American and Brazilian courts are travelling quite different paths regarding the question of racial justice. Race neutrality became an influential interpretive approach in both jurisdictions, a perspective that articulates a depiction of these nations as culturally homogenous societies with the defense of liberal principles as necessary requirements for social cohesion. Because of their representation as nations that facilitate integration of all racial groups, courts have developed an equal protection approach that combines the rhetoric of assimilation and formal equality. But while the discourse of race neutrality gains continuous political force in the United States, race consciousness acquires increasing persuasive power in Brazil. Instead of the traditional depiction of the country as a society that has overcome racial discrimination, governmental institutions have implemented large scale affirmative action programs in the last decade. Although state and federal courts condemned this policy on the grounds that they subvert liberal principles and moral consensus about equal racial treatment, the Brazilian Supreme Court has recently classified race transcendence as a strategy of racial domination. Differently from American affirmative action cases, this decision formulated a notion of citizenship that function as a counter-hegemonic narrative. In articulating progressive constitutional principles and a group-oriented equal protection perspective, the Brazilian Supreme Court significantly contributed to the deconstruction the traditional discourse of race transcendence. Recognizing the distinctive and long history of social marginalization that affect those of African and Amerindian descent, the decision marks a departure of the official representation of Brazil as a racial democracy. This case may serve as an interesting point of comparison for the debate about affirmative action in the United States, since the Brazilian history shows very clearly how race neutrality allows majoritarian groups to defend racial privileges while advocating formal equality as a way to promote social inclusion.

A comparative analysis between the American and Brazilian patterns of racial progress and racial domination poses some important questions about the meanings of citizenship in socially stratified societies. Brazil and the United States adopted quite different strategies to maintain white supremacy after the emancipation of slaves. The former sought to whiten the

population, which was seen as a requirement for national development. Some decades later, academic and political elites represented cultural and racial mixing as evidence of Brazil as a nation that had transcended the problem of racism, a strategy that sought to impede political mobilization around the question of race. In the case of the United States, an attempt to reconstruct of the social status of emancipated slaves was soon followed by a system of racial segregation that lasted sixty years. Most recently, as a consequence of affirmative action policies, the rhetoric of race neutrality became an influential interpretive perspective in these nations which otherwise have quite histories of racial oppression. Seemingly seeking to preserve social unity through universal policies, those who have formulated this position argue that racially neutral policies can promote integration of racial minorities without producing social conflict. Deeming liberal democracy as a political regime that affords the same opportunities to individuals from all racial groups, this reasoning relies on a representation of fairness as a constitutive aspect of public morality, an understanding that legitimizes the defense of symmetrical treatment as an expression of racial justice.²

At the same time, a countervailing perspective contends that only measures that guarantee substantive equality can actually foster integration of racial minorities. Expressing skepticism toward the defense of liberalism as a political arrangement that facilitates racial progress, its supporters argue that the existence of structural inequalities among racial groups prevent full access to citizenship, a problem bound to persist with the absence of measures that target this issue. Consequently, they defend racially selective policies, which they understand as mechanisms that materialize distributive justice and contribute to the recognition of common human dignity.³ These two opposing understandings greatly impacts how courts interpret the principle of equality, expressing ideological frameworks through which legal actors understand the social world. Because of the central role of law in shaping public opinion, these diverging views of societal functioning influences the construction of race as a social and legal category as well as its correlations with nation building-processes.⁴

² See ().
³ For an analysis of existing understanding of justice and their role in antidiscrimination strategies see generally ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY (1998).
⁴ See, e.g., IAN HANEY LOPEZ, WHITE BY LAW. THE LEGAL CONSTRUCTION OF RACE 78 - 108 (examining the processes through which the category of whiteness was constructed in American immigration cases); DAVID GOLDBERG, THE RACIAL STATE 138 - 160 (1999) (investigating the role of legal rules in the construction of the modern state as a racial state).
The discussion about the legality of race-conscious measures in the United States and in Brazil exemplifies this continuous disagreement about how society should promote racial justice. The ways in which judges conceive a particular polity have a fundamental role in judicial review of affirmative action programs. In the case of United States, the colorblindness rationale became a central reference for establishing the parameters through which the state accords rights to the citizens. Certain American Supreme Court justices regard their country as a society that comprises a variety of groups with a similar history that goes from initial rejection to posterior assimilation. Societal emphasis on the value of the individual rather than on her group membership constitutes the basis of social fairness, one of the main characteristics of American public morality. As a political actor which should promote citizenship, the state must eliminate those classifications that impede the construction of social solidarity. Thus, the traditional liberal view of citizenship facilitates the preservation of a consensus that structures the moral values of a just society. Color-blind liberalism protects individuals from arbitrary racial classifications, which preserves individual liberty and proscribes social divisions. Race neutrality appears in these cases as a principle that fosters citizenship because it affirms social commitment to equal social belonging and equal dignity. Based on these arguments, American Supreme Court justices have consistently restricted the reach of affirmative action programs by claiming that race neutrality can promote racial inclusion.

There are striking similarities between the American discourse of colorblindness and the Brazilian ideology of race transcendence, two social narratives that articulate race neutrality and

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6 See Antonin Scalia, The Disease as cure: “In order to get beyond racism, we first must take account of race”. 1979 WASH. U. L. Q. 147, 1979 (classifying affirmative action as a discriminatory behavior that promotes social dissention); David L. Kirp & Nancy A. Weston, The Political Jurisprudence of Affirmative Action. 5 SOC. PHIL. & POL. 223 (1999) (examining how race neutrality became an influential political instance in affirmative action cases); Thomas Ross, Innocence and Affirmative Action. 43 VANDERBILT L. REV. 297 (1990) (examining the rhetoric of white innocence in affirmative action cases, an argument that frequently appears to stress the negative implication of this policy in public morality).
7 This notion refers to the ideal that race should not have any role in determining the social status of the individual because of its moral irrelevance. Racial classifications prevent individuals from planning their lives according to the parameters they are have reason to value; this means that all racial classifications that restrict individual freedom should be eliminated. See DAVID CARROLL COCHRAN, THE COLOR OF FREEDOM, RACE AND CONTEMPORARY AMERICAN LIBERALISM 2 - 5 (1999).
formal equality. The latter became an essential element of the Brazilian ideal of racial democracy since the first decades of the last century, a perspective that depicts the country as a society that has transcended the question of race. Based on the representation of Brazil as a racially and culturally miscegenated nation that has successfully assimilated racial minorities, legal and political elites deem the idea of race neutrality as a central feature of the Brazilian public culture. As such, more than defending this principle as a form of social justice, these two legal narratives represent cultural homogeneity as a necessary requirement for the proper functioning of liberal values. This vision of what has been called liberal-nationalism refers to the national community as an instance that presupposes cultural uniformity and social consensus around political values among individuals. For this reason, many contend that affirmative action and its underlying defense of social pluralism poses a threat to political unity because of the potential dissension around legitimacy of the principles that guide society.

Lately, despite its ongoing influence in the debate about affirmative action, the discourse of race neutrality began to lose its persuasive power in Brazil. Actually, Brazilian Supreme Court justices have claimed that the defense of liberal citizenship as a parameter for equal protection prevents the construction of a racially egalitarian society. In clear contrast with lower courts that classified race transcendence as an expression of social justice, they rejected an ethics of assimilation as a descriptive element of the Brazilian public morality and recognized that race

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10 See generally FRANCE WINDDANCE TWINE, RACISM IN A RACIAL DEMOCRACY. THE MAINTENANCE OF WHITE SUPREMACY IN BRAZIL 65 - 110 (2001) (examining the political uses of Brazil’s image as a racially harmonious society).

11 I follow the schema proposed by Andrew Mason, who utilize the notion of liberal-nationalism to describe the position according to which it is important to “to forge or sustain a shared national identity, for they believe that in the absence of such an identity the realization of liberal values is jeopardized. In effect, liberal-nationalists of this kind believe that national community is a precondition for the viability of political community as liberals conceive it.” See Andrew Mason, Political Community, Liberal-Nationalism, and the Ethics of Assimilation, 109 ETHICS 261 (1999).
directly affects the social standing of individuals. The increasing presence of race consciousness in the country and the emergence of a new constitutional culture motivated them to abandon traditional representations of Brazil as a racially inclusive society. Actually, they have argued that staggering racial disparities create obstacles to the construction of a polity based on the idea of equal respect. Differently from their American counterparts, they see the state as a major agent of social transformation. In their view, the constitutional commitment to substantive equality legitimates measures that aim to transform the social status of disadvantaged groups.

Citizenship appears in this discourse as a political category that has many purposes such as serving as an instrument that promotes social inclusion of minority groups and as a mechanism that reinforces the necessity of recognizing social pluralism as a constitutive element of the Brazilian polity. Instead of seeing assimilation as a force that promotes equality, the justices see this idea as an ideological mechanism that conceals racial discrimination and white privilege as sources of social stratification. Along these lines, the Brazilian Supreme Court recognized the legality of racial quotas, a policy that its justices unanimously classified as an instrument of social inclusion.12

By exploring the role of citizenship as an argument for equality and as a reference for state action in American and Brazilian affirmative cases, this paper examines the increasingly divergent paths that Brazil and the United States are travelling toward the goal of promoting racial inclusion: while the discourse of colorblindness gains continuous political force in the United States, race consciousness acquires increasing persuasive power in Brazil. A comparative analysis of the affirmative action debate in these countries has considerable relevance for the discussion about racially conscious policies in the United States. It has been argued that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”13 This claim categorically proposes colorblindness as the only solution for racial inequality in a liberal society, a position that several authors have classified as a strategy of racial domination.14

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13 This statement summarizes Chief Justice Roberts’ position regarding race consciousness in the United States, the same opinion embraced by other conservative members of the Court. See Parents Involved in Community Schools v. Seattle, 551 US 701, 748 (2007).
14 See, e.g., Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331 (1988) (claiming that race neutrality limits the power of antidiscrimination laws to protect minorities from social exclusion); Deirdre M. Bowen, Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action, 85 IND. L. J. 1197 (2010) (demonstrating...
order to provide further strength to the thesis that race neutrality foster social stratification, this paper compares the similarities and differences between race consciousness in United States and in Brazil. First, I consider how a narrative that combines race neutrality and formal equality influences public discourse and equal protection analysis of affirmative action cases in these two jurisdictions. Second, I examine how Brazilian courts have constructed a group-based interpretive perspective that allowed them to dismantle the narrative of race transcendence. Principles such as the notions of substantive equality and social justice structure an emerging equal protection methodology that has many similarities with antisubordination theory. More than the product of significant changes in the public discourse on race, the decisions that affirmed the legality of racially conscious measures articulate social justice and citizenship, two structuring principles of the Brazilian Constitution. This commitment to social transformation presupposes equality as instrument of change, a significant difference from the understanding of this principle as a constitutional provision that aims exclusively to protect negative liberties and symmetrical treatment. In this sense, these decisions show how an interpretive perspective that prioritizes a substantive meaning of equality can function as a defense against discourses that subvert the emancipatory ideals that inform the Brazilian Constitution. These cases reflect an


15 CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION], [http://www2.camara.leg.br/atividade-legislativa/legislacao/Constituicoes_Brasileiras/constituicao1988.html] Preamble (Braz.) [hereinafter CF] states: We, the representatives of the Brazilian People, convened in the National Constituent Assembly to institute a democratic state for the purpose of ensuring the exercise of social and individual rights, liberty, security, well-being, development, equality and justice as supreme values of a fraternal, pluralist and unprejudiced society, founded on social harmony and committed, in the internal and international orders, to the peaceful settlement of disputes, promulgate, under the protection of God, this Constitution of the Federative Republic of Brazil.” Article I provides: “The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on: I - sovereignty; II - citizenship; III - the dignity of the human person; IV - the social values of labor and of the free enterprise; V - political pluralism.”

16 CF, art. III declares: “The fundamental objectives of the Federative Republic of Brazil are: 1. to build a free, just and solidarity society; 2. to guarantee national development; 3. to eradicate poverty and substandard living conditions and to reduce social and regional inequalities; 4. to promote the well-being of all, without prejudice as to origin, race, sex, color, age and any other forms of discrimination.”
understanding of citizenship as something that seeks to protect diverse forms of social identities, since individual rights express the amount of recognition of a group within society.\(^\text{17}\)

The transformation of the Brazilian racial order toward a more progressive perspective occurs as a consequence of the departure from race neutrality, an ideology that has preserved racial stratification in the country for several decades. In the past, this ideology proved to be essential in dismantling racial oppression in the United States. Nowadays, as it has been the case of Brazil for most of its history, this ideal legitimizes patterns of racial domination. Consequently, the Brazilian case reinforces the idea that individual-focused policies in societies with an ongoing history of racial stratification perpetuate racial disparities instead of producing racial inclusion. The Brazilian case shows very clearly how race neutrality allows majoritarian groups to defend racial privileges while advocating formal equality as a way to promote assimilation. One could classify the Brazilian narrative of race transcendence as a predecessor of the American discourse of colorblindness, which means that the severe shortcomings of the former functions as cautionary example for the latter.\(^\text{18}\) Consequently, the Brazilian case may serve as an interesting parameter for affirming the constitutional commitment to substantive equality as well as an example for other Latin American nations that have both build a similar racial narrative and undergone significant constitutional transformation in the last decades.\(^\text{19}\)

I approach the concept of assimilation present in the discourse of race neutrality in both Brazil and in the United States as an ideological device that aims to maintain social control through the demand of cultural and racial homogeneity, an ideological mechanism that finds support in the discourse of liberal citizenship.\(^\text{20}\) This paper characterizes the American and the Brazilian narratives of race neutrality as two examples of how dominant racial groups utilize

\[^{17}\text{This rationale played an important role in the decisions that led to the recognition of same-sex marriage in Brazil, cases that also utilized a notion of equality as an ideal that promotes recognition and redistribution. See Adilson José Moreira, We Are Family! Legal Recognition of Same-Sex Unions in Brazil. 60 AM J. COMP. L. 1003 (2012).}\]

\[^{18}\text{See generally G. REGINALD DANIEL, RACE AND MULTIRACIALITY IN BRAZIL. CONVERGING PATHS? 259 - 297 (2006) (analyzing the similarities and differences of racial policies in Brazil and in the United States in the twentieth century).}\]

\[^{19}\text{Many Latin American countries have developed similar versions of the same racial ideology, which has prevented political mobilization of race. See generally Lourdes Martinez-Echazabal, Mestizaje and the Discourse of Racial/national Identity in Latin America 1845 - 1959. 25 LAT AM. PERSPEC. 21 (1998).}\]

\[^{20}\text{This paper follows the arguments developed in three important articles about the connections between citizenship, liberalism, and racism: Peter Fitzpatrick, Race and the innocence of law. 14 J. LAW & SOC. 119 (1987); Kenneth Karst, Foreword: Equal Citizenship under the Fourteenth Amendment. 91 HARV. L. REV. 1 (1977 - 1978); Andrew Mason, Political Community, Liberal-Nationalism, and the Ethics of Assimilation. 109 ETHICS 261 - 286 (1996).}\]
forms of strategic assimilation in order to preserve racial privileges.\textsuperscript{21} By demanding a material retreat from race, this seemingly egalitarian discourse actually reproduces the mechanisms that prevent social integration of racial minorities. Race neutrality thus allows the majoritarian group to portray fairness as a central aspect of a public culture that provides the same social opportunities for all individuals.\textsuperscript{22} This discourse builds upon a notion of assimilation that requires integral identification with the values of the majoritarian culture. In pursuing the goal of post-racial society, they classify race as an entirely illegitimate principle for public policy purposes and for the goal of constructing individual and group identity. This narrative interprets identificational assimilation\textsuperscript{23} as the central element of a racial narrative that deems a strong sense of national community as a fundamental requirement for building a nation that celebrates fairness and meritocracy. These social and legal actors see the preservation of these principles as

\textsuperscript{21}This article utilizes the notion of assimilation as a strategy of social control that dominant ethnic group deploy to guarantee social control over minority ethnic groups. Dominant racial or ethnic actively promotes assimilation in order to make minority groups more like them in order to maintain social control. This form of collective assimilation perpetuates social hierarchies through a discourse of cultural sameness and racial neutrality. See TERRENCE E. COOK, SEPARATION, ASSIMILATION, ACCOMMODATION. CONTRASTING ETHNIC MINORITY POLICIES 61 - 89 (2003).

\textsuperscript{22}I approach these racial ideologies fundamentally as elite discourses, social groups that can conform the parameters of the public debate about various issues because they control the most influential societal institutions. See TEUN ANDREAS VAN DIJK, ELITE DISCOURSE AND RACISM (1994) (examining the role of political, economic, and academic elites in the production of racism). The Brazilian and the American rhetoric of race neutrality have been formulated by academic and political elites that sought to maintain social dominance by dismissing race as a relevant social category. There is a significant difference between popular and elitist perceptions of race relations in these two nations and racial groups also have divergent understandings of social reality. See, e.g. STANLEY R. BAILEY, LEGACIES OF RACE: IDENTITIES, ATTITUDES, AND POLITICS IN BRAZIL (2009) (conducting the first in dept study of the Brazilian public opinion about racial attitudes in the country and observing the significant difference between them and the elite’s conception of racial democracy); CLEUSA TURRA & GUSTAVO VENTURY, RACISMO CORDIAL: A MAIS COMPLETA ANÁLISE SOBRE O PRECONCEITO DE COR NO BRASIL (1995) (demonstrating the differences between representations of Brazil as a racial democracy and how the large population understand race relations in the country); ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992) (observing the differences between black and white perceptions of the social relevance of race in the United States); DONALD R. KINDER & LYNN M. SANDERS, DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS (1996) (demonstrating how elite discourse about racism shape public debate about race and how they determine different perceptions of social reality by different racial groups); Michael K. Brown et al., Of Fish and Water: Perspectives on Racism, in WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY34 - 64 (Michael K. Brown at al. eds., 2003) (analyzing the differences between public discourse of colorblindness and the ongoing process of racial subordination, a reality that most whites fail to recognize as product of racial privilege); BEVERLY DANIEL TATUN, “WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA” (2003) (examining the role of race in the construction of personal identity and in the perception of social reality on individuals from different racial groups).

\textsuperscript{23}This concept refers to the process through which an immigrant groups develops a sense of peoplehood based on the principles that characterizes the host society or in the values that emerge after the creation of a new national identity based on the amalgamation of various cultural values. See MILTON GORDON, ASSIMILATION IN AMERICAN LIFE. THE ROLE OF RACE, RELIGION, AND NATIONAL ORIGIN 70 - 75 (1964).
a particularly difficult goal in societies in which racial groups strives to maintain cultural distinctions, one of the obstacles to the goal of promoting integration of racial minorities.24

In view of the relevance of citizenship to understand the similarities and differences between American and Brazilian affirmative action cases, I explore the notion of citizenship along three lines: as a political category that express a particular notion of equality, as a principle that entails certain representations of the polity, and as an ideal that envisions a role of the state in securing equal treatment. Part I examines the discourse of colorblindness as a reference for the discussion of citizenship in American affirmative action cases. It demonstrates how social and legal actors helped to build a social narrative that determines the contours of the public discussion of race in the country. The connection between liberal citizenship and race neutrality as parameters for equal protection operates as the basis of a social discourse that based on the idea of assimilation as the basis of American public morality. Part II begins with an assessment of the Brazilian ideology of race transcendence and mentions afterwards the factors that contributed to the increasing appeal of race consciousness in the country. By refusing the notion of racial assimilation as a core of the national identity and seeing the state as an agent of social transformation, Brazilian judges played a central role in the transformation of the parameters of the discussion about racial justice in the country.

1 - Colorblindness as an Interpretive Principle of Equality in the United States

1.1 - Citizenship and Equality in American Affirmative Action Cases

In a world in which race neutrality has emerged as an influential interpretive approach to equality, the appropriateness of race-conscious measures such as affirmative action became a rather divisive political topic. Colorblindness emerged as a reaction to race consciousness as a

24 See George Reid Andrews, Brazilian Racial Democracy, 1900 - 1990: An American Counterpoint, 31 J. CONT. HIST. 483 (1996) (exploring the origins of the discourse of the Brazilian discourse of racial democracy and its role in preventing political mobilization of race); EDWARD E. TELLES, RACE IN ANOTHER AMÉRICA. THE IMPORTANCE OF SKIN COLOR IN BRAZIL 107 - 139 (2006) (examining the contradiction between the discourse of racial harmonious relations and widespread racial inequalities in Brazil); MICHAEL GEORGE HANCHARD, ORPHEUS AND POWER: THE MOVIMENTO NEGRO OF RIO DE JANEIRO AND SÃO PAULO 1945 - 1988 (1994) (analyzing the various components of racial democracy as a racial narrative and its relations with the construction of Brazilian national identity).
policy orientation. Considered as principle of social governance, race consciousness was an essential part of American life from the foundation of the country until the elimination of racially discriminatory laws a couple of decades ago. From the system of racialized slavery that lasted three hundred years to the regime of official racial segregation, race defined the entire social experience of African Americans. Race consciousness was the opposite of race neutrality because several laws maintained race as fundamental legal category, what motivated progressives to fight for equal legal treatment before the law.”25 As stated before, the idea of race consciousness became increasingly contested as many legal actors adopted colorblindness as a guiding principle. For some legal scholars, current defense of colorblindness as an interpretive principle disregards the historical origins of this principle and its commitment to a substantive conception of equality based on the idea of social citizenship.”26 Those justices who defend this interpretive position recognize the connections between racial status and material disadvantage and stress the sharp differences between measures that intentionally discriminate racial minorities and remedial policies. In their opinion, the decision to subject affirmative action programs to the most stringent scrutiny test implies a position that denies the social relevance of racism in the country.”27 Additionally, some dissenting opinions have rejected arguments that portray the United States as society fundamentally committed to the idea of fairness. Defending intermediate level scrutiny as the most adequate standards for reviewing racial classifications that benefit racial minorities, these justices usually consider societal discrimination as a factor that legitimizes racially conscious measures. In some vociferous dissenting opinions, certain


27 See, e.g., Adarand Constructors v. Pena, 515 U.S., at 243(criticizing the concept of consistency because its application in equal protection cases disregards the question of discrimination intent) (Stevens, dissenting) (internal quotes omitted); Regents of University of California v. Bakke, 438 U.S. 265, 327 (contending that “claims that law must be colorblind or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality.”) (Brennan, dissenting).
justices defended a contextual interpretation of equality by arguing that race neutrality functions as a factual reading of a society that does not exist.\textsuperscript{28}

Much of this discussion revolves around the connections between citizenship and equality. More than a mere category that designates the status of individuals in a political community, citizenship implies a principle of equal treatment, a representation of the polity, and a particular way to understand the role of the state in fostering the values of liberty and equality.\textsuperscript{29} Within the discussion about affirmative action in the United States, the prevalence of liberalism as a foundational political philosophy directly influences how public debate articulate citizenship and equality. In this perspective, race should never play a role in patterns of distribution of social and economic goods because of its morally irrelevant status, a rule that applies to all racial groups irrespective of their social history. Equal legal treatment among them guarantees social opportunities and provides an ethical basis for constructing a just society. Based on the assumption that past injustices no longer determine individual outcomes in the present reality, this understanding of race relations presupposes colorblindness as a parameter for social justice. Those who advocate this position claim that changes in public morality regarding the question of race transformed social relations in the public and in the private spheres, which means that symmetric treatment among individuals should be a rule for equal protection in cases dealing with racial classifications.\textsuperscript{30} Racial progress appears as an essential element of this racial narrative, indicating that considerable changes in racial attitudes makes race-based decision-making entirely unnecessary.\textsuperscript{31}

\textsuperscript{28} See, e.g., \textit{Richmond v. J. A. Croson}, 488 U.S. 469, 528 - 566 (defending intermediate scrutiny as the most adequate criterion for reviewing benign racial classifications on the grounds that societal discrimination maintain racial minorities in a subordinate position) (Marshall, dissenting); \textit{Gratz v. Bollinger}, 534 U.S. 244, 298 - 299 (defending race-based measures on the grounds that centuries of racial discrimination “remain painfully evident in our communities and schools”, which means that the government should “properly distinguish between policies of exclusion and inclusion.”) (Ginsburg, dissenting).


\textsuperscript{31} See generally Michael K. Brown et al., \textit{Race Preferences and Race Privileges, in REDRESS FOR HISTORICAL INJUSTICES IN THE UNITED STATES: ON REPARATIONS FOR SLAVERY, JIM CROW, AND THEIR
For those who subscribe this position, these general changes demonstrate the necessity of adopting and maintaining measures that focus on the individual rather than on its membership on a particular racial group. In their view, race consciousness prevents the consolidation of a public culture based on mutual respect, a necessary requirement for the adequate functioning of a liberal society. Colorblind advocates recognize that some individuals may disregard the social consensus about equal treatment, but they maintain that social progress in race relations makes race-conscious policies a violation of an ethical principle according to which equally situated people should be treated equally. For colorblindness advocates, race-conscious policies remain an obstacle to the goal of constructing a just society because they arbitrarily discriminate individuals on the basis of race. Through the erasure of race as a social category, colorblindness becomes an instrument of collective assimilation, which increases social unity and functions as a solution for the problems that maintain certain groups in a disadvantaged position. The radical support of assimilation that informs current discourse of colorblindness deems this process as beneficial to racial minorities. Defending a form of identificational assimilation, they contend that cultural changes conduce minority members to behave according to the principles that regulate mainstream American culture. This in turn increases their chances of achieving integration and diminishes racial stereotypes that remain as consequence of racially conscious initiatives.

Because this social narrative implies individualism and fairness as basic ethical principles of American citizenship, race neutrality became an increasingly dominant position in affirmative
action cases. An understanding of equality as a principle that only protects individuals emerge in these cases as a guarantee against measures that penalize persons who bear no responsibilities over past invidious acts of discrimination as well as those who have to endure social stigmas derived from policies that classify people on the basis of race.\(^{35}\) In this sense, race blindness affirms American commitment to citizenship of whites and blacks by avoiding discrimination against innocent victims and preventing the propagation of cultural stereotypes that harm racial minorities. As some American Supreme Court justices have stated, social policies that have the goal of enhancing the social standing of groups give legitimacy to every segment that suffered discrimination to demand remedy for historical grievances, something that compromises the sense of common belonging. Consequently, these cases establish a moral equivalence between racially discriminatory measures and policies that aims to promote racial inclusion because all state acts that pose burdens or give benefits because of racial membership impedes the creation of a society in which a conception of citizenship based on equal treatment can flourish. Problematically, the assimilationist rationale that underlies the portrait the United States as an all inclusive nation provides support for an interpretation that classifies “distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.”\(^{36}\) Emphatic defense of the individual as the subject of equal protection rather than groups legitimizes the idea that malign and benign racial classifications are pure and simple forms of race discrimination. More than simply violating equality because of the impossibility of classifying preferential treatment as a compelling state interest, affirmative action programs perpetuates social division in the same way that racially discriminatory practices prevented the inclusion of racial minorities.\(^{37}\)

1.2 - Citizenship, Race, and the American Polity

Citizenship appears as a rhetorical idea in the colorblind discourse in another important way: the disapproval of racially conscious measures derives from a representation of affirmative action as an initiative that corrupts American polity. Racially selective measures confront the

\(^{35}\) For an analysis of white innocence in American affirmative action cases see


\(^{37}\) *Ibid.*, at 307 (“Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.”).
ideal of liberal citizenship, a category that focuses on the protection of freedom as a prevailing principle. As a counterpart to an understanding of racial oppression as a deeply entrenched aspect of American society, certain authors began to formulate a discourse strongly based on the ideal of assimilation as a distinctive aspect of American society. As Ian Haney Lopez has noted, some important elements characterize certain theses that became an integral part of conservative formulations of colorblindness. Proposing the notion of ethnicity as the main parameter to interpret race relations, these scholars rejected race as an operative category in the country. Current articulation of colorblindness builds upon the white ethnic narrative as the portrait of a history of groups who have successfully overcome racial and class discrimination in their way to complete assimilation into American society. As such, the notion of ethnicity became a central parameter for understanding the history of communities that faced similar experiences in their struggle for assimilation in the United States.38

The white immigrant narrative legitimizes a rhetoric that denies any correspondence between racial identity and social disadvantage. First, this discourse functions as an ideological rationale that embodies certain aspects of the American public morality such as the celebration of individualism and the defense of meritocracy and fairness. Second, the mythical representation of white immigrants as groups who have become part of mainstream American life dismisses the racism as a relevant obstacle to social inclusion. Within this discourse, access to social opportunities requires cultural assimilation, which means that only those who operate accordingly to the principles of American mainstream culture can achieve this result. Persistence to remain attached to cultural particularities contributes to group failure because of the incompatibility between particularism and universal liberal principles. These values constitute the basis of a system of moral virtue that differentiates those who strive to succeed and those condemned to lag behind because of their unwillingness to follow mainstream society.39

Another important development has strengthened the discursive power of assimilation as a central feature of American society in the last decades: the uses of racial mixing against the defense of cultural pluralism. Several individuals of multiracial parentage have challenged

traditional racial classifications on the grounds that their mixed heritage defies traditional social meanings of race. In addition to lobbying for a multiracial category in certain contexts, many multiracial individuals conflate racial miscegenation with racial harmony. Because race has become a rather fluid category with the increasing numbers of interracial relationships, rigid classifications of individuals serves only to preserve cultural meanings that have lost their social significance. In actuality, racial mixing realizes the humanitarian goals behind the ideal of racial integration since race loses its relevance in the public and in the private spheres, thus functioning as a healing factor of race relations. As such, the multiracial movement questions the use of any racial classifications and portrays colorblindness as embodying the ideal of social justice.\(^{40}\) In this sense, racial hybridity appears as a natural argument for social policies that treat all similarly situated individuals similarly because of the irrelevance of race as a meaningful social category. In the place of the traditional system that interprets any form of racial mixing with racial degeneration, the multiracial movement portrays interracial relationships as a signal of social evolution.\(^{41}\)

Problematically, the assimilationist rationale that underlies the portrait the United States as an all inclusive nation provides support for an interpretation of equality that classifies “distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.”\(^{42}\) Because of social evolution toward the creation of an inclusive society, all forms of racial classification are deemed suspect, attracting the most stringent level of scrutiny.\(^{43}\) Emphatic defense of the individual as the subject of equal protection legitimizes the idea that malign and benign racial classifications are pure and simple forms of race discrimination. More than simply violating equality because of the impossibility of classifying preferential treatment as a compelling state interest, affirmative action programs perpetuates social division in the same way that racially discriminatory practices prevented the inclusion of racial minorities.


\(^{41}\) See KIMBERLY McClAIN DaCOSTA, MAKING MULTIRACIALS. STATE, FAMILY, AND MARKET IN THE REDRAWING OF THE COLOR LINE 1 - 47 (2007) (exploring the cultural climate in which multiracialism as a social movement emerged, its main claims and ideologies).

\(^{42}\) 438 US at 291.

\(^{43}\) Ibid., at 290.
As such, the rhetoric of assimilation and liberal individualism present in affirmative action cases functioned as a foundation for an interpretive position that articulates cultural homogeneity and formal equality, a line of reasoning that characterizes current formulations of colorblindness. Some important affirmative action cases built upon this rationale to defend race neutrality as necessary parameter for maintaining social unity in a liberal society. As a consequence of the prominence of liberal individualism as an interpretive approach to equality, these decisions classify race neutrality as the only policy principle compatible with a society that aims to guarantee individual freedom and political peace. Criticizing those who defend race consciousness as a necessary mechanism to overcome the problem of racial inequality, certain American Supreme Court justices defended the identification with liberal principles as an obligatory moral alternative to racial partisanship. As a consequence of this interest in preserving the sense of common belonging, the majority and concurring opinions characterized set-aside programs as initiatives that harm racial minorities because they reproduce the idea of their inferior academic and professional capacity. Social policies that draw lines based on race undermine the goal of building a society in which liberal values function as parameter for personal and national identity-building patterns. This reasoning clearly suggests that these initiatives threaten social cohesion because they violate the basic principle of fairness that characterize American social ethos.

The concern with social unity expressed in American affirmative action cases shows the unwillingness of the justices in recognizing racism as a reality that justifies measures that draw clear lines among racial groups. In fact, a decision like Adarand Constructors v. Pena clearly stated that it is simply impossible to utilize this rationale to justify racially conscious measures. In the opinion of the Court, it is unfeasible to identify clear connections between the very general claim of societal discrimination and the current situation of specific social groups in the country. In refusing societal discrimination as justification for affirmative action programs, the case under

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44 “In this regard, we are in accord with Justice Stevens’ observation in Fullilove that because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate. Richmond v. J.A. Croson, 488 US 469, 505 (notes omitted).

45 “Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.” Croson, 488 US at 493 (notes omitted).
analysis gives more relevance in protecting the social significance of liberal values, despite the disparities between them and the reality of racial discrimination.⁴⁶

Implying identificational assimilation as a strategy for overcoming racial separatism and liberal-nationalism as a political value, *City of Richmond v. Croson* formulated and consolidated certain arguments that have served as important rationales in cases involving racial classifications. By far one the most important was the idea of race neutrality as a principle of social organization. The justice who wrote the majority opinion claimed that applying strict scrutiny to all racial classification was a necessary requirement for constructing a society in which race has no social relevance. Consequently, application of a less intense level of scrutiny to racial classifications preserves race as a relevant aspect of American society. Because of the interest in promoting social unity, the protection of the individual becomes a moral imperative.⁴⁷

Posterior cases involving the question of benign racial classifications utilized the same reasoning to validate the use of strict scrutiny. For instance, the prevalence of national identity over racial identity has been defended as an important parameter for race relations, an idea that considers the nation as large group of similarly situated individuals that recognize the importance of common social values.⁴⁸ The defense of the material retreat from race as the necessary condition for

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⁴⁶ Legal scholars have stressed the importance of the uses of history in this case. They have claimed that the majority’s defense of an abstract understanding of equality served to ignore the relevance of racism in the history of Richmond and consequently to eliminate policies that seeks to mitigate its consequences. *See*, e.g., Peter Charles Hoffman, “Blind to History”. The Use of History in Affirmative Action Suits: Another Look at Richmond v. J. A. Croson, 23 RUTGERS L. J. 271 (1991 - 1992) (exploring the uses of historical narratives in the majority and dissenting opinion in affirmative action cases); Thomas Ross, The Richmond Narratives, 68 TEX. L. REV. 381 (1989-1990) (utilizing the idea of narrative to explore the ways in which legal decisions construct social meanings and determine the contours of public debate about racial justice).

⁴⁷ “The moral imperative of racial neutrality is the driving force of the Equal Protection Clause”(*Richmond v. Croson*, 488 U.S., at 518 (Stevens, concurring); *Grutter v. Bollinger*, 539 U.S., at 329 (reaffirming individual-focused approach to equal protection as the only compatible with the principle of equality); *Fisher v. University of Texas*, U. S. at 7 - 10 (affirming that even race conscious policies must employ methods that do not disregard the interest in protecting individual right, which means that institutions of higher education must utilize criteria that can survive strict scrutiny). For an analysis of individual-focused equal protection methodology see generally Robert C. Farrel, *Affirmative Action and the Individual Right to Equal Protection*, 71 U. PITT. L. REV. 241 (2009-2010).

⁴⁸ “To pursue the concept of racial entitlement - even for the most admirable and benign of purposes - is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race. It is American” *Adarand Constructors v. Pena*, 515 U.S. 200, 238 (Scalia, concurring) (internal quotes omitted); “Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people” *Fisher v. University of Texas*, supra note 60, citing *Rice v. Cayetano*, 528 U.S. 495, 517 (2000); *Fisher v. University of Texas*, 570 U.S. __ (classifying racially conscious measures as a form of racial discrimination that disrupts the social fabric because they are inherently discriminatory, which prevents the construction of a nation that respects liberal values) (Thomas, concurring). For a discussion about the ideal of assimilation underlying this reasoning see generally, Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 771 - 182
overcoming racial divisiveness has motivated some justices to defend race neutrality the only defensible expression of social justice in a liberal society.49

1.3 - Citizenship, Affirmative Action, and the State.

Unsurprisingly, the defense of liberal citizenship in American affirmative action cases designates a particular role to the state: it appears as an agent that must guarantee the protection of individual freedoms by refraining from imposing classifications that restrict individual rights. Those who defend general policies conceive such policies as arbitrary measures because state institutions distributive opportunities based on a value which has no relevance for the social standing of the individual. In establishing this pattern of distribution, state institutions violate equality and promote social instability. Instead of following liberal values in order to reinforce social commitment to the basic principles of public morality, the state perpetuates social stereotypes and consequently racial discrimination. Those who advocate colorblindness approach race neutrality as an important parameter for state action in two complementary ways. First, the erasure of race from public culture promotes an important social change in the individual level: it impels individuals to identify with the public principles that animate American public culture. Second, the disappearance of this category reinforces social unity as citizens see each other as particular individuals, which creates the conditions for eliminating racism as a reason for social divisions.50

Colorblindness discourse establishes an essential contradiction between liberalism and racism, a position that identifies racism as legally sanctioned discrimination against racial minorities, the only expression of discrimination that restricts individual rights. Thus, racism is incompatible with the reality of a state that accords equal rights to individuals, but it can actually


50 This was the basically rationale behind most recent American affirmative action cases. For an analysis of this argument see generally Reva Siegel, From Colorblindness to Antibalkanization: Am Emerging Ground of Decision in Racial Equality Cases. 120 YALE L. J. 1278 (2011).
happens when they are institutions classify them based on their racial membership. Liberalism actually prevents racism when forcing the state to produce universal policies that see the individuals as entities abstracted from their particularities.\textsuperscript{51} State policies that adopt race consciousness as an orientation compromise the liberal political project because they impair the fundamental obligation of fair treatment, a basic value of modern citizenship. The state has an interest in correcting discrimination only when such discrimination was perpetrated by state actors. Otherwise, public institutions should not seek to reverse what they interpret as consequences of racism because the equal protection imposes race neutrality as a moral imperative.\textsuperscript{52}

This reading of these cases show that certain American Supreme Court justices envision a kind of racial citizenship based on liberal individualism as a basic principle of political organization and as a central value of public morality. Adequate functioning of liberalism depends on the recognition of cultural homogeneity as a central cultural trait, which means that the state should act as an agent that promotes social conformity to traditional moral values, rather than enforcing social engineering. They comprehend colorblindness as an essential principle to protect the liberal project, which prescribes the elimination of racial classifications that both burden and benefit social groups. In this sense, racial citizenship designates the absence of state policies that classifies individuals on the basis of race, which secures the liberty and equality of all individuals.

2 - The Brazilian Discourse of Citizenship as Race Transcendence

2.1 - Race Transcendence as a Form of Racial Citizenship

In spite of contemporary defense of colorblind social policies in countries with an enduring history of legal racial discrimination, the idea of race neutrality has framed the discussion about race in other parts of the world for almost a century. As the current situation in

\textsuperscript{51} See Peter Fitzpatrick, supra, note, at 119 - 123.

\textsuperscript{52} “For purposes of the ordinance challenged here, it suffices to say that the State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself. The Fourteenth Amendment ought not to be interpreted to reduce a State’s authority in this regard, unless, of course, there is a conflict with federal law or a state remedy is itself a violation of equal protection. The latter is the case presented here.” 488 US at 518 (Justice Kennedy, concurring).
the United States, certain nations have developed racial discourses that aim to prevent political mobilization around the question of race, narratives that articulate citizenship, liberalism, and cultural homogeneity. Recent changes in the official discourse on race relations in Brazil impelled the implementation of large scale affirmative action programs, a public policy that generated a heated debate about the social meanings of race in a nation that has long represented itself as a racially egalitarian society. An important development caused the reemergence of a racial narrative that condemns race consciousness as a rationale for public policies in Brazil. The current struggle for racial justice that began after the recent political liberation of the country coincided with important transformations in the international arena, most specifically with the formulations of cosmopolitan notions of citizenship. Intellectuals and politicians worldwide began to articulate a severe critique of multiculturalism, classifying this movement as a threat to social unity. These actors have defended the transcendence of race as a social category and advocated universal social policies. This appeal to race neutrality became an influential argument as the neoliberal agenda sought to portray political mobilization of racial and ethnic movements as an obstacle to social progress toward a global form of citizenship. More recently, this liberal discourse on race relations found further support in certain narratives that utilize genomic studies as a foundation for social policies. Certain authors have claimed that recent findings on genetic research justify a social agenda based on traditional liberal values. Because these studies reveal that each human being is a unique product of a varied genetic pool, the state should utilize the individual as the reference for social policies rather than groups.

One basic line of reasoning informs the use of genetics as a reference for public policies: the idea that science can play an important role in the process of political decision-making. Science provides accurate foundations for the discussion of social problems, an important reference for assessing the necessity and adequacy of political social policies. In this sense, claim many intellectuals, scientific findings demonstrating that race has no real existence should be

53 See generally ALANA LENTIN & GAVAN TITLEY, THE CRISES OF MULTICULTURALISM. RACISM IN A NEOLIBERAL AGE 85 - 123 (2011) (examining the post-liberal discourse as a conservative reaction to identity politics); MARWAN M. KRAIDY, HYBRIDITY, OR THE CULTURAL LOGIC OF GLOBALIZATION 1 - 71 (2005) (approaching hybridity as a mechanism of social domination based on the idea of transcendence of racial identities); CRHISTIAN GROS, NACIÓN, IDENTIDAD Y VIOLENCIA: EL DESAFÍ AO LATINOAMERICANO 33 - 66 (2010); (examining the mobilization of indigenous groups in Latin America and the simultaneous emergence of the neoliberal agenda).

54 See generally CATHERINE BLISS, RACE DECODED: THE GENOMIC FIGHT FOR SOCIAL JUSTICE (2012) (examining the ideological uses of genomic studies in the discussion about racial justice).
incorporated by political institutions and the society at large.\textsuperscript{55} These genetic studies have been praised as a new paradigm for constructing social relations based on the recognition of the common legacy of all individuals. More than an ethical reference for a new model of social interactions, genomics legitimizes universal antiracist policies. This area of study provides intellectual parameters for deconstructing collective identities that have historically functioned both as instruments of oppression and references for social emancipation. Actually, claim affirmative action opponents, this area of study offer a new ethical reference for socialization processes in order to decrease societal awareness of race.\textsuperscript{56}

Within this racial narrative, racial homogeneity became an evidence of assimilation and the basis for constructing a society based on liberal values, the reason why the state should embrace universal policies. Affirmative action opponents in Brazil have a clear idea about the role of law in society: legal rules should protect the societal consensus about race relations and not impose race consciousness a new understanding of interactions among racial groups. In the opinion of many intellectuals who oppose these programs, the current politicization of racial identities contributes to social divisions because it reinvents race as an essential trait of human populations. They propose an antiracist strategy based on the defense of measures that can articulate the struggle against class inequalities, the preservation of the cultural unity, and the equal treatment of all individuals before the law.\textsuperscript{57} Those who champion race neutrality see the increasing proliferation of affirmative action programs in Brazil as a defeat of colorblind antiracism and ultimately of liberalism and equal citizenship.\textsuperscript{58} Cultural unity plays a fundamental role in the formation of the Brazilians as a people who reject racial conflict and recognizes the importance of social solidarity. This essential cordiality became a cardinal trait of

\textsuperscript{55} Ricardo Ventura Santos & Marcos Chor Maio, \textit{Antropologia, Raça e os Dilemas das Identidades na Era da Genômica}, in RAÇA COMO QUESTÃO. HISTÓRIA, CIÊNCIA E IDENTIDADES NO BRASIL 171 - 195 (Marcos Chor Maio & Ricardo Ventura Santos, eds. 2010).


\textsuperscript{57} Most academics who oppose race consciousness classify themselves as anti-racist individuals and defend universal measures against racial discrimination. \textit{See generally} ANTÔNIO SÉRGIO ALFREDO GUIMARÃES, RACISMO E ANTI-RACISMO NO BRASIL (2005).

the Brazilian national identity and an expression of the absence of racial animosity in the country.\textsuperscript{59}

As a consequence of the ongoing relevance of what they classify as a constitutive cultural trait, those who advocate race neutral policies classify the social consensus about equal racial treatment as a normative parameter for evaluating the constitutionality of racial classifications. Although they recognize the positive duty of the state to promote redistributive policies, they contend that these initiatives cannot pose unjust burdens on individuals. Racial classifications promote racial separatism and diminish the humanity of individuals who are forced to classify themselves according to fictitious racial categories. For those who endorse universal policies, racialization dismantles identity-building patterns that allow individuals to understand themselves according to universal cultural references. More dramatically, affirmative action introduces a process of racialization that alters the ways that the nation thinks about itself. Hence, race consciousness imposes a double harm because it interferes in the processes of individual and collective understandings.\textsuperscript{60}

Many opponents of affirmative action in Brazil characterize this policy as an expression of racism against those socially classified as whites; it is claimed that whites became an oppressed racial group as a consequence of these arbitrary measures. These scholars consider affirmative action programs as clear expression of black racism, an unfortunate development in a country of peaceful interactions among racial groups. Within this social narrative, affirmative action programs represent a form of racial discrimination against whites, a social group that lack race consciousness because they understand themselves as multiracial individuals, regardless of their physical complexion. In their view, this racial animosity imposes another form of disadvantage upon those whites who already suffer the consequences of poverty. Those of who advocate race transcendence contend that affirmative action policies may create racial hatred in

\textsuperscript{59} See Luis Nassif, As Cotas Raciais na Universidade, in DIVISÕES PERIGOSAS 173 - 175 (Peter Fry et al, eds., 2006).

\textsuperscript{60} See Karine Perreira Goss, Retôricas em Disputa: O Debate Intelectual Sobre as Políticas de Ações Afirmativas para Estudantes Negros no Brasil, 45 CIÊNCIAS SOCIAIS UNISINOS 114 (2009)(Braz.) (analyzing the arguments against race consciousness in the affirmative action debate); SÉRGIO COSTA, FORMAS E DILEMAS DO ANTI-RACISMO NO BRASIL 107 - 120 (1999) (situating the debate about strategies to end racial discrimination in Brazil); Sérgio Costa & Denilson Luís Werle, Reconhecer as Diferenças: Liberais, Comunitaristas e as Relações Raciais no Brasil 1997 NOVOS ESTUDOS CEBRAP, 159 (1997) (Braz.) (identifying the different approaches to anti-racist policies in Brazil).
Brazil, something that has never existed in the country.\textsuperscript{61} For Eunice Durham, an influential intellectual and fierce opponent of affirmative action, miscegenation prevented the emergence of social division but this reality may change because racial categorization creates racial oppositional racial identities.\textsuperscript{62}

2.2 - The Brazilian Polity: A Racial Paradise

The expansion of affirmative action programs in the last ten years has provoked criticism in a society that has historically celebrated racial egalitarianism as a fundamental trait of its public culture. In response to the increasing acceptance of race consciousness as a police principle, a new social discourse about race relations emerged. I characterize this discourse as a form of racial humanism because of its claim that Brazil has created a culture that provides universal, racially blind parameters for individual and national identity building patterns. Certain premises sustain this racial narrative about race relations in Brazil: the idea that race has been an irrelevant social category in the country, the classification of racial and cultural hybridity as constitutive traits of the national identity, the equation of racial blindness with racial justice, and a defense of race neutrality based on the connections between genomic studies and liberal values.

Representing the liberal values of formal equality and mutual respect as essential elements of the Brazilian national identity, those who condemn affirmative action programs classify these initiatives as a threat to the cultural and racial unity that has provided the means to assimilation of racial minorities. Conservative intellectuals and politicians basically contend that racially conscious policies defeat the goal of preserving an egalitarian public morality. Notwithstanding the negative political uses of the image of Brazil as a racial democracy, they argue that this representation of the country remains a cogent cultural force.\textsuperscript{63} Many of them consider race transcendence a normative ideal resulting from the confluence of liberal principles

\textsuperscript{61} See generally Luis Nassif, \textit{supra}, note 54, at 17 - 175; Ferreira Gullar, Somos Todos Irmãos, in: \textit{DIVISÕES PERIGOSAS, supra}, note 54, at 303 - 305.


\textsuperscript{63} See generally Peter Fry, \textit{Politics, Nationality, and the Meanings of “Race” in Brazil}. 129 DAEDALUS 83 (2000) (claiming that Brazilians recognize the existence of racial prejudice, but they still defend the cultural relevance of racial democracy); ROBERT STAM & ELLA SHOHAT, \textit{RACE IN TRANSLATION. CULTURE WARS AROUND THE POSTCOLONIAL ATLANTIC} 216 - 222 (2012) (classifying the debate about racially conscious measures in Brazil as a cultural war between those who defend race neutrality and blackness).
and the public consensus on equal racial treatment. This understanding underlies their criticism of race consciousness, a strategy that abandoned universal measures as adequate means for combating racism and preserving social harmony. They claim that racial mixing reveal the absence of staunch forms of racism in the country, what they classify as the forms of racial segregation that exists in the United States, a society that could not achieve the same level of assimilation that exist in Brazil. Racial mixing attests the presence of a cultural framework that provides universal parameters for individual and collective identity-building processes. Most importantly, racial amalgamation actually functions as a harmonizing force, a historical development that prevented the existence of racial segregation in the country. Because of these biological and cultural processes, the ideal of equal treatment among racial groups remains an important factor of social integration. In this account of the Brazilian social reality, identification assimilation designates more than individual strategy. Actually, it designates a feature of a society that has already resolved the problem of racial intolerance, because Brazilians recognize their cultural heritage and biological ancestry.64

Those who advocate universalist antiracist strategies classify the current politicization of race as an unfortunate influence of identity politics in Brazil. They contend that multiculturalism threaten social unity by creating the idea that racial groups have different social experiences and distinct social cultures. More than depicting Brazil as a society in which racial groups have no common experiences, identity politics legitimizes governmental initiatives that disregard the social consensus about equal racial treatment. Affirmative action opponents contend that most Brazilians interpret their ideals of racial inclusion as something that actually reflects public morality.65 Unlike those who claim that symbolic connections between race and power continue to reproduce racialization patterns that maintain racial stratification, many affirmative action opponents understand racial hierarchy essentially as product of class disparities.66 They

64 See generally ROBERTA FRAGOSO MENEZES KAUFMANN, AÇÕES AFIRMATIVAS A BRASILEIRA 256 - 259 (2005) (stressing the differences between racial practices in Brazil and in the United States); George Andrews, Ação Affirmativa: Um Modelo para o Brasil?, in MULTICULTURALISMO E RACISMO. UMA COMPARAÇÃO BRASIL - ESTADOS UNIDOS, 142 - 144 (Jessé Souza et al, eds. 1999) (affirming that affirmative action will reproduce in Brazil the same kind of racial intolerance that exists in the United States).
65 See generally Mônica Grin, A Celebração Oficial da Nova Diversidade no Brasil, 68 REVISTA USP 36 (2005 - 2006 (Braz.).
66 See, e.g., Yvone Maggie, Anti-Racismo Contra Leis Raciais, 3 INTERESSE NACIONAL 29 (2008) (Braz.) (defending effective application of antidiscrimination laws and class-based measures as the best alternative to racially conscious affirmative action programs); Roberta Fragoso Menezes Kaufmann, As Diversas Cores do Brasil: A Inconstitucionalidade de Programas Afirmativos em que a Raça Seja o Único Critério Levado em Consideração.
frequently claim that race became a relevant social category because of the political interests of certain groups, which is often the case of those who defend the use of race as a parameter for public policies. In their view, these groups advance a social agenda based on the idea that race exist as an independent category, a quite problematic assertion because such perception only serves to essentialize social groups by attributing distinctive and usually negative traits to them. Those who defend race transcendence as a policy principle condemn the official use of racial classifications because this measure ignores the existence of a population that recognizes their common racial ancestry. Brazilians utilize dozens of expressions to express their biological and cultural heritages, categories that vary from the darkest to the lightest, a sign that they do not see themselves as belonging to a particular race.67

According to this interpretation of social reality, Brazilians are proud of being a raceless population, a people who recognizes the heritage of different groups in the shaping of an infinite variety of skin colors. In this sense, racial and cultural miscegenation must be seen as positive social facts because these processes consolidate a national identity that supersedes other forms of particular belongings.68 In adopting the same categories implicated in the processes of social oppression, race-conscious policies run against historical and social processes that have contributed to the formation of ideals of universal treatment. Race-conscious measures create significant social problems because they impose an official process of racialization, something that ignores the complexity of racial identity in Brazil.69 This narrative finds support in the idea that hybridity has created the conditions for transforming the traditions of all racial groups into universal cultural references. Hybridity has forged a unified culture that expresses the social commitment to equal treatment. In their view, race-conscious measures undermine social and

60 REVISTA DE DIREITO CONSTITUCIONAL E INTERNACIONAL 206, 240 - 255 (2007) (Braz.) (defending class-based affirmative action as the best solution for the problems of racial inequalities).
61 See Celia Maria Marinho de Azevedo, Cota Racial e Estado: Abolição do Racismo ou Direito de Raça, 34 CADERNOS DE PESQUISA 203, 222 - 224 (2004) (Braz.) (investigating the various categories that Brazilians utilize to classify themselves in racial terms); Nelson Valle da Silva, Uma Nota sobre “Raça Social” no Brasil, 26 ESTUDOS AFRO-ASIÁTICOS 67 (1994) (Braz.) (analyzing the relevance of the idea of “social race” in the Brazil system of racial classification).
62 See, e.g., Yvonne Maggie & Peter Fry, A Reserva de Vagas Para Negros nas Universidades Brasileiras, 18 ESTUDOS AVANÇADOS 67 - 69 (2004) (Braz.) (defending universal policies on the grounds that affirmative action programs disrupts processes of socialization and common understandings of identity); Manolo Fiorentino, Da Atualidade de Gilberto Freyre, in DIVISÕES PERIGOSAS, supra, note 54, at 89 - 95) (defending the relevance of Gilberto Freyre studies on race relations in the discussion about race classifications in Brazil).
63 See César Benjamim, Receita para uma Humanidade Desracializada, in DIVISÕES PERIGOSAS, supra, note 85, at 27 - 35(claiming that affirmative action destabilizes established patterns of socialization by introducing racial classifications).
cultural unity and prevent individuals from constructing their identities according to universal cultural parameters. This social narrative characterizes the typical Brazilian as an individual who comprehends the public and private spheres as operating according to the same values. This social actor understands the larger society as an extension of familial relations, which means that he is essentially a cordial person.

2.3 - Race Transcendence in Brazilian Affirmative Action Cases

The recent implementation of affirmative action programs forced Brazilian courts to consider the question as to whether racial classifications that benefit racial minorities have constitutional standing. There was a significant division among them about this particular issue, a problem that continues until the present day. It is important to notice that this subject sharply divided the courts themselves: while some benches affirmed the legality of racially selective programs, other voted against them. Since this analysis involves historical and sociological arguments, many of them endorsed traditional racial discourses. These decisions combine past and present formulations of race transcendence in order to dismiss the adequacy of these social policies. In interpreting constitutional equality as a mere procedural principle that seeks to protect individuals from what they categorize as an arbitrary form of classification, Brazilian courts institutionalize social meanings whose importance transcends equal protection analysis. As a legal discourse, race transcendence articulates racial sameness and liberal-nationalism as the ideological basis for building an equal protection methodology based on the same principles that structure the idea of antidiscrimination. This narrative congregates a particular form racial ideology, a representation of Brazil as a racially homogeneous polity, an anticlassification perspective to equal protection analysis, and an idea of justice as symmetrical treatment.

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70 See generally Yvonne Maggie, Pela Igualdade. 16 ESTUDOS FEMINISTAS 897 (2008) (Braz.) (stressing the cultural relevance of hybridity in the ways in which Brazilians understand themselves); ALI KAMEL, NÃO SOMOS RACISTAS. UMA REAÇÃO AOS QUE QUEREM NOS TRANSFORMAR NUMA NAÇÃO BICOLOR (2006) (classifying Brazil as a society that has transcended the question of racial discrimination); ANTÔNIO RISÉRIO, A UTOPIA BRASILEIRA E OS MOVIMENTOS NEGROS 39 - 90 (2007) (claiming that cordiality characterizes social relations in Brazil, a consequence of racial and cultural amalgamation).

Before the 2012 Supreme Court decision that affirmed the constitutionality of race-based initiatives, Brazilian courts frequently contended that affirmative action programs violate the idea of proportionality, a scrutiny test they frequently utilize to consider the legality of racial classifications. These courts classified affirmative action programs as inappropriate means to promote inclusion of racial minorities because extensive racial mixing prevents the identification of the beneficiaries of these policies. According to them, the Brazilian tradition of racial amalgamation produced a population with a great variety of skin color; most individuals do not think about themselves in racial terms, but actually through a combination of cultural meanings and physical traits. Moreover, racial mixing express social integration and absence of patterns of racial discrimination, which these courts interpret as evidence of assimilation of racial minorities. More than evidence of racial harmony, the argument of miscegenation in the Brazilian discourse of race transcendence derives from the common belief that race makes little or no difference to life outcomes.

Brazilian courts claimed that affirmative action policies such as racial quotas cannot survive judicial scrutiny because they subvert the idea of necessity, another important aspect of proportionality. The doctrine divides the notion of proportionality in three different elements: appropriateness, necessity, and proportionality. The first one considers the ability of the classification under scrutiny to foster a legitimate state interest. In this first moment of the scrutiny process, the interpreter should consider whether the classification is the most appropriate instrument to foment a legitimate goal. The interpreter must examine afterwards if the means found to promote this goal is the least restrictive one. Therefore, the idea of necessity poses the question as to whether a governmental act could reach a particular purpose through a less intrusive way. In the last phase of this judicial inquiry the interpreter must evaluate the existence of a proper balance between the restriction of a fundamental right and the importance of the constitutional goal that the measure aims to achieve.

72 The doctrine divides the notion of proportionality in three different elements: appropriateness, necessity, and proportionality. The first one considers the ability of the classification under scrutiny to foster a legitimate state interest. In this first moment of the scrutiny process, the interpreter should consider whether the classification is the most appropriate instrument to foment a legitimate goal. The interpreter must examine afterwards if the means found to promote this goal is the least restrictive one. Therefore, the idea of necessity poses the question as to whether a governmental act could reach a particular purpose through a less intrusive way. In the last phase of this judicial inquiry the interpreter must evaluate the existence of a proper balance between the restriction of a fundamental right and the importance of the constitutional goal that the measure aims to achieve. See CELSO ANTÔNIO BANDEIRA DE MELLO, O CONTEÚDO JURÍDICO DO PRINCÍPIO DA IGUALDADE 21 - 45 (2001). See AARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATION 131 - 174 (2012)

73 See, e.g., T.R.F. - 4, Ap. Cív. No. 2009.72.00.001078-7/SC, Órgão Julgador: 3a. Turma, Relator: João Pedro Gebran Neto, 20.10.2009, http://www.trf4.jus.br (Braz.)(affirming that race offends the idea of appropriateness because “skin color and race cannot justify the differentiation between equally situated individuals. Two persons who attended public or private schools cannot be submitted to different treatment only because one have black skin and the other white skin. The choosen criteria bear no relation with the goal this policy aims to achieve.”); T.J.E.S., ADI No. 100070023542, Órgão Julgador: Tribunal Pleno, Voto: Arnaldo Santos Souza, 22.09.2001, http://www.tjes.gov.br (Braz.) (classifying the use of race as a violation of adequacy because of the impossibility of determining “the “race” of candidates who could not be objectively classified as Afro-Brazilians, something that offends human dignity.”); See, e.g., T.R.F. - 1, Ag. Inst. No. 61893, Órgão Julgador: 2ª. Turma, Relator: Paulo Gadelha, DJ 27/01/2006 (Braz.) (affirming that the presence of African, Europeans, and Amerindians formed a highly miscegenated society, which creates special difficulties to determine the racial status of individuals); T.J.M.G., ADIN No. 1.000.00.3275572-4/00(1), Órgão Julgador: Corte Superior, Relator: Corrêa de Martins, 03/12/2003 http://www.tjmg.jus.br/ (Braz.) (claiming that race-conscious policies in a highly miscegenated country are inherently problematic since most individuals have African ancestry); T.J.E.S., Apel. Cív. No. 024070612809, Órgão Julgador: 4ª. Câmara Cível, Relator: Ney Batista Coutinho 15.12.2009, http://www.tjes.jus.br (Braz.) (claiming that affirmative action programs were implemented in the United States as measures against systematic racial discrimination, something that has never existed in Brazil, a country known for the cordial relations among individuals from different racial groups).
inquiry. In their opinion, social exclusion of Afro-Brazilians derives from their inferior position in the class system, which means that race appears as a proxy to social class. This means that state can foster social inclusion of racial minorities through less restrictive means, namely social policies that target class disparities. Possible exclusionary practices express class prejudice rather than systemic racism, which means that the convergence of class and race produce a social race that corresponds to the position of the individual in the class structure. Consequently, the social race has no necessary relation with racial categories; it actually transcends identification with specific racial groups. In this representation of the Brazilian reality, class status represent them main reason of social exclusion.  

It is clear for many Brazilian judges that race has no rational relations with the goal of selecting the best candidates for institutions of higher education or public employment. Consequently, these programs violate the idea of proportionality because they establish arbitrary distinctions among individuals who are similarly situated. The equal standing of all racial groups in Brazil led these courts to classify affirmative action as reverse discrimination against a social group that rarely express animosity toward racial minorities. in this sense, these initiatives run against the interest in constructing a society free of racism, a society that rejects reverse discrimination and racial factionalism.  

The connections between citizenship and polity become clear in these cases. Brazilian judges classified affirmative action programs as morally reproachable policies because they utilize a social category that has been historically used to promote racial oppression. In view of the importance of hybridity in the construction of the national identity, these institutions

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74 See, e.g., T.R.F. - 5, Ag. Instr. No. 110495, Relator: Francisco Wildo Lacerda Dantas, 16.09.2010, DJe 23.09.2010, p. 620 (Braz.) (contending that racial quotas violate sub principle of necessity because “access to higher education for disadvantaged groups can be facilitated through less intrusive ways in the individual sphere of certain students, for example, through preparatory courses for students who attend public schools and massive investment in the public educational system.”); T.J.E.S., ADI No. 100070023542, Órgão Julgador: Tribunal Pleno, Voto: Arnaldo Santos Souza, 22.09.2001, http://www.tj.es.gov.br (Braz.) (concluding that race-based affirmative action violates the idea of adequacy because racial quotas is an excessive measure to promote social inclusion of Afro-Brazilians, especially because the obstacle to their social mobility resides on their precarious economic situation that affects most of them.”).

75 See, e.g., T.J.E.S., ADI No. 100070023542, Órgão Julgador: Tribunal Pleno, Voto: Arnaldo Santos Souza, 22.09.2001, http://www.tj.es.gov.br (Braz.) (claiming that an analysis of whether affirmative action programs have a rational relation with the goal of promoting racial justice require the consideration of the proper balance between “the necessity of affirmative action policies for the inclusion of Afro-Brazilians and the racialization of the city of Vitória, which implies a violation of the principles of equality, personal merit, of the constitutional prohibition of racial discrimination and of reverse discrimination.”); T.R.F. - 4, Ap. Cív. No. 2009.72.00.001078-7/SC, Órgão Julgador: 3a. Turma, Relator: João Pedro Gebran Neto, http://www.trf4.jus.br (Braz.) (claiming that race-based affirmative action programs violate the principle of proportionality because “there are no justification for racial quotas for blacks and browns. There are no differences between blacks, browns, whites, or Amerindians when it comes to the question of knowledge.”).
condemned affirmative action programs as a form of symbolic violence because they violate the right of all individuals to construct their identity according to the cultural repertoire that belongs to all Brazilians. Certain courts represent Brazil as a generally fair society, a perception that motivates them to utilize a moral conception of race based on the abstract ideals of formal equality and symmetric treatment. This reading of race as formal-race supports the claim that all racial groups have equal grounds to make claims of racial discrimination. By articulating race sameness and formal equality, these courts formulate a moral grammar of racial morality that serves to dismiss claims of distributive and compensatory justice. They claimed the country has never implemented racially discriminatory policies, which means that there are no social consequences that demand social redress. The articulation of race neutrality and formal equality forms the basis of an argument that dismisses distributive and compensatory arguments supporting race-based affirmative action programs. Many judges rejected the argument based on distributive concerns because miscegenation make impossible to identify the beneficiaries of such policies. Although recognizing the positive obligation of the state to implement social policies that aim to eradicate social inequalities, Brazilian courts often contended that race-conscious measures have no constitutional standing because racism does not prevent blacks from achieving social opportunities.

Following a similar rationale, the idea of corrective justice was consistently dismissed as a legitimate goal of affirmative action programs. It was frequently claimed that past racially

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discriminatory measures no longer influences the present, a clear indication that current social problems require racially neutral measures. Corrective justice presupposes a history of discrimination that prevented members of a particular social group to compete for equal opportunities on fair terms. In the opinion of these courts, Brazilian social history markedly differs from other nations that implemented officially discriminatory policies in order to maintain social opportunities in the hands of the dominant racial group. Different outcomes between whites and nonwhites, claim these institutions, derive from the historical processes that maintained blacks in the inferior social classes. The absence of systematic racial discrimination in Brazil show that European-Brazilians do not desire to inflict harm on Afro-Brazilians, what makes claims for compensatory justice incompatible with the Federal Constitution. Absence of institutional forms of discrimination means that this group should not be classified as perpetrator or endure restriction on social opportunities in order to remedy their past wrongs.  

The rhetoric of race neutrality that underlies the opposition to affirmative action policies in Brazil and in the United States raises some important issues regarding the notion of assimilation and its relation with liberalism. Although substantially different, assimilation practices in these two nations follow a model that combines racial and ethnic hierarchy and a demand of cultural conformity with majoritarian culture as a requirement to full citizenship. This hierarchical model of assimilation applies to large periods of the historical development of both nations, moments in which social privileges were secured to a dominant racial group as natural consequence of their supposed superiority. In recent times, this hierarchical model has been gradually substituted by an idea of assimilation that poses the burden of acculturation upon those who want to have access to social opportunities. Both processes of assimilation have a

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78 See, e.g., T.R.F.- 4, Emb. Infr. No. 2009.72.00.002018-5/SC, Órgão Julgador: 2ª. Seção, Relator: Fernando Quadros da Silva, DE 21.07.2011, http://www.trf4.jus.br (Braz.) (dismissing the claim that affirmative action programs seek remedy societal discrimination because racism, in case of its existence, may affect various ethnic groups who live in the country); T.R.F.- 5, Ap. Cív.No. 469454/AL, Órgão Julgador: 1ª. Turma, Relator: Cesar Carvalho, 04.08.2011, http://www.trf5.jus.br (Braz.) (claiming that the sufferings related with slavery cannot be redeemed with race-based affirmative action programs because public universities have no responsibility for past social wrongs); T.J.E.S., Ag. Inst. No. 024079005294, Órgão Julgador: 4ª. Câmara Cível, Relator: Carlos Roberto Mignone, 17.02.2009, http://www.tj.es.gov.br (Braz.) (affirming that social injustices against Afro-Brazilians happened in a very distant past; racial quotas just implement racial discrimination in the country); JF/SC, Florianópolis, Processo No. 2007.72.00.011867-0, Juiz: Carlos Alberto da Costa Dias, 29.11.2007 (Braz.) (arguing that slavery had a negative effect upon Afro-Brazilians, but claiming that abolition created the conditions for social mobility); JF/SE, 1a. Vara Federal, Processo No. 2004.85.00.006438-3, Juiz: Ricardo César Mandarino Barreto, 01.03.2005 (Braz.) (contending that the present generations have no responsibility for past wrongs, especially in a country which has learned to respect individuals from all races).
unidirectional character because the values of the dominant racial groups become are deemed universal and legitimate. Brazilian and American society have developed models of assimilation structured upon the idea of the inherent superiority of the European heritage, despite the common portraits of these nations as culturally diverse.79

3 - Race Consciousness as a Discourse of Citizenship in Brazil

3.1 - Political and Cultural Transformations in Contemporary Brazil

Despite the ongoing influence of race transcendence in the political and legal debate about racial justice, the official discourse on race relations changed considerably in the last three decades in Brazil. The end of the military dictatorship thirty years ago was definitely a turning point in this process, ending the political silence about racial discrimination in the country that lasted more than sixty years.80 As a counteract to the previous dismissal of the fight for racial equality as a relevant agenda by political actors situated across all the political spectrum, the publication of some books transformed social perception of race relations. Challenging the depiction of Brazilian history as a linear development towards racial democracy, these books showed that racial discrimination is an integral part of almost every aspect of Brazilian social life.81 The political liberalization of the country transformed this subject into a matter of public discussion, especially during the sessions of the Constituent National Assembly. New


80 See EDWARD TELLES, supra, note 23, at 40 - 42.

antidiscrimination laws and new forms of lawsuits aimed at protecting minority rights provided the legal basis for litigation seeking to eradicate racial inequality.  

Some important changes happened in the cultural arena as a consequence of the resurgence of the black movements. More than pursuing political mobilization of race in order to denounce the structural nature of racial inequality, leaders began to articulate a cultural transformation based on the valorization of blackness as a distinctive form of group identity. This effort sought to challenge the liberal/integrationist narrative of racial democracy, an ideology that transformed blackness into a symbol of national identity, a strategic rhetoric that had the effect of preventing political mobilization.  

The emergence of grass roots movements and several cultural associations increased considerably after redemocratization. These groups began to discuss and rearticulate a distinct Afro-Brazilian identity through religious and cultural expressions, which became vehicles for protesting against pervasive racial inequality. One can classify the appearance of black movements of national expression as evidence of the relevance of race consciousness in contemporary Brazil both as a cultural critique as a principle of social organization, although in considerably less effective ways than in the United States during the civil rights movement. The question of racial identity acquired legal status as constitutional norms recognized Native Brazilians and the descendents of maroon communities as culturally distinct groups and granted them landownership over their lands based on the idea of cultural rights.

Another important factor has provided legitimacy to expand race-conscious measures in Brazil: the enactment of a Federal Constitution that incorporates the promotion of citizenship, substantive equality, and social justice as the main goals of the legal system. More than

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82 The 1988 Brazilian Constitution gave special power to the Public Prosecutors Office, including the protection of minority groups. Black movements and federal public prosecutors have worked closely to improve the social standing of Afro-Brazilians, especially through the use of lawsuits mandating court-ordered affirmative action programs. Article 129 of the Brazilian Constitution states: “The following are institutional functions of the Public Prosecution: (...) II - to ensure effective respect by the Public Authorities and by the services of public relevance for the rights guaranteed in this constitution, taking the action required to guarantee such rights.”

83 See Joaze Bernardino, Ação Afirmativas e a Rediscussão do Mito da Democracia Racial no Brasil, 24 ESTUDOS AFRO-ASIÁTICOS 247 (2002) (situating the debate about race consciousness in Brazil after the adoption of affirmative action programs); Karine Pereira Goss, Retóricas em Disputa: O debate Intelectual sobre as Políticas de Ação Afirmativa para Estudantes Negros no Brasil, 45 CIÊNCIAS SOCIAIS UNISINOS 114 (2009) (assessing the main components of the debate about racial democracy and black consciousness in the debate about affirmative action).

84 See generally G. REGINALD DANIEL, supra, note 17, at 185 - 188.

85 JAN HOFFMAN FRANCE, LEGALIZING IDENTITIES. BECOMING BLACK OR INDIAN IN BRAZIL’S NORTHEAST (2009).
functioning as a basis for a progressive understanding of equality, this legal document characterizes the state as an agent transformation, which posits the basis for social policies specially directed to transform the social standing of excluded groups. In this context, the constitution means more than a legal document that establishes the rules for the organization of political power. Actually, it becomes a program of social transformation as it integrates principles of different constitutional traditions: it inherits the relevance of rule of law and individuals rights from liberal constitutionalism and a substantive notion of equality as well as the notion of acting state from social constitutionalism. These ideas acquire new meanings under the current constitutional paradigm as it becomes clear that individual liberty demands more than negative action from the state or social rights. Additionally, recent constitutional documents recognize the cogent force of substantive moral values such as the ideas of social justice and human dignity, which acquires relevant meaning as becomes clear to social agents that their realization depends on the access to different categories of fundamental rights. Constitutional principles and fundamental rights such as the notions of citizenship and substantive equality become interpretive references for the entire legal system, determining clear direction for the activities of the legislative and executive powers.86

The judiciary becomes an important space of political struggle because of the role of the courts in protecting minority groups. A substantive notion of democracy arises in the place of the political process as a mechanism that basically guarantees fair representation. As a consequence of the emergence of a new legal culture that poses the protection of fundamental rights and social transformation as essential features of the legal order, new methods of constitutional interpretation emerged. In rejecting positivism and deductive reasoning as the most appropriate methods to interpret legal norms, those authors who have provided intellectual support for this legal paradigm recognize the teleological nature of constitutional norms. Instead of an understanding of constitutional interpretation as an endeavor that requires objectivity and neutrality, transformative constitutionalism proposes a hermeneutic perspective that considers the major social context. Rejecting the idea according to which legal norms contain an intrinsic

86 See generally Karl E. Klare, Legal Culture and Transformative Constitutionalism. 14 S. AFR. J. HUM. RTS 146 (1998) (Commenting the political and theoretical principles of transformative constitutionalism); Santiago Sastre Arisa, La Ciencia Jurídica ante el neoconstitucionalismo, in: NEOCONSTITUCIONALISMO(S) 239 - 265 (Miguel Carbonell, ed., 2003).
meaning, this constitutional paradigm takes issue with the representation of the interpreter as someone who should say what the written law is.\textsuperscript{87}

In establishing the principles of human dignity, social solidarity, social justice, and substantive equality as fundamental principles of the legal order, many recently enacted constitutions have conditioned the judges to always consider the relations between morality and the law in the process of constitutional interpretation. The inclusion of these principles as positive rights and as parameters for constitutional interpretation was responsible for the abandonment of a formal hermeneutical approach, which characterized previous legal cultures that frequently resorted to a formalistic concept of constitutional norms in order to maintain social hierarchies.\textsuperscript{88} Intellectual commitment to liberal individualism and formal equality has been gradually substituted by the ideas of group protection and substantive equality. The complementing conceptions of equality that inform the Brazilian Constitution attest its commitment to social emancipation of traditionally disadvantaged groups. Conceived within a constitutional paradigm that poses the eradication of social inequalities as a fundamental goal of the Brazilian legal order, the notions of formal and substantive equality reveal that the Constitution requests the dismantling of status hierarchy.\textsuperscript{89} In recognizing the fact that governmental institutions have a positive obligation to create social policies that seek to create a balance between the democratic process and fundamental rights, several Brazilian courts have


\textsuperscript{89} Several authors have defended this position in a variety of contexts ranging from the question of same-sex unions to affirmative action. See, e.g, MARIA BERENICE DIAS, \textit{UNIÃO HOMOAFETIVA, O PRECONCEITO E A JUSTIÇA} (2006) (claiming that the constitutional commitment to substantive equality and social justice mandates equal treatment among straight and gay couples); ROGER RAUPP RIOS, \textit{O PRINCÍPIO DA IGUALDADE E A DISCRIMINAÇÃO POR ORIENTAÇÃO SEXUAL: A HOMOSEXUALIDADE NO DIREITO BRASILEIRO E NORTE-AMERICANO} (2002) (analyzing the question of legal protection of same-sex couples in the light of constitutional formulations of equality); FLÁVIA PIOVESAN & DOUGLAS MARTINS DE SOUZA, \textit{ORDEM JURÍDICA E IGUALDADE ÉTNICO-RACIAL} (2008) (considering affirmative action programs as legitimate policies that aim to realize constitutional goals of social justice).
constantly stressed the idea that the Constitution is a legitimizing source for measures that seek to guarantee equality of status.90

Although race transcendence remains an influential rhetoric in Brazil, race neutrality has been defeated as a strategy of racial justice in the political level. Following the idea that the state has a positive obligation to promote substantive equality among racial groups, the last two federal administrations have implemented public policies aimed at eliminating social inequalities, which includes wealth redistribution programs and measures that target racial minorities. Institutional resistance to racially conscious measures has been supplanted by large scale affirmative action programs in higher education and public employment. Several governmental institutions started to announce affirmative action programs in the last thirteen years. These initiatives began within the federal government and they were rapidly followed by similar initiatives in the state and municipal levels. Public institutions of higher education started to implement quota systems in their entrance examination processes in 2001. Following the guidelines of the National Human Rights Program, some states passed legislation creating race-based and class-based affirmative action for Afro-Brazilians and Native-Brazilians in public institutions of higher education. Federal and state universities, the best institutions of higher education in the country, have adopted four types of affirmative action. Some of them implemented only race-based affirmative action, a quota system for students of African and Amerindian descent. Other universities adopted both race-based and class-based affirmative action policies. Certain public institutions of higher education created a more strict form of affirmative action that combines class and racial requirements: only individuals of African and Amerindian descent who studied in public high schools are eligible for this program. As stated before, these programs are not restricted to the access to institutions of higher education. Many public institutions passed resolutions requiring the companies which have contract with the government to implement set-aside programs for Afro-Brazilians employees. Several

90 See, e.g., T.J.R.S., Ap. Cív. 70013034152, Órgão Julgador: 3ª. Câmara Cível, Relator: Paulo de Tarso Vieira Sanseverino, 25.05.2006, http://www.tjrgs.gov.br (Braz.) (referring to the principle of substantive equality as fundamental instrument to eliminate social disparities between racial groups since the application of formal equality tends to preserve the status quo rather than promote social emancipation); S.T.F., RMS 21.046-0/RJ, Órgão Julgador: Tribunal Pleno, Relator: Sepúlveda Pertence, DJ 14.12.2000, S.T.J.J. (Braz.) (dissertating about the transformation of equal protection in the history of modern constitutionalism and affirming that formal equality is not only one dimension of this constitutional principle that exists along with other forms of equal treatment); T.R.F - 4a,Ap. Cív. No. 2008.04.00.017059-7/RS, Relator: Luiz Carlos de Castro Lugon, DE 09.06.2008 (Braz.) (disserting about the conceptual transformations of the idea of equality in the history of the modern constitutionalism and affirming that formal equality could not provide equitable conditions of life).
municipalities across the countries have created a quota system for Afro-Brazilians in entrance examination process for public employment. In 2012, the National Congress passed legislation establishing class-based affirmative action in federal universities and in the same legislative house implemented a quota system for Afro-Brazilians in public employment.

3.2 - Race Consciousness as a Form of Citizenship in Brazilian Affirmative Action Cases

The several court decisions that affirmed the constitutionality of racially inclusive measures in institutions of higher education and in public employment utilize a line of reasoning that clearly differs from American and Brazilian discourse of race neutrality. Actually, one could classify the Supreme Court case that declared the legality of these programs as a counter-hegemonic narrative. In articulating progressive constitutional principles and an equal protection approach that incorporates many elements of antisubordination theory, the decision deconstructs the main elements of the traditional discourse of race transcendence, which the justices characterize as an effort to preserve the subaltern status of racial minorities. In this sense, the decision represents a significant departure from common representations of the country as a racially inclusive society. As many scholars have argued, race transcendence conceals structural forms of inequality, which creates significant obstacles to social inclusion. Brazilian courts have formulated a notion of racial citizenship that combines a group-based notion of equality, a defense of pluralism and recognition, a comprehension of the state as an agent of social inclusion, and antisubordination as an equal protection perspective.

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92 Lei No. 12.990, 06.09.2014 http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2014/Lei/L12990.htm
93 “Another aspect of this discussion derives from the fact that affirmative action programs departures from the existing race consciousness that exist within society with the final scope of eliminating it. In other words, the ultimate goal of these programs is to put an end on what was his initial word, i.e., the subjective feeling of belonging to a particular race or to be discriminated against because of his or her membership into this group. In societies that have experienced slavery, repression and prejudice, a fact responsible for the reproduction of derogatory images of certain racial groups, the legal guarantee of a merely formal equality sublimates the differences between people, helping to perpetuate the inequalities that exist between them. It is common knowledge that the small number of blacks and brown individuals performing relevant functions in the public and in the private spheres results from historical discrimination of successive generations although in most cases in a hidden or implied ways.” S.T.F. ADPF No. 186, Órgão Julgador: Tribunal Pleno, Relator: Ricardo Lewandovsky, 26.04.2012, S.T.F.J. (Braz.).
Prominently, the decision in question embraced a group-oriented approach to equal protection instead of resorting to an individualistic conception of equality based on means-ends rationality. In defining the eradication of social marginalization as a fundamental social goal, the Brazilian Constitution incorporates the idea of social groups as object of equal protection analysis. As other affirmative action cases, the decision recognized Afro-Brazilians as a distinct class of individuals which has been subjected to discriminatory practices that transformed Brazil in one of the most racially stratified societies of the world. This defense of a group-oriented equal protection analysis implies an indirect critique to the articulation of formal equality and racial neutrality in other Brazilian affirmative action cases. As other judges, the justice who authored the decision criticized this liberal approach to social policies claiming that universal policies have maintained the Brazilian racial caste system intact.\(^4\)

Contrary to those judges who advocate universal policies on the grounds of the social irrelevance of race in Brazil, the justice who wrote the controlling vote, Ricardo Lewandovsky claimed that access to the most important domains of power remain inaccessible to racial minorities, which allows the perpetuation of the same elites that creates several mechanisms to reproduce its privileges. This affirmation clearly implies the recognition that white privilege produces black subordination. In fact, the justice mentioned sociological studies demonstrating the correlation between these two social processes, which motivated him to affirm the

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\(^4\)“Thus, we should reject the biological notion of race for the purposes of this discussion and consider it as a cultural-historical concept, artificially built, to justify discrimination or even domination exerted by some individuals over certain social groups, thought to be inferior. However, as the constituents 1988 qualified racism as a crime with the purpose of preventing negative discrimination against certain groups of people, we should classify race not as a biological category but as a social fact. Hence we shall approach race as a social and historical category, a perspective that allow us to use this comprehension of race in the judgment of affirmative action programs that seek to promote social inclusion of traditionally excluded groups. Affirmative action programs in societies where this process occurs, including ours, constitute an important way to mitigate the consequences of discrimination, which is culturally rooted, often practiced unconsciously and in the shadow of a compliant state.” S.T.F. ADPF No. 186, Órgão Julgador: Tribunal Pleno, Relator: Ricardo Lewandovsky, 26.04.2012, S.T.F.J. (Braz.). Federal and state courts have argued in this direction in some important cases. See, e.g., T.R.F. - 1, Ap. Cív. No. 1999.38.00.036330-8/MG, Órgão Julgador: 5ª, Turma, Relatora: Selene Maria de Almeida, DJ 19.04.2007, http://www.trf1.jus.br (Braz.) (arguing that universal policies ignore social disparities and prevents social inclusion of marginalized groups); T.R.F. - 4, Ap. Cív. No. 2008.04.00.017059-7/RS, Relator: Luiz Carlos de Castro Lugon, DE 09.06.2008, http://www.trf4.gov.br(Braz.) (arguing that the idea of formal equality that characterized liberal constitutionalism could not promote social emancipation as a consequence of an abstract formulation of the individual); T.J.R.J., Ag. Inst. No. 2003.002.05345, Órgão Julgador: 16ª. Câmara Cível, Relator: Edson Vasconcelos, 05.08.2003 http://www.tj.rj.go.br (Braz.) (recognizing the constitutionality of an affirmative action program in higher education as an effective way to correct the Brazilian social history of racism and arguing that formalism and liberalism were incapable of promoting real social emancipation since legal norms were manipulated to guarantee white supremacy).
importance of affirmative action in dismantling this social pattern. In the place of a narrative that
dismisses the existence of a majoritarian racial group, the justice actually recognized its power of
conforming social structures according to their interests. The decision acknowledges the
existence of a majoritarian culture identified as universal cultural parameters that serves as the
basis for judging the value of other groups and cultures. Affirmative action programs in racially
stratified societies, claimed the justice, intend to eliminate the social privileges enjoyed by
whites as a consequence of intragenerational and intergenerational patterns of racial
stratification. Euro-Brazilians live in a society that gives them social privileges at the expense of
the well-being of racial minorities, an argument that other courts have utilized to dismiss the
narrative of innocent white victims. For Lewandovsky, the defense of formal equality and racial
neutrality in Brazil perpetuates informal exclusionary practices that preserve white privilege,
which impedes a construction of a racially egalitarian society. Social stigmatization not only
perpetuates racial prejudice that brings material benefits for whites, but it also generate negative
feelings in the minds of those who belong to racial minorities. Social exclusion promoted by
racial discrimination and class inequalities impede the creation of an inclusive society, a situation
that requires corrective measures such as affirmative action programs.95

95 "The need to overcome this attitude of state absenteeism was defended by Justice Marco Aurélio in the following
terms: "We can say, without fear, that the current constitutional order abandoned a merely negative conception of
equality that basically prohibits discrimination and adopted a dynamic perspective in the matters of social policy,
since the verbs ‘build’, ‘guarantee’, and ‘promote’ imply ‘action’. Legislation that punishes discrimination cannot
promote the goal of social integration alone. It is necessary to adopt an affirmative position regarding the question
of social justice. State neutrality has failed to promote greater access to the higher levels of education (...). It is
important to stress the fact that laws that aim to give concrete meaning to the Constitution should not be deemed
unconstitutional up front. (...) Social studies demonstrate that, while considering candidates with the same
credentials, those responsible for hiring process usually prefer white candidates; whites are also given preference in
other circumstances and they also are dispensed with better treatment in an variety of social situations.
Sophisticated shops and restaurants rarely hire African Brazilians, another evidence of systemic racism.” S.T.F.
2005.70.00.008336-7/PR, Órgão Julgador: 3ª. Turma, Relator: Maria Lúcia Luz Vieira, DE 24.04.2008 (Braz.)
(rejecting the idea of innocent victims in societies in which exists widespread forms of racial discrimination since
the dominant racial groups benefit directly and indirectly from social practices that maintain racial minorities in a
Relator: Rudi Loewenkron, 30.06.2004, http://www.tj.rj.gov.br (Braz.) (rejecting argument according to which
affirmative action constitutes a form of racism against whites because these policies do not seek to maintain that
group in a position of social subordination). S.T.J., REsp. No. 1.132.476 - PR, Órgão Julgador: 2ª. Turma, Relator:
Humberto Martins, DJ13.10.2009, S.T.J.J. (Braz.) (classifying affirmative action programs as social policies that
seek to guarantee legal protection to vulnerable social groups that otherwise would be deprived from social
opportunities); TRF – 1, MS No. 2006.33.00.0029789-0/BA, Órgão Julgador: 5a. Turma, Relatora: Selene Maria de
Almeida, DJ 10.08.2006, http://www.trf1.gov.br (Braz.) (classifying affirmative action programs as legitimate
governmental initiatives that seek to reduce social inequalities among social groups by providing educational and
Instead of defending cultural uniformity as a necessary requirement for fostering liberal values, the decision under analysis actually asserted the importance of social pluralism. For Justice Lewandovsky, this value has considerable importance in a society that has historically concealed racial stratification under the disguise of racial and cultural sameness. The decision claims that racially inclusive policies aim to achieve two important goals of current understandings of social justice: redistribution and recognition. Redistributive measures promote fairer allocations of social resources while recognition of cultural pluralism incorporate diverse social values deemed to be inferior to the dominant cultural ideals. In this sense, this comprehension of social justice seeks to eliminate social practices that impede equal access to material opportunities and equal respect. Quoting contemporary social theorists, the justice who contended that racial identity operates as a powerful criterion of differentiation, an instance also regulated by asymmetrical relations of power. For him, those segments whose identity was denied and despised have not been able to fight against negative stereotypes that reproduce racial stigmatization and, consequently, material disadvantage. In the place of a position that portrays social uniformity as a necessary condition for preserving liberal principles, Brazilian courts have approached cultural pluralism as an important political value. Based on the constitutional recognition of this principle as a reference for social policies, these institutions have actually

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professional opportunities); T.J.R.J., Ag. Instr. No. 2003.002.05345, Órgão Julgador: 16ª. Câmara Cível, Relator: Edson Vasconcelos, 05.08.2003, http://www.tj.rj.gov.br (Braz.) (classifying affirmative action programs as adequate solutions for the historical oppression imposed upon Afro-Brazilians and claiming that refusal to accept these policies on the grounds that they offend formal equality constitutes a sign of social backwardness since blacks and whites do not have live in vastly different situations).

96 “In other words, social justice, today, means more than the pursuit of redistributive measures that promote fairer allocation of social resources. Contemporary notions of social justice seeks to incorporate into society the diverse social values deemed to be inferior by the dominant cultural ideals. This way of thinking reveals the inadequacy of the exclusive use of the social class as an instance to promote the inclusion of socially excluded groups, and demonstrates the need to create race-based affirmative action programs. Zygmunt Bauman expresses this opinion by stating that: Let me note that identification is also a powerful factors in stratification; one of its most divisive and sharply differentiating dimensions. At one pole of the emergent global hierarchy are those who can compose and decompose their identities more or less at will, drawing from the uncommonly large, planet-wide pools of offers. At the other pole are crowded those whose access to identity choice has been barred, people who are given no say in deciding their preferences and who in the end are burdened with identities enforced and imposed by others.” S.T.F. ADPF No. 186, Órgão Julgador: Tribunal Pleno, Relator: Ricardo Lewandovsky, 26.04.2012, S.T.F.J. (Braz.). Several Brazilian courts employed the same argument to justify legal recognition of same-sex unions in the last twenty years. For these courts, exclusion of same-sex couples from legal protection prevents them from having access to legal guarantees that provide the conditions for building relationships, which reproduces stigmatization of same-sex relationships. See generally Adilson José Moreira, We Are Family! Legal Recognition of Same-Sex Unions in Brazil, 60 AM. J. COMP. L. 1003 (2012).
rejected the traditional idea of multiculturalism as a threat to social unity.\textsuperscript{97} As a consequence of this conversion of recognition and cultural pluralism, Brazilian judges have formulated an interpretive approach to equality that incorporates many principles that characterizes the antisubordination approach.\textsuperscript{98}

The justice who authored the vote claimed that the state can achieve the constitutional goal of fostering social emancipation through universal policies, but in certain cases this ideal must consider the situation of various social groups because they may not equally promote social emancipation. In his view, different patterns of social exclusion operate simultaneously to promote social stratification, which requires policies that target the particular situation of certain groups.\textsuperscript{99} Constitutional commitment to substantive equality rejects a purely procedural understanding of this principle and affirms its connections with the democratic principle. Democracy protects individuals from social practices that disregard different social experiences

\textsuperscript{97} The Brazilian Supreme Court has classified pluralism as a protected interest in the decision that recognized same-sex union in 2011. The justice who wrote the controlling vote contended that “This type of fraternal constitutionalism geared towards the integration of groups in the community (not exactly seeking “social inclusion”) seeks to materialize the necessity of public policies that foments civic and moral equality (thus more than simple economic equality) of those groups who have historically disfavored and frankly demonized. These groups include social segments such as Afro-Brazilians, Native Brazilians, women, disabled individuals and, most recently, those who have been named “homoafecionalism” instead of “homosexuals”. This policy orientation complies with the interest in challenging social prejudice, which realizes the acceptance of the social and political pluralism, which is one the foundations of the Brazilian Federal Republic.” S.T.F., ADI No. 4.277, Órgão Julgador: Tribunal Pleno, Relator: Carlos Ayres de Brito, 04.05.2011, S.T.F.J. (Braz.).

\textsuperscript{98} The idea of antisubordination appears in affirmative action cases as a general defense of equality of status among racial groups. Recently, a federal circuit court explicitly mentioned antisubordination theory as an interpretive approach that advances the goals of New Constitutionalism as a political project. T.R.F. - 4, Ap. Cív. No. 2005.70.00.008336-7/PR, Órgão Julgador: 3\textsuperscript{a} Turma, Relator: Maria Lúcia Luz Vieira, DE 24.04.2008 (mentioning the idea of antisubordination as the most adequate interpretive approach to the interpretation of equality and claiming that this perspective seeks to eliminate forms of nonrecognition that exists in the Brazil).

\textsuperscript{99} “The state has two basic alternatives to promote substantive equality. First, governmental institutions can implement universal policies that address problems affecting an indeterminate number of individuals. Second, they can create affirmative action programs that target particular social groups, giving them certain benefits for a limited period of time in order to enable them to overcome social inequalities.” S.T.F. ADPF No. 186, Órgão Julgador: Tribunal Pleno, Relator: Ricardo Lewandovsky, 26.04.2012, S.T.F.J. (Braz.). Brazilian courts have followed this reasoning in many affirmative action cases. See, e.g., S.T.F., ADIN 3.330-1, Órgão Julgador: Tribunal Pleno, Relator: Carlos Britto, Dje 19.06.2008, S.T.F.J (Braz.) (referring to formal equality as a social goal that requires the eradication of social practices that maintains blacks in an inferior position); T.J.R.J., Ag. Instr. No. 2003.002.05345, Órgão Julgador: 8a. Câmara Cível, Relator: Odete Knaack de Souza, 24.01.2006, http://www.tj.rj.gov.br (Braz.) (classifying constitutional equality as a principle that endeavor to promote substantive equality among social groups in the current constitutional paradigm); T.J.R.J., Ag. Instr. No. 2003.002.05345, Órgão Julgador: 16\textsuperscript{a} Câmara Cível, Relator: Edson Vasconcelos, 05.08.2003, http://www.tj.rj.gov.br (Braz.) (classifying affirmative action programs as adequate solutions for the historical oppression imposed upon Afro-Brazilians and claiming that refusal to accept these policies on the grounds that they offend formal equality constitutes a sign of social backwardness since blacks and whites live in vastly different situations).
in the name of an abstract understanding of equality. Lewandovsky claimed that the current understandings of the democratic principle disfavor a mechanical application of this constitutional principle. Instead of conceiving it merely as a right of individuals who live in a democracy, it is important to consider its potential to produce social inclusion. From this point of view, equality requires efforts aimed to eliminate structural inequalities, a situation that prevents individuals from competing in fair terms because of systemic social disadvantages. Consequently, the Constitution authorizes an asymmetrical application of equality when dealing with cases of pervasive inequality.\(^{100}\)

The Brazilian Supreme Court case that affirmed the constitutionality of racial quotas in institutions of higher education followed a progressive equal protection perspective that contains many elements of antisubordination theory such as the commitment to substantive justice and the comprehension of equality as a mechanism of social emancipation. As the case of lower courts that supported racially conscious measures, the decision claimed that current constitutional paradigm contains a transformative conception of equality.\(^{101}\) The opinion began with a consideration of the current understandings of equality as a constitutional guarantee, claiming that the drafters of the Federal Constitution envisioned this principle as a guarantee which has a formal and a substantive aspect. The justice who wrote the controlling vote classified this

\(^{100}\) “The adoption of such policies, which implies a rejection of a procedural understanding of equality, informs the concept of democracy, the regime in which, to use the words of Boaventura de Sousa Santos: “(...) We have the right to be equal when our difference make us inferior, and we have the right to be different when our equality disregards our particularities. Hence the need for an understanding of equality that both recognizes our differences and prevent the production and reproduction of inequalities.” S.T.F. ADPF No. 186, Órgão Julgador: Tribunal Pleno, Relator: Ricardo Lewandovsky, 26.04.2012, S.T.F.J. (Braz.). This position sharply differs from the dominant understanding present in the American jurisprudence according to which all racial classifications should be subjected to the stringiest level of scrutiny. The substantive approach to equality allows an asymmetrical model that considers whether the classification promotes emancipation or perpetuates racial classifications. While the United States Supreme Court in the cases Richmond v. J.A. Croson v. Pena and Adarand Constructors, INC v. Pena established strict scrutiny to all racial classifications, Brazilian state and federal courts have clearly employed different scrutiny tests for policies that benefit and hurt racial minorities. The Brazilian Supreme Court has followed the same approach that South African courts have adopted to deal with the question of racial classifications that benefit minorities. See generally Saras Jagwanth, Affirmative Action in a Transformative Context. The South African Experience, 36 CONN. L. REV. 725 (2003 - 2004).

\(^{101}\) See, e.g., S.T.F., ADIN 3.330-1, Órgão Julgador: Tribunal Pleno, Relator: Carlos Britto, Dje 19.06.2008 S.T.F.J. (Braz.) (evaluating the constitutionality of an affirmative action program by considering whether or not the particular statute contributed to the emancipation or for the subordination of a particular group); T.R.F. - 4, Ap. Civ. No. 2005.70.00.008336-7/PR, Órgão Julgador: 3ª. Turma, Relator: Maria Lúcia Luz Vieira, DE 24.04.2008 (Braz.) (arguing that the constitutional clause establishing the eradication of poverty and marginality as fundamental goals implies positive actions aimed at eliminating practices of social subordination and not only prohibition of discrimination); S.T.J., MS No. 26.089, Órgão Julgador: 5ª. Turma, Relator: Felix Fischer, DJ 12.05.2008, S.T.J.J. (Braz.) (arguing that emancipation of social groups is one of the main purposes of the idea of substantive equality since this principle seek to produce equality of results).
constitutional guarantee as an important social goal that requires the consideration of the actual social disparities in order to effectively equalize individuals. Only public policies that seek to eradicate marginalization can elevate individuals to an equitable situation in the social world. The principle of substantive equality has significant instrumental importance to achieve this goal because it imposes an obligation upon the state to eradicate social disparities among racial groups. Affirmative action has the potential of attaining the goal of promoting the transformative ideals enshrined in the Brazilian Constitution because these programs attempt to correct historical injustices. In providing education and professional opportunities to Afro-Brazilians and Native Brazilians, these initiatives materialize equal citizenship among racial groups in Brazil.

Contrary to American affirmative action cases that have dismissed societal discrimination as a rationale for affirmative action programs, the Brazilian Supreme Court recognized the distinctive history of racial oppression that has prevented assimilation of Afro-Brazilians. In Brazilian courts reject an understanding of equality as a purely procedural principle that only limits state power to classify individuals. See, e.g., T.R.F. - 4, Ap. Cív. No. 2008.04.00.017059-7/RS, Relator: Luiz Carlos de Castro Lugon, DE 09.06.2008, http://www.trf4.gov.br (Braz.) (disserting about the conceptual transformations of the idea of equality in the history of the modern constitutionalism and affirming that formal equality could not provide equitable conditions of life); T.J.M.S., Ag. Instr.No. 2009.005947-1/0000-00, Órgão Julgador: 4ª. Turma Civil, Relator: Dorival Renato Pavan, 14.04.2009, http://www.tjms.jus.br (Braz.) (affirming that constitutional equality should not be understood in its formal dimension in a deeply unequal society such as Brazil); T.J.R.J., Ag. Instr. No. 2003.002.05345, Órgão Julgador: 16ª. Câmara Cível, Relator: Edson Vasconcelos, 05.08.2003, http://www.tj.rj.gov.br (Braz.) (disserting about the conceptual transformations of the idea of equality in the history of the modern constitutionalism and affirming that formal equality could not provide equitable conditions of life); T.J.M.S., Ag. Instr.No. 2009.005947-1/0000-00, Órgão Julgador: 4ª. Turma Civil, Relator: Dorival Renato Pavan, 14.04.2009, http://www.tjms.jus.br (Braz.) (affirming that constitutional equality should not be understood in its formal dimension in a deeply unequal society such as Brazil); T.J.R.J., Ag. Instr. No. 2003.002.05345, Órgão Julgador: 16ª. Câmara Cível, Relator: Edson Vasconcelos, 05.08.2003, http://www.tj.rj.gov.br (Braz.) (rejecting a formalistic interpretation of the principle of equality to assess the question of legality of race-conscious measures because this perspective contributes to the permanence of asymmetrical relations of power among racial groups in Brazil).

The Brazilian Supreme Court followed this reasoning in a previous decision that addressed the question of a federal program that provided financial aid for racial minorities. The justice who authored the decision stressed the importance of substantive equality in producing social transformations that conduce to formal equality among racial groups. See, e.g., S.T.F., ADIN 3.330-1, Órgão Julgador: Tribunal Pleno, Relator: Carlos Britto, 19.06.2008, S.T.F.J. (Braz.) Other courts have followed the same rationale in decisions that affirmed the constitutionality of race-based affirmative action programs. See, e.g., T.J.R.J., Ap. Cív. No. 2005.001.23440, Órgão Julgador: 8ª. Câmara Cível, Relatora: Odete Knaack de Souza, 24.01.2006, http://www.tj.rj.gov.br (Braz.) (classifying constitutional equality as a principle that endeavor to promote substantive equality among social groups in the current constitutional paradigm); S.T.J., MS No. 26.089, Órgão Julgador: 5ª. Turma, Relator: Felix Fischer, DJ 12.05.2008, S.T. J.J. (Braz.) (arguing that emancipation of social groups is one of the main purposes of the idea of substantive equality since this principle seek to produce equality of results); T.R.F - 4, Agr. Instr. No. 2008.04.00.010730-9/RS, Relator: Maria Lúcia Luz Lleire, DE 16.04.2008, http://www.trf4.gov.br (Braz.) (affirming that the principle of equality presupposes both a prohibition of discrimination and an obligation of differentiation. The state does not discriminate when creates measures that seek to promote social equality).

Lower courts have followed this argument in affirmative action cases in higher education. See, e.g., T.J.R.J., Ag. Instr., No. 2003.002.05345, Órgão Julgador: 16ª. Câmara Cível, Relator: Edson Vasconcelos, 05.08.2003, www.tj.rj.gov.br (Braz.) (recognizing the constitutionality of an affirmative action program in higher education as an effective way to correct the Brazilian social history of racism and arguing that formalism and liberalism were incapable of promoting real social emancipation since legal norms were manipulated to guarantee white supremacy); T.R.F. - 3, Ap. Cív. No. 292295, Órgão Julgador: Turma Suplementar da 2ª. Seção, Relator: Valdecio dos Santos, 04.09.2008, http://www.trf3.jus.br (Braz.) (arguing that affirmative action programs seek to materialize the principle of human dignity through the creation of opportunities for traditionally discriminated groups); T.R.F. - 5, Agr.
the opinion of justice Lewandovsky, race is a legitimate criterion for social policies because it has been historically used as a way to promote subordination. Although scientists have dismissed its existence as a meaningful biological category, it remains relevant as a legal and social reality because it structures a series of social practices that reproduce social stratification. In the opinion of the justice, racism exists as a social practice regardless of the biological existence of race as a biological reality. Actually, he claimed, racism has utilized other categories as a source of ideological legitimacy, which means that it is an ideological construction that acquires different meanings in different social contexts. The state can utilize race as a criterion for social policy because it is a social construction which has concrete and lasting consequences, which affects individual and collective consciousness. In the same way that the state recognizes the existence of race when passes legislation that proscribes discriminatory practices, it can also recognize its relevance when implementing social policies that foments social inclusion.\footnote{Inst.No. 61937/AL, Órgão Julgador: 2ª. Turma, Relator: Petrucio Ferreira, 03.10.2006, http://www.trf5.jus.br (Braz.) (classifying affirmative action programs as social policies that aim to alleviate social marginalization of Afro-Brazilians).}

In an opposite direction to the defense of race neutrality as an instrument of social justice, the decision mentioned distributive justice as a principle that seeks to overcome inequalities through state intervention designed to relocate resources and opportunities that can produce social inclusion. He went on to argue that the Brazilian Constitution incorporates this idea of distributive justice by introducing a series of provisions that aim to correct the distortions caused by an understanding of equality in purely abstract terms. Actually, this legal document contains a series of expressions that clearly implies a state obligation to act in order to transform social reality. This legal document objectively seeks to give full effectiveness to its intention to produce social inclusion; in the case under analysis, distributive justice considers the relative position of social groups when considering the legality of social policies. In the words of the justice, “distributive justice consists of a technical distribution of justice, which ultimately aims to

\footnote{Other courts have followed a similar reasoning and recognized race as an operative category in the country and racism as an obstacle to access to social resources. See, e.g., T.R.F. - 4, Ap. Cív. No. 2005.70.00.008336-7/PR, Órgão Julgador: 3ª. Turma, Relator: Maria Lúcia Luz Vieira, DE 24.04.2008, http://www.trf4.gov.br (Braz.) (understanding race as a social category that expresses a conception of the other as an inferior being which supports practices of social subordination).}
promote social inclusion of excluded or marginalized groups, especially those who, historically, were compelled to live on the outskirts of society.”

Such understanding of justice in a democratic regime raises suspicions about the idea of meritocracy as an isonomic and impartial method because it ignores the distortion caused by various forms of societal discrimination, claimed justice Lewandovsky. The decision acknowledged the reference to meritocracy in the constitutional provision that regulates access to higher education, but affirmed that this rule needs to be balanced with the recognition of education as a fundamental social right. Instead of defending a strict principle of meritocracy, the justice observed that class disparities privileges students who attend private schools who are mostly white; a university that does not include all students only reinforces processes of social stratification. Moreover, policies regulating access to higher education must take into consideration the fundamental principles that regulate the entire constitutional order: the exercise of social rights, the commitment to national development, and the idea of social justice. In this sense, argued the justice, public universities can employ racial or socio-economic criteria in the admission process in order to actualize the constitutional commitment to social inclusion.


107 C.F., art. 206 states: “The duty of the State towards education shall be fulfilled by ensuring the following: (…) V - access to higher levels of education, research and artistic creation according to individual capacity.”

108 The Brazilian Supreme Court rejected the rationale frequently employed by the American Supreme Court justices that affirmative action programs impose racial stigma because they violate the principle of meritocracy. Justice O’Connor claimed in Richmond v. Croson that “classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved from remedial setting they may in fact promote notion of racial inferiority and leads to a politics of racial hostility”. For the justice who wrote the majority decision in the Brazilian case, affirmative action aims to mitigate the psychological harm that comes with the daily experience of social exclusion. The antisubordination approach of the decision considers social exclusion a harm in itself, one that is much more relevant that the ones caused by white resentment.

109 The preamble of the Brazilian Constitution states: “We, the representatives of the Brazilian People, convened in the National Constituent Assembly to institute a democratic state for the purpose of ensuring the exercise of social and individual rights, liberty, security, well-being, development, equality and justice as supreme values of a fraternal, pluralist and unprejudiced society, founded on social harmony and committed, in the internal and international orders, to the peaceful settlement of disputes, promulgate, under the protection of God, this Constitution of the Federative Republic of Brazil.”
In addition to the need to mitigate societal discrimination, the decision referred to other arguments to justify affirmative action programs. One of the most relevant was the creation of a leadership among those who benefit from these programs, persons who can become important social actors in the fight for better conditions of life. Contrary to American affirmative action cases that have ruled out role models as justification for racial classifications, the decision under analysis claimed that social inclusion through affirmative action programs promotes a change in the subjective attitude of the members of these groups, increasing their self-esteem and of other members of the community. These individuals become important cultural references because they acquire psychological strength to fight internalized social stigmas that reproduce ideas of racial inferiority.110

In the view of the Court, affirmative action programs bring other tangible benefits for individuals and for the community. As the United States Supreme Court said in *Grutter v. Bollinger*, this decision invoked the idea of diversity as a rationale that guarantees participation of members from all racial groups in the decision-making process. In addition to this transformative understanding of this justification of affirmative action, a racially diverse student body promotes mutual understanding by helping the various racial groups to overcome racial barriers that still persist in our society. As such, affirmative action programs diversifies the whole cultural landscape by allowing cultural values to circulate in society, which permits the construction the universities as a public space open to the inclusion of the other. In this sense, “the public university is the ideal place to eliminate social prejudices and foster the construction of a plural collective consciousness consistent with the reality of a globalized world.”111

110 “Historic discrimination of black and brown individuals perpetuates stratification because social exclusion reproduces feelings of social inferiority and conformism with lack of aspirations, driving thousands, especially the younger generations, to the road of criminality. This effect, deriving from a subjective evaluation of these groups, has a considerable repercussion on those who submitted to social exclusion as well on those who consciously or unconsciously contribute to their situation.” S.T.F. ADPF No. 186, Órgão Julgador: Tribunal Pleno, Relator: Ricardo Lewandowsky, 26.04.2012, S.T.F.J. (Braz.).

111 “Therefore, it is necessary to build a public culture open to the inclusion of the other, of all socially excluded individuals, a space that contemplates alterity. The university is the ideal place for the dismissal of prejudices about the Other and, consequently, for the construction a plural and heterogeneous collective consciousness compatible with the current globalized world.” S.T.F. ADPF No. 186, Órgão Julgador: Tribunal Pleno, Relator: Ricardo Lewandowsky, 26.04.2012, S.T.F.J. (Braz.). The argument of diversity has not been utilized as a major argument for affirmative action in Brazil because of the substantive approach utilized by many courts. However, social reality suggests its importance. Creating professional and academic diversity would better represent the idea of Brazil as a racially mixed society, instead of preserving economic and social privileges in the hands of the small ruling white
CONCLUSION

This paper sought to demonstrate that adopting race neutrality as a policy principle in societies with a long history of racial subordination poses considerable obstacles to the goal of promoting social justice. Those who defend universal policies in Brazil and in the United States formulate a narrative that combines the defense of assimilation as a process that produces social homogeneity with the defense of formal equality, which they consider a necessary condition for building a society structured upon liberal values. In their view, race consciousness maintain race as an operative category in these societies, thus stimulating racial separatism and undermining the credibility of social institutions. Rather than laying the basis for better social understanding, American and Brazilian courts reproduce historical process of racial stratification. The rhetoric of race neutrality has been historically utilized in Brazil as an assimilationist strategy that depicts the country as a racially inclusive society in order to prevent political mobilization of race. Utilizing a liberal and humanitarian rhetoric of a social ideology that portrays the country as a racial democracy, Brazilian elites managed to maintain white privilege unchallenged form almost a century. This reality begins to change as Brazilian society began to recognize the manipulative interests behind the celebration of racial and cultural amalgamation. Several authors classify the Brazilian social experience as a clear example of the ways in which the institutionalization of race neutrality as an official ideology produces disastrous social consequences. As stated in the beginning of this article, Brazilian social history functions as a cautionary example for those engaged in the discussion about racial justice in the United States. The idea of race transcendence operates as a social epistemology through which social and legal actors interpret social reality, a development that has impeded racial progress in the country.

Despite the considerable influence of colorblindness discourse within the Brazilian judicial system, an increasing number of courts have formulated a progressive interpretive approach that combines substantive equality and a contextual interpretation. Increasing influence of this parameter of judicial review has transformed Brazilian equal protection doctrine, serving to construct a notion of equal citizenship as a central value in public discussions about equality. In recognizing the fundamental role of human dignity and social justice in equal protection, Brazilian courts have endorsed a social agenda that seeks to reverse the situation that was

majority. See generally José Murilo de Carvalho, A Universidade Pública e a Diversificação do Corpo Discente, in UNIVERSIDADE PÚBLICA E INCLUSÃO SOCIAL. EXPERIÊNCIA E IMAGINAÇÃO 225 - 238 (2008);
worsened because of the defense of universal policies. In this sense, they are adopting a position that radically differs from the current attempts to erase race as a meaningful social category in the United States. While liberal citizenship remains an essential reference for the debate about racial inclusion in the United States, Brazilian courts have consistently understood citizenship as an instance that aims to produce redistribution and recognition, two necessary parameters for racial equality in contemporary society. As they defend a notion of justice that recognizes the direct connections between social status and material conditions, Brazilian courts contribute to the transformation of one of the most unequal societies of the world.