (1994); Cheryl I. Harris, Whiteness as Property, 106 HARV. L. REV. 1707, 1709 (1993) (demonstrating the law's role in constructing whiteness as racial identity and racial privilege); Ian F. Haney Lopez, The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

37. See, e.g., IAN HANEY-LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (describing how courts assigned individuals to races based on factors such as biology and culture). For a comprehensive list of historical cases and opinion excerpts where courts assigned individuals to races based on these factors see id. at 163–167 (appx. A), 169–182 (appx. B).
other words, they would agree that race has "content" (at least in the minimalist sense of racial categorization), but disagree about the "viewpoint" race should express.

Note that in the context of any given admissions pool, black students could be in the category of students for whom race is not an essential part of their identity and white students could be among the students for whom race is central to their self-definition. This is not to say that whites and non-whites are likely to be equally represented in both categories. The effects of the colorblind racial preference may well be racially disproportionate; that is, as an empirical matter, it could be that a greater proportion of racial minorities as compared to whites emphasize their racial identity and thus consider it a salient and constitutive part of who they are.38 While this disparate impact issue is important, it is not the central focus of this Article. Our primary objective is to highlight the role the personal statement plays in the context of admissions to demonstrate that Proposition 209 and Proposal 2 neither eliminate race from admissions nor make admissions processes racially neutral. Both initiatives produce a new racial preference that has gone largely unnoticed.

We develop these arguments more fully below. To do so we draw on the life experiences of four public figures: Barack Obama, a United States Senator and the Democratic presidential candidate; Dalton Conley, a sociologist; Clarence Thomas, a Supreme Court Justice; and Margaret Montoya, a law professor. In different forms, each of these individuals has written detailed autobiographical accounts of their lives, providing the kind of information relevant to the personal essay that is part of an application process.

In Part I, we draw on these accounts to construct "personal statements" as if each subject were a hypothetical candidate to a selective college, university, or graduate program. Despite the profound differences in political alignments, even regarding their views on the salience of race, it is clear that race plays an important role in each of their stories.39 We explore whether and to what extent

38. See Russell K. Robinson, Perceptual Segregation, 108 COLUM. L. REV. 1093, 1127 (2008) ("While many whites view race-consciousness as an evil that must be strenuously avoided, blacks tend to see race-consciousness as critical to their survival in white-dominated realms."); id. at 1124 ("Whites tend to think about race less often than blacks because they have fewer incentives to be race-conscious . . . ."); see also, Barbara J. Flagg, "Was Blind, But Now I See": White Race Consciousness & the Requirement of Discriminatory Intent, 91 MICH. L. REV. 953, 953 ("Advocating race consciousness is unthinkable for most white liberals. We define our position on the continuum of racism by the degree of our commitment to colorblindness; the more certain we are that race is never relevant to any assessment of an individual's abilities or achievements, the more certain we are that we have overcome racism as we conceive of it.").

This is sometimes supported via questionnaires in which people are asked to self describe; typically, people of color mention race very early in their self-definition. Whites, as a general matter, do not. See Ray Friedman & Martin N. Davidson, The Black-White Gap in Perceptions of Discrimination: Its Causes and Consequences, in RESEARCH ON NEGOTIATION IN ORGANIZATIONS 203, 213 (R. Bies et al. eds., 1999) (discussing surveys showing that blacks are more likely than whites to cite race as a key aspect of personal identity).

39. Moreover, each of them has particularly unique racial viewpoints and experiences:
these personal statements could be re-written without reference to race and remain intelligible. We also consider whether excising race renders such statements colorblind or race neutral. Part II examines these statements from the university’s perspective. Here we ask: can an admissions committee read race out of the personal statement and what are the consequences of doing so? Together, Parts I and II demonstrate the persistence of race even in formally race-free admissions regimes such as those that are implemented in response to Proposition 209 and Proposal 2. The question then becomes: Why do these regimes continue to have standing as colorblind and race-neutral processes? We pursue this inquiry in Part III. More specifically, Part III delineates and challenges the theoretical foundation for the claim that “anti-preference” initiatives produce colorblindness and race neutrality. In so doing, we question not only whether colorblindness and race neutrality are conceptually coherent but whether these concepts are practically achievable. Part IV introduces a new racial vocabulary. Its starting point is the idea that our current racial discourse is over-determined in ways that make it difficult for us to disentangle empirical claims from normative ones. In an effort to shift the terms upon which race-based policies are understood, Part IV redefines crucial terms that create the discursive field from which our current understanding of race-based decision-making emerges. Part IV then concludes by applying this new racial understanding to the admissions context.

I
THE APPLICANT: CONSTRUCTING THE PERSONAL STATEMENT

While the specific question can differ from school to school, the personal statement generally calls upon applicants to provide some personal narrative in which they state something unique about themselves.40 Others call on applicants to provide information regarding “disadvantage overcome.”41 Within Obama—a political liberal—is both multiracial and the son of a Kenyan black father, while Thomas is a native-born black conservative raised under Jim Crow. Conley is white, raised in a black segregated urban neighborhood, while Montoya is part of a Latino community that was racially marked as different through linguistic and cultural markers. Because of the diversity of their stories, together they help illustrate the ways in which colorblind or race neutral policies can suppress the vast range of racial viewpoints and experiences—a consequence that opponents of affirmative action paradoxically frequently contend is a result of affirmative action.

40. See, e.g., Univ. of Cal., Berkeley Sch. of Law (Boalt Hall), 2008 J.D. Program Application, at 3, available at http://www.law.berkeley.edu/admissions/jddegree/appprocess/2008Application.pdf (“Boalt Hall seeks to enroll a class with varied backgrounds and interests. If you wish, you may discuss how your interests, backgrounds, life experiences, and perspectives would contribute to the diversity of the entering class.”); UCLA School of Law, Admission Application for Fall 2008, at 7 (asking for “any attributes, experiences or interests that would enable you to make a distinctive contribution to the law school or legal profession”).

41. See, e.g., Univ. of Cal., supra note 40, at 3 (“If applicable, you may also describe any disadvantage that may have adversely affected your past performance or that you have successfully overcome, including linguistic barriers or a personal or family history of cultural,
the cottage industry of assisting applicants in preparing applications, significant attention has been devoted to developing the essay that expresses the applicant's unique attributes, personal experiences, and characteristics.\footnote{See, e.g., ESSAYS THAT WORKED FOR LAW SCHOOLS (Boykin Curry & Emily Angel Baer eds., 2003); PRINCETON REVIEW, LAW SCHOOL ESSAYS THAT MADE A DIFFERENCE (2d ed. 2006); PAUL BODINE, GREAT PERSONAL STATEMENTS FOR LAW SCHOOL (2005); Princeton Review, Writing the Statement of Purpose, http://www.princetonreview.com/grad/apply/articles/application/purpose.asp (last visited Feb. 1, 2008); EssayPlus.com, The Personal Statement, http://www.essayplus.com/Personal_Statement.htm (describing how to write a good essay but also offering their services to help edit).}

In this section, we take autobiographical statements from Senator Barack Obama and sociologist Dalton Conley and utilize them as examples of how race might figure in the lives and personal statements of these "applicants." We do not know what aspects of their lives these individuals actually conveyed in the context of applying to graduate school. What we posit here is a hypothetical personal statement drawn from their narratives. We so for three principal reasons: (1) to identify the costs and burdens on applicants who interpret Proposal 2 and Proposition 209 as requiring that they not include references to race in their personal statements, (2) to explain why that racial elision does not make the application process racially neutral, and (3) to illustrate some of the subtle but significant ways in which racial advantages and disadvantages can persist in formally race-free admissions environments. We begin with a "personal statement" based on Barack Obama's Dreams from My Father: A Story of Race and Inheritance.

\textit{A. Dreams From My Father: Pieces of a Story of Race and Inheritance}

\textbf{1. The Personal Statement}

\textit{That my father looked nothing like the people around me—that he was educational, or socio-economic disadvantage.}\); Univ. of Mich. Law School, Application to J.D. Program, at 4, available at http://www.law.umich.edu/prospectivestudents/admissions/Documents/jdapp.2007.app.pdf (suggesting that applicants can write about "significant obstacles met and overcome" or "experiences and perspectives relating to disadvantage, disability, or discrimination").
black as pitch, my mother white as milk—barely registered in my mind.\textsuperscript{43}

In fact, I can recall only one story that dealt explicitly with the subject of race . . . . According to the story, after long hours of study, my father had joined my grandfather and several other friends at a local Waikiki bar. Everyone was in a festive mood, eating and drinking to the sounds a slack-key guitar, when a white man abruptly announced to the bartender, loudly for everyone to hear, that he shouldn’t have to drink good liquor “next to a nigger.” The room fell quiet and people turned to my father, expecting a fight. Instead, my father stood up, walked over to the man, smiled, and proceeded to lecture him about the folly of bigotry, the promise of the American dream, and the universal rights of man. “This fella felt so bad when Barack was finished,” Gramps would say, “that he reached into his pocket and gave Barack a hundred dollars on the spot.”\textsuperscript{44}

Miscegenation. The word is humpbacked, ugly, portending a monstrous outcome: like antebellum or octoroon, it evokes images of another era, a distant world of horsewhips and flames, dead magnolias and crumbling porticos. And yet it wasn’t until 1967—the year I celebrated my sixth birthday . . . —that the Supreme Court of the United States would get around to telling the state of Virginia that its ban on interracial marriages violated the Constitution. In 1960, the year that my parents married, miscegenation still described a felony in over half the states in the Union.\textsuperscript{45}

White folks. The term itself was uncomfortable in my mouth at first; I felt like a non-native speaker tripping over a difficult phrase. Sometimes I would find myself talking to Ray about white folks this or white folks that, and I would suddenly remember my mother’s smile, and the words that I spoke would seem awkward and false.\textsuperscript{46}

\textsuperscript{44} \textit{Id}.
\textsuperscript{45} \textit{Id.} at 11–12.
\textsuperscript{46} \textit{Id.} at 75.
\textsuperscript{47} \textit{Id.} at 91–92.
minority assimilated into the dominant culture, not the other way around. Only white culture could be neutral and objective. Only white culture could be nonracial, willing to adopt the occasional exotic into its ranks. Only white culture had individuals. And we, the half-breeds and the college-degreed, take a survey of the situation and think to ourselves, Why should we get lumped in with the losers if we don't have to? We become so grateful to lose ourselves in the crowd, America's happy, faceless marketplace; and we're never so outraged as when a cabbie drives past us or the woman in the elevator clutches her purse, not so much because we're bothered by the fact that such indignities are what less fortunate coloreds have to put up with every single day of their lives—although that's what we tell ourselves—but because we're wearing a Brooks Brothers suit and speak impeccable English and yet have somehow been mistaken for an ordinary nigger.48

[Bleaching Cream.] Since my first frightening discovery of bleaching creams in Life magazine, I'd become familiar with the lexicon of color consciousness within the black community—good hair, bad hair; thick lips or thin; if you're light, you're all right, if you're black, get back.49

... Later, I would realize that the position of most black students in predominantly white colleges was already too tenuous, our identities too scrambled, to admit to ourselves that our black pride remained incomplete. And to admit our doubt and confusion to whites, to open up our psyches to general examination by those who had caused so much of the damage in the first place, seemed ludicrous, itself an expression of self-hate—for there seemed no reason to expect that whites would look at our private struggles as a mirror into their own souls, rather than yet more evidence of black pathology.50

[Community organizing] In 1983, I decided to become a community organizer... That's what I'll do. I'll organize black folks. At the grass roots. For change.51... Wrote to every civil rights organization I could think of; to any black elected official in the country with a progressive agenda, to neighborhood councils and tenant rights groups. When no one wrote back, I wasn't discouraged. I decided to find more conventional work for a year, to pay off my student loans and maybe even save a little bit.52

Eventually a consulting house to multinational corporations agreed to hire me as a research assistant... As far as I could tell, I was the only black man in the company, a source of shame for me but a source of considerable pride for some of the company's secretarial pool. They treated me like a son, those black ladies; they told me how they

48. Id. at 92.
49. Id. at 177.
50. Id. at 177–78
51. Id. at 123.
52. Id. at 125.
expected me to run the company one day.\textsuperscript{53} . . . \[A\]s the months passed, I felt the idea of becoming a community organizer slipping from me.\textsuperscript{54} . . . I turned in my resignation at the consulting firm and began looking in earnest for an organizing job.\textsuperscript{55} . . . In six months I was broke, unemployed, eating soup from a can.\textsuperscript{56}

[Divided Soul?] When people don’t know me well, black or white, discover my background (and it’s usually a discovery, for I ceased to advertise my mother’s race at the age of twelve or thirteen, when I began to suspect that by doing so I was ingratiating myself to whites), I see the split-second adjustments they have to make, the searching of my eyes for some telltale sign. They no longer know who I am. Privately, they guess my at my troubled heart, I suppose—the mixed blood, the divided soul, the ghostly image of the tragic mulatto trapped between two worlds. And if I were to explain that no, the tragedy is not mine, at least not mine alone, it is yours, sons and daughters of Plymouth Rock and Ellis Island, it is yours . . . well, I suspect that I sound incurably naive . . . . Or worse, I sound like I’m trying to hide from myself.\textsuperscript{57}

I don’t fault people their suspicions. I learned long ago to distrust my childhood and the stories that shaped it. It was only many years later, after I had sat at my father’s grave and spoken to him through Africa’s red soil, that I could circle back to evaluate these early stories for myself.\textsuperscript{58}

### 2. Does this Statement Violate the Mandate for Colorblindness?

Let’s imagine that Barack Obama sat down and wrote the foregoing account as his personal statement for the law school application process. Assume that he believes that the above narrative best captures his sense of identity and provides a clear window both on who he is as an individual and his normative commitments about family, community and nation. Indeed, so pleased is he with the narrative that he sends it off along with other admissions materials to Harvard Law School, his first choice.

Assume that Obama is also interested in the University of California, Berkeley, School of Law as his second choice. He believes that the history of student activism at Berkeley suggests that the law school will be a good fit for a person who is interested in community organizing.\textsuperscript{59} However, he is concerned

\textsuperscript{53.} Id.
\textsuperscript{54.} Id. at 126.
\textsuperscript{55.} Id. at 128.
\textsuperscript{56.} Id. at 129.
\textsuperscript{57.} Id. at ix.
\textsuperscript{58.} Id.
\textsuperscript{59.} See Sumi Cho & Robert Westley, Critical Race Coalitions: Key Movements that Performed the Theory, 33 U.C. DAVIS L. REV. 1377 (2000) (describing the history of student activism at Berkeley, and more specifically, how student activism at Boalt Hall influenced other
about Proposition 209. His worry is not just about the extent to which Proposition 209 is likely to diminish the number of black law students at the law school, though he still remembers how shocked he was upon learning that in 1997, the very first year that Proposition 209 took effect, Berkeley Law enrolled only one black student.\textsuperscript{60} Although numbers at Berkeley Law have improved since then, they are not nearly as high as they were in the pre-209 days.\textsuperscript{61}

Nor is Obama's concern just about the relationship between the demographics of a law school's student body and the nature of that school's institutional culture, though this is certainly on his mind. Indeed, he has read Claude Steele's work on stereotype threat and its impact on black students—roughly, that black students under-perform on standardized tests because of a concern that their performance might confirm negative stereotypes about black intellectual inferiority—and queries whether the "threat in the air"\textsuperscript{62} might actually be heightened as a function of small black enrollments. But, again, his worries do not end here. He is deeply concerned about the application itself. His questions, specifically, are these: Does the fact that his personal statement is explicitly racialized violate Proposition 209? Should he strike all references of race from his personal statement?

He re-reads Proposition 209, which provides, in part, that "[t]he state shall


\textsuperscript{61} \textit{Michelle Locke, Blacks, Hispanics Rebound from Death of Preferences: Enrollment Back Up – With a Catch}, CHIC. SUN TIMES, May 7, 2007, at 36 ("Last fall, 13 black students enrolled, a big increase from 1997 but still below the mid-90s totals of 20 or more . . . . "The bottom line on Proposition 209, from where I sit, is it has continued to suppress enrollment," said Ed Tom, director of Boalt admissions."); \textit{Michelle Maitre, First Black Editor of Boalt Law Review Has Lofty Goals}, OAKLAND TRIBUNE, Mar. 8, 2006 ("Robert Boone [a second year law student] . . . is one of only 44 African-American students who were accepted into Boalt in 2004 and is one of only 15 who ultimately enrolled in the law school . . . . The first-year class included 19 Latino students, nine African-American students and three American Indians."). Similarly, Proposition 209 negatively influenced admission rates of black students at UCLA School of Law. In the entering class in fall 1999 there were two Black students enrolled; the following year there were five. \textit{See Cheryl I. Harris, Critical Race Studies: An Introduction}, 49 UCLA L. REV. 1215, 1236 app.A (2002). For the past three years—2006 through 2008—there have been between nine and fourteen Black students enrolled in the 1L class. Class size in these years has ranged from between 303 and 328 students. See \textit{ABA-LSAC Official Guide to ABA-Approved Law Schools}, 2006, 2007, 2008 edition.

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. Based on this language, Obama concludes that, at the very least, there is a real question about whether it is permissible for him to write a personal statement that is explicitly and self-referentially racialized. Would these references to race in his background violate the norm of colorblindness that Proposition 209 purportedly instantiates? He searches Berkeley Law’s admissions materials for an answer to this question. The admissions policies state simply that “[r]ace . . . [is] not used as a criter[ion] for admission to Boalt Hall.” On the other hand, there is no clear direction in the admissions material that prohibits any mention of race, and indeed the school invites applicants to relate how they may have overcome disadvantage including “a personal or family history of cultural, educational, or socioeconomic disadvantage.” Shouldn’t this include racial disadvantage? Or would even these racial references be impermissible?

There are a number of options available to Obama. First, he could decide not to apply to Berkeley Law. He could believe that doing so would require him to suppress an important sense of himself: his racial identity and experiences. Alternatively, he might think that there is simply no way to make sense of himself outside of his race and racial experiences. Here, his worry is not about suppressing one aspect of himself; it is about suppressing himself tout court. He could believe that he is racially inscribed—all the way down—and that not naming race is akin to not naming himself.

But let’s suppose that Obama decides to apply. He believes that there might be a way to tell his story within the racial restrictions of Proposition 209. He queries: “What if I simply removed all references of race from my personal statement? Presumably that would satisfy Proposition 209’s investment in colorblindness.” He then proceeds to do precisely that, producing the personal statement below.

REDACTED STATEMENT

That my father looked nothing like the people around me—that he was black as pitch, my mother white as milk—barely registered in my mind.

In fact, I can recall only one story that dealt explicitly with the subject of race . . . . According to the story, after long hours of study, my father had joined my grandfather and several other friends at a local Waikiki bar. Everyone was in a festive mood, eating and drinking to

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64. See Weng, supra note 20, at 806 (discussing criticism of steps taken by Boalt Hall to promote diversity in response to SP-1 and Proposition 209).
the sounds a slack-key guitar, when a white man abruptly announced to the bartender, loudly for everyone to hear, that he shouldn’t have to drink good liquor “next to a nigger” next to my father.\textsuperscript{67} The room fell quiet and people turned to my father, expecting a fight. Instead, my father stood up, walked, walked over to the man, smiled, and proceeded to lecture him about the folly of bigotry, the promise of the American dream, and the universal rights of man. “This fella felt so bad when Barack was finished,” Gramps would say, “that he reached into his pocket and gave Barack a hundred dollars on the spot.”

Miseegenation. The word is humpbacked, ugly, portending a monstrous outcome: like antebellum or octoroon, it evokes images of another era, a distant world of horsewhips and flames, dead magnolias and crumbling porticos. And yet it wasn’t until 1967—the year I celebrated my sixth birthday . . . —that the Supreme Court of the United States would get around to telling the state of Virginia that its ban on interracial marriages law violated the Constitution. In 1960 was the year that my parents married. Miseegenation still described a felony in over half the states in the Union.

White folks. Folks. The term itself was uncomfortable in my mouth at first; I felt like a non-native speaker tripping over a difficult phrase. Sometimes I would find myself talking to white folks this or white folks that, and I would suddenly remember my mother’s smile, and the words that I spoke would seem awkward and false.

[Multiracial.] “I am not black,” Joyce said. “I’m multiracial . . . It’s not white people who are making me choose [one part of my identity]. Maybe it used to be that way, but now they are willing to treat me like person. No—it’s black people who always have to make everything racial. They’re the ones making me choose.”

They, they, they. That was the problem with people like Joyce. They talked about the richness of their multicultural heritage and it sounded real good, until you noticed that they avoided black people. It wasn’t a matter of conscious choice, necessarily, just a matter of gravitational pull, the way integration always worked, a one-way street. The minority assimilated into the dominant culture, not the other way around. Only white culture could be neutral and objective. Only white culture could be nonracial, willing to adopt the occasional exotic into its ranks. Only white culture had individuals. And we, the half-breeds and the college-degreed, take a survey of the situation and think to ourselves, Why should we get lumped in with the losers if we don’t have to? We become so grateful to lose ourselves in the crowd, America’s happy, faceless marketplace; and we’re never so outraged as when a cabbie drives past us or the woman in the elevator clutches

\textsuperscript{67}. Note that the words in italics were added or substituted for deleted words or phrases in order to make the statement legible.
her purse, not so much because we’re bothered by the fact that such indignities are what less fortunate people less fortunate coloreds have to put up with every single day of their lives—although that’s what we tell ourselves—but because we’re wearing a Brooks Brother suit and speak impeccable English and yet have somehow been mistaken for an ordinary nigger, for an ordinary person.

[Bleaching Cream.] Since my first frightening discovery of bleaching creams in Life magazine, I’d become familiar with the lexicon of color consciousness within the black community—good hair, bad hair; thick lips or thin; if you’re light, you’re all right, if you’re black, get back. . . . Later, I would realize that the position of most black students in predominantly white colleges was already so tenuous, our identities too scrambled, to admit to ourselves that our black pride remained incomplete. And to admit doubt and confusion to whites, to open up our psyches to general examination by those who had caused so much of the damage in the first place, seemed ludicrous, itself an expression of self-hate—for there seemed no reason to expect that whites would look at our private struggles as a mirror into their own souls, rather than yet more evidence of black pathology.

[Community organizing] In 1983, I decided to become a community organizer. . . . That’s what I’ll do, organize people black folks. At the grass roots. For change. . . . Wrote to every civil rights organization I could think of, to any black elected official in the country with a progressive agenda, to neighborhood councils and tenant rights groups. When no one wrote back, I wasn’t discouraged. I decided to find more conventional work for a year, to pay off my student loans and maybe even save a little bit. Eventually a consulting house to multinational corporations agreed to hire me as a research assistant. . . . As far as I could tell, I was the only black man in the company, a source of shame for me but a source of considerable pride for some of the company’s secretarial pool. They treated me like a son, those black ladies; they told me how they expected me to run the company one day. . . . [A]s the months passed, I felt the idea of becoming a community organizer slipping from me. . . . I turned in my resignation at the consulting firm and began looking in earnest for an organizing job. . . . In six months I was broke, unemployed, eating soup from a can.

[Divided Soul?] When people who don’t know me well, black or white, discover my background (and it’s usually a discovery, for I ceased to advertise my mother’s identity—see—at the age of twelve or thirteen, when I began to suspect that by doing so I was ingratiating myself to whites), I see the split-second adjustments they have to make, the searching of my eyes for some telltale sign. They no longer know who I am. Privately, they guess my at my troubled heart, I suppose—the mixed blood, the divided soul, the ghostly image of the tragic mulatto
person trapped between two worlds. And if I were to explain that no, the tragedy is not mine, at least not mine alone, it is yours, sons and daughters of Plymouth Rock and Ellis Island, it yours . . . well, I suspect that I sound incurably naïve . . . Or worse, I sound like I’m trying to hide from myself.

I don’t fault people their suspicions. I learned long ago to distrust my childhood and the stories that shaped it. It was only many years later, after I sat at my father’s grave and spoken to him through Africa’s his country’s red soil, that I could circle back to evaluate these early stories for myself.

Upon examining the statement, Obama notes that even if he endeavors to eliminate only explicit references to race, the statement sounds completely unlike his actual experience. Simply excising specific references to his race or the race of his parents renders his life story unintelligible. For example, deleting explicit references to race changes the statement “As far as I could tell, I was the only black man in the company” to “As far as I could tell, I was the only man in the company,” which is simply inaccurate. Moreover, it sounds completely incredible that a consulting house to a multinational corporation would have only one male employee.\(^{68}\) The story about his father sounds like just another barroom brawl; the references to interracial marriage and *Loving v. Virginia*\(^ {69}\) are incomprehensible. In the absence of any reference to Obama’s race, his reluctance to speak about his mother to others and his sense that people speculate about his tragically divided soul read like symptoms of mental imbalance or paranoia. Obama could of course eliminate these passages and substitute others. But this alternative also presents problems. Exactly what constitutes a racial reference? References to geography, such as his father’s grave in Africa, and his name are racial markers.\(^ {70}\) Subtle references to knowledge about particular practices like “bleaching creams” or hierarchies like “good hair and bad hair” also betray a racial basis of knowledge that can be a proxy for a person’s racial identity.\(^ {71}\)

Obama then considers employing class to stand in for race, but finds that

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\(^{68}\) In contrast, that such a firm would have only one black male employee is considered normal or completely unremarkable.

\(^{69}\) 388 U.S. 1 (1967) (declaring state anti-miscegenation statute barring whites from intermarrying with non-whites unconstitutional).


\(^{71}\) See generally Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (discussing how minority racial characteristics such as skin color or hair are treated in anti-discrimination law).
unsatisfying.\textsuperscript{72} He tries doing the same with national origin and ethnicity—that is, substituting both for race—but neither seems to capture who he imagines himself to be.\textsuperscript{73} From his perspective, even the most minimalist description of himself as a bi-racial person—the product of “miscegenation”—cannot be expressed in the language of class, national origin or ethnicity.

Obama decides to revisit the question of whether he can transcribe his life in non-racial terms, not by editing what he has already written or by substituting race with some other social category, but by starting again from scratch. After extending several hours on this project, he can’t seem to come up with a meaningful account of his life without referencing race. In a state of identity fatigue, he decides, at least for the moment, to suspend his application to Berkeley Law.

3. The Costs of Restricting Race

The foregoing hypothetical suggests that applicants who wish to make race salient in formally race-free admissions processes—what we call “race-positive applicants”—face a number of burdens. First, they have to comb through admissions materials and the language of (and documents interpreting) the specific anti-preference mandate. Even after learning that the admissions policies provide that race cannot be considered in the process, it is not altogether clear precisely what that means. Does this prohibit any mention of race, or simply that race \textit{qua} race cannot be taken into account as a plus on behalf of the applicant? The uncertainty about the racial restrictions that anti-preference regimes impose on applicants could compel prospective law students to seek guidance from law school admissions staff or other sources of authority on the matter. In any event, all of this is extra time and ultimately

\textsuperscript{72} While race and class are deeply connected, scholars continue to debate whether one can be a substitute for the other. For an argument that class is not an effective surrogate for race, see Cheryl I. Harris, \textit{Mining in Hard Ground}, 116 Harv. L. Rev. 2487, 2517-38 (2003) (book review); Deborah C. Malamud, \textit{Assessing Class-Based Affirmative Action}, 47 J. Legal Educ. 452 (1997); Deborah C. Malamud, \textit{A Response to Professor Sander}, 47 J. Legal Educ. 504 (1997).

extra effort. Applicants for whom race is not a salient aspect of their identity, "race-negative applicants," do not have to perform this extra work.74

Second, race-positive applicants have to struggle with whether they can represent themselves without reference to their race, or even if they elect to include race-specific information, to evaluate how much information will be seen as "going too far," and hence become counter-productive. Just thinking about this is work, particularly in the context of a broader concern about making oneself competitive in an extremely competitive process.75 Time and energy spent thinking about how to present one's racial identity could be re-allocated to other parts of the application process which even absent these questions is demanding.76 Again, this extra work is a direct function of how one negotiates one's relationship to race.77

Third, should they conclude that there is a possibility that too many references to race will be seen as an inappropriate effort to solicit prohibited

74. Note that race-positive does not mean that the applicant has a positive view about race. It simply means that race shapes that applicant's sense of herself. Likewise, race-negative does not mean that the applicant has negative views about race. It simply means that the applicant does not believe that race figures meaningfully in her life.

75. ANNE MCGRATH, U.S. NEWS & WORLD REPORT: ULTIMATE GUIDE TO LAW SCHOOLS 37 (2d ed. 2006) ("Law schools across the country are reporting record numbers of applicants, so you'll be applying during the most intensely competitive era in history."); see also Finder, supra note 17, (reporting record low admission rates because of many applicants with very high academic credentials.).

76. ERIC OWENS, LAW SCHOOL ESSAYS THAT MADE A DIFFERENCE 7 (2d ed. 2006) ("[The law school admission process is] time-consuming, and it's not known being fun."); RUTH LAMMERT-REEVES, GET INTO LAW SCHOOL: A STRATEGIC APPROACH 61 (3d ed. 2006) ("However you obtain your applications, once they begin arriving you'll notice that no two are exactly alike. Some require one recommendation, others two or three. Some ask you to write one essay or personal statement, while others may ask for two or even three. Some have very detailed forms requiring extensive background information; others are satisfied with your name and address and very little else."). EssayEdge.com, Law School Personal Statement Services, http://www.essayedge.com/law/editing/ (last visited May 27, 2008) ([L]aw school admissions officials expect candidates to demonstrate an airtight handle on grammar and the ability to write strong, persuasive prose. Whether you are pursuing a J.D., LL.M., or J.S.D., your essay must be a self-marketing masterpiece, clearly proving your commitment, character, and intellectual maturity, without a hint of indecision or pompous insincerity."); V.W. Barber, College-Admission-Essay.com, How to Write a Law School Personal Statement, COLLEGE-ADMISSION-ESSAY.COM, http://www.college-admission-essay.com/lawschoolpersonalstatement.html (last visited Feb. 3, 2008) ("You have two pages or less to present to the admissions board a fabulous, honest, and interesting first impression so that you will stand out among thousands and thousands of other applicants. No pressure."). Many companies now provide services to help law school applicants through the burdensome process of writing the personal statement. See, e.g., ACCEPTED, Initial Law Essay Package, http://www.accepted.com/services/servicesdetails.aspx?servicecid=140 (last visited May 27, 2008); EssayEdge.com, Law School Personal Statement Services, http://www.essayedge.com/law/editing/ (last visited May 27, 2008); Kaplan: Test Prep & Admissions, Basic 3 Hour Package, http://www.kaptest.com/Law/Admissions_Consulting/Admissions-Consulting-Packages/LS_admiss_3hour.html?cid=494903 (last visited May 27, 2008).

77. See Carbado & Gulati, Working Identity, supra note 33, at 1263–70 (describing how outsiders negotiate their identities to fit into mainstream, predominantly white workplaces).
racial consideration, there is the work of actually rewriting the personal statement. In a world where there are both affirmative action and non-affirmative action law schools, race-positive prospective law students likely will be applying to both. In our hypothetical, Obama applied to Harvard, an affirmative action school, and to Berkeley Law, a non-affirmative action school. As a race-positive applicant, his Harvard statement constitutes his "true" sense of himself.\textsuperscript{78} It is, from his perspective, authentic. To the extent that he wishes to apply to Berkeley Law, he may believe that he has to rewrite his personal statement to satisfy the dictates of Proposition 209. Assuming an applicant believes he can do this, it entails serious intellectual and emotional work—work that colorblind admissions processes do not require of race-negative applicants.

Fourth, if a race-positive applicant determines that he is not able to re-imagine himself in colorblind terms, and therefore decides not to apply to a non-affirmative action law school, (a) his access to legal education (and quite possibly his options in the legal profession) has been diminished, and (b) he must accept the notion that there is something about his racial experiences and sense of identity that is negative. More than that, he must accept that within anti-preference and ostensibly colorblind institutional settings, his race-conscious identity is quasi-illegal—something that must remain undocumented.

Fifth, if the race-positive applicant finds that he is able to re-inscribe himself in race-neutral terms, and is ultimately accepted to a law school that does not practice affirmative action, he will likely wonder whether that law school will expect him to embody his race-neutrality in his everyday interactions and overall identity as a law student. Moreover, he might worry that, at such a law school, most if not all of the non-white law students will be race-neutral, which would diminish his ability to establish identity-specific communities.

Any one of the foregoing costs is meaningful. Cumulatively, they are substantial. While we are not making an empirical argument, there is at least strong theoretical basis for thinking that the costs we enumerate above are real. Although these costs are likely to disproportionately affect people of color, there are race-positive white people who would experience these costs as well. To make this point more concrete, we construct a personal statement for Dalton Conley based on his book, \textit{Honky}.

\textsuperscript{78} We are not saying that people have real or fixed identities—an existential essence. Our point is rather than any particular moment in a person's life, it is reasonable to assume that that person as a sense of herself. Expressions like "it was so unlike me to do X" or "I betrayed myself by doing Y" capture this idea. See Carbado & Gulati, \textit{Working Identity}, supra note 33, at 1261 n.2 (discussing working a sense of identity and distinguishing it from ascriptive or attributional identity).
B. Honky: I Almost Had a Black Sister

1. The Personal Statement

I am not your typical middle-class white male. I am middle class, despite the fact that my parents had no money; I am white, but I grew up in an inner-city housing project where most everyone was black or Hispanic. I enjoyed a range of privileges that were denied my neighbors but that most Americans take for granted. In fact, my childhood was like a social science experiment: Find out what being middle class really means by raising a kid from a so-called good family in a so-called bad neighborhood. Define whiteness by putting a light-skinned kid in the midst of a community of color. If the exception proves the rule, I'm that exception.\(^{79}\)

Ask any African American to list the adjectives that describe them and they will likely put black or African American at the top of the list. Ask someone of European descent the same question and white will be far down the list, if it's there at all. Not so for me. I've studied whiteness the way I would a foreign language. I know its grammar, its parts of speech; I know the subtleties of its idioms, its vernacular words and phrases to which the native speaker has never given a second thought. There's an old saying that you never really know your own language until you study another. It's the same with race and class.\(^{80}\)

In fact, race and class are nothing more than a set of stories we tell ourselves to get through the world, to organize our reality. And there was no one who told more stories to me than my mother, Ellen. One of her favorites was how I had wanted a baby sister so badly that I kidnapped a black child in the playground of the housing complex. She told this story each time my real sister, Alexandra, and I were standing, arms crossed, facing away from each other after some squabble or fistfight. The moral of the story for my mother was that I

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79. DALTON CONLEY, Honky at xi (2000).
80. Id. at xi-xii.
should love my sister, since I had wanted to have her so desperately. The message I took away, however, was one of race. I was fascinated that I could have been oblivious to something that years later feels so natural, so innate as race does.  

... Learning race is like learning a language. First we try mouthing all sounds. Then we learn which are not words and which have meaning to the people around us. Likewise, for my sister and me, the first step in our socialization was being taught that we weren't black. Like a couple of boot camp trainees, we had first to be stripped of any illusions we harbored of being like the other kids, then be built back up in whiteness.

My sister Alexandra started getting the message as early as age two. She and I attended nursery school courtesy of the federally subsidized Head Start program. ... Each December Santa Claus came bounding in with a bag of presents and a series of “Ho! Ho! Hos!”

... It didn’t matter what they asked for; everyone got dolls. The boys got boy dolls, and the girls got girl dolls. In line with the consciousness of the times, the teachers had made sure that the dolls were ethnically appropriate. The other kids’ dolls looked like black versions of Ken and Barbie, while my sister ended up with the only white doll in her class.

... “Black is beautiful,” the teacher screamed over the din of crying and yelling.

“We want Barbie!” the kids yelled back in unison.

Finally, one kid pulled hard at the white doll’s legs and broke the toy in half. Evidently satisfied that she had secured at least a piece of Barbie, she scurried off to a corner to dress up the half-doll.

... At some point that same week, our grandparents called to wish us a Happy Chanukah. My sister recounted the Barbie events to my grandmother, who, in turn, told her the story of King Solomon and the
In the family annals, my sister's answer to the King Solomon question was what got told and retold; the issue of black beauty, the other kids' desperation for the white doll, and the idea that "real" Barbie could only be white was left for the parents of the other children to sort out. It wasn't our problem; after all, we were the color of Barbie. The next year everyone got black dolls whether they liked it or not. And since they had long hair, my sister was happy.

By the time she was six years old, Alexandra had tired of combing and brushing and wanted to do more advanced hair things. All her friends now had cornrows, and my sister begged my mother to braid some for her, too.

My mother, who couldn't draw, knit, or cornrow a straight line, told Alexandra that her hair type wouldn't work for that style but was beautiful in its own right.

But the next year the movie 10 came out, making Bo Derek famous. At first all the little girls thought Bo Derek, with her cornrowed hair and tropical tan, must be black. They wanted to grow their own cornrows longer so that they, like Bo Derek, could have the best of both worlds: long hair and tight braids along their scalp.

Then one of the older girls told the group that Bo Derek was actually white, a revelation that left the younger ones feeling confused, hurt, and betrayed. My sister, however, was joyous; now she, too, could have the cornrows she had, up till then, been denied because of her race. When she brought home this piece of information, our mother had no choice but to relent and braid Alexandra's hair.

"Yo, excuse me, miss," an older girl said and laughed, "someone left some twine on your head."

From then on Alexandra only wanted long blonde hair, straight as
could be, taking comfort in the cultural value of her whiteness.\textsuperscript{95}

... It didn’t take more than one or two messages like this to drive home the meaning of race to my sister. Race was not something mutable, like a freckle or a hairstyle; it defined who looked like whom, who was allowed to be in the group—and who wasn’t. But for Alexandra and me, race was turned inside-out. Notwithstanding the Barbie incident, the cornrows, and the images we saw on television, we had no idea that we belonged to the majority group, the privileged one. We merely thought we didn’t belong.\textsuperscript{96}

2. Does this Statement Violate the Mandate for Colorblindness?

Like Obama’s “personal statement,” this one, too, is explicitly racially conscious. Like Obama, Conley has a positive racial identity. Accordingly, the struggles and costs that we imagined Obama encountering with respect to navigating a non-affirmative action admissions process are struggles and costs that Conley likely would encounter as well. The fact that Conley is white does not insulate him from these burdens. Paradoxically, it is precisely Conley’s acknowledgement of and explication of his whiteness that disadvantages him in “anti-preference” admissions processes. To put the point another way, the problem for Conley is not that affirmative action is conferring a preference for black students but rather that an “anti-preference” admissions process is conferring a preference for applicants for whom race does not matter. Unlike Conley, such applicants can speak authoritatively and authentically about themselves and their experiences.

That anti-affirmative initiatives like Proposition 209 and Proposal 2 can be interpreted to restrict the terms upon which white applicants like Conley express themselves is particularly worrisome because of the dominant way in which racism is framed. For the most part, our understanding of racism is shaped by the “disadvantaging” side of racism and the accounts people of color provide to describe how racism impacts their lives. We have very few accounts of the “advantaging” side of racism and the accounts white people could provide to describe how racism privileges them. And yet it is the linkage between white privilege and the disadvantage of racial minorities that is a critical feature of how race structures social and economic relations.\textsuperscript{97} Barbara Flagg’s and Peggy McIntosh’s work illustrates why mapping the contours of this linkage might be important.

\textsuperscript{95} Id.
\textsuperscript{96} Id. at 42–43.
\textsuperscript{97} See Michael K. Brown, et. al, Whitewashing Race: The Myth of a Colorblind Society (2003) (enlisting social science literature to document the persistence of durable racial inequality among Blacks and whites resulting from the intergenerational accumulation of advantages for whites and the concomitant disaccumulation for blacks).
According to Barbara Flagg, "[t]here is a profound cognitive dimension to the material and social privilege that attaches to whiteness in this society, in that the white person has an everyday option not to think of herself in racial terms at all." Indeed, this, Flagg maintains, is the very definition of whiteness: "to be white is not to think about it." Flagg employs the term "transparency phenomenon" to describe the extent to which whites do not view themselves in racial terms. Crucially, Flagg’s argument is not that whites do not see race and that they are unaware of their own racial identities and the racial identities of others. Rather, her point is that because whiteness is the racial default, whites can easily and comfortably “relegate [their] own racial specificity to the realm of the subconscious.”

Peggy McIntosh advances a similar argument. In the context of doing so she, sets forth a methodology whites can utilize to name and give content to their racial identity: an identity privilege list that is mostly self-referential. That is, the purpose of the list is not to hypothesize what the privileges of whiteness might be in a general sense but to employ one’s own life to ground an understanding of phenomenon. We quote at length from McIntosh’s list to provide a clear indication of its scope:

1. I can if I wish arrange to be in the company of people of my race most of the time.

5. I can go shopping alone most of the time, pretty well assured that I will not be followed or harassed.

6. I can turn on the television or open to the front page of the paper and see people of my race widely represented.

7. When I am told about our national heritage or about “civilization,” I am shown that people of my color made it what it is.

8. I can be sure that my children will be given curricular materials that testify to the existence of their race.

10. I can be fairly sure of having my voice heard in a group in which I am the only member of my race.

11. I can be casual about whether or not to listen to another person’s voice in a group in which s/he is the only member of his/her race.

13. Whether I use checks, credit cards or cash, I can count on my skin

99. Id.
100. Id. at 957.
101. Id. at 971.
color not to work against the appearance of financial reliability.

14. I could arrange to protect our young children most of the time from people who might not like them.

15. I did not have to educate my children to be aware of systemic racism for their own daily physical protection.

16. I can be reasonably sure that my children's teachers and employers will tolerate them if they fit school and workplace norms; my chief worries about them do not concern others' attitudes toward their race.

...  

20. I can do well in a challenging situation without being called a credit to my race.

21. I am never asked to speak for all the people of my racial group.

22. I can remain oblivious of the language and customs of persons of color who constitute the world's majority without feeling in my culture any penalty for such oblivion.

...  

24. I can be pretty sure that if I ask to talk to the "person in charge", I will be facing a person of my race.

25. If a traffic cop pulls me over or if the IRS audits my tax return, I can be sure I haven't been singled out because of my race.

26. I can easily buy posters, post-cards, picture books, greeting cards, dolls, toys and children's magazines featuring people of my race.

...  

30. If I declare there is a racial issue at hand, or there isn't a racial issue at hand, my race will lend me more credibility for either position than a person of color will have.

...  

32. My culture gives me little fear about ignoring the perspectives and powers of people of other races.

...  

34. I can worry about racism without being seen as self-interested or self-seeking.

...  

38. I can think over many options, social, political, imaginative or professional, without asking whether a person of my race would be accepted or allowed to do what I want to do.

39. I can be late to a meeting without having the lateness reflect on my race.
40. I can choose public accommodation without fearing that people of my race cannot get in or will be mistreated in the places I have chosen.

41. I can be sure that if I need legal or medical help, my race will not work against me.

42. I can arrange my activities so that I will never have to experience feelings of rejection owing to my race.

43. If I have low credibility as a leader I can be sure that my race is not the problem.¹⁰²

One can query what an admissions officer working under Proposition 209 or Proposal 2 would do with—or do to—McIntosh's list. What's particularly productive about the items she enumerates is the extent to which they make transparent and concrete what it can (but won't necessarily always) mean to live on the "white side of race."¹⁰³ Indeed, each item might be thought of as a "positive" externality of racism; people of color experience racism's "negative" externalities. Framing racism in this way helps to reveal its bi-directionality.

"There is no disadvantage without a corresponding advantage, no marginalized group without the powerfully elite, no subordinate identity without a dominant identity."¹⁰⁴ What racism takes away from people of color it gives to white people. Racism "effectuates and maintains a relational difference that is based on power."¹⁰⁵

Of course, not all white people experience the white side of race with privilege and power. And even when they do, the nature of that privilege is mediated by other social categories, such as class, gender, and sexual orientation.¹⁰⁶ Historically, whiteness has quite literally operated as property—a valued asset to the protected and policed—and a social resource upon which one can draw.¹⁰⁷ Because the contemporary consequences of this remain to be fully articulated, we continue to think of racism as a phenomenon that disadvantages some people and not as a social force that advantages others.

Conley's narrative transcends this frame. Although he clearly lived an economically disadvantaged life as child, because Conley's parents were white, he inherited some of the intergenerational advantages of whiteness: formally educated parents, grandparents with meaningful resources, and the cultural capital that flows from both. His personal statement illustrates how white

¹⁰³ Id. at 105.
¹⁰⁴ Id. at 95.
¹⁰⁵ Id. (making this argument with respect to heterosexism).
¹⁰⁷ See generally Harris, supra note 36.
privilege can manifest itself even in the context of real economic disadvantage. This challenges the idea that race is epiphenomenally related to class and that white privilege and class privilege (and class disadvantage and racial disadvantage) are one and the same thing.

Proposition 209 and Proposal 2 discourages white applicants from explicitly inscribing themselves in the way that Conley does in his “personal statement.” Moreover, even should white applicants describe themselves and their experiences in racial terms, both initiatives encourage admissions officers to ignore that racial specificity. Think how much less we would know about Conley—and whether we could make sense of his life—had he articulated an account of his upbringing without referencing race. And think how much less we would know about race and racism had Conley de-racialized his experiences. Again, we are not making an empirical claim about what prospective race-positive applicants actually do. We simply mean to highlight the theoretical position in which “anti-preference” admissions place them.

C. Beyond Admissions: Stories That Resist Telling

The problem of removing race from narrative accounts exists outside of the admissions process as well. In fact, Patricia Williams’ scholarship, which utilized personal narrative to examine issues relating to race and the law, reveals another way in which this problem can surface. In Alchemy of Race and Rights, in a chapter entitled, “Death of the Profane (a commentary on the genre of legal writing),” Williams relates her attempt to purchase a sweater from a Benetton store in midtown Manhattan.108 Her efforts were thwarted when a white sales clerk refused to buzz her into the store, despite the fact it was early afternoon on Saturday just before Christmas and there were other patrons shopping. She experienced this as a form of racial exclusion, connecting the store clerk’s actions and the policy of installing buzzers to exclude “undesirables”—a category that is racially marked. She was enraged and humiliated. In protest, she wrote her account of the events on a poster board and the next day posted it on the store window.109

This narrative became the core of an essay Williams submitted to a law review symposium on the theme of Excluded Voices.110 In it, she connected her personal narrative about being excluded from Benetton to her analysis of “how the rhetoric of increased privatization, in response to racial issues, functions as the rationalizing agent of public unaccountability and, ultimately, irresponsibility.”111 The Benetton story was tethered to the critique of the construction of a private sphere where racially discriminatory practices were

109. Id. at 46.
111. WILLIAMS, supra note 108, at 47.
insulated from intervention. However, in each successive edit of the article by the law review editors, some part of her story was excised. Initially, her anger was removed, smoothed over, and "[her] fury . . . carefully cut out." The second edit excised all references to Benetton on the grounds that Williams’ story was not verifiable and might be defamatory. When the final page proofs of the article were submitted to her, she discovered that all references to her race had been removed on the basis that “it was against ‘editorial policy’ to permit descriptions of physiognomy.” As one editor justified the decision, Williams’ mention of race was unnecessary since “any reader will know what you must have looked like,” while another editor simply said it was irrelevant in that it failed to connect to any discussion of legal principle. When she protested that she was being censored, the disagreement was dismissed as a “matter of style.” Her insistence that race could not be omitted from her story ultimately led the law review to reverse their decision, but as she put it:

[M]ention of my race was central to the whole sense of the subsequent text; that my story became one of extreme paranoia without the information that I am black; or that it became one in which the reader had to fill the gap by assumption, presumption, prejudgment, or prejudice. What was most interesting to me in this experience was how the blind application of principles of neutrality, through the device of omission, acted either to make me look crazy or to make the reader participate in old habits of cultural bias.

Williams’ analysis is directly applicable to the admissions context. It provides concrete (though certainly not definitive) support for our theoretical claim that that requiring applicants like Obama and Conley to excise race from their applications at best distorts their lives or renders their experiences incomplete. At worst, this discursive racial cleansing makes their life story impossible to understand. Applicants to colleges and universities should not be made to suffer these disadvantages.

II

THE INSTITUTION: READING THE PERSONAL STATEMENT

Thus far, we have focused on how applicants might respond to the requirement of colorblindness in Proposition 209 and Proposal 2. We now shift the discussion from individuals to institutions. Here, we ask: How do non-affirmative action colleges and universities operationalize the mandate of anti-
preference initiatives? What, concretely, does it mean to not take race into account when deciding which applicants to admit? To answer this question we draw on the life and jurisprudence of Supreme Court Justice Clarence Thomas and on an autobiographical excerpt from an article by law professor Margaret Montoya. With respect to Justice Thomas, our aim is to show that while Thomas has extolled the value of colorblindness, his own life story reveals why, in the context of admissions, compelling a colorblind approach is both impracticable and normatively unsatisfying. Professor Montoya’s account also helps to demonstrate the impracticality and undesirability of colorblind admissions processes. In addition, her explicit invocation of race and gender allows us to engage the specific impact of “anti-preference” measures like Proposition 209 and Proposal 2 on women of color. In other words, Montoya’s “personal statement” allows us to perform an intersectional analysis, one that considers the impact of both race and gender.\(^\text{118}\)

**A. Against Race? Justice Thomas’s Affirmative Action Jurisprudence**

While the constitutionality of Proposition 209 and Proposal 2 have not been argued before the Supreme Court, the issue of affirmative action as well as other forms of race-conscious remedies have been regularly adjudicated in cases involving voting,\(^\text{119}\) affirmative action in contracting,\(^\text{120}\) higher education,\(^\text{121}\) and, most recently, in elementary and secondary desegregation

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118. See Kimberlé Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139, 139 (examining the “problematic consequence of the tendency to treat race and gender as mutually exclusive categories of experience and analysis” and evaluating how “this tendency is perpetuated by a single-axis framework that is dominant in antidiscrimination law and that is also reflected in feminist theory and anti racist politics”).

119. See, e.g., *Holder v. Hall*, 512 U.S. 874 (1994). In considering a voting rights challenge to a single member district county government, Thomas concurred with the majority’s finding, but went further to condemn the concept of vote dilution and the remedy of majority-minority districts:

[I]n resolving vote dilution actions we have given credence to the view that race defines political interest. We have acted on the implicit assumption that members of racial and ethnic groups must all think alike on important matters of public policy and must have their own “minority preferred” representatives holding seats in elected bodies if they are to be considered represented at all.

The assumptions upon which our vote dilution decisions have been based should be repugnant to any nation that strives for the ideal of a color-blind Constitution.

*Id.* at 903, 905-06 (Thomas, J., concurring).

120. In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), Thomas concurred in the majority’s finding that congressionally enacted affirmative action programs in federal contracting were unconstitutional. In his concurring opinion, he went further to condemn the entire premise of such remedial action. *See id.* at 240 (Thomas, J., concurring in part) (“I believe that there is a ‘moral and constitutional equivalence’ between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality.”).

121. See *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part, dissenting in part) (“The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every
In each instance, Justice Thomas has been a vocal critic of such remedies on the ground that they violate the legal and moral mandate of colorblindness. What distinguishes his opinions from those of other justices who share his views, such as Justice Antonin Scalia, is that Justice Thomas frequently invokes black cultural references or adopts a specifically black subject position.

For example, in *United States v. Fordice*, the Court sought to address the meaning of desegregation mandates in higher education. Thomas's concurrence, which focused on the apparent tension between dismantling a dual system and the existence of historically black colleges and universities, began with a quotation from W.E.B. DuBois, a leading black intellectual: "We must rally to the defense of our schools. We must repudiate this unbearable assumption of the right to kill institutions unless they conform to one narrow standard." Similarly, in *Missouri v. Jenkins*, a case in which the Court rejected a lower court's order for wide ranging remedial programs and expenditures to address ongoing racial inequities, Thomas concurred, denouncing the lower court: "It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior." His citations to Frederick Douglass and W.E.B. DuBois, along with other specific claims about the importance of historically black colleges and universities—indeed, the reference to black schools as "our schools"—
unequivocally mark him as black. It is from this racially specific position that he argues that the Constitution compels colorblindness.

While Thomas vehemently eschews government policies like affirmative action that rely upon or take cognizance of race, even if those policies seek to enhance equality, his autobiography explicitly articulates the role race played in shaping his life experiences and achievements. Of course, to say that one is opposed to the state engaging in practices that rely upon race and yet assert a specific racial identity as an individual is not inherently contradictory. Indeed, Thomas's approach to race could be analogized to the constitutional treatment of religion—that religious practices are to be free of state interference. Yet in Thomas, the repeated assertion of racial identity belies any notion that he sees himself as a person for whom race was irrelevant, despite his conservative commitments. In his autobiography, My Grandfather's Son, he relates the story of his beginnings in rural Georgia in the late 1940s and his experience as one of only a handful of blacks attending schools with whites in the early days of desegregation. It is a story of poverty, perseverance—and race.

B. Pieces of My Life as My Grandfather's Son

Imagine that Clarence Thomas has applied to the University of Michigan Law School and that he offers the personal statement below in support of his

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130. One major approach to the "establishment clause" of the First Amendment is a theory of neutrality. See Chemerinsky, supra note 34, § 12.2.1, at 1193 (3d ed. 2006) ("[T]he establishment clause says that the government must be neutral toward religion" and "'prohibit[s] classification in terms of religion either to confer a benefit or to impose a burden.' )" (citing Philip Kurland, Of Church and State and the Supreme Court, 29 U. Chi. L. Rev. 1, 96 (1961)). At the same time the First Amendment is said to protect the free exercise of religion. See Chemerinsky, supra note 34, § 12.3.1, at 1247. Similarly Thomas could be said to be asserting that race and racial identity is a private matter and that one's racial identity, like one's religious beliefs, ought not to be imposed by government.

Whether Thomas's racial philosophy is sound on this and other dimensions we do not consider here. That is part of another project. See Harris, Doubting Thomas, supra note 124.
candidacy.

1. The Personal Statement

Most of the people I've known, and nearly all of the important ones, are anything but famous. Yet their story is my story: their struggles in the face of futility, their perseverance through accumulated injustices, their resilience in the face of broken promises and dashed dreams, their hopefulness in the face of impenetrable bigotry, and their unrequited love for a country that often seemed to reject them at every turn.\textsuperscript{131}

I am descended from the West African slaves who lived on the barrier islands and in the low country of Georgia, South Carolina, and coastal northern Florida. In Georgia my people were called Geechees, in South Carolina, Gullahs. They were isolated from the rest of the population, black and white alike, and so maintained their distinctive dialect and culture well into the twentieth century. What little remains of Geechee life is now celebrated by scholars of black folklore, but when I was a boy, “Geechee” was a derogatory term for Georgians who had profoundly Negroid features and spoke with a foreign-sounding accent similar to the dialects heard on certain Caribbean islands.\textsuperscript{132} . . . Pinpoint [where I was born] is a heavily wooded twenty-five acre peninsula on Shipyard Creek, a tidal salt creek ten miles southeast of Savannah. A shady quiet enclave full of pines, palms, live oaks, and low-hanging Spanish moss, it feels cut off from the rest of the world and it was even more isolated in the fifties than it is today. Then as now, Pinpoint was too small to properly be called a town. No more than a hundred people lived there, most of whom were related to me in one way or another. Their lives were a daily struggle for the barest of essentials, food, clothing and shelter. Doctors were few and far between, so when you got sick, you stayed that way, and often you died of it. The house in which I was born was a shanty with no bathroom and no electricity except for a single light in the living room. Kerosene lamps lit the rest of the house.\textsuperscript{133}

Pinpoint was at the water’s edge and just about everyone I knew did some kind of water-related work. Many of the men raked oysters during the winter and caught crabs and fish in the spring and summer. . . . Every winter the women of Pinpoint shucked oysters in the factory. . . . The women who didn’t work there served as domestics in the homes of white people, bringing back such dubious treats as the crusts of the slices of bread that had been used to make the hors d’oeuvres served at their employers’ parties.\textsuperscript{134}

\textsuperscript{131} Clarence Thomas, My Grandfather’s Son at 2 (2007).
\textsuperscript{132} Id. at 2.
\textsuperscript{133} Id. at 3–4.
\textsuperscript{134} Id. at 4–5.
Life in Pinpoint was uncomplicated and unforgiving, but to me it was idyllic. . . . Nothing about my childhood seemed unusual to me at the time. I had no idea that any other life was possible, at least for me. Sometimes I heard the grown ups talk about the white people for whom they worked, but I took it for granted that they were all rich.135

[After I began school, the house where my family and I lived was destroyed in a fire started accidentally by my cousins.] After that [my mother] took my brother and me to Savannah, where she was keeping house for a man who drove a potato-chip delivery truck. We moved into her one-room apartment on the second floor of a tenement on the west side of town. . . . Overnight I moved from the comparative safety and cleanliness of rural poverty to the foulest kind of urban squalor. The only running water in our building was downstairs in the kitchen. . . . The toilet was outdoors in the muddy backyard. . . . I'll never forget the sickening stench of the raw sewage that seeped and sometimes poured from the broken sewer line.136

[My mother] enrolled me in the afternoon first-grade class at Florence Street School . . . one of the first public schools in Savannah built specifically for black students. . . . [At school m]y lessons were slow moving and repetitive, so I started skipping school and wandering around the west side of town. . . . Mother always came home tired and drained. It was as though her job sapped all of the hope out of her. She worked to stay alive and to keep us alive, nothing more.

We couldn't afford to light the kerosene stove very often, so I was cold most of the time, cold and hungry.137

[After that winter, my mother decided to send my brother and me to live with our grandparents.] The main reason must have been that she simply couldn't take care of two energetic young boys while holding down a full-time job that paid only ten dollars a week. . . . Since she refused to go on welfare, she needed some kind of help, and I suspect that my grandfather told her that we would either live with him permanently or not at all.138

Daddy [my grandfather] had converted to Roman Catholicism in 1949. . . . [H]e . . . thought that children learned better when they wore uniforms and studied in a structured environment. It followed that Catholic schools were better than public schools, so he sent my brother and me to one.

I spent the first day of my second-grade year at East Broad Street School, a public elementary school in which Daddy briefly enrolled me while he tried to get me into St. Benedict the Moor Grammar School . . .

135. Id. at 5.
136. Id. at 6.
137. Id. at 7.
138. Id. at 8–9.
It took him just one day to win his case. This was in September 1955 and even though the Supreme Court had ruled the year before that segregation was unconstitutional, the public schools of Georgia had chosen to defy it. I knew nothing of Brown v. Board of Education, of course. I was too young to understand such things. The only responses that I can recall from my early years in Savannah were the “Impeach Earl Warren” billboards that started cropping up here or there and the adoption in 1956 of a new state flag that bore the seal of Georgia next to a Confederate flag.\textsuperscript{139}

Daddy had stopped selling wood and coal by the time Myers and I went to live with him; most of Savannah’s residents had switched by then to fuel oil or natural gas. Daddy got up between two-thirty and four each morning to start making his rounds, and [beginning the fourth grade] I worked every day after school and all day on Saturday. . . . We weren’t allowed to wear gloves when pulling the hose or putting oil in the tanks—he was afraid they might get caught in the machinery—and my fingers grew numb from the cold.\textsuperscript{140}

In the fifties and sixties, blacks steered clear of many parts of Savannah, which clung fiercely to racial segregation as long as it could. The Ku Klux Klan held a convention there in 1960 and 250 of its white-robed members paraded down the city’s main street one Saturday afternoon. No matter how curious you might be about the way white people lived, you didn’t go where you didn’t belong. That was a recipe for jail or worse.\textsuperscript{141}

The family farm and our unheated oil truck became my most important classrooms, the schools in which Daddy passed on the wisdom he had acquired in the course of a long life as an ill-educated, modestly successful black man in the Deep South. Despite the hardships he had faced, there was no bitterness or self-pity in his heart. As for bad luck, he didn’t believe in it. Instead he put his faith in his own unaided effort—the one factor in his life he could control—and he taught Myers and me to do the same. Unable to do anything about the racial bigotry and lack of education that had narrowed his own horizons, he put his hope for the future in “my two boys,” as he always called us. We were his second chance to live, to take part in America’s opportunities, and he was willing to sacrifice his own comfort so that they would be fully open to us.\textsuperscript{142}

2. What’s Race Got to Do With It?

Imagine that a dean of admissions at the University of Michigan Law

\begin{itemize}
  \item \textsuperscript{139} Id. at 13–14.
  \item \textsuperscript{140} Id. at 21.
  \item \textsuperscript{141} Id. at 21–22.
  \item \textsuperscript{142} Id. at 26–27.
\end{itemize}
School, Michelle Philips, picks up Thomas's file as one of many that she will read as part of the admissions process. She instantly encounters the way in which race is prominently noted in Thomas’s personal statement and worries that this might create a problem in light of Proposal 2. Given that Proposal 2 is a very recent legal mandate, she has virtually no institutional memory to draw upon. After reading Thomas’s file several times, she explores four approaches, none of which is satisfying.

a. Literally Removing All References to Race

Philips could begin by striking all references of race from the personal statement. Imagine that she endeavors to do just that. There is no question in Philips’s mind about whether the terms “black” and “white” should be stricken; thus, she is comfortable removing both. However, she is not at all clear about whether non-consideration of race requires her to strike a number of other terms, among them: “Caribbean,” “slave,” “Geechees,” and “segregation.” She worries that race might be embedded in each term, even as none of them explicitly signifies a particular racial identity. Moreover, somewhat familiar with recent studies in social psychology, she knows that striking this information from the file will not erase Thomas’s racial identity from her mind or the minds of other reviewers. Her efforts to suppress what she already knows—that Thomas is black—likely will be ineffective.

Philips then considers excising references to race from Thomas’s statement and then passing his file on to another reader. Perhaps another reader—one without her personal knowledge of Thomas’s original racially infused statement—would be able to read Thomas’s file in a “race-free”
manner. However, she worries that her editing will not prevent another reader from reading race into Thomas’s statement because it is likely that in the absence of explicit non-white racial references, her colleagues will presume that Thomas is white. This presumption is not illogical since empirically, the majority of applicants to graduate school are white. But even beyond that fact, a line of research in social psychology suggests that in the absence of an indication that a person is not white, the default presumption is that the person is white. Philips worries about this. She is now not at all sure that Thomas’s file can be race neutrally read. She comes to realize that, if Thomas’s statement is considered as written, he is racially marked as black, while if it is successfully purged, he is presumptively white. Under neither condition is the process truly race free. In both scenarios Thomas is explicitly or implicitly racially marked. Stumped by this, Philips decides to adopt another approach.

b. Imagining that Clarence Thomas is White

Philips is aware that, in the context of admissions, colorblindness is sometimes formulated in terms of whether whites and non-whites are treated the same. To ensure that no unfair consideration is given to Thomas because he is black, one might ask the counterfactual question: would the applicant have been admitted if she were white? Philips tries to operationalize this standard with respect to Thomas’s personal statement. To do so, she treats the statement as if a white person had written it. Upon doing so, she quickly

146. Since the majority of people enrolled in graduate school are white, the reasonable presumption is that the applicant pool is predominately white as well. See Office of Research & Policy Analysis, Council of Graduate Schools, Graduate Enrollment and Degrees: 1996 to 2006, available at http://www.cgsnet.org/portals/0/pdf/R_ED2006.pdf. 147. This presumption derives from the fact that white identity is normative, or put another way, whiteness “goes without saying.” See Felicia Pratto et al., When Race and Gender Go Without Saying, 25 Soc. Cognition 221, 223 (2007) (“White Americans generally presume that being White and male is normative.”); see also Steven Stroessner, Social Categorization by Race or Sex: Effects of Perceived Non-Normalcy on Response Times, 14 Soc. Cognition 247, 248-249 (1996) (noting that particular category memberships such as white in American society are perceived as more “normal” than being Black due to the prominence of whites in media representations, the historical dominance of whites over Blacks, and the fewer number of Blacks than whites). Thus, when a racial identity is unspecified the “cultural expectation” is that the person is white. See Thierry Devos & Mahzarin R. Banaji, American = White?, 88 J. Personality & Soc. Psychol. 447, 449 (2005) ("In Western cultures, White racial identity and male gender are treated as cultural expectations. Evidence for this ‘White male norm’ hypothesis comes from experiments showing that membership in nonnormative groups receives greater attention than membership in normative groups because of its incongruence."). 148. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in judgment) (“In my view, government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction. . . . Under our Constitution there can be no such thing as either a creditor or debtor race. That concept is alien to the Constitution’s focus upon the individual . . .”; see also Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289–290 (Powell, J.) (1978) (“The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.”).
realizes two things. First, significant parts of Thomas’s story are incomprehensible from the racial subjectivity of a white person. Recall, for example, Thomas’s recollection of this first grade classroom: “[My mother] enrolled me in the afternoon first-grade class at Florence Street School . . . one of the first public schools in Savannah built specifically for black students.”  

This remembering is explicitly linked to a black racial experience, unless we assume that, in an era when Plessy v. Ferguson was still good law, a white person would have attended a school “specifically for black students.”

Think now about Thomas’s statement of his origins: “I am descended from the West African slaves who lived on the barrier islands and in the low country of Georgia, South Carolina, and coastal northern Florida.” Here, again, the statement makes little sense if Philips imagines Thomas as a white person. Finally, consider Thomas’s sense of the politics of racial segregation in Savannah: “In the fifties and sixties, blacks steered clear of many parts of Savannah, which clung fiercely to racial segregation as long as it could. The Ku Klux Klan held a convention there in 1960 and 250 of its white-robed members paraded down the city’s main street one Saturday afternoon. No matter how curious you might be about the way white people lived, you didn’t go where you didn’t belong. That was a recipe for jail or worse.” Again, it is difficult to make sense of Thomas’s account from a white racial perspective. The “you didn’t go where you didn’t belong” observation is a statement about the ways in which the color-line policed black freedom of movement—and, more specifically, policed the freedom of movement of Thomas himself. In light of the foregoing passages, Philips concludes that re-reading Thomas’s statement as if Thomas were white renders much of the statement unintelligible.

Philips’s other reaction to this identity-switching approach is that it might not be race-neutral or colorblind at all. Reading Thomas’s statement as though he were white simply substitutes one racial identity for another.

c. Evaluate the Quality of the Writing—Not the Experience

Another way Philips might try to process Thomas’s personal statement is to read his story for its prose, not its content—for its form, not its substance. Among other questions, Philips would ask herself these: How well organized is Thomas’s account of his life? How sophisticated is the language he employs? Is

149. Thomas, supra note 131, at 7.
150. 163 U.S. 537 (1896).
151. Thomas, supra note 131, at 2.
152. This is particularly so given the fact the one-drop rule (roughly, the notion that any amount of African ancestry renders one black), see, e.g., States’ Laws on Race and Law (Pauli Murray ed., 1997) (providing a history of state laws that instituted one-drop rules), continues to play an enormous role in defining racial identity; see also Nancy Leong, Multiracial Identity and Affirmative Action, 12 Asian Pac. Am. L.J. 1, 31–32 (“The ‘one-drop’ rule has a long history in American society, and continues to shape the way many people think about race.”).
153. Thomas, supra note 131, at 21–22.
his weaving of thematic development with narrative successful? There are several problems with this approach.

First, to the extent that Philips is not evaluating other personal statements in this way, she is treating Thomas differently; for some, that alone might be cause for concern, particularly if the difference in treatment is framed as a process failure. Second, this different treatment substantively disadvantages Thomas. This is because personal statements are read primarily as a window on the applicant's character, experiences and aspirations. They are read primarily (though not entirely) for substance, not form. Third, such an approach would

154. See EssayEdge.com, supra note 76 (stating that "your essay must be a self-marketing masterpiece, clearly proving your commitment, character, and intellectual maturity, without a hint of indecision or pompous insincerity."); see also, Dennis J. Shields, A View from the Files: Law School Admissions and Affirmative Action, 51 Drake L. Rev. 731, 737 (revealing how "[t]he application essays may (and often do) have a significant positive or negative impact on the ultimate decision whether to admit a particular candidate. A well written essay, beyond revealing the applicant to be an excellent writer, may reflect thoughtful introspection, potential contributions, and insight into the quality of student and lawyer the candidate has the potential to become.").

When providing advice to applicants, some schools encourage students to focus on the substance of the essay because the admissions officers are interested in getting to know their personal experiences. See University of Michigan Office of Undergraduate Admissions, Tips for Writing a Great Essay, http://www.admissions.umich.edu/essay/tips/ (last visited Jul. 8, 2008) (suggesting applicants to "[b]e authentic" because the office "want[s] to hear [the applicant’s] voice in [her] response – the experiences, opinions and values that have shaped [her]" and to "[f]eel free to write on something you are passionate about so we can get to know you better.").

Although most books on college and university admissions suggest having strong form (spelling, grammar, etc.), they also greatly stress the critical importance of substance. See Owens, supra note 76, at 42 (revealing that admissions officers want to hear more about "the kind of experience that led to the formulation of the candidate's attitudes and beliefs" and "a history of disadvantage, ethnic status, [and so on] . . . [because it] is very valuable to the admissions committee."); see also Lammert-Reeves, supra note 76, at 76-79 (providing the advice that essays should "[t]ell [s]tories," "[b]e interesting," "[s]tart with a [g]reat [l]ead," "[h]ave a [g]eneral [t]heme," and "[e]xpress [o]pinions.").

According to one report:

The analyses reported here do not diminish the value of the personal statement for the various purposes described at the outset of this paper—for example, as a source of information about valued personal qualities and a means for learning about an applicant’s goals and aspirations. The results of our research do, however, cast some rather serious doubt on the validity of the personal statement as an indicator of writing skill, even when carefully evaluated. If graduate (and other) admissions committees are to employ personal statements to evaluate writing skill, it would seem prudent to establish the personal statement as a clearer manifestation of writing proficiency than we have found it to be.


Moreover, some universities (especially at the undergraduate level) require additional statements that are used as writing samples (for form instead of substance). For example, Reed College requires a common application, a supplemental essay for the purpose of determining match between applicant and College ("Why Reed?") and a graded writing sample. See Reed College, Reed Application Supplement, available at http://www.reed.edu/apply/applying_to_reed/applications/Reed07_app_supp.pdf. Pomona College also requires a common Application, plus Pomona Supplement, which has a strongly
systematically disadvantage race-positive applicants. Because it is reasonable to assume that non-whites are more likely to have a race-positive sense of identity than whites, reading personal statements for prose could have a disparate impact that would be far from race neutral.\footnote{See supra note 38 and accompanying text (discussing research supporting the idea that blacks more so than whites see race as a central part of their identity). It is precisely the notion that a policy that is neutral on its face but that disparately impacts a particular group is not race neutral that helps to explain the broad literature criticizing the intent standard articulated in Washington v. Davis, 426 U.S. 229 (1976). See Charles R. Lawrence III, The Id, the Ego, and Equal Protection; Reckoning with Unconscious Racism, 39 STAN. L. REV. 317 (1987); see also Alan David Freeman, Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine, 62 MINN. L. REV. 1049 (1978) (explaining the perpetrator perspective similarly criticizing intent).}

d. No Race-Neutral Way Out: Risk, Anger, or Indecision

Because of the difficulties of each of the foregoing approaches, Philips ends up feeling rather flustered about Thomas's file. What exactly is she to do? On the one hand, she could argue that there is an important difference between considering race as a plus factor in making a decision about whether to admit Thomas—that is, considering Thomas's black racial identity—and considering Thomas’s life under pervasive racial segregation—that is, considering Thomas’s black racial experiences. Proposal 2 arguably only prohibits the former, not the latter. However, she notes that advocates of Proposal 2, like Ward Connerly, contend that any mention of race anywhere in the application invites a violation of the law, and that applicants whose files reflect any racial information should be denied admission.\footnote{See Seema Mehta, UCLA Accused of Illegal Admissions Practices, L.A. TIMES, Aug. 30, 2008, at B1, available at http://www.latimes.com/news/local/la-me-ucla30-2008aug30,0,6489043.story. The question of whether there is a difference between considering race and considering racial experience surfaced recently in Coalition To Defend Affirmative Action v. Regents of the University of Michigan, 539 F. Supp. 2d 924 (E.D. Mich. 2008), where plaintiffs challenged Proposal 2 as unconstitutional. The plaintiffs argued that because race is an important part of how minority students choose to define themselves, state universities cannot delete race and selectively deny applicants the opportunity to have central aspects of their identity considered; this creates an impermissible distinction based on race in violation of the Fourteenth Amendment. See Memorandum of Law in Support of the Cantrell Plaintiffs’ Motion for Summary Judgment, Coal. To Defend Affirmative Action v. Regents of the Univ. of Mich., 539 F. Supp. 2d 924 (E.D. Mich. 2008) (Nos. 06-15024, 06-15637), 2007 WL 4595210. In response, supporters of Proposal 2 countered that while there might be a distinction “between considering race as a per se plus factor in allocating admissions and financial aid” which would be proscribed by Proposal 2 and permitting consideration of “an applicants’ unique experiences that might have racial overtones,” “any such distinction whether valid or not in principle, as highly tenuous in practice, and therefore does not dispute the Cantrell Plaintiffs’ implied assumption that Proposal 2’s...}{155}
application, Philips may worry that any decision on his behalf will be subject to particular scrutiny and may invite litigation.

She may even feel angry about the fact that Thomas has put her in this position. Surely, given the language of the application for admissions, he knows that Proposal 2 forbids the school from taking race into account in the context of admissions? Why, then, would he write a statement that is so explicitly racially infused? Is he hoping that the school will cheat or put more bluntly, violate the law? Is he providing a means by which the school might do so? Was he simply too lazy to spend the time to write a race-neutral application? Or is he too racially invested to conceive of himself outside of race?

prohibition of 'preferential treatment' on the basis of race prevents the Universities from deliberately providing a forum, in their application process, for applicants . . . to highlight their 'racial identity' to sympathetic reviewers." See Defendant-Intervenor Eric Russell's Memorandum in Opposition to the Cantrell Plaintiffs' Motion for Summary Judgment at *7 n.3, Coal. To Defend Affirmative Action v. Regents of the Univ. of Mich., 539 F. Supp. 2d 924 (E.D. Mich. 2008) (Nos. 06-15024, 06-15637), 2008 WL 2155059. The advocates for Proposal 2 contend that the University of Michigan has in fact improperly provided such a forum in that the University of Michigan's Application for Undergraduate Admission quotes a speech from the University President:

defying Proposal 2 and direct[ing] all undergraduate applicants to '[c]omment on how your personal experiences and achievements would contribute to the diversity of the University of Michigan. [citation omitted] In light of [the President's] speech, it is difficult to view this mandatory essay without cynicism, indeed, as a calculated ploy to encourage minority applicants to publish racial information, otherwise forbidden by law, to a sympathetic admissions committee.'

In the context of Proposition 209 similar allegations have been made regarding admissions to California schools.

See Richard Sander, Colleges Will Just Disguise Quotas, L.A. TIMES, June 30, 2003 (asserting that Boalt evaded the law in the wake of Proposition 209 and that UCLA School of Law was engaged in different but equally problematic "rigging of their admissions systems").

157. Philips could form this conclusion because of stereotypes about blacks as having a poor work ethic. See, e.g., Timothy Brezina & Kenisha Winder, Economic Disadvantage, Status Generalization, and Negative Racial Stereotyping by White Americans, 66 SOC. PSYCH. Q. 402 (2003); Kathryn M. Neckerman & Joleen Kirschenman, Hiring Strategies, Racial Bias, and Inner-City Workers, 38 SOC. PROBS. 433, 440 (1991) ("Employers were especially likely to say that inner-city blacks lacked the work ethic, had a bad attitude toward work, and were unreliable; they also expected them to lack skills, especially basic skills. About half said that these workers had a poor work ethic."). This is not to say that Philips would be consciously thinking that blacks are lazy. Instead, she could be drawing on implicit biases. See Jerry Kang, Trojan Horses of Race, 118 HARV. L. REV. 1489, 1494 (2005) ("[R]esearch demonstrates that most of us have implicit biases in the form of negative beliefs (stereotypes) and attitudes (prejudice) against racial minorities. These implicit biases, however, are not well reflected in explicit self-reported measures. This dissociation arises not solely because we try to sound more politically correct. Even when we are honest, we simply lack introspective insight."); see also Robinson, supra note 38, at 1139.

158. Some suggest that blacks are overly focused on race. See, e.g., FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY 295 (1996) ("[W]hites complain that blacks are too race conscious . . . "); see also Robinson, supra note 38 (manuscript at 27-36) (discussing the differences between attentiveness to race and the disparity of incentives to attend to and perceive racial discrimination between blacks and whites); GEORGE YANCEY, WHO IS WHITE? LATINOS, ASIANS, AND THE NEW BLACK/NONBLACK DIVIDE 100-04, 182-86 & tbl.A (in response to questions whether there was too much talk about race, very few black respondents
Assuming that Philips is not angered or annoyed by Thomas's application, Philips might be inclined to categorize this file as a "hold"—a file that is difficult to process—leading Philips to take no decision as she tries to sort through whether or how to consider Thomas's statement. Thomas's file has now been placed in an ambiguous status and possibly in a negative light all because race is salient to his self-perception. Thomas's file would not raise any of these questions if race did not figure explicitly in his personal statement.

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Many schools invite applicants to relate aspects of their background including a personal or family history or cultural, educational or socioeconomic disadvantage.\(^{159}\) In Thomas's case, that history of disadvantage is also racial. It would be virtually impossible for him to tell the story of his background without reference to race. His story would be both incomplete and incomprehensible. The difficult position Thomas finds himself in here exposes the problem of formally removing race from an admissions process against a social backdrop in which race both matters and is cognizable.

C. Inscribing Latina Voices

As the discussion of Justice Thomas reveals, the problem of reading race out of a personal statement is not a function of the ideological commitments of the applicant. Even Thomas's application file could be negatively burdened by an "anti-preference" admissions regime of the sort Proposal 2 and Proposition 209 seem to require.

Nor is Dean Philips's job of reading admissions files made easier by switching the identity of the applicant from black to Latina/o. One could argue that because, historically, Latinas/os were formally classified as white,\(^{160}\) their experiences are not as racially infused or subordinating as blacks. Thus, the argument might continue, the problem of reading race out of the personal statement would be less problematic. But, as we have already argued, whiteness alone does not insulate an applicant from the burdens described. More importantly, the formal categorization of Latinas/os as white has always lagged behind the social recognition of them as non-white.\(^{161}\) Margaret Montoya's

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agreed while most whites thought it was true). Sometimes, this idea is expressed via the claim that blacks all too often "play the race card." See, e.g., Kimberle Crenshaw, Playing Race Cards: Constructing a Pro-active Defense of Affirmative Action, 16 Nat'l Black L.J. 196 (1999); see also Robinson, supra note 38, at 1101.

159. See, e.g., Berkeley Law, Application Process, supra note 19.

160. See Ian F. Haney Lopez, Race, Ethnicity, and Erasure: The Salience of Race to Latcrit Theory, 85 Calif. L. Rev. 1143 (1997) (exploring whether Latinas/os should be characterized as a race or an ethnicity and noting the fact that, formally, Latinas/os were classified as white).

161. See Hernandez v. Texas, 347 U.S. 475 (1954) (decided the same year as Brown v. Bd. of Educ., 347 U.S. 483 (1954)). In Hernandez, the Supreme Court refused to treat Mexican Americans as a distinct racial but nevertheless found an equal protection violation because of widespread evidence of social exclusion. Id. For an historical treatment of the racialization of Mexicans, see Laura Gomez, Manifest Destinies (2007). See also Ian Haney-Lopez, Racism
Mascaras, Trenzas, y Grednas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse makes this latter point especially clear. Thus, we draw from it to construct a personal statement to reveal the specific ways in which colorblind admissions processes burdens Latinas/os. Moreover, because Montoya speaks specifically as a Latina, her “personal statement” is also a useful window on how a narrow interpretation of Proposition 209 and Proposal 2 can severely restrict the terms upon which women of color can inscribe themselves in the admissions process.

1. The Personal Statement: Unmasking the Self

[School Days.] One of the earliest memories from my school years is of my mother braiding my hair, making my trenzas. In 1955, I was seven years old. I was in second grade at the Immaculate Conception School in Las Vegas, New Mexico. Our family home with its outdoor toilet was on an unpaved street, one house from the railroad track. We dressed in front of the space heater in the bedroom we shared with my older brother. Catholic school girls wore uniforms. I remember my mother braiding my hair and my sister’s braids so tightly as our squirming would allow, so the braids could withstand our running, jumping, and hanging from the monkey bars at recess. “I don’t want you to look greñudas,” my mother would say. [“I don’t want you to look uncombed.”] Hearing my mother use both English and Spanish gave emphasis to what she was saying. She used Spanish to talk about what was really

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163. Id. at 186-87.
important . . . . She also talked to us in Spanish about gringos, Mexicanos, and the relations between them.

Sometimes Spanish was spoken so as not to be understood by Them. Usually, though, Spanish and English were woven together. "Greñuda" was one of many words encoded with familial and cultural meaning. . . . The real message of "greñudas" was . . . : be prepared, because you will be judged by your skin color, your names, your accents. They will see you as ugly, lazy, dumb and dirty.

As I put on my uniform and as my mother braided my hair, I changed; I became my public self. My trenzas announced that I was clean and well-cared-for at home. My trenzas and school uniform blurred the differences between my family's economic and cultural circumstances and those of the more economically comfortable Anglo students. I welcomed the braids and uniform as a disguise which concealed my minimal wardrobe and the relative poverty in which my family lived...

Our school was well integrated with "Spanish" students because it was located in a town with a predominantly Latino population. The culture of the school, however, was overwhelmingly Anglo and middle class. The use of Spanish was frowned upon and occasionally punished.

By the age of seven, I was keenly aware that I lived in a society that had little room for those who were poor, brown, or female. I was all three. I moved between dualized worlds: private/public, Catholic/secular, poverty/privilege, Latina/Anglo. I moved between these worlds. My trenzas and school uniform were a cultural disguise. They were also a precursor for the more elaborate mask I would later develop.

Presenting an acceptable face, speaking without a Spanish accent, hiding what we really felt—masking our inner selves—were defenses against racism passed on to us by our parents to help us get along in school and in society. . . . We struggled to be seen as Mexican but also wanted acceptance as Americans at a time when the mental image conjured up by that word included only Anglos.

[University Latinas.] Mine is the first generation of Latinas to be represented in colleges and universities in anything approaching significant numbers. We are now represented in virtually every college and university. But, for the most part, we find ourselves isolated.

164. Id. at 187.
165. Id. at 187-88.
166. Id. at 188.
167. Id. at 189-90.
168. Id. at 190.
Rarely has another Latina gone before us. . . .

Academic success traditionally has required that [Latinos] exhibit the linguistic and cognitive characteristics of the dominant culture. . . . Virtually all Latino students with a college-level education appear to be highly assimilated into Anglo culture. [They appear to be wearing masks.] . . .

[Masking Racial Difference.] Feeling masked because of ethnic and racial differences is directly linked to the process of cultural assimilation, and to the pervasive Latina/o resistance against assimilation; against being seen as "agringada," of becoming a gringa, of being taken for something one never wanted to become. Assimilation has become yet another mask for the Latina/o to hide behind.

Being masked may be a universal condition in that all of us control how we present ourselves to others. There is, however, a fundamental difference in feeling masked because one is a member of one or more oppressed groups within the society. When members of the dominant culture mask themselves to control the impressions they make, such behavior is not inherently self-loathing. But when we attempt to mask immutable characteristics of skin color, eye shape or hair texture because they historically have been loathsome to the dominant culture, then the masks of acculturation can be experienced as self-hate. Moreover, unmasking for members of the dominant culture does not involve the fear or depth of humiliation that it does for the subordinated, for whom the unmasking is often involuntary and unexpected.

For Outsiders, unmasking is a holistic experience: I do not have separate masks for my female-ness and Latina-ness. The construction of my public persona involves all that I am. My public face is an adjustment to the present and a response to the past. Any unmasking resonates through the pathways of my memory. For Outsiders, the necessity of unmasking has been historical. Strategies are passed on from one generation to another to accommodate, to resist, to subvert oppressive forces. Involuntary unmasking is painful, it evokes echoes of past hurts, hurts one has suffered, and hurts one has heard stories about.

For stigmatized groups, such as persons of color, the poor, women, gays and lesbians, assuming a mask is comparable to being "on stage." Being "on stage" is frequently experienced as being acutely

169. Id. at 190-91.
170. Id. at 192.
171. Id. at 193-94.
172. Id. at 196-97.
173. Id. at 197.
aware of one's words, affect, tone of voice, movements and gestures because they seem out of sync with what one is feeling and thinking. At unexpected moments, we fear that we will be discovered to be someone or something other than who or what we pretend to be. Lurking just behind our carefully constructed disguises and lodged within us is the child whom no one would have mistaken for being anything other than what she was. Her masking was yet imperfect, still in rehearsal, and at times unnecessary. \ldots

As a child I had painstakingly learned my bicultural act: how to be a public American while retaining what I valued as Mexican in the most private parts of my soul. My childhood mask involved my outward self: how I looked, how I sounded. By college, my mask included more subtle aspects of my personality and intellect: a polysyllabic vocabulary, years of tested academic achievement, and a nascent political philosophy wrapped up in the ideology of being Chicana. \ldots

[Masking and Professional Identity.]

[The pressures to mask do not disappear with childhood or adolescence. They follow you throughout life. And they were there before my first presentation.] I apply my make-up and dress carefully. I wear a white suit, a cobalt blue silk blouse and matching suede heels.\ldots

I begin my presentation with a short introduction written in Spanish, but then I switch to English. I am compelled to switch. As a child I was forced to use English; now it is my language of choice. It has become my public voice—it lends me identity, authority, credibility.\ldots

I deliver the narratives about my childhood and law school experiences. This is familiar terrain, my voice is confident. I continue with a short synopsis of the expository sections on masking. As I am standing there, I am aware of an internal voice urging me to listen to my own words; I am increasingly aware that my words spoken in English to this Mexican audience capture the very inauthenticity I am describing.\ldots

With great trepidation, I say: Masks can be sartorial, ideological, cognitive. Masks can also be lexographic, rhetorical or linguistic. I stand before you with my linguistic mask. Aquí estoy ocultada por mi máscara linguistica con sus aspectos subtextuales. Desde niña, he entendido el significado deaccentos, vocabulario, pronunciacion, sintaxis. En ingles estos elementos idiomaticos estan relacionados con

174. Id. at 197-98.
175. Id. at 206.
176. Id. at 218.
177. Id. at 219.
178. Id.
NEW RACIAL PREFERENCE

my pisque, con la persona quien soy. Por la primera vez entiendo que español tiene el mismo poder, a pesar de estar donde no soy parte de una minoría cultural o racial. Para mí, hablar español afuera de la casa me hace sentir vulnerable. Sobre todo, hablar español donde la mayoría lo habla mucho mejor que yo, tiene algún aspecto de como me sentía cuando era niña, cuando me sentía vulnerable antes de los gringos. Por eso es difícil quitarme la máscara que me presta el inglés y hablarles en español. Así es la locura de la discriminación. 179

I knew it wasn’t neat and orderly: my greñas were showing for all to see. I shrugged off my mother’s concern about how others might judge me, and there I stood “sounding greña.” But this new identity, this contradictory and ambiguous identity, was my own. I felt authentic. My public persona, like my private face and private speech, no longer reflected only those who had dominated me and my people. I found my voice, mis voces. 180

Gracias á mi mamá, Josephine Chavez, Gloria Anzaldúa, y muchas otras. 181

2. The Costs of Excising Race

Like Thomas’s personal statement, this one is also explicitly race conscious. Like Thomas, Montoya has a positive racial identity. In this sense, the struggles and costs that we imagined Dean Philips encountering with respect to reading race out of Thomas’s personal statement are struggles and costs that she would encounter with respect to Montoya’s file as well.

But Montoya’s narrative reveals the particular ways in which Latinas/os are potentially affected by anti-preference admissions regimes. A dominant theme in her personal statement is assimilation, or the extent to which Latinas/os feel pressured to “work their identities”182 and eschew Spanish and other cultural signifiers of Latina/os identity to fit in within mainstream (“Anglo”) society. Anti-preference admissions processes increase the likelihood of that disavowal. That is, they encourage Latinas/os to “mask” their identities when this is precisely what Latinas/os are struggling to resist.

This is not to say that the phenomenon of masking is applicable only to Latinas/os. On the contrary, one can thinking of masking as a form of “partial passing,” by which outsiders reduce the salience of their outsider identity,183 or as passing per se, by which outsiders completely obscure their outsider identity.184 Understood in this way, Montoya’s utilization of the masking

179. Id.
180. Id.
181. Id. at 220.
182. See generally Carbado & Gulati, Working Identity, supra note 33.
183. See id. at 1304 (discussing “partial passing”).
184. See Harris, supra note 36 (discussing the incentives to and pass and the costs of doing so).
metaphor invites us to view the suppression of racial identity in the context of admissions not only as a form of masking, or covering up identity, \(^{185}\) but also as a form of passing, or giving up identity.

To the extent that passing entails both the act of “giving up” (e.g., being Chicana) and the act of “claiming” (e.g., being white/Anglo), one can raise a question about whether, by stripping people of color of their racial markers, anti-preference admissions processes render them white—not in the literal sense, but in the sense that whiteness often operates as a default identity that does not have to specified or pointed out. It is precisely the racial default of whiteness that renders people of color, but not whites, “different.” But for this notion of difference, the diversity rationale for affirmative action would have little traction. Underwriting this rationale is the belief that the “difference” people of color bring into colleges and universities diversifies those domains.\(^ {186}\) This understanding of difference conceptually and normatively works only when the background assumption that whiteness is neither diverse nor different is firmly in place. Whiteness, in other words, is simply a “what is.” As such, it is the benchmark against which difference comes into being, is expressed, and is measured.

When people of color suppress their race in the context of admissions they not only give up their difference, but they also assume the risk that they will be read as (or pass for) white. What this means concretely is that people of color who live their lives negotiating the fact that they are not in fact white could, as a result of excising race from their self-representation, become functionally white from the perspective of an admissions officer.\(^ {187}\) Conceptualizing Montoya’s notion of masking as a form of passing brings this problem into sharp relief.

Montoya’s narrative also invites us to think about the particular constraints women of color face with respect to anti-preference admissions. She speaks explicitly as a Latina—of being “poor, brown, and female,” revealing the extent to which the masking phenomenon she describes is deeply gendered. Of course, Latinos (and Chicanos more specifically) experience the pressures of assimilation as well. But, presumably, they would not employ the braiding of their hair as both a literal and figurative representation of one of the ways in which they have had to manage their identity.\(^ {188}\) Yet, a crucial part of Montoya’s narrative is that Montoya’s mother’s braided her hair to construct,


\(^{187}\) See supra note 147 and accompanying text (referring to studies that suggest that when decision-makers lack racial information about a person, they assume that the person is white).

\(^{188}\) See also Paulette Caldwell, *supra* note 71 (discussing the particular racial meaning and significance of black women’s hair).
If Proposition 209 and Proposal 2 are interpreted to prohibit both gender and racial self-expressions, there is virtually no space in the application process for applicants like Montoya to inscribe their intersectional experiences. In this respect, Montoya's situation is even worse than that in which women of color historically have found themselves vis-à-vis anti-discrimination law—having to decide whether to ground their discrimination claim in the language of race or gender. Under a narrow reading of Proposition 209 and Proposal 2, women of color may not even fragment their identities along “a single axis framework.” Their admissions files must be silent as to their race and gender, both of which must be masked.

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At the very end of her narrative, Montoya suggests that “I found my voice, mis voces.” Anti-preference admissions regimes encourage her not to use it. They encourage her, quite literally, to hold her tongue. But, even should she endeavor to speak, her intersectional voice may not be institutionally heard. In this respect, and to borrow from Gayatri Spivak, the question with respect to women of color and “anti-preference” admissions is not: can women of color speak? The question is rather: with which voice will they be permitted to do so?

III

UNPACKING BAGGAGE: THE IDEOLOGY OF COLORBLINDNESS AND NEUTRALITY

As Parts I and II demonstrate, “anti-preference” admissions regimes produce racial preferences. Specifically, they prefer applicants for whom race is not an important part of their sense of identity or social experiences over applicants who understand themselves and their lives in racial terms. We advanced this point by honing in on a particular part of the application process: the personal statement. This offered a concrete example of how “anti-preference” initiatives can be easily interpreted to install the very thing they purport to eliminate and stand in opposition to: racial preferences.

Our aim now is to move from the concrete to the theoretical. The question we pursue here is this: if we are right that “anti-preference” admissions processes that purport to be colorblind and race neutral in fact produce racial preferences, why do they continue to have traction as colorblind and race-neutral procedures? Put another way, why are the racial preferences that result from admissions policies that formally erase race largely uncontested? In part

189. See generally Crenshaw, supra note 118 (criticizing anti-discrimination law for adopting a “single-axis” framework under which women of color have to decide whether to sound their discrimination claim in the language of race or gender—but not both).

the answer resides in a three-pronged ideological structure that undergirds colorblindness and race neutrality and mediates the relationship between them. The first prong rests on the assumption that colorblindness and race neutrality are normatively desirable and practically realizable. Indeed, this presumption lies at the foundation of initiatives like Proposition 209 and Proposal 2; for if one can demonstrate that either colorblindness or race neutrality is unattainable or unstable—which is precisely what we endeavor to do here—so too are the policies that purport to effectuate them.

The second part of the ideological structure conflates colorblindness with race neutrality and race consciousness with racial preference. The prevailing understanding of race in America is that these associations are both fixed and inexorable. Part of what we will show is that far from being necessary and inevitable, the association between colorblindness and race neutrality on the one hand, and race consciousness and racial preference on the other, are contingent and mired in a set of contestable assumptions.

The third part of the structure is constituted by empirical claims about race—for example, that our society is colorblind—masquerading for normative claims—for example, that our society should be colorblind. Similarly, in this part of the ideological structure, the empirical assertion that race does not matter often stands in for the normative assertion that race should not matter. This simple transmutation of an aspirational statement to an empirical assertion helps to make colorblindness an existential "what is"—the default racial description of American society. This default simultaneously obscures the pervasiveness of racial consciousness and makes it difficult to have a public debate about the efficacy and desirability of colorblindness.

Below, we more specifically map the contours of this three-part ideological structure. As we will show, each part helps to explain our collective and national racial blind-spot to the advantages and disadvantages "anti-preference" initiatives like Proposition 209 and Proposal 2 can be interpreted to confer.

A. Evaluating Colorblindness and Race Neutrality

Contemporary racial discourse in the United States proceeds from the assumption that both colorblindness and racial neutrality are realizable. For some, both have already been achieved, making race irrelevant. In fact, it is against the background of colorblindness and race neutrality that the claim "race does not matter" makes sense and is normatively appealing.

But even those who do not believe that we already live in a colorblind or

191. See, e.g., Media Release, American Civil Rights Institute, Connerly Declares Supreme Court Decision "Glorious Victory" (Jun. 28, 2007), available at http://www.acri.org/pr_062807.html (last visited June 9, 2008) (declaring that Supreme Court now recognizes that "[r]ace has no place in American public life").
race-neutral world argue that this world is one to which we should aspire. Indeed, for people in this group, the assertion that race should not matter is a “means” to get us to that “end.” Inasmuch as Proposition 209 and Proposal 2 trade on the claims that (1) race does not matter and (2) race should not matter (collectively, “the colorblind claims”), both initiatives are also necessarily trading on colorblindness and race neutrality.

But what if the colorblind claims neither produce nor reflect colorblindness or race neutrality? How would that change the way in which Proposition 209 and Proposal 2 figure in our debates about race and equality? These are the questions to which we now turn our attention. We argue that the colorblind claims do not, in fact, necessarily produce race neutrality or colorblindness. We develop this argument with reference to Justice Thomas, an important advocate for the principles of colorblindness and race neutrality. More specifically, we draw on Justice Thomas’s own racial identity to expose the racial consciousness and non-neutrality of the colorblind claims. We perform this analysis to remove some of the currency with which Proposition 209 and Proposal 2 purchase their colorblind and race-neutral status.

Our starting point is to think about how Justice Thomas’s colleagues perceive him, a basic question of racial categorization. When Thomas enters the chambers of the Supreme Court every day, his colleagues are very much aware of his race. If they were asked to racially categorize Thomas, presumably they would say that he is black. Let’s call the moment in which Justice Thomas is categorized in this way the moment of racial recognition.

Stipulate now that upon noticing or becoming aware of Thomas’s race, his colleagues, particularly Justices Scalia, Alito and Roberts determine either that (a) as descriptive matter, Thomas’s race does not matter, or (b) as a normative matter, Thomas’s race should not matter. Let’s call both of these positions racial non-consideration. As we explain below, neither form of racial non-consideration is necessarily colorblind or race-neutral. We discuss them in turn.

a. Thomas’s Race Does Not Matter

There are number of ways one might contest this claim. First, one could point to the empirical evidence across disciplines demonstrating that being

192. Justice Thomas has been a vocal proponent of colorblindness and race neutrality, as well as and advocate of the proposition that race should not matter in governmental decision-making. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240–41 (1995) (Thomas, J. concurring) (stating his belief that there is a moral and constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality).


194. We suggest Justices Scalia, Alito, and Roberts in particular because, in their opinions, they have endorsed the principles of colorblindness and race-neutrality and have embraced the notion that race should not matter in governmental decision-making.
black in America matters. At the very least, this is indirect evidence that Justice Thomas’s race matters. Second, Justice Thomas’s race might matter to him in the sense that his history as a person who experienced racial segregation makes him deeply opposed to any state policy based on race. Indeed, Thomas’s autobiography suggests that this is his stance.

Third, others with whom Thomas interacts may share Thomas’s view that because of his racial history, it is important to take his views about race seriously. In other words, they may believe that it’s one thing for Justice Scalia, a white man who did not experience the burdens of Jim Crow, to say that race does not matter, and quite another thing for Justice Thomas, a black man who grew up attending segregated schools, to stake out that very position. In this way, Thomas’s race can matter in terms of conferring racial authority or legitimizing his racial viewpoint.

Fourth, Thomas’s race matters in a more fundamental way. His phenotype is processed through a particular matrix of social meanings, historically inscribed, and maintained through contemporary social relations that code him as outside the racial category “white” or “Caucasian.” Because of these social meanings that link phenotype to racial categories, at least in the context of the United States, he cannot claim to be white. That such an assertion is easily falsifiable demonstrates that his race, and race more generally, matters.

Fifth, the simple fact that Thomas’s colleagues recognize him as black suggests that, in some instances, they rely on, take note of, and differentially respond to people based on racial categorization. (Again, they wouldn’t refer to Thomas as white or any of their other colleagues as black). That in other instances, such as in the context of admissions, they seek to ignore race, is neither colorblind nor race neutral. It reflects a set of preferences about when to see and when not to see—when to ignore and not to ignore—race.

Neil Gotanda’s seminal work on colorblindness makes a similar point about a decision maker’s claim that she ignored race and was effectively colorblind. According to Gotanda, “before a private person or a government agent can decide ‘not to consider race,’ he must first recognize it. In other words, we could say that one ‘noticed race but did not consider it.”’ However, the claim of non-consideration rests upon the dubious assertion that it


196. See Thomas, supra note 131, at 62 (describing his growing identity as a conservative who believes in the notion of individual rights: “we are all individuals . . . . What I wanted was for everyone – the government, the racists, the activists, the students, even Daddy – to leave me alone so that I could finally start thinking for myself.”).

197. As Gotanda argues, “Nonrecognition differs from nonperception. Compare color-blind nonrecognition with medical color-blindness. A medically color-blind person is someone who cannot see what others can. . . . To be racially color-blind, on the other hand, is to ignore what one has already noticed.” Gotanda, supra note 193, at 18.
is possible to be colorblind by first recognizing race and then suppressing the prior racial recognition based upon a legal mandate to do so. As Linda Krieger notes, drawing on studies in social psychology, "[a] legal duty which admonishes people simply not to consider race, national origin or gender harkens to Dostoevsky's problem of the polar bear: 'Try... not to think of a polar bear, and you will see that the cursed thing will come to mind every minute.'"¹⁹⁸ Krieger's point, with which we agree, is that efforts to suppress a thought produce the paradoxical effect that one repeatedly thinks about and is preoccupied with the prohibited thought. Likely, this is especially so with respect to race, a salient and prominent social category. The ambient nature of race in our society makes it enormously difficult, if not impossible, as a matter of cognition, for us to ignore racial markers that we have already noticed.¹⁹⁹ Dostoevsky's problem of the polar bear is our problem of race.

Moreover, even assuming that suppression is possible, as Gotanda points out, neither the moment of recognition nor the moment of suppression (what we call racial non-consideration) is colorblind: "To argue that one did not really consider the race of an African-American is to concede that there was an identification of Blackness. Suppressing the recognition of a racial classification in order to act as if a person were not of some cognizable racial class is inherently racially premised."²⁰⁰ Under such circumstances, one is choosing to ignore a thing (race) that is otherwise socially recognizable. To put the point more concretely, disregarding race when one knows the category is socially salient is not the same as blinding oneself to race.

Secondly, the suppression of racial recognition is not racially neutral. Upon noticing race, the decision to suppress it is predicated on a normative judgment that it ought not to be part of some deliberative process. But inasmuch as race has already been recognized, that commitment comes too late. In this regard, the choice is not between a process that does not include race and one which does. Instead, the choice is either about the "quantitative measure of the weight accorded race in the decision,"²⁰¹ or about how qualitatively to treat race in the decision. The exercise of either of those choices is neither colorblind nor race neutral.

Nor is the conceptualization of race as "just" skin color neutral. People often base their commitment to colorblindness on the view that race is mere skin color. If race is nothing but skin color, they argue, it is an aspect of


¹⁹⁹. See Eleanor Rosch, Human Categorization, in STUDIES IN CROSS-CULTURAL PSYCHOLOGY 1, 40 (Neil Warren ed., 1977) (noting that social categories that help people explain and function in their natural or social environment are not going to be discarded simply as a result of an admonishment not to consider it).

²⁰⁰. Id. at 19.

²⁰¹. Gotanda, supra note 193, at 18.
identity that we should ignore. Note, however, that this ostensibly race-neutral position is based on a racial understanding of identity: race as skin color. Further, it is based on a racial understanding of awareness and epistemology: that it is possible to eradicate our awareness of skin color and therefore our knowledge of race altogether.

The conception of race as skin color (and the notion that race can be eliminated by that formulation) is neither race neutral nor colorblind. It is one way to understand race and, as such, is in competition with other understandings, including, but not limited to, the notion that race is a structural and ideological force that employs social categories to allocate benefits and burdens. Viewing race as skin color might be blinding oneself to this structural conception of race, but it is not blinding oneself to race per se. Viewing race as skin color is seeing race in a particular way that is contestable and normatively contingent.

b. Thomas's Race Should Not Matter

The problem of non-neutrality is even more apparent in the claim that race should not matter, which is explicitly normative in its articulation. One can understand this statement as expressing something like the following idea: “I know that many people continue to pay attention to race, but as a society we should stop doing so.” That this statement is not neutral is evident from an example of judicial reasoning that Gotanda critiques. In Fullilove v. Klutznick, a divided Court upheld a federal program that required ten percent of funding for public works to be reserved for minority owned businesses. Justice Stewart dissented, arguing, among other things, that in “making race a relevant criterion . . . , the Government implicitly teaches the public that the apportionment of rewards and penalties can legitimately be made according to race—rather than according to merit or ability—and that people can, and perhaps should, view themselves and others in terms of their racial characteristics.”

Here Justice Stewart offers a reason for rejecting a race-conscious approach in favor of a colorblind one: He does not want to adopt a constitutional framework for race that encourages people to view themselves or others in terms of their racial characteristics. His racial preference is that people ignore their race. This is neither a race-neutral nor a colorblind position. It is normative claim about how race should matter.

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As the preceding discussion indicates, the colorblind claims are in effect rhetorical placeholders for colorblindness and race neutrality, not “factual/empirical” conditions that necessarily produce or reflect race neutrality.

203. Id. at 532.
and colorblindness. This might suggest that we jettison colorblindness and race neutrality from our racial vocabulary, and at a minimum re-evaluate, if not abandon, the assertions that race does or should not matter. We take up this matter in Part IV. For now, it is enough to understand that the perceived neutrality and colorblindness of Proposition 209 and Proposal 2 is based in part on the perception that colorblindness and race neutrality are in fact realizable or have in fact been realized. More specifically, fueling both measures are the claims that (1) we do not take race into account (and therefore are already colorblind and race neutral) and (2) we should not take race into account (in order to become colorblind and race neutral). The circulation of these ideas obfuscate the racial consciousness of Proposition 209 and Proposal 2 and lead us to think that both mandates are necessary either to keep us colorblind and race neutral or as a means to get us to those realizable ends.

At the same time, the colorblind claims also affect how we view affirmative action. It is because of the epistemological work they perform—the knowledge about race they produce—that the racial consciousness of affirmative is salient. The claims render affirmative action a racial preference that either departs from the status quo of colorblindness and race neutrality, or prevents us from getting to those desirable and attainable ends.

**B. The Colorblindness/Race Neutrality and Color Conscious/Racial Preference Conflation**

Another explanation for the perceived race neutrality of Proposition 209 and Proposal 2 is the notion that colorblindness is the sole mechanism through which race neutrality can be achieved. By contrast, race consciousness is perceived to lead ineluctably to the racial preferences banned under initiatives like Proposal 2 and Proposition 209. To put all of this another way, the dominant racial discourse conflates colorblindness and race neutrality on the one hand, and color consciousness and racial preferences on the other. Moreover, this discourse positions colorblindness against color consciousness and race neutrality against racial preferences.

Schematically expressed, the prevailing understanding looks like this:

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<thead>
<tr>
<th>Colorblindness</th>
<th>Race neutrality</th>
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<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Race consciousness</td>
<td>Race preference</td>
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</table>

This part unmasks these conceptual predicates and challenges the perceived inevitability of their relationships—again, that race consciousness necessarily produces racial preferences and that colorblindness necessarily produces race neutrality. Unpacking these relationships clears the ground for an understanding of “anti-preference” initiatives as racial preferences.
Recall our suggestion that, in the context of the affirmative action debate, the dominant understanding of race neutrality is decision-making that confers neither a racial advantage nor a racial disadvantage. Indeed, the notion that affirmative action is a racial preference and therefore not racially neutral is based on the claim that it confers a racial advantage to blacks and a racial disadvantage to whites. For the moment, we will not contest this characterization. Instead, we refer back to our earlier point that "anti-preference" or "colorblind" admissions regimes also produce racial advantages and disadvantages and are therefore themselves racial preferences. More specifically, initiatives like Proposition 209 and Proposal 2 confer an advantage to race-negative applicants and a disadvantage to race-positive applicants. Already it should be clear, then, that there is no necessary relationship between colorblindness and race neutrality.

There is a more general way to make this point and its corollary that racial consciousness does not necessarily produce racial preferences. To do so, we invoke what we call "the baseline assumption": the view of the status quo against which admissions processes are implemented and operationalized. Under one view, the baseline is formally and substantively equal and candidate X, who is black, and candidate Y, who is white, are similarly situated with respect to their opportunity to gain admissions. Affirmative action disrupts this baseline equality by tilting the process in favor of Candidate X over Candidate Y. Under another view, the baseline is unequal and affirmative action is necessary to counteract the structural impediments to Candidate X. Here, formally taking race into account helps to offset the fact that current admissions practices are already stacked in ways that prefer whites and disadvantage blacks.

There are a number of ways to give content to this racial asymmetry: (1) biased standardized tests,\(^2\) (2) stereotype threat depressing performance on standardized tests,\(^3\) (3) class and wealth disparities that track race,\(^4\)
racially unequal K-12 education,207 (5) negative racial experiences (micro-aggressions) non-whites experience in predominantly white schools,208 (6) social capital about how to navigate admissions systems,209 (7) the extent to which the notion and operationalization of merit has been racialized,210 and (8) the creation of toxic or high stakes racial environments through ongoing debates about whether blacks have the intellectual capacity211 or credentials212 to perform successfully.

These are not exhaustive of the ways in which one might raise a question about whether, as a general matter, whites and blacks and other under-represented minorities are similarly situated with respect to admissions to colleges and universities. Indeed, more than fifty years ago, President Lyndon Johnson put the point this way:

[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, and 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 to the starting line of a race and then say, ‘you are free to compete with all others,’ and still justly believe that you have been completely fair.213

210. See Harris & Narayan, supra note 14, at 13 (questioning the concept of merit as racially neutral); see also Lani Guinier, Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals, 117 HARV. L. REV. 113, 191 (2003) (discussing how merit is racialized: “Indeed, affirmative action opponents tend to embrace two internally contradictory rubrics: ‘radical individualism’ and ‘quantifiable merit,’ both of which are infused with, and in denial about, the collective experience of race”); Roithmayr, supra note 14.
211. See Richard Nisbett, “All Brains are the Same Color,” N.Y. TIMES, Dec. 9, 2007 (reporting the comments of James Watson, the 1962 Nobel Laureate, who “recently asserted that he was ‘inherently gloomy about the prospects of Africa’ and its citizens because “all of our social policies are based on the fact that their intelligence is the same as ours—whereas all the testing says not really”’); see also William Saletan, Created Equal: Race, Genes and Intelligence, SLATE, Nov. 28, 2007 (asserting that the IQ deficit of blacks relative to whites is partially the result of genetic differences).
212. See Richard Sander, A Systemic Analysis of Affirmative Action in American Law Schools, 57 STAN. L. REV. 367 (2004) arguing that blacks are frequently mismatched to institutions where their academic credentials are substandard and they are therefore unable to compete.
213. President Lyndon B. Johnson’s Commencement Address at Howard University: “To Fulfill These Rights” (June, 4, 1965), in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED
For Johnson, affirmative action was justified not only because of historical exclusion but because blacks and white were not competing on a level social field. If one thinks that Johnson is right, or if one is persuaded by the racial asymmetry arguments the eight factors we enumerate above convey, one is less likely to see the formal and conscious incorporation of race into the admissions process as a racial preference. If, on the other hand, one assumes that applicants across race are similarly situated with respect to the obstacles they face in the context of admissions, one is more likely to view taking race into account as a racial preference.

Justice Powell recognized this contingency in a footnote in *Regents of the University of California v. Bakke*, in which the Supreme Court invalidated an affirmative action program that the UC Davis School of Medicine had implemented to address, among other things, the dearth of minority medical students and doctors. According to Justice Powell, "[r]acial classifications in admissions conceivably could serve a fifth purpose, one which petitioner does not articulate: fair appraisal of each individual's academic promise in the light of some cultural bias in grading or testing procedures. To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no 'preference' at all." This is precisely our point. If one thinks that there are defects in the application process, and that explicitly taking race into account is necessary to cure them, one is less likely to view affirmative action as a racial preference. This is because the notion of affirmative action as a racial preference only makes sense against a normative baseline assumption that there are no defects in the admissions process—that admissions processes are both racially neutral and racially fair.

Significantly, this normative baseline assumption is contested neither in current legal doctrine nor public policy debates about race consciousness. Notwithstanding Justice Powell's footnote, as a matter of constitutional law, color consciousness but not colorblindness is suspect, a move that presumes the racial preference of the former and race neutrality of the latter. Similarly, in public discussions about race, even "respectable" media outlets like the *New York Times* and NPR overlook the conflation of racial consciousness—understood as formally taking race into account—with racial preferences.

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215. *Id.* at 306 n.43 (Powell, J., plurality opinion).
216. See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). Moreover, the court has refused to draw a distinction between what some refer to as benign racial consciousness, on the one hand, and invidious racial consciousness, on the other.
217. See, e.g., Linda Greenhouse, *The Supreme Court: Affirmative Action; Justices Look for Nuance in Race-Preference Case*, N.Y. TIMES, April 2, 2003, at A1 ("Opponents of affirmative action came to the Supreme Court today to make an absolute case against race-conscious government policies but found the justices impatient with absolutes and hungry for
when the conflation is precisely the issue that ought to be the subject of debate. Kimberlé Crenshaw and Luke Harris, both in their scholarship and in their public policy work with the African American Policy Forum, have been pushing for a reformulation of the debate precisely along the lines we are suggesting. In fact, the twin ideas that formally not recognizing race is race neutral and formally recognizing race is a preference are so readily accepted that the racial conflation problem we have described is not perceived to be problem at all. What counts as "race neutrality" and what counts as "racial preference" is uncontested.

This lack of clarity is precisely why most people accept the characterization of Proposition 209 and Proposal 2 as colorblind/race-neutral measures. These "anti-preference" initiatives have engendered virtually no discussion about whether they might be color conscious/preferential policies. The dominant debate about both mandates is whether their ostensible colorblindness and race neutrality imposes too high a cost on racial diversity. More pointedly, the question is whether discriminating against whites in the context of admissions is necessary to achieve racial diversity in the context of colleges and universities. Under this inquiry, the race neutrality of Proposition 209 and Proposal 2 is taken for granted. The notion that these initiatives might actually produce the racial preferences they are perceived to prevent is almost unimaginable.

nuance.")); Neil A. Lewis, Bush and Affirmative Action: Constitutional Questions; President Faults Race Preferences as Admission Tool, N.Y. TIMES, Jan. 16, 2003, at A1 ("President Bush offered a sweeping denunciation of direct preferences for racial minorities in university admissions today and said his administration would file a brief with the Supreme Court urging that the affirmative action admissions policies at the University of Michigan be declared unconstitutional."); Tamar Lewin, Colleges Regroup After Voters Ban Race Preferences, N.Y. TIMES, January 26, 2007, at A1 ("With Michigan's new ban on affirmative action going into effect, and similar ballot initiatives looming in other states, many public universities are scrambling to find race-blind ways to attract more blacks and Hispanics."); Tamar Lewin, Campaign to End Race Preferences Splits Michigan, N.Y. TIMES, October 31, 2006, at A1 ("Three years after the Supreme Court heard Jennifer Gratz's challenge to the University of Michigan's affirmative action policy, she is still fighting racial preferences, this time in a Michigan ballot initiative."); All Things Considered: Michael Griffin, Political Editor of the Orlando Sentinel, Discusses Policy Banning Race-Based Admissions in State Universities and Racial Preferences in Government Contracts (National Public Radio broadcast, Nov. 11, 1999) ("Florida's Governor Jeb Bush has ordered an end to race-based admissions in state universities and racial preferences in government contracts. A move has been underway in Florida to hold a state-wide vote on banning affirmative action."); Morning Edition: Bush Administration's Emerging Stand on Affirmative Action Policies (National Public Radio broadcast, Aug. 7, 2001) ("The Bush administration is expected to help defend an affirmative action program before the US Supreme Court. Sources say the Justice Department will file a brief in support of a federal contracting program by the end of the week. That makes some conservatives angry. They say the Bush administration is missing an opportunity to roll back racial preferences.").

C. The Normative/Empirical Conflation

Thus far, we have offered two explanations for the conception of "anti-preference" initiatives as colorblind and racially neutral: (1) the notion that race neutrality and colorblindness have already been achieved or are achievable, and (2) the conflation of colorblindness with racial neutrality and color consciousness with racial preference. This part articulates a third: our tendency both in law and public discourse to treat normative claims about race as empirical ones. Put another way, the dominant analytical framework treats "should" or "ought" as "is" or "does."

To appreciate how this conflation works, consider the following statements:

a. Police officers should not take race into account. They should ignore it. This statement is being offered to contest racial profiling in the context of both everyday policing and terrorism.

b. Voters should not take race into account when they participate in the political process. This statement is being offered to suggest that neither Barack Obama's nor Hillary Clinton's race should inform whether we vote for them. It is also being offered to challenge the legitimacy of redistricting plans that take race into account.

c. We should not take race into account in the context of intimacy. This statement is being offered to challenge the practice of same-race marriages and partnerships.

d. We should not take race into account in deciding which children to adopt. This statement is being offered to challenge both the state's practice of taking race into account when deciding the adoptive homes of children and the practice of prospective adoptive parents specifying the race of the children they want to adopt.

Note that were we to substitute "we do not" for "we should not" in each of the foregoing items, they would be demonstrably false as an empirical matter. Yet, far too often our public policy discussions proceed as though our normative racial aspirations were our empirical racial conditions, as though we are in fact colorblind with respect to family formation or political participation, for example. The transmutation of the normative into the empirical masks the extent to which race consciousness is pervasive, and not just manifested in affirmative action policy, and prevents robust conversations about how we might want race to matter. That is, because the normative "we should not" functions as the empirical "we do not" we short circuit a meaningful conversation about "the whether and how."219

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219. Consider this point with respect to law enforcement. Should we take race into account in determining whether a person is seized for purposes of the Fourth Amendment? See Devon W. Carbado, (E)racing the Fourth Amendment, 100 Mich. L. Rev. 946 (2002) (discussing the absence of a serious engagement with race in the context of Fourth Amendment jurisprudence).
There is another sense in which the foregoing normative statements do empirical work. Each is expressed against a background assumption that we are otherwise racially neutral. Thus, the statement "we should not take race into account in the context of policing" contains an unarticulated "because"—that is, "because we do not take race into account in society more generally." In other words, it is the assumption that we are already colorblind that gives the "should not" component of the claim normative bite.

We do not want to overstate this argument. Clearly, when people say "we should not take race into account in society," the "because" that follows could also be normatively oriented: "because we should not take race into account in the context of society more generally." We recognize, then, that sometimes "should" claims function as "should" claims. Our point is that they function as "is" claims as well—and in ways that blind us to the racial consciousness of colorblindness.

That normative claims about race function in this way should not surprise us. The "should" standing in for the "is" has a long constitutional and anti-discrimination history that can be traced back to the first moment in which the concept of colorblindness is introduced to equal protection doctrine: Justice Harlan's dissent in *Plessy v. Ferguson*. According to Justice Harlan, "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." As an empirical claim, this statement cannot withstand scrutiny: race is specifically inscribed into the Constitution in a number of significant ways. But to be fair to Justice Harlan, one could say that in setting forth his colorblind conception of the Constitution, he was referring to the post-Reconstruction Constitution, the Constitution that, among other things, overruled *Dred Scott* by naturalizing the former slaves by granting them

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Should the police be prohibited from acting on race-based suspect descriptions? See generally R. Richard Banks, *Race-Based Suspect Descriptions and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075 (2001) (urging rethinking about the line we draw between racial profiling and the employment of race-specific suspect descriptions). Should prisoners be separated based on race? See Johnson v. California, 543 U.S. 499 (2005). Part of reasons we do not have full and robust public discussions about the foregoing question is because of the ease with which we move from the normative claim that race should not matter to the normative claim that race does not matter. See also Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1535 (making a similar point about empirical and normative claims: "as a normative matter, we must not conflate 'is' and 'ought.' Even if it is descriptively true that we are hardwired to have implicit bias in favor of our 'race' (or clumps of people loosely affiliated with today's social construction of race), that says nothing about what we should do about it normatively.").

200. 163 U.S. 537, 559 (1896) (Harlan, J. dissenting).

21. U.S. CONST. art I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."); see also WILLIAM WIECEK, THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848 (1977) (enumerating the numerous ways that slavery was engrafted into the Constitution).
Let's stipulate that this is indeed the case and consider Harlan's argument that the Constitution is colorblind in light of the Reconstruction Amendments. As a descriptive matter, his colorblind claim remains at the very least contestable. In fact, Justice Harlan's own jurisprudence calls into question the notion that, post Reconstruction, the Constitution is colorblind. In *Wong Kim Ark*, for example, decided two years after *Plessy*, the Court confronted the question of whether the Fourteenth Amendment conferred citizenship to people of Chinese descent born in the United States. While the Court answered the question in the affirmative, Justice Harlan joined Justice Fuller's dissent in which Fuller argued that people of Chinese descent were not naturalizable. Under Fuller's analysis, with which Harlan agreed, Chinese people were outside of the purview of the Citizenship Clause of the Fourteenth Amendment because he viewed them as too racially different.

Harlan's cosigning of Justice Fuller's explicitly racial understanding of the Constitution is thoroughly consistent with the way in which Justice Harlan refers to people of Chinese ancestry in his dissent in *Plessy*. In arguing against the racial segregation of blacks, Harlan maintained that "[t]here is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race." Justice Harlan's colorblind Constitution not only recognized the Chinese as a race; it saw them (unlike blacks) as being so unalterably and racially different as to be ineligible for citizenship. All of this is to say that one can challenge Harlan's claim that "our Constitution is colorblind" both empirically (the Constitution is not in fact colorblind) and normatively (Harlan did not believe that his colorblind Constitution should apply to people of Chinese descent).

Because of the extent to which Justice Harlan's dissent has been celebrated in legal and public discourses on race, it makes sense that as a

222. Devon W. Carbado, *Racial Naturalization*, 57 Am. Q. 633 (2005) (discussing the process by which the Fourteenth Amendment granted citizenship to blacks as an example of racial naturalization).
223. 169 U.S. 649 (1898)
224. Id. at 705-32.
225. Id.
228. *See* Romer v. Evans, 517 U.S. 620, 623 (1996) ("One century ago, the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among..."
nation we have been heavily influenced by his articulation of colorblindness and his conflation of the is with the should be. Proposition 209 and Proposal 2 benefit from this conflation. To the extent that the social backdrop against which these initiatives are promulgated is presumed to be colorblind, it becomes easy to label such measures as racially neutral and affirmative action as racially conscious.

IV
A NEW RACIAL VOCABULARY

Part of what the preceding discussion suggests is that the terms we currently employ in law and social policy to address racial problems are deeply flawed. They fail to help us to think critically and carefully about precisely what constitutes racial consciousness or colorblindness. Nor does the existing discourse invite us to consider whether particular forms of racial consciousness prevent rather than install racial preferences. These theoretical shortcomings argue for a new racial vocabulary. This Part provides one. As will become clear, most of the terms we employ are not new. We simply redefine the key terms now in circulation. In the context of doing so, we illustrate why allowing applicants to describe their experiences in racially specific terms avoids rather than reproduces at least one form of racial preference.

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citizens.' Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake.”) (citing Justice Harlan’s dissent in Plessy v. Ferguson, 163 U.S. 537, 559 (1896)); David H. Gans, The Unitary Fourteenth Amendment, 56 Emory L.J. 907, 921 (2007) (“The Equal Protection Clause ensures the integrity of that constitutional definition of citizenship, forbidding government from legislating favored and disfavored classes of citizens. The first Justice Harlan elegantly captured this idea in his famous Plessy dissent.”); Allison Orr Larsen, Perpetual Dissents, 15 Geo. Mason L. Rev. 447, 448 (2008) (“On the one hand, history has glorified many great dissenters on the Supreme Court (Justice Holmes in Lochner, Justice Harlan in Plessy) whose views were eventually redeemed and whose words seem all the wiser in the present when echoed from the past.”); William H. Pryor, Jr., Not-So-Serious Threats To Judicial Independence, 93 Va. L. Rev. 1759, 1776 (2007) (“The judiciary, of course, is not perfect. The twin evils of slavery and segregation were, to say the least, exacerbated by two decisions of the Supreme Court. Justice Harlan’s dissent in Plessy v. Ferguson was prophetic: ‘In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case.’”); Julie Chi-hye Suk, Equal By Comparison: Unsettling Assumptions of Antidiscrimination Law, 55 Am. J. Comp. L. 295, 336 (2007) (“In his now-celebrated dissenting opinion in Plessy v. Ferguson, Justice Harlan stated, ‘Our constitution is color-blind.’”); Alexander Tsesis, A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment, 39 U.C. Davis L. Rev. 1773, 1829 (2006) (“At the turn of the twentieth century, Justice Harlan understood better than the politicians and theorists before him the extent of harm a segregated society would cause ostracized minorities.”).
A. Redefining Key Terms

1. Race Consciousness/Color Consciousness

The dominant understanding of race or color consciousness is that it is an instance in which a decision-maker actively, consciously, and formally takes race into account. The classic example is affirmative action policies that use race as one of many factors. This definition of "race/color consciousness" is too narrow. Our new formulation is this: race consciousness occurs whenever race figures in or shapes decision-making. This can occur positively or negatively, consciously and unconsciously.

a. Positive Race Consciousness

This occurs when race is explicitly and formally incorporated into decision-making. Officers who consciously racially profile are engaged in formal race consciousness, as are admissions officers who formally take race into account. The normative valence of formal race consciousness can differ, as the two preceding examples make clear. In this sense, the "positive" preceding the race consciousness is not intended to characterize the racial consciousness as "good." Rather, it signifies the affirmative and conscious nature in which race is being utilized. What unites the police officer and the admissions official is the fact that both actively and formally draw upon race. Expressed as a formula, racial awareness + express reliance on that racial awareness = positive racial consciousness.

b. Negative Race Consciousness

This occurs when a decision-maker is aware of race but does not expressly or formally incorporate that awareness into her decision-making—indeed, she might expressly repudiate or disavow the idea that race is shaping her thinking. Admissions officers who ignore race when they are very much aware of race in the context of their work, and people who take the position that race does not or should not matter when they are very much aware of race in their everyday lives, are engaged in negative racial consciousness. To put the point the way Neil Gotanda might, negative racial consciousness occurs when the non-recognition of race is preceded by the recognition or a general awareness of race.\textsuperscript{229} What unites the admissions official and the person who seeks to ignore race is that both are generally aware of and/or see race before they endeavor to blind themselves to it.

As with the "positive" in positive racial consciousness, the "negative" in

\textsuperscript{229} See Gotanda, supra note 193, at 16 ("This technique of 'noticing but not considering race' implicitly involves recognition of the employee's racial category and a transformation or sublimination of that recognition so that the racial label is not 'considered' in the employer's decisionmaking process.").
negative racial consciousness is not a comment on the normative valence of decision-making. In other words, the employment of "negative" is not intended to suggest that negative racial consciousness is necessarily bad. Rather, the "negative" signifies that this form of race consciousness is the product of a racial denial or disavowal. Expressed as a formula, general or specific racial awareness + racial denial or disavowal = negative racial consciousness.

c. Unconscious Racial Consciousness

Our formulation of both positive racial consciousness and negative racial consciousness presume a level of racial awareness. But what if the decision-maker is unaware of race? Can her decision-making reflect racial consciousness nonetheless? Our answer is yes. The fact that a decision-maker is unaware of race does not mean that her decision is uninfluenced by race. This is precisely what the growing literature on implicit bias more generally demonstrates: that people rely on race even—and sometimes especially—when they do not mean to do so, and that racial biases can operate below the level of conscious awareness. This literature is not without its critics, but the social psychology of race strongly supports the notion that our brain encounters and processes race at a level below our awareness. This is the backdrop against which we posit the existence of unconscious racial consciousness. Precisely how one establishes this form of racial consciousness in a particular case is a difficult evidentiary question. Our aim here is to mark the phenomenon conceptually.

2. Colorblindness

The dominant understanding of colorblindness is that it is an instance in which the state ignores or does not formally take race into account. Our definition is this: colorblindness occurs whenever there is no conscious or unconscious awareness of race. Certain internet interactions come close to colorblindness. We say such interactions "come close," but are not


231 See, e.g., Gregory Mitchell & Phillip E. Tetlock, Antidiscrimination Law and the Perils of Mindreading, 67 Ohio St. L.J. 1023 (2006) (arguing that implicit bias research should not be accepted as legislative authority or litigation evidence until more investigation as to its level of scientific predictability and broader societal value has been established).

232 See Jerry Kang, Cyber-Race, 113 Harv. L. Rev. 1130, 1155 ("By making it easier for us to wear a racial veil, cyberspace promotes racial anonymity. This prompts fantasies about
necessarily a manifestation of colorblindness for three reasons. First, the fact that one does not know the racial identity of a person does not mean that one is racially unaware. Think, for example, of instances in which we encounter an individual whose racial identity we cannot discern. In such circumstances, we are very racially aware that we cannot racially categorize the person. A similar dynamic exists with respect to internet exchanges. In that domain as well, we can be very racially aware of the fact that we do not know the racial identity of the people with whom we are interacting.

Second, internet interactions, like of other social interactions, can contain racial cues, such as geography or name, even when racial identity \textit{per se} is not disclosed. To the extent such racial cues are a part of the internet exchange, the interaction will not be colorblind.

A third reason to query whether colorblindness is attainable over the internet is a point we advanced earlier: white often functions as the default identity in the absence of identity specific information or other racial cues. In other words, if in the context of an internet exchange the person with whom we are interacting does not expressly indicate their race, and if their racial identity is not otherwise discernible, there is at least some evidence to suggest that we will presume that that person is white. The fact of that racial presumption precludes the possibility of colorblindness.

Central to our re-formulation of colorblindness is the idea that racial awareness, without more, calls into question the attainability of colorblindness. As we noted in Part III, once one is aware of race, deciding to ignore it or not pay attention to it is not the same as being colorblind. Note that this is a different claim than one that suggests that efforts to discount or ignore race after it has already been noticed are unlikely to be successful because of how race operates unconsciously. Underwriting this latter argument is the notion that, upon noticing race, it remains the elephant in our minds. While we are sympathetic to this claim, our argument here is different. What we are suggesting is that whether or not we can successfully ignore race subsequent to noticing it, our decision to attempt to do so will not be colorblind.


We accept the dominant definition of race neutrality and racial preference. The former occurs when decision-making confers neither a racial disadvantage nor a racial advantage; the latter occurs when decision-making confers either. As we have already discussed, however, and want to reiterate here, the characterization of a particular action or decision as race neutral or a racial preference rests upon our assessment of the baseline against which both terms are deployed. Differences about how that baseline is marked—as fair and equal realizing Martin Luther King, Jr.'s dream in cyberspace. In the digital remix version, people are judged by the content of their text-characters, not the color of their skin.

\footnote{realizing Martin Luther King, Jr.'s dream in cyberspace. In the digital remix version, people are judged by the content of their text-characters, not the color of their skin.}
or asymmetrical—will affect the determination of whether the decision is or is not racially neutral or is or is not a racial preference. Stated slightly differently, our determination that any given process is race neutral or a racial preference is unavoidably contingent on a mixed question of fact and normativity: our characterization of the social context in which the racial decision-making occurs.

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In setting forth the foregoing definitions we do not mean to suggest that they reflect an objective representation of the social relations of race. Our definitions, like the ones we reject, are contingent upon both empirical assumptions about how race operates and normative assumptions about fairness and equality. We offer our definitions to be transparent about these contingencies. Our hope is that this transparency will facilitate a meaningful debate about the empirical realities and possibilities of race, and the normative desirability of particular conceptions of race.

**B. Application to the Admissions Context**

The foregoing discussion suggests that it is likely impossible for admissions officers to be colorblind, particularly to the extent that the personal statement is part of the process, for at least three reasons. First, as we said, admissions files will often contain implicit racial markers, such as geography, linguistic practices, institutional affiliations, and names. Once one is aware of those markers, there is no colorblind exit: ignoring or paying attention to them is equally racially conscious—descriptively, not normatively. Second, the files of some applicants will include explicit racial signifiers. Here, too, there is no colorblind exit once these signifiers are recognized.

Third, admissions personnel, like the rest of us, have a general awareness about race. That general awareness does not disappear when they read admissions files. What it concretely translates to in any given case is hard to say. Our point is that it is not unreasonable to posit that admissions officers bring their conscious or unconscious frames with them into a process within which they are already primed to think about whether they may or may not or should or should not take race into account. The question, then, is not whether we want admissions officers to be color conscious but rather how we want them to be color conscious. Put another way, colorblindness in the context of admissions might not be realizable.

Is this true of race neutrality? As we suggested earlier, whether one thinks that an entire admissions regime is racially neutral turns at least in part on one’s assumptions about the baseline—whether it is racially symmetrical or asymmetrical. But what about the personal statement, the part of the admissions process in which we are most interested? Can race neutrality be achieved in terms of the space applicants have in the admissions process to inscribe their lives?
We have already argued that excising race from the personal statement is not racially neutral in that such an approach prefers race-negative applicants over race-positive applicants. Our contention now is that permitting applicants to express themselves in racial terms produces something closer to race neutrality in that it preserves the individual’s prerogative to assert (or not assert) what meaning race holds in her life. In this sense, with respect to the personal statement, one can posit something like the following relationship between race awareness and colorblindness, on the one hand, and race neutrality and racial preference, on the other:

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<thead>
<tr>
<th>Race awareness/</th>
<th>Race neutrality</th>
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<tbody>
<tr>
<td>Color consciousness</td>
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</tr>
<tr>
<td>Colorblindness</td>
<td>Racial preference</td>
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</table>

Significantly, we are not arguing that racial awareness always produces racial neutrality and that colorblindness (as it is currently understood) always produces racial preferences. Our claim is a contextual one, specifically applicable to how the personal statement functions in the context of admissions. Being race aware with respect to that process does not necessarily require the allocation of a benefit or preference. It simply permits an admissions officer to consider the race-positive applicant’s experiences as a whole, just as she would the experiences of other applicants. Unlike the colorblind process advocates of Proposition 209 and Proposal 2 endorse, permitting applicants to express and institutions to take note of racial experiences do not coerce or create incentives for the adoption of a specific understanding or articulation of one’s racial identity. Nor does such an approach result in applicants being advantaged or disadvantaged as a function of how they express their racial identity. On the contrary, an explicitly race aware process prevents colleges and universities from imposing racialized burdens—that is, from putting in place precisely what Proposition 209 and Proposal 2 ostensibly seek to avoid—racial preferences. This new racial preference needs to be exposed and challenged.

CONCLUSION

There is a broad literature criticizing the normative space colorblindness occupies in American law.233 Our aim in this Article was to build on this literature by situating our critique of colorblindness in a concrete institutional context: admissions. More specifically, our project was to reveal how the

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ideology of colorblindness obscures the racial consciousness of "anti-preference" initiatives like Proposition 209 and Proposal 2.

One explanation for this obfuscation is the presumed alignment between colorblindness and race neutrality on the one hand, and race and color consciousness and racial preference on the other. However, as we have demonstrated, in some contexts, including affirmative action, this alignment does not necessarily obtain. Indeed, a case can be made that with respect to admissions, "anti-preference regimes" produce racial preferences whereas race consciousness—which includes but is not exhaustive by affirmative action—can get us closer to race neutrality by leveling the admissions playing field.

One can particularize this claim with respect to an applicant’s personal statement, the more specific site of our intervention. Refusing formally to remove race from an applicant’s statement preserves the individual’s prerogative to assert (or not assert) what meaning race holds in her life. This is not a preference but rather a fair and open process that permits colleges and universities to take account of something that has been constitutive of an applicant’s life and experiences: race. Applicants remain free to racially inscribe themselves in any way they see fit—or not at all. Justice Thomas’s racial inscription would be different from Barack Obama’s, which, in turn, would differ from Dalton Conley’s, who would differ from Margaret Montoya.

Yet each of those narratives—in their rich racial detail—is an important window on their lives and their accomplishments. They suggest that each individual would make a vital contribution to colleges or universities, which, after all, are venues for diverse ideas, perspectives and experiences. These benefits, and the stories themselves, are potentially lost if Proposition 209 and Proposal 2 are read to preclude the articulation and consideration of race in the admissions process. And new burdens are "gained."

Proponents of Proposition 209 and Proposal 2 would likely agree with the claim that the state should not force the individual to racially define herself in any particular way. They would also likely agree with the idea that people should have the right to freedom of racial expression, and that the state should not coerce people into occupying particular racial subject positions. Yet "anti-preference" initiatives are being interpreted to do just that—that is, to force

234. See Grutter v. Bollinger, 539 U.S. 306, 329 (2003) ("In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: 'The freedom of a university to make its own judgments as to education includes the selection of its student body.' From this premise, Justice Powell reasoned that by claiming 'the right to select those students who will contribute the most to the "robust exchange of ideas,"' a university 'seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission.' Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that 'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'") (citations omitted).
individuals to be silent about their racial identity and experiences, a silence that implicitly expresses the idea that race does not matter. Applicants who break that silence and explicitly inscribe themselves and their experiences in racial terms are disadvantaged.

We think that the implications for this insight potentially extend beyond the structure and consideration of the personal statement. For example, one can easily apply the analysis to the context of the workplace. In that domain as well, the colorblind imperative coerces individuals to downplay if not completely suppress their racial identity.\textsuperscript{235} And certainly our analysis is applicable to the political arena, as demonstrated by the discussions suggesting that Barack Obama cannot afford to be “too black” from the perspective of white people.

Both of the foregoing examples make clear that racial identity can be expressed in different ways and that some expressions are more racially palatable than others. While Barack Obama cannot express himself “out of” the social category of blackness, he can express himself as less racially black. Some voters expect him to do just that. Proponents of Proposition 209 and Proposal 2 would have him do more—to not express himself as black at all, and to racially cleanse himself in the context of his personal statement. Imposing this new racial preference is tantamount to asking Barack Obama to “pass.” The state should not be permitted to do so—and certainly not under the legitimizing guise and false pretense of colorblindness and race neutrality.