ARTICLES

THE *CUL DE SAC* OF RACE PREFERENCE DISCOURSE

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I. INTRODUCTION

Despite over a quarter century of affirmative action policy,[1] public endorsement of the practice by leading American institutions,[2] and validation by the United States Supreme Court,[3] the relevance of race in university admissions and hiring decisions remains a persistent source of conflict. Disagreement, however, has not produced a particularly robust or constructive public dialogue on this issue. Indeed, public conversation

1. Most commentators agree that the origins of "affirmative action" lie in President John F. Kennedy's Executive Order 10,925, which required certain federal contractors to take "affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin." *See* Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961). The affirmative action mandate was greatly expanded by President Lyndon Johnson's issuance of Executive Order 11,246. *See* Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965). However, the idea of imposing some affirmative obligation on state actors to improve employment opportunities arguably predates both of these orders. *See* Angela Onwuachi-Willig, *Using the Master's "Tool" to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. 113, 125 (2005) (arguing that the Kennedy and Johnson orders were "actually part of a long line of executive orders" dating back to the Roosevelt administration that were "intended to expand employment opportunities for Blacks").

2. *See* Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241); Brief for Gen. Motors Corp. as Amicus Curiae Supporting Respondents, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516). *See also* Brief for Amici Curiae 65 Leading American Businesses Supporting Respondents at 3–5, *Grutter*, 539 U.S. 306 (No. 02-241) ("Because our population is diverse, and because of the increasingly global reach of American business, the skills and training needed to succeed in business today demand exposure to widely diverse people, culture, ideas and viewpoints.").

3. *See Grutter*, 539 U.S. 306.

regarding the appropriateness of race preferences remains mired in an unhealthy and unproductive impasse.

The breakdown usually, but not always, occurs along traditional ideological lines.[4] Progressive proponents generally endorse the use of race preferences as a measured response to the perceived malign status quo of American race relations. They highlight myriad ways in which individual and institutional practices have, over time, worked to entrench the subordinated status of racial minorities and point to race preferences as an example of the kind of robust, substantive, and race-conscious response that "justice" demands. Conservative opponents generally acknowledge persistent racial disparities in health, wealth, and society, but point to substantial advances in modern race relations as a testament to the virtues of colorblindness and formal racial equality—virtues threatened by the reliance upon race when dispensing educational and employment opportunities and other social goods. Impassioned disagreement is inevitable, given the extended legacy of racial oppression, conflicting perceptions of racial injustice, and divergent visions of what a racially just society entails. What might have been the subject of robust exchanges of ideas, however, now cycles stubbornly and uncomfortably within a caustic, ideological cul-de-sac.[5]

The stagnation of race preference discourse presents a particularly tragic state of affairs. As an initial matter, this conversational crisis calcifies existing divisions between progressives and conservatives regarding this racial issue, and encourages a closing-ranks mentality that is

4. For a particularly thoughtful left critique of affirmative action, see RICHARD THOMPSON FORD, RACIAL CULTURE: A CRITIQUE (2005).

5. *See* Richard A. Epstein, *A Rational Basis for Affirmative Action: A Shaky but Classical Liberal Defense*, 100 MICH. L. REV. 2036, 2046 (2002) (describing current affirmative action policy as placing us in an "unhappy impasse" for "[i]f we hew to traditional constitutional law doctrine, then we must jettison affirmative action notwithstanding its widespread support in the university and business communities"); Daniel A. Farber, *The Outmoded Debate over Affirmative Action*, 82 CAL. L. REV. 893 , 893 (1994) ("The academic debate over affirmative action has become a bitter stalemate."); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1766 (1993) (describing affirmative action as a "wellspring" of bitter debate); Samuel Issacharoff, *When Substance Mandates Procedure:* Martin v. Wilks *and the Rights of Vested Incumbents in Civil Rights Consent Decrees*, 77 CORNELL L. REV. 189, 252 (1992) (stating that the affirmative action debate is "caustic and draining"); Ilhyung Lee, *Race Consciousness and Minority Scholars*, 33 CONN. L. REV. 535, 536 (2001) (describing a "growing incivility in legal scholarship" on race and lamenting that "much of what is written about race in legal academia can be 'dishonest, confused, ill-informed, [and] unhelpful'" (quoting K. ANTHONY APPIAH & AMY GUTMANN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 182 (1996))); Kendall Thomas, *Racial Justice: Moral or Political?*, 17 NAT'L BLACK L.J. 222, 222 (2003) (observing that "our national conversation about 'race' now stands at an impasse" and that much of what passes as reasoned debate can be reduced to a basic disagreement over whether the constitution permits color-conscious policies).

antithetical to the reasoned and robust exchange of ideas that is the hallmark of our democracy. At the same time, what might have been reasoned debate over the relative merits of race preferences is transformed into ritualized recitation of ideological platitudes and inflexible appeals to the inexorable logic of one ideological commitment or another.

Perhaps the most tragic consequence is that this unresolved conflict over race preferences obscures the focus of progressives and conservatives alike as to our shared aspiration of constructing a more racially inclusive American society. For progressives, defense of race preferences has taken precedence over internal critiques of such policies and sustained attention to the larger, progressive agenda of which race preferences are merely one component. At the same time, ideological trench warfare over race preferences reinforces the prevailing conservative view that color-conscious policies bear no discernible relationship to conventional principles of racial justice and equality, and that arguments in support of race preferences are rightly dismissed as mere special interest pleading.

The prevailing view among scholars is that this conversational impasse is, at bottom, essentially a "framing" problem. As Lani Guinier and Susan Sturm have argued, opponents challenge race preference policies as "extraordinary" and "deviant" practices violative of the quintessential American values of "fairness, equality, and democratic opportunity."[6] Rather than reframe the debate, proponents of race preferences have tended to "engage the debate on the terms defined by the assault."[7] Although Guinier and Sturm's "framing" explanation correctly pinpoints the locus of disagreement, it nevertheless fails to explain adequately why public debate invariably devolves into disengaged moral and ideological posturing.

I want to suggest that the problem is one of *tone* as well as terms—that is, the *manner* in which conservative opponents of race preferences register their opposition to such policies taps into deep-seated racial tensions that, when left unaddressed by opponents, leads to the subversion of substantive dialogue. A review of the history of race preferences reveals that conservative opposition to color-conscious policies has demonstrable roots traceable to the nineteenth century. Indeed, the basic set of arguments deployed by opponents of race preferences today bear a striking family resemblance to core arguments advanced by nineteenth century legal actors to contest racial reform efforts following the Civil War—the Freedmen's

6. Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 953 (1996).

7. *Id.* at 954.

Bureau initiatives, Negro citizenship, and a host of Reconstruction era proposals, for example—that were commonly understood as mechanisms that gave preference or "special treatment" to blacks. Not surprisingly, the rhetorical themes advanced by early opponents of race preferences seized upon and amplified the prevailing racial hostilities that defined that era.

In this Article, I argue that the central difficulty in modern public debate on race preference arises precisely because the basic rhetorical themes advanced by opponents have evolved little over the intervening 150 years. These rhetorical themes, though deployed in the modern era, retain this odious nineteenth-century pedigree. They are "normatively loaded," so to speak, with a subtext of racial hostility that proponents find exceedingly difficult to disaggregate from the substantive arguments themselves. This difficulty is only further compounded by the failure of opponents to adequately explain how these themes, when advanced in the modern era, promote a vision of society that is not consistent with the retrograde past from which they are drawn. Thus, the conversational impasse is not wholly a product of the terms of the debate, or at least not explicitly so. Rather, it is the product of an overarching skepticism about the underlying normative commitments of opponents of race preferences, animated by the deployment of rhetorical themes once used to justify racial subordination—a skepticism that opponents are either unwilling or unable to ameliorate.

A deepened appreciation and open acknowledgment of this pedigree is crucial to restoring public conversation on race preferences. Opponents of race preferences must come to understand that this pedigree, if left unaddressed, tends to overwhelm the underlying merit of arguments against race preferences in the eyes of proponents. At the same time, proponents must understand that the deployment of these pedigreed rhetorical themes does not necessarily signal agreement with nineteenth-century conservative racial norms from which they are sourced. For both proponents and opponents, the avoidance of a rapid retreat into ideological trench warfare not only preserves space for reasoned, substantive debate regarding race preferences, but also allows for the possibility of overcoming our collective fixation on race preferences as *the* issue in American race relations and advancing the conversation to reach the larger issue of producing a more racially inclusive society.

A deepened understanding of the role of rhetoric in race preference discourse also provides two additional insights into the contentious nature of American race relations. First, such an inquiry reveals the crucial role of rhetoric in defining individual and collective identities, and in the perpetuation of a subordinating racial ideology. Racial ideology, at bottom,

is an expression of political imagination—a vision of social ordering that explains how the world is or ought to be. Rhetoric and conversation are crucial elements of the ideological enterprise because it is through rhetoric and conversation that the vision is projected and ultimately proffered to the public for mass scale approval and acceptance. As society transforms and evolves, each succeeding generation chooses how to interact and respond to the racial world it inhabits. It is critical, then, that we understand the intellectual history of ideas and arguments that comprise the modern conversation that generates our sustained allegiance to the prevailing legal order in which racial subordination remains commonplace.

Second, a deepened understanding of the rhetorical pedigree provides the basis for questioning the legitimacy of any institution that continues to avail itself of these pedigreed rhetorical themes. The longevity of these themes in our legal conversations about racial policy prove troubling for those concerned about the increasingly contentious nature of the public debate on race in this country. The durability of these themes offers a painful reminder that much of our shared racial past remains fundamentally unresolved. At the same time, the persistent reliance upon rhetorical themes that date back to the nineteenth century suggests a real deficit in our political imagination when it comes to matters of race in this country. Americans work incessantly to come up with new ways in which to envision the world around us. Yet in the racial context, we remain captured by and continue to struggle against our racial inheritance, taking shape within and against a cage of reality bestowed upon us at birth. As James Baldwin famously lamented,

> it is exceedingly difficult for most of us to discard the assumptions of the society in which we were born, in which we live, to which we owe our identities; . . . virtually impossible, if not completely impossible, to envision the future, except in those terms which we think we already know.[8]

An inquiry into the pedigree of rhetoric reminds us of the importance of exposure and acknowledgment of the underlying values—the ghosts in the machine—so that we may ultimately understand more fully the complex of images and ideas implicated whenever we engage in serious conversation on matters of contemporary racial justice.

This Article proceeds as follows. Part II discusses the dominant rhetorical themes deployed by opponents of race preferences in the modern

8. JAMES BALDWIN, *Every Good-bye Ain't Gone*, *in* THE PRICE OF THE TICKET: COLLECTED NONFICTION 1948–1985, at 641, 643 (1985).

era, and compares and contrasts these modern expressions with their nineteenth-century counterparts. In particular, I argue that the novelty of the affirmative action issue—admittedly unique to the late twentieth and early twenty-first centuries—only superficially masks the more established rhetorical moves that were the hallmark of nineteenth-century opposition to policies thought to grant preference or provide "special treatment" to blacks following the Civil War.[9] In Part III, I examine the normative and ideological signaling effects of continued reliance upon these themes. Part IV argues that sustained, meaningful dialogue is essential to the task of achieving continued racial progress, and offers concrete insight on how public conversation on race preferences ought to proceed in the wake of these revelations. Part V concludes.

Before proceeding, a word about the nature of this project is in order. This Article attempts to develop transhistorical insights into both the structure of arguments against racial progress and the underlying values and interests such arguments advance and protect. My approach is grounded in the belief that we reveal something about ourselves by the words, symbols, and ideas we choose to convey an argument. In some instances, the style and presentation of an argument can reveal a second, deeper argument, the content of which can, on occasion, tell us a great deal about what is truly at stake in the rhetorical contest. But one must be careful not to read too deeply into these arguments. Debating the "race problem" is a longstanding and quintessentially American pastime, and "[w]hen American life is most American it is apt to be most theatrical."[10] The drama of the struggle for racial justice has played out famously in the rhetoric of both proponents and opponents of racial justice, and one must be ever mindful that the instrumental quality of race rhetoric may on occasion distort, obscure, or mask the true beliefs of the speaker.

These twin concerns place some important limits on the normative implications that can be drawn from the descriptive accounts of race rhetoric. To be clear, this project is neither a crusade to identify unreconstructed racists, nor an attempt to ascribe racist motivations to all individuals who oppose race preferences. Rather, my purpose is to deepen the racial conversation in this country by drawing attention to the *manner*

9. Here, I do not mean to suggest that it is impossible to oppose affirmative action without relying upon racist heritage. Rather, as I argue later in the Article, elite legal thinkers continue to rely upon a body of rhetoric powerfully connected with the support and maintenance of nineteenth-century racial subordination. It is this demonstrable link between rhetoric and the prevailing ideology of racial subordination that triggers the skepticism and distrust that plagues contemporary conversation on race matters. In Part IV, I propose a framework to push racial dialogue beyond this critical impasse.

10. RALPH ELLISON, SHADOW AND ACT 54 (1964).

in which opposition to race preferences is articulated, and its effects upon public conversation. Understanding the effects of this pedigreed rhetoric is a crucial first step to providing a foundation for renewed dialogue on race preferences, and deepening public discourse on race matters more generally.

II. THE PEDIGREE OF CONTEMPORARY RHETORIC OPPOSING RACE PREFERENCES

Although the struggle for racial justice is perhaps best understood as a struggle for basic dignity, respect, and inclusion in society, the various battlegrounds for progress have shifted noticeably over time. In the wake of the Civil War and ratification of the Thirteenth Amendment, legal and political elites were faced with the daunting task of delineating a path of transition for blacks from slavery to freedom. Although it was clear that blacks would no longer be enslaved, the status that blacks would assume was far less certain. For the remainder of the nineteenth and much of the early twentieth century, the struggle for racial progress centered on defining the status of the Negro as an American citizen, securing the full range of political rights accorded to all citizens, and demarcating a pathway to social equality for blacks—each step undertaken in the face of deep and sustained white resistance. Opposition to Negro advancement took many forms during this period. Opposition among intellectual elites, grounded largely in assumptions of biological inferiority of blacks, fueled lowbrow sentiments of racial animus and expanded the scholarly appeal of the burgeoning Eugenics movement.[11] Opposition among the masses was tragically manifested in widespread lynchings throughout the South and the West,[12] race riots in urban areas,[13] and the extreme elaboration of de jure

11. *See* Robert J. Cynkar, Buck v. Bell: *"Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1427 (1981) (explaining that the study of Eugenics and its use of the Binet-Simon tests confirmed what many people at the time had guessed for years: blacks were inferior). For a discussion of historical antecedents to the eugenics movement, see WILLIAM STANTON, THE LEOPARD'S SPOTS: SCIENTIFIC ATTITUDES TOWARD RACE IN AMERICA, 1815–59, at 166–68 (1960).

12. For a discussion of the tragic practice of Negro lynching in early American history, see *infra* notes 220–22 and accompanying text.

13. *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 30 (1993) (noting that race riots occurred in New York, New York, in 1900; "Evansville, Indiana, in 1903; Springfield, Illinois, in 1908; East St. Louis, Illinois, in 1917;" and Chicago, Illinois, in 1919). For an interesting discussion of the tragic Tulsa Race Riot of 1921, see ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921, RACE REPARATIONS, AND RECONCILIATION (2002).

segregation throughout the nation.[14] Structural manifestations of anti-Negro sentiment in the middle to late twentieth century—de jure and de facto segregation, fear of equal citizenship, and wholesale rejection of political equality—were likewise sustained by claims of biological inferiority as well as deep-seated belief in the presumptive cultural inferiority of blacks.[15]

Today, we live in a relatively enlightened period in which de jure segregation no longer exists and explicit claims of inherent racial inferiority are unacceptable in public racial discourse.[16] We generally

14. For a discussion of the explosion in segregation laws across the country following the Court's decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896), see THE ORIGINS OF SEGREGATION (Joel Williamson ed., 1968); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 97–109 (3d rev. ed. 1974) (noting that the spread of Jim Crow laws both before and after *Plessy* had the effect of "constantly pushing the Negro farther down"); C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH 1877–1913, at 211–12 (Wendell Holmes Stephenson & E. Merton Coulter eds., 1971) ("It took a lot of ritual and Jim Crow to bolster the creed of white supremacy in the bosom of a white man working for a black man's wages."). *See also* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 57 (2001) (noting that "in the wake of *Plessy*, legally mandated race-based segregation had suffused the social and political fabric of many states, especially in the South"). *But see* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 48 (2003) (concluding that "[t]he spread of segregation to new social contexts is also more plausibly attributable to factors other than *Plessy*" and noting that "white southerners generally codified their racial preferences first and tested judicial receptivity later").

15. *See* Herbert Hovenkamp, *Social Science and Segregation Before* Brown, 1985 DUKE L.J. 624, 651–56 (1985) (exploring the scientific and social scientific racial inferiority theories of the late nineteenth and early twentieth centuries that would create anxieties regarding racial mixing and prompt the passage of strict segregation legislation).

16. There are some exceptions, however. Richard Herrnstein and Charles Murray's infamous *Bell Curve* resurrected and redeployed late nineteenth and early twentieth-century claims of Negro genetic inferiority. *See* RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE 470 (1994). A handful of cultural critics of color—linguist John McWhorter, public policy analysts Dinesh D'Souza and Shelby Steele, entertainer Bill Cosby, and economist Thomas Sowell, to name a few—have advanced the notion that blacks possess an inferior cultural sensibility that largely explains persistent racial disparities in health, wealth, and society. *See* JOHN H. MCWHORTER, LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA (2000); DINESH D'SOUZA, THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY 10, 525–26 (1995); SHELBY STEELE, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA (1990); Colbert I. King, *Fix It, Brother*, WASH. POST, May 22, 2004, at A27 (describing comments made by Bill Cosby at a May 2004 ceremony that paid tribute to the *Brown v. Board of Education* decision in which Cosby chastised poor black people, or some of them, as "knuckleheads" who mangle the English language); *Cosby Has More Harsh Words About Black Community*, ORLANDO SENTINEL, July 2, 2004, at A6 (noting that Cosby told a room of activists that too many black men are beating their wives while their children run around not knowing how to read or write); Thomas Sowell, *Crippled by Their Culture*, WALL ST. J., Apr. 26, 2005, at A15 (arguing that the ills of poor blacks are, and always have been, caused by an inferior culture absorbed from southern whites, and observing that "[t]oday the last remnants of that culture can still be found in the worst black ghettos, whether in the North or the South, for the ghettos of the North were settled by blacks from the South," and suggesting that "[t]he counterproductive and self-destructive culture of black rednecks in today's ghettos is regarded by many as the only 'authentic' black culture—and for that reason, something not to be tampered with"). *See*

disavow the crass and racist practices that defined race relations well into the twentieth century and mutually acknowledge a collective sense of shame whenever we reflect upon this tragic history.

Despite this progress, most commentators agree that modern race relations remain highly contentious. Historically contentious issues of citizenship, voting, and access to public accommodations have been supplanted by the equally contentious issues of how to best respond to the vestiges of the old racist regime: racial disparities in health, wealth, and society; the emergence of "new racism"—including, but not limited to, the widespread acceptance of destructive stereotypes;[17] the disabling consequences of seemingly innocuous subtle forms of racial bias—not full blown racist acts, but more or less acts of racial carelessness;[18] and the unexamined acceptance of so-called societal discrimination.[19]

Perhaps the single most contentious issue in modern race relations, however, concerns the propriety of racial preferences in education and employment. The debate over race preference figures prominently in

generally THOMAS SOWELL, BLACK REDNECKS AND WHITE LIBERALS (2005) (discussing cultural and racial issues).

17. One particularly pernicious effect of pervasive racial stereotypes is the phenomenon of "stereotype threat" identified by psychologist Claude Steele. Steele's research demonstrates that stereotypes are self-confirming in that they can be deployed in social interaction to influence and shape outcomes consistent with the stereotype. According to Steele, stereotype threat may explain racial disparities in performance on standardized tests:

> African-American students know that any faltering could cause them to be seen through the lens of a negative racial stereotype. Those whose self-regard is predicated on high achievement—usually the stronger, more confident students—may feel this pressure so greatly that it disrupts and undermines their test performance.

Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Test Performance of Academically Successful African Americans*, *in* THE BLACK-WHITE TEST SCORE GAP 402 (Christopher Jencks & Meredith Phillips eds., 1998). *See also* Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613, 620–24 (1997); Claude M. Steele, *Thin Ice: "Stereotype Threat" and Black College Students*, ATLANTIC MONTHLY, Aug. 1999, at 44.

18. *See* Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1565 (1989) (describing microaggressions as "subtle, stunning, often automatic, and non-verbal exchanges which are 'put downs' of blacks by offenders" that can be viewed "as 'incessant and cumulative' assaults on black self-esteem"). *See also* ROY L. BROOKS, INTEGRATION OR SEPARATION? A STRATEGY FOR RACIAL EQUALITY 109 (1996) (describing dignity harms as "macrosystemic" and "ubiquitous and permanent because they result from racialized ways of feeling, thinking, and behaving toward African Americans (and other minorities) that emanate from the American culture at large").

19. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505–06 (1989) (plurality opinion) (rejecting "societal discrimination" as a justification for affirmative action); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274–75 (1986) (same); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307–08 (1978) (plurality opinion) (expressing deep skepticism that affirmative action may be used to address "societal discrimination"). For a fuller discussion of the evolution of new racism in the post-civil rights era, see EDUARDO BONILLA-SILVA, WHITE SUPREMACY AND RACISM IN THE POST-CIVIL RIGHTS ERA 89–136 (2001).

contemporary race relations precisely because it touches on all of the contested racial battlegrounds of the past. A race preference, at its core, is a remedial materialist response to concerns about wealth and income inequality. Race preferences in an employment setting provide access to income producing jobs. Race preferences in education provide access to educational opportunities that have historically served a gatekeeping function to professional success. Race preferences also have a socio-cultural dimension. A policy of race preferences purports to deepen our understanding and approach to difference. Race preferences also possess a political dimension, signaling inclusion in society, wealth, and nation building. Finally, race preferences serve a symbolic moral purpose, offering a collective expression of public atonement for racial injuries both past and present.

Despite the inherent dynamism of American race relations, rhetorical forms opposing racial progress have proven remarkably static. From the mid-nineteenth century onward, legal rhetoric opposing race preferences—be it opposition to full Negro citizenship, support for segregation, or opposition to affirmative action policy—has trafficked in four principal themes: (1) innocence, (2) merit, (3) stigma, and (4) domestic tranquility.[20] In this Part, I present and analyze each of the aforementioned rhetorical themes in generic form, then offer examples of how these themes are expressed by modern legal actors in disputes involving race preferences. Next, I locate the pedigree of the rhetorical theme in nineteenth-century legal discourse and compare the modern expressions with those of historical actors in legal disputes involving a host of post-Civil War reforms designed to secure and promote racial justice for historically free and newly emancipated blacks.

Although in most instances, the family resemblance is quite striking, it is worth noting that the pedigree is not always so obviously present in the modern incarnation. Nearly a century of thought and social development separate today's rhetoric from its pedigree, and few, if any, ideas survive the generations in absolutely pristine form. Moreover, the legal disputes from which the examples are drawn share neither a single factual context nor a distinct procedural posture—both of which work to shape not only the presentation of the argument, but also reader perception of the

20. To be sure, opponents have relied upon other thematic material when declaring opposition to race preference policy—federalism, separation of powers, and colorblindness, for example. These themes, however, are more or less reified interpretations of constitutional text or doctrine. By contrast, the dominant rhetorical themes discussed in these pages represent grand, cultural precepts exogenous to any specific text or doctrine.

argument. Nevertheless, as a descriptive matter, the similarities between these ancient forms and their modern iterations prove too great to simply ignore. How we interpret this family resemblance and choose to respond is the subject of Parts III and IV.

A. INNOCENCE

The concept of innocence is deeply rooted in American culture and is closely linked to primordial intuitions concerning religion, good, evil, and sex. One who proclaims innocence in the classic sense is declaring one's "'freedom from guilt or sin' or, in the sexual sense, 'chastity.'"[21] In American society, innocence is often linked with victim status, and the image of the innocent victim is often accompanied by what Thomas Ross describes as "the symbol of the defiled taker."[22] Thus, innocence is traditionally viewed as a peculiarly precarious state. Those who claim innocence are understood as suffering in perpetual jeopardy as they stave off the threat of their innocence being lost or spoiled.

The rhetoric of innocence proves particularly useful for opponents because it projects both the image of innocent victims and a class of tormentors who victimize them. When innocence rhetoric is mapped onto the prototype of racial discrimination, racial minorities are usually understood as victims of discrimination rather than perpetrators of such acts.[23] However, when innocence rhetoric is deployed by racial conservatives who view racially progressive measures as a form of "reverse discrimination," the paradigm is inverted, thereby enabling whites to claim the status of innocent victim. This move to invert the paradigm is crucial

21. Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 308 (1990).

22. *Id.* at 310.

23. *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193, 229 (1979) ("To be sure, the reality of employment discrimination against Negroes provided the primary impetus for passage of Title VII"); Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 71 (1872) (observing that "the one pervading purpose" of the reconstruction amendments was "[t]he freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him"). Indeed, some commentators have argued that the extended legacy of black victimization may serve as a justification for preferred treatment. *See, e.g.*, Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 900 (1995) ("[N]o other group compares to African Americans in the confluence of the characteristics that argue for inclusion in affirmative action programs."); Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1071–73 (arguing that the unique experience of blacks justifies the use of racial quotas for their benefit).

because it conjures up the image of minorities as perpetrators of racial harm.[24]

The claim of white innocence is animated by two key assumptions about the nature of racism. First, proponents of racial innocence assume that that racism is not a cultural or structural phenomenon but a product of individual racists. The rhetoric of racial innocence rests on the idea of the individual, intentional discriminator. According to this view, racism is the result of racist acts perpetrated by rogue individuals acting outside of society's rules or conventions. The focus is on the "perpetrator" as opposed to the victim of racism.[25] The objective of antidiscrimination law, then, is to prevent the replication of racist acts by punishing the individual perpetrators of those acts.

Conversely, individuals who do not perpetrate racist acts are viewed as presumptively innocent bystanders. They exist within a culture of racial subordination, witness racist acts, and arguably derive benefits from the hierarchical arrangements maintained by such acts. However, staunch adherence to the belief that racism results from the intentional transgressions of individuals allows proponents of this rhetorical strategy to maintain a general claim of innocence for the vast majority of whites.

Although the rhetoric of racial innocence is steeped in the idea of individual blame, its proponents curiously ignore the extended history of systematic state-sanctioned racial oppression and embrace a narrative of racial discrimination characterized by free will and moral responsibility. Often, those who advance the rhetoric of racial innocence categorically reject the possibility that racism can become naturalized, marbled into institutions and practices—that racial subordination can be instantiated in "procedures that . . . become conventional, part of the bureaucratic system of rules and regulations."[26] The eschewal of a structural account of racism, which does not rely upon a finding of prejudice as motivational force for

24. *See* Ross, *supra* note 21, at 310.

25. *See* Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052 (1978) (criticizing prevailing equal protection doctrine for focusing exclusively on the subjective intent of the individual actor, rather than on the nature of the injury to the victim). *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1509 (2d ed. 1988) (observing that the search for intent under the Equal Protection Clause is premised on the "search for a bigoted decision-maker"); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (criticizing the limitation of equal protection doctrine to cases where there is proof of subjective discriminatory intent and noting that "a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation").

26. ROBERT BLAUNER, RACIAL OPPRESSION IN AMERICA 10 (1972).

racial subordination, affords racial "innocents" the comfort of individual blamelessness.[27] Thus, innocence rhetoric enables whites—individually or collectively—to argue that they too have been "victimized" by racist acts insofar as they are asked to bear some of the costs of racial progress.

The second and related assumption underlying the rhetoric of racial innocence is that racial progress for minorities only comes at the expense of whites—a zero-sum understanding of the nature of racial progress. According to this view, racial progress for blacks cannot be obtained without some concomitant losses sustained by whites. In the affirmative action context, the idea of racial progress as zero-sum routinely takes the form of complaints levied by disgruntled students not admitted to public universities that "unqualified black and brown students are taking the place of more qualified white applicants."[28] The zero-sum conception of racial

27. In this sense, innocence rhetoric reflects the prevailing view in American criminal law that "state of mind" matters, and that intentional acts warrant greater punishment than unintentional ones. *See* MODEL PENAL CODE § 2.02 (1962) (utilizing five discrete levels of culpability—purpose, knowledge, recklessness, negligence, and strict liability); Robert Batey, *Judicial Exploitation of Mens Rea Confusion, at Common Law and Under the Model Penal Code*, 18 GA. ST. U. L. REV. 341, 341 (2001) ("A majority of the states and the federal system continue to apply the framework developed by the common law, allowing courts to construe crimes as requiring specific intent, general intent, strict liability, or one of the seemingly infinite shades of meaning along the continuum upon which these three concepts reside."). In the race discrimination context, this belief is embodied in the invidious intent requirement. *See* Washington v. Davis, 426 U.S. 229 (1976). But as Barbara Flagg points out, a principle failing of this requirement is that it allows unconscious race discrimination to flourish. *See* Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 1017 (1993) ("Uncovering, naming, and counteracting the unrecognized whiteness of a white-dominated government . . . is a first, crucial step in the realignment of social power that dismantling white supremacy entails."). Thus, a number of scholars have advanced a model of antidiscrimination law that does not rely upon proof of invidious intent. *See* Jessie Allen, *A Possible Remedy for Unthinking Discrimination*, 61 BROOK. L. REV. 1299, 1330–43 (1995) (advocating an "inferred intent" standard for cases of unconscious discrimination); Jane Byeff Korn, *Institutional Sexism: Responsibility and Intent*, 4 TEX. J. WOMEN & L. 83, 122 (1995) (stating that "the difficulty in determining group intent supports the argument that the intent requirement should be eliminated"); Lawrence, *supra* note 25, at 355–56 (arguing for replacing the intent requirement with a "cultural meaning test"); Michael D. Moberly, *Reconsidering the Discriminatory Motive Requirement in ADEA Disparate Treatment Cases*, 24 N.M. L. REV. 89 (1994) (addressing the merits and ramifications of a strict liability standard in ADEA disparate treatment cases); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1135–77 (1999) (considering at length the possibility of addressing unconscious discrimination under an accident law liability regime, but ultimately rejecting it as too inefficient).

28. LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 267–68 (2002) (recounting claims from disgruntled students not admitted to public universities that "unqualified black and brown students are taking the place of more qualified white applicants"). *See also* D'SOUZA, *supra* note 16, at 10 (quoting an anonymous flier at the University of California at Berkeley: "When I see you in class it bugs the hell out of me because you're taking the seat of someone qualified."); TERRY EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE 196 (1996) ("Whoever would have been admitted to a school, or won the

progress continues to resonate in the affirmative action context despite arguments that the benefits of diversity accrue to everyone and in the face of evidence that very few whites have their educational opportunities negatively impaired by such policies.[29] Historic opposition to integration of public schools by Herbert Wechsler and others was similarly rooted in the idea that the benefits of integration for blacks could only be obtained by running roughshod over the associational rights of whites.[30] Indeed, the prevailing justification for scapegoating black criminality rests on the assumption that racial progress is rarely, if ever, a "win-win" situation. Current Fourth Amendment doctrine works to protect the interests of the white majority, who are largely indifferent to racial harms caused by aggressive search and seizure practices, and to justify disparate law enforcement policy. As David Cole explains, it is easy for "conservatives living in the comfort of more privileged neighborhoods to argue that the reduction in crime outweighs the intrusions on citizens' constitutional rights [because] their rights are not threatened . . . . [And they] do not have to bear the costs of their positions, so long as they do not live in the inner city."[31] In each instance, the zero-sum assumption reinforces the erroneous

promotion or the contract, but for race, has suffered discrimination—and there is no good discrimination."); HERRNSTEIN & MURRAY, *supra* note 16, at 470 (concluding that "some number of white students are denied places at universities they could otherwise have won, because of affirmative action"); Jacques Steinberg, *Looming Decision; Affirmative Action Faces a New Wave of Anger*, N.Y. TIMES, Jan. 5, 2003, § 4, at 3 (reporting that opposition to affirmative action, "in the form of white applicants . . . who argue that their rightful places at the top schools are being given to black and Hispanic students of lesser ability, has been gaining momentum once again").

29. *See* Goodwin Lui, *The Causation Fallacy:* Bakke *and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045 (2002) (arguing that far fewer whites are hurt by racial affirmative action than whites often think, that displaced whites are often admitted to other schools of similar prestige, and that those voicing complaints of having been displaced, including Barbara Grutter, are often simply inadmissible, regardless of whether the school employs an affirmative action policy or not).

30. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34–35 (1959) (arguing that desegregation remedies for blacks necessarily conflict with associational rights of whites). *See also* Nathan Glazer, *Is Busing Necessary?*, 53 COMMENT. 39, 45 (Mar. 1972) (noting that busing desegregation remedies required white children and nonblack children to be "conscripted to create an environment . . . [believed to] provide equality of educational opportunity for black children" and wondering whether "'equal protection of laws' was once again being violated, this time from the other side"); Jack Greenberg, Brown v. Board of Education*: An Axe in the Frozen Sea of Racism*, 48 ST. LOUIS U. L.J. 869, 885–86 (2004) (observing the perceived tradeoff consequences of racial integration in public schools); Charles J. Ogletree, Jr., *Reflections on the First-Half Century of* Brown v. Board of Education*—Part I*, 28 MAY CHAMPION 6, 9 (2004) (recounting prevailing perceptions among whites that racial integration in public schools would "destroy their way of life").

31. DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 45–6 (1999). *See also* STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE 285 (1997) ("If the African-American crime rate suddenly dropped to the current level of the white crime rate, we would eliminate a major force that is driving blacks and whites apart and is

notion that racial progress for minorities of any sort is presumptively a windfall sourced from the unjust suffering of whites.

Innocence rhetoric is actually comprised of two related strands—*individual* white innocence and *collective* white innocence. The strand of innocence rhetoric deployed is dependent upon the posture and particular factual circumstances of the case. *Individual* white innocence figures most prominently in cases in which the preference or special treatment is directed at a limited set of targeted beneficiaries and the brunt of such policy is borne by a limited set of readily identifiable whites. In these cases, the argument advanced is that the burdened individuals are individually innocent of any racial wrongdoing and should not be individually "penalized" for racial transgressions committed by others. *Collective* white innocence, by contrast, is typically deployed to stymie broadly conceptualized race preference policies that purport to provide group-based relief in response to a perceived injustice sustained by all members of the group. In these cases, opponents argue that such measures burden innocent whites as a collective because they brand all whites with the unproven charge of racial discrimination. Although the two strands of innocence rhetoric are present in both nineteenth-century and modern race cases, it is the more focused claim of individual white innocence that has proven most resilient in modern legal discourse.

1. Racial Innocence Rhetoric in Modern Legal Discourse

City of Richmond v. J.A. Croson Co.[32] provides a particularly useful point of departure to gain an appreciation of the modern expression of individual white innocence rhetoric. As an initial matter, *Croson* represents the first instance in which a majority of the Court agreed to subject race-conscious affirmative action programs to the highest level of scrutiny, thereby equating efforts to achieve racial integration in the labor market with white racial discrimination against racial minorities.[33] *Croson* also carries with it the dubious distinction of being the first case in which the

destroying the fabric of black urban life."); Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 L. & CONTEMP. PROBS. 221, 277 (2003) ("Whites, feeling their lives and property threatened, 'seek to eliminate that threat as expeditiously as possible,' thus favoring harsher criminal sentences and scapegoating black criminality as emblematic of the breakdown in social order." (quoting CAROL M. SWAIN, THE NEW WHITE NATIONALISM IN AMERICA: ITS CHALLENGE TO INTEGRATION 129 (2002))).

32. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (plurality opinion).

33. Prior to *Croson*, the Court had been sharply divided over what standard of review it ought to use to examine the constitutionality of affirmative action programs. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448 (1980).

Court struck down an affirmative action program and rejected the prevailing view at that time that affirmative action was a necessary tool to remedy the effects of past racial discrimination against African Americans. An essential feature of this shift in sensibility was the invocation of innocence rhetoric by multiple Justices, which had the effect of enshrining this particular rhetorical form as a credible argument to contest affirmative action policy in the future.

Indeed, *Croson* provides perhaps the most thoroughgoing modern articulation of presumptive white racial innocence ever advanced by the Court. Interestingly, arguments of racial innocence were not limited to the "conservative" Justices. Although Justice Scalia offered the bluntest articulation of racial innocence rhetoric, Justice Stevens availed himself of the same rhetorical theme. Thus, the collection of opinions in *Croson* offers a none-too-subtle reminder that opposition to race preference policy does not always map neatly onto the prevailing liberal/conservative ideological spectrum.

In *Croson*, a plurality of the Court declared unconstitutional a race preference program implemented by the Richmond, Virginia city council to assist minority-owned firms in obtaining lucrative contracts for city construction projects.[34] The Richmond plan required prime contractors to subcontract at least thirty percent of the dollar amount of each contract to one or more "Minority Business Enterprises."[35] In striking down the program, various Justices expressed grave concern over the possibility that the program unjustifiably burdened innocent whites, both individually and collectively. This argument appears most explicitly in Justice Scalia's concurring opinion. Scalia rejected the idea that a race preference program can serve benign purposes:

> Apart from their societal effects, however, which are "in the aggregate disastrous," it is important not to lose sight of the fact that even "benign" racial quotas have individual victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race.[36]

Justice Stevens shared Scalia's concern that race preferences might stigmatize presumptively innocent whites in the aggregate, but was especially consumed with the notion that the Richmond Plan stigmatized

34. *Croson*, 488 U.S. at 469–70.

35. *Id*. at 477.

36. *Id*. at 527 (Scalia, J., concurring) (quoting ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 134 (1975)).

the limited class of white Richmond contractors with the "unproven" charge of past racial discrimination:

> [I]t is only habit, rather than evidence or analysis, that makes it seem acceptable to assume that every white contractor covered by the ordinance shares in that guilt. . . . Imposing a common burden on such a disparate class merely because each member of the class is of the same race stems from reliance on a stereotype rather than fact or reason.[37]

For Stevens, the Richmond Plan was especially problematic because it purported to punish private citizens for past discrimination:

> The constitutional prohibitions against the enactment of *ex post facto* laws and bills of attainder reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens. It is the judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed.[38]

Stevens's invocation of the "separation of powers" argument highlighted his deep concerns about racial innocence. The central issue he identified was to what extent were the white contractors innocent of claims of past racial discrimination. In his view, the question of racial innocence was of primary importance and therefore should be analyzed with the utmost care and attention not only to the interests of the historic victim of racial injustice, but also to the accused perpetrator of racially harmful acts as well.

Stevens's position is not altogether removed from that of Justice Rehnquist in *United Steelworkers v. Weber*.[39] In *Weber*, the Court reviewed a challenge to a voluntary affirmative action program that mandated a one-for-one quota for minority workers who wished to participate in an on-the-job training program. The defendant, Kaiser Aluminum and Chemical Co., had developed the plan to eliminate racial imbalances in Kaiser's then almost exclusively white craftwork forces by reserving half of the openings in in-plant craft-training programs for black employees until black representation in skilled jobs mirrored black representation in Kaiser's overall labor force.[40] Dissenting from the majority's endorsement of this program, Justice Rehnquist rushed to the defense of innocent whites who, in his view, were severely burdened by the

37. *Id*. at 516 (Stevens, J., concurring).
38. *Id*. at 513–14.
39. United Steelworkers v. Weber, 443 U.S. 193 (1979).
40. *Id*. at 199–200.

voluntary affirmative action policy undertaken by Kaiser and the Steelworkers:

> Now we are told [by the majority] that the legislative history of Title VII shows that employers are free to discriminate on the basis of race: an employer may, in the Court's words, "trammel the interests of the white employees" in favor of black employees in order to eliminate "racial imbalance." . . . To be sure, the reality of employment discrimination against Negroes provided the primary impetus for passage of Title VII. But this fact by no means supports the proposition that Congress intended to leave employers free to discriminate against white persons.[41]

A similar argument was advanced by Justice Stewart in *Fullilove v. Klutznick*,[42] a predecessor case to *Croson* in which the Court upheld a Public Works program that required at least ten percent of federal funds granted for local public works projects to be used by state and local grant recipients to obtain services or supplies from minority-owned businesses. In defense of innocent white victims, Stewart chastised the Court for upholding a statute that granted preferences to "citizens who are 'Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts'" in the name of promoting the public good, when that same rationale had been used to justify the segregation of railroad cars in *Plessy v. Ferguson*.[43]

For Stewart, equal protection ensured that government may never act to the detriment of a person solely because of that person's race, and the rule is not different when persons injured are not members of a minority. Moreover, Stewart believed that the benefits of equal protection are a personal right. From the point of view of an injured person—and here, the injured are a limited set of white business owners seeking public works contracts—it does not matter whether the distinction is purportedly for the promotion of the public good or otherwise.[44] Thus, Stewart lamented that the Court's decision in *Fullilove* was "wrong for the same reason that *Plessy v. Ferguson* was wrong."[45]

Justice O'Connor similarly relied upon innocence rhetoric in her majority opinion in *Croson.* Indeed, O'Connor's concern about the threat to innocent victims of the Richmond Plan provides the most compelling explanation for her insistence that discriminatory acts be identified with particularity:

41. *Id.* at 221, 229 (Rehnquist, J., dissenting).
42. Fullilove v. Klutnick, 448 U.S. 448 (1980).
43. *Id.* at 523 (Stewart, J., dissenting). *See* Plessy v. Ferguson, 163 U.S. 537, 550 (1896).
44. *Id.* at 526.
45. *Id.* at 523.

> While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, *with some specificity* before they may use race-conscious relief. . . . The "evidence" relied upon by the dissent, the history of school desegregation in Richmond and numerous congressional reports, does little to define the scope of any injury to minority contractors in Richmond or the necessary remedy. The factors relied upon by the dissent could justify a preference of any size or duration.[46]

The problem, according to O'Connor, was that the remedy proved too broad and had "no logical stopping point."[47] As O'Connor explained, "a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy."[48] Interestingly, O'Connor sought to buttress her view that only individual racist acts are remediable by grounding her position on the principle of colorblindness. According to O'Connor, if the Court accepted past societal discrimination as a basis for remedial action, then "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs."[49]

O'Connor's skepticism that any race preference could serve a benign purpose would gain full voice in *Metro Broadcasting, Inc. v. FCC*.[50] In *Metro Broadcasting*, the Court upheld as constitutional a program that gave preference to minority-owned firms in competitive bidding for new communications licenses and provided for "distress sales" of a limited category of existing radio and television stations to minority controlled firms. Throughout the case, the FCC maintained that, although the program took race into account, the use of race was benign and hence did not run

46. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 504–05 (1989) (plurality opinion) (emphasis added).

47. *Id*. at 498 (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275 (1986)). Justice O'Connor would return to this argument over a decade later in *Grutter v. Bollinger*, 539 U.S. 306 (2003), arguing that race preference in law school admissions may be appropriate in 2003, but should prove unnecessary twenty-five years thereafter.

48. *Croson*, 488 U.S. at 498 (citing *Wygant* 476 U.S. at 275).

49. *Id*. at 505–06. Note that Justice O'Connor's invocation of the principle of colorblindness works to deflect the criticism that she is engaging in policymaking while at the same time suggests that this is precisely what proponents of race preferences are undertaking.

50. Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990), *overruled by* Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).

afoul of the general prohibition on the use of race in governmental decisionmaking. Justice O'Connor forcefully rejected the characterization of the FCC's program as benign:

> The Court's reliance on "benign racial classifications" is particularly troubling. "Benign racial classification" is a contradiction in terms. Governmental distinctions among citizens based on race or ethnicity, even in the rare circumstances permitted by our cases, exact costs and carry with them substantial dangers. To the person denied an opportunity or right based on race, the classification is hardly benign. The right to equal protection of the laws is a personal right, securing to *each* individual an immunity from treatment predicated simply on membership in a particular racial or ethnic group.[51]

For O'Connor, colorblindness was a moral principle, whereas the idea of a benign race distinction merely reflected political whim:

> The Court's emphasis on 'benign racial classifications' suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. History should teach greater humility. Untethered to narrowly confined remedial notions, 'benign' carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable.[52]

Individual white innocence rhetoric has enjoyed similar appeal among elite legal actors in the education setting. Consider Judge Daniel Boggs's opinion in *Grutter v. Bollinger*.[53] In *Grutter*, Judge Boggs objected to the University of Michigan Law School's policy of providing a limited race preference in admissions decisions on the ground that it unfairly penalized innocent white candidates for admission:

> As I put it to counsel for the Law School in oral argument, if Heman Sweatt, the plaintiff in the famous case *Sweatt v. Painter*, 339 U.S. 629 (1950), had been able to ask the Dean of the University of Texas Law School, "Dean would you let me in if I were white?," the dean, if he were honest, would surely have said "Yes." I then asked counsel, "If Barbara Grutter walked in to whoever the current Dean of the Law School is and said, 'Dean, would you let me in if I were black?' wouldn't he have to honestly say either 'Yes' or 'pretty darn almost certain[ly]'?"[54]

51. *Metro Broad.*, 497 U.S. at 609 (O'Connor, J., dissenting) (citing Shelley v. Kraemer, 334 U.S. 1 (1948)).

52. *Id*. at 609–10.

53. Grutter v. Bollinger, 288 F.3d 732, 775 (6th Cir. 2002) (Boggs, J., dissenting).

54. *Id.*

For Boggs, Barbara Grutter is no less a victim of racial injustice than Heman Sweatt. Notably absent from Boggs's account is a serious comparison of the hostilities that provide the relevant context in which the purported racial discrimination took place. For instance, twelve years prior to *Sweatt*, the Supreme Court declared that Lloyd Gaines had been unjustifiably excluded from the University of Missouri Law School on account of his race. Unlike Heman Sweatt, who eventually attended classes at Texas Law School, Gaines suspiciously disappeared prior to oral argument of his case and was never heard from again. Most commentators agree that he was lynched to insure that the Missouri Law School would remain racially segregated.[55] The climate of racial hostility in which Heman Sweatt lived and Lloyd Gaines died helps us appreciate the difference between race distinctions rooted in white supremacy and race distinctions that serve some less malign purpose.

Nevertheless, Boggs suggested that proponents of modern race preferences indulge in the same well of hostility that motivated white supremacists of earlier generations. As Boggs explained:

> The struggle for civil rights in America, going back well over a century, can certainly be characterized as a righteous war. . . . In this case, the "spoils" [of war] that are involved are the individual rights to equal treatment of real people like Barbara Grutter. If, in the words of Abraham Lincoln, society chooses that "every drop of blood drawn by the lash shall be paid by another," then that bill should be paid by the whole society . . . . Though the war may be righteous, such spoils taken from the Barbara Grutters of our society are not just.[56]

55. Gaines's curious disappearance shortly before oral argument in the case remains a mystery. Missouri historian Richard Kirkendall provided the following explanation:

> The NAACP tried to challenge the politicians' [decision to open a segregated black law school] but failed. Planning to argue before a circuit court that the university was obligated to admit Gaines since Lincoln's not-yet-open law school could not supply opportunities equal to those provided by the well-established school in Columbia, the lawyers discovered that Gaines had disappeared, could not locate him, and had to drop their plans. His disappearance remained a mystery, with some assuming he had been murdered, others convinced he had been bribed. There is evidence that after earning a master's degree in economics at the University of Michigan and working at several lowly jobs, he had grown discouraged and bitter. He may have accepted a bribe and used it to move to another country.

5 RICHARD S. KIRKENDALL, A HISTORY OF MISSOURI 1919 to 1953, at 188 (1986). In light of Gaines's peculiar disappearance, Thurgood Marshall lamented that the "case could not be followed through and ended with the establishment of a Jim Crow law school." Thurgood Marshall, *An Evaluation of Recent Efforts to Achieve Racial Integration in Education Through Resort to the Courts*, 21 J. NEGRO EDUC. 316, 318 (1952), *reprinted in* SUPREME JUSTICE: SPEECHES AND WRITINGS, THURGOOD MARSHALL 45, 47 (J. Clay Smith, Jr. ed., 2003).

56. *Grutter*, 288 F.3d at 809 (quoting Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865)).

In this way, Boggs situates Barbara Grutter as a victim of racial injustice perpetrated at the hands of postmodern racists who simply hide beneath the mantle of diversity:

> Michigan's plan does not seek diversity for education's sake. It seeks racial numbers for the sake of the comfort that those abstract numbers may bring. It does so at the expense of real rights of real people to fair consideration. It is a long road from Heman Sweatt to Barbara Grutter. But they both ended up outside a door that a government's use of racial considerations denied them a fair chance to enter.[57]

Boggs's concession that "it is a long road from Heman Sweatt to Barbara Grutter" implies an appreciation of key differences between these two scenarios. However, he ultimately chose to underplay those differences to serve his greater rhetorical aspiration of characterizing the Grutters of the world as innocent victims of misdirected racial policy.

Although opponents of race preferences rely heavily upon the notion of *individual* white innocence, they have also periodically advanced the idea of *collective* white innocence to undermine progressive racial policy. In *Metro Broadcasting*, Justice Kennedy shared Justice O'Connor's reservations about the harm to innocent victims caused by awarding race preferences in the distribution of broadcast licenses. According to Kennedy, "[t]here is the danger that the 'stereotypical thinking' that prompts policies such as the FCC rules here 'stigmatizes the disadvantaged class with the unproven charge of past racial discrimination.'"[58] "Whether or not such programs can be described as 'remedial,'" continued Kennedy, "the message conveyed is that it is acceptable to harm a member of the group excluded from the benefit or privilege."[59] However, Kennedy viewed the FCC policy as implicating collective white innocence as well. As Kennedy explained:

> If this is to be considered acceptable under the Constitution, there are various possible explanations. One is that the group disadvantaged by the preference should feel no stigma at all, because racial preferences address not the evil of intentional discrimination but the continuing

57. *Id.* at 810. The dissenting Justices in *Grutter* did not address the issue of white innocence directly, in part, because the issue had been framed in terms of diversity—which purportedly benefits all students—and because recent empirical studies suggested that the reduction in the probability of any white student being admitted because of the existence of an affirmative action policy was extremely modest. *See* Lui, *supra* note 29, at 1045 (arguing that far fewer whites are hurt by racial affirmative action than whites often think).

58. Metro Broad., Inc. v. FCC, 497 U.S. 547, 636 (1990), *overruled by* Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).

59. *Id.*

> unconscious use of stereotypes that disadvantage minority groups. But this is not a proposition that the many citizens, who to their knowledge "have never discriminated against anyone on the basis of race," will find easy to accept.[60]

But it is Justice Scalia, in *Adarand Constructors, Inc. v. Peña*,[61] who subscribed most fully to the idea that whites as a collective should be free from bearing the burden of the history of racial wrongdoing. In *Adarand*, the Court struck down a federal program designed to assist minority business enterprises in obtaining highway construction contracts. On the question of remedy, Scalia wrote:

> In my view, government can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction. Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race.[62]

Justice Powell similarly advanced the notion that innocent whites should not be called upon to assist in remedying past discrimination in *Regents of the University of California v. Bakke*,[63] in which the Court struck down a university admissions policy that reserved 16 of the 100 positions for "disadvantaged" minority students, but a plurality upheld the possibility that race might be taken into account in admissions decisionmaking. In rejecting the specific plan advanced by the Medical School, Powell declared:

> Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. . . . [T]here is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making.[64]

Moreover, Powell advanced his belief that remedies should follow only from specific findings of individual racist acts. As Powell explained, "[w]e have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings

60. *Id.* at 636–37 (Kennedy, J., dissenting).
61. Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).
62. *Id.* at 239 (citation omitted) (Scalia, J., concurring).
63. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) (plurality opinion).
64. *Id.* at 298.

of constitutional or statutory violations."[65] Importantly, these remedies must be closely watched to insure that innocent victims are not harmed. "Remedial action," Powell argued, "usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit."[66] Without such findings of constitutional or statutory violations, Powell continued, "it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another."[67]

The problem with the Medical School's program was not one of oversight, however. According to Powell, the crux of the problem was that

> the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.[68]

Like Justice O'Connor, Justice Powell perceived no logical stopping point to a race preference scheme grounded in societal discrimination:

> To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved.[69]

2. The Pedigree of Racial Innocence Rhetoric

Racial innocence rhetoric is plainly an indispensable element of contemporary opposition to race preference policy. Its durability in legal discourse is no doubt a testament to its intuitive appeal. The general theme of innocence may traffic in deep cultural notions of religion and morality, but there is a second, more specific, pedigree of racial innocence rhetoric in legal discourse that might also be profitably explored—one with its roots in the brute racism that defined American society in the late nineteenth and early twentieth century.

65. *Id.* at 307.
66. *Id.* at 308.
67. *Id.* at 308–09.
68. *Id.* at 310.
69. *Id.*

The theme of *individual* white innocence—the dominant expression of modern innocence rhetoric—figured most prominently in nineteenth-century opposition to legal efforts to achieve social equality for blacks. The most infamous expression of this theme appears in *Plessy v. Ferguson*,[70] in which the Court upheld a Louisiana ordinance that mandated segregation in railroad cars. According to the Court, the ordinance did not violate the Fourteenth Amendment because it was a "reasonable regulation" rooted in "established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."[71]

In reconciling the segregation policy with the spirit of the Fourteenth Amendment, Justice Brown explained that the segregation ordinance, though plainly implemented for the comfort of white passengers, should not be construed as hostile or demeaning to blacks. As Brown explained, "Laws permitting, and even requiring, [racial segregation] in places where [whites and blacks] are liable to be brought into contact do not necessarily imply the inferiority of either race to the other."[72] Indeed, Brown dismissed Plessy's argument that segregation stigmatized blacks, and suggested that if racial separation were stigmatizing, it is because blacks choose to experience it that way:

> We consider the underlying fallacy of plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.[73]

Brown's invocation of a self-imposed stigma drew upon the rhetorical theme of innocence in two important ways. First, and most importantly, the notion of a self-imposed stigma insulated white street car operators and passengers from the charge that, by engaging in the customs and habits of racial segregation, they were somehow engaging in racial wrongdoing. Segregation was, in the words of the Court, a "reasonable" race distinction. Members of white society that participated in this practice were, by extension, acting reasonably. Enjoyment of the privilege of racial segregation was construed as a "guilt-free" indulgence to which all whites were presumptively entitled. Invalidation of the ordinance, however, would have unfairly imposed upon the prerogative of whites to enjoy the custom

70. Plessy v. Ferguson, 163 U.S. 537 (1896).
71. *Id.* at 550.
72. *Id.* at 544.
73. *Id.* at 551.

and privilege of racial separation. Implicit in the Court's position is the notion that the integration of railroad cars privileged blacks to the detriment of innocent white passengers. Second, the suggestion that any stigma imposed by segregation was self-imposed allowed Brown to evade the argument that he was guilty of perpetuating notions of white supremacy. In other words, the Justices themselves were innocent of any racial wrongdoing. The racial injury, if sustained at all, was self-inflicted.

This theme of white racial innocence in *Plessy*—that government policy designed to elevate the social status of blacks equal to whites unjustly burdened the private lives of innocent whites—had been subtly advanced two decades earlier by the Court in the *Civil Rights Cases*, which declared unconstitutional provisions of the Civil Rights Act of 1875 that provided, among other things, equal access for blacks to public accommodations.[74] For Justice Bradley, author of the majority opinion, the Act presented an unwarranted intrusion in the private lives of individuals. He conceded that Congress may act to protect blacks from state-sponsored acts of racial subordination, but maintained that individual acts of discrimination by private persons were an entirely different matter:

> [U]ntil some state law has been passed, or some state action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said Amendment . . . can be called into activity . . . . [To allow regulation absent state action] would be to establish a code of municipal law regulative of all the private rights between man and man in society.[75]

According to Bradley, the act of a "mere individual, the owner of the inn, the public conveyance, or place of amusement, refusing the accommodation"[76] was a "private wrong" that did not rise to the level of a constitutional rights deprivation. Where a private right has been infringed, Bradley argued that "redress is to be sought under the laws of the State" first, and through legislation only to the extent that those laws fail to

74. The Civil Rights Cases, 109 U.S. 3 (1883). For a fuller discussion of "An act to protect all citizens in their civil and legal rights," ch. 114, 18 Stat. 335 (1875), better known as the Civil Rights Act of 1875, see ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION 226 (1990); JAMES M. MCPHERSON, THE ABOLITIONIST LEGACY: FROM RECONSTRUCTION TO THE NAACP 16–19 (2d ed. 1995); Alfred Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 COLUM. L. REV. 873, 875 (1966); JOHN HOPE FRANKLIN, *The Enforcement of the Civil Rights Act of 1875*, *in* RACE AND HISTORY: SELECTED ESSAYS, 1938–1988, at 116 (1989). For an analysis of the legislative history leading up to the enactment of the Civil Rights Act of 1875, see WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION 1869–1879, at 186–279 (1979).

75. *Civil Rights Cases*, 109 U.S. at 13.

76. *Id.* at 24.

provide adequate protection.[77] In the meantime, private individuals should remain free to engage in "every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business."[78]

Like Justice Brown in *Plessy*, Justice Bradley, in *The Civil Rights Cases*, situated himself as defender of the innocent white victims against state intrusion in their private affairs. For dissenting Justice Harlan, this claim of innocence rang hollow. In Harlan's view, Bradley himself was guilty of using the rhetoric of innocence to distort the meaning of the protections provided by the Reconstruction Amendments. As Harlan lamented,

> [t]he substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism. 'It is not the words of the law but the internal sense of it that makes the law: the letter of the law is the body; the sense and reason of the law is the soul.'[79]

Bradley, of course, had his own understanding of the "sense and reason" of the Reconstruction Amendments—to abolish the institution of slavery and invest blacks with minimal rights of citizenship. Anything beyond this, according to Bradley, amounted to unwarranted "special" treatment. As Bradley explained:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.[80]

In making the "special favorites" argument, Bradley implicitly suggested that this Act was necessarily an imposition on innocent whites because they presumably were not "special favorites." But as Harlan explained, blacks had been anything but the special favorites of the law:

> It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws . . . . What the nation through Congress, has sought to accomplish in reference to that race, is—what had already been done in every State of the Union for the white race—to secure and

77. *Id.*
78. *Id.* at 24–25.
79. *Id.* at 26 (Harlan, J., dissenting).
80. *Id.* at 25.

> protect the rights belonging to them as freemen and citizens; nothing more . . . . The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens.[81]

In the final analysis, however, it was Bradley's position of white citizens as innocent victims of state policy designed to provide "special treatment" to blacks that ultimately prevailed.

Although nineteenth-century actors relied upon innocence rhetoric when opposing race preference policies of that era, it is important to note a key feature that distinguishes this rhetoric from contemporary deployment of this pedigreed theme. Unlike modern opponents, who draw heavily upon *individual* white innocence rhetoric, nineteenth-century racial opponents relied more heavily upon the notion of *collective* white innocence, in large part because (1) race preferences were historically framed in terms of providing relief to all blacks as opposed to some limited set of black beneficiaries, and (2) the "burden" of such policies was thought to be borne by all members of white society. The earliest expression of white collective innocence appears in the Supreme Court's infamous decision in *Dred Scott v. Sandford*, which has been universally condemned for its audacious assertion that blacks were not citizens of the United States.[82] Chief Justice Roger Taney, the author of the majority opinion, was subsequently vilified and ostracized for orchestrating this most odious event in American legal history.[83] Few, if any, opponents today champion the virtues of Taney's opinion. Indeed, most view Taney's opinion in the *Dred Scott* case as a stain on our national honor.[84]

81. *Id.* at 61.

82. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1856) (declaring that blacks could not be citizens because they were inferior and possessed "no rights which the white man was bound to respect," and that blacks were justifiably reduced to slavery).

83. 5 CARL B. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836–64, at 631 (Paul A. Freund ed., 1974) (concluding that *Dred Scott* "has gone down in history as a major disaster, degrading the Court and the Constitution and precipitating the Civil War"); Michael J. Gerhardt, *The Lives of John Marshall*, 43 WM. & MARY L. REV. 1399, 1408 (2002) (remarking that Chief Justice Taney's reputation never recovered, though he remained on the Court for almost another decade, and quoting Taney's biographer as conceding that Taney "died in virtual public disgrace"); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 48 (1996) (describing the *Dred Scott* case as a one of the "most vilified cases in the Court's history").

84. Of particular concern to both liberals and conservatives was Taney's flagrant abuse of the Court's authority. As Mark Graber explains:

> Taney's claims about black citizenship and slavery in the territories have been criticized for three distinct and inconsistent failings. One line of criticism claims that Dred Scott rests on a mistaken theory of the proper role of judicial institutions in a democratic society. Robert McCloskey, Alexander Bickel, Lino Graglia, Cass Sunstein and other proponents of judicial restraint maintain that the Supreme Court should not have made any authoritative attempt, even one based on the constitution, to resolve the constitutional controversy over the status of slavery in the territories. The other two criticisms claim that Dred Scott rests on a mistaken

Yet it is Taney's compelling use of *collective* white innocence rhetoric to conclude that Negroes were not citizens of the United States that, in some ways, prefigured the way in which future opponents of race preferences would deploy this style of argument. Much of the cultural authority of the *Dred Scott* decision was drawn from the way in which Taney framed the case as one that pitted white society as the innocent holder of citizenship and civility, and Negroes such as Dred Scott as "defiled takers" of the virtues of citizenship and political inclusion. Taney accomplished this task by appealing to the prevailing view of blacks as intellectual and cultural inferiors who posed a serious threat to white civil society. As Taney famously argued, black Americans

> had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.[85]

According to Taney, the Framers viewed blacks as "so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattos were regarded as unnatural and immoral, and punished as crimes."[86] Importantly, Taney pointed out that beliefs in Negro inferiority were "fixed and universal in the civilized portion of the white race [and] regarded as an axiom in morals as well as in politics, which no one thought of disputing."[87]

In this way, Taney situated himself as defender of innocent whites *as a collective* against the corrosive effects produced by the inclusion of blacks in the political community. Taney's rhetorical strategy effectively projected an image of race politics in which gains for blacks could only be had at the expense of whites. Black citizenship threatened to strip innocent whites of their superior status in the racial hierarchy and destroy the prevailing conception of the American national identity. The price of

> theory of constitutional interpretation. Robert Bork, David Currie, Don Fehrenbacher and other historicists condemn the Taney opinion for relying on personal notions of justice instead of on the specific norms set down by the constitutional framers and previous judicial precedents. Thurgood Marshall, Sotirios Barber, Christopher Eisgruber and other aspirationalists, in contrast, condemn the Taney opinion for not tempering the specific policies set out by the constitutional framers and past judicial precedents with more general notions of constitutional and human right.

Mark A. Graber, *Desperately Ducking Slavery:* Dred Scott *and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 276–77 (1997).

85. *Dred Scott*, 60 U.S. (19 How.) at 407.

86. *Id.* at 409.

87. *Id.* at 407.

inclusion of blacks in civil society was, in short, the end of white civilization as they knew it. The decision to deny U.S. citizenship to blacks was not simply an episode of brute racism—it could also be understood on a deeper level as an act of protectionism to safeguard innocent whites from the inherently destructive nature of black inclusion in civil society.

Interestingly, Justice Taney secondarily engaged the rhetoric of individual white innocence—as Justice Brown would later do in *Plessy*[88]—as a means of personally shielding himself from criticism that he was acting as an autonomous decisionmaker. His startling declaration that blacks were not citizens of the United States was plainly rooted in notions of white supremacy. Yet Taney made clear that he was innocent of the charge of racism. For Taney, the issue had already been decided by the Constitution. He was simply the innocent bearer of the volatile message. He was not entirely unlike Judge Ruffin, who declared in *State v. Mann*[89] twenty-five years earlier that a white man could not be criminally charged with assaulting a slave because "[t]he slave, to remain a slave, must be made sensible, that there is no appeal from his master."[90] "The power of the master must be absolute to render the submission of the slave perfect," explained Ruffin.[91] But Ruffin was clear to point out that "[t]his discipline belongs to the state of slavery," and "I most freely confess my sense of the harshness of this proposition; I feel it as deeply as any man can."[92]

In both *Dred Scott* and *State v. Mann*, the judges were able to disavow the racist implications of their decisions. But unlike Judge Ruffin, who rested his decision on the customs and conventions of slave society, Taney accomplishes his feat of disavowal by situating his arguments in the interpretive theory of original intent. As Thomas Ross points out, "the original intent interpretive theory is not unique to the *Dred Scott* case, its use did permit Taney to push away responsibility for his choice."[93] Thus, much of Taney's argument relied upon the interpretation of the Framers' intentions. According to Taney, the Framers were

> [G]reat men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; and they

88. *See supra* notes 70–73 and accompanying text.
89. State v. Mann, 13 N.C. (2 Dev.) 263 (1829).
90. *Id.* at 267.
91. *Id.* at 266.
92. *Id.*
93. Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 11 (1990).

> knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.[94]

By relying upon original intent, Taney accomplished an important task in the maintenance of white racial innocence—he was able to disaggregate individual racist acts (attitudinal racism) from racism that was endemic to the framing of the constitutional order (structural racism). As Ross explains, "his originalism theory permitted him to pretend he was not saying blacks ought not be deemed citizens. He merely was saying that the Constitution, properly interpreted, did not include them."[95] Thus, Taney, innocent of any overtly racist act of his own, could evade responsibility for structural harm produced by the Court's decision in this case.

The themes of collective white innocence would become a staple of opponents of a host of legal reform measures designed to improve upon the dire social, political, and economic plight of newly emancipated blacks. As the benefits and beneficiaries became more crisply defined, so too did the harms and identities of purportedly innocent whites "victimized" by such policies. One of the earliest instances involved Congressional efforts to resist the passage of the Freedmen's Bureau Bill.[96] In a report submitted by the Minority of the Select Committee on Emancipation to accompany the

94. *Dred Scott*, 60 U.S. (19 How.) at 410.

95. Ross, *supra* note 93, at 11.

96. The Bureau of Refugees, Freedmen, and Abandoned Lands, commonly referred to as the Freedmen's Bureau, was established in March 1865 and commenced work shortly thereafter. According to historian John Hope Franklin, the Bureau "aided refugees and freedmen by furnishing supplies and medical services, establishing schools, supervising contracts between freedmen and their employers, and managing confiscated or abandoned lands, leasing and selling some of them to freedmen." JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 306–07 (3d ed. 1967). Most commentators agree that the Bureau's success was modest at best. *See* W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 188, 227–28 (1935) (describing the Bureau's refusal to deliver land to slaves as one of its greatest failings); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 70–71, 258–59 (1988) (discussing the 1865 Freedmen's Bureau Act and the failure of the federal government to fulfill its promise of transferring forty acres of land and a mule to freed African Americans to compensate for past wrongs done to them); Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 525–26 (2001) ("Although the Freedmen's Bureau had 850,000 acres of land under its control in 1865, half of the land was returned to the former white owners by mid-1866.").

Bill to Establish a Bureau of Freedman's Affairs, members expressed outrage at the idea that innocent whites might bear the burden of racial progress for blacks. Members derided the proposed Bureau as "a grand almshouse department, whereby the labor and property of the white population of this country is to be taxed to support the pauper labor of the freedmen and mendicant officials of the country."[97] "Its operations," according to the Report, "cannot be too closely scrutinized."[98] One aspect of the program that was subject to particularly close scrutiny was the setting aside of portions of former plantations for farming by newly emancipated blacks. Members argued that black recipients of Bureau's administered lands enjoyed an unjust windfall at the expense of hard working whites. According to the Report,

> Your committee cannot conceive of any reason why this vast domain [of Southern lands], paid for by the blood of white men, should be set apart for the sole benefit of the freedmen of African descent, to the exclusion of all others, and leased for an unlimited time, thereby preventing its occupation, except by them, at least for a long time to come. It seems to . . . [this] committee incomprehensible, nay extremely unjust.[99]

Here members of the committee invoked the idea of innocence to suggest that blacks did not deserve access to Southern lands, despite having worked those lands as slaves for countless generations. According to the Committee, the disputed acreage was "paid for by the blood of white men," and thus it should remain in deserving white hands. The newly emancipated, by contrast, paid nothing and deserved the same.

President Andrew Johnson's Message to Congress in opposition to the Civil Rights Act of 1866 echoed many of these sentiments. The 1866 Act was designed to bestow full citizenship upon free and newly emancipated blacks and establish civic equality among all American citizens. The Act specifically sought to eliminate the pervasive use of Black Codes, which were enacted following the ratification of the Thirteenth Amendment in order to regulate the free and newly emancipated black population in a manner that perpetuated patterns of subjugation as the slavery regime had done previously.[100]The Act summarily declared that all citizens of the United States:

97. H.R. REP. NO. 2, at 4 (1864).

98. *Id.*

99. *Id.* at 3.

100. As subsequently described by the Supreme Court in the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 70 (1872), "laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value . . . ." Against this backdrop, Congress established the Joint Committee on

> shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.[101]

Under the Act, citizenship was defined with remarkable specificity. To be an American citizen meant that one possesses certain specific rights, such as the right to make and enforce contracts, the right to file lawsuits and participate in lawsuits as parties or witnesses, and the right to inherit, purchase, lease, sell, hold and convey real property. In defining citizenship in this manner, the Act effectively overruled state-sponsored Black Codes. At the same time, the Act's delineation of certain rights as "civil rights" provided the first clear indication that, in the context of race relations, there were tiers of rights at stake. Civil rights at this time were understood in terms of property rights, contract rights, and equal protection of the laws.[102] These rights were distinctive from "political rights," which involved the right to vote, hold public office, and "social rights," which related to access to public accommodations and the like. The bestowal of civil rights in the 1866 Act would be followed by a grant of political rights, with social rights bringing up the rear.[103]

In his veto message, President Johnson made generous use of the innocence rhetoric. According to Johnson, "[t]he Bill in effect proposes a discrimination against large numbers of intelligent, worthy, and patriotic foreigners, and in favor of the negro, to whom, after long years of bondage, the avenues of freedom and intelligence have just now been suddenly opened."[104] Indeed, Johnson perceived a fundamental defect of this act to be that it establishes "for the security of the colored race safeguards which go infinitely beyond any that the General Government has ever provided to

Reconstruction, which grappled with "the question of how the liberties of the black race were to be made secure." 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864–88 PART ONE 117 (Paul A. Freund ed., 1971).

101. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).

102. *Id.*

103. U.S. CONST. amend. XIV (granting citizenship and a basic set of civil rights to all Americans); U.S. CONST. amend XV (confirming the right to vote for all U.S. citizens); Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875) (prohibiting racial discrimination in public accommodations).

104. 8 MESSAGES AND PAPERS OF THE PRESIDENTS 3604 (1914) [hereinafter MESSAGES AND PAPERS].

the white race. *In fact, the distinction of race and color is by the bill made to operate in favor of the colored and against the white race.*"[105]

For Johnson, the elevation of blacks to equal citizens necessarily produced a concomitant loss of status traditionally enjoyed by whites seeking to naturalize. From Johnson's perspective, these would-be white citizens were innocent victims of race preferences in citizenship. But his argument went beyond mere assertion of victim status—Johnson's implication was that, when it came to state beneficence, blacks were also distinctly lacking in merit and thus were comparatively undeserving of such treatment.

B. MERIT

The concept of merit, like the idea of innocence, is deeply rooted in American culture. Indeed, the belief in individual merit and the corresponding denunciation of unearned privilege has been mythologized throughout American literature.[106] The idea of merit permeates nearly every aspect of American life, from club memberships to education to employment.[107] Although we often contest the criteria used to determine

105. *Id.* at 3611 (emphasis added).

106. For examples of this belief in fictional works, see HORATIO ALGER, JR., RAGGED DICK, OR STREET LIFE IN NEW YORK, *reprinted in* RAGGED DICK AND STRUGGLING UPWARD (Penguin 1868); EDNA FERBER, EMMA MCCHESNEY & CO. (1915); F. SCOTT FITZGERALD, THE GREAT GATSBY (1925). For nonfictional works, see ANDREW CARNEGIE, THE EMPIRE OF BUSINESS (1902); BENJAMIN FRANKLIN, AUTOBIOGRAPHY (Modern Library 1950) (1790); BOOKER T. WASHINGTON, UP FROM SLAVERY (1901). For an excellent discussion of the salience of merit and hard work in the American consciousness portrayed through fiction, see AYN RAND, ATLAS SHRUGGED (1957). According to Rand:

> To the glory of mankind, there was, for the first and only time in history, a country of money—and I have no higher, more reverent tribute to pay to America, for this means: a country of reason, justice, freedom, production, achievement. For the first time, man's mind and money were set free, and there were no fortunes-by-conquest, but only fortunes-by-work, and instead of swordsmen and slaves, there appeared the real maker of wealth, the greatest worker, the highest type of human being—the self-made man—the American industrialist.
>
> If you ask me to name the proudest distinction of Americans, I would choose—because it contains all the others—the fact that they were the people who created the phrase "to make money." No other language or nation had ever used these words before; men had always thought of wealth as a static quantity—to be seized, begged, inherited, shared, looted or obtained as a favor. Americans were the first to understand that wealth has to be created. The words "to make money" hold the essence of human morality.

Id. at 414.

107. Epstein, *supra* note 5, at 2053–54 (noting that the original rhetoric in support of the 1964 Civil Rights Act was grounded in a sincere belief that "disembodied merit should be the exclusive criterion on which employment (and similar decisions) were made"); Mark R. Killenbeck, *Pushing Things up to Their First Principles: Reflections on the Values of Affirmative Action*, 87 CAL. L. REV. 1299, 1307 (1999) ("Much of the growth and prestige of post-World War II American higher education was a direct consequence of the ability of colleges and universities to characterize themselves as institutions open to all, where individual merit and personal determination were the criteria for success

merit, the notion of individual merit itself has remained largely free from criticism. The promise of meritocracy is reflected in what Jennifer Hochschild describes as the fundamental tenets of the American Dream. According to Hochschild, the American Dream (1) is available to everyone, regardless of background or origin; (2) consists of a reasonable anticipation or hopefulness of success; (3) is produced by actions under one's individual control; and (4) is inextricably linked to virtue insofar as "virtue leads to success, success makes a person virtuous, success indicates virtue, or apparent success is not real success unless one is also virtuous."[108]

or failure."). *See also* HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960–72 (1990) (describing the prevailing view among race commentators that merit is, and should be, the determining factor in employment and academic selections, and noting that critics consider antidiscrimination legislation and affirmative action to be deviations from a merit-based system). For an interesting account of gender distinctions in merit-based hierarchical arrangements, see DONALD E. BROWN, HUMAN UNIVERSALS 110, 137 (1991) (observing that men serve as military leaders and hold leadership roles in religious, social, and cultural institutions more often than women); Felicia Pratto et al., *Social Dominance Orientation: A Personality Variable Predicting Social and Political Attitudes*, 67 J. PERSONALITY & SOC. PSYCHOL. 741, 742 (1994) (citing studies demonstrating that "men hold more hierarchy-enhancing attitudes, such as support for ethnic prejudice, racism, capitalism, and right-wing political parties, than do women").

108. JENNIFER L. HOCHSCHILD, FACING UP TO THE AMERICAN DREAM: RACE, CLASS, AND THE SOUL OF THE NATION 18–23 (1995). Merit has proven a particularly divisive concept in race relations, yielding heated debate over the following: (1) the relevant criteria of merit; (2) the starting assumption that all candidates compete on a level playing field; (3) the hyper subjectivity of a metric for measuring merit; and (4) the circumstances in which merit-based decisionmaking is appropriate (and where it is not). *See, e.g.*, CHARLES LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 91–111 (1997) (stating that the current meritocratic system employs rhetoric that masks the reality of unfair privilege, measurements that are highly imprecise or simply subjective, and subjective value choices about what factors constitute merit). *See also* NICHOLAS LEMANN, THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY 342–51 (1st rev. paperback ed. 2000) (observing that meritocracy in America operates on an uneven playing field, presenting subjectively chosen criteria of what constitutes merit as if these criteria were objective); John E. Roemer, *Equality of Opportunity*, *in* MERITOCRACY AND ECONOMIC INEQUALITY 17 (Kenneth Arrow et al. eds., 2000) (proposing a way to purportedly "level the playing field"); Susan Sturm & Lani Guinier, *The Future of Affirmative Action*, *in* WHO'S QUALIFIED? 3–5 (Susan Sturm & Lani Guinier eds., 2001) (stating that a meritocracy based on standardized tests does not begin with a level playing field, make truly objective measurements, or accurately measure merit, unless merit is redefined strictly as the ability to do well on standardized tests); Mary C. Waters & Carolyn Boyes-Watson, *The Promise of Diversity*, *in* WHO'S QUALIFIED, *supra*, at 55 (agreeing with Sturm and Guinier that a meritocracy based on standardized tests is "neither functional nor fair"); Robert Paul Wolff & Tobias Barrington Wolff, *The Pimple on Adonis's Nose: A Dialogue on the Concept of Merit in the Affirmative Action Debate*, 56 HASTINGS L.J. 379, 385–92 (2005) (arguing, in the education admissions context, that the criteria constituting merit vary depending upon the goals of the admitting institution); Leon Botstein, *The Merit Myth*, N.Y. TIMES, Jan. 14, 2003, at A27 ("[U]niversities have for too long maintained a lie about how subjective and imprecise the assessment of merit actually is. . . . Motivation, ambition, curiosity, originality and the capacity to endure risk and think independently are essential components of merit."). For examples of arguments that certain circumstances do or should involve nonmeritocratic decisions in traditionally meritocratic contexts, see Richard A. Epstein, *The Status-Production Sideshow: Why the Antidiscrimination Laws Are Still a Mistake*, 108 HARV. L. REV. 1085, 1097–98

It is therefore unsurprising that opponents of race preferences have seized upon the mythology of merit throughout the ages, often in close connection with innocence rhetoric. Merit rhetoric is similar to innocence rhetoric insofar as both accept as a fundamental operating premise the zero-sum conceptualization of racial progress. The rhetoric of merit, however, is distinctive insofar as it places particular emphasis on the *comparative deservedness* of the recipients of state beneficence. The thrust of the racial innocence argument is that measures designed to benefit minorities unfairly burden innocent nonminorities. By contrast, the thrust of the racial meritocracy argument is that minorities are *comparatively undeserving* of state beneficence, which arguably should be bestowed upon other, more deserving recipients. Moreover, merit rhetoric is powerfully linked to stigma rhetoric insofar as recipients of benefits dispersed in a manner that is inconsistent with the meritocracy myth are understood as distinctly lacking in virtue.

(1995) (asserting that, in circumstances where employee satisfaction with the work environment strongly influences efficiency and there is no overriding customer preference for diversity, homogeneity (rather than merit) should be the basis of employment decisions). *See also* Grutter v. Bollinger, 539 U.S. 306, 367 (2003) (Thomas, J., concurring in part and dissenting in part) (stating that the college admissions process "is poisoned by numerous exceptions to 'merit,'" including "legacy preferences"); JAMES L. SHULMAN & WILLIAM G. BOWEN, THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES (2001) (detailing the effects of admissions preferences for athletes); Jody David Armour, *Hype and Reality in Affirmative Action*, 68 U. COLO. L. REV. 1173, 1195–99 (1997) (observing that, in circumstances of legacy admissions in education and the "old boy network" in employment, non-merit-based decisions prevail); Debra Lyn Bassett, *Ruralism*, 88 IOWA L. REV. 273, 311 n.177 (2003) (observing that legacy admissions "circumvent" meritocratic "qualifications"); Richard A. Epstein, *The Subtle Vices of the Employment Discrimination Laws*, 29 J. MARSHALL L. REV. 575, 580 (1996) [hereinafter Epstein, *Subtle Vices*] (reiterating the argument in *The Status-Production Sideshow*, *supra*); Robert Laurence, *Symmetry and Asymmetry in Federal Indian Law*, 42 ARIZ. L. REV. 861, 925–26 (2000) (observing that, due to their small size, modern tribal governments must accept nepotism); L. Darnell Weeden, *Employing Race-Neutral Affirmative Action to Create Educational Diversity While Attacking Socio-Economic Status Discrimination*, 19 ST. JOHN'S J. LEGAL COMMENT. 297, 319 (arguing that law schools should "consider granting a multicultural race-neutral diversity preference admission to qualified former athletes who have less than excellent grades and lower standardized test scores"); Kimberly A. Yuracko, *One for You and One for Me: Is Title IX's Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 NW. U. L. REV. 731, 757 (2003) (noting that the application of a "sex-integrated meritocracy" would most likely "lead to an almost total absence of women from the formally coed varsity athletic squads"). *But see* Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CAL. L. REV. 853 (1995) (asserting that the successes of Jews, Japanese Americans, and Chinese Americans, surpassing those white gentile males on the whole, can only be explained by conceding that the current meritocratic system really does reward actual merit to some degree).

1. Merit Rhetoric in Modern Legal Discourse

Modern opponents have consistently used merit rhetoric as a means of openly questioning the standing of beneficiaries of race preferences—that is, whether racial minorities are truly aggrieved, and thus deserving of the preference under consideration. The debate of the comparative deservedness of designated recipients of race preferences figured prominently in the exchange between Justice Stewart and Justice Stevens in *Fullilove v. Klutznick*. According to Stewart, disadvantages rooted in a history of racial oppression did not necessarily make African Americans worthy beneficiaries of special consideration in federally funded public works projects. "No race," according to Stewart, "has a monopoly on social, educational, or economic disadvantage, and any law that indulges in such a presumption clearly violates the constitutional guarantee of equal protection."[109] Even if minorities were deserving on this score, a race preference based upon membership in a minority group still would not suffice because "the guarantee of equal protection immunizes from capricious governmental treatment 'persons'—not 'races'—[and] it can never countenance laws that seek racial balance as a goal in and of itself."[110]

Stevens disagreed with Stewart's suggestion that history of oppression was insufficient to justify a race preference. The problem, in Stevens's view, was that Congress had not provided sufficient evidence to explain why the program was limited to certain groups and why it defined the preference the way it had. "[I]f Congress is to authorize a recovery for a class of similarly situated victims of a past wrong," wrote Stevens, "it has an obligation to distribute that recovery among the members of the injured class in an even-handed way."[111] Stevens continued, "in such a case the amount of the award should bear some rational relationship to the extent of the harm it is intended to cure."[112]

109. Fullilove v. Klutznick, 448 U.S. 448, 529–30 (1980) (Stewart, J., dissenting).

110. *Id.* at 529.

111. *Id.* at 537.

112. *Id.* Stevens criticized the plan for failing to explain, among other things, why certain racial and ethnic groups were being treated similarly, despite differing histories of racial subordination. As Stevens explained:

> Quite obviously, the history of discrimination against black citizens in America cannot justify a grant of privileges to Eskimos or Indians.
>
> Even if we assume that each of the six racial subclasses has suffered its own special injury at some time in our history, surely it does not necessarily follow that each of those subclasses suffered harm of identical magnitude. Although "the Negro was dragged to this country in chains to be sold in slavery," the "Spanish-speaking" subclass came voluntarily, frequently without invitation, and the Indians, the Eskimos and the Aleuts had an opportunity to exploit America's resources before the ancestors of most American citizens arrived. There is no

Stevens also questioned whether the program actually benefits those who were aggrieved and thus most deserving of the race preference. For instance, Stevens argued that this limited race preference did not do enough to uproot the layers of racial oppression because members of a minority who are most disadvantaged are least likely to get the benefit but most likely to be still suffering the consequences of the past wrong. According to Stevens, "[a] random distribution to a favored few is a poor form of compensation for an injury shared by many."[113] At the same time, Stevens suggested that the remedy was too broad, including firms that did not deserve a preference. According to Stevens, a race preference is not narrowly tailored as long as it includes minority firms that were not hurt by discrimination—for instance, firms that were formed after the statute was passed to take advantage of the grant, firms that could not compete due to reasons unrelated to race, or firms that had competed successfully before the statute.[114]

In addition, Justice Stevens suggested that some of the obstacles faced by minority firms were not unique to minorities. According to Stevens, some of the difficulties cited in the legislative history—"unfamiliarity with bidding procedures followed by procurement officers" and "difficulties in obtaining financing"[115]—were hurdles that all new firms faced. For Stevens, it was "essential to draw a distinction between obstacles placed in the path of minority business enterprises by others and characteristics of those firms that may impair their ability to compete."[116]

In *City of Richmond v. J.A. Croson Co.*, Justice O'Connor focused on the actual ability of minority contractors to avail themselves of the preference. According to O'Connor, Richmond's argument for the plan would have been strengthened if it could prove that there was a "significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors."[117] As O'Connor noted, one cannot look to general population for evidence of discrimination:

> reason to assume, and nothing in the legislative history suggests, much less demonstrates, that each of these subclasses is equally entitled to reparations from the United States Government.

Id. at 537–38 (Stevens, J., dissenting).

113. *Id.* at 538–39.

114. *Id.* at 540–41.

115. *Id.* at 543.

116. *Id.* at 544.

117. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989) (plurality opinion).

> When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value . . . . [It is a] 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.[118]

Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics.

Stevens likewise criticized the City of Richmond for engaging in "the type of stereotypical analysis that is a hallmark of violations of the Equal Protection Clause."[119] And just as he had argued in *Fullilove*, Stevens suggested that a set-aside only served to benefit the least deserving individuals. As Stevens wrote, it is "minority firms that have survived in the competitive struggle, rather than those that have perished, [that] are most likely to benefit from an ordinance of this kind."[120]

In *Metro Broadcasting, Inc. v. FCC*, Justice O'Connor employed the same analysis that she undertook in *Croson*, questioning whether the beneficiaries of race preferences in the sale and distribution of broadcast licenses actually deserved the benefits of such policies. Much of O'Connor's discussion of deservedness is tied to her critique of diversity in broadcast viewpoints. O'Connor rejected the idea that diversity in viewpoint was a compelling interest, arguing that "[i]t is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications."[121] But even if it were, O'Connor expressed doubts as to whether the stations identified as beneficiaries of the policy were truly deserving:

> The FCC justifies its conclusion that insufficiently diverse viewpoints are broadcast by reference to the percentage of minority-owned stations. This assumption is correct only to the extent that minority-owned stations provide the desired additional views, and that stations owned by individuals not favored by the preferences cannot, or at least do not, broadcast underrepresented programming.[122]

In O'Connor's view, minority-owned stations were in no better position to advance diversity of viewpoints than nonminority owned ones.

118. *Id.* at 501, 507.
119. *Id.* at 515.
120. *Id.*
121. Metro Broad., Inc. v. FCC, 497 U.S. 547, 612 (1990), *overruled by* Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).
122. *Id.* at 618–19.

O'Connor believed that all firms were essentially driven by market concerns, and thus each would approach the issue of diverse programming in the same way. According to this view, there is no reason to prefer minority ownership because it rests on the dubious assumption that "preferences linked to race are so strong that they will dictate the owner's behavior in operating the station, overcoming the owner's personal inclinations and regard for the market."[123]

The struggle over the link between diversity and deservedness of a race preference also figured prominently in university admissions. In *Hopwood v. Texas*, [124] the United States Court of Appeals for the Fifth Circuit rejected the link between race and diversity. According to the *Hopwood* court, "[t]he use of race, in and of itself, to choose students simply achieves a student body that looks different." [125] The court continued, "[s]uch a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants."[126]

In the court's view, diversity takes many forms. "To foster such diversity," the court maintained, "state universities and law schools and other governmental entities must scrutinize applicants individually, rather than resorting to the dangerous proxy of race."[127] Furthermore, to the extent that the university wished to make use of the proxy, the court warned that the use should be extremely modest—that it must carefully limit the "plus" given to applicants to remedy that harm.[128]

Judge Daniel Boggs's lower court opinion in the *Grutter v. Bollinger* case echoed many of these sentiments. Boggs chastised the Michigan Law School's consideration of race as a criteria of merit, arguing that this practice was fundamentally violative of the principle of merit. As Boggs explained:

> Mentioning status as an under-represented minority in the same breath, the Law School generalizes, in the abstract, that it would also give a preference to an applicant with "an Olympic gold medal, a Ph.D in physics, the attainment of age 50 in a class otherwise lacking anyone over 30, or the experience of having been a Vietnam boat person." *Yet to equate bare racial status with the experiential gains of these generally*

123. *Id.* at 619.
124. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).
125. *Id.* at 945.
126. *Id.*
127. *Id.* at 947.
128. *Id.* at 950.

> *remarkable (and exceedingly rare) achievements demonstrates that the Law School's desired diversity is unrelated to the experiences of its applicants.*[129]

For Boggs, using race as a criteria of merit produced glaring absurdities. "When it comes to a choice between admitting a conventionally liberal (or conventionally conservative) black student who is the child of lawyer parents living in Grosse Pointe, [Michigan] just like the previous ten white admittees," lamented Boggs, "the black student will be given a diversity preference that would not be given to a white or Asian student, her unique experience notwithstanding."[130]

2. The Pedigree of Merit Rhetoric

Merit rhetoric in the modern race preference context has a strong intuitive appeal because such preferences are commonly understood as "special" consideration above and beyond a perceived baseline of equal treatment. Not surprisingly, the appeal of merit rhetoric strengthens as society distances itself from the brute racism of the past, and the demonstrable impact of historic racial oppression becomes increasingly difficult to discern with acute specificity. Yet, merit rhetoric enjoyed strong appeal in the nineteenth century, despite the existence of rampant structural inequality. But whereas "special" consideration is measured against baseline *equality* in the modern era, the label "special" consideration in the nineteenth century attached to any consideration received by blacks that could be construed as having the effect of upsetting or undermining *status quo inequality*. Thus, efforts to achieve baseline equal treatment for blacks were viewed as "special" consideration that implicated the merit principle.

Opposition to the creation of the Freedmen's Bureau provides a striking example of pedigreed merit rhetoric. In a report submitted by the Minority of the Select Committee on Emancipation to accompany the Bill to Establish a Bureau of Freedman's Affairs, members questioned whether newly emancipated blacks were worthy of legislation designed to ease the transition of blacks into white civil society. As the members explained:

> A proposition to establish a bureau of Irishmen's affairs, a bureau of Dutchmen's affairs, or one for the affairs of those of Caucasian descent generally, who are incapable of properly managing or taking care of their own interests by reason of neglected or deficient education, would, in the opinion of your committee, be looked upon as a vagary of a diseased

129. Grutter v. Bollinger, 288 F.3d 732, 790 (6th Cir. 2002) (citation omitted) (emphasis added).
130. *Id.* at 790–91.

> brain. No one would, for a moment, suppose that it would receive serious consideration of any Congress; yet, equally strong claims, upon the score of humanity and philanthropy, might be urged with great force in their behalf. Why the freedmen of African descent should become these marked objects of special legislation, to the detriment of the unfortunate whites, your committee fails to comprehend. . . . The propriety of . . . laying a tax upon the labor of the poor and, perhaps, less favored white men to defray it, is very questionable, and, in the opinion of . . . [this] committee, unwise and unjust, even admitting it to be lawful.[131]

Note that the report, which distinguished freedmen from their Irish, Dutch, and Caucasian counterparts, made no mention of the legacy of African slavery. The strategic evasion of the slavery issue enabled the Committee members to argue that whites who were "incapable of properly managing or taking care of their own interests by reason of neglected or deficient education" were equally worthy of special dispensation as newly emancipated blacks, who had been systematically deprived of developmental opportunities by law up to this point. Although the reasons for special dispensation to freedmen were perhaps too obvious to mention for most members of Congress at the time, the report clearly established that certain members held fast to the belief that the distinguishing features of Negro oppression did not warrant unique consideration.

President Johnson exuded the same willful blindness to the historical legacy of black suffering when explaining his opposition to the Freedmen's Bureau Bill. As Johnson argued, Congress

> has never founded schools for any class of our own people, not even for the orphans of those who have fallen in the defense of the Union, but has left the care of education to the much more competent and efficient control of the States, of communities, of private associations, and of individuals. It has never deemed itself authorized to expend the public money for the rent or purchase of homes for the thousands, not to say millions, of the white race who are honestly toiling from day to day for their subsistence. A system for the support of indigent persons in the United States was never contemplated by the authors of the Constitution; nor can any good reason be advanced why, as a permanent establishment, it should be founded for one class or color of our people more than another.[132]

Johnson would later explicitly rely upon merit rhetoric questioning whether newly emancipated blacks were qualified to become U.S. citizens.

131. H.R. REP. NO. 2, at 2 (1864).

132. MESSAGES AND PAPERS, *supra* note 104, at 3599.

In his veto message to Congress opposing the Civil Rights Act of 1866, Johnson proclaimed:

> Four millions of them have just emerged from slavery into freedom. Can it be reasonably supposed that they possess the requisite *qualifications* to entitle them to all the privileges and immunities of citizens of the United States?[133]

One of Johnson's main objections to granting civic equality to blacks was that blacks were not well schooled in liberal democratic ideas. According to Johnson,

> He must of necessity, from his previous unfortunate condition of servitude, be less informed as to the nature and character of our institutions than he who, coming from abroad has, to some extent, at least, familiarized himself with the principles of a Government to which he voluntarily intrusts "life, liberty, and the pursuit of happiness."[134]

In this way, Johnson revealed that beneath his procedural objection was a deeper cause for concern: blacks are undeserving of citizenship, and that other (presumably white) candidates are more deserving recipients of any state-sponsored preference. Johnson said:

> [I]t is now proposed, by a single legislative enactment, to confer the rights of citizens upon all persons of African descent born within the extended limits of the United States, while persons of foreign birth who make our land their home must undergo a probation of five years, and can only then become citizens upon proof that they are 'of good moral character.'[135]

The ratification of the Fourteenth Amendment laid to rest arguments questioning the freedmen's deservedness of the basic rights of citizenship. Social equality was an entirely separate matter, however. Not surprisingly, opponents of policies designed to promote greater social inclusion for blacks relied upon merit rhetoric when arguing that blacks were undeserving of equal social status.

Justice Bradley's arguments against the 1875 Act further exemplified this approach. For Bradley, access to public accommodations was a social privilege enjoyed by whites unrelated to the core privileges of citizenship. Bradley acknowledged that the Thirteenth and Fourteenth Amendments were enacted to abolish slavery and protect the civil rights of freedmen from abrogation by the State and conceded that the freedmen deserved

133. *Id.* at 3604 (emphasis added).
134. *Id.*
135. *Id.* at 3604–05.

protections of this sort. But such protections did not entitle freemen to free and open access "to *all* the privileges enjoyed by white citizens."[136] For Bradley, blacks had not yet earned the privilege of social interaction with whites, and neither Amendment empowered Congress to legislate social equality.

In this way, fidelity to the merit principle had the effect of reinforcing status quo inequality in the nineteenth century—an effect not altogether different from that produced by staunch adherence to the merit principle in the modern era. Moreover, in both the nineteenth century and the modern era, racial policy that appeared to violate the merit principle could be further attacked on the ground that the policy stigmatized members of groups identified as would-be beneficiaries.

C. STIGMA OF DEPENDENCE

Stigma associated with dependence on government has proven particularly useful for opponents of race preferences. The extensive literature that speaks of race relations as "the Negro problem" or "Indian problem" or "the White Man's Burden" revel in the twin images of white benefactor (or savior) and the dark-hued suppliant.[137] At the same time, however, dependence upon the State is routinely viewed as degrading and stigmatizing. In the nineteenth century, stigma rhetoric was used to oppose race preference programs such as the Freedmen's Bureau, which opponents derided as "a new system of vassalage" that "revive[s] the most odious features of slavery without its name."[138] Modern race preference programs, such as minority set-aside contracts and affirmative action in admissions to institutions of higher education, are similarly opposed on the ground that such programs stigmatize purported minority beneficiaries.[139]

136. The Civil Rights Cases, 109 U.S. 3, 25 (1883) (emphasis added).

137. *See, e.g.*, 1 GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 215 (1944) (describing issues in American race relations as "the Negro problem" and noting the prevailing view among intellectuals that "Negroes are the wards of the white people"). *See also* MICHAEL K. BROWN, RACE, MONEY, AND THE AMERICAN WELFARE STATE 3 (1999) ("Many, perhaps most, whites believe blacks are the authors, defenders, and prime beneficiaries of wasteful, feckless social policies that do more harm than good.").

138. H.R. REP. NO. 2, at 2, 3 (1864).

139. *See infra* notes 183–91 and accompanying text.

Opponents generally believe that policies that denote racial minorities as beneficiaries are stigmatic in at least two important ways. First, they argue that such policies are harmful because they threaten to undermine the beneficiary's sense of pride in personal accomplishment. As American poet and essayist Ralph Waldo Emerson once observed, "[e]very body likes to know that his advantages cannot be attributed to air, soil, sea, or to local wealth, as mines and quarries, nor to laws and traditions, nor to fortune, but to superior brain, as it makes the praise more personal to him."[140] As Emerson's comment suggests, personal accomplishment figures prominently in the American cultural consciousness. Opponents seize upon this idea and denounce race preference policies as fundamentally violative of this hallowed principle.[141]

Second, such programs are stigmatizing to the extent that they invoke or reinforce existing racial stereotypes. Erving Goffman's pioneering work on the nature of stigma proves particularly illuminating on this point. According to Goffman, a stigmatized individual "possess[es] an attribute that makes him different from others in the category of persons available for him to be, and of less desirable kind—in the extreme, a person who is quite thoroughly bad, or dangerous, or weak."[142] Among the criteria for

140. Ralph W. Emerson, *English Traits* (1856), *in* 5 THE COMPLETE WORKS OF RALPH WALDO EMERSON 46 (Houghton Mifflin Co. 1903).

141. This general approach is exemplified in traditional opposition to progressive welfare policy. *See* Martha A. Fineman, *The Inevitability of Dependency and the Politics of Subsidy*, 9 STAN. L. & POL'Y REV. 89, 90 (1998) (noting that the pejorative use of the term "dependency" in welfare debate "justifies, even compels, negative judgments of individuals"); Robert Moffitt, *An Economic Model of Welfare Stigma*, 73 AM. ECON. REV. 1023, 1033–34 (1983) (modeling the decision to participate in welfare programs and concluding that stigma of participation arises "mainly from the act of welfare recipiency per se"); Charles A. Reich, *Social Welfare in the Public-Private State*, 114 U. PA. L. REV. 487, 491 (1966) (observing that "[r]eceipt of government aid by the poor has carried stigma whereas receipt of government aid by the rest of the economy has almost been made into a virtue"); Paul M. Sniderman & Edward G. Carmines, *The Moral Basis of a Color-blind Politics*, *in* THE AFRICAN AMERICAN PREDICAMENT 175, 183 (Christopher H. Foreman, Jr. ed., 1999) ("When a group like blacks is perceived to benefit disproportionately from a program of government assistance *and* simultaneously is seen as not having tried to be self-reliant, there is a risk of being stigmatized."); Lucie E. White, *No Exit: Rethinking "Welfare Dependency" from a Different Ground*, 81 GEO. L.J. 1961, 1989 (1993) (observing that women "face shame if they stay on welfare" and noting that "the 'exits' they are offered are really traps"). *See also* BROWN, *supra* note 137, at 3 (observing that "[m]any, perhaps most, whites believe blacks are the authors, defenders and prime beneficiaries of wasteful, feckless, social policies that do more harm than good" and that "blacks . . . are lazy, do not try hard enough to overcome economic liabilities, and are overly 'dependent' on welfare"); PAUL M. SNIDERMAN & THOMAS PIAZZA, THE SCAR OF RACE 97 (1993) (noting that the stigma of dependence provokes opposition to additional welfare spending); DONALD R. KINDER & LYNN M. SANDERS, DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS 121–22 (1996) (same).

142. ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 3 (1963).

delineating individuals worthy of stigma are "race, nation, and religion."[143] Individuals who are not different—who do not depart from preexisting expectations—are viewed as "normal." By contrast, those who do depart from preexisting expectations are stigmatized, viewed as either "discredited" or "discreditable," and presumptively excluded from the community.[144]

Under this view, members of social groups denoted as beneficiaries of race preference policies are stigmatized simply by virtue of having been singled out for differential treatment. Differential treatment—especially when that treatment is viewed as preferential—becomes the source of deep suspicion. This alone is sufficient to generate the sort of stigma described by Goffman. However, the stigmatic harm is only heightened when differential treatment is placed against the backdrop of prevailing perceptions of racial minorities as educationally deficient or culturally inferior. Importantly, the stigma attaches whether one conforms to or deviates from prevailing perceptions. Conformity renders the individual, in Goffman's words, "discredited," while the absence of conformity places the individual into the category of persons who are potentially "discreditable."[145] Thus, it matters not whether the individual actually receives differential treatment. In either case, stigma is thought to attach.

1. Stigma of Dependence Rhetoric in Modern Legal Discourse

Stigma rhetoric remains a feature of modern legal discourse on race preferences. Beginning in *Fullilove v. Klutznick*, Justice Stevens warned that race-based preferences rooted in a history of oppression pose an inherent stigma because that history can be used "as a permanent source of justification for grants of special privileges."[146] For Stevens, such preferences posed a threat of dependence and fostered the assumption that minorities are less qualified solely because of race. His view that race preferences may impose a greater stigma on its supposed beneficiaries

143. *Id.* at 4.

144. *Id.* For a deeper discussion of the harm produced by racial stigma and legal approaches to remedy that harm, see R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803 (2004).

145. As Goffman writes:

> [D]oes the stigmatized individual assume his differentness is known about already or is evident on the spot, or does he assume it is neither known about by those present nor immediately perceivable by them? In the first case, one deals with the plight of the *discredited*, in the second with that of the *discreditable*.

GOFFMAN, *supra* note 142, at 4.

146. Fullilove v. Klutznick, 448 U.S. 448, 539 (1980) (Stevens, J., dissenting).

would later resurface in his concurring opinion in *City of Richmond v. J.A. Croson Co*.[147]

But it is Justice O'Connor who made the point most explicitly in *Croson*, where she proclaimed "[c]lassifications 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."[148] O'Connor returned to this theme in *Metro Broadcasting, Inc. v. FCC*, where she argued that "[r]acial classifications, whether providing benefits to or burdening particular racial or ethnic groups, may stigmatize those groups singled out for different treatment and may create considerable tension with the Nation's widely shared commitment to evaluating individuals upon their individual merit."[149]

Justice Thomas would later echo this sentiment in *Adarand Constructors, Inc. v. Peña.* According to Thomas, "there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination."[150] Thomas continued:

> So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race.[151]

But it is Thomas's dissenting opinion in *Grutter v. Bollinger* that invokes the idea of stigma most forcefully. As Thomas wrote,

> The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the "beneficiaries" of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed "otherwise unqualified," or it did not, in

147. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 516–17 (1989) (plurality opinion).

148. *Id*. at 493.

149. Metro Broad., Inc. v. FCC, 497 U.S. 547, 604 (1990), *overruled by* Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).

150. *Adarand*, 515 U.S. at 241 (Thomas, J., concurring).

151. *Id.*

> which case asking the question itself unfairly marks those blacks who would succeed without discrimination.[152]

O'Connor undoubtedly shared Thomas's concern regarding the stigma of dependence. Although she found diversity a compelling interest that warranted limited race preferences, her suggestion that "[we can] expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interests approved today" evinced a concern about the stigmatizing effect of long-standing reliance upon race preferences.[153] In any event, it is clear that the theme of stigmatic harm continues to resonate among modern opponents of race preferences.

2. The Pedigree of Stigma of Dependence Rhetoric

If modern fascination with the purportedly stigmatizing effects of being denoted a beneficiary of a race preference is rooted in a deep disdain for racial paternalism, the same can be said about opponents of race preferences in the nineteenth century. Indeed, one of the central objections to legal efforts that assisted newly emancipated blacks in adjusting to freedom was that such efforts were unduly paternalistic and stigmatic.

Consider the debate over the establishment of the Freedmen's Bureau. In addition to concerns about whether newly emancipated blacks were worthy of the bestowals offered by the Freedmen's Bureau, opponents criticized the proposal on the ground that it would only serve to reinforce Negro dependence on the State. In a report submitted by the Minority of the Select Committee on Emancipation to accompany the Bill to Establish a Bureau of Freedman's Affairs, Congressmen Martin Kalbfleisch and Anthony Knapp condemned the bill for creating "a new system of vassalage" reminiscent of slavery.[154] According to the Minority Committee, the Bureau administrators would simply step into the shoes of the former master. "[T]he number of . . . [bureau administrators] shall equal or exceed the number of overseers formerly in use upon slave plantations," and the organizing and coordination of freedman labor and land issues only "revives[s] most of the odious features of slavery without its name."[155] Under the bill,

152. Grutter v. Bollinger, 539 U.S. 306, 373 (2003) (Thomas, J., concurring in part and dissenting in part).

153. *Id.* at 343. However, to the extent that Justice O'Connor found the program objectionable at all, one might imagine that she would necessarily want to limit the program's duration.

154. H.R. REP. NO. 2, at 2 (1864).

155. *Id.* at 3.

> [T]he freedman may be as effectively stripped of the proceeds of his labor to build up the fortunes of an avaricious [Bureau] superintendent, as though he were under the control of a master, without enjoying the benefits of the protection and support the system of slavery affords.[156]

For members of the Committee, bureaucratic oversight not only produced stigmatic harm on par with slavery, but also created a regime that was potentially more oppressive than slavery.

Not surprisingly, President Andrew Johnson advanced the notion that newly emancipated blacks would be stigmatized by dependence upon Freedmen's Bureau largesse in his veto message to Congress. Johnson argued that one of the principal failings of the Freedmen's Bureau bill was that it gave insufficient consideration "to the ability of the freedmen to protect and take care of themselves."[157] According to Johnson,

> It is no more than justice to them to believe that as they have received their freedom with moderation and forbearance, so they will distinguish themselves by their industry and thrift, and soon show the world that in a condition of freedom they are self-sustaining, capable of selecting their own employment and their own places of abode, of insisting, for themselves, on a proper remuneration, and of establishing and maintaining their own asylums and schools.[158]

Concerns about special treatment for blacks would crescendo in Justice Bradley's majority opinion in the *Civil Rights Cases*. In striking down portions of the Act, Bradley criticized the Act on the ground that it afforded privileged status to newly emancipated blacks. According to Bradley, blacks must "cease[] to be the special favorite of the laws" and "take the rank of mere citizen" whose rights are protected "in the ordinary modes by which other men's rights are protected."[159] The effect of denoting blacks as "special favorites of the law" was two-fold. Not only did it suggest that innocent whites would suffer insofar as they were not denoted "special" and thus treated unequally, but it also suggested that there was something unseemly about blacks receiving special treatment, despite an historical legacy of oppression. In juxtaposing black "special favorite" and white "ordinary citizenship," and indicating that blacks should endeavor to assume the rank of "mere citizen," the Court effectively reimagines laws designed to promote greater equality as stigmatizing the purported beneficiaries.

156. *Id.*
157. CONG. GLOBE, 39th Cong., 1st Sess. 917 (1866).
158. *Id.* at 917.
159. The Civil Rights Cases, 109 U.S. 3, 25 (1883).

The significance of this point was not lost on Justice Harlan. In his dissenting opinion, Harlan attempted to persuade his colleagues of the folly of their reasoning. For Harlan, the 1875 Act was not a shameful measure that stigmatized newly emancipated blacks. To the contrary, it was necessary in order to overcome the inertia of white privilege that worked to reinforce racial oppression in its absence.[160] The 1875 Act was fundamentally protective in Harlan's view and no more or less stigmatic than the Bill of Rights. Nevertheless, the view that progressive racial policy posed a significant stigmatic threat would soon dominate nineteenth-century racial jurisprudence, and continue to thrive in the modern era as well.

D. DOMESTIC TRANQUILITY

The rhetoric of domestic tranquility is rooted in the idea that changes in society are best when undertaken slowly and deliberately. Because they place a premium on social stability, progressive racial measures are presumptively suspect in that they threaten the upheaval of prevailing norms and practices. The focus is shifted away from the conditions of racial subordination experienced by minorities, and onto the burden of change imposed upon whites.

Three strands emerge in the rhetoric of domestic tranquility. The first and mildest of these strands is a claim of discomfort associated with the upheaval of established social norms and customs privileging whites. The threat of erosion of naturalized white privilege has fueled opposition to a host of reform measures, including, but not limited to, efforts to desegregate public conveyances and accommodations, initiatives to strike down antimiscegenation laws, and policies designed to promote equal opportunity and diversity in education and employment.

The second strand is an expression of anxiety about escalating racial tension and, in particular, encouraging white racial hostility. White hostility, like minority reprisal for past injustices, poses a substantial threat to the peaceful ordering of society. According to this view, progressive racial measures may benefit minorities in the short term, but they also serve to engender longstanding resentment among whites. Historically, opponents of progressive measures suggested that such measures could incite outright violence. According to the modern restatement of this view,

160. *Id.* at 61–62.

progressive racial measures not only risk exacerbating racial tensions, but also engender underground acts of racial retaliation.[161]

The third and most fervent strand of domestic tranquility rhetoric is an expression of fear or apprehension regarding the exercise of black human agency and, in particular, black political power. Unlike innocence rhetoric, which seeks to avoid confronting the extended legacy of public and private acts of racial terror, violence, and humiliation, the rhetoric of domestic tranquility embraces this legacy as a justification for opposing progressive racial measures that would empower the "embittered masses" of minorities. Fear of retaliation figured prominently in post-Reconstruction efforts to restrict access of blacks to public office, where rhetoric reached the height of paranoia. Consider the following report that appeared in *The Nation* in opposition to voting rights for freemen:

> [T]he well known love of the Negro for tender meat . . . is capable, under certain social and political conditions, of being developed into a craving for white babies and, that craving he would, if once in possession of the franchise, embody in legislation in those States where his race was in the majority, by exacting tithes of their offspring from white mothers.[162]

Although the *Nation* report is a parodic response to the authentic accusation that newly emancipated blacks would all become Mormons and use newfound political power to legislate polygamy, it nevertheless reveals something about the depravity of *nonparody* discourse of many nineteenth-century public intellectuals who endorsed a grossly exaggerated image of

161. *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 28–30 (1992) (arguing that employment discrimination laws actually serve to exacerbate discrimination in private transactions by reducing the flow of permissible information to employers, causing employers to resort to "crude proxies" in assessing employees). As Epstein explains, "To the extent, therefore, that the present antidiscrimination law imposes enormous restrictions on the use of testing, interviews, and indeed any information that does not *perfectly* individuate workers, then by indirection it encourages the very sorts of discrimination that the law seeks to oppose." *Id.* at 40.

Antidiscrimination law, according to Epstein, should also be rejected on efficiency grounds. Epstein states:

> To the extent . . . that individual tastes are grouped by race, by sex, by age, by national origin—and to some extent they are—then there is a necessary conflict between the commands of any antidiscrimination law and the smooth operation of the firm. Firms whose members have diverse and clashing views may well find it more difficult to make collective decisions than firms with a closer agreement over tastes.

Id. at 66–67. Richard Posner shares this view. *See* Richard A. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513, 530 (1987) (observing that "Title VII makes it more costly to employ black workers . . . [and] to fire them because the firm may have to incur the expense of defending a Title VII disparate-treatment suit when a black employee is discharged," and concluding that "[t]hese costs operate as a tax on employing black workers and give firms an incentive to locate in areas with few blacks").

162. *A New Danger to the South*, NATION, Oct. 19, 1865.

Negro savagery to stoke white fears of racial retaliation.[163] The image of racial retaliation was similarly, albeit less fantastically, invoked by Justice Scalia in *City of Richmond v. J.A. Croson Co.*, when he questioned the intent of the majority-black Richmond City Council's program that gave preference to minority contractors. Characterizing the Richmond plan as a form of racial payback, Scalia remarked "[w]here injustice is the game, . . . turnabout is not fair play."[164]

1. Domestic Tranquility Rhetoric in Modern Legal Discourse

The three strands of domestic tranquility rhetoric remain indispensable elements of modern opposition to race preferences. Consider the mildest strand of this rhetoric—the claim that racially progressive measures engender discomfort among whites who are called upon to endure radically destabilizing changes in prevailing modes of social interaction. As Justice Rehnquist noted in *United Steelworkers v. Weber*, fear of rapidly changing conventional practices that preserved the racial status quo in employment figured prominently in the minds of opponents to Title VII.[165] According to Rehnquist, opponents were assured that:

> It is likewise not true that the Equal Employment Opportunity Commission would have power to rectify existing "racial or religious imbalance" in employment by requiring the hiring of certain people without regard to their qualifications simply because they are of a given race or religion. [It was generally understood that] [o]nly actual discrimination could be stopped. . . . [and that] [q]uotas are themselves discriminatory.[166]

163. *See, e.g.*, J.H. VAN EVRIE, WHITE SUPREMACY AND NEGRO SUBORDINATION 312 (Negro Universities Press 1868) (describing free blacks of Maryland and Virginia as "vicious as well as idle and non-productive, and every one of them a disturbing force—a dangerous element—which, in conjunction with those hideous wretches maddened with a monstrous theory like those miscreants at Harpers Ferry, are always liable to be made instruments of fearful mischief"). *See also* GEORGE FITZHUGH, SOCIOLOGY FOR THE SOUTH; OR THE FAILURE OF FREE SOCIETY 84 (A. Morris 1854) (arguing that slavery is a civilizing institution for Negroes, without which the Negro "would become idolatrous, savage and cannibal"); THOMAS NELSON PAGE, THE NEGRO: THE SOUTHERNER'S PROBLEM 112–14 (1904) (arguing that social equality has been understood by "the ignorant and brutal young Negro" to signify "the opportunity to enjoy, equally with white men, the privilege of cohabitating with white women," and that the lynching of blacks was done largely to stall the "ravishing and tearing to pieces of white women and children").

164. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 524 (1989) (Scalia, J., concurring).

165. 42 U.S.C. § 2000e (2000).

166. United Steelworkers v. Weber, 443 U.S. 193, 233, 241 (1979) (Rehnquist, J., dissenting) (quoting the Congressional Record and a Senate Report).

Although Kaiser and the Steelworkers voluntarily adopted a quota system, Rehnquist explained the sense of betrayal felt by opponents of Title VII:

> Kaiser and the Steelworkers acted under pressure from an agency . . . which found that minorities were being 'underutilized' at Kaiser's plants. . . . Bowing to that pressure, Kaiser instituted an admissions quota preferring blacks over whites, thus confirming that the fears of Title VII's opponents were well founded. Today, §703(j), adopted to allay those fears, is invoked by the Court to uphold imposition of a racial quota under the very circumstances that the section was intended to prevent.[167]

Justice Rehnquist is not alone in his views. Like Justice Stevens in *Fulliove v. Klutznick*, who saw farreaching harms associated with the endorsement of a race preference in hiring, Justice O'Connor viewed the effects of race preference in the sale of broadcast licenses in *Metro Broadcasting, Inc. v. FCC*, as "trivializ[ing] . . . the constitutional command to guard against such discrimination and . . . [advancing] a potentially farreaching principle disturbingly at odds with our traditional equal protection doctrine."[168] Court endorsement of race preferences, in O'Connor's view, threatened domestic tranquility insofar as it advanced social norms in tension with status quo equal protection jurisprudence.

The United States Court of Appeals for the Fifth Circuit in *Hopwood v. Texas* amplified the Court's concerns in the educational context, invoking the specter of never-ending race preferences in its opinion. As the court observed, "[i]f a state can 'remedy' the present effects of past discrimination in its primary and secondary schools, it also would be allowed to award broad-based preferences in hiring, government contracts, licensing, and any other state activity that in some way is affected by the educational attainment of the applicants."[169]

This argument is not unlike the one advanced by the Supreme Court in *Washington v. Davis*,[170] in which the Court refused to allow a litigant to use disparate impact theory to advance an equal protection challenge.[171] The sheer breadth of transformative possibilities presented by the

167. *Id.* at 246.

168. Metro Broad., Inc. v. FCC, 497 U.S. 547, 613 (1990) (O'Connor, J., dissenting), *overruled by* Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).

169. Hopwood v. Texas, 78 F.3d 932, 950 (5th Cir. 1996).

170. Washington v. Davis, 426 U.S. 229 (1976).

171. *Id.* at 239.

constitutionalization of this more thoroughgoing racial remedial scheme gave the Court substantial pause. As Justice White explained,

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be farreaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."[172]

In addition to expressing discomfort regarding changes in social norms, modern opponents of race preferences tend to express deep concern that racially progressive policy might exacerbate racial tension and provoke white hostility. One of the most poignant expressions of these sentiments was advanced by Justice Stewart, who likened the federal codification of a race preference challenged in *Fullilove* to the passage of odious Jim Crow legislation half a decade earlier. According to Stewart, "[O]ur statute books will once again have to contain laws that reflect the odious practice of delineating the qualities that make one person a Negro and make another white."[173] Race preferences would not only reinforce the salience of the colorline, but also sanction racial animus and fuel the prospects of white retaliation:

> Most importantly, by making race a relevant criterion once again in its own affairs the Government implicitly teaches the public that the apportionment of rewards and penalties can legitimately be made according to race—rather than according to merit or ability—and that people can, and perhaps should, view themselves and others in terms of their racial characteristics. Notions of 'racial entitlement' will be fostered, and private discrimination will necessarily be encouraged.[174]

Stevens likewise expressed concern over the threat to domestic tranquility posed by race preferences. According to Stevens, a race preference "creates monopoly privileges . . . for a class of investors defined solely by racial characteristics. . . . [Monopolies often lead to] high prices and shoddy workmanship . . . [and] engender animosity and discontent as well."[175] Not only would this race preference fail to remedy current racial discrimination, but it would also likely "engender resentment . . . [from

172. *Id.* at 248.
173. Fullilove v. Klutznick, 448 U.S. 448, 531 (1980) (Stewart, J., dissenting).
174. *Id.* at 532.
175. *Id.* at 532–33 (Stevens, J., dissenting).

competitor firms] and skepticism on the part of customers and suppliers aware of the statutory classification."[176]

The fear of stoking white hostility figured prominently in the Court's rhetoric in *City of Richmond v. J.A. Croson Co*. According to Justice O'Connor, "[c]lassifications based on race carry a danger of stigmatic harm."[177] "Unless they are strictly reserved for remedial settings," she continued, "they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."[178] The fear that attention to race—even for purportedly benign purposes—would result in racial balkanization also figured prominently in O'Connor's rejection of the FCC's race preference program in *Metro Broadcasting*. According to O'Connor, "[t]he dangers of such classifications . . . clear[ly] endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict."[179] For O'Connor, some of this hostility stems from staunch adherence to the concept of merit. "Racial classifications," she argued, "whether providing benefits to or burdening particular racial or ethnic groups, may stigmatize those groups singled out for different treatment and may create considerable tension with the Nation's widely shared commitment to evaluating individuals upon their individual merit."[180]

Concerns about exacerbating racial tensions frequently appear in arguments against race preferences in the education setting as well. Justice Powell, in *Regents of the University of California v. Bakke*, remarked that "[d]isparate constitutional tolerance of such classifications well may serve to exacerbate racial and ethnic antagonisms rather than alleviate them."[181] This theme is developed more fully in *Hopwood*, where the court proclaimed that "[d]iversity fosters, rather than minimizes, the use of race."[182] According to the *Hopwood* court, such a policy "treats minorities as a group, rather than as individuals" and while this "may further remedial purposes [it is] just as likely [to] promote improper racial stereotypes, thus fueling racial hostility."[183] The court also noted "one cannot conclude that a hostile environment is the present effect of past discrimination. Any

176. *Id.* at 545.

177. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion).

178. *Id.*

179. Metro Broad., Inc. v. FCC, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting), *overruled by* Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).

180. *Id.* at 604.

181. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298–99 (1978) (plurality opinion).

182. Hopwood v. Texas, 78 F.3d 932, 945 (5th Cir. 1996).

183. *Id.*

racial tension at the law school is most certainly the result of present societal discrimination and, if anything, is contributed to, rather than alleviated by, the overt and prevalent consideration of race in admissions."[184]

The dissenting Justices in *Grutter v. Bollinger* were likewise concerned about the threat that diversity-based admissions policies posed to domestic tranquility. For instance, Justice Scalia presented a "parade of horribles," outlining the multitude of lawsuits that the Court's decision would likely produce. He referred to many aspects of the decision as "tempting targets" for challenges, noting that he "[did] not look forward to any of these cases."[185] Justice Thomas decried the law school's use of race preferences as "demean[ing to] us all," and suggested that endorsement of such policies help to "fulfill the bigot's prophecy about black underperformance—just as it confirms the conspiracy theorist's belief that 'institutional racism' is at fault for every racial disparity in our society."[186] Justice Kennedy similarly lamented that, in the wake of *Grutter*, universities "will have few incentives to make the existing minority admissions schemes transparent and protective of individual review."[187] "The unhappy consequence," Kennedy concluded, "will be to perpetuate the hostilities that proper consideration of race is designed to avoid."[188]

Beyond the anxiety regarding the escalation of racial tension and white hostilities, modern opponents express deep reservation regarding any progressive racial measure that purports to empower blacks to take action that might be adverse to perceived white interests. For instance, in *Croson*, it was suggested that the Richmond Plan could be viewed as an attempt at racial retaliation to punish whites for past racial wrongs. As Justice O'Connor explained:

> In this case, blacks constitute approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case.[189]

184. *Id.* at 953.

185. Grutter v. Bollinger, 539 U.S. 306, 349 (2003) (Scalia, J., concurring in part and dissenting in part).

186. *Id*. at 354, 377 (Thomas, J., concurring in part and dissenting in part).

187. *Id.* at 394 (Kennedy, J., dissenting).

188. *Id.*

189. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495–96 (1989) (plurality opinion).

Justice Scalia reinforced this claim. He too observed that it was a majority black city council that was advancing a race preference for minorities. Invoking fears of minority retaliation, Scalia noted: "Where injustice is the game, however, turnabout is not fair play."[190] Scalia maintained that, under the circumstances, the Richmond Legislature simply could not be trusted to advance a fair policy. He offered a formal justification for this position, remarking that Congress can legislate remedial actions because of explicit power granted in the Fourteenth Amendment, not granted to the states.[191] In making this argument, however, Scalia suggested Congress possessed "dispassionate objectivity" to mold race-conscious remedies that, in his view, the Richmond City Council lacked. [192]

Nevertheless, Scalia went on to argue that race preferences, whether advanced by Congress or a local legislature, threaten domestic tranquility because they only serve to draw attention to race distinctions. According to Scalia,

> [r]acial preferences appear to 'even the score' (in some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white.[193]

"Nothing," he argued, "is worth that embrace."[194] Or as Justice Kennedy put it in his concurring opinion,

> [w]e are left with an ordinance and a legislative record open to the fair charge that it is not a remedy but is itself a preference which will cause the same corrosive animosities that the Constitution forbids in the whole sphere of government and that our national policy condemns in the rest of society as well.[195]

2. The Pedigree of Domestic Tranquility Rhetoric

The fact that modern opponents, in the face of persistent racial disparities in health, wealth, and society, continue to highlight the possibility that race preferences engender white discomfort, fuel white resistance, and spark black reprisal, serves as an important reminder that a

190. *Id.* at 524.
191. *Id.* at 521–22.
192. *Id.* at 522.
193. *Id.* at 528.
194. *Id.*
195. *Id.* at 519–20.

great deal of racial tension within American society remains fundamentally unresolved. Given the historic origins of this tension, it is perhaps unsurprising that nineteenth-century legal actors, acutely aware of the transformative possibilities presented by Reconstruction era racial reform, viewed race preferences of that era as a supreme threat to white domestic tranquility. Much like their modern counterparts, early opponents of race preferences articulated fears ranging from psychic discomfort caused by mundane intrusions into everyday life to deep concerns about the threat posed by the free exercise of black human agency and political power.

Concern that policy specifically designed to benefit blacks would upset the prevailing order of white privilege figured prominently among opponents of post-Reconstruction civil rights legislation. Consider the comments of Illinois Congressman Anthony Thornton, in response to the proposed Civil Rights Act of 1866:

> I insist, sir, that the construction given to the [Thirteenth] constitutional amendment by gentlemen who advocate this bill is too broad, too latitudinarian. The sole object of that amendment was to change the *status* of the slave to that of a freeman; and the only power conferred upon Congress by the second section of that amendment is the power to enforce the freedom of those who have been thus emancipated. Is it necessary to constitute a man a freeman that he should have conferred upon him all the civil rights and immunities provided for in this bill?
>
> . . . Look at the conditions of those whom this bill is most to affect. Reflect upon the relations between the late master and his late slave. These relations have been such for long series of years as to engender a state of feeling which will prevent the Negro from being impartial and unbiased witness in controversies between white men.
>
> . . . I cannot consent to force upon the people of the Southern states, or of any of the States, the provisions of this bill.[196]

Similar fears were expressed by the Delaware Legislature, which issued the following formal statement in opposition to the Act:

> That the immutable laws of God have affixed upon the brow of the white races the ineffaceable stamp of superiority, and that all attempt to elevate the negro to a social or political equality with the white man is futile and subversive to the ends and aims for which the American Government was established, and contrary to the doctrines and teachings of the Father of the Republic.[197]

196. CONG. GLOBE, 39th Cong., 1st Sess. 1156–57 (1866).

197. Delaware Laws 13:86–88, *reprinted in* RADICALISM, RACISM, AND PARTY REALIGNMENT: THE BORDER STATES DURING RECONSTRUCTION 197 (Richard O. Curry ed., 1969).

Domestic tranquility concerns similarly animated President Johnson's explicit federalism objection to the Act. Johnson criticized the Act as an attempt to achieve "perfect equality of the white and colored races . . . fixed by Federal law in every State of the Union," which, in Johnson's mind, unduly imposed on state sovereignty.[198] According to Johnson, "In the exercise of State policy over matters exclusively affecting the people of each State it has frequently been thought expedient to discriminate between the two races."[199] As an example of a State's power to regulate its own citizenry, Johnson invokes the lightning rod of interracial intimacy:

> By the statutes of some of the States, Northern as well as Southern, it is enacted, for instance, that no white person shall intermarry with a negro or mulatto. . . . I do not say this bill repeals State laws on the subject of marriage between the two races . . . . I cite this discrimination, however, as an instance of the State policy as to discrimination, and to inquire whether if Congress can abrogate all State laws of discrimination between the two races in matters of real estate, of suits, and of contracts generally. Congress may not also repeal State laws as to the contract of marriage between the two races.[200]

Beneath Johnson's federalism objection, then, lies a deeper concern that the race preferences contemplated by the Act pose a viable threat to establish social hierarchy between the races.

Domestic tranquility rhetoric fueled opposition to the Civil Rights Act of 1875 as well. Consider the Virginia Legislature's Resolution opposing the Civil Rights Act of 1875. The Virginia Legislature maintained that provisions of the 1875 Act that provided for greater social equality between whites and blacks posed a serious threat to domestic tranquility. According to the Legislature:

> [T]he bill now before Congress . . . [is] injurious alike to the white and colored population of the Southern States, and that its enforced application . . . will prove destructive of their systems of education; . . . produce continual irritation between the races, counteract the pacification and development now happily progressing, . . . re-open wounds now almost healed, . . . and paralyze the power and influence of the State government for duly controlling and promoting domestic interests and preserving internal harmony.[201]

198. MESSAGES AND PAPERS, *supra* note 104, at 3605.
199. *Id.*
200. *Id.*
201. H.R. DOC. NO. 60, at 2 (Va. 1874).

In a similar spirit, Representative William Robbins of North Carolina offered the following comments during spirited debate over the 1875 Act:

> I lay down a true doctrine—that every man has the right, and is bound by duty, to fill the sphere and move in the orbit to which God and nature have assigned him, as indicated by his peculiar natural endowments, which, being different in each individual and in each race, point out for each a different party to perform. If we could change this, and compel all to revolve in one and the same orbit, we should overthrow the eternal laws and reduce the world back to chaos.[202]

Representative Robbins was not alone in these debates. Kentucky Congressman Milton Durham's opposition to the 1875 Act was likewise rooted in white supremacy. According to Durham, even "[t]he poorest and humblest white person in my district feels and knows that he or she belongs to a superior race morally and intellectually and nothing is so revolting to them as social equality with this inferior race."[203]

Interestingly, not all former slave states viewed the 1875 Act as a threat to domestic tranquility. In a similar resolution offered by the South Carolina Legislature, local politicians supported the Act based upon the belief that "it will remove real grievances, will secure rights now denied, and will tend to promote peace and harmony among all our citizens."[204] Remarking upon the fear that the Act creates a new form of "social equality," the South Carolina Legislature stated:

> Social equality is said to be the result of the passage of the bill. Such a claim is a shallow pretense. The broad doctrine that every right or occupation dependent upon our public laws should be exercised for the benefit of all, without regard to the accident of race or color, is fundamental and irrefragable. The public schools, the public conveyances, the public cemeteries, the public inns, are all alike within this principle.[205]

Nevertheless, the opponents to the 1875 Act held fast to the argument that such a progressive measure posed a threat to domestic tranquility.

The wholesale acceptance of this strand of domestic tranquility rhetoric by the end of the nineteenth century is perhaps best exemplified by Justice Brown's opinion in *Plessy v. Ferguson*, which summarily declared that racial separation was both desirable and comfortable for whites and blacks alike. The Louisiana ordinance mandating segregation in railroad

202. 2 CONG. REC. 897, 898 (1874) (statement of Rep. Robbins).
203. 2 CONG. REC. 405, 406 (1874) (statement of Rep. Durham).
204. H.R. DOC. NO. 111, at 1 (S.C. 1874).
205. *Id.*

cars, according to Brown, was a "reasonable" race regulation that had been enacted "with a view to the promotion of . . . comfort, and the preservation of the public peace and good order."[206] The Court's explicit endorsement of the comforts of white supremacy signaled the radical expansion of Jim Crow legislation, much of which was justified on similar grounds of domestic tranquility.[207]

Nineteenth-century opponents of race preferences also expressed deep reservations about the efficacy of empowering blacks as full citizens. Indeed, in his opposition to the 1866 Act, President Johnson speculated on just how far the Act might go in terms of upsetting domestic tranquility:

> If it be granted that Congress can repeal all State laws discriminating between whites and blacks . . . why, it may be asked, may not Congress repeal in the same way all State laws discriminating between the two races on the subjects of suffrage and office? . . . [Under the Act], Congress can by law also declare who, without regard to color or race, shall have the right to sit as a juror or as a judge, to hold office, and, finally, to vote, "in every State and Territory of the United States."[208]

Congressional opposition to the 1866 Act further exemplified this most fervent strand of domestic tranquility rhetoric. Members of Congress sought to characterize the debate over Negro citizenship as one that threatened the sanctity of foundational American precepts. Consider the position of New Jersey Representative A.J. Rogers:

> I would not go for an amendment to the Constitution to give [the power of citizenship] so dangerous, so likely to degrade the white men and women of this country, which would put it in the power of the fanaticism of the times of excitement and civil war to allow the people of any State to mingle and mix themselves by marriage with Negroes so as to ruin the pure white blood of the Anglo-Saxon people of this country into the black blood of the Negro or the copper blood of the Indian.[209]

During a spirited debate, Rogers elaborated on his position:

> Mr. Rogers: . . . [I]f you pass this bill, you will allow the negroes of this country to compete for the high office of President of the United States. Because if they are citizens at all, they come within the meaning and letter of the Constitution of the United States, which allows all natural

206. Plessy v. Ferguson, 163 U.S. 537, 550 (1896).

207. For a discussion of the explosion in segregation laws across the country following the Court's decision in *Plessy*, see *supra* note 14.

208. MESSAGES AND PAPERS, *supra* note 104, at 3606.

209. CONG. GLOBE, 39th Cong., 1st Sess. 134 (1866).

> born citizens to become candidates for the Presidency, and to exercise the duties of that office if elected.
>
> Member: Are you afraid of that?
>
> Mr. Rogers: I am afraid of degrading this Government. I am afraid of danger to constitutional liberty. I am alarmed at the stupendous strides which this Congress is trying to initiate. And I appeal in behalf of my country, in behalf of those that are to come after us, of generations yet unborn, as well as those now living, that conservative men on the other side should rally to the standard of sovereign and independent States, and blot out this idea which is inculcating itself here.[210]

Congressman Rogers's fearful articulation exemplifies the palpable insecurities of defeated white southerners only decades removed from the Civil War. Yet his views would soon be shared by nineteenth-century white northerners and southerners alike, and remain an integral feature of American race relations for a century and beyond.

III. THE SIGNALING EFFECTS OF PEDIGREED RHETORIC

Sir Frances Bacon famously quipped: "The duty and office of Rhetoric is to *apply Reason to Imagination* for the better moving of the will."[211] If Bacon is correct, then an examination of how and why particular words are used, and with what effects, illuminates substantial areas in the political and legal culture.

The manner in which we choose to talk about issues shapes the character and health of community and culture. The rhetorical strategies we employ can and often do lead to a greater constructive unity. In the nineteenth century, the rhetoric of respect, dignity, and inclusion advanced by noted abolitionists, such as Frederick Douglass[212] and William Lloyd Garrison,[213] exemplified the best of inclusionary racial politics of that era.

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210. CONG. GLOBE, 39th Cong., 1st Sess., H.P. 1122 (1866).

211. FRANCIS BACON, SELECTED WRITINGS OF FRANCIS BACON 309 (Hugh G. Dick ed., 1955).

212. *See* Frederick Douglass, What to the Slave is the Fourth of July?: An Address Delivered in Rochester, New York (July 5, 1852), *in* 2 THE FREDERICK DOUGLASS PAPERS 359 (John W. Blassingame ed., 1982). According to Douglass:

> You are all on fire at the mention of liberty for France or for Ireland; but are as cold as an iceberg at the thought of liberty for the enslaved of America. . . . You profess to believe "that, of one blood, God made all nations of men to dwell on the face of all the earth," and hath commanded all men, everywhere to love one another; yet you notoriously hate, (and glory in your hatred), all men whose skins are not colored like your own.

Id. at 383.

213. *See* William Lloyd Garrison, Abolitionist William Lloyd Garrison Admits of No Compromise With the Evils of Slavery (1854), *in* LEND ME YOUR EARS: GREAT SPEECHES IN HISTORY 628 (William Safire ed., 1997). According to Garrison:

Similarly, the civil rights rhetoric of Martin Luther King, Jr. exemplified the best of twentieth-century American discourse on racial unity.[214] Following the attacks of September 11, 2001, we witnessed an outpouring of rhetoric imploring Americans of all persuasions to unite against the threat of terrorism.[215] More recently, political discourse of the Democratic

> I am a believer in that portion of the Declaration of Independence in which it is set forth, as among self-evident truths, "that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness." Hence, I am an abolitionist. Hence, I cannot but regard oppression in every form—and most of all, that which turns a man into a thing—with indignation and abhorrence. . . . Convince me that one man may rightfully make another man his slave, and I will no longer subscribe to the Declaration of Independence . . . . I do not know how to espouse freedom and slavery together.

Id.

214. Racial unity rhetoric figured prominently in King's "I Have a Dream Speech":

> And when we allow freedom to ring, when we let it ring from every village and hamlet, from every state and city, we will be able to speed up the day when all of God's children—black men and white men, Jews and Gentiles, Catholics and Protestants—will be able to join hands and to sing the words of the old Negro spiritual, "Free at last, free at last; thank God Almighty, we are free at last."

Martin Luther King, Jr., I Have a Dream Speech (Aug. 28, 1963), *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 217, 220 (James M. Washington ed., 1986) [hereinafter A TESTAMENT OF HOPE]. Racial unity rhetoric was also of primary importance in King's other speeches and writings, see, for example, Martin Luther King, Jr., *Negroes Are Not Moving Too Fast*, *in* A TESTAMENT OF HOPE, *supra*, at 176, 180 ("The best course for the Negro happens to be the best course for whites as well and for the nation as a whole."), and proved central to his belief that "community" lies at the heart of civilization:

> At the heart of all that civilization has meant and developed is "community"—the mutually cooperative and voluntary venture of man to assume a semblance of responsibility for his brother. What began as the closest answer to a desperate need for survival . . . was the basis of present-day cities and nations. Man could not have survived without the impulse which makes him the societal creature he is.

Martin Luther King, Jr., The Ethical Demands for Integration (Dec. 27, 1962), *in* A TESTAMENT OF HOPE, *supra*, at 117, 122.

215. Consider President George W. Bush's public remarks immediately following the tragedy of September 11th:

> Both Americans and Muslim friends and citizens, tax-paying citizens, and Muslims in nations were just appalled and could not believe what we saw on our TV screens . . . . And that's made brothers and sisters out of every race—out of every race . . . . Muslims are doctors, lawyers, law professors, members of the military, entrepreneurs, shopkeepers, moms and dads. And they need to be treated with respect. In our anger and emotion, our fellow Americans must treat each other with respect.

George W. Bush, U.S. President, Remarks at the Islamic Center of Washington, D.C. (Sept. 17, 2001). The President reiterated this theme in a subsequent public address to Congress:

> In the normal course of events, Presidents come to this chamber to report on the state of the Union. Tonight no such report is needed. It has already been delivered by the American people . . . . We have seen the state of our Union in the endurance of rescuers, working past exhaustion. We have seen the unfurling of flags, the lighting of candles, the giving of blood, the saying of prayers—in English, Hebrew, and Arabic.

George W. Bush, U.S. President, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html. In an address

Party has reflected a dramatic embrace of rhetorical strategies designed to evoke a greater constructive unity.[216]

Rhetorical strategies can also exacerbate community divisions. The ideology of white supremacy, which animated much of American political discourse from the founding of this Nation well into the twentieth century, the legacy of hostility toward non-European immigrants, the rhetoric of separatist black nationalism,[217] and the more recent vilification of Japanese

before the United Nations, Mayor Giuliani employed community rhetoric in an effort to unite the world against the growing threat of terrorism:

> We are defined as Americans by our beliefs—not by our ethnic origins, our race or our religion. Our beliefs in religious freedom, political freedom, and economic freedom—that's what makes an American. Our belief in democracy, the rule of law and respect for human life—that's how you become an American . . . . [The war on terrorism] is not a dispute between religions or ethnic groups. All religions, all decent people, are united in their desire to achieve peace, and understand that we have to eliminate terrorism. We're not divided about this.

Rudolph Giuliani, N.Y. Mayor, Opening Remarks to the United Nations General Assembly Special Session on Terrorism (Oct. 1, 2001), http://www.un.org/terrorism/statements/giuliani.html.

216. Barak Obama's speech during the 2004 Democratic Convention provides a particularly compelling example of this approach:

> Yet even as we speak, there are those of us who are preparing to divide us, the spin masters and negative ad peddlers who embrace the politics of anything goes. Well, I say to them tonight, there is not a liberal America and a conservative America—there's the United States of America. There's not a black America and a white America and a Latino America and an Asian America; there's the United States of America.

Barak Obama, candidate for U.S. Senate, Keynote Address at the Democratic National Convention: Out of this Long Political Darkness a Brighter Day Will Come (July 27, 2004). Other speakers built upon this immediate theme throughout the Convention, see, for example, John Edwards, Keynote Address, Democratic National Convention (July 28, 2004) ("And the heart of this campaign—your campaign—is to make sure that everyone has those same opportunities that I had growing up—no matter where you live, who your family is, or what the color of your skin is. This is the America we believe in.").

217. *See, e.g.*, Minister Louis Farrakhan of the Nation of Islam, Challenge to Black Men Delivered at the Million Man March (Oct. 17, 1995) ("There's still two Americas, one Black, one White, separate and unequal." Also,"[t]here's a new Black man in America today . . . . [W]henever you return to your cities and you see a Black man, a Black woman, don't ask him what is your social, political or religious affiliation, or what is your status? Know that he is your brother."). Stokely Carmichael, a seminal figure in the mid-century Black Power Movement, sounded similar themes in his seminal 1966 speech at the campus of UC Berkeley:

> We cannot have white people working in the black community—on psychological grounds. The fact is that all back people question whether or not they are equal to whites, since every time they start to do something, white people are around showing them how to do it. If we are going to eliminate that for the generation that comes after us, then black people must be in positions of power, doing and articulating for themselves. That's not reverse racism; it is moving onto healthy ground; it is becoming what the philosopher Satre says, an "antiracist racist."

Stokely Carmichael, Remarks in Berkeley, California: Black Power (Oct. 1966).

Americans,[218] Muslims, and Americans of Arab ancestry in times of national crisis[219] are but a few examples.

In addition to shaping individual and community identity, rhetoric plays a crucial role in the articulation and maintenance of ideology, including racial ideology. It is easy to forget that racial ideology, at bottom, is political imagination naturalized through conversation. The content of racial ideology itself is sourced from a multitude of conflicting and often confrontational principles, beliefs, and impulses.[220] But every racial

218. *See* Korematsu v. United States, 323 U.S. 214 (1944) (upholding internment of Americans of Japanese ancestry on grounds of military necessity). For a legal history of the internment of American citizens of Japanese descent, see generally JACOBUS TENBROEK, EDWARD N. BARNHART & FLOYD W. MATSON, PREJUDICE, WAR, AND THE CONSTITUTION (1968). For a documentary history, see ERIC K. YAMAMOTO ET AL., RACE RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (2001). For a critique of internment policy, see DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 96–100 (2003). According to Cole:

> None of the interned Japanese was ever charged with, much less convicted of, espionage, sabotage, or treason. But the absence of evidence did not stop the demands for internment. Instead, . . . government officials argued that the very fact that Japanese aliens and citizens living among us had *not* taken any subversive action only underscored how dangerous they really were.

Id. at 97.

219. *See* COLE, *supra* note 218, at 47 ("By January 2002 . . . the Council on American-Islamic Relations had already received 1,658 reports of discrimination, profiling, harassment, and physical assaults against persons appearing Arab or Muslim, a three-fold increase over the prior year. The reports included beatings, death threats, abusive police practices, and employment and airline-related discrimination."); Eric K. Yamamoto, Susan K. Serrano & Michelle Natividad Rodriguez, *American Racial Justice On Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1278 (2003) ("Peter Kirsanow, a controversial Bush appointee to the Commission on Civil Rights, predicted the broad-scale internment of Arab Americans if another terrorist attack occurs in the United States."). For a detailed account of the negative portrayal of Arabs in entertainment and news media, see JACK G. SHAHEEN, REEL BAD ARABS: HOW HOLLYWOOD VILIFIES A PEOPLE (2001) (chronicling over 1000 movies which portray Arabs as villains); JACK G. SHAHEEN, THE TV ARAB (1984) (describing the villainization of Arabs in television and news media sources).

220. *Compare* DAVID M. CHALMERS, HOODED AMERICANISM: THE FIRST CENTURY OF THE KU KLUX KLAN 1865–1965 (1965) (describing the Klan's white supremacy ideology), *with* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 108–15 (1962) (advocating a free market approach to regulating and remedying racial discrimination), *and* ANDREW KULL, THE COLOR-BLIND CONSTITUTION 8–21, 222 (1992) (advocating colorblindness based upon perceived fidelity to the Framer's intentions and belief in colorblind governmental decisionmaking while endorsing race-neutral approaches to remedying past discrimination), *and* STOKELY CARMICHAEL & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA 3–5 (1967) (advocating black nationalism in response to "the active and pervasive operation of anti-black attitudes and practices"), *and* IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 9 (1990) (advocating group identity politics in response to perceived group politics and "real" group-based inequalities), *and* T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1065–66 (1991) (advocating race conscious identity politics grounded in a theory of racial justice), *and* Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976) (advocating a regime of positive antidiscrimination law grounded in the antidiscrimination principle).

ideology—from white supremacy to colorblindness to identity politics—is an expression of political imagination insofar as it projects upon the world a vision of racial ordering to explain how the world is or ought to be. Racial ideology is not content with mere expression, however. It is a *political instrument* designed to protect or advance the interests of those who wield it. The utility of racial ideology is a function of its social and institutional acceptance. The end-game for all racial ideology is naturalization—the total absorption and marbling of policies and moral imperatives into the flesh of society, instantiation into individuals and institutions to the point that the form of racial ordering appears as an inevitable, mundane, and ordinary feature of everyday life.

Rhetoric and conversation are the principal but surely not the sole means through which we eventually subscribe to a racial ideology and come to believe that a particular form of racial ordering is correct or just. This is especially true of racially subordinating ideologies. In the realm of racial subordination, rhetoric has always been accompanied by violence or elements of coercion. An account of white supremacist ideology of the late nineteenth and early twentieth century is incomplete without reference to private and public acts of racial terror.[221] Separatist ideology underlying expansive segregation policies that defined much of the twentieth century cannot be properly understood unless one also takes into account the concomitant enforcement strategies of violence, humiliation, and indignity.[222] Likewise, the subordinating ideology of colorblindness, rhetorically grounded in the discourse of individualism, equality, and

221. *See, e.g.*, PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA 23, 27 (2002). Dray gives an account of the 1935 lynching of dozens of slaves and their alleged white conspirators who were suspected of plotting an insurrection, and describing the South's use of armed patrollers "whose purpose was to restrict slave movement . . . inhibit slaves from congregating or visiting, and intimidate any who had designs on running away . . . . Whippings and other punishments were common. The system intensified in brutality and paranoia as abolitionist sentiment increased in the 1850s." *Id. See also* KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 190–200 (1956) (observing that following Nat Turner's rebellion, lynchings as deterrence for insurrections increased throughout the South).

222. *See, e.g.*, JERROLD M. PACKARD, AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW 132 (2002) (noting that, during the Jim Crow era, "the racial atmosphere . . . was so warped that murdering blacks became almost a socially acceptable tool for embedding white supremacy in the region's social fabric"); STEWART E. TOLNAY & E. M. BECK, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS 55–82, 131 (1995). According to Tolnay and Beck:

> Eventually these brutal acts [of lynching] degenerated simply into a method to keep African-Americans in their "place," even to the extent of picking out the occasional sacrificial lamb whose killing, racists knew, would terrify other blacks and tend to even further docilize them. . . . [P]ressure exerted by the Klan and other white supremacists kept all but a relative handful of opponents from challenging these tactics.

Id.

neutrality, is only fully revealed when one appreciates the manner in which it neglects structural racism and material conditions of oppression so as to simultaneously lock in current racial inequalities and fortify structural barriers to racial progress in health, wealth, and society.[223]

We can understand the relationship between rhetoric, ideology, and racial policy as a dialectic in which each mutually reinforce, nurture, and sustain one another. As Americans, we are a nation of people who self-consciously chose to adopt a vision of society that embraced lofty ideals of individual freedom and democracy along with powerful mechanisms for devastating racial oppression.[224] Our history is replete with instances of differential treatment on account of race—slavery being only the most egregious example[225]—that achieved the desired effect of generating remarkable disparities in socioeconomic well-being among individuals and

223. *See, e.g.*, Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162 (1994) (arguing that colorblindness is a myth which we construct in order to deal with the moral dilemma of a racially stratified society); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind*," 44 STAN. L. REV. 1 (1991) (arguing that the metaphor of "Our Constitution is Color-Blind" fosters racial domination).

224. Western-style racism and race consciousness are truly distinctive when viewed against the backdrop of the global history of racism, precisely because each developed within an overarching cultural mindset premised upon human equality. *See* GEORGE M. FREDRICKSON, RACISM: A SHORT HISTORY 12 (2002) ("It is uniquely in the West that we find the dialectical interaction between a premise of equality and an intense prejudice toward certain groups that would seem to be a precondition for the full flowering of racism as an ideology or worldview."). The U.S. Constitution itself embodies a powerful contradiction—a guarantee of individual freedom for all, and an explicit endorsement of Negro slavery. *Compare* U.S. CONST. pmbl. ("We the people of the United States, in Order to . . . secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution . . . ."), *with* U.S. CONST. art. I, § 2, cl. 3 (counting Negro slaves as three-fifths of one person for political representation purposes), *and* U.S. CONST. art I, § 9, cl. 1 (allowing for the importation and federal taxing of slave labor until 1808), *and* U.S. CONST. art. IV, § 2, cl. 3 (creating a constitutional right to the return of fugitive slaves), *and* U.S. CONST. art. V (prohibiting amendment of the slave importation and taxation provision of the Constitution prior to 1808). Although the words slave and slavery are studiously excluded from the Constitution, former president John Quincy Adams put it best when he remarked that "[c]ircumlocutions are the fig-leaves under which these parts of the body politic are decently concealed." JOHN QUINCY ADAMS, ARGUMENT OF JOHN QUINCY ADAMS, BEFORE THE SUPREME COURT OF THE UNITED STATES, IN THE CASE OF THE UNITED STATES, APPELLANTS, VS. CINQUE, AND OTHERS, AFRICANS, CAPTURED IN THE SCHOONER AMISTAD 39 (reprinted ed. 1969).

225. Other historic examples illustrate this contradiction. On the topic of federal Indian removal policy, see Indian Removal Act of 1830, ch. 148, 4 Stat. 411 (1830). On the topic of prohibitions on the naturalization of nonwhites, see Uniform Naturalization Act of 1790, ch. 3, 1 Stat. 103 (1790) (restricting naturalization to "free white person[s]"). On the topic of the curtailment of rights of Asian immigrants, see Chinese Exclusion Act of 1882, ch. 220, 23 Stat. 115 (1884) (amending the 1882 act and barring entry of Chinese laborers into the United States for ten years); Scott Act of 1888, ch. 1064, 25 Stat. 504 (1888) (prohibiting Chinese resident aliens who traveled between China and the United States from reentering the United States). On the topic of Japanese American internment during World War II, see generally YAMAMOTO ET AL., *supra* note 218.

between different racial groups.[226] Such disparities are not simply historical artifacts. They are facts of the contemporary American racial landscape as well.[227] Racial disparity in socioeconomic well-being has always been, and continues to be, a central feature of American life.

At bottom, however, the life cycle of any single racial ideology and the longevity of its manifold expressions are contingent upon social acceptance, and that acceptance is achieved through persuasion. As society transforms and evolves, each succeeding generation chooses how to interact and respond to the racial world we inhabit. It is thus critical that we understand the intellectual history of ideas and arguments that animate our policy positions on race.

But if rhetoric is the primary means through which we signal our normative and ideological commitments, then the contemporary reliance

226. Human relations always take place against the backdrop of the relative power possessed by each person. *See* MAX WEBER, BASIC CONCEPTS IN SOCIOLOGY 117 (H.P. Secher trans., 1962) (describing "power" in social settings as "that opportunity existing within a social relationship which permits one to carry out one's own will even against resistance and regardless of the basis on which this opportunity rests"). Slavery represents the ultimate expression of such power—absolute power for the master and absolute powerlessness for the slave—and a most obvious means of imposing social, economic, and cultural isolation. *See* ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY 182, 183 (1982).

227. Recent data confirms these disparities. African Americans with the same level of education as whites continue to earn substantially less. *See* U.S. CENSUS BUREAU, MONEY INCOME IN THE UNITED STATES: 1999, CURRENT POPULATION REPORTS (2000). Blacks continue to occupy proportionally fewer managerial positions and proportionally greater service and unskilled labor positions. *See* U.S. BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY, ftp://ftp.bls.gov/pub/special.requests/lf/aat10.txt (last visited Sept. 18, 2006). Median family income for African Americans is roughly two-thirds that of whites. *See* U.S. CENSUS BUREAU, HISTORICAL INCOME TABLES—HOUSEHOLDS, http://www.census.gov/income/ (last visited Sept. 18, 2006). Black youth continue to lag behind whites in performance on standardized tests for mathematics and reading comprehension. *See* J.R. Campbell, Catherine M. Hombo & John Mazzeo, *Three Decades of Student Performance*, *in* U.S. Dep't of Educ., Office of Educational Research and Improvement, National Center for Statistics, tbl. B.8, B.9, and 17–18 (1999). The percentage of African American children under the age of eighteen who live in poverty is almost double that of whites. *See* Joseph Dalaker & Bernadette D. Proctor, *Poverty in the United States: 1999*, *in* U.S. Census Bureau, Current Population Reports (2000). The same is true for the number of births to unwed mothers. *See* Stephanie J. Ventura & Christine A. Bachrach, *Nonmarital Childbearing in the United States, 1940–99*, National Vital Statistics Report (2000). Homicide victimization rates for blacks are more than six times the rates for whites. *See* James A. Fox & Marianne W. Zawitz, *Homicide Trends in the United States*, *in* U.S. Dep't. of Justice, Bureau of Statistics (2002). Incarceration rates for black men are seven times those of white men. *See* BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1997 (2000). African American adult men and women have a shorter life expectancy than their white counterparts, with black infant mortality rates approximately double those for whites. *See* Sherry L. Murphy, *Deaths: Final Data for 1998*, *in* National Vital Statistics Reports (2000).

For a discussion of empirical studies documenting the persistence of racial discrimination in education, employment, retail purchases, law enforcement, and housing, see discussion *infra* text accompanying notes 249–56.

upon pedigreed rhetoric opposing race preferences may prove particularly troubling. As demonstrated above, the dominant themes employed by opponents of race preferences have evolved little over the past 150 years. Their resilience presents a remarkable curiosity, especially given the radical societal transformation that occurred during this same period. American society has rejected explicit white supremacy in favor of the principle of colorblindness. The race preference debate has shifted from emancipation to citizenship to political rights to social quality to economic and educational opportunity. Yet the essential manner in which these issues are engaged remains fundamentally unchanged despite the benefit of historical hindsight—hindsight that exposes the absurdity of previous opposition to such measures and a pedigree rooted in the demonstrably retrograde racial climate of the nineteenth century.

Reliance upon these themes poses a substantial threat to contemporary public discourse on race preference. This is because these rhetorical themes, though deployed in the modern era, retain this odious nineteenth-century pedigree. They are "normatively loaded," so to speak, and presumptively signal a subtext of racial hostility that proponents find exceedingly difficult to disaggregate from the substantive arguments themselves. This difficulty is only further compounded by the failure of opponents to adequately explain how these themes, when advanced in the modern era, promote a vision of society that is not consistent with the retrograde past from which they are drawn. Public conversation devolves into ideological trench warfare in large part because of an overarching skepticism about the underlying normative commitments of opponents of race preferences.

Indeed, in the absence of a credible attempt by opponents of race preferences to disentangle these pedigreed themes from their retrograde normative and ideological moorings invites speculation as to what the opponents "true" normative and ideological commitments might be. What follows is a brief discussion of the kind of normative and ideological commitments signaled by opponents who fail to disentangle these pedigreed themes from the racial climate from which they are sourced.

A. WHITE PRIVILEGE

In the absence of some alternative explanation, proponents may view the continued reliance upon pedigreed rhetorical themes as signaling an underlying normative commitment to preserve white privilege. Although rigid notions of white supremacy in this country, instantiated in nearly

every facet of intellectual, cultural, and political life, have been largely eradicated, gauzy notions of exalted status possessed by virtue of being white or associated with whiteness linger and often crystallize into concrete and meaningful racial disparities. White privilege lives on in public education, reflected in entrenched segregation of schools and dramatic disparities in the quality of teachers and educational facilities.[228] It persists in law enforcement, evidenced by ongoing disparities in automobile stops and searches and how whites interpret strategies of disparate law enforcement.[229] It affects our perceptions of who is presumptively employable, and who should be denied a job opportunity.[230] It shapes our

228. *See* Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* (Jan. 2003), http://www.civilrightsproject.harvard.edu/research/reseg03/finalexec.pdf (discussing patterns of racial enrollment and segregation in American public schools at the national, regional, state, and district levels for students of all racial groups); Gary Orfield, Schools More Separate: Consequences of a Decade of Resegregation (July 2001), http://www.civilrightsproject.harvard.edu/research/deseg/Schools_More_Separate.pdf (presenting new statistics showing that racial and ethnic segregation continued to intensify throughout the 1990s). *See also* JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991) (documenting inequality in school conditions between 1988 and 1990); STEPHEN J. MCNAMEE & ROBERT K. MILLER, JR., THE MERITOCRACY MYTH 164 (2004) ("Schools with high minority enrollments are more likely to be older or run down; have inadequate facilities, programs, and technology; be overcrowded; have larger classes; have less experienced and qualified teachers; [and] have student bodies that are disproportionately lower in socioeconomic status . . . ."); Richard Thompson Ford, Brown*'s Ghost*, 117 HARV. L. REV. 1305 (2004) (presenting proposals to promote integration of public schools and housing).

229. *See, e.g*, DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 79–80 (2002) (noting that hit rates, defined at "the rates at which police actually find contraband . . . when they perform stops and searches," for African Americans and Latinos is the same or lower than the rate for whites); Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 655 (2002) (noting that, in the period from 1997 to 2000, African Americans were seventeen percent of the drivers on a highway near Baltimore but twenty-eight percent of those stopped were black and fifty-one percent of those searched were black). White privilege also affects community perceptions of racial disparities in law enforcement. As Donna Coker explains:

> Whites seldom think of themselves through the lens of race; whiteness is invisible to most whites. Rather, whites see themselves and other whites as individuals. Because they cannot see the privilege that protects them from police maltreatment and suspicion, they have difficulty believing that such treatment is not in some way invited or provoked when it happens to others.

Donna Coker, *Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. CRIM. L. & CRIMINOLOGY 827, 870 (2003). Not surprisingly, studies show that the majority of whites, when asked, expressed confidence in the ability of local police to treat blacks and whites equally and generally do not believe that blacks are treated more harshly by the criminal justice system. *See* Ronald Weitzer & Steven A. Tuch, *Race, Class, and Perceptions of Discrimination by the Police*, 45 CRIME & DELINQ. 494, 498 (1999).

230. Recent empirical studies demonstrate the benefits that whites receive in the employment context. In a recent study, researchers found that job candidates with "black sounding" names were significantly less likely to receive callback interviews. *See* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* (July 2003), http://nber.org/papers/w9873. The authors sent resumes in response to

retail purchasing experiences.[231] It colors our perceptions of minority creditworthiness.[232] It reinforces patterns of housing segregation[233] and, by extension, exacerbates racial disparities in real estate valuation and net wealth calculation.[234] The presumption of entitlement and bestowal of credibility are but a few of the ways in which white privilege continues to shape our lives and institutions.

help-wanted ads in Chicago and Boston newspapers, randomly assigning "very white sounding names (such as Emily Walsh or Greg Baker) to half the resumes," and "very African American sounding names (such as Lakisha Washington or Jamal Jones) to the other half." *Id.* at 2. The researchers discovered a fifty percent variance in callback rates. According to the authors of the study, "a White name yields as many more callbacks as an additional eight years of experience." *Id.* at 3. Interestingly, the researchers found that firms listed as "equal opportunity employers" discriminate as much as other employers. *See id.* at 17. These findings are similar to those of a 1990 study conducted by the Urban Institute. *See* MARGERY AUSTIN TURNER, MICHAEL FIX & RAYMOND J. STRUYK, OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: RACIAL DISCRIMINATION IN HIRING (1991) (using pairs of trained auditors, one black, one white, to respond to newspaper advertisements for jobs in the Chicago and Washington D.C. areas, and finding that the white auditors both advanced further in the hiring process and received job offers at a significantly higher rate than black auditors). However, some commentators maintain that class is more significant than race in shaping the employment opportunities of Blacks in postindustrial markets. *See* CHUCK COLLINS & FELICE YESKEL, ECONOMIC APARTHEID IN AMERICA: A PRIMER ON ECONOMIC INEQUALITY AND INSECURITY 43 (2005); Arthur Sakamoto & Jessie Tzeng, *A Fifty-Year Perspective on the Declining Significance of Race in the Occupational Attainment of White and Black Men*, 42 SOC. PERSP. 157, 170–74 (1999).

231. For a discussion of discrimination in retail purchases, see Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109, 116 (1995) (finding that black males received final offers that were, on average, $1,132 higher than those offered to white males); Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991) (reporting similar results using a smaller sample of testers).

232. For a discussion of mortgage credit discrimination or "redlining," see MASSEY & DENTON, *supra* note 13, at 50–57, 105–09; Keith N. Hylton & Vincent D. Rougeau, *Lending Discrimination: Economic Theory, Econometric Evidence, and the Community Reinvestment Act*, 85 GEO. L.J. 237, 241 (1996) (citing GEORGE J. BENSTON ET AL., AN EMPIRICAL STUDY OF MORTGAGE REDLINING 1–33 (1978) (summarizing a number of empirical studies confirming the existence of redlining in various communities)). *See also* MCNAMEE & MILLER, *supra* note 228, at 167 ("Studies have also revealed that, although it is illegal, banks, mortgage companies, and insurance companies discriminate, as indicated by black-white differences in loan approval rates, mortgage interest rates, and insurance rates that cannot be accounted for by black-white differences in income and other relevant characteristics.").

233. JOE R. FEAGIN & MELVIN P. SIKES, LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE 226–28 (1994) (observing that racial discrimination is a primary cause of racial segregation and noting a federal survey in which black homeseekers reportedly faced discriminatory treatment in their house searches fifty-nine percent of the time). *See also* LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA: 2002/2003, at 283, 292 (2003) (observing racial disparities in home ownership, and the effect of diminished home value on overall net wealth of racial minorities).

234. *See* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 147–51 (1995) (observing that the rate of appreciation in property values for whites was roughly double that for blacks); Margalynne Armstrong, *Race and Property Values in Entrenched Segregation*, 52 U. MIAMI L. REV. 1051, 1059 (1998) (observing that "white refusal to purchase property in locations where there are significant numbers of African-Americans means that the pool of potential buyers decreases, cutting the number of potential competing bidders for the property, resulting in lower purchase prices for black-owned property").

Some have argued that the longevity of white privilege is the natural consequence of fixation upon race because status differentiation is marbled into the concept of race as we know it. Proponents of this view maintain that the only way to deprivilege whiteness is to eradicate the concept of race from our discourse. As William Van Alstyne famously proclaimed, "[o]ne gets beyond racism by getting beyond it now: by a complete, resolute and credible commitment *never* to tolerate in one's own life—or in the life or practices of one's government—the differential treatment of other human beings by race."[235]

Critics point out, however, that eliminating consideration of race from our discourse leads to the opposite result of further entrenching racial disparities and solidifying core notions of white privilege. As Neil Gotanda explained, "Nonrecognition [of race] fosters the systematic denial of racial subordination and the psychological repression of an individual's recognition of that subordination, thereby allowing such subordination to continue."[236] As Justice Blackmun argued in *Regents of the University of California v. Bakke*,

> In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot – we dare not – let the Equal Protection Clause perpetuate racial supremacy.[237]

What is missing from this debate, however, is a sincere discussion about the nature of privilege. Privileges, which are commonly understood as special benefits, advantages, or claims to preferential treatment,[238] are both desirable and highly coveted. The pursuit of preferred treatment is a natural occurrence. As Alexis de Toqueville famously quipped, "whatever may be the general endeavor of a community to render its members equal and alike, the personal pride of individuals will always seek to rise above

235. William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809–10 (1979).

236. Gotanda, *supra* note 223, at 16.

237. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part).

238. *See e.g.*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) (defining "privilege" as "a special advantage, immunity, permission, right, or benefit granted to or enjoyed by an individual, class, or caste"); WEBSTER'S REVISED UNABRIDGED DICTIONARY (1998) (defining "privilege" as "a peculiar benefit, advantage, or favor; a right or immunity not enjoyed by others or by all; special enjoyment of a good, or exemption from an evil or burden; a prerogative; advantage; franchise"); BLACK'S LAW DICTIONARY 1197 (6th ed. 1990) (defining "privilege" as "[a] particular or peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of other citizens").

the line and to form somewhere an inequality to their own advantage."[239] Not surprisingly, a great deal of American popular culture is dedicated to both the pursuit and demystification of privileged status.[240] For better or worse, we all aspire to be privileged in some way and, once obtained, privilege proves notoriously difficult to relinquish. This is especially true in the American racial context where white skin privilege has thrived unabated for nearly four centuries.[241]

Pedigreed rhetoric, as deployed by opponents of race preferences, may prove transhistorically seductive because it appeals to and reinforces core aspects of white privilege. When legal actors invoke these pedigreed themes, they in effect declare whites innocent of racial wrongdoing while simultaneously casting proponents of racially progressive measures as political insurgents (or worse yet, "reverse racists") who seek to upset the natural order of American life. Furthermore, by affirming the status quo, opponents would appear to support individual and institutional practices that explicitly and implicitly promote white privilege and affirm the exalted status of whites. In short, one might reasonably conclude that opponents

239. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 216 (Alfred A. Knopf, Inc. 1994) (1835).

240. America's longstanding obsession with celebrity status and "VIP treatment" is most powerfully reflected in today's television offerings directed at America's youth audience. Reality television series such as Fox's *American Idol,* CBS's *Survivor* and *Big Brother*, and NBC's *The Apprentice* offer the promise of instant celebrity and presumptive privileged status. Other examples include: HBO's new dramatic series *Entourage*, which chronicles the fictional lives of the friends and groupies of a new Hollywood star; VH1's documentary series *The Fabulous Life of . . .* which offers viewers a " fast-paced, first class joy ride of lavish living, as we check out the fortune building careers and businesses of the extremely rich and famous and the incredible indulgences that come with it," VH1, http://www.vh1.com/shows/dyn/fabulous_life_of/series.jhtml (last visited Sept. 18, 2006); and MTV's *Newlyweds* reality series, which attempts to demystify the celebrity lifestyle by offering a "realistic" glimpse into the lives of recording artist Nick Lachey and pop icon Jessica Simpson.

241. *See* Martha Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799, 826 (2003) (observing that "protecting white privilege appears to be a natural economic and social interest for white people, regardless of their wealth or class position"). Barbara Flagg eloquently described the challenge of renouncing white privilege as follows:

> White people must make concrete efforts to renounce white privilege and to foster racial redistribution. We must find ways to share wealth, power, and prestige with nonwhites. The place to begin constructing a genuinely nonracist white identity is at the point where whites really give up something.

BARBARA J. FLAGG, WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW 146 (1998). *See also* J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2329 (1997) ("[I]n a system of white supremacy, whites gain positive associations of honesty, reliability, industry, intelligence, and morality in comparison to blacks. To increase the status of blacks in society means that these positive associations must be weakened or eliminated."). For a fuller discussion of white privilege, see STEPHANIE M. WILDMAN ET AL., PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996).

who rely upon these pedigreed rhetorical themes seek to promote a vision of America that is a racially hierarchical society.

B. PSYCHIC COMFORT

Proponents of race preferences might also conclude that the reliance upon pedigreed rhetorical themes by opponents of race preferences evinces a normative commitment that privileges psychic comfort at the expense of racial justice. Consider the rhetoric of racial innocence. Innocence rhetoric promotes psychic comfort of those who oppose race preferences because it rejects structural accounts of racism and racial subordination in favor of a purely attitudinal model of racism that focuses exclusively upon bad racial actors. It absolves those whites who implicitly benefit from racial privilege of any responsibility for the sorry state of race relations and any duty to undertake efforts to ameliorate racial disparities in the material conditions of racial minorities.

In this way, innocence rhetoric enables whites to enjoy the comforts of status inequality because it removes, albeit superficially, the troubling notion of racial inheritance. Again, most people are not terribly eager to be equal. To the contrary, most like to think of themselves as better than average[242] and vigorously pursue credentials and symbols that project an image of success.[243] We do not aspire to mediocrity but superiority in virtually all matters of health, wealth, and society. At the same time, few of us are eager to attribute our successes to racial inheritance, or use racial inheritance explicitly to improve our lot. Race invariably plays a part in the creation of our life chances, but few whites wish to be known either as racists or racial beneficiaries. Thus, innocence rhetoric proves comforting to whites in search of an explanation for racial disparities that does not question the legitimacy of their own individual success.

242. *See* REEVE VANNEMAN & LYNN WEBER CANNON, THE AMERICAN PERCEPTION OF CLASS 47–48 (1987) (observing that Americans routinely overestimate their relative class status).

243. For an analysis of the quest for educational and occupational credentials in American society, see DAVID K. BROWN, DEGREES OF CONTROL: A SOCIOLOGY OF EDUCATIONAL EXPANSION AND OCCUPATIONAL CREDENTIALISM (1995); Randall Collins, *Functional and Conflict Theories of Educational Stratification*, 36 AM. SOC. REV. 1002–119 (1971). For an analysis of social climbing and the pursuit of social capital in the employment context, see MCNAMEE & MILLER, *supra* note 228, at 71–94. For an interesting economic analysis of the "snob" effect and efforts to achieve social status through acquisition of fashion accessories, see Philip R.P. Coelho and James E. McClure, *Toward an Economic Theory of Fashion*, 31 ECON. INQUIRY 595, 600 (1993) (noting that "fashion goods signal status" and that fashionable clothing must change because "[t]o be an effective signal, the fashion good must be more costly to obtain for those who do *not* possess the status than for those who do").

Merit rhetoric induces comfort in a similar fashion. The idea of merit has always been situated as an ideal against the prevailing backdrop of privilege and inheritance. In the modern era, the idea of merit is increasingly exposed as largely illusory. As Fred Schauer explains, "[w]e are rapidly in the process of burying the myth of Horatio Alger [because it is becoming increasingly apparent that] [y]ou cannot get rich (or even not poor) in contemporary America just by working hard."[244] But much of that mythology still remains and continues to serve an important role in the shaping of our American identity.

Merit rhetoric engenders psychic comfort because it explains and ameliorates suspicion triggered by demonstrable racial disparity. Race preferences pose a direct challenge to illegitimate racial hierarchy by calling attention to inequalities among groups and highlighting the social and cultural insecurities of those with whom they interact. By contrast, merit rhetoric reduces the shock value of racial disparities because it not only justifies inequality, but also envelopes inequality within an aura of naturalness. It seduces whites into attributing social rank to efforts of the individual and evading contemplation of exogenous explanations for natural hierarchy. This evasion of structural accounts of racial subordination has led some commentators to question whether whites continue to believe that racism affects the life chances of minorities.[245] Thus, proponents may very well conclude that opponents who deploy pedigreed rhetorical themes when opposing race preferences are motivated by the desire to remain comfortably ensconced in the pleasures of the racial status quo.

C. ADMINISTRATIVE EASE

In the absence of some alternative explanation, proponents may attribute sustained reliance upon these pedigreed themes as evidence of their opponents' fetish for administrative ease and the illusion of analytic elegance—again, at the expense of racial justice. The *Plessy* Court's

244. Frederick Schauer, *Community, Citizenship, and the Search for National Identity*, 84 MICH. L. REV. 1504, 1516 (1986).

245. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 662 (1989) (Blackmun, J., dissenting) ("One wonders whether the majority [of the Supreme Court] still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was."); Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1348 & n.66 (1988) (most white Americans do not believe that racism still denies equal social and economic opportunities to blacks); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2327 (1989) (observing that whites tend to deny the reality of racism).

suggestion that segregation was simply a "reasonable" race distinction innocently deployed in accordance with established usages and customs provided an elegant resolution to the issue because the habits and customs were well known expressions of white supremacy.[246] The prevailing opposition to race preferences arguably reflects a similar desire to achieve analytic elegance. This position is exemplified by Justice O'Connor's argument in *Adarand Constructors, Inc. v. Peña* that all racial classifications—federal and state, benign and invidious—should be subject to strict scrutiny and tested against the moral imperative of colorblindness.[247] But as a number of commentators point out, the analytic elegance comes at a price. Beneath the veneer of elegance lie a host of critical assumptions about the nature of racism, the kinds of conduct that will be deemed actionable, but most importantly, the appropriate means of engaging matters of race. As Daniel Farber suggests, "a Court obsessed with theoretical consistency might be less able to play a useful role in the practical tasks of democratic government."[248] One of those practical tasks is to protect the interests of minorities against retrograde political choices of the majority, and this entails consideration of the impact of such policies. The simple elegance of the ideal of colorblindness and deductive logic thwarts this important function.

Formalist deductive logic may prove useful in exploring the relationship between ideas, but it is not particularly useful in exploring the underlying facts. To fully grapple with race issues, one must appreciate the influence of history, sociology, and political and economic theory on the shaping of human behavior. Commitment to the colorblind ideal and antiseptic formalism allows courts to avoid this difficult and unsettling task, to the detriment of a larger aspiration to create a more racially inclusive society.

D. INTEREST CONVERGENCE

Proponents might also view opponents' reliance upon pedigreed rhetorical themes as simply more data to support Derrick Bell's theory of interest convergence. Bell developed his theory of interest convergence to reconcile the principled success and practical failure of school desegregation efforts. The Supreme Court's unanimous declaration that segregation in public education was unconstitutional and inherently

246. Plessy v. Ferguson, 163 U.S. 537, 550 (1896).

247. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995).

248. Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1341 (1988).

unequal was, in the view of many, a milestone achievement in the legal struggle for racial justice. Yet as historians and social scientists point out, desegregation remedies failed to live up to the promise of *Brown v. Board of Education*.

According to Bell, the promise and concomitant failure of *Brown* can be explained in terms of interest convergence. According to Bell, "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."[249] "[T]he Fourteenth Amendment, standing alone," Bell wrote, "will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior society status of middle- and upper-middle class whites."[250] Bell argued that the interests of whites and blacks were aligned when it came to asserting a principled objection to segregation in public schools. As an initial matter, Bell argued that the *Brown* decision lent credibility to American Cold War efforts to persuade emerging third-world countries to reject communism.[251] Second, Bell observed, "*Brown* offered much needed reassurance to American blacks that the precepts of equality and freedom so heralded during World War II might yet be given meaning at home."[252] In this way, *Brown* helped to quell rising anger, resentment, and disillusionment among blacks that posed a threat to national stability. Third, Bell suggested that many whites viewed the presence of segregation, especially in the South, as a threat to further industrialization. As Bell recounted, "there were whites who realized that the South could make the transition from rural plantation society to the sunbelt with all its potential and profit only when it ended its struggle to remain divided by state-sponsored segregation."[253]

By contrast, the interests of whites and blacks diverged when it came to the issue of remedy. This was especially true among poor whites, noted Bell, who stood to lose control over their local school systems.[254] Poor whites experienced a sense of betrayal when it came to the issue of desegregation because, as Bell explained, "[t]hey had relied, as generations before them, on the expectation that white elites would maintain lower-class whites in a societal status superior to that designated for blacks."[255]

249. Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

250. *Id.*

251. *Id.* at 524.

252. *Id.*

253. *Id.* at 525.

254. *Id.* at 526–27.

255. *Id.* at 525–26.

Subsequent court decisions that retreated from the bold relief pronounced in *Brown* proved evidence that "the convergence of black and white interests that led to *Brown* in 1954 and influenced the character of its enforcement had begun to fade."[256]

It is arguable, then, that opponents of race preferences rely upon pedigreed rhetorical themes simply because they have proven particularly effective at thwarting racial justice initiatives when political interests diverge. Note that, under this view, one who avails himself of the rhetorical forms need not subscribe fully to the historic or contemporary ideology of racial subordination from which these rhetorical forms emanate. Sincere belief in white innocence or the stigmatizing effects of affirmative action, for instance, typically do not figure into the traditional libertarian approach to affirmative action policy. The objection is grounded typically in a sincere belief that government regulation is usually less efficient than private ordering, that racial discrimination is inefficient, and that market-based approaches to racial regulation will produce the optimal level of deterrence for bad actors.[257] Yet, to the extent that the interest of

256. *Id.* at 527. For a discussion of the possibilities presented by the *Brown* decision, see Mark Tushnet, *The Significance of* Brown v. Board of Education, 80 VA. L. REV. 173, 174–77 (1994) (discussing the role of *Brown* in affecting change in society and law); John Charles Boger, *Mount Laurel at 21 Years: Reflections on the Power of Courts and Legislatures to Shape Social Change*, 27 SETON HALL L. REV. 1450, 1469 (1997) (defending *Brown* as inspiration for civil rights activists, even though it did not result in "the immediate transformation of the racial composition of Southern schoolrooms"); Jerome M. Culp, Jr., *Black People in White Face: Assimilation, Culture, and the* Brown *Case*, 36 WM. & MARY L. REV. 665, 668 (1995) (suggesting that *Brown* "changed how we think about the society we live in," even though it did not achieve its full promise).

For discussion on the limited practical impact of the *Brown* decision on school segregation, see GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 157 (1991) (concluding that there is "little evidence that the judicial system, from the Supreme Court down, produced much of the massive change in civil rights that swept the United States in the 1960s"); Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 10, 13 (1994) (using empirical evidence to support an argument that little changed in the South immediately post-*Brown* and noting that *Brown*'s short-term effects were "indirect" and "almost perverse"); Stuart Scheingold, *Constitutional Rights and Social Change: Civil Rights in Perspective*, *in* JUDGING THE CONSTITUTION: CRITICAL ESSAYS ON JUDICIAL LAWMAKING 73, 80 (Michael W. McCann & Gerald L. Houseman eds., 1989) ("[C]ourts have sufficient power to politicize—to provoke a crisis—but not to effect social change on their own.").

For reflections on *Brown* spurred on by the fortieth anniversary of the decision, see DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2004); CHARLES OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* (2004) (arguing that the *Brown* decision was flawed from its inception and deeply susceptible to defiance and circumvention).

257. *See, e.g.*, CHARLES A. MURRAY, WHAT IT MEANS TO BE A LIBERTARIAN: A PERSONAL INTERPRETATION 82–83 (1997) (arguing that the "marketplace" provides a more efficient mechanism to deal with existing forms of racial discrimination); RICHARD A. EPSTEIN, EQUAL OPPORTUNITY OR MORE OPPORTUNITY?: THE GOOD THING ABOUT DISCRIMINATION 16 (2002) (noting that, in addition

libertarians and minorities diverge on the issue of affirmative action, libertarians may choose to deploy pedigreed rhetoric simply to protect their interests. Thus, the rhetorical themes remain a part of the political repertoire mainly due to their efficacy. Furthermore, one can imagine that, should these arguments lose that efficacy, opponents would freely abandon these forms for new ones that more adequately protected their interests.

E. A DEFICIT OF POLITICAL IMAGINATION

Proponents may also conclude that continued reliance upon the pedigreed rhetorical themes when opposing race preferences evinces a sheer deficit of political imagination. For many Americans, it is impossible to imagine a world in which consideration of race does not present a catastrophic threat to either the lives of whites or minorities. These pedigreed rhetorical themes capitalize on prevailing perceptions that racial progress is a zero-sum affair and that taking race into account necessarily harms whites, minorities, or both. As Justice Thomas declared in the Court's most recent race case, race-based decisionmaking is categorically "demean[ing] [to] us all."[258] Pedigreed rhetorical themes also revel in racial tension, seeking to inflame the passions of whites in order to rally against the perceived racial and cultural insurgency that threatens to undermine the virtues of American society. Continued reliance upon these themes, in other words, reinforces the emaciated view of the world around us.

In a very real sense, the use of pedigreed rhetoric to oppose race preferences not only stifles racial progress, but also stunts the growth of our political imagination. Proponents of race preferences explicitly challenge prevailing notions of political community by brushing aside traditional understandings of equality and inclusion. Race preferences themselves are generally designed to expand opportunities for racial minorities and, in turn, realize the democratic possibilities of American society. Staunch adherence to pedigreed rhetoric opposing race preferences not only signals a commitment to stifle racial progress, but also exudes a nostalgia for the uninspired democracy that defined nineteenth-century racial politics.

The essential task is to persuade Americans to muster the courage to imagine greater possibilities of racial inclusiveness, and to inspire a critical

to undermining basic human liberty, the cost of the administration of the antidiscrimination law is "hundreds of millions of pounds in foregone economic efficiency").

258. Grutter v. Bollinger, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part).

intelligence that disciplines the almost reflexive impulse to view racially progressive measures in tragic or catastrophic terms. The genius of our Founding Fathers was that they understood the organic nature of democracy and the vital role of political imagination in maintaining and ensuring national stability and longevity. The race issue has proven particularly divisive throughout history precisely because it calls upon each of us to imagine an American democracy capable of confronting and responding meaningfully to the absurdity of racial injustice.[259] In this way, political imagination serves as both the first and final frontier for conscientious dialogue on the future prospects of racial progress.

IV. A FOUNDATION FOR RENEWED RACIAL DIALOGUE

A deepened appreciation and open acknowledgment of this pedigree is crucial to restoring public conversation on race preferences. Opponents of race preferences must come to understand that this pedigree, if left unaddressed, tends to overwhelm the underlying merit of arguments against race preferences in the eyes of proponents. At the same time, proponents should understand that the deployment of these pedigreed rhetorical themes does not necessarily signal agreement with the nineteenth-century racial norms from which they are sourced. For both proponents and opponents, the avoidance of a rapid retreat into ideological trench warfare not only preserves space for reasoned, substantive debate regarding race preferences, but also allows for the possibility of overcoming our collective fixation on race preferences as *the* issue in American race relations and advancing the conversation to reach the larger issue of producing a more racially inclusive society.

Our failing public conversation on race matters not only presents a particularly tragic moment in American race relations, but also evinces a greater failure of democracy. Sustained, meaningful dialogue is a critical, if not indispensable feature of our liberal democracy.[260] It is through

259. Operationalizing political imagination undoubtedly carries with it substantial risks. But as Cornel West remarks in his most recent meditation on the future of American democracy, "if we lose our precious democratic experiment, let it be said that we went down swinging like Ella Fitzgerald and Muhammad Ali—with style, grace, and a smile that signifies that the seeds of democracy matters will flower and flourish somewhere and somehow remember our gallant efforts." CORNEL WEST, DEMOCRACY MATTERS 218 (2004).

260. Deliberation and dialogue figure prominently in democratic theory. *See* STEPHEN MACEDO, INTRODUCTION TO DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT 1 (Stephen Macedo ed., 1999) (taking note of the surging popularity of the Deliberative Democracy school of thought); David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1756–71 (2005) (recounting at length the fall of pluralism and the rise of deliberation as a central feature of democratic

meaningful public conversation about what actions government should take (or refrain from taking) that public policy determinations ultimately gain legitimacy. Conversation is particularly important in our democracy, given the profoundly diverse and often contradictory cultural and political traditions that are the sine qua non of American life. Under these particular circumstances, "persons ought to strive to engage in a mutual process of critical interaction, because if they do not, no uncoerced common understanding can possibly be attained."[261] Sincere deliberation, in its broadest idealized form, ensures that a broad array of input is heard and considered, legitimizing the resulting decision. Under this view, "[i]f the preferences that determine the results of democratic procedures are unreflective or ignorant, then they lose their claim to political authority over us."[262] In the absence of self-conscious, reflective dialogue, "democracy loses its capacity to generate legitimate political power."[263]

In addition to legitimizing the exercise of state authority in a liberal democracy, dialogue works to promote individual freedom. The power to hash over our alternatives is an important exercise of human agency. [264] If democracy is taken to mean rule by the people themselves, then conversation and deliberation are the principal means through which we declare and assert the power to shape our own belief systems. The roots of this idea of dialogue as freedom-promoting are traceable to the Kantian view that individual motivation that is either uncriticized or uncontested can be understood on a deeper level as a mode of subjugation. As Frank Michelman explains, "in Kantian terms we are free only insofar as we are

thought). Civic republican theory also places particular emphasis on dialogue. Lori Ringhand, *Defining Democracy: The Supreme Court's Campaign Finance Dilemma*, 56 HASTINGS L.J. 77, 83 (2004–05) ("Ideal democracy, to the civic republican, consists of deliberative debate about public issues, conducted in the context of political equality and respect."). *See also* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988) (explaining the civic republican tradition). By contrast, the liberal democratic tradition views a system of representation (rather than participation) as crucial to democratic functioning. *See* JOSEPH M. BESSETTE, THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT 3 (1994) (stating that deliberation's proper place is in Congress, before going on to chronicle Congress's abysmal failure to engage in meaningful deliberation); GEORGE KATEB, HANNAH ARENDT: POLITICS, CONSCIENCE, EVIL 115 (1984) (criticizing deliberative theory for failing to appreciate the benefits of a representative system).

261. ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 143 (1995).

262. JAMES S. FISHKIN, DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM 29 (1991).

263. JAMES BOHMAN, PUBLIC DELIBERATION: PLURALISM, COMPLEXITY, AND DEMOCRACY 238–39 (1996).

264. ADOLF GUNDERSEN, THE SOCRATIC CITIZEN: A THEORY OF DELIBERATIVE DEMOCRACY 123–24 (2000) (quoting Robert Lane, *Patterns of Political Belief*, *in* HANDBOOK OF POLITICAL PSYCHOLOGY 115 (Jeanne Knutson ed., 1973)).

self-governing, directing our actions in accordance with law-like reasons that we adopt for ourselves, as proper to ourselves, upon conscious, critical reflection on our identities (or natures) and social situations."[265] Because "self-cognition and ensuing self-legislation must, to a like extent, be socially situated," Michelman continues, "norms must be formed through public dialogue and expressed as public law."[266] In this way, dialogue as democratic modus operandi can be understood both as a material expression of freedom and as a mechanism to promote individual freedom.

Robust dialogue on public policy matters also promotes the individual growth of the dialogue participants. Conversation helps people become more knowledgeable and hold better developed opinions because "opinions can be tested and enlarged only where there is a genuine encounter with differing opinions."[267] Moreover, meaningful conversation serves to broaden people's moral perspectives to include matters of public good, because appeals to the public good are often the most persuasive arguments available in public deliberation.[268] Indeed, even if people are thinking self-interested thoughts while making public good arguments, cognitive dissonance will create an incentive for such individuals to reconcile their self interest with the public good.[269] At the same time, because political dialogue is a material manifestation of democracy in action, it promotes a feeling of democratic community and instills in the people a will for political action to advance reasoned public policy in the spirit of promoting the public good.[270]

For these reasons, the collective aspiration of those interested in pursing serious, sustained, and policy-legitimating dialogue on race matters must be to cultivate a reasoned discourse that is relatively free of retrograde ideological baggage that feeds skepticism, engenders distrust, and effectively forecloses constructive conversation on the most corrosive and divisive issue in American history and contemporary life. As the forgoing sections suggest, the continued reliance upon pedigreed rhetorical themes has and continues to poison racial legal discourse. Given the various

265. Frank I. Michelman, *Traces of Self-Government*, 100 HARV. L. REV. 4, 26 (1986).

266. *Id*. at 27.

267. RICHARD BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS 216 (1983).

268. Jon Elster, *The Market and the Forum: Three Varieties of Political Theory*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 3, 12 (James Bohman & William Rehg eds., 1997). *See* Matthew Festenstein, *Deliberation, Citizenship, and Identity*, *in* DEMOCRACY AS PUBLIC DELIBERATION: NEW PERSPECTIVES 88, 97 (Maurizio Passerin D'Entrèves ed., 2002).

269. *See* Elster, *supra* note 268, at 12–13; Festenstein, *supra* note 268, at 97.

270. GUNDERSEN, *supra* note 264, at 121–22.

normative and ideological commitments that might be ascribed to opponents of race preferences, the question thus becomes, how are we to approach the task of breaking through the conversational impasse and creating intellectual space for meaningful discourse on this issue?

One can imagine at least three responses to this question. As an initial matter, one might subscribe to the view that pedigree is not destiny, and thus conclude that the family resemblance tells us little, if anything, definitive about the normative commitments of today's opponents of race preferences. Consider the argument that the benefits of white privilege do not extend equally among all whites, and that policies that treat all whites as equally guilty of racial subordination advance a theory of undesirable rough justice.[271] Although this argument is a staple of modern opponents of race preferences, it would be a mistake to conclude that it can only be deployed by those persons who normatively oppose race preferences. Indeed, one might very well support race preferences, but believe quite strongly that such programs should be particularly sensitive to individual candidate qualifications.

Similarly, although one might believe that diversity does not comport with merit based decisionmaking in education and employment, it would be incorrect to interpret this belief as necessarily indicative of a greater commitment to preserving status quo racial inequality. One might reject the diversity rational as insufficient to justify a system of race preferences that one strongly believes must be justified. In short, one may be inclined to simply engage the argument and ignore the possibility of retrograde normative underpinnings.

Interestingly, a small cadre of scholars has adopted this approach. Derrick Bok and William Bowen, in *The Shape of the River*, investigated whether racial minorities feel stigmatized or otherwise adversely affected as a result of being denoted beneficiaries of affirmative action policy in college admissions.[272] Thomas Ross has critically examined claims of collective white innocence.[273] More recently, Goodwin Lui has researched the scope of the burden that affirmative action in college admissions imposes upon aspiring white students.[274] In each instance, these scholars chose to place to one side their skepticism about the normative

271. *See supra* notes 21–69 and accompanying text.
272. WILLIAM G. BOWEN & DEREK C. BOK, THE SHAPE OF THE RIVER (1998).
273. Ross, *supra* note 93.
274. *See* Lui, *supra* note 29.

commitments of those advancing the viewpoint, and launch directly into substantive critiques of that viewpoint.

This approach, however, may prove unsatisfactory for those more strongly committed to racial justice—those for whom it is not enough to simply challenge ideas in the abstract. As the late Robert Cover famously wrote, "legal interpretation takes place within a field of pain and death."[275] By this, he meant that the stakes of legal discourse are elevated when bodies are on the line. A vigorous critique of the substantive position alone leaves the normative underpinnings—the motivational force behind the proposal—dangerously intact. It may stymie the particular vehicle that attempts to reinforce racial subordination, but it leaves unaddressed the fundamental motive driving policy positions that seek to undermine racial minorities in the first place.

At the other end of the responsive spectrum is wholesale rejection. One might view the pedigree as providing good reason to dismiss opponents of race entirely. Proponents of this view may choose to indulge fully this liberal skepticism and simply reject the message along with the messenger.[276] The tradition of legal discourse on American race relations

275. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

276. *See* NORMAN C. AMAKER, CIVIL RIGHTS AND THE REAGAN ADMINISTRATION (1988) (strongly implying that the Reagan administration was thoroughly racist); ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 201 (1992) ("One of the two major parties—the Republicans—has all but explicitly stated that it is willing to have itself regarded as a white party, prepared to represent white Americans and defend their interests."); GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 161–71 (1993) (arguing that the Supreme Court functions to perpetuate the subordination of racial minorities in the United States); Michael Berube, *Extreme Prejudice*, 69 TRANSITION 90, 90 (1996) (reviewing D'SOUZA, *supra* note 16) ("Do I really have any obligation to keep plowing through the bookshelves of the Right, demonstrating again and again that there's no one there?"); Crenshaw, *supra* note 245, at 1338 (hinting that, despite its protestations, "the Reagan Administration was anti-Black and ideologically opposed to civil rights"); Richard Delgado, *Rodrigo's Bookbag: Brimelow, Bork, Herrnstein, Murray, and D'Souza—Recent Conservative Thought and the End of Equality*, 50 STAN. L. REV. 1929 (1998) (reviewing multiple books and implying that recent conservative scholarship has been simply racist); Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash"*, 87 MINN. L. REV. 1447 (2003) (noting that the Republican party's "war on crime" is nothing but coded racism); Paul Finkelman, *The Rise of the New Racism*, 15 YALE L. & POL'Y REV. 245, 282 (1996) (reviewing D'SOUZA, *supra* note 16) ("D'Souza's book stands as a heavily footnoted manifesto for [a] 'new racism.'"); Cheryl Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753, 1756 (2001) ("While I do not hold the view that there is something inherent in the Constitution that inevitably and fatally constricts the possibilities of . . . equal citizenship, it is certainly the case that the current interpretive approaches now prevalent in the Supreme Court[] . . . lead to precisely such limitations."); Sidney Willhelm, *The Supreme Court: A Citadel for White Supremacy*, 79 MICH. L. REV. 847 (1981) (reviewing DERRICK BELL, RACE, RACISM AND AMERICAN LAW (2d ed. 1980)) (asserting that Bell does not go far enough in his criticisms and that the Supreme Court is a citadel for white supremacy). *See generally* DERRICK BELL, FACES AT THE BOTTOM

has been one steeped in racial animus and characterized by circumlocution, evasiveness, reluctance and denial. When opponents avail themselves of rhetorical strategies used by nineteenth-century legal elites, they necessarily invoke the specter of this tragic racial past. Moreover, their continued reliance upon pedigreed rhetoric to justify a system that only modestly responds to persistent racial disparities in the material lives of racial minorities suggests a deep, unarticulated normative commitment to preserving the racial status quo in which whites remain comfortably above blacks. The steadfast reliance upon pedigreed rhetoric, coupled with the apparent disconnect between claims of racial egalitarianism and material conditions of racial subordination as a result of persistent racial disparities, spoils the credibility of modern opponents of race preferences and creates an incentive for proponents to dismiss them without serious interrogation, consideration, and weighing of the arguments they advance.

The principal deficit of this approach is that it would serve only to concretize the existing conversational impasse and subvert the larger aspiration of seeking constructive solutions to pressing racial issues. It creates an incentive to view race matters in purely ideological terms and further subverts the possibility of reasoned policy debate. Speaking of race matters in purely ideological terms poses a serious impediment to racial

OF THE WELL: THE PERMANENCE OF RACISM (1992) (discussing race and racial assumptions). *See also* T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325 (1992) ("Acts of bigotry are not isolated fires caused by unpredictable lightning strikes, but rather the manifestations of the racist fires that continue to burn deep within American culture."); Regina Austin, *Back to Basics: Returning to the Matter of Black Inferiority and White Supremacy in the Post*-Brown *Era*, 6 J. APP. PRAC. & PROCESS 79 (2004) (observing that "at the root of [public schools' failing of black youths] lies the pervasive ideological insistence on the inevitability of black inferiority and white supremacy and the naturalness of the unequal distribution of resources and opportunities that they justify," and that "such core beliefs die hard"); John C. Brittain, *Is Racism Permanent? A Symposium*, POVERTY & RACE, Nov./Dec. 1993, *reprinted in* DOUBLE EXPOSURE: POVERTY AND RACE IN AMERICA 22 (Chester Hartman, 1997) (agreeing with Bell's thesis that racism is a permanent feature of America); Robert S. Chang & Jerome M. Culp, Jr., *Business as Usual?* Brown *and the Continuing Conundrum of Race in America*, 2004 U. ILL. L. REV. 1181 (2004) (explaining why, despite promises of formal equality, America is stuck in a racial "inequality cycle"); Jerome M. Culp, Jr., *Neutrality, the Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform*, 45 RUTGERS L. REV. 965 (1993) (agreeing with Bell's thesis that racism is a permanent feature of America); Bernardine Dohrn, *Is Racism Permanent? A Symposium*, POVERTY & RACE, Nov./Dec. 1993, *reprinted in* DOUBLE EXPOSURE, *supra*, at 35 (same); Daniel Levitas, *Is Racism Permanent? A Symposium*, POVERTY & RACE, Nov./Dec. 1993, *reprinted in* DOUBLE EXPOSURE, *supra*, at 30 (same); José Padilla, *Is Racism Permanent? A Symposium*, POVERTY & RACE, Jan./Feb. 1994, *reprinted in* DOUBLE EXPOSURE, *supra*, at 31 (same); Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination*, 86 VA. L. REV. 727 (2000) (comparing white dominance of law school admissions to a self-reinforcing monopoly and explaining the durability of such monopolies); George H. Taylor, *Racism as "the Nation's Crucial Sin": Theology and Derrick Bell*, 9 MICH. J. RACE & L. 269 (2004) (implicitly accepting Bell's thesis that racism is a permanent feature of America).

conversation because, in advancing one's position, one essentially argues that a particular set of circumstances demands a particular outcome. In this way, purely ideological race rhetoric functions much like philosopher Immanuel Kant described in the *Groundwork of the Metaphysics of Morals*.[277] According to Kant, a moral imperative is categorical insofar as it is presented as objectively necessary, without reference to some purpose or outcome. The imperative is the end in and of itself. As Kant explained, the moral imperative "has to do not with the matter of the action and what is to result from it, but with the form and the principle from which the action itself follows; and the essentially [sic] good in the action consists in the disposition, let the result be what it may."[278] Because the moral imperative embodies that which is morally good, it necessarily makes a claim about justice. In short, an act is deemed morally just to the extent that it retains fidelity to the moral imperative.

By contrast, a policy argument reflects a set of choices or priorities and asserts a claim about the impact of a particular set of decisions upon the world.[279] A policy argument does not embody a claim to justice. Indeed, the correctness of a policy choice is often tested against the backdrop of some agreed upon conception of justice. As the late Jerome Culp, Jr. explained:

> Neither side of a moral debate is likely to be persuaded by proof that the policy claims support or discredit their moral positions. Policy arguments can be disproved by empirical evidence and challenged by showing in some situations the policy does not work or has contrary results. To refute a moral claim, however, first requires some agreement on the moral framework. Only then can one discuss whether the moral policy advocated conforms to the agreed-upon framework.[280]

Speaking about race matters in purely ideological or moral terms creates the impression that a particular racial policy is rooted in some theory of what is morally just. In this way, opposition to race preferences is made to appear "above the fray" of politics and less susceptible to public

277. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (Mary Gregor trans. & ed., Cambridge Univ. Press 1997).

278. *Id.* at 27.

279. Culp, *supra* note 223, at 170. *See also* Linda H. Edwards, *The Convergence of Analogical and Dialectical Imaginations in Legal Discourse*, 20 LEGAL STUD. F. 7, 10 (1996) (describing policy arguments as arguments about the way the world works, or arguments that a proposed rule will benefit society by serving a particular social function); Wilson R. Huhn, *Teaching Legal Analysis Using a Pluralistic Model of Law*, 36 GONZ. L. REV. 433, 485 (2001) (noting that "[t]he distinctive feature of policy arguments is that they are consequentialist in nature").

280. Culp, *supra* note 223, at 170.

choice debate. In addition, it enables opponents to claim that race preferences merely reflect the political whims of its proponents, unanchored by principle or a coherent theory of social justice.

Second, reducing conversation on race matters to an ideological contest allows opponents to elide inquiry into whether the *results* of a particular preference policy are desirable. Policy positions masquerading as principled ideological stances create the impression that a racial policy is not simply a choice among available alternatives, but the embodiment of some higher moral principle. Thus, the "principle" becomes an end in itself, without reference to outcomes. Consider the prevailing view of colorblindness in constitutional discourse. Colorblindness has come to be understood as the embodiment of what is morally just, independent of its actual effect upon the lives of racial minorities. This explains Justice Thomas's belief in the "moral and constitutional equivalence" between Jim Crow laws and race preferences, and his tragic assertion that "Government cannot make us equal [but] can only recognize, respect, and protect us as equal before the law."[281] For Thomas, there is no meaningful difference between laws designed to entrench racial subordination and those designed to alleviate conditions of oppression. Critics may point out that colorblindness in practice has the effect of entrenching existing racial disparities in health, wealth, and society. But in framing the debate in purely ideological terms, opponents are able to avoid the contentious issue of outcomes and make viability determinations based exclusively on whether racially progressive measures exude fidelity to the ideological principle of colorblindness. Meaningful policy debate is replaced by ideological exchange, which further exacerbates hostilities and deepens the cycle of resentment.[282]

A third, and perhaps more promising path, involves a partial embrace of normative skepticism with a view toward stimulating improved dialogue and the transparent, healthy exchange of ideas. Under this view, opponents who traffic in nineteenth-century rhetorical styles and argument trigger a strong, but rebuttable presumption that they harbor normative and ideological commitments fundamentally at odds with the shared aspiration of creating a more racial inclusive and egalitarian society. But rather than reject opponents categorically, one may call upon opponents to rebut this presumption by articulating their normative commitments and subject those normative commitments to closer scrutiny. Rebutting this presumption

281. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 240 (1995) (Thomas, J., concurring).

282. *See supra* text accompanying note 5 (describing the prevailing view that current racial legal discourse is plagued by bitterness and resentment).

would require opponents to acknowledge the devastating effects of their pedigreed arguments in the past, and offer a convincing explanation of how the deployment of these themes in the modern era does something other than perpetuate status quo inequality.

The rebuttable presumption framework proves particularly useful in situations like this because it facilitates deep interrogation of motives for conduct that often appears superficially free of bias, but where there is strong reason to believe otherwise.[283] For instance, in the antidiscrimination law context, an individual who claims to have been racially discriminated against by a would-be employer carries the initial burden of establishing a prima facie case of racial discrimination by showing that he or she (1) belongs to a racial minority; (2) applied for a job for which the employer was seeking applications; (3) was rejected despite being qualified for the position; and (4) that after the complainant's rejection, the employer continued to seek applications. Once the complainant establishes these facts, the burden shifts to the employer to show some legitimate, nondiscriminatory reason for the employer's adverse decision to the complainant. Then, the complainant must be given the

283. For examples of the traditional burden shifting framework applied in connection with federal nondiscrimination statutes, see Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) (applying the McDonnell Douglas burden shifting framework to an ADA claim); Ross v. Campbell Soup Co., 237 F.3d 701 (6th Cir. 2001) (same); Gallups v. City of Alexander City, 287 F. Supp. 2d 1286 (M.D. Ala. 2003) (same); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) (assuming arguendo, where the parties did not dispute the issue, that the McDonnell Douglas burden shifting framework applies to ADEA claims, based on numerous circuit court decisions); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (applying the McDonnell Douglas burden shifting framework to an EEOA claim); Corning Glass Works v. Brennan, 417 U.S. 188 (1974) (applying a framework analogous to the McDonnell Douglas burden shifting framework to an EPA claim); Fallon v. Illinois, 882 F.2d 1206 (7th Cir. 1989) (distinguishing the EPA burden shifting framework from the traditional McDonnell Douglas burden shifting framework in that both the burden of production and the burden of persuasion shifts to the defendant upon the showing of a prima facie case); Gavalik v. Cont'l Can Co., 812 F.2d 834 (3d Cir. 1987), *cert. denied*, 484 U.S. 979 (1987) (applying the McDonnell Douglas burden shifting framework to an ERISA claim); Cichon v. Exelon Generation Co., 401 F.3d 803 (7th Cir. 2005) (applying the McDonnell Douglas burden shifting framework to an FLSA claim); Grey v. City of Oak Grove, Mo., 396 F.3d 1031 (8th Cir. 2005) (same); Buie v. Quad/Graphics, Inc., 366 F.3d 496 (7th Cir. 2004) (applying the McDonnell Douglas burden shifting framework to an FMLA claim); Potenza v. City of New York, 365 F.3d 165 (2d Cir. 2004) (same); Smith v. BellSouth Telecomms., Inc., 273 F.3d 1303 (11th Cir. 2001) (same); Clean Harbors Envtl. Servs., Inc. v. Herman, 146 F.3d 12 (1st Cir. 1998) (applying the McDonnell Douglas burden shifting framework to an STAA claim); Gagnon v. Sprint Corp., 284 F.3d 839 (8th Cir. 2002), *cert. denied*, 537 U.S. 1014 (2002) (distinguishing the USERRA burden shifting framework from the traditional McDonnell Douglas burden shifting framework in that both the burden of production and the burden of persuasion shift to the defendant upon the showing of a prima facie case); Sheehan v. Dep't of Navy, 240 F.3d 1009 (Fed. Cir. 2001) (same).

opportunity to show that the employer's purported decision is a pretext for a racially discriminatory decision.[284]

Courts employ a similar framework to interrogate lawyers' motives in striking jurors from cases. In addition to challenges for cause—in which a juror may be eliminated for a specific, articulated reason—a lawyer may also use a limited number of peremptory strikes to eliminate potential jurors without providing an explicit reason for doing so. If, however, it appears that a potential juror was eliminated on the basis of race or gender, the lawyer may be called upon to explain the race-neural or gender-neutral motivation for striking that particular juror. The lawyer's strike, however, may still be overturned if the complaining party can convince the court that the explanation offered is a mere pretext.[285]

In each instance, the burden shifting framework is deployed to smoke out discriminatory motive were there is a strong basis for skepticism. In both the employment and criminal justice context, this skepticism is derived from the immediate facts at issue in the case when situated against the backdrop of America's extended history of institutionalized racial and gender bias. When the decision to deny employment or strike a juror looks and feels like the sort of racial and gender discrimination that we know has taken place in the past, we are rightly skeptical and demand that individuals who engage in such conduct "hum a few more bars" in order to push the conversation beyond suspicion and toward a more fruitful, transparent dialogue on the merits.

Ideally, the burden shifting framework provides a mechanism through which we gain a deeper understanding both of the conduct at issue and the underlying motives and normative commitments of those who engage in such conduct. However, this ideal proves far more elusive in practice. As scholars have pointed out over the years, lower courts often reduce the "burden" on those accused of discrimination in jury selection through non-critical acceptance of a host of race- and gender-neutral explanations for

284. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

285. *See* J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994); Batson v. Kentucky, 476 U.S. 79 (1986). *See also* John J. Francis, *Preemptory Challenges,* Grutter*, and Critical Mass: A Means of Reclaiming the Promise of* Batson, 29 VT. L. REV. 297 (2005) (charting the judicial missteps since *Batson* and noting several proposed solutions); Geoffrey A. Gannaway, *Texas Independence: The Lone Star State Serves as an Example to Other Jurisdictions as It Rejects Mixed-Motive Defenses to* Batson *Challenges*, 21 REV. LITIG. 375 (2002) (holding up Texas as the model of a jurisdiction faithful to *Batson*'s purpose and spirit); Robert William Rodriguez, Batson v. Kentucky*: Equal Protection, the Fair Cross-Section Requirement, and the Discriminatory Use of Preemptory Challenges*, 37 EMORY L.J. 755 (1988) (chronicling the history of discrimination and the preemptory challenge and finding *Batson* to be a right headed but vague solution).

peremptory strikes.[286] Moreover, racial discrimination in the employment context is particular difficult to discern. For instance, an interviewing panel might claim that the job applicant did not interview particularly well—a claim that is incredibly difficult to refute. The same is likely true of the contention that the applicant did not demonstrate strong "people skills" during the interview process. Moreover, it would be equally difficult to argue that these proffered explanations are a mere pretext.

Despite these shortcomings, the presumption framework provides the most compelling prospect for achieving robust, constructive dialogue on race matters. As an initial matter, it avoids the destructive closing-ranks mentality. It also may prove effective in deescalating racial hostilities because it provides a mechanism for structured interrogation of the opponents' position that acknowledges and affirms skepticism, but highlights a pathway for continued dialogue that steers clear of the nihilism and despair that plagues many racial progressives. Because the presumption is rebuttable, the framework may prove effective in breaking the cycle of resentment.

At the same time, the presumption framework acknowledges the dialectical relationship between rhetoric, ideology, and identity, and provides a mechanism to simultaneously address both the rhetoric and the normative commitments that animate such rhetoric. By spotlighting the linkage between rhetoric, ideology, and community, and situating that dialectic within the larger history of American race relations, it generates a heightened sensitivity to the influence of race rhetoric. This, in turn, creates an incentive to avoid the inflammatory rhetoric that leads to the disintegration of reasoned discourse.

Although the burden shifting framework provides a useful mechanism to promote democracy-enhancing dialogue on race matters, one can anticipate a number of objections that may problematize the ability to capitalize on this approach in this particular context. First, opponents may bristle at the idea that the mere deployment of pedigreed rhetoric should trigger elevated scrutiny of the normative commitments of the speaker. The history of American race relations and the persistence of racial disparities

286. *See* United States v. Martinez, 168 F.3d 1043, 1047 (8th Cir. 1999) (noting that poor eye contact is a legitimate race-neutral reason for striking a juror); United States v. Fields, 72 F.3d 1200, 1206 (5th Cir. 1996) (same); Polk v. Dixie Ins. Co., 972 F.2d 83, 85–86 (5th Cir. 1992) (same); United States v. Bishop, 959 F.2d 820, 821, 827 (9th Cir. 1992) (holding that the potential bias of minority jurors living in low income neighborhoods is a legitimate race-neutral reason for striking a juror); Rice v. State, 746 S.W.2d 356, 357 (Tex. App. 1988) (holding that poor spelling on a juror information card is a legitimate race-neutral reason for striking a juror).

in health, wealth, and society, however, suggest that a presumption of good faith is simply not warranted. Nineteenth-century racial norms, from which these pedigreed themes are sourced, nurtured and sustained devastating modes of racial oppression. Although modern opposition to race preferences has largely broken free of its white supremacist origins, it nevertheless works to concretize the current state of racial inequality. If modern opponents are to be viewed as partners in the search for a clear vision of the public good, then their underlying normative commitments must be professed and scrutinized.[287]

Second, one may argue that the additional burden of having to lay bare one's normative commitments whenever advancing pedigreed arguments may create an incentive to avoid inflammatory rhetoric, but may also motivate opponents to "disguise" their rhetoric in order to mask the motive, or refrain from dialogue altogether.[288] Although the risk that some opponents, wary of exposing their true beliefs, might seek to mask their normative commitments and subvert the dialogue is real, it nevertheless reveals something about the nature of their commitment to the purportedly shared enterprise of racial progress. The burden shifting framework structures dialogue in a way that tends to expose insincere posturing, thereby creating an incentive not to participate in an overly strategic fashion. If nothing else, simple confirmation that these individuals lack the will to engage in serious, transparent dialogue will work to undermine their credibility and effectively diminish the persuasiveness of their positions.

Third, opponents may be skeptical that the burden shifting framework will produce that sort of engaged dialogue that it promises, given the entrenched nature of the ideological positions. Constructive democratic dialogue presupposes that the participants are willing to move a meaningful distance from their initial position. But this is not always possible. Consider the example of a religious fundamentalist. Not only is it central to the fundamentalist's religious beliefs that he or she is always correct and

287. Moreover, there is no reason to think that this framework should not apply to racial progressives as well—the virtue of transparency is good for all sides of the debate.

288. As Richard Epstein once observed in the context of firm compliance with the mandates of Title VII,

> Any sound overall assessment cannot ignore the material effects that such litigation has on the creation of new jobs for other workers. Tracing down these consequences will be hard. Firms are not likely to announce that their decisions are made to minimize the adverse effects of the civil rights laws. They are not likely to broadcast their strategy. The effects are likely to be large and significant, but they also will be hidden from view. They may involve decisions on where to build the next new plant; or to decide which of two plants the firm will expand and by how much; or to decide which plant the firm will shut down.

Epstein, *Subtle Vices*, *supra* note 108, at 575.

everyone else is always incorrect on certain issues, but also the basic presupposition that makes dialogue function to legitimate public policy is also incompatible with the fundamentalist's beliefs. Indeed, the prospect of dialogue is particularly dim precisely because what the fundamentalist believes is diametrically opposed to the nature of deliberative dialogue itself.[289] Within the framework of dialogue, the fundamentalist is the prototype of the immovable deliberator.[290]

William Simon identifies subscribers to identity politics as a second class of immovable deliberators. According to Simon, minorities who subscribe to identity politics feel that their sense of self-worth is so bound up with affirmative action that the validity of race preferences is simply not open to debate.[291] Taken together, one might hypothesize that any time an issue becomes bound up too tightly with one's identity—be it religious identity, racial identity, or any other kind of identity, one can no longer hear debate about that issue without hearing debate about oneself, which makes addressing arguments *qua* arguments on the merits exceedingly difficult.

To be sure, the presence of immovable deliberators may result in a conversation on race matters that falls short of the idealized form envisioned by a burden shifting framework, but imperfect dialogue is arguably better than no dialogue at all. Moreover, reasoned dialogue on race matters is not the be-all-end-all of American race relations. Indeed, sustained, meaningful conversation may not be the silver bullet that will end racial conflict for all time. [292] However, it is perhaps the most important tool we have to provide a deeper understanding of the normative and substantive terrain that must be negotiated as we strive collectively toward the larger goal of racial justice in the most diverse civilization on earth.

289. *See* Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* DELIBERATIVE DEMOCRACY, *supra* note 268, at 67, 82; Festenstein, s*upra* note 268, at 92–94; Michelman, *supra* note 265, at 27; Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31 (1985).

290. *See* Ian Shapiro, *Enough of Deliberation: Politics is About Interests and Power*, *in* DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT 30–31 (Stephen Macedo ed., 1999).

291. William Simon, *Three Limitations on Deliberative Democracy: Identity Politics, Bad Faith, and Indeterminacy*, *in* DELIBERATIVE POLITICS, *supra* note 290, at 50–53.

292. *See* Iris Marion Young, *Activist Challenges to Deliberative Democracy*, *in* DEBATING DELIBERATIVE DEMOCRACY 102 (James S. Fishkin & Peter Laslett eds., 2003) (arguing that the principle of resolving political issues via dialogue may be at odds with the tradition of social activism, which occasionally produces laudable results).

V. CONCLUSION

In this Article, I have argued that public conversation regarding the use of race as a factor in university admissions and hiring decisions remains at a contentious impasse because the *manner* of engaged opposition, rhetorically speaking, has evolved little over the past 150 years. A deep understanding of the pedigree of rhetoric deployed by opponents of race preferences explains why public conversation has fallen into a cycle of resentment. But it also provides crucial insight into the foundation for renewed racial dialogue. As an initial matter, this inquiry provides a welcome opportunity for legal and political actors to pause and reflect on the trajectory of race relations in American culture. As Charles Miller wrote some time ago, "[b]oth statutory and judge-made law have played important roles in the history of American race relations, and race weighs heavy in the American constitutional tradition."[293] To be sure, legal pronouncements on the preeminent racial issues of the day are not the be-all-end-all of American race relations. But the reach of such pronouncements can and does extend beyond their specific legal holdings to exert a profound influence on our culture, and the evaluation of this influence is well served by a rigorous consideration of the structure and style of reasoning used to justify the prevailing racial legal order.

An appreciation of the pedigreed rhetoric opposing race preferences also serves to vindicate the deep skepticism shared by many regarding the normative commitments of opponents. At the same time, an exploration of this pedigree allows opponents the opportunity to respond to this skepticism by elaborating on the reasons for opposing race preferences in a manner that dispels the presumptive linkages to the reasoning and discourse that defined retrograde nineteenth-century racial politics. This may entail open acknowledgment and engagement with the unpleasantness of past racial discourse, but such an unpleasant recognition may be the proverbial "brook of fire" that cleanses individuals and institutions and enables us to commit to the reasoned and robust exchange of ideas that is the hallmark of our democracy.

A deepened understanding of rhetoric provides a pathway out of the ideological *cul de sac* of race preference discourse. It provides us with a means of transforming ritualized recitation of ideological platitudes and inflexible appeals to the inexorable logic of one ideological commitment or another into reasoned debate over the relative merits of race preferences.

293. Charles A. Miller, *Constitutional Law and the Rhetoric of Race*, 5 PERSP. AM. HIST. 147, 200 (1971).

Equally important, however, is that the restoration of public conversation on race preferences allows us to see race preferences as merely one component of a much larger vision to construct a more racially inclusive American society—an aspiration generally shared by proponents and opponents alike.