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FOREWORD:
**THE ABOLITION OF PUBLIC RACIAL
PREFERENCE — AN INVITATION TO
PRIVATE RACIAL SENSITIVITY**

DOUGLAS W. KMIEC*

This volume is about race. In the Catholic, if not larger Judeo-Christian tradition, race is morally irrelevant. We are all created in God's image,¹ and therefore skin color tells us nothing about a person's intellectual, spiritual, or moral worth. And yet, race is not unknown to our lives. Census data, rates of illegitimacy, school admissions, employment practices, housing patterns, religious beliefs, sporting interests, criminal prosecutions, prison populations, to mention but a few obvious subjects, have persistent racial compositions.

The papers in this symposium ask plaintively, if sometimes only implicitly: why — as we approach a new millennium — haven't we transcended race? Ultimately, they supply no definitive answer. Yet, in exploring the topic from legal, religious, empirical, and even literary perspectives, the contributors to this volume invite, indeed demand, that each of us not complacently assume that ignoring the issue will settle it.

This is not to say that constitutional interpretation has not consciously, if glacially and not always directly, evolved toward a standard of color-blindness. The spurious decision in *Plessy v. Ferguson*,² thirty years after the Fourteenth Amendment was drafted to secure the "equal protection of the laws," was the first to go badly awry. In *Plessy*, the Court upheld a state law requiring "separate but equal" railway accommodations on the basis of race.³ In a vigorous dissent, the senior Justice Harlan wrote: "But

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1. "God created man in his own image, in the image of God he created him, male and female he created them." *Genesis* 1:27 (New International Version). "God's word in *Genesis* announces that all men and women are created in God's image; not just *some* races and racial types, but *all* bear the imprint of the Creator and are enlivened by the breath of His one Spirit." NATIONAL CONFERENCE OF CATHOLIC BISHOPS, BROTHERS AND SISTERS TO US, para. 7 (Nov. 14, 1979).

2. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

3. *Id.*

in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."⁴ Eighty years later, Thurgood Marshall, the Court's first African-American justice disputed Harlan's claim to support a race-conscious admissions policy at a public university. Marshall wrote:

[H]ad the Court been willing in 1896, in [*Plessy*], to hold that [equal protection] forbids differences in treatment based on race, we would not be faced with this dilemma in 1978. We must remember, however, that the principle that the "Constitution is colorblind" appeared only in the opinion of the lone dissenter.⁵

The Harlan-Marshall quotations frame the historical debate regarding the original intent of the Fourteenth Amendment. What did the Amendment mean by "equality"? Were white persons, as well as black, thought to be within the scope of the equal protection guarantee? If so, did the drafters and ratifiers of the Amendment ever contemplate that long-term programs of special treatment in favor of one race would be constitutional?

In terms of equality, those contemporary with the drafting of the Amendment understood that the law could create conditions of equality of opportunity, but not result. For example, Congressman Butler, the Chairman of the House Judiciary Committee a few years after the Amendment's ratification, explained the meaning of equality in reference to the similar principle in the Declaration of Independence. Butler stated:

I believe that "equal" in the Declaration of Independence is a political word, used in a political sense, and means equality of political rights. All men are not equal. Some are born with good constitutions, good health, strength, high mental power; others are not. Now, we cannot by legislation make them equal. God has not made them equal, with equal endowments. But this is our doctrine: Equality . . . and I will embody it in a single phrase, as the true touchstone of civil liberty — is not that all men are equal, but that every man has the right to be the equal of every other if he can.⁶

Butler's perspective is clearly that of someone who intends to provide individual opportunity, not the redistribution of benefits

4. *Id.* at 559 (Harlan, J., dissenting).

5. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 401 (1978).

6. CONG. GLOBE, 43d Cong., 1st Sess. 413 (1874).

to a racial group. In this, it is much different from that of Justice Marshall, who argues:

It is unnecessary in 20th century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive . . . [and] we now must permit the institutions of this society to give consideration to race in making decisions about who will hold positions of influence, affluence and prestige.⁷

Despite *Plessy*'s misstep, and others that followed, the Fourteenth Amendment originally applied to citizens of all races. Senator Howard in 1866 reflected that Congress intended to "abolish[] all class legislation . . . and do[] away with the injustice of subjecting one cast of persons to a code not applicable to another."⁸ Similarly, Senator Stevens commented that "no distinction would be tolerated in this purified republic but what arose from merit or conduct."⁹ Finally, Senator Wilson pointedly stated: "[W]e mean that the poorest man, be he black or white . . . is as much entitled to the protection of the law as the richest and the proudest man in the land. . . . [W]e have advocated the rights of the black man because the black man was the most oppressed."¹⁰

Wilson's comment is revealing because it helps explain some arguably race-conscious behavior on the part of the Thirty-ninth Congress that drafted and passed the Fourteenth Amendment. As I explained in an earlier work,¹¹ during the Civil War a proposal was considered to establish a Bureau of Freedmen's Affairs to assist freed slaves in leasing property, entering into employment contracts, and other related matters. The bill did not pass because of strong opposition to the race-based benefits it provided, and as unfamiliar as it may sound to present ears, because members of Congress strongly felt that social welfare schemes were the sole province of the states. One House report stated flatly:

A proposition to establish a bureau of Irishmen's affairs, a bureau of Dutchmen's affairs, or one for the affairs of those of Caucasian descent generally, who are incapable of properly managing or taking care of their own interests by reason of a neglected or deficient education, would . . . be

7. *Bakke*, 438 U.S. at 400-01 (Marshall, J., concurring).

8. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

9. *Id.* at 65.

10. *Id.* at 343.

11. DOUGLAS W. KMIEC, *THE ATTORNEY GENERAL'S LAWYER* 156-57 (1992).

looked upon as the vagary of a diseased brain Why the freedmen of African descent should become these marked objects of special legislation, to the detriment of the unfortunate whites, your committee fail[s] to comprehend. . . .¹²

In response, the proponents of a Freedmen's Bureau subtly changed their arguments. The bill, it was argued, was merely a temporary expedient to rectify the mistreatment of the slaves. The Bureau was needed "not because these people are negroes, but because they are men who have been for generations despoiled of their rights."¹³ Thus, the Bureau was not a permanent recognition of race, but an effort to help former slaves become self-sufficient.

It was a reasonable "special case" argument, but it too was contested. For example, the proponents of short-term assistance to the recently freed slaves attempted to analogize the Bureau's legislation to that which gave special benefits to Indian tribes. Few thought the analogy apt, however, insofar as tribes were effectively separate sovereign units, and the special federal efforts on their behalf reflected that fact as well as their prior possessory claim on the territory of the United States.¹⁴

When the next Congress took the Bureau legislation up again, it passed and was signed into law by President Lincoln in March 1865.¹⁵ But this time there was a crucial difference. The 1865 legislation specifically provided that the relief was intended not only for the freed slaves, but also for the white refugees from the rebel states. This diluted the racial nature of the original proposal and focused the new law on those injured. The assistance to the generation of freed slaves could be justified in 1865 as reparation for government-fostered deprivation. So too, the limitation of the assistance to refugees *from the rebel states* tended to confirm that the Congress viewed the legislation as necessary because of specific and extraordinary devastation contemporary with the Civil War.

When the Freedmen's Bureau was sought to be reauthorized in 1866, renewed objection was made to any "class legislation — legislation for a particular class of the blacks to the exclusion of all whites."¹⁶ It was strongly argued that any such partiality would be "in opposition to the plain spirit pervading nearly every sec-

12. H.R. REP. NO. 38-2, at 2-4 (1864).

13. CONG. GLOBE, 38th Cong., 1st Sess. 2800 (1864) (statement of Sen. Sumner (quoting Secretary of War Stanton)).

14. *See id.* at 3346 (statement of Sen. Hendricks).

15. Act of Mar. 3, 1865, ch. 90, 13 Stat. 507, 508.

16. CONG. GLOBE, 39th Cong., 1st Sess. 544 (1866) (statement of Rep. Taylor).

tion of the Constitution that congressional legislation should in its operation affect all alike."¹⁷ Again, the supporters of the legislation pointed to the measure's victim-specific nature and that the measure was temporary. For example, the Bill's author argued that "[w]e shall not long have to support any of these blacks out of the public Treasury if we educate and furnish them land upon which they can make a living for themselves."¹⁸

The Bill passed, but Andrew Johnson vetoed the measure because he was concerned about its class implications, the displacement of state authority, and the extent of Congress' constitutional authority. While the vote in the Senate was insufficient to override Johnson's veto, the Senate arguments made in favor of override stressed the legislation's victim specificity and idiosyncratic nature in several ways. This was a measure for four million recently emancipated people, it was said, and "never before" had such necessity for aid arisen. That the Congress viewed its special assistance to be for *these* freedmen and not their descendants more than a century later, was clear from their explicit reliance upon the abolition of slavery provisions of the Thirteenth Amendment for constitutional authority.¹⁹ The Freedmen's Bureau continued for another few years, using revenue generated by fees and some later appropriations to provide assistance to former slaves and the poor generally. Consistent with its designedly temporary status, the Bureau was abolished in 1872.

The "separate but equal" doctrine in *Plessy* was fundamentally at odds with the history of the Fourteenth Amendment, and the reconstruction Congress' rejection of class-based legislation. That it took sixty years for this proposition to be repudiated by the Supreme Court in *Brown v. Board of Education*²⁰ is an embarrassment to our history as a nation. Chief Justice Warren's opinion in *Brown*, striking down the segregation of public schools by law, was less direct than it might have been and it is sometimes likened to a sociological essay. In context, Warren curiously did rely upon non-legal material demonstrating the ill consequences of segregation on a child's educational development in order to reach a legal result.

However, Warren came very near to embracing Harlan's dissent in *Plessy* that the Constitution is color-blind. Indeed, Warren noted that the strongest proponents of the Fourteenth Amendment intended it "to remove all legal distinctions among 'all per-

17. *Id.*

18. *Id.* at 322 (statement of Sen. Trumbull).

19. *See id.* at 941.

20. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

sons born or naturalized in the United States.”²¹ Yet, Warren did not come right out and take this definitive view himself. Warren’s hesitation or unclarity thus invited later years of confusion entailing sometimes rough forms of racial proportionalism, rather than a careful remedial identification and elimination of the vestiges of past discrimination.

The rest of the legal story is well-told in Edward Erler’s paper included in this symposium.²² As Erler reveals, the color-blind principle was initially incorporated into the text of the principal civil rights legislation that followed the *Brown* decision. Almost immediately thereafter, however, a combination of amorphous presidential rhetoric giving rise to the term “affirmative action,” aggressive quota-oriented administrative interpretation of the same, and a complacent [if not always coherent] judicial acceptance of explicit racial set-asides in federal contracting programs²³ again took the Nation in a discouraging racially-conscious direction. Most recently, however, the Court has returned to the wiser course of equality. Writing that all racial classifications, whether intended to be hurtful or helpful, are subject to strict scrutiny and requiring of a compelling governmental interest, Justice O’Connor in *Adarand v. Peña* has largely reaffirmed the color-blind standard.²⁴ There remains disagreement among the justices with regards to what, if any, interests are compelling enough to justify the public use of race.

The latest chapter in the constitutional tale is still being written, and it involves California’s Proposition 209. Passed by a substantial majority of California voters in 1996, the proposition amends the California Constitution to preclude any component of state government from “either discriminating against, or granting preferential treatment to, any individual or group” on the basis of race, sex, color, ethnicity or national origin. This embodiment of the color-blind principle was at first preliminarily enjoined,²⁵ but the battle is far from over. As Erler speculates, and a panel of the Ninth Circuit has now held,²⁶ the logic of the injunction is very likely at odds with the Supreme Court’s reason-

21. *Id.* at 489.

22. Edward Erler, *The Future of Civil Rights: Affirmative Action Redivivus*, 11 NOTRE DAME J.L. ETHICS & PUBLIC POL’Y 15 (1997).

23. Fullilove v. Klutznick, 448 U.S. 448 (1980). *But see* Adarand Constructors, Inc., v. Pena, 115 S. Ct. 2097 (1995).

24. Adarand Constructors, Inc., v. Pena, 115 S. Ct. 2097 (1995).

25. Coalition for Economic Equity v. Wilson, 946 F. Supp. 1480 (N.D. Cal 1996).

26. Coalition for Economic Equity v. Wilson, Nos. 97-15030, 97-15031, 1997 WL 160667 (9th Cir. Apr. 8, 1997).

ing in *Adarand*. Indeed, it is hard to fathom how a state provision which expressly recognizes the supremacy of federal civil rights laws as well as exempting existing court orders and such other actions as are necessary to qualify for federal funding could be held to transgress federal law. It is doubly fatuous to suggest that a remote case striking an earlier Washington state initiative that selectively precluded the use of school busing for racial remedy but not other purposes,²⁷ invalidates a California amendment embracing a general principle of non-discrimination. The prior case employed a prohibited racial classification, the present California amendment banishes them. As a matter of the law of equality, the refusal to use race, sex or ethnicity cannot be an impermissible use of race, sex or ethnicity. In the words of the Ninth Circuit,

Where a state denies someone a job, an education, or a seat on the bus because of her race or gender, the injury to that individual is clear. . . . Where, as [under Proposition 209], a state prohibits race or gender preferences at any level of government, the injury to any specific individual is utterly inscrutable. No one contends that individuals have a constitutional right to preferential treatment solely on the basis of their race or gender.²⁸

Having established that the federal constitution by present interpretation aspires to be color-blind, and even that the California Constitution has very likely been successfully amended to be expressly so, does this fully reconcile law and morality? Or could it be that, even though the law rightfully precludes the coercive use of race in public settings, there are circumstances where moral teaching, and in particular Catholic social teaching, calls upon private actors to take race into account consistently with the Catholic principles of subsidiarity and solidarity?

Subsidiarity admonishes us to never arrogate to a higher level that which can be done more effectively below.²⁹ Solidarity calls upon us to see ourselves not as individuals, but as members

27. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982).

28. *Coalition for Economic Equity*, 1997 WL 160667, at *10.

29. The Catechism provides:

Excessive intervention by the state can threaten personal freedom and initiative. The teaching of the Church has elaborated the principle of *subsidiarity*, according to which a community of higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to co-ordinate its activity with the activities of the rest of society, always with a view to the common good.

CATECHISM OF THE CATHOLIC CHURCH, para. 1883 (1994).

of a community — the larger body of Christ.³⁰ Applying these principles to the present subject, the question becomes whether, in individually evaluated circumstances, it is morally permissible, if under not morally preferred, to employ race voluntarily (and altruistically) to create or share opportunities otherwise unavailable in private schools, work places, churches, and even families? In other words, where there is a reality of continuing racial stereotype or harm in a particular person's life and that reality becomes known to us, are we called to seek greater racial reconciliation or solidarity in the specific context of that life, rather than pretend that race has been socially transcended, when it has not?

Cardinal Mahony concludes that Catholic teaching, especially when considered in light of solidarity, "impels us to mend social relationships torn apart by sin."³¹ The Cardinal highlights the teaching of John Paul II that "'evil mechanisms' and 'structures of sin' . . . can be overcome only through the exercise of the human and Christian solidarity to which the church calls us and which she tirelessly promotes."³² These are vitally important words. They serve to remind us that what the law requires (color-blindness) may, as in other areas of human action, be only a minimum obligation and not the summation of moral duty. Yet, this greater moral duty is not without its paradox, as it seemingly invites the voluntary recognition that race may be recognized in individual circumstance, even as the ultimate moral end may be the law's own aspiration of color-blindness, or the recognition that in God's sight, we are all one.³³

30. [The] law of human solidarity and charity [is] dictated and imposed both by our common origin and by the equality a rational nature in all men, to whatever people they belong, and by the redeeming Sacrifice offered by Jesus Christ on the Altar of the Cross to His Heavenly Father on behalf of sinful mankind.

POPE PIUS XII, *SUMMI PONTIFICATUS*, para. 35 (1939), reprinted in 4 *THE PAPAL ENCYCLICALS* 5 (Claudia Carlen ed., 1981). In the words of the catechism, solidarity "presupposes the effort for a more just social order where tensions are better able to be reduced and conflicts more readily settled by negotiations." *CATECHISM OF THE CATHOLIC CHURCH*, para. 1940 (1994).

31. Cardinal Roger Mahony, *A Call to Solidarity: A Pastoral Statement on Catholic Social Teaching and Affirmative Action*, reprinted in 11 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* (1997).

32. JOHN PAUL II, *SOLLICITUDO REI SOCIALIS*, para. 40 (Dec. 30, 1987), reprinted in *CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE* 395 (David J. O'Brien & Thomas A. Shannon, eds. 1992).

33. I suspect it was this moral paradox that led Justice Brennan in *United States v. Weber*, 443 U.S. 193 (1979), to construe the Civil Rights Act against the meaning of its color-blind text to allow voluntary, private affirmative action

Any reservation of the use of race, even a private one, will be objectionable to some. This interpretation of Catholic social teaching, it will be said, is as foolish and hurtful as Justice Marshall's proposition that the law must use race to get beyond it. The claim will be made that all of the injustices associated with widespread public preferences will exist only more haphazardly and covertly with individual private attention to race.

This argument cannot be understated or disregarded. The abuses of public affirmative action are legion. Lance Izumi in this symposium demonstrates well the unfairness of the failure to consider the individual circumstance of Asian populations in the context of the usual black-white paradigm. Izumi writes with more than a little bitterness:

[W]hen race preference programs injure Asian Americans, the paradigm [of individual whites paying an African-American debt] collapses. When the son or daughter of an impoverished Vietnamese refugee is denied entrance into a prestigious public university merely because he or she is not a member of a preferred racial or ethnic group, how is this harm justified by appeals to historical discrimination or "lingering effects"?³⁴

Similarly, Michael Lynch demonstrates with statistical irrefutability that the University of California's attempt to secure racial proportionality has led to massively unequal application of standards from the simple fact that high school students from various ethnic groups do not qualify in neat, equal proportions.³⁵ The result is deliberate inequality and injustice, or as Lynch describes it by way of analogy, it is like "a basketball game in which everyone plays on the same court, but some individuals, depending on their race and ethnicity, receive ten points per-basket while others receive one."³⁶

Cardinal Mahony's response is to suggest reform of public affirmative action in order "to root out abuses and to increase its effectiveness in enabling qualified candidates to compete where they have been traditionally excluded."³⁷ These words, while

efforts. See KMIEC, *supra* note 11, at 169. Justice Brennan's statutory interpretation can nevertheless be faulted for infidelity to the rule of law. *Id.*

34. Lance T. Izumi, *Confounding the Paradigm: Asian Americans and Race Preferences*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 121 (1997).

35. Michael Lynch, *Affirmative Action at the University of California*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 139 (1997).

36. *Id.*

37. Cardinal Roger Mahony, *Solidarity and the Common Good: A Pastoral Response to Proposition 209* (Sept. 3, 1996), reprinted in 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 89, 92 (1997).

benevolent, are indeterminate, and they may not answer the moral fallacies of public racial preferences. If there is to be any continued use of race-based classifications, it must be highly particularized and voluntarily assumed. *Rerum Novarum* reminds us not to disregard the natural and manifold differences among individuals.³⁸ *Pacem in Terris* requires that every effort be made to ensure that people are enabled on the basis of merit to advance and assume responsibility in society.³⁹

No reform of public affirmative action can be true to these instructions of faith. The hurt felt by Izumi, the illogic of proportional preference carefully demonstrated by Lynch, and even the stridently ideological condemnation of social security and the GI bill put forth in this volume by Anthony Platt,⁴⁰ illustrate that public affirmative action is beyond reform, and it is so because it presumes to do in law what can only be done in the hearts of men and women. Public affirmative action creates what Justice Scalia has aptly termed the false notion of separate creditor and debtor nations,⁴¹ not a community of Christian solidarity. It per-

38. There naturally exist among mankind manifold differences of the most important kind; people differ in capacity, skill, health, strength; and unequal fortune is a necessary result of unequal condition. Such inequality is far from being disadvantageous either to individuals or to the community. Social and public life can only be maintained by means of various kinds of capacity for business and the playing of many parts; and each man, as a rule, chooses the part which suits his own peculiar domestic condition.

LEO XIII, *RERUM NOVARUM*, para. 17 (1891), reprinted in 2 *THE PAPAL ENCYCLICALS*, *supra* note 30, at 245.

39. "Furthermore, a system must be devised for affording gifted members of society the opportunity of engaging in more advanced studies, with a view to their occupying, as far as possible, positions of responsibility in society in keeping with their natural talent and acquired skill." JOHN XXIII, *PACEM IN TERRIS*, para. 13 (1963) reprinted in 5 *THE PAPAL ENCYCLICALS*, *supra* note 30, at 107.

40. Anthony Platt, *The Rise and Fall of Affirmative Action*, 11 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 67 (1997).

41. In his concurring opinion in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2118 (1995), Justice Scalia observed: "Individuals who have been wronged by unlawful racial discrimination should be made whole; but 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." The Justice's observation is unassailable as a matter of constitutional law, but of course, it does not speak to the deeper Christian notion, explicit in the Catholic teaching on solidarity, that man exists, not alone, but in community. Ken Masugi in a provocative retelling of the Merchant of Venice in this symposium comments similarly: "the crisis in civil rights mirrors an even deeper crisis concerning constitutionalism and modernity in general. Liberalism, with its emphasis on an abstract individual and limited government is not sufficient sustenance for the human soul." Ken Masugi, *Race, the Rule of Law, and the*

petuates not “love of neighbor,” which itself is an admonition against coerced public racism, but a perpetual demand of “where’s mine?”

Those who disagree with Cardinal Mahony’s reliance upon the unsatisfactory political reform of public racial preferences do not assume that racial discrimination has been sufficiently eliminated nor do they disregard the Cardinal’s proper concern for lingering racism. Rather, there is simply genuine apprehension that the Cardinal’s articulated position does not fully respond to the mandate of subsidiarity. Yes, solidarity calls upon *us* to mend social relations torn by sin, but subsidiarity enjoins us to understand that this is a personal call, not one directed at government. The Cardinal’s sound instruction to be realistic about the continuing existence of racism in the individual lives of citizens we encounter becomes obscured, if not undermined, by his later unqualified reference that it is the “government’s role to guarantee the minimum conditions . . . [for] human rights and justice.”⁴²

The government has played its role by pointing us to the morally perfect position of color-blindness. But subsidiarity calls us to be individually sensitive to the fact, as Law Professor Patricia Williams comments that “the rules may be color-blind, but people are not.”⁴³ Williams uses this dichotomy, like Cardinal Mahony, to support employing the law as a coerced mechanism for public racial preference. With respect, the dichotomy better illustrates what the law cannot accomplish, and what individual sensitivity to race in particular private contexts perhaps can. The particularized focus of subsidiarity morally allows the creation of individual racial opportunity to be a variable in private action. Though given the ill-effects of public racial preferences (for example, increased racial jealousy and stigma), even private racial preference should be a cautiously-utilized, secondary measure. It is far better to apply the Catholic preferential option for the poor more generously and more generally to rectify social injustice by addressing economic disadvantage. Certainly, given the corporate size of some private sector actors, (for example, international corporations, major private universities), it must

Merchant of Venice: From Slavery to Citizenship, 11 NOTRE DAME J.L. ETHICS & PUB. POL’Y 197, 200 (1997). How true, and herein lies the vital importance of intermediary institutions like the family and church being privately sensitive to race. See generally, DOUGLAS W. KMIEC, CEASE-FIRE ON THE FAMILY (1995).

42. Mahony, *A Call to Solidarity*, *supra* note 31, at 85 (quoting NATIONAL CONFERENCE OF CATHOLIC BISHOPS, ECONOMIC JUSTICE FOR ALL: CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY 122 (Nov. 18, 1986)).

43. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991).

always be remembered that individual sensitivity to race should not replicate the mindless numeric comparisons of past preference programs in the public sector.⁴⁴

Returning our attention to the specific materials in this symposium, Simon and Alstein demonstrate that transcending race does not always mean disregarding its presence. These neutral observers of transracial adoption, who entered upon the empirical study of this issue "with no social or political agenda," found overwhelmingly that "transracial adoptions serve the children's best interests."⁴⁵ The reformulation of the law to be color-blind or race-neutral in matters of adoption had nevertheless been resisted. Public race neutrality in this context was opposed with a variant of the same weak arguments that today prop up what remains of discredited programs of public racial preference. Black children, it was argued, can only be placed with black families, or the result would be "cultural genocide."⁴⁶ Simon and Alstein amassed hard data to the contrary, finding that in multi-racial families "the child emerges a highly intact Black adult, aware of and sensitive to his identity and community. The families live with the knowledge they have nurtured a productive member of society, at ease in both Black and White worlds."⁴⁷

Transracial adoptions work because minority children are not simply allocated like public racial entitlements. They are effective because, at the intimate level of the family, transcending race can be understood as not displacing Blackness or the

44. As Title VII and other federal laws were erroneously transmuted from racial intent to disparate impact statutes, some private businesses adopted quotas, not out of any sense of private Christian solidarity, but as a "cost of doing business" or insulating themselves from lawsuit. See *KMEC*, *supra* note 11, at 170-71 (1992). As the *Wall Street Journal* reported following the passage of California's Proposition 209, "[d]espite growing public disgust with quotas, most of the state's major private employers have no intention of moving away from group-conscious policies." Heather MacDonald, *Race Still Matters to California Companies*, WALL ST. J., Nov. 11, 1996, at A14. Often, these practices are wholly statistical and not at all particularized, or even rational. As Heather MacDonald of the Manhattan Institute relates, "while it's plausible to suppose [] that Hispanics tend to know best how to market to Hispanic consumers, the diversity mandate often leads to a preposterous essentialism." *Id.* Ms. MacDonald asked one aircraft manufacturer to explain and he said that "a racially diverse team would bring 'diverse approaches to problem solving.'" *Id.* (quoting Dave Barclay, Vice-President of Hughes), which prompted Ms. MacDonald to wonder whether "the laws of physics discriminate[.]" *Id.*

45. Rita J. Simon & Howard Alstein, *The Relevance of Race in Adoption Law and Social Practice*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 171, 194 (1997).

46. *Id.* at 172 (quoting *Barriers to Adoption: Hearings before the Senate Committee on Labor and Human Resources*, 99th Cong. 213 (1985)).

47. *Id.* at 194.

unique nature of the person God has created. As Michael Eric Dyson writes:

[T]hose courageous black souls who fought to make America all that it should be were not interested in what is presently meant by a color-blind society. True enough, they were interested in shaping an American society that wasn't obsessed with race, that didn't use race to unfairly dispense goods or allocate resources. But most were not naive enough to believe that we could ever, in the foreseeable future, arrive at a place where race didn't make a huge difference in how we live our lives, how we view one another, how we are granted or denied social privilege.⁴⁸

The legal abolition of public affirmative action holds out the ideal of a color-blind society. A society without sin. Because on this earth that society does not, and will not, exist, we are called upon to be individually sensitive to the stereotypes that remain among races. We would do well not to forget, however, that the public law defeats the aspiration for the perfect moral position either when it perpetuates public racial preference or blocks privately-extended racial opportunity.

48. MICHAEL ERIC DYSON, *RACE RULES: NAVIGATING THE COLOR LINE* 223 (1996).

