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Devon Carbado currently serves as vice dean for faculty and research. He was elected Professor of the Year by the UCLA School of Law Classes of 2000 and 2006, is the 2003 recipient of the Rutter Award for Excellence in Teaching and was recently awarded the University Distinguished Teaching Award, The Eby Award for the Art of Teaching. He is a recipient of the Fletcher Foundation Fellowship, which, modeled on the Guggenheims, is awarded to scholars whose work furthers the goals of Brown v. Board of Education.

Professor Carbado writes in the areas of critical race theory, employment discrimination, criminal procedure, constitutional law and identity. He is editor of *Race Law Stories* (Foundation Press) (with Rachel Moran) and is working on a book on employment discrimination tentatively titled "Acting White" (Oxford University Press) (with Mitu Gulati). He is a former director of the Critical Race Studies Program at UCLA Law, a faculty associate of the Ralph J. Bunche Center for African American Studies, a board member of the African American Policy Forum and a James Town Fellow.



## Cheryl I. Harris

Professor of Law

Cheryl I. Harris is professor of law at UCLA School of Law where she teaches Constitutional Law, Civil Rights, Employment Discrimination, Critical Race Theory and Race Conscious Remedies.

A graduate of Wellesley College and Northwestern School of Law, Professor Harris began her teaching career in 1990 after working for one of Chicago's leading criminal defense firms and later serving as a senior legal advisor in the City Attorney's office as part of the reform administration of Mayor Harold Washington of Chicago. The interconnections between racial theory, civil rights practice, politics and human rights have been important to her work. She was a key organizer of several major conferences that helped establish a dialogue between U.S. legal scholars and South African lawyers during the development of South Africa's first democratic constitution.

Professor Harris is the author of groundbreaking scholarship in the field of Critical Race Theory, including the influential article, "Whiteness as Property" (*Harvard Law Review*). Her scholarship has also engaged the issue of how racial frames shape our understanding and interpretation of significant events like Hurricane Katrina. Most recently she has undertaken an examination of how race functions in officially colorblind terrain—a topic that inspired her most recent article, "The New Racial Preferences" (with Devon Carbado) (*California Law Review*).

Professor Harris has been active in leadership in the American Studies Association and the ACLU of Southern California and has served as a consultant to the MacArthur Foundation. She has been widely recognized as a groundbreaking teacher in the area of civil rights education.



# THE NEW RACIAL PREFERENCES<sup>[a]</sup>

Devon W. Carbado

Cheryl I. Harris<sup>[b]</sup>

Introduction

**M**ichigan's Proposal 2 and California's Proposition 209 both prohibit their state governments from discriminating or granting "preferential treatment ... on the basis of race." Both initiatives were aimed at eliminating state promulgated race-based affirmative action programs because 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 while burdening whites and, in some formulations, Asian Americans.

More generally, proponents of these initiatives 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. This racial logic made both ballot initiatives the heirs of *Brown* and affirmative action policies the heirs of *Plessy*.

Drawing from our recent article in the *California Law Review* of the same title, this essay 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 explore this question in the context of school admissions policies, where selection procedures have been highly scrutinized and debated.

In addition to an evaluation of "objective" measures of academic achievement, such as standardized test scores and grade point averages, college and university admission requirements also include an assessment of letters of recommendation and personal statements. We are most interested in the personal statement, which plays a particularly important role in an applicant's file. Admissions officers read these statements to ascertain whether applicants can distinguish themselves and demonstrate that their potential contributions to the school extend beyond the applicants' numerical scores. Applicants, for their part, employ the personal statement as a way to quite literally inscribe themselves into and personalize the application. Because personal statements play such a critical role, it is important to consider: what do "anti-preference" mandates require with respect to personal statements?

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 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 efforts to ignore race, race will remain salient—an elephant in the 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.

Third, even 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 *tout court*—is only half of the story. As we will show, again drawing on the personal statement, the other crucial 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.” Taking the standard definition of “preferential” treatment to mean the “giving of priority or advantage to one person over ... others,” efforts to excise race from admissions processes can do just that. Consider first the applicant’s experience.

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 life story of many people—particularly with regard to describing disadvantage—simply does not make sense without reference to race. Their lives may become unintelligible to admissions officials and unrecognizable to themselves.

Of course, how one presents oneself in the context of any admissions process is ultimately a question of choice: applicants can ultimately choose whether to make their racial identity essential or inessential, salient or insignificant. 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. Should an applicant describe herself in explicitly racial terms because her racial identity and experiences are an important part of who she is, she is disadvantaged in a colorblind admissions process in two ways. First, 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 action characterize the policy. The new racial 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 employ them here as heuristics to make the point that racial viewpoints are expressed not only at the level of explicitly articulated 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. 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 consider race to be a salient and constitutive part of who they are.<sup>1</sup> 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.

To develop these arguments more fully we draw on the life experiences of two public figures as relayed in their autobiographies: Barack Obama, President of the United States and Clarence Thomas, a Supreme Court Justice.<sup>2</sup>

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 between these men, even regarding their views on the salience of race, it is clear that race plays an important role in each of their stories. We explore whether and to what extent these personal statements could be re-written without reference to race and remain intelligible as well as the burdens imposed in trying to do so. We also consider whether excising race in fact renders personal 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? The full article from which this redacted version is drawn answers that question by describing and critiquing the theoretical foundation of the claim that “anti-preference” initiatives produce colorblindness and race neutrality. We note that a central problem lies in the conflation of the assertion that “race should not matter”—the normative, with the assertion that “race does not matter”—the empirical. We point out that there are myriad ways in which race continues to matter, even with respect to those like Clarence Thomas, who are strong proponents of colorblindness. Indeed, the fact of his racial identity and experiences is enlisted by him as well as others to legitimate the call for colorblindness. We also, in that article, endeavor to clarify the debate by introducing a new racial vocabulary to shift the terms upon which race-based policies are conceptualized and adjudicated. We then apply that new racial understanding to the admissions context. This essay does



not include those analyses. It focuses on the problems of attempting to excise race from 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. Others call on applicants to provide information regarding “disadvantage overcome.”

## I. THE APPLICANT: Constructing the Personal Statement

In this section, we take autobiographical statements from President Barack Obama to construct a hypothetical personal statement. We do so for three principal reasons: (1) to identify the burdens imposed on applicants by “anti-preference initiatives” like Proposal 2 and Proposition 209 that are interpreted to require that applicants not include references to race in their personal statements, (2) to explain why racial erasure 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*.

*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.*

### A. *Dreams from My Father: Pieces of a Story of Race and Inheritance*

*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 of 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.”*

#### 1) *The Personal Statement*

[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 a 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 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.*

*[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.... 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 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 spilt-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 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.*

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 who he is as an individual and his normative commitments about family, community and nation.

Assume that Obama is 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. However, he is concerned about Proposition 209 because since its implementation, the number of black law students at the law school has diminished. Indeed, in 1997, the very first year that Proposition 209 took effect, Berkeley Law enrolled only one black student. Although numbers at Berkeley Law have improved since then, they are not nearly as high as they were in the pre-209 days.<sup>3</sup>

Nor is Obama's concern just about how the demographics of a law school's student body might impact that school's institutional culture and environment, though this is certainly on his mind. Indeed, he has read Claude Steele's work on stereotype threat and its impact on groups like black students that are subject to negative societal stereotypes: According to Steele, black students tend to under-perform on academic assessments like high stakes tests because of a concern that their performance might confirm negative stereotypes about black intellectual inferiority. Obama queries whether this "threat in the air"<sup>4</sup> 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? Would any reference to race in his background violate the norm of colorblindness that Proposition 209 purportedly instantiates?

Obama 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 criterion for admission." On the other hand, there is no clear direction in the admissions material that prohibits any mention of race. 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. 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. But let's suppose that Obama decides to apply. 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.

*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.*

REDACTED  
STATEMENT

*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 of 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. 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."

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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 her purse, not so much because we're bothered by the fact that such indignities are what less fortunate people ~~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 person ~~nigger~~.

[Community organizing] In 1983, I decided to become a community organizer.... That's what I'll do. I'll organize ~~black folks~~ people. 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 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 ~~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 spilt-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 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 is yours ... well, I suspect that I sound incurably naive .... Or worse, I sound like I'm trying to hide from 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. The story about his father sounds like just another barroom brawl; the references to interracial marriage 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? Subtle references to knowledge about particular practices (like multiracial identity) also betray a racial basis of knowledge that can be a proxy for a person’s racial identity.

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.

The foregoing hypothetical suggests that applicants who wish to make race salient—what we call “race-positive applicants”—face a number of burdens. First, [e]ven 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 *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 the expenditure of extra time and ultimately 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.<sup>5</sup> 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,

### 3) *The Costs of Restricting Race*

particularly in the context of a broader concern about making oneself competitive in an extremely competitive process. 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.

Third, should race positive applicants believe that too many references to race will be seen as an inappropriate effort to solicit prohibited 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. This may require that an applicant rewrite his personal statement to satisfy what he perceives to be 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 form at least some 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, our un-redacted article constructs a personal statement for Dalton Conley based on his book, *Honky*.<sup>6</sup>

II. THE  
INSTITUTION:  
*Reading the  
Personal  
Statement*

**T**hus 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. 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.

Justice Thomas has been a vocal critic of [race-conscious] remedies on the ground that they violate the legal and moral mandate of colorblindness.<sup>7</sup> 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.<sup>8</sup>

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

In his concurring opinions his citations to Frederick Douglass and W.E.B. DuBois,<sup>9</sup> along with other specific claims about the importance of historically black colleges and universities—indeed, the reference to black schools as “our schools”<sup>10</sup>—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. 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.

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 candidacy.

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

*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 ... 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*

*1) The Personal  
Statement*

*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.*

*[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.*

*[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.*

*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.*

**2) What's Race Got to Do With It?**

Imagine that a dean of admissions at the University of Michigan Law 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.<sup>12</sup> 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.<sup>13</sup> Philips is troubled by 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 realizes two things. First, significant parts of Thomas's story are incomprehensible from the racial subjectivity of a white person. Consider 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, the statement makes little sense if Philips imagines Thomas as a white person: Indeed, it 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 frame (white) for another (black).

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. But 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 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.<sup>14</sup>

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.<sup>15</sup> 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.<sup>16</sup> While empathic to Thomas's 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?<sup>17</sup> Or is he too racially invested to conceive of himself outside of race?<sup>18</sup>

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. In Thomas's case, that history of disadvantage is also racial. Without reference to race, Thomas's 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.

**O**ur project in this essay was to reveal how the ideology of colorblindness obscures the racial consciousness of “anti-preference” initiatives like Proposition 209 and Proposal 2.

CONCLUSION

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. In the full article we expose and challenge this alignment by arguing, among other things, 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.

In terms of the personal statement, not formally removing race from an applicant's narrative 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.

Both Thomas's and Obama's narrative—in their rich *racial* detail—is an important window on the lives and accomplishments of both men. Their respective narratives suggest that each individual would make a vital contribution to colleges or universities, which, after all, are venues for diverse ideas, perspectives and experiences.<sup>19</sup> 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 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.<sup>20</sup> And certainly our analysis is applicable to the political arena, as demonstrated by the discussions that raised the question of whether Barack Obama could 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 expected 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.

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<sup>1</sup> 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).

<sup>2</sup> The full article also includes constructed personal statements based on autobiographical accounts written by Dalton Conley, a white male sociologist, and Margaret Montoya, a Chicana law professor.

<sup>3</sup> A similar pattern emerged at UCLA School of Law. In the entering class in 1999 there were two black students; the following year there were five. Like Berkeley the number of black students has risen slightly, ranging between eight and fifteen in recent years. See Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. Rev. 1215, 1236 app.A (2002).

<sup>4</sup> See Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613 (1997).

<sup>5</sup> 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.

<sup>6</sup> Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CAL. L. REV. 1139, 1164-68 nn.79-96 and accompanying text (2008) (citing DALTON CONLEY, HONKY (2000)).

<sup>7</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (Thomas, J., concurring in part and dissenting in part) (“[T]hat these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government’s racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged.”).

<sup>8</sup> One of the authors has been exploring the extent to which Thomas’s jurisprudence draws upon and invokes black cultural, historical and political references. See Cheryl I. Harris, *Doubting Thomas and the Anti-Identity Identity* (draft manuscript on file with authors); see also Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931 (2005); Angela Onwuachi-Willig, *Using the Master’s “Tool” to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. 113 (2005).

<sup>9</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 349-50 (2003) (Thomas, J., concurring in part and dissenting in part) (quoting Frederick Douglass’s speech that was delivered to a group of abolitionists); *United States v. Fordice*, 505 U.S. 717, 745 (1992) (Thomas, J., concurring) (quoting W.E.B. DuBois’s work).

<sup>10</sup> See *Fordice*, 505 U.S. at 745 (Thomas, J., concurring) (quoting W.E.B. DuBois).

<sup>11</sup> In so doing Phillips might be emulating the efforts of Ward Connerly in California to erase the box indicating race from the application in order to avoid using the information in making admissions decisions. See JOHN AUBREY DOUGLASS, *THE CONDITIONS FOR ADMISSION: ACCESS, EQUITY AND THE SOCIAL CONTRACT OF PUBLIC UNIVERSITIES* 205 (2007) (noting university administrators’ resistance to Connerly’s proposal on the grounds that it eliminated needed data on the effects of admissions changes, and ultimate compromise in which the data was electronically erased from the applications before they were read by admissions staff).

<sup>12</sup> See Daniel M. Wegner, David J. Schneider, Samuel R. Carter III, & Teri L. White, *Paradoxical Effects of Thought Suppression*, 53 J. PERSONALITY & SOC. PSYCHOL. 5, 6 (1987) (“Whether people are instructed to ignore the information before they encounter it ... or are told to disregard it afterwards ..., they tend to incorporate it into subsequent judgments nonetheless.”); Anthony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 211 n.286

(2005) (citing Wegner for the proposition that “it is notoriously difficult for people to consciously avoid thoughts”).

<sup>13</sup> 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.”).

<sup>14</sup> See *supra* note 1 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).

<sup>15</sup> 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 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:

"def[ies] Proposal 2 and direct[s] all undergraduate applicants to '[c]omment on how your personal experiences and achievements would contribute to the diversity of the University of Michigan.' 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."

The Cantrell plaintiff's claims were ultimately rejected and the case was dismissed. *Coalition To Defend Affirmative Action*, 539 F. Supp. 2d at 960.

<sup>16</sup> 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> (quoting Connerly to the effect that any applicant who mentions race in their personal statement should be rejected.) In the context of Proposition 209 similar allegations have been made regarding admissions to California's state law schools. See Richard Sander, *Colleges Will Just Disguise Quotas*, L.A. TIMES, June 30, 2003 (asserting that Berkeley Law 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").

<sup>17</sup> 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 1.



<sup>18</sup> 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 1 at 1117-1126 (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 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 1, at 1101.

<sup>19</sup> *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).

<sup>20</sup> *See generally* Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645 (2004).