
RETHINKING RACIAL ENTITLEMENTS: FROM EPITHET TO THEORY

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From warnings of the “entitlement epidemic” brewing in our homes to accusations that Barack Obama “replac[ed] our merit-based society with an Entitlement Society,” entitlements carry new meaning these days, with particular negative psychological and behavioral connotation. As Mitt Romney once put it, entitlements “can only foster passivity and sloth.” For conservatives, racial entitlements emerge in this milieu as one insidious form of entitlements. In 2013, Justice Scalia, for example, famously declared the Voting Rights Act a racial entitlement, as he had labeled affirmative action several decades before.

In this Article, I draw upon and upend the concept of racial entitlement as it is used in modern political and judicial discourse, taking the concept from mere epithet to theory and setting the stage for future empirical work. Building on research in the social sciences on psychological entitlement and also on theories and research from sociology on group-based perceptions and actions, I define a racial entitlement as a state-provided or backed benefit from which emerges a belief of self-deservedness based on membership in a racial category alone. Contrary to what conservatives who use the term would have us believe, I argue that racial entitlements can be identified only by examining government policies as they interact with social expectations. I explain why the Voting Rights Act and affirmative action are not likely to amount to racial entitlements for blacks and racial minorities,

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and I present one way in which antidiscrimination law today may amount to a racial entitlement—for whites.

Theorizing racial entitlements allows us a language to more accurately describe some of the circumstances under which racial subordination and conflict emerge. More importantly, it gives us a concrete sense of one way in which laws can interact with people to entrench inequality and foster conflict. It uncovers the psychological and emotional elements of racial entitlements that can turn seemingly neutral laws as well as those that explicitly rely on racial classifications against broader nondiscrimination goals. This conceptual gain, in turn, can open up new avenues for research and thought. And it can provide practical payoff: ability to isolate laws or government programs that are likely to amount to racial entitlements for targeted change.

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INTRODUCTION

Racial entitlements are the unspoken but obvious shame in American law. They have been with us since the start of the Republic. America was born as a nation of free white men. The Constitution made it clear that only free white men were eligible to exercise the rights, privileges, and immunities conferred by its provisions. As Chief Justice Taney explained in the infamous *Dred Scott* decision, “[blacks] had no rights which the white man was bound to respect.”¹ Even after slavery ended, Jim Crow and decades of legally endorsed, sometimes mandated racial segregation made it clear that entitlements for whites were central to the operation of American law and society. The government doled out housing, loans, roads, sewers, parks, and schools along racial lines, with whites in the category of perpetual benefit.

Today, though, there’s a new racial entitlement afoot: it’s the stuff of conservative political rhetoric aimed at upending civil rights programs that address the racial subordination of minorities. Conservatives using the term today seek to bracket it from early American history and to capitalize instead on their more recent success in pathologizing the concept of entitlement more broadly. For these conservatives, the history of racial entitlements begins in the 1970s, when then-law professor Antonin Scalia first used the term in an academic writing on affirmative action. Later, the term was extended to refer to the Voting Rights Act as it prevented the dilution of racial minority votes in preclearance jurisdictions. When conservative critics cry “racial entitlement” in these scenarios they are alleging that the state—whether by a constitutional provision, statute, regulation, or judicial interpretation—provides or backs up a benefit based on membership in a racial category alone that has negative consequences for society as a whole. As they seem to see it, the initial social evil of this arrangement is that it violates basic tenets of fairness and colorblindness. Even worse, though, is the entitlement piece: that the state-provided benefit will create a sense of race-based deservedness in the particular racial community benefitted and a relationship of dependency as members of that group expect continued conferral of the benefit.

This Article takes a closer look at the modern concept of racial entitlement in political and judicial rhetoric. It exposes the history behind the term, including conservatives’ contemporary deployment of the term to raise

1. *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857).

questions about the propriety of race-based antidiscrimination measures. And it considers whether and how the concept might in fact be useful in thinking about the ways that law can entrench subordination and engender racial conflict in America today.

The overarching goal of the Article is one of broad theoretical strokes: to flip the script on racial entitlement, delving more closely into its meaning and its operation so that we can see it from a new perspective. Taking the lead from conservatives, we can define a racial entitlement as a government-provided or backed benefit that automatically accrues because of one's membership in a protected group and that creates undue feelings of deservedness and dependency along racial lines. But this Article argues that racial entitlements cannot be determined by looking solely at government policies, at whether they confer a race-based benefit, and then assigning or assuming negative consequences from there. Rather, racial entitlements can be identified only by examining government policies as they interact with social expectations, by asking whether the government policy is likely to create the subjective, psychological state of entitlement around race and corresponding negative behaviors.

Taking this theoretical understanding to concrete examples, the Article shows that the programs conservative critics challenge as racial entitlements for blacks and other racial minorities—affirmative action and voting rights—are not likely to be such. It also presents one way in which antidiscrimination law today may amount to a racial entitlement—for whites. It argues that by insulating organizational structures and racialized work cultures from antidiscrimination purview, federal employment discrimination law as currently implemented may be creating a sense among whites in some white-dominated workplaces that they are entitled to work environments that advantage them.

A key secondary goal of the Article is to open up space for research and thinking on racial entitlements without the political baggage that the term has carried with it over the past several decades. To this end, the Article goes beyond mere critique of a term of current conservative rhetoric to build groundwork for a positive research agenda around the concept of racial entitlements. Theorizing racial entitlements allows us a language to more accurately describe some of the circumstances under which racial conflict emerges. More importantly, it gives us a concrete sense of one way in which laws can interact with people to entrench inequality. Theorizing racial entitlements uncovers the psychological and emotional elements that can turn seemingly neutral laws as well as those that explicitly rely on racial classifications against broader nondiscrimination goals. It also allows

conceptual distinction between laws that explicitly provide group-based benefits, which sometimes can but will not always entitle, and laws that entitle more subtly by backing up a group-based benefit that already exists. We can think of a racial entitlement as a layer on inequality in a specific context, a psychological, emotional layer that lies atop racial advantage or privilege and that is created by specific government policy or law. Understanding racial entitlements in this way can open up important new avenues of research and thought. Moreover, this conceptual gain, in turn, can present practical payoff: it provides us with opportunity to isolate laws or policies that are likely to amount to racial entitlements for targeted change.

By giving the term racial entitlement meaning that allows us to better see how law can interact with people to shape beliefs and behaviors, the Article draws on and contributes to several lines of research and literature. Most prominently, it builds from work in critical race theory and sociology that surfaces the actions and harms of colorblind racism and other ideological frames that perpetuate segregation and subordination.² It also calls for empirical work that challenges racialized assumptions and claims.³ Racial entitlement is a concept that to date has been a tool of the right: applied exclusively to programs and policies that generally benefit blacks and racial minorities and used to stoke racial resentment on the part of whites.⁴ More deeply theorizing racial entitlements exposes the possibility of white racial entitlements, and the conditions under which they may arise.

The Article also ties firmly into research on law and society.⁵ When law

2. For examples of works discussing the impact of colorblind racism, see generally EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM & THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* (5th ed. 2017); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

3. For examples of symposia drawing on empirical work and interrogating assumptions and terminology in the area of welfare, race, and families, see generally Symposium, *Reframing the Welfare Queen: Feminist and Critical Race Theory Alternatives to Existing Poverty Discourse*, 25 S. CAL. INTERDISC. L.J. 257 (2016); Symposium, *The Moynihan Report Revisited: Lessons and Reflections After Four Decades*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 315 (2009).

4. See ARLIE RUSSELL HOCHSCHILD, *STRANGERS IN THEIR OWN LAND: ANGER AND MOURNING ON THE AMERICAN RIGHT* 136–51 (2016) (relaying a “deep story” of whites that racial minorities, immigrants, and women are “cutting in line”).

5. The Article draws on and contributes to work in the field of law and society in at least two ways: broadly in thinking about the law’s relationship with individuals and groups, including group conflict, and more narrowly in thinking about how legal consciousness can influence feelings and beliefs about self (including deservingness) apart from rights mobilization. See generally ELLEN BERREY ET AL., *RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY* (2017) (contrasting the effect of antidiscrimination laws on individuals’ and groups’ legal consciousness with the high personal costs and structural obstacles that make these rights difficult to vindicate); LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* (2016) (arguing that the intended effects of workplace antidiscrimination laws are attenuated by employers’ and managers’

amounts to a racial entitlement it can reinforce and legitimize racial hierarchy by engendering feelings of racial superiority and behaviors of racial conflict. The term racial entitlement can refer to the descriptive, psychological state of believing oneself more deserving than members of another group (beliefs of racial entitlement) and also to an act of the state that creates or contributes to those beliefs and associated behaviors (a racial entitlement). This Article homes in primarily at the latter point.⁶ Although it draws on research in the field of psychology to develop a preliminary sense of the psychological and emotional elements of racial entitlements and their costs, the goal is not to psychologize racism or discrimination, but rather to expose the law's or state's role in entrenching racial privilege.⁷

A modern theory of racial entitlements gets us past mere epithet to offer advocates and scholars a fresh way of thinking about how law interacts with racial identities, expectations, and behaviors to entrench or create inequality. It also provides courts and scholars new possibilities for change, shedding light on ways in which the law might be better structured to avoid racial entitlements that can contribute to ongoing inequality and subordination. Theorizing racial entitlements might also carry beyond race to thinking about gender, sexuality, disability, class, religion, or other group-based and often historically subordinating statuses. It can prompt us to think more deeply about benefits that the law provides around socially salient categories (both in the present and in the past), even when the law itself is not expressly doling out benefits along category lines.

implementations of those laws, which in turn influence courts' interpretation and enforcement of the laws in ways that undermine workers' interests).

6. This Article focuses at the macro level, asking whether we might better understand racial entitlements to begin to dismantle one source of psychological entitlement and associated conflict and negative social behavior. One way of describing the focus of this piece is as one of whether and when the law and other government policies *create* racial entitlement beliefs and behaviors. In future work, I plan to investigate racial entitlement more deeply at the meso and micro, relational level by thinking more about how beliefs and behaviors of racial entitlement can build in various contexts, including particular institutions such as neighborhoods, schools, and workplaces, and also how racial entitlement might affect identity and vice versa. The inquiry for the law in this future project will be about how the law might be best structured to *disrupt* or *discourage* feelings and behaviors of racial entitlement even when societally created. As such, this future project will more fully engage the important scholarship on identity and especially racial identity over time and in context. For examples of scholarship engaging these topics, see generally Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Self-Identification*, 102 GEO. L.J. 1501 (2014); Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497 (2010) [hereinafter Rich, *Marginal Whiteness*]; Nancy Leong, *Identity Entrepreneurs*, 104 CALIF. L. REV. 1333 (2016); Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013).

7. For an account of the shift toward defining dependency as a character trait, see generally Nancy Fraser & Linda Gordon, *A Genealogy of Dependency: Tracing a Key Word of the U.S. Welfare State*, 19 SIGNS 309 (1994).

The Article is organized in three parts. Part I charts neglected history, showing how the concept of entitlement has been pathologized and racialized in discussion of government benefits. It also shows that public conservative commentators mapped this pathological understanding of entitlement onto civil rights protections as a way of challenging the legitimacy of those protections. They did so with the language of racial entitlements—but without adequate theory or support for their claims.

Part II offers a theory of racial entitlements that goes beyond mere epithet, but that is nonetheless consistent with conservative commentators' concerns. Drawing on some of the psychological research on entitlement beliefs and behaviors, a racial entitlement is defined here as a government-provided or backed benefit that automatically accrues because of one's membership in a protected group and that creates undue feelings of deservedness and behaviors of dependency along racial lines. This Part also explores why we should be concerned with racial entitlements when they arise and distinguishes racial entitlements (and the subjective state of racial entitlement) from some of the key concepts used today in understanding racial dominance ideologies and persistent racial inequalities.

Part III takes this newly theorized concept of racial entitlements and applies it to antidiscrimination law. It shows that laws and programs that conservative commentators have labeled racial entitlements for racial minorities—voting rights and affirmative action—are actually unlikely to be such. Once we consider how the laws or state programs in these areas work on the ground, we can see that benefit is not automatically conferred because of race; nor do the laws or state programs in these areas always or even regularly inure to the protection of particular racial groups. Claims of racial entitlement in these areas rely upon an attenuated and unconvincing account of dependency that is unsupported by theory or empirical evidence. These are claims of racial entitlement as mere epithet.

This Part also shows how other seemingly colorblind arrangements in the law can produce racial results with clear or regular benefits to particular racial categories—a scenario that might qualify as a racial entitlement. Specifically, it argues that the law of employment discrimination under Title VII of the Civil Rights Act may amount to a racial entitlement for working whites in some workplaces today by providing whites with certainty in their group-based advantage. Title VII as it operates today—as a law of individualized retribution—allows employers to develop racialized work environments that advantage whites and creates expectations on the part of all employees that the law will not disrupt those environments. Seeing an alternative to individualized retribution, an alternative that has foundations

in but diverges in several ways from existing law, points us toward what might be done if our goal is to dismantle racial entitlements. We would shift the law so that Title VII will more regularly require disruption of racial advantage, thereby undermining the certainty on which subjective feelings of white racial entitlement can build.

I. THE CREATION OF RACIAL ENTITLEMENTS—AN EPITHET IN SEARCH OF A THEORY

Go back far enough, and the term entitlement described nothing more or less than a natural right, something of which all people are deserving. This is arguably the meaning from the days of the drafting of the Constitution and the Declaration of Independence, and this meaning still holds today, particularly in the fields of philosophy and human rights.⁸ Determining who counts as “people” owed these rights has unquestionably been racialized, with blacks, native Americans, and other racial minorities largely excluded throughout history. Nonetheless, this idea of an entitlement is a relatively simple one, without particular pejorative gloss.

8. The notion of being entitled to something—of being naturally deserving of it—is centuries old. Our Declaration of Independence describes the circumstance of people breaking political bonds as “among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them.” THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). This view has long been instrumental in the area of human rights in thinking about rights to which all people are deserving. *See, e.g.*, G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. II (Dec. 10, 1948), available at <http://www.un.org/en/universal-declaration-human-rights> [<https://perma.cc/M4RM-KGBE>] (“Everyone is entitled to all the rights and freedoms set forth in this Declaration . . .”). The term was also used by philosopher Robert Nozick to describe people’s rights over things produced, with strict limitations. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 150 (1974) (developing an “entitlement theory” of rights).

In the legal field, we also use the word “entitlement” to refer to legally enforceable rights. *See, e.g.*, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1984) (holding that where the terms of public employment create an “entitlement,” the employee has a legally enforceable right to a job that must comply with the Due Process Clause). There is a long line of legal scholarship and advocacy on entitlements understood as legally enforceable rights and property interests protected by the Due Process Clause. *See* MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT 1960–1973, at 99–118 (1993) (describing the history of *Goldberg v. Kelly*, 397 U.S. 254 (1970)); Judith Resnick, *The Story of Goldberg: Why This Case Is Our Shorthand*, in CIVIL PROCEDURE STORIES 473, 483–87 (Kevin M. Clermont ed., 2d ed. 2008); Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964); *see also* Ian Ayres & J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 YALE L.J. 703, 704 (1996) (describing “legal entitlements” broadly as “encompassing such diverse rights as the right to bodily security, the right to a pollution-free atmosphere, the right to build a house that blocks another’s view, or the right to damage another’s reputation by false accusation”); Darryl K. Brown, *Criminal Procedure Entitlements, Professionalism, and Lawyering Norms*, 61 OHIO ST. L.J. 801, 803 (2000) (describing entitlements in criminal procedure, such as the right to a jury trial in misdemeanor cases). We also say that litigants are “entitled” to judgment in their favor when they have satisfied a relevant legal standard. *See, e.g.*, Fed. R. Civ. P. 56(a) (stating that judgment should be granted when the movant shows that it is “entitled to judgment as a matter of law”).

With the advent of Social Security in the 1930s, the term was used to refer to benefits under a program in which recipients had paid in, an “earned entitlement,” as opposed to a government gratuity; the idea with Social Security, for example, was that people would put money into the system when they were at their highest earning potential and then draw out of it down the road when their work energies began to wane.⁹ By the mid-1970s, though, the term had largely lost the “earned.”¹⁰ It came to define a type of government benefit that the government is obligated to provide to those who meet certain eligibility requirements, such as income or age.¹¹ The 1974 Congressional Budget and Impoundment Control Act, for example, defined “entitlement authority” as authority to

make payments, the budget authority for which is not provided for in advance by appropriation Acts, to any person or government if under the provisions of the law containing such authority, the United States is obligated to make such payments to persons or governments who meet the requirements established by laws.¹²

Even this meaning is at core neutral; it’s a matter of financing more than anything.

From here, however, the conservative pathologizing of entitlements emerged, first as concern for government fisc and then as concern about immoral dependence and un-deserved payouts.¹³ Over the next several decades, conservative critics and politicians (with help from others who

9. This distinction between an “entitlement,” for which there is an earned component, and a “gratuity,” for which there is not, continued through the 1950s, at least in debates over disability benefits. See Matthew Diller, *Entitlement and Exclusion, The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361, 393–95 (1996) (describing a “two-track” approach taken to disability benefits in the Social Security Disability Insurance and Aid to the Permanently and Totally Disabled programs). Even in this time, however, opponents of disability insurance cited concerns about creating a sense of entitlement. See *id.* at 404–08.

10. As columnist Hendrick Hertzberg describes it, the term “dropped out of sight for decades” between the 1930s and 1970s. Hendrik Hertzberg, *Senses of Entitlement*, NEW YORKER, Apr. 8, 2013, at 23. However, the term did continue to operate in legislative circles, even if not as much in the public sphere during this time. See Diller, *supra* note 9, at 454–55.

11. The shift from “earned entitlement” to “entitlement” was not merely one of political rhetoric. It built on a convergence of the negative income tax and social welfare movements in the 1960s and early 1970s that rejected a linkage between poverty and moral failure and led to successfully shifting some benefits from “welfare,” with its substantial stigma and social assessment and supervision, to income transfer based on eligibility criteria. See Diller, *supra* note 9, at 435–43 (describing debates surrounding the Supplemental Security Income Program and its passage in 1972).

12. See JOHN H. MAKIN & NORMAN J. ORNSTEIN, DEBT AND TAXES 224 (1994) (identifying this act as the first to use the term in legislation).

13. By 2013, columnist Hendrik Hertzberg declared that despite continued political skirmishes over vocabularies (the death tax versus inheritance tax, for example), “the conservative side long ago won a decisive victory, a victory at once famous and infamous: ‘entitlements.’” Hertzberg, *supra* note 10.

bought in) managed to turn entitlement into a four-letter word, and they simultaneously deployed it—this time in the language of racial entitlements—to attack race-based provisions in civil rights programs. In this Part, I briefly detail this historical development.¹⁴

A. CONSERVATIVE CRITICS AND THE VILIFICATION OF ENTITLEMENT PROGRAMS

Since the 1970s, conservatives have marked government benefits programs as an illegitimate betrayal of neoliberal principles, the market, and the public's confidence. This construction of entitlements as dangerous conferrals of unfair benefits that deplete the public fisc, violate fairness principles, and create sloth and dependence on the part of recipients proved a powerful and heady charge for conservatives.¹⁵ Most entitlements are treated in this prominent conservative discourse as illegitimate programs that transfer the wealth of hardworking private parties to other, un-deserving Americans.

It may be possible to trace the beginnings of this entitlement-as-epithet to backlash against the success of legal aid lawyers and other advocates in the 1960s and their case in favor of due process rights for recipients of government benefits.¹⁶ These lawyers and advocates built their case on the idea of welfare as property articulated by Charles Reich in his seminal article, *The New Property*.¹⁷ In 1970, Justice Brennan wrote for a majority

14. A full history of the vilification of entitlements is beyond the scope of this Article; I describe the history briefly as context for thinking more deeply about the modern concept of racial entitlements. For richer historical treatment of social welfare, see generally MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* (rev. ed. 1996); JAMES T. PATTERSON, *AMERICA'S STRUGGLE AGAINST POVERTY 1900–1980* (1981); JOEL F. HANDLER & YEHESKEL HASENFELD, *WE THE POOR PEOPLE: WORK, POVERTY, AND WELFARE* (1997); KAARYN A. GUSTAFSON, *CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY* (2012).

15. Mainstream media also ran with the idea so that today parents are cautioned against being too soft on their children, lest they become entitled, thereby expecting to be waited on instead of taking hold of the reins and doing things for themselves: entitlement is an “epidemic” that parents “enable” with lax rules and low expectations. *Today: Raising Unentitled Kids, Featuring Amy McCready* (NBC television broadcast Sep. 17, 2015); see also JOHN TOWNSEND, *THE ENTITLEMENT CURE: FINDING SUCCESS IN DOING HARD THINGS THE RIGHT WAY* 15–28 (2015) (describing entitlement as a “universal disease” that has a cure: doing things the “hard way”); Amy McCready, *Avoid Raising an Entitled Child: 5 Strategies That Really Work*, TODAY (Nov. 4, 2016), <https://www.today.com/parents/avoid-raising-entitled-child-5-strategies-really-work-t44576> [<https://perma.cc/P336-VZKR>] (featuring a video clip of McCready's appearance on the Today Show).

16. See DAVIS, *supra* note 8, at 40–118 (on lawyers and other advocates, including the National Welfare Rights Organization). For additional discussion of the emergence of the use of “entitlement” with a pejorative gloss, see Mark Liberman, *Entitlement*, LANGUAGE LOG (Oct. 6, 2012), <http://languageolog.ldc.upenn.edu/nll/?p=4240> [<https://perma.cc/KJG9-VCFZ>].

17. Reich, *supra* note 8.

of the Court in *Goldberg v. Kelly* holding that procedural due process requirements are applicable to termination of welfare benefits.¹⁸ According to Brennan, “Such benefits are a matter of statutory entitlement for persons qualified to receive them” and their termination could cause recipients “to suffer grievous loss.”¹⁹ Citing Reich, Brennan said that “[i]t may be realistic today to regard welfare entitlements as more like ‘property’ than a ‘gratuity.’”²⁰ Therefore, while “some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing,” welfare benefits could not.²¹ Justice Black in dissent insisted that welfare was merely a “promised charitable instalment” and not a person’s own property.²² Just six years later, the promise of *Goldberg* had been largely rolled back.²³ As long-time social welfare analyst and advocate Elizabeth Wickenden put it in an internal memo written in 1971 to fellow advocate George Wiley, “The wave of regressive reaction to liberal welfare policy has now surfaced and is inescapably clear to everyone Every day, there is more and more talk of ‘welfare cheaters,’ ‘free loaders,’ and ‘greed.’”²⁴

Most publicly, though, the express vilification of entitlements started in the 1970s and early 1980s with reference to the government fisc. President Ronald Reagan brought the term to the fore in a speech he made in the summer of 1981 at a Jaycee convention in San Antonio, Texas.²⁵ Before then, Reagan had always referred to government programs for the old, sick, and poor as the “Social Security net”; in that speech he renamed them “entitlements.”²⁶ Listing food stamps and federal housing subsidies as examples, he described entitlement programs as “programs [that] have spending increases built into them directly by the law,” and labeled them

18. *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

19. *Id.* at 262 (citation omitted).

20. *Id.* at 262 n.8.

21. *Id.* at 263–64.

22. *Id.* at 275 (Black, J., dissenting).

23. Resnick, *supra* note 8, at 498–503 (describing post-*Goldberg* cases). In 1996, Congress enacted welfare legislation that included a provision stating that it should not be “interpreted to entitle any individual or family to assistance under any State program funded” therein. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 401, 110 Stat 2105, 2113 (codified as amended at 42 U.S.C. § 601(b) (2018)).

24. DAVIS, *supra* note 8, at 139.

25. See Ronald Reagan, President of the United States, Remarks at the Annual Convention of the United States Jaycees in San Antonio, Texas (June 24, 1981), <https://www.reaganlibrary.gov/research/speeches/62481a> [<https://perma.cc/A7KF-D7TS>] [hereinafter “Reagan, Jaycees Speech”]; see generally MAKIN & ORNSTEIN, *supra* note 12, at 222–25 (describing this turn in use of the term “entitlement”).

26. Hertzberg, *supra* note 10; see also Reagan, Jaycees Speech, *supra* note 25.

“budgetary time bombs.”²⁷ Reagan called on his supporters to reduce these automatic spending programs and thereby to balance the budget (and reduce taxes). Soon thereafter, the term was commonplace. By one account, the *Washington Post* used the term “entitlements” or “entitlement programs” in the same article as “Social Security” over 800 times by the 1990s; it had done so just five times in 1979.²⁸

Within just a few years of Reagan’s Jaycees speech, entitlements had gained a distinctly pejorative gloss that went well beyond fiscal concern.²⁹ Entitlement had come to be a term tied to the psychology and behaviors of those receiving benefits, to an assumed un-deservingness and lazy dependence.³⁰ Mitt Romney wrote in an op-ed in 2011,

Over the past three years, Barack Obama has been replacing our merit-based society with an Entitlement Society. . . . If we continue this course for another four years, we may pass the point of no return. We will have created a society that contains a sizable contingent of long-term jobless, dependent on government benefits for survival. . . . Government dependency can only foster passivity and sloth.³¹

In 2012, Nicolas Eberstadt, a conservative political economist, drove

27. According to Reagan, the food stamp program went from \$577 million in 1970 to \$11.5 billion in 1981; federal housing subsidies went from \$500 million in 1970 to \$6.5 billion in 1981. Reagan, *Jaycees Speech*, *supra* note 25.

28. Hertzberg, *supra* note 10.

29. See LAWRENCE MEAD, *BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP* 1–3 (1986). For an excellent social history of welfare in the United States from the Eighteenth Century through the mid-1990s, see KATZ, *supra* note 14. Among other things, Katz shows that the assumption that welfare begets laziness goes back much further than the “entitlement” of the 1980s. *Id.* at 17–20 (noting that “[o]verseers of the poor in Beverly, Massachusetts, [in the 1820s] claimed that poor relief encouraged ‘idleness’ and ‘improvidence’”). A report published in New York around the same time put forth similar ideas. *Id.* at 18 (describing a New York report as stating that poor-relief practices operated “as so many invitations to become beggars” (citation omitted)). Katz shows that welfare policies since the 1800s have “focused more on changing behavior than [on] helping people survive with some comfort and dignity.” *Id.* at 301 (referring to welfare reform in the 1990s).

30. *Id.* at 328 (noting that “[w]ithin only a few years [in the 1990s], ‘entitlement’ had developed a connotation nearly as negative as ‘welfare’”). Some see use of the term “entitlement” today as a signal of political identity. See THOMAS BYRNE EDSALL, *THE AGE OF AUSTERITY: HOW SCARCITY WILL REMAKE AMERICAN POLITICS* 123–24 (2012) (“Entitlement reform as a catchphrase has two political advantages: first, it softens what are in fact draconian cuts in federal benefits aimed at the poor and disabled, children, and the elderly; secondly, insofar as it refers to a government-granted right, it appeals to conservative hostility to the catalog, over the past fifty years, of government-sanctioned rights, of all kinds, collectively known as the rights revolution—civil rights, gay rights, abortion rights, prisoners’ rights, criminal defendants’ rights, the right to sexual privacy, and so forth.”).

31. Mitt Romney, *What Kind of Society Does America Want?*, USA TODAY, Dec. 20, 2011, at A11; see also David Corn, *Secret Video: Romney Tells Millionaire Donors What He Really Thinks of Obama Voters*, MOTHER JONES (Sept. 17, 2012), <https://www.motherjones.com/politics/2012/09/secret-video-romney-private-fundraiser> [<https://perma.cc/6EHY-8KC7>].

this point home in his book, *A Nation of Takers: America's Entitlement Epidemic*.³² He documented the rise in government benefits paid out from 1960 to 2010, and, among other things, he showed that the most extreme county-level dependence tended to be in rural areas over urban ones, and in red states over blue ones.³³ When it came to drawing lessons from the data, Eberstadt was firmly committed to a negative psychological tale.³⁴ Quoting Daniel Patrick Moynihan, he said, “It cannot too often be stated that the issue of welfare is not what it costs those who provide it, but what it costs those who receive it.”³⁵ In Eberstadt’s view, the “entitlement epidemic” is not just a matter of increased governmental spending on benefits (Reagan’s “budgetary time bomb”); it is the “entitlement lifestyle” in modern America,³⁶ the “noxious something-for-nothing thinking that lies at the heart of the modern entitlement mentality.”³⁷

President Donald Trump, for his part, has played the pathologizing of entitlement at both ends, calling upon whites to tamp down on others as a means of getting their own due, of “mak[ing] America great again,” and capitalizing on a rhetoric of immorality in receipt of welfare benefits.³⁸ As

32. NICHOLAS EBERSTADT, *A NATION OF TAKERS: AMERICA'S ENTITLEMENT EPIDEMIC* (2012). Daniel Patrick Moynihan published a paper in 1965 known as the “Moynihan Report” in which he blamed the black racial community and especially black families for problems faced by black people in the United States. See IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 94–102 (2014) (describing some of Moynihan’s work and its influence).

33. *Id.* at 3–10, 28.

34. *Id.* at 41–58. The evidence is much more mixed on the question of dependence and moral decline than Eberstadt lets on. See *infra* notes 53–54. As William Galston points out in his “dissenting view” in Eberstadt’s book, “to be entitled to something is not necessarily to be dependent on it.” William A. Galston, *Have We Become a “Nation of Takers”?*, in EBERSTADT, *supra* note 32, at 93, 98. Galston also disputes use of the term “dependence,” preferring “interdependence” to better capture the ways that benefits can reflect human interrelations and moral obligations. See *id.* at 97–98.

35. EBERSTADT, *supra* note 32, at 38. In a 1965 report, Moynihan promoted the idea that the problems of inner cities could be traced to a “tangle of pathology” perpetuated by unmarried black mothers. DANIEL P. MOYNIHAN, OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEP’T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* 29–45 (1965).

36. EBERSTADT, *supra* note 32, at 25.

37. *Id.* at 73. Eberstadt’s “entitlement epidemic” followed closely arguments made by Charles Murray about public welfare with racial imagery of the “underclass.” For Murray’s work, see generally CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950–1980* (1984). For discussion of the racial lines in these arguments, see *infra* notes 47–54 and accompanying text. For a convincing response to Murray from the same era, see generally WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987) (placing conditions of urban poverty in context of broader social, economic, and historical structures).

38. In April 2018, Trump issued an executive order directing federal agencies to strengthen work requirements for welfare recipients so that all benefits are “consistent with principles that are central to the American spirit—work, free enterprise, and safeguarding human and economic resources.” Exec. Order No. 13,828, 83 Fed. Reg. 15,941, 15,941 (Apr. 13, 2018).

for express use of the term “entitlement” in the Trump administration: it became so reviled as to be declared forbidden. In late 2017, news reports revealed that the Center for Disease Control had imposed a ban on use of certain terms in budget documents. “Entitlement” was on that list.³⁹

Lest we think the pathologizing of entitlements has been the work entirely of conservatives, I should point out that some liberal politicians and even the mainstream media have bought in as well. Democratic Senator Bob Kerrey once said that entitlement programs promote a “corrosive give-to-me, help-me attitude” in which individuals seek to be “protected from the consequences of their own actions.”⁴⁰ President Bill Clinton famously pledged to “end welfare as we know it,” and although he did not use the term entitlement in signing the Personal Responsibility and Work Opportunity Reconciliation Act, which substantially restructured the nation’s welfare system, he did buy in strongly to the idea of dependency, stating that the Act “gives us a chance we haven’t had before to break the cycle of dependency that has existed for millions and millions of our fellow citizens, exiling them from the world of work.”⁴¹ Even President Barack Obama, rather than taking on the term and interrogating it, mostly avoided using it in his public speeches, especially to refer to TANF or healthcare, two traditional entitlement programs. Instead, he referred to “commitments” that we make to each other, commitments which he claimed “do not sap our initiative, they strengthen us. They do not make us a nation of takers; they free us to take the risks that make this country great.”⁴²

39. Lena H. Sun & Juliet Eilperin, *CDC Gets List of Forbidden Words: Fetus, Transgender, Diversity*, WASH. POST (Dec. 15, 2017), https://www.washingtonpost.com/national/health-science/cdc-gets-list-of-forbidden-words-fetus-transgender-diversity/2017/12/15/f503837a-e1cf-11e7-89e8-edec16379010_story.html [<https://perma.cc/RU24-FA8E>].

40. BOB WOODWARD, *THE AGENDA: INSIDE THE CLINTON WHITE HOUSE* 289 (1994).

41. Bill Clinton, President of the United States, *Announcement on Welfare Legislation* (Aug. 1, 1996), <https://www.nytimes.com/1996/08/01/us/text-of-president-clinton-s-announcement-on-welfare-legislation.html> [<https://perma.cc/R45U-VVF7>].

42. Barack Obama, President of the United States, *Second Inaugural Address* (Jan. 20, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama> [<https://perma.cc/38YL-4Z9E>]. Obama’s ambivalence toward the term entitlement was evident in his speech to graduates of Howard University in May 2016. He urged the graduates to avoid entitlement under a broader psychological meaning of the term, explaining that entitlement represented a lack of humility, lack of understanding of how structures can keep some people down, of the ways that luck, and not just hard work, helps get us where we want to go. Specifically, he called upon the graduates to eschew a sense of entitlement, and to be cognizant of history and of structures of discrimination. In his words, “We can’t meet the world with a sense of entitlement.” Barack Obama, President of the United States, *Remarks by the President at Howard University Commencement Ceremony* (May 7, 2016), <https://obama.whitehouse.archives.gov/the-press-office/2016/05/07/remarks-president-howard-university-commencement-ceremony> [<https://perma.cc/6574-7CX7>].

There was (and continues to be) a distinct racial side to the conservative dependency overlay on entitlements, as numerous scholars have shown. In *Shifting the Color Line: Race and the American Welfare State*, political scientist Robert Lieberman exposes how racial divisions and anxieties shaped the institutional structure of several New Deal social welfare policies against blacks and in favor of whites.⁴³ And in *Why Americans Hate Welfare*, sociologist Martin Gilens shows that racial stereotypes of blacks continued to play a central role in generating opposition to welfare in America in the 1990s.⁴⁴ Racial stereotypes of blacks as lazy were used to support slavery, as well as more recently to champion welfare cuts and strict work requirements.⁴⁵ As Gilens shows, the news media racialized poverty at the same time that President Richard Nixon and Senator George McGovern offered plans to fix the “welfare mess.”⁴⁶ Gilens reports that “[v]irtually all poverty-related coverage during [1972 and 1973]—whatever the topic—was illustrated with pictures of blacks.”⁴⁷ In the 1980s, when entitlement rhetoric in conservative politics was on the rise, so were racialized campaign appeals by politicians like President George H.W. Bush.⁴⁸ By this juncture entitlements had a distinctly negative connotation of un-deservingness and dependence on the part of those who receive the benefits.⁴⁹

Conservatives in this way turned entitlements into a story about morality: politicians claim government entitlement programs are ill advised because they stunt self-sufficiency on the part of recipients and trigger moral

43. See generally ROBERT C. LIEBERMAN, *SHIFTING THE COLOR LINE: RACE AND THE AMERICAN WELFARE STATE* (1998).

44. See generally MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY* (1999).

45. See generally ANGE-MARIE HANCOCK, *THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN* (2004) (discussing the intersection between welfare and racial stereotypes); GUSTAFSON, *supra* note 14 (providing a thorough account of welfare fraud from both a policy and boots-on-the-ground perspective).

46. GILENS, *supra* note 44, at 122.

47. *Id.* at 123.

48. HANEY LÓPEZ, *supra* note 32, at 57. In short, the term entitlement has been used as a race-coded weapon. *Id.* It is of a piece with the twisted neutrality of discrimination and colorblindness that erase a long history of race-based subordination and turn a blind eye to persistent advantage and disadvantage along racial lines. See generally BONILLA-SILVA, *supra* note 2 (discussing colorblind racism at length). It is a concept that likely exacerbates whites’ fears that others—blacks and Hispanics particularly, but also Indians and Asians—are cutting in line, taking something that is perceived by whites to belong to them after years of government support for white enclaves and power. HOCHSCHILD, *supra* note 4, at 135–207.

49. Use of the term entitlement continued even after the Personal Responsibility and Work Opportunity Act of 1996 restructured funding for welfare to depend on block grants. See 42 U.S.C. § 601(b) (2018) (stating a definition of entitlement that depends upon funding structure); HANDLER & HASENFELD, *supra* note 14, at 5–8 (summarizing the major welfare provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996).

decline.⁵⁰ Yet it turns out that this story is mostly fiction. No evidence has been offered to support the claim. To the contrary, a broad array of evidence has amassed that undermines the assumption that provision of government benefits by statutory eligibility standards necessarily leads to laziness and sloth on the part of recipients.⁵¹ For example, studies in several major cities in the late 1980s, when welfare had fewer work restrictions than today,⁵² found that virtually all welfare recipients worked.⁵³ In much the same way, empirical research also calls into question the efficacy of many of the more recent welfare-to-work measures.⁵⁴

That the morality story of entitlements seemed to be of fiction rather than fact did not detract from its inherent attraction, however, and out of the story emerged a means of attacking race-based civil rights protections: by labeling them racial entitlements.

B. USING ENTITLEMENT RESENTMENT TO CONSTRUCT CHALLENGES TO ANTIDISCRIMINATION PROTECTIONS: RACIAL ENTITLEMENT AS EPITHET IS BORN

With their attack on welfare benefits, conservative critics soon realized the power in pathologizing and racializing entitlements as triggers of government dependence and claims of special rights. Another logical place for deployment of the term was to upend rights programs that specifically mentioned and addressed the racial subordination of minorities. In this moment, the modern concept of racial entitlements was born.

50. See generally Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783 (2002) (tying the rhetoric shift to neoliberalism and its focus on the economic rhetoric of efficiency).

51. See HANDLER & HASENFELD, *supra* note 14, at 44–52 (describing studies involving work of those receiving welfare benefits); Galston, *supra* note 34, at 105–13 (questioning Eberstadt's assertion that welfare policies have resulted in dependence and citing to studies involving attitudes toward work); see also PATTERSON, *supra* note 14, at 14 (noting evidence of strong work ethic among the poor in the late 1800s and early 1900s and yet descriptions of a "culture of poverty" much like the conservative gloss on entitlement today). For a more recent account of the history of poverty policies and measures of poverty, see generally Robert Haveman et al., *The War on Poverty: Measurement, Trends, and Policy*, 34 J. POL'Y ANALYSIS & MGMT. 593 (2014).

52. HANDLER & HASENFELD, *supra* note 14, at 47–48. For a description of more stringent work requirements since 1996, see *id.* at 6–7.

53. Even inner city, teenage black mothers expressed desire to work and worked. See *id.* at 50–51.

54. See, e.g., Lawrence M. Mead, *Why Welfare Reform Succeeded*, 26 J. POL'Y ANALYSIS & MGMT. 370, 371–72 (2007); Sharon Parrot & Arloc Sherman, *TANF's Results are More Mixed than is Often Understood*, 26 J. POL'Y ANALYSIS & MGMT. 374, 374–80 (2007); see also Haveman et al., *supra* note 51, at 605 ("In the long run, PRWORA appears to have had a greater impact on reducing the caseload rather than on increasing employment rates or reducing poverty."). For recent research that calls into question popular beliefs about welfare fraud, see generally GUSTAFSON, *supra* note 14.

The idea of a racial entitlement as applied to civil rights protections was coined in 1979 by then-Professor Scalia in an academic commentary, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race."*⁵⁵ Scalia wrote in that piece that preferring a black medical school applicant to a white one, even when they are of equal qualifications, is "based upon concepts of racial indebtedness [of whites] and racial entitlement [of blacks] rather than individual worth and individual need."⁵⁶ This, in his words, made such a preference "racist."⁵⁷

Not long after Scalia's commentary was published, Justice Stewart invoked the term in his dissenting opinion in *Fullilove v. Klutznick*, the Supreme Court case holding that the "minority business enterprise" provision of the Public Works Employment Act of 1977 did not violate the Equal Protection Clause of the Constitution.⁵⁸ Scalia did so again much later, by then as a sitting justice on the Supreme Court, in his concurrence in *Adarand Constructors v. Pena*, where he noted that "[t]o pursue the concept of racial entitlement—even for the most admirable or benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred."⁵⁹

Although not as frequently drawing on the term, Justice Thomas and other black conservative commentators have also long decried affirmative action as dependency-producing for blacks.⁶⁰ As Thomas wrote in his concurrence in *Adarand*, "These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an

55. Antonin Scalia, Commentary, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race,"* 1979 WASH. U. L.Q. 147, 154.

56. *Id.*

57. *Id.*

58. *Fullilove v. Klutznick*, 448 U.S. 448, 532 (1980) (Stewart, J., dissenting) (stating that "[n]otions of 'racial entitlement' will be fostered" by the government's "making race a relevant criterion . . . in its own affairs").

59. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring). The term was also used by those objecting to an effects standard in the Voting Rights Act. See Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 25 & n.121 (2013).

60. See, e.g., SHELBY STEELE, *CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* 118–19, 134 (1990) (discussing the victim mentality and its effect on middle-class black students). For a discussion of black and white conservative thought on affirmative action and other civil rights issues, see generally Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931 (2005).

Steele uses the word entitlement broadly as a state of belief about one's innocence and deservingness of power. See STEELE, *supra*, at 140. Although he uses the term entitlement in his arguments against affirmative action, he tends to veer from the political conservative emphasis on psychological or behavioral dependency, focusing instead on what he calls "implied inferiority" as it translates to "an enlargement of self-doubt" in the benefited group. *Id.* at 116–17.

attitude that they are ‘entitled’ to preferences.”⁶¹ And later in dissent in *Grutter*, involving affirmative action and admissions to the Michigan Law School, Thomas maintained that “there is no incentive for the black applicant to continue to prepare for the LSAT [“Law School Admissions Test ”] once he is reasonably assured of achieving the requisite score.”⁶² According to Thomas, whites, on the other hand, who “aspir[e] to admission at the Law School have every incentive to improve their score to levels above that range.”⁶³

The conservative idea of racial entitlement in the voting context, just like with affirmative action, rested at bottom on colorblindness. To see how and why the conservative claim of racial entitlement emerged in the voting rights context requires a bit of background. In 1969, the Supreme Court held in *Allen v. State Board of Elections* that section 5, the preclearance provision of the Voting Rights Act, protected racial minorities not only against obvious disenfranchising devices, such as physically blocking blacks from the ballot box or, in many cases, imposing literacy tests,⁶⁴ but also against those that more subtly affected the outcome of elections by diluting their vote, such as a change from district to at-large elections.⁶⁵ Vote dilution after *Allen* constituted a “practice or procedure” that is subject to preclearance under section 5. As Chief Justice Warren wrote for the Court, “The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race.”⁶⁶

Some years later, in 1977, the Court specifically held in *United Jewish Organizations v. Carey* that race was relevant in considering redistricting in preclearance districts and that consideration of race in such cases was constitutional.⁶⁷ The case came out of redistricting in Brooklyn, New York in 1970.⁶⁸ The county had been added to the list of counties requiring preclearance under section 5 of the Voting Rights Act in 1970 because it used a literacy test and voter turnout was below 50 percent in the 1968 election.⁶⁹ When New York submitted its redistricting plan for the state

61. *Adarand Constructors Inc.*, 515 U.S. at 241 (Thomas, J., concurring).

62. *Grutter v. Bollinger*, 539 U.S. 306, 377 (2003).

63. *Id.*

64. *Gaston Cty. v. United States*, 395 U.S. 285, 296–97 (1969) (literacy tests). In 1970, Congress amended the Voting Rights Act to ban literacy tests nationwide. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 6, 84 Stat. 314, 315–16 (codified as amended at 52 U.S.C. § 10501 (2018)).

65. *Allen v. State Bd. of Elections*, 393 U.S. 544, 550 (1969).

66. *Id.* at 565.

67. *United Jewish Orgs. v. Carey*, 430 U.S. 144, 167–68 (1977).

68. *Id.* at 186 (Burger, J., dissenting).

69. *Id.* at 148–49 (majority opinion).

legislatures following the 1970 census, the Department of Justice recommended drawing boundaries that would result in a minority (black and Puerto Rican) population of 65 percent, which would be sufficient to elect minority representatives.⁷⁰ To draw these districts, the state divided the neighborhood's Hasidic voters into two senate and two assembly districts.⁷¹ The Hasidim sued, arguing that the Constitution forbids consideration of race in redistricting.⁷² Writing for the Court, Justice White rejected that argument, stating that, "[c]ompliance with the Act in reapportionment cases would often necessitate the use of racial considerations in drawing district lines," and that "the Constitution does not prevent a State subject to the . . . Act from deliberately creating or preserving black majorities in particular district in order to ensure that its reapportionment plan complies with § 5."⁷³

Prominent conservatives responded to these and other Voting Rights Act decisions with harsh critique. Justice Burger in dissent in *United Jewish Organizations* objected principally to any use of race, stating that the use of a mathematical formula based on race "moves us one step farther away from a truly homogeneous society."⁷⁴ This was mostly a colorblind idea. But the idea of entitlement, too, began to work its way in. Abigail Thernstrom, a conservative writer and confidant of Justice Thomas, wrote in 1987 in her book, *Whose Vote Counts*, that once the Court interpreted the Voting Rights Act to include vote dilution as disenfranchisement, "a meaningful vote was almost bound to become an entitlement."⁷⁵ Elsewhere in her book, she described the entitlement as something attaching to political candidates rather than to voters. She said that the Voting Rights Act grants racial minority candidates an "entitlement" to "special protection from white competition."⁷⁶

70. *Id.* at 181 (Burger, J., dissenting).

71. *Id.* at 152 (majority opinion).

72. *See id.* at 155.

73. *Id.* at 159, 161. Apparently, even Robert Bork, Nixon's solicitor general at the time, agreed with this position. *See* ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA 129 (2015).

74. *United Jewish Orgs.*, 430 U.S. at 187 (Burger, J., dissenting).

75. ABIGAIL THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 4 (1987). On the connection between Thernstrom and Thomas, see Adam Shatz, *The Thernstroms in Black and White*, AM. PROSPECT (Dec. 10, 2001), <https://prospect.org/features/thernstroms-black-white> [<https://perma.cc/WNL7-XF49>] (stating that Thernstrom's book is a "virtual bible" to Justice Sandra Day O'Connor and Clarence Thomas, and noting that Thernstrom is a "frequent visitor in Thomas's chamber").

76. THERNSTROM, *supra* note 75, at 5. As Thernstrom elaborated: "[O]ur sensitivity to the special significance of black officeholding in the South, where blacks were disenfranchised before 1965, has shaded into a belief in the entitlement of black and Hispanic candidates everywhere to extraordinary protection from white competition." *Id.* at 235.

In 2013, prior to the Court's fatal decision on the racial preclearance provisions to the Voting Rights Act in *Shelby County v. Holder*, Justice Scalia famously declared the provisions to be a racial entitlement.⁷⁷ When Scalia referred to the Voting Rights Act as a racial entitlement, he assumed a new consequence from a race-based benefit. Specifically, he said: "I think [the vote by Congress in 2006 to continue the Act without change] is attributable, very likely attributable, to a phenomenon that is called perpetuation of racial entitlement. . . . Whenever a society adopts racial entitlements, it is very difficult to get out of them through normal political processes."⁷⁸ According to Scalia, this meant that the judiciary was in the best position to intervene, to act where the politically elected legislature would not.⁷⁹ This view circles back to a thread of the political rhetoric around entitlements. It assumes political entrenchment. The idea is that entitlements are difficult to pull back once instituted because they lead to a constituency of benefit recipients who are dependent and fiercely opposed to removal of the benefit such that they will not vote for someone who would pull it back. This was what Romney meant with his 47 percent remark during the campaign: "those that are dependent on government and those who think the government's job is to redistribute—I'm not going to get them."⁸⁰

Conservatives' use of the term "racial entitlement" provides us with only a glimpse into the harms that they imagine inure from race-based benefits provided by the state. The first, of course, is unfairness as the provisions declared as racial entitlements violate the colorblind notion of equality. The second is where the entitlement comes in: conservatives like Abigail Thernstrom, Justice Scalia, and Justice Thomas assume that any race-based benefit will accrue along racial lines in ways that foster dependency and resistance to removal of the benefit on the part of racial minorities.⁸¹ The problem, like with the conservative gloss on entitlement

77. Transcript of Oral Argument at 47, *Shelby Cty. v. Holder*, 570 U.S. 529 (2013) (No. 12-96). Justice Sotomayor was quick to challenge this representation, asking counsel for Shelby County for his view. *Id.* at 63.

78. *Id.* at 47. In its decision in the case, the Supreme Court struck down the coverage formula for determining which jurisdictions would be held to preclearance requirements under section 5 of the Act. *Shelby Cty. v. Holder*, 570 U.S. 529, 556 (2013).

79. See Transcript of Oral Argument, *supra* note 77, at 47.

80. Romney, *supra* note 31.

81. These and other conservatives would be sure to point out that they object to the Voting Rights Act provisions and affirmative action on multiple grounds, moral, political, and economic, but there is little question that the psychological and behavioral hazards that I have drawn out above are key to their understanding of the harms of entitlements, and racial entitlements specifically. I do not claim to address any other objections here, but rather undertake to interrogate more closely a meaning of racial entitlements that captures the psychological hazards thread.

more broadly, however, is that there is neither theoretical nor empirical reason to believe that this result will occur, that racial entitlement beliefs and behaviors will result from affirmative action or voting rights protections. I turn to this question of whether affirmative action or voting rights protections as practiced under the law today likely amount to racial entitlements in Part III. In the next Part, I first provide the beginnings of a theory of racial entitlements, what they are, and why when they exist they might rightly warrant concern.

II. RETHINKING RACIAL ENTITLEMENTS—FROM EPITHET TO THEORY

Before deciding whether racial entitlements are good or bad for American society, it is critical to know what a racial entitlement is. Indeed, while conservatives have been quick to criticize antidiscrimination protections as racial entitlements—and to talk about government financial entitlement programs in racialized terms—they have never articulated precisely what a “racial entitlement” is.

I define a racial entitlement here, consistent with the conservative lead, as a government-provided or backed benefit that automatically accrues because of one’s membership in a protected group and that creates undue feelings of deservedness and behaviors of dependency along racial lines. A racial entitlement understood in this way is a relationship between the state and people.⁸² Racial entitlements cannot be determined by looking solely at government policies, at whether they confer a benefit, and then assigning or assuming negative consequences. Rather, racial entitlements can be identified only by examining government policies in practice as they interact with social expectations. Moreover, racial entitlements carry with them a racially categorized psychological, emotional component on the part of people who are interacting with the state. More specifically, a racial entitlement involves a relation between law and people that creates a psychological mindset of self-deservingness based on membership in a racial category alone, apart from work put in, a mindset that can lead to feelings of dependence and group-based superiority and that may result in reduced work and excessive protectionism in the face of threat.

82. At least this is one thread of meaning for racial entitlements. One could also argue that in addition or in the alternative racial entitlements should be understood and interrogated without the pejorative gloss of psychological and behavioral hazards. I do not disagree, but that project is beyond the scope of this Article, which seeks to take seriously the idea of psychological and behavioral hazard.

A. SOME RELEVANT RESEARCH ON PSYCHOLOGICAL ENTITLEMENT AND BEHAVIORS

Some of the growing body of research on psychological entitlement in the social sciences can help us understand what the subjective state of racial entitlement and behaviors associated with it might look like. As of yet, this research does not focus either on racial entitlements or even on the subjective psychological state of racial entitlement specifically, and research in this area generally is nascent. But the research does suggest both what racial entitlement beliefs and behaviors might look like, when they arise, and why racial entitlements might be of concern to those interested in racial equality and justice.

Over the past couple of decades, entitlement beliefs and behaviors associated with those beliefs have become more frequent subjects of scientific study and theoretical inquiry in the social sciences, particularly the field of psychology. The popular measure of narcissism, the Narcissistic Personality Inventory (“NPI”), has included a factor of and several questions measuring a person’s entitlement beliefs since the late 1980s, but the first study of entitlement as an independent psychological construct was published much more recently, in 2004.⁸³ In that study, W. Keith Campbell and colleagues describe entitlement as a “pervasive sense that one deserves more and is entitled to more than others.”⁸⁴ They developed a stand-alone measure of psychological entitlement, the Psychological Entitlement Scale (“PES”), that measures entitlement by asking subjects to respond to a list of statements and to indicate a number that best reflects their beliefs, from one (strong disagreement) to seven (strong agreement).⁸⁵ The statements include things like, “If I were on the Titanic, I would deserve to be on the first lifeboat!”; and “I feel entitled to more of everything.”; and “Great things should come to me.”⁸⁶

Psychological entitlement in this emerging literature is sometimes described as involving expectations based on status or quality of a person or other social contract or norms, while deservingness is described to involve

83. W. Keith Campbell et al., *Psychological Entitlement: Interpersonal Consequences and Validation of a Self-Report Measure*, 83 J. PERSONALITY ASSESSMENT 29, 30–31 (2004).

84. *Id.* In the psychological literature, entitlement is often understood as a trait that is generally experienced across situations and not just in response to a specific moment or incident, such as paying into social security or performing well in a class. *Id.* at 31.

85. *Id.* at 31.

86. *Id.* at 45. The full list of statements also includes: “I feel entitled to more of everything.”; “I honestly feel like I am more deserving than others.”; “I demand the best because I’m worth it.”; “I do not necessarily deserve special treatment.”; “I deserve more things in life.”; “People like me deserve an extra break now and then.”; and “Things should go my way.” *Id.*

expectations based on what has been earned by the individual.⁸⁷ The basis for psychological entitlement is seen to derive externally from social norms or formally prescribed rules, while the basis for deservingness derives internally from one's own work put in. As one researcher describes it, "[D]eservingness is a product of what one has internally and controllably earned or achieved, whereas entitlement refers to an external prescriptive frame of reference that is independent of individual actions and due to causes beyond individual control."⁸⁸ This said, entitled individuals are likely to perceive themselves as deserving, which is reflected in the list of statements in the PES that refer to self-deservingness.⁸⁹

Recent research in the field of management elaborates. Early research in this field tied entitlement beliefs to equity sensitivity, or one's reactions to inequity. This research suggests that people vary in their degree of preference for inequity from benevolent (preferring underpayment of self in relation to others) to equity sensitive (preferring equity) to entitled (preferring overpayment of self in relation to others).⁹⁰ Several studies in this area identify someone who is "entitled" as someone who is "more focused on the outcomes they receive than the inputs they contribute," meaning that while the result may be a preference for overpayment in equity, the key trait is the focus on obtaining outcomes and the neglect of inputs that give rise to those outcomes.⁹¹ Entitled people in these studies, in other words, are those people who think that they should be paid more than others regardless of the amount of work they put in.

Some research also suggests that entitlement beliefs involve a derogation of relevant others. Put another way, psychological entitlement has a component of the self-centric ("I deserve . . .") that stands in relation to

87. See Edward C. Tomlinson, *An Integrative Model of Entitlement Beliefs*, 25 EMP. RESP. RTS. J. 67, 69 (2013).

88. *Id.* at 70. Point in time can affect whether someone experiences deservingness or entitlement. Tomlinson provides the following example: "[S]tudents must earn certain grades to obtain an academic degree (a matter of deservingness); but once that degree is earned, it confers upon the recipient 'all the honors, rights, and privileges thereunto appertaining' (a matter of entitlement)." *Id.*

89. Stefanie E. Naumann et al., *The Use of the Concept "Entitlement" in Management Literature: A Historical Review, Synthesis, and Discussion of Compensation Policy Implications*, 12 HUM. RESOURCE MGMT. REV. 145, 146–47 (2002) (surveying entitlement as it is understood in several fields and identifying a common defining element as what individuals perceive they deserve).

90. Tomlinson, *supra* note 87, at 70. For more research on this topic, see generally Richard C. Huseman et al., *A New Perspective on Equity Theory: The Equity Sensitivity Construct*, 12 ACAD. MGMT. REV. 222 (1987).

91. Tomlinson, *supra* note 87, at 70 (quoting H. Kristl Davison & Mark N. Bing, *The Multidimensionality of the Equity Sensitivity Construct: Integrating Separate Benevolence and Entitlement Dimensions for Enhanced Construct Measurement*, 20 J. MANAGERIAL ISSUES 131, 132 (2008)).

others (“more than others”).⁹² Moreover, the sense of deservingness in relation to others is not in relation to just any others, but in relation to those who are considered rivals. In a series of studies published in 2014, Phyllis Anastasio and Karen Rose measured undergraduate students’ entitlement (using the Campbell test) and then measured their attitudes toward two collegiate out-groups and an in-group.⁹³ The items measured how much participants “(a) liked students from a nearby university considered to be their chief rival, (b) liked students from a nearby university not considered to be a rival, and (c) liked students from their own university.”⁹⁴ Participants high in psychological entitlement in these studies did not dislike all out-groups; they disliked only those groups that were perceived as a potential threat, such as the rival school group.⁹⁵ Further research buttresses this point. As one author recently put it, “[E]ntitled individuals consistently strive to receive special treatment, often responding particularly harshly to those who they perceive as standing in the way of such gain.”⁹⁶ Moreover, Anastasio and Rose found that perception of belonging to the in-group was not necessary for entitlement; not belonging to the out-group was enough.⁹⁷

Some studies also find that entitled people (those with high levels of entitlement using the PES) behave more selfishly than less entitled people. One component of the Campbell et al. study, for example, found that people who scored high on the PES took more candy from a bowl purportedly intended for young children, rated themselves as deserving higher salaries than their co-workers in a hypothetical company, and took more in a commons dilemma.⁹⁸ Another study showed that individuals who scored high in entitlement were more willing than low scorers to engage in selfish behaviors, such as riding a bike on a crowded sidewalk, and less willing to

92. Phyllis A. Anastasio & Karen C. Rose, *Beyond Deserving More: Psychological Entitlement Also Predicts Negative Attitudes Toward Personally Relevant Out-Groups*, 5 SOC. PSYCHOL. & PERSONALITY SCI. 593, 593–94 (2014).

93. *Id.* at 594.

94. *Id.* The researchers also tested endorsements of female equality, attitudes toward homosexuality, and endorsements of modern racism, finding at least some support in each study for a relationship between entitlement and negative out-group attitudes toward groups that may pose a threat to group dominance. Moreover, the authors found no relationship between psychological entitlement and in-group favoritism. They took this to suggest that “a strong identification with the in-group is not necessary for the entitled person to hold negative attitudes toward meaningful out-groups.” *Id.* at 598.

95. *See id.*

96. Joshua B. Grubbs et al., *Psychological Entitlement and Ambivalent Sexism: Understanding the Role of Entitlement in Predicting Two Forms of Sexism*, 70 SEX ROLES 209, 211 (2014).

97. Anastasio & Rose, *supra* note 92, at 598.

98. Campbell et al., *supra* note 83 (subjects with high PES scores also reported behaving selfishly in romantic relationships).

engage in helpful behaviors, such as volunteering or giving blood.⁹⁹ Individuals high in entitlement also lashed out and behaved more aggressively toward those who criticized them.¹⁰⁰ Further research in the management field suggests that psychological entitlement in the work context can promote conflict with supervisors, decreased job satisfaction, and increased turnover intentions.¹⁰¹ This research also suggests that entitlement can be associated with self-serving attributional biases, assignment of blame for a missed deadline to others, for example, without pausing to consider their own role or responsibility.¹⁰²

Finally, a related line of research in the field of psychology has focused on psychological entitlement as it is affected by group status. In a recent article, psychologist Brenda Major and colleague Laurie O'Brien theorize that group status can lead to inferences or assumptions about inputs (for example, skills and intelligence). "The inference that high-status groups have more inputs than low-status groups may [then] lead to the belief that they deserve greater outcomes, and thus increase feelings of personal entitlement among members of high-status groups and decrease entitlement among members of low-status groups."¹⁰³

O'Brien and Major point to the vast body of research showing gender differences in entitlement to pay. In one study, for example, researchers assigned men and women an identical clerical task to work on for twenty minutes. After performing the task, each participant was given four dollars in change and asked to pay themselves the amount that they saw as fair for their work. Having done the same work, male participants paid themselves over three dollars on average, while female participants paid themselves less than two dollars on average. In a follow-up study, participants were paid four dollars and asked to do as much work as they thought was fair in exchange for the payment. Men in that study worked for significantly shorter periods

99. See Emily M. Zitek et al., *Victim Entitlement to Behave Selfishly*, 98 J. PERSONALITY & SOC. PSYCHOL. 245, 249 (2010). This study also showed that feeling wronged (or recalling such an incident) can lead to entitlement. *Id.*

100. Campbell et al., *supra* note 83, at 41.

101. Paul Harvey & Mark J. Martinko, *An Empirical Examination of the Role of Attributions in Psychological Entitlement and Its Outcomes*, 30 J. ORGANIZATIONAL BEHAV. 459, 460 (2008).

102. *Id.*

103. Laurie T. O'Brien & Brenda Major, *Group Status and Feelings of Personal Entitlement: The Roles of Social Comparison and System-Justifying Beliefs*, in SOCIAL AND PSYCHOLOGICAL BASES OF IDEOLOGY AND SYSTEM JUSTIFICATION 427, 427 (John T. Jost et al. eds., 2009). In this line of work, researchers define entitlement and deservingness as "affectively laden cognitive judgments that someone, or some category of people, should receive a particular set of outcomes by virtue of who they are (entitlement) or what they have done (deserving[ness])." *Id.* at 427–28 (emphasis omitted).

of time and did less work and less accurate work than women.¹⁰⁴

Research by O'Brien and Major also suggests that entitlement can be affected by (and manipulated by) the degree to which individuals endorse (or are primed with) system-justifying beliefs, belief systems that justify hierarchical and unequal relationships.¹⁰⁵ Not surprisingly, research in this line also suggests that those of high status may resist new status orders, particularly when rewards are at stake. Researchers in one study on women and men explained:

[W]hen status change would result in loss of reward for men, most men ignore the new status order. They do so by not conforming to the new order (e.g., by refusing to reduce the amount of their allotted self-pay), and they do so by actively opposing the new order (e.g., by increasing assertions of their own competence).¹⁰⁶

What can we learn from this research on entitlement beliefs and behaviors for our understanding of government-provided or backed racial entitlements and their possible harms? One thing this research does is

104. *Id.* at 429 (describing studies). O'Brien and Major argue that because women tend to compare themselves with their own social group, as do men (social comparison theory), women tended to undervalue their work in relation to men's work, while men overvalued theirs in relation to women's work. *Id.* at 430.

105. *Id.* at 432. In a study much like their earlier one in which participants were asked to pay themselves fairly for work done, men who were primed with meritocratic beliefs, a type of system-justifying belief, paid themselves much more than those who were not primed with meritocratic beliefs. Women who were so primed paid themselves much less than women who were not so primed. *Id.*; see also Mary Hogue & Janice D. Yoder, *The Role of Status in Producing Depressed Entitlement in Women's and Men's Pay Allocations*, 27 *PSYCHOL. WOMEN Q.* 330, 336 (2003) (finding correlation between women's beliefs about relatively lower worth and lower social status such that when women's status was raised, their wage entitlement rose as well).

106. Mary Hogue et al., *The Gender Wage Gap: An Explanation of Men's Elevated Wage Entitlement*, 56 *SEX ROLES* 573, 577 (2007). Other research suggests mere labeling can result in entitlement beliefs. For example, in a series of studies, researchers studied the effect of being labeled a "leader" on entitlement beliefs. Participants in the studies engaged in a social dilemma experiment where they were given identical information and instructions except for whether they were labeled a "leader" or a "follower." It turned out that those labeled "leaders" consistently took more than those labeled "followers." Tomlison, *supra* note 87, at 75 (describing a study by DeCremer, van Dijk, & Folmer on this topic). While the psychological research and literature on entitlement tends to focus on entitlement as a trait (even as the product in part of social norms), research in the management field has turned to focus more closely on the role of situational factors in generating entitlement beliefs. This research distinguishes between trait entitlement, which is often the focus of psychological studies and describes an individual characteristic that is stable across situations and therefore not particularly malleable, and entitlement beliefs, which describes a state of expectation that is more malleable and formed in response to the situation, including organizations' policies, rules, and norms. Some studies suggest a relationship between trait entitlement and entitlement beliefs in that the higher one is in trait entitlement, the higher one's entitlement beliefs are likely to be, but that changing situational factors can nonetheless affect entitlement beliefs. See Zitek et al., *supra* note 99, at 249, 251-52 (showing that feeling wronged or recalling an incident of being wronged can result in entitlement).

provide a very preliminary sense of the subjective component of racial entitlements. It would be a stretch to say that the research builds a particular theory of racial entitlements for use in thinking about when law creates negative social behaviors, but the research is helpful for envisioning what we might expect racial entitlement beliefs to look like when they take hold.

The research also helps us see why racial entitlements, when they exist, might be problematic. We should be concerned about racial entitlements if they buttress a sense of superiority built on racial category. Moreover, the research suggests that feelings of racial entitlement are likely to result in increased or exacerbated racial conflict based on beliefs of deserving more than others and derogation of out-groups as well as dependency and importantly resistance to removal of the group-based benefit to which the recipient feels entitled.¹⁰⁷

Moreover, the literature suggests that entitlement as a subjective condition involves feelings and perceptions of self that set it apart from mere objective expectation. It involves a sense of deservedness, not just of expectation. I may expect that as a member of a particular racial group my odds are better that I will succeed on a specific test, for example. A feeling of entitlement takes me further, not only to expect success or even a certain condition in life, but to emotionally anticipate it and to justify it based on my membership in one category over others.

B. SITUATING CONCEPTS

It is worth exploring how the concept of a racial entitlement may differ from existing concepts in the study of racial ideologies and persistent racial inequality, including white privilege and supremacy, among others. One of the benefits of theorizing racial entitlements, after all, lies in opening more conceptual space for understanding and disrupting or dismantling longstanding (and re-occurring) inequalities and injustices. Realizing that potential requires understanding how racial entitlements fit in with existing research and theory.

White privilege is a key concept in modern racial justice research and theory. As it has developed over the past several decades, privilege, like racial entitlement, tends to involve two components. It describes a system of sustained and intertwined advantage and also the psychological state of comfort and self-confidence that comes from obliviousness about that

107. Racial entitlement is also likely to intersect with identity in important ways. Study of race and racial identity as it is experienced in everyday life will benefit from identifying and studying racial entitlement as it has built historically, both socially and with the support of law.

systemic white advantage.¹⁰⁸ White privilege is understood to be a part of racial identity for many whites (a racial identity that includes consciousness or in some cases lack of consciousness of race).¹⁰⁹ Moreover, psychologists have shown that when their privilege is revealed to them, whites can experience anger, fear, and resentment, which can lead to avoidance and resistance or unwillingness to discuss the ways in which privilege operates in American society.¹¹⁰

Despite their common grounding in a relation between macro conditions and micro beliefs, emotions, and behaviors, the two concepts and their research emphases are likely to differ in several key ways. On beliefs and emotions, for example, the entitlement research suggests that psychological entitlement involves a core sense of comparative deservingness (a feeling of deserving more than others) that is not usually emphasized in privilege alone.¹¹¹ Moreover, while research on privilege

108. STEPHANIE WILDMAN WITH MARGALYNNE ARMSTRONG, ADRIENNE D. DAVIS, & TRINA GRILLO, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 29–30 (1996). Peggy McIntosh is credited with first describing privilege and its psychological and emotional components. For her work, see generally Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies*, in POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER 22 (Leslie Bender & Daan Braveman eds., 1995). For a more recent introductory treatment, see generally JEAN HALLEY ET AL., SEEING WHITE: AN INTRODUCTION TO WHITE PRIVILEGE AND RACE (2011). For a history on use of the term, see generally Jacob Bennett, *White Privilege: A History of the Concept* (April 11, 2012) (unpublished thesis), https://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1051&context=history_theses [<https://perma.cc/548M-JG46>].

109. In comparing white privilege to male privilege, McIntosh described white privilege as being “like an invisible weightless knapsack of special provisions, assurances, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear, and blank checks.” McIntosh, *supra* note 108, at 23.

110. See, e.g., E. Janie Pinterits et al., *The White Privilege Attitudes Scale: Development and Initial Validation*, 56 J. COUNSELING & PSYCHOL. 417, 417–18 (2009) (describing affective, cognitive, and behavioral reactions to surfacing of white privilege to whites). For a recent study examining how racial attitudes motivate the desire to avoid additional information about white privilege and influence desire to change white privilege, see John G. Conway et al., *Racial Prejudice Predicts Less Desire to Learn About White Privilege*, 48 SOC. PSYCHOL. 310 (2017).

111. See McIntosh, *supra* note 108, at 22–24. This is not to say that the concept of privilege is not capacious enough to capture something like entitlement beliefs and emotions. When Peggy McIntosh asks herself the question, “On a daily basis, what do I have that I didn’t earn?” she is evoking a similar idea of earned versus unearned deservingness, though she does not explore further the emotions and beliefs of those who do not ask that question of themselves. Joshua Rothman, *The Origins of “Privilege,”* NEW YORKER (May 12, 2014), <https://www.newyorker.com/books/page-turner/the-origins-of-privilege> [<https://perma.cc/Z5KA-GP5N>] (relaying an interview with Peggy McIntosh).

Recent research and theory in the area of race and politics has evoked the idea of entitlement in understanding white opinions. See Maruice Mangum & LaTasha DeHaan, *Entitlement and Perceived Racial Discrimination: The Missing Links to White Opinions Toward Affirmative Action and Preferential Hiring and Promotion*, 47 AM. POL. RES. 415, 428 (2018) (exploring the factors of racial resentment as they inform whites’ opinions on affirmative action and preferential hiring and promotion and framing the factors together as evidence of entitlement among whites, stating that “[e]ntitlement marries the belief

surfaces emotion as privilege is challenged, it tends not to focus on psychological states or emotions when privilege operates without challenge. Research on entitlement, in contrast, suggests that the psychological state of entitlement and associated behaviors, selfishness and derogation of others, are likely to emerge and operate regardless of whether the advantage is challenged. Conceptualizing racial entitlement as distinct from privilege thereby provides an opening for additional research on beliefs and emotions involved with entitlement as well as with privilege, both when advantage goes unchallenged and when it is challenged.¹¹²

In addition, the two concepts—privilege and entitlements—differ in the scope of their more macro influences. Like privilege, racial entitlement beliefs build from group-based advantage or benefit.¹¹³ However, while privilege is nearly always systemic, advantage or benefit can also occur in a more isolated circumstances. For example, a black man can be advantaged by his race in a supervisor's decision whether to fire him, even as he is unlikely to be privileged by his race more broadly in society or in work.¹¹⁴ Racial entitlement beliefs (and behaviors) can arise from this isolated advantage in a particular context as provided or backed up by law as well as from the more systemically intertwined advantages that amount to privilege.

In critical race theory scholarship, the concept of “white entitlement” also emerges as a psychological, world-view concept tied to longstanding

that African Americans are undeserved beneficiaries with the belief that Whites are discriminated against”).

112. Much of the research on privilege has focused in the field of counseling and education, where better understanding the psychology of white privilege is thought to improve counselors' and teachers' ability to raise, discuss, and combat white privilege. It will be useful to study points of intersection between the psychology of privilege and entitlement. For example, some affective reactions to removal of a benefit to which someone feels entitled, particularly fear of losing advantage, may be similar to those of whites forced to see their white privilege. See, e.g., Helen A. Neville et al., *Race, Power, and Multicultural Counseling Psychology: Understanding White Privilege and Color-Blind Racial Attitudes*, in HANDBOOK OF MULTICULTURAL COUNSELING 257, 265–69 (Joseph G. Ponterotto et al. eds., 2d ed 2001) (describing studies on fear in context of white privilege); see generally Pinterits et al., *supra* note 110, at 417–18 (describing affective reactions, including fear, guilt, shame, and anger to the surfacing of white privilege).

113. For a recent call for more study of privilege that situates privilege in systemic context, see William Ming Liu, *White Male Power and Privilege: The Relationship Between White Supremacy and Social Class*, 64 J. COUNSELING PSYCHOL. 349, 351 (2017) (explaining that “privilege must represent the ways in which history, systems of power, and structures of legitimization leverage themselves into people's worldviews, values, and beliefs in everyday life”).

114. Note that this does not turn racial entitlements into an individual phenomenon. It is the person's membership in a particular racial category that advantages him or her in this particular context. My point rather is that a racial entitlement, while group based, is not always systematically intertwined with other disadvantages or advantages; it can be isolated to a specific law or governmental policy. This is one of the practical benefits of theorizing racial entitlements separately from white privilege.

white supremacy.¹¹⁵ In her seminal article, *Whiteness as Property*, Cheryl Harris showed how whiteness as an aspect of identity has been converted by law into an external object of property, “moving whiteness from privileged identity to a vested interest.”¹¹⁶ Since the publication of Harris’s article, the idea of white entitlement is most evident in scholarship on affirmative action and in critiques of the merit principle in education,¹¹⁷ although it has appeared elsewhere as well.¹¹⁸ This concept of white entitlement associated with longstanding white supremacy, like entitlement traits and beliefs generally, is well worth further study. To date it has not been deeply interrogated or developed. It seems to differ, however, from the concept of racial entitlement that I develop here in that, like privilege, it tends to describe broad legal and social conditions or norms created, influenced, and reinforced by a range of laws over time, rather than to focus on the relationship between specific laws and people today.¹¹⁹

This emphasis on specific laws also distinguishes a racial entitlement from racial supremacy and general racism. Racial entitlement beliefs may be similar to racist beliefs in the sense that they involve “better than” beliefs: “I believe I am better than someone else due to my racial identity.” For this reason, they may also involve similar societal harms. However, an entitlement, unlike general racism or supremacy, involves beliefs with respect to a particular benefit. This makes racial entitlement a particularly useful concept for devising change—it allows us to target those laws that provide or back up the benefit.

115. See, e.g., DERRICK BELL, *CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER* 148 (1994) (reflecting on “the difficulty and often the futility of trying to propagate [his] views about racial discrimination to those who already possessed quite different, and equally deeply held views about white entitlement”).

116. Harris, *supra* note 2, at 1725.

117. See, e.g., Robert S. Chang, *Reverse Racism!: Affirmative Action, the Family, and the Dream That Is America*, 23 HASTINGS CONST. L.Q. 1115, 1123 (1996) (“[M]erit and fairness are deployed in ways that mask the real issues, white entitlement and patriarchy”); Jeremiah Chin, *What a Load of Hope: The Post-Racial Mixtape*, 48 CAL. W. L. REV. 369, 381 (2012) (“Whites’ ‘disfavored’ status represents white entitlement and a distancing move by comparing attempts at dismantling whiteness to the disenfranchisement of people of color”); Cheryl I. Harris & Kimberly West Faulcon, *Reading Ricci: Whitening Discrimination, Racial Test Fairness*, 58 UCLA L. REV. 73, 85 (2010) (“Race neutrality is . . . manipulated in ways that entrench white entitlement to overrepresentation.”).

118. See, e.g. LISA MARIE CACHO, *SOCIAL DEATH, RACIALIZED RIGHTLESSNESS AND THE CRIMINALIZATION OF THE UNPROTECTED* 35–38, 61–96 (2012).

119. See, e.g., George H. Taylor, *Racism as “The Nation’s Crucial Sin”: Theology and Derrick Bell*, 9 MICH. J. RACE & L. 269, 278 (2004) (stating that “[e]ven if a case is won, its goals will be ignored, circumvented, or negated if they challenge existing claims of White entitlement”). For recent use of the term “white entitlement” that is closer to the idea of racial entitlements that I explore in this Article, see Harris & Faulcon, *supra* note 117, at 85, 122, 159; see also *supra* Section III.B.3 (discussing *Ricci*).

Indeed, racial entitlements (and the psychological state that emerges from them) might be seen as a distinct, observable layer to the problem of race-based subordination and racial conflict in our society. Studying the subjective, psychological state or condition of racial entitlement that emerges from a specific, identifiable relationship between law and people thereby not only provides us a more precise language for thinking about various forms of racial subordination and conflict; it adds to our conceptual toolbox for dismantling it. We can study how and under what conditions racial entitlement beliefs emerge. Moreover, being able to home in on places where law or government policies today may amount to racial entitlements (thereby creating the subjective state of racial entitlement in members of a racial group) provides a new lever for change. We can focus change at the level of racial entitlements—targeting removal of the entitlements—in addition to the level of advantage or privilege.

With a sense of the subjective component of racial entitlement (the beliefs of racial entitlement in people who are benefited along racial category lines), we can better theorize about when a racial entitlement is likely to arise. I have said that a racial entitlement can be understood as a relationship between the law and people that creates undue feelings of deservedness and dependency along racial lines. Empirical work on beliefs and behaviors among those benefited will of course be important to determining whether a particular law amounts to a racial entitlement. But we can also begin by theorizing about the conditions under which law or government programs are likely to amount to racial entitlements. In the next Part, I take that step, examining civil rights law for likelihood of racial entitlements by first considering conservatives' claims and then presenting my own.

III. RACIAL ENTITLEMENTS AND CIVIL RIGHTS LAWS—A THEORY IN APPLICATION

It turns out that modern antidiscrimination law may operate as a racial entitlement, but the racial entitlement is likely to take different forms and lie in different areas of antidiscrimination law than conservative critics imagine. This Part starts with an examination of those laws or programs that conservatives decry as racial entitlements for racial minorities. It asks whether in practice they are likely to be such, and concludes that they are not. It does not claim that these laws or programs could never amount to racial entitlements, but that as interpreted and constrained by the courts and practiced today they are unlikely to amount to racial entitlements. In the area of employment discrimination law, in contrast, preliminary theoretical inquiry suggests that the law is likely to amount to a racial entitlement for

whites, which points to this area of the law as ripe for reform.

A. FAKE NEWS AND REAL NEWS: DECONSTRUCTING RACIAL ENTITLEMENT CLAIMS

Do the Voting Rights Act or affirmative action programs permitted by law today amount to racial entitlements? At this juncture, it is worth returning to these particular provisions to determine whether they do in fact function in the ways that conservative critics claim. If these programs do not constitute racial entitlements, how are they distinguishable from programs that subsidize the harms conservatives fear from racial entitlements? Conservatives assume racial entitlement from mere mention of racial category, but both the voting rights law and affirmative action programs are distinguishable from racial entitlements. As they operate on the ground, they are unlikely to inure either the sense of deservingness or behaviors of dependency that are the hallmarks of racial entitlements.

1. The Voting Rights Act

Are the voting preclearance provisions as interpreted by the Supreme Court effectively a racial entitlement, as Thernstrom and Justice Scalia claim? Do voters or political candidates receive an automatic benefit based on their membership in a particular racial category that is likely to create in racial minorities undue feelings of deservedness and behaviors associated with dependence?

The Voting Rights Act is a law protecting all citizens from discrimination in voting. In that sense, it makes voting an American entitlement, at least in the sense of a right guaranteed by law for all. The Act was passed in an era of Jim Crow entrenchment against constitutionally guaranteed rights to black citizens, including the right to vote in the Fifteenth Amendment of the U.S. Constitution.¹²⁰ Persistent violations of voting rights by state actors (and violent white resistance to calls for voting rights like the one in Selma, Alabama) led President Lyndon Johnson to put the Act to Congress and fueled its passage.¹²¹

Justice Scalia, we know, saw the benefit provided to blacks and other racial and ethnic minorities under the preclearance provisions of the Act as akin to affirmative action, his original “racial entitlement.” Under the

120. See generally GARY MAY, BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICAN DEMOCRACY (2013) (discussing the historical background of the Voting Rights Act).

121. See generally *id.*

preclearance provisions of the Voting Rights Act, certain counties are required to obtain approval of the Attorney General of the United States or the District Court for the District of Columbia for changes to “procedures with respect to voting,” including redistricting plans and annexations as well as literacy tests.¹²² As discussed above, in application, this came to mean that some redistricting plans and other changes to voting submitted by states for preclearance included districts drawn with race in mind to preserve blocks of minority populations that would be sufficient to elect minority representatives.¹²³ Conservatives saw this willingness to consider race a betrayal of the colorblind ideal that in their view the Voting Rights Act was meant to advance.¹²⁴ In the words of William Bradford Reynolds, the assistant attorney general for civil rights during the Reagan administration, the Voting Rights Act had become part of “a kind of racial spoils system in America” favoring historically disadvantaged minorities over whites.¹²⁵

But color consciousness allowed by law is not the same thing as a racial entitlement. To the contrary, using the definition of a racial entitlement delineated here as a benefit conferred along racial lines that creates undue feelings of deservedness and behaviors of dependency and resistance to removal of the benefit, we can see that the Voting Rights Act does not likely amount to a racial entitlement, whether for political candidates or for voters. Preclearance protections under the Act are triggered by a pattern of segregation or exclusion in a particular jurisdiction; history and prior evidence are the triggers for increased scrutiny. Consequently, not every minority district is eligible for protection.¹²⁶ Moreover, the fact that this history establishes a reason for concern suggests that there is no illegitimate invocation of rights or deservedness in racial status alone. The additional layer of protection is required, after all, because of evidence of prior illicit behavior involving race in those targeted districts. It is true that some

122. See *Allen v. State Bd. of Elections*, 393 U.S. 544, 563, 566 (1969) (interpreting the Voting Rights Act preclearance requirement to include redistricting). I use the present tense because the Voting Rights Act, including its preclearance requirement, is still in place, even after the Supreme Court invalidated the coverage formula that determines which counties will be covered by the preclearance requirement. See *Shelby Cty. v. Holder*, 570 U.S. 529, 557 (2013).

123. See *United Jewish Orgs. v. Carey*, 430 U.S. 144, 176–79 (1977) (upholding a redistricting plan in which race was considered to preserve voting power of blacks and Puerto Ricans in Brooklyn).

124. Abigail Thernstrom was one of the most prominent academics asserting this position. Her position was consistent with and drew from other prominent opponents of any consideration of race, including Nathan Glazer and Antonin Scalia. See BERMAN, *supra* note 73, at 127–31 (describing the relationship between Thernstrom and Glazer and their conservative adoption of colorblindness).

125. BERMAN, *supra* note 73, at 143 (citation omitted).

126. See generally Pamela S. Karlan & Peyton McCrary, *Without Fear and Without Research*, 4 J.L. & POL. 751 (1988) (reviewing ABIGAIL THERNSTROM, *WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* (1987)).

incumbent political candidates may benefit from creation of competitive districts that are protected from racial minority vote dilution by the Voting Rights Act, but so long as race remains less than a “predominant” factor, those districts are not likely to become so over-packed that re-election is a certainty rather than a competitive possibility.¹²⁷ Notice, too, that while some incumbent political candidates will be racial minorities, many will not. This makes development of racial entitlement beliefs for political candidates

127. *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (holding that a district becomes an unconstitutional racial gerrymander if race was the “predominant” factor in the drawing of its lines).

There is one way in which current implementation of voting rights law may amount to a racial entitlement for some racial minority politicians. One race-based gerrymandering tactic that Republicans occasionally use is to over-pack racial minorities in certain districts with the aim of providing partisan advantage to Republicans in neighboring districts. See Gowri Ramachandran, *Math for the People: Reining in Gerrymandering While Protecting Minority Rights*, N.C. L. REV. (forthcoming) (manuscript at 10 & n.40), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3340991 [<https://perma.cc/5K6A-PEH5>] [hereinafter Ramachandran, *Math for the People*]; see also Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor’s Clothes*, 71 TEX. L. REV. 1589, 1592 (1993) (describing how votes that a candidate did not need in order to win as well as votes for a losing candidate are “wasted”). With its recent decision, *Abbott v. Perez*, 138 S. Ct. 2305 (2018), the Supreme Court might be seen to allow this practice by heightening the burden of proving racial intent. What this can do in practice is protect an incumbent racial minority politician in the district that is overly packed with racial minorities. Sometimes, though not always, the candidate (usually a Democrat) will be a racial minority him or herself. Nonetheless, we might imagine that this scenario, if allowed, could produce feelings of entitlement by the minority-representing candidate in the super-safe, over-packed district.

Yet this is not quite the racial entitlement that Justice Scalia had in mind. During oral argument in *Shelby*, Scalia objected to a Voting Rights Act that allowed consideration of race as a means of combatting longstanding disenfranchisement of racial minorities. His view was that in seeking to provide greater political opportunity for racial minorities in districts with histories of discrimination, the Act was providing an unearned windfall to racial minorities. In the post-*Abbott* scenario, in contrast, the Court may allow a plan to over-pack racial minorities in a single district with the aim of creating Republican-favored districts surrounding that district.

Which gets us back to the question of whether the entitlement beliefs that the racial minority candidate in the over-packed district experiences are *racial* entitlement beliefs. The candidate likely knows that while race is being used in drawing the district lines, his/her own protection is a side-effect of politically motivated action by Republicans seeking to protect their own districts. In this scenario, therefore, just as with drawing of competitive districts under the Voting Rights Act, I submit that we should not expect the entitlement beliefs to be racial; in other words, we would not expect feelings of superiority or deservedness along racial lines.

Notice, too, that even if we were concerned about racial entitlement in this scenario, the solution is to interpret the Voting Rights Act to forbid over-packing minority districts, not to prohibit consideration of race at all. The Voting Rights Act could be interpreted to require competitive districts without allowing over-packed districts, which would ease any entitlement feelings of candidates in currently over-packed districts, whether we consider those feelings racial entitlement or not. For more on the need for emphasis on competitive districts as a means of protecting against racial over-packing, see Gowri Ramachandran, *Why Didn’t the Democrats Talk about Minority Voting Rights During the Debates*, SLATE (June 28, 2019, 4:49 PM), <https://slate.com/news-and-politics/2019/06/democratic-debate-voting-rights-gerrymandering-supreme-court.html> [<https://perma.cc/W9WA-9UQZ>]; Ramachandran, *Math for the People*, *supra* (manuscript at 33–43) (proposing a mathematical solution to improve the competitiveness of districts).

unlikely as race is being considered at the level of district mapping rather than in preferring a minority candidate directly.

As to voter entitlement, there is an additional problem with the causal link between the protections of the Voting Rights Act and racial entitlement concerns. Preclearance provisions are properly characterized as fiduciary provisions—they are invoked by politicians or advocacy groups on behalf of voters. Accordingly, information about when challenges are made and when race conscious action is permitted is not likely to be transmitted in the way conservatives suggest, automatically upon drawing of district lines. Indeed, any benefit to members of minority groups from preservation of minority districts is likely to be so attenuated, dependent as it is on political representation, that it would seem highly unlikely for a voter to develop the sort of group-based feelings of deservedness or behaviors of dependency based on protections of the Act.

2. Affirmative Action Programs

What about affirmative action? The claim here, too, seems to be that any race consciousness pursuant to an affirmative action program amounts to a racial entitlement for racial minorities. More specifically, going back to Justice Scalia's point in his 1979 commentary, he said that preferring a black medical school applicant to a white one, even when they are of equal qualifications, is "based upon concepts of racial indebtedness [of whites] and racial entitlement [of blacks] rather than individual worth and individual need."¹²⁸ The entitlement as Scalia sees it is in relation to whites' indebtedness; that is, any expectation on the part of the black applicant turns on perceived indebtedness of whites as a group for harms done to blacks as a group. The black applicant, in turn, Scalia might argue, expects something that does not tie to his own work but rather to his membership in the racial category. The emphasis here is on the unfairness of the system for whites, but the use of the term "racial entitlement" is tinged with pejorative gloss that goes beyond mere unfairness to assertions about dependency and conceptions of self-deservingness. Justice Thomas states the concern even more directly: he is worried about "developed dependencies" on the part of blacks from affirmative action programs.¹²⁹

128. Scalia, *supra* note 55, at 154.

129. Justice Thomas's concern about stigma from affirmative action tends to overshadow that of his concern about dependency. Although stigma may present its own challenge for affirmative action, stigma (whether internal or external) is not a defining feature of an entitlement or a racial entitlement. A racial entitlement can just as easily (if not more easily, given the research on entitlement) generate feelings of and expectations of superiority as inferiority. See *supra* Section II.A. (discussing studies on entitlement). For a recent examination of the stigma claim against affirmative action, see generally Angela

Any theory of racial entitlement, however, requires that we interrogate more closely how the law or program actually operates on the ground. In other words, before we suspect a racial entitlement, we should at least have reason to expect that the costs of perceived deservedness and dependency, for example, are likely to inure from the relationship between the state and people that the law or program creates. I undertake that examination here, concluding that affirmative action as practiced under current law is unlikely to amount to a racial entitlement for several reasons.

First, mere membership in a particular racial group does not ensure that a benefit is received. Scholars such as Cristina Rodríguez have noted the ways in which admissions officers are likely to sort within individual racial categories to select preferred over less preferred versions of racial identity.¹³⁰ Recent empirical research finding that white admissions counselors made intra-race distinctions in their responses to student inquiries lends support to this suspicion. The white counselors responded to non-racially-salient black students' emails 65 percent of the time, but to racially-salient black students' emails 55 percent of the time.¹³¹ Black students who included an anti-racist narrative in their query experienced a response rate that was 17 percent lower than black students presenting one of three other narratives, including a racial unity narrative.¹³² This research suggests that performance of racial identity, even among black applicants, is what determines access, not membership in the group alone.¹³³ Indeed, some commentators argue that the Court's rejection of transparency in favor of an opaque box of individualized decision making in affirmative action law rested precisely on this concern that transparency would build racial entitlement among racial minorities.¹³⁴

Onwuachi-Willig et al., *Cracking the Egg: Which Came First—Stigma or Affirmative Action*, 96 CALIF. L. REV. 1299 (2008).

130. Cristina M. Rodríguez, *Against Individualized Consideration*, 83 IND. L.J. 1405, 1409–13 (2008); see also Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 175–95 (2003) (critiquing the opacity of elite, individualized decision making under affirmative action law).

131. Ted Thornhill, *We Want Black Students, Just Not You: How White Admissions Counselors Screen Black Prospective Students*, 5 SOC. RACE & ETHNICITY 456, 464 (2019). For additional background theory on intra-race distinctions, see DEVON W. CARBADO & MITU GULATI, *ACTING WHITE?: RETHINKING RACE IN A "POST-RACIAL" AMERICA* 11–26 (2013); see also Devon W. Carbadó & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1287–97 (2000).

132. Thornhill, *supra* note 131, at 10.

133. Given the current system, members of racial groups may experience feelings of superiority over other members of their group based on their ability to perform their racial identity in ways that are more palatable or valuable to the decision makers, see CARBADO & GULATI, *supra* note 131, at 23–25, but they are not likely to develop racial entitlement beliefs with respect to their group and others, as the conservative label of racial entitlement claims.

134. See Robert Post, *Affirmative Action and Higher Education: The View from Somewhere*, 23 YALE L. & POL'Y REV. 25, 31 (2005) (stating that “the Court seems primarily concerned with the effect

Moreover, there is reason to believe that this sorting occurs within all racial categories. In today's political climate, some schools have taken a pointed interest in white diversity, in particular disempowered white communities in Appalachia or the Deep South as significant members that add to campus diversity. A recent study of admissions officers reported that 24 percent (non-public) and 36 percent (public) of those surveyed thought that colleges, especially elite colleges, should recruit more low-income white students.¹³⁵ Regional expression of particular racial identities, class, religion, and immigration history all play a role.

Any benefit to blacks is also not assured because schools' priorities with regard to diversity change with no input or acknowledgement of the impact on minority applicants and no sense on the part of racial minorities that they have any right to control these changes.¹³⁶ Rather, as Supreme Court doctrine on educational diversity makes clear, schools deploy and control the diversity definition.¹³⁷ They determine the type of diversity they seek based on their educational goals and the perceived needs of the university community.¹³⁸ There is neither transparency nor a right on behalf of minority

that transparent affirmative action programs will have on its minority beneficiaries"); *id.* ("The Court in *Grutter* is worried that minorities may come to feel entitled to whatever advantages a transparent affirmative action plan may award them . . ."). Note, however, that while transparency would help racial minorities with knowledge about how their race might help them and would guard against stereotypes and biases in application of race, for other reasons detailed here, even a group-based, transparent consideration of race as a factor in decisionmaking would not likely amount to a racial entitlement.

135. Scott Jaschik, *The 2017 Survey of Admissions Directors: Pressure All Around*, INSIDE HIGHER ED (Sept. 13, 2017), <https://www.insidehighered.com/news/survey/2017-survey-admissions-directors-pressure-all-around> [<https://perma.cc/KKY5-VH4H>].

136. See Nancy Leong, *Multiracial Identity and Affirmative Action*, 12 UCLA ASIAN PAC. AM. L.J. 1, 6–7 (2007) (noting the variation in ways that schools categorize race in the admissions process).

137. There is some reason to believe that current deployment of a "diversity" frame by elite universities in particular may generate feelings of racial entitlement in whites to racial access. See, e.g., NATASHA K. WARIKOO, *THE DIVERSITY BARGAIN: AND OTHER DILEMMAS OF RACE, ADMISSIONS, AND MERITOCRACY AT ELITE UNIVERSITIES* 104 (2017) (relaying views of students at Brown and Harvard wherein the presence of racial minorities on campus is seen as a "resource" held out to them by the University and of which they feel wrongly deprived if racial minorities do not fully "integrate"). Because I suspect these feelings of entitlement are likely to inure today from the university-driven frame of diversity (even as the law played a role in the turn to the diversity frame), see, e.g., Leong, *supra* note 6, at 1339–43. I postpone further discussion of these entitlement beliefs for future work focused on using the law as disrupter. See *supra* note 6. For one example of work emphasizing the role of law in shaping narrative and action involving race in employment, albeit not steeped in the concept of entitlement, see generally Tristin K. Green, *Race and Sex in Organizing Work: "Diversity," Discrimination, and Integration*, 59 EMORY L.J. 585 (2010). It may turn out, however, that affirmative action law is doing considerable work in this scenario by backing up the diversity frame, much like the work that Title VII is doing in my example below.

138. See ELLEN BERREY, *THE ENIGMA OF DIVERSITY: THE LANGUAGE OF RACE AND THE LIMITS OF RACIAL JUSTICE* 112–18 (2015) (describing changes in rhetoric and focus in admissions at the University of Michigan after *Grutter* and *Gratz*).

student populations to an expected level of access.

Claims of racial entitlement from affirmative action are even weaker in the workplace context as the Court has repeatedly noted that in the absence of prior proof of discrimination (or, for private employers, proof of a “manifest imbalance” in a “traditionally segregated job category”), programs that aim for target numbers are inherently suspect.¹³⁹ Mere deviation from the demographics of the surrounding community is insufficient to establish harm as lack of interest, lack of training, and other barriers are cited as explanations as to why minorities are not guaranteed a particular level of access or inclusion to a particular industry or job category.

This is not to say that an affirmative action program designed to benefit racial minorities could never amount to a racial entitlement. For example, we might suspect that a nationwide program that promised top ten university admission to any black high school graduate, regardless of courses taken or grades received, might amount to a racial entitlement. This is because in practice we might expect that black high school students who are aware of the group-based benefit could develop dependence and a sense of deservedness apart from work put in. Being assured of the benefit by law makes it more likely in this scenario that expectations will develop, thereby raising legitimate concerns about racial entitlement beliefs and behaviors. These concerns would, of course, be tempered by historical and social context surrounding affirmative action in the United States,¹⁴⁰ and the theoretical conclusion should be subject to empirical check. But the possibility of a racial entitlement is much higher in this scenario than under current law and conditions. Indeed, even a university or employer with a target demographic goal or less individualized diversity inquiry than currently practiced would not rise to this level.

Nor do the conservatives claiming racial entitlement offer evidence to support the notion that deservedness and dependence norms have developed within minority applicant populations. Ironically, instead, legal claims reflecting a sense of deservedness and dependency have come from white applicants in the affirmative action arena. These claims from whites can show an emotional attachment to seemingly colorblind merit systems that ensure success to their group—even when those merit systems would not help in their particular case.

139. *Johnson v. Transp. Agency*, 480 U.S. 616, 631–32 (1987); *United Steelworkers v. Weber*, 443 U.S. 193, 209 (1979).

140. *See Harris*, *supra* note 2, at 1784–87.

Consider, for example, the *Fisher v. University of Texas* case.¹⁴¹ After much litigation, it was revealed that Abigail Fisher did not meet the standard admission criterion she identified for white students attending the university.¹⁴² Her complaint was that her substantially lower grades and less distinguished academic record were similar to that of some of the black applicants who had been admitted to the University.¹⁴³ Yet, to be clear, if the school had stuck firmly to its numerical guidelines for admission and admitted no student that did not meet those guidelines, it would have admitted other whites—but not Fisher. Fisher’s claim was different; she claimed that the altered standard that included holistic review, designed to ensure inclusion of a diversity of racial and ethnic perspectives, must be applied to her and result in her admission.¹⁴⁴ But Fisher cannot have it both ways: either the numerical standards control and must be adhered to on basic fairness and colorblindness grounds or schools may deviate for diversity reasons. She cannot then insist that she offers the same diversity benefits as a black student in adding to the educational mission. Indeed, her attitude demonstrates a distorted sense of deservedness to every slot available.¹⁴⁵

Abigail Fisher’s pitch is similar to that of whites in *United Steelworkers v. Weber*, more than forty years ago, who insisted upon access to all of the training slots created under a diversity recruitment program by Kaiser Steel.¹⁴⁶ In that case, whites alleged discrimination because they were not granted access to all of the slots in the company’s new diversity recruitment program, which was designed to train blacks to diversify the plant’s workforce.¹⁴⁷ Instead of giving all slots to blacks (to correct for a longstanding exclusion of black workers from trade programs), the program gave black applicants only 50 percent of the spaces.¹⁴⁸ The irony in that case was that the new training program would not have been created but for the employer’s desire to diversify the workforce.¹⁴⁹ It added spots to ensure that it could include whites in the new initiative as well.¹⁵⁰ However, the white

141. *Fisher v. Univ. of Tex.*, 570 U.S. 297 (2013).

142. See Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 443–45 (2014) (describing Fisher’s qualifications).

143. See *id.* at 427–30 (describing Fisher’s sense of the injustice she suffered as reported by a news source).

144. Because she did not meet the top ten percent criteria, in order to be admitted, Fisher needed to get in under the school’s holistic review system. *Id.*

145. *Id.* at 430 (identifying Fisher’s response to her rejection as “entitled thinking”).

146. See *United Steelworkers v. Weber*, 443 U.S. 193, 199 (1979).

147. *Id.*

148. *Id.* at 197.

149. See *id.*

150. See *id.* at 197–98.

applicants arguably felt they deserved to compete for all of the slots in the program, even if that would defeat the purpose of the program itself.

B. A NEW STORY: TITLE VII AS RACIAL ENTITLEMENT

In this Section I consider how civil rights law today may amount to a racial entitlement. Again, my point is preliminary and theoretical, rather than empirical. But it applies a theory of racial entitlement that is consistent with conservatives' concerns at a level of grounded reality that is absent from the racial entitlement claims asserted by conservative commentators about affirmative action and voting rights. Moreover, it is supported by a body of empirical work on how Title VII law is experienced by employees. Specifically, in this Section, I identify several developments in Title VII law that lead the law to back up racially aligned benefits provided by employers, making it likely that at least in some workplaces whites may develop racial entitlement beliefs. In other words, I show how the law of Title VII may amount to a racial entitlement in some workplaces by backing up employer-provided white advantage. The goal is to map out how Title VII may amount to a racial entitlement, paving the way for future empirical work aimed at testing a racial entitlement theory.

I focus here on two interrelated developments in Title VII law that together allow employees and employers to define racialized work environments to the advantage of whites and that protect those environments from disruption. The first development is in the specific doctrinal rules created by the Supreme Court and lower federal courts in the area of individual disparate treatment and hostile work environment law that operate to enable racialized work environments. The well-documented stray remarks doctrine in individual disparate treatment law and ratcheting-up of behavior required for proof of racial harassment law in hostile work environment law act as a free pass on racism and racist comments for white supervisors and co-workers. The second is in the Court's broader approach to employment discrimination law over the past several decades, wherein the Court has steered antidiscrimination measures toward individualized retribution, thereby insulating organizational structures and cultures from antidiscrimination purview. Employment discrimination law as individualized retribution allows for occasional punishment of individuals, but otherwise tends to leave in place racialized work environments.

The group-based benefit in this scenario that may amount to a racial entitlement is not expressly stated in the law, but rather emerges as the law is implemented. The law allows whites to create rules and norms for behavior, including racialized behavior, thus providing an advantage to

whites in some workplaces where they can more easily adhere to behavioral expectations. And the law backs up this group-based advantage by shielding racialized work environments from disruption. Indeed, it is key to see that racial advantage in the workplace alone does not amount to a racial entitlement; rather, it is racial advantage together with a law that is shoring up that advantage, thereby providing state-backed certainty, that allows entitlement beliefs to build. By backing up the racial advantage, employment discrimination law as implemented today may create a relationship between the state and people in which whites working in a white-advantaged work environment will develop entitlement beliefs and behaviors with respect to that advantage. I close with an example of Title VII law in action that also serves to provide insight into how we might go about dismantling a racial entitlement once it is identified.

1. Individual Disparate Treatment Law Protecting Racialized Work Environments: Doctrinal Machinations of Stray Remarks and Hostile Work Environments

Over the decades since Title VII was passed, courts have developed numerous doctrinal rules that are likely to affect the certainty of advantage experienced by white employees, shoring up their advantage rather than disrupting it.

For example, when an individual brings a claim alleging that she was discriminated against because her supervisor denied her a promotion, the supervisor's clear statements of bias may not be considered evidence of discrimination if those statements are not uttered close enough in time or context to the promotion or other adverse employment decision.¹⁵¹ In one case, the plaintiff alleged that his supervisor called him a "black motherfucker" and "an ugly black man" and that he said that black people "can be a lot of trouble."¹⁵² The Court of Appeals for the Fourth Circuit in affirming summary judgment for the defendant held that this did not constitute evidence of bias in the plaintiff's employment ratings because the

151. On the "stray remarks doctrine," including a recent database search that yielded 2943 cases referring to "stray remarks," see Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 540–42 & 540 n.240 (2018); see also SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW* 59–66 (2017); Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149, 153–73 (2012). For discussion of the stray remarks doctrine as a way for courts to close relations and emotions out of antidiscrimination inquiry, see Tristin K. Green, *Racial Emotion in the Workplace*, 86 S. CAL. L. REV. 959, 983–88 (2013).

152. Brief of Appellant at 4, *McNeal v. Montgomery Cty.*, 307 F. Appx. 766 (4th Cir. 2009) (Mem.) (No. 07-1323); see also *McNeal v. Montgomery Cty. Md.*, 307 Fed. Appx. 766, 774 (4th Cir. 2009) (Mem.).

plaintiff did not show that the comments were “temporally connected” to the ratings decisions and because two co-workers, in addition to the supervisor, were responsible for the ratings.

The point here is not that any statement by a supervisor should necessarily be grounds for plaintiff success in all discrimination lawsuits going forward involving that supervisor,¹⁵³ but rather that by excluding the comment from the case or downplaying it as no evidence at all, courts send the message to employers (and employees) that some statements are safe from legal reproach. From this, white advantage to define the terms of work space is reinforced by the law.

Judges in the area of racial harassment also tend to protect racialized work cultures in various ways. In order to establish discrimination in violation of Title VII when the plaintiff has not suffered an adverse employment action, such as a discharge or denial of a promotion, the law of hostile work environment as developed by the Supreme Court requires that a plaintiff prove both that he or she subjectively perceived experienced the work environment as severe or pervasive and that a reasonable person would have perceived the environment as severe or pervasive.¹⁵⁴ One way in which judges protect dominant racialized work cultures is through this second element by holding that the environment, although perhaps perceived by the plaintiff as hostile, would not be perceived by a reasonable person to be such.

In *Pratt v. Austal, U.S.A., L.L.C.*, for example, the plaintiff Rahman Pratt, a black man, argued that he experienced a racially hostile environment at a shipbuilding company in Mobile, Alabama.¹⁵⁵ He testified that he overheard three white co-workers saying “[h]ow him and the nigger got into it yesterday, and he’ll hang that nigger and shoot that nigger, and all that kind of stuff. Just going on and on. And . . . calling them ‘monkeys’ and stuff like that.”¹⁵⁶ He also presented evidence that several white co-workers wore T-shirts and bandanas bearing the Confederate flag to work and that he saw racial epithets in graffiti on the bathroom walls and stalls and on toolboxes.¹⁵⁷ The judge in the case granted summary judgment, holding that a jury could not conclude from the evidence that a reasonable person would have found

153. See TRISTIN K. GREEN, DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW 105–06 (2017) (pointing out that evidence required to prove individualized discrimination may differ from that required for proving discrimination against members of a group).

154. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

155. *Pratt v. Austal, U.S.A., L.L.C.*, No. 08-00155-KD-N, 2011 U.S. Dist. LEXIS 82736, at *9 (S.D. Ala. July 27, 2011).

156. *Id.* (alterations in original).

157. *Id.* at *10–12.

the environment racially hostile.¹⁵⁸ It was important to the judge that Pratt “only overheard racial comments (not directed to him)” and that when Pratt complained about the graffiti, it was painted over.¹⁵⁹ Pratt testified that the graffiti was painted over only after it had “piled up[,]” and others testified that after the re-painting the walls would soon be filled again with racial graffiti.¹⁶⁰ When Pratt complained to his supervisor about the continuing graffiti, the supervisor responded that it had been going on “for so long. We can’t do nothing but paint the walls[.]”¹⁶¹

These judges sometimes cite to other cases involving racial harassment as support for their view that only extreme racial harassment violates Title VII, thus protecting the white culture space. As one court put it in a case involving a reference to a black customer as “nigger,” a racial joke, and a reference to the office where the plaintiff worked as the “ghetto” and a “FEMA trailer,” the plaintiff’s race-based incidents “‘pale in comparison, both in severity and frequency,’ to the kinds of verbal harassment that this court and other circuits have held would support a Title VII claim.”¹⁶² The court cited for comparison three cases: one in which the plaintiff submitted evidence of, as the court put it, “years of inflammatory racial epithets, including ‘nigger’ and ‘little black monkey’”; another in which the plaintiff “was subjected to ‘nigger jokes’ for a ten-year period and the plaintiff’s workstation was adorned with ‘a human-sized dummy with a black head’”; and a third “where the plaintiff suffered ‘incessant racial slurs’ including ‘nigger’ and ‘dumb monkey.’”¹⁶³

Judges also confine their inquiry to behavior or comments made in the plaintiff’s presence. This protects white cultural space so long as it is performed behind closed doors or is general rather than targeted at a specific plaintiff. For example, in *McCann v. Tillman*, the plaintiff, a black woman and corrections officer for the Mobile County, Alabama, alleged a race-based hostile work environment within the county sheriff’s office.¹⁶⁴ She alleged that she was called “girl” by her supervisor, and two black officers were

158. *Id.* at *19.

159. *Id.* at *12, 16.

160. *Id.* at *13 (alteration in original).

161. *Id.* (alteration in original); *see also* *Brooks v. Firestone Polymers L.L.C.*, 640 Fed. Appx. 393, 398–99 (5th Cir. 2016) (Mem.) (granting summary judgment for the defendant in a case involving racial slurs and “black faces” drawn in the bathroom stalls, a manager’s statement that as long as he was in charge of a certain unit “there would be no blacks in the control room,” and claims that black employees were discriminatorily given less overtime and less training than white counterparts).

162. *White v. Gov’t Emps. Ins.*, 457 Fed. Appx. 374, 376, 381 (5th Cir. 2012) (Mem.) (citation omitted).

163. *Id.* at 381 n.35

164. *McCann v. Tillman*, 526 F.3d 1370, 1379 (11th Cir. 2008).

called “boy.”¹⁶⁵ She also alleged that the sheriff referred to a former employee as a “nigger bitch,” and remarked that “he had never received the ‘nigger vote’ and that he didn’t want it.”¹⁶⁶ The court found significant that the remarks made by the sheriff were not directed towards McCann or made in her presence.¹⁶⁷

In another, earlier case, the court described the African-American, male plaintiff, James Bolden, “as a sensitive and serious person working in a shop filled with boorish churls.”¹⁶⁸ Bolden worked as an electrician for PRC, Inc., for eight years.¹⁶⁹ The court acknowledged that Bolden was “badgered frequently by several of his coworkers” but pointed out that “only two of his coworkers made overtly racial remarks.”¹⁷⁰ One of those co-workers warned Bolden, “[Y]ou better be careful because we know people in [the] Ku Klux Klan,” and used terms like “honky” and “nigger” in Bolden’s presence.¹⁷¹ He also drew a cartoon in front of Bolden that Bolden perceived to be race based. Other co-workers called Bolden “dickhead,” “dumbshit,” and other similar names, and one rigged his chair during a lunch break so that the back would fall off when Bolden leaned against it.¹⁷² The court of appeals affirmed the district court’s grant of summary judgment in the case.¹⁷³ It reasoned that the two comments were not pervasive and therefore were not actionable; “[i]nstead of sporadic racial slurs,” said the court, “there must be a steady barrage of opprobrious racial comments.”¹⁷⁴ Moreover, according to the court, because the racialized comments were made two years prior to when the “general ridicule became prevalent,” it was not reasonable to infer

165. *Id.* at 1378.

166. *Id.* at 1379.

167. *Id.*; *see also* EEOC v. A. Sam & Sons Produce Co., 872 F. Supp. 29, 36 (W.D.N.Y. 1994) (“Less compelling are Titus’s claims that she was subjected to hostile environment sexual harassment. Although she, on three occasions, overheard Charles through the walls of his office refer to the women in the office as ‘whores,’ Titus herself stated that Charles never called her a whore”). Courts also exclude evidence of racially biased remarks made outside the presence of the plaintiff as hearsay. *See, e.g.,* Alex v. Gen. Elec. Co., 149 F. Supp. 3d 253, 281–82 (N.D.N.Y. 2016) (“In any event, Plaintiff’s deposition testimony that one or more unidentified co-workers told Plaintiff that Defendant Lanoue had referred to Plaintiff as ‘N----’ (behind her back) is inadmissible. Specifically, the alleged statements by one or more unidentified co-workers is hearsay”); Cain v. Elgin, Joliet E. Ry. Co., 04-CV-0347, 2006 U.S. Dist. LEXIS 4373, at *40 (N.D. Ind. Jan. 19, 2006) (“[T]his Court cannot take into consideration Plaintiff’s alleged statement that Plaintiff was referred to a ‘nigger,’ because the statement was made outside the presence of Plaintiff, and constitutes hearsay.”).

168. Bolden v. PRC Inc., 43 F.3d 545, 548 (10th Cir. 1994).

169. *Id.*

170. *Id.* at 549

171. *Id.* (second alteration in original).

172. *Id.*

173. *Id.* at 555.

174. *Id.* at 551–52.

that the “general torment and taunting” was racially discriminatory.¹⁷⁵

These are extreme cases, but they illustrate judicial permission of white racialized work space at the same time that they build toward a racial entitlement by interpreting the law to protect those racialized spaces from disruption.

2. Employment Discrimination Law as Individualized Retribution: Obligations and Expectations

The case for Title VII as racial entitlement today is made stronger by the law’s overarching move toward individualized retribution over disruption of work cultures and systems that benefit whites. The shift is neither complete nor wholesale, but there is reason to believe that Title VII today is understood by judges, by those implementing Title VII within organizations, and by victims of discrimination as a law that for the most part provides individuals with the right to have their individualized complaints of specific instances of discrimination investigated and to have identified discriminators, if any, disciplined. This law, in turn, insulates work cultures and other systemic features that advantage white employees from antidiscrimination purview, leaving whites with increasing certainty that their group-based advantage will continue.

The Supreme Court turned the law toward individualized retribution in several key cases starting in the mid-1980s after it declared sexual harassment a form of discrimination.¹⁷⁶ At first glance, these early sexual harassment cases expanded the definition of discrimination, but sexual harassment is often individualized as courts talk about a specific person making sexual advances or requesting sexual favors of a targeted victim,¹⁷⁷ and these cases marked a turning point toward intense focus in the legal doctrine on individuals over context and structures. As I recount in the book *Discrimination Laundering: The Rise of Organizational Innocence and the Crisis of Equal Opportunity Law*, these cases intertwine with many others to individualize discrimination and to reduce employer liability not just for individual instances of discrimination but for systemic discrimination as

175. *Id.*

176. *See, e.g., Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (holding that a plaintiff need not show “tangible effects” or “psychological injury” to establish a violation of Title VII); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) (holding that a plaintiff need not prove tangible economic harm to establish a violation of Title VII).

177. *See, e.g., Harris*, 510 U.S. at 19 (involving a company president who insulted women and made sexual innuendos about the plaintiff’s and other women’s clothing); *Meritor*, 477 U.S. at 60 (involving a bank manager who sexually harassed a bank employee).

well.¹⁷⁸

In *Burlington Industries v. Ellerth*¹⁷⁹ and *Faragher v. City of Boca Raton*,¹⁸⁰ for example, the Supreme Court eliminated vicarious liability for harassing acts of non-supervisors and for supervisors who do not take tangible employment action. Instead of vicarious liability, the Court substituted an affirmative defense for employers in some circumstances and in others a requirement that the plaintiff prove negligence on the part of the employer; in both cases the emphasis is on whether the plaintiff complained about each discrete harassing incident and whether the employer responded to the complaint and disciplined the harassing employee, where appropriate.¹⁸¹ And more recently in *Wal-Mart Stores, Inc. v. Dukes*, in a break from established law, the Supreme Court required proof of shared individual biases on the part of managers in order for plaintiffs to obtain class certification.¹⁸² Together, as *Discrimination Laundering* shows, these and many other judicial decisions over the past several decades are turning the law of employment discrimination into one of individualized retribution, a law that incentivizes employer policing of individuals in response to discrete complaints over disruption of broader structures and cultures that incite bias and produce inequality.¹⁸³

But Title VII as individualized retribution goes much deeper than the legal doctrine suggests. Abundant empirical research shows that the nondiscrimination obligation as implemented by employers focuses on individuals to the exclusion of broader cultures and practices.¹⁸⁴ Over twenty years ago, Lauren Edelman identified the problem of “managerializing” antidiscrimination complaints within organizations, bringing the complaints into the private realm of managerial dispute resolution and therefore out of the public realm of antidiscrimination.¹⁸⁵ Her extensive research over the

178. GREEN, *supra* note 153.

179. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

180. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

181. *Burlington Indus.*, 524 U.S. at 764–65. According to the Court, vicarious liability for harassment is not appropriate in all cases because “[t]he harassing supervisor often acts for personal motives, motives unrelated and even antithetical to the objectives of the employer.” *Id.* at 757.

182. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 358 (2011); see generally Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395 (2011) (describing how the Court’s view of systemic disparate treatment theory breaks with longstanding understanding of that law).

183. GREEN, *supra* note 153, at 45–97 (describing these and other decisions that are narrowing Title VII focus and employer liability toward individualized complaint and response).

184. See *id.* at 36–38 (describing some of this research).

185. See generally Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589 (2001); Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC’Y REV. 497 (1993) (describing this research).

past twenty years shows that the people responsible for nondiscrimination within organizations often reframe nondiscrimination in terms of basic fairness with an organizational end goal of internalizing resolution of discrimination complaints and thereby managing away legal risk.¹⁸⁶ This managerialization takes what might have been discrimination in violation of Title VII and turns it into personal conflict or misunderstanding.¹⁸⁷

There is also research showing that managerialization has led to shifts in how victims of discrimination perceive events (whether they perceive events as discriminatory in violation of the law), particularly in organizations that have built up grievance procedures and other structures that signal compliance with nondiscrimination norms.¹⁸⁸ One sociologist's study showed how managers reframed sexual harassment that violated the law to involve only the most egregious and severe behaviors, leaving less egregious behaviors in the realm of managerial difficulty, but not legal violation.¹⁸⁹ Employees in turn tended to incorporate those views into their own, leading them to see a legal claim as inappropriate.¹⁹⁰ In one instance, for example, an employee whose manager repeatedly asked her to have sex with him reported that perhaps the manager's behavior did not constitute illegal harassment.¹⁹¹

In their recent book, *Rights on Trial: How Workplace Discrimination Law Perpetuates Inequality*, sociologist Ellen Berrey and colleagues describe results of their multi-method study on employment discrimination litigation in the United States.¹⁹² Their research included interviews with plaintiffs, lawyers, and human resources officers involved with employment discrimination claims under federal statutes, including Title VII.¹⁹³ This research shows that grievance and bureaucratic personnel systems frame narrow inquires for resolution, often inquiries that focus on management and personal conflict instead of discrimination. The authors describe the process this way:

First, personnel professionals and defense lawyers (commonly working behind the scenes) attempt to defuse the conflict by explaining the

186. See EDELMAN, *supra* note 5, at 124–33.

187. *Id.*

188. *Id.* at 154–55 (describing some of this research).

189. Anna-Maria Marshall, *Idle Rights: Employees' Rights Consciousness and the Construction of Sexual Harassment Policies*, 30 LAW & SOC'Y REV. 83, 102–05 (2005).

190. *Id.* at 115. Some women also feared that the grievance procedure would lead to more trouble, including retaliation. See *id.*

191. *Id.*

192. BERREY ET AL., *supra* note 5.

193. *Id.* at 13–25 (describing the research).

situation to the aggrieved employee. Defendant representatives may attempt to work out a severance package that includes the waiver of a lawsuit. If they see a dispute brewing, they may prepare the employment file to limit potential liability in the event the employee is terminated. . . . If a dispute does proceed to the filing of a charge or a lawsuit, the employer's personnel bureaucracy may be deployed as part of the defense to the litigation claim—namely, in demonstrating that the employer has EEO structures in place that should limit its liability and actual instances of discrimination.¹⁹⁴

Indeed, even in the realm of nondiscrimination (when employees maintain and personnel professionals agree that they have suffered discrimination and not merely a personal misunderstanding or managerial mistake), the obligation of organizations tends to be narrowly construed around complaint and response. The plaintiffs whom Berrey and colleagues interviewed more than anything wanted to keep their jobs.¹⁹⁵ They wanted acknowledgment of their discriminatory experience.¹⁹⁶ And yet they often settled for monetary payment and dismissal, signing confidentiality agreements that will keep their stories from building to broader frames.¹⁹⁷

This same sense—that antidiscrimination protection is limited to narrowly individualized inquiries and relief—emerges in legal cases and the opinions generated by those cases. A recent case out of the Seventh Circuit provides a good example.¹⁹⁸ Warnether Muhammad, a black man, alleged that he was subjected to a race- and sex-based hostile work environment in the form of offensive comments and graffiti at work.¹⁹⁹ The first comment involved a co-worker calling Muhammad a “black nigger.”²⁰⁰ Muhammad complained to human resources, human resources responded by reprimanding the individual, and that person never made such a comment

194. *Id.* at 262.

195. *Id.* at 8 (quoting one plaintiff explaining that after filing a lawsuit and a month of negotiations she wanted “a public apology, one dollar, and to keep her job”); *id.* at 204 (quoting a plaintiff who received money but who said “I wanted my job back”); *id.* at 212 (stating that over 40 percent of the people interviewed said they wanted their jobs back).

196. *Id.* at 8 (describing one plaintiff's refusal to agree to a settlement agreement in which she might be perceived as having been in the wrong).

197. *See id.* at 225 (describing employer responses, including requiring confidentiality). On confidentiality in settlement agreements, see generally Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927 (2006). This same sense—that antidiscrimination protection is limited to narrowly individualized inquiries and relief—also emerges in legal cases and the opinions generated by those cases.

198. *Muhammad v. Caterpillar, Inc.*, 767 F.3d 694 (7th Cir. 2014).

199. *Id.* at 696.

200. *Id.*

again.²⁰¹ The second incident involved a different co-worker who stated that he did not like Muhammad's "black faggot ass."²⁰² Muhammad reported the incident, human resources responded, and as the court put it, "Muhammad had no subsequent problems with that employee."²⁰³ A third incident involved an employee who told Muhammad that her grandchildren were black, that she did not like them or black people generally, and that she wished her daughter had dated a white man. Muhammad complained.²⁰⁴ The next month the same employee stated to Muhammad that "his black butt should have stayed fired."²⁰⁵

Offensive comments were also scrawled on the walls of the bathroom nearest Muhammad's workstation.²⁰⁶ In early August 2006, the walls read Muhammad "is a fag, a know it all fag" and also that he was a "black nigger" who "should be killed."²⁰⁷ Muhammad reported the graffiti.²⁰⁸ His supervisor called someone to come and paint it over.²⁰⁹ Within a week similar graffiti appeared, and the walls were again repainted.²¹⁰ Muhammad's supervisor raised the issue of the graffiti problem at a shift meeting.²¹¹ When more graffiti appeared at the end of the month, the walls were again repainted and each person on Muhammad's line was individually warned that anyone caught defacing the walls would be fired immediately.²¹²

The trial court in the case granted summary judgment for the defendant employer, and the court of appeals affirmed.²¹³ The narratives of the judges and Muhammad alike focus closely on individual instances of racialized behavior and the employer's individualized response to that behavior, asking whether the employer had done enough to prevent re-occurrence of specific acts. The court of appeals held that summary judgment was warranted because the employer acted reasonably in response to each of Muhammad's complaints (and that the employer could not be held responsible for any incidents that Muhammad did not complain about).²¹⁴ As the court states the

201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.* at 697.
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.* at 697–98.
214. *Id.* at 698.

law, an employer will not be liable if it “took prompt action that was reasonably likely to prevent a reoccurrence.”²¹⁵ It matters not that each individual instance represented one piece in broader pattern. Muhammad, in turn, argued that Caterpillar was not reasonable in its response to his complaints, that it “should have done more to identify who was responsible for the graffiti and to punish all coworkers who harassed him.”²¹⁶

These narratives about what the law requires, as well as the internal narrative of the human resources officer responding to Muhammad’s complaint, emphasize the personal experience of Muhammad and specific other individuals. From what one can tell from the case, no one, not Muhammad or his lawyers, the internal equal opportunity investigators, or any of the judges, framed his or her lens to include broader workplace practices and cultures. Particularly given the multiple co-workers involved in the harassment, we might expect the law to require some inquiry into whether the harassing behavior was more broadly experienced and whether non-racialized but racially motivated action may also have been involved.²¹⁷ But even if Muhammad convinced the employer or the court to do what he wanted, even if, in other words, he had won, he would have obtained only punishment of those people who were openly harassing him and not a broader look at what was going on within Caterpillar.

Title VII as individualized retribution results in employer policing of certain individual behaviors, usually relatively extreme behaviors, like the graffiti involved in Muhammad.²¹⁸ But it leaves largely intact the broader advantage experienced through racialized cultures involving behaviors that are considered less extreme. Together with doctrinal developments like the stray remarks doctrine and ratcheted-up hostile work environment standards, the law leaves whites in many workplaces in charge of setting the behavioral scripts for success. Extreme racialized taunting may be prohibited, but whites determine the details of who fits in, who gets help when needed, who asks whom to lunch and when.

A work environment in which whites in power set the rules of the work environment, including racialized work environments, describes a form of

215. *Id.* (quoting *Berry v. Chicago Transit Auth.*, 618 F.3d 688, 692 (7th Cir. 2010)).

216. *Id.*

217. For a similar case holding that an employer was not liable because it had acted reasonably in response to specific harassing incidences and a plaintiff arguing that punishment of individual engaged in the harassing behavior should have been more severe, see *Cable v. FCA US LLC*, 679 F. App’x 473, 476 (7th Cir. 2017) (Mem.).

218. For discussion of the dangers of over-policing individual relationships to the exclusion of broader structural change, see GREEN, *supra* note 153, at 110–12; see also Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2131–36 (2003) (focusing on sex).

racial advantage; where then is the racial entitlement? My argument is that employment discrimination law as implemented today is doing more than allowing the continuation of white advantage in workplaces; it amounts (or may amount) to a racial entitlement. In other words, employment discrimination law as implemented today—by instilling in all employees, regardless of race, an understanding that the law will not disrupt racialized work environments—is likely to contribute to a sense of entitlement on the part of whites who are racially advantaged by those environments. We should expect racial entitling to occur because the law shores up dominant white (and often male) advantage, providing certainty in racial advantage and thereby allowing entitlement beliefs to build. Whites may, for example, feel that they are better at navigating their work cultures and succeeding under existing practices because of skills that they associate with their race (for example, “I fit in, while they don’t.”) rather than because the work culture or practice itself has been structured to their advantage. Of course, research suggests that there is also likely to be uncertainty (and outright denial)²¹⁹ in the minds of many whites about the extent to which race plays a role in their advantage, but a sense of group-based entitlement may nonetheless emerge from conditions under which racial advantage goes untested and undisrupted by law, particularly law that presents itself as breaking down inequality rather than building it up.

Unlike with affirmative action programs, where racial identity is sorted within racial categories to determine individual benefit, the racialized work environment like that in *Muhammad* advantages whites as a group. Whites in these workplaces are provided the advantage of being free from taunting and harassment about their race; racial minorities are not. Moreover, even if advantage in a workplace is structured to include some racial minorities or to exclude other “marginal” whites, as research suggests it often is,²²⁰ access to advantage in a racialized work environment on the whole is group based. Whites on the whole will benefit from their group status, even if certain individual whites are excluded. Not so in the affirmative action context where individualized decisions are constantly being made in doling out what

219. For recent argument by social scientists that whiteness and white privilege are not invisible to but rather managed by whites, including through denial, see Eric D. Knowles et al., *Deny, Distance, or Dismantle?: How White Americans Manage a Privileged Identity*, 9 PERSP. ON PSYCHOL. SCI. 594, 599–601 (2014); see also Ruth Frankenburg, *Mirage of an Unmarked Whiteness*, in THE MAKING AND UNMAKING OF WHITENESS 72, 76 (Birgit Brander Rasmussen et al. eds., 2001) (noting that the “conditions and practice of whiteness” render “the notion that whiteness might be invisible . . . bizarre in the extreme”); see generally BONILLA-SILVA, *supra* note 2 (on colorblind racism and denial).

220. On selective inclusion and racial minorities, see CARBADO & GULATI, *supra* note 131; Nancy Leong, *Identity Entrepreneurs*, 104 CALIF. L. REV. 1333, 1343–46 (2016). On selective inclusion and whites, see Rich, *Marginal Whiteness*, *supra* note 6, at 1510–34.

is described broadly as a group-based benefit.

It is true, as some commentators are sure to point out, that Title VII does not provide an absolute right to white advantage. Employers, after all, can voluntarily disrupt their racialized work environments. The law of Title VII does, however, currently set a default under which disruption is outside of the norm. The law of affirmative action as discussed earlier, in contrast, constrains university decisions so that the default is almost always uncertainty around both broad diversity goals and individual decision making.

Research shows that some white men complain that antidiscrimination efforts lead them to feel as if they are “walking around on eggshells,”²²¹ unable to say what they would like for fear of saying something that is perceived as offensive. That these men feel like they are walking around on eggshells adds further support for my point that employees perceive nondiscrimination efforts as largely an exercise in monitoring and punishing individuals for their behavior. But it suggests something else as well. Implicit in the response of these white men is their sense that self-awareness of what they might do wrong is a harm that they are suffering, a cost of nondiscrimination efforts. “We are walking around on eggshells” is an accusation: “This is what nondiscrimination efforts have done to us!” I submit that this observed reality is actually evidence that Title VII as currently implemented is serving as a racial entitlement. These white men are feeling entitled to their lack of self-restraint, entitled to a workplace that makes them comfortable even when they engage in racist behavior.

The existing research on psychological entitlement suggests that we should be concerned that entitlement beliefs by whites in the current Title VII climate will exacerbate status-based hierarchies as whites derogate other racial groups whom they perceive as a threat, even as colorblind ideology prevents them from publicly attaching racial motivation to their actions.²²² The racial entitlement of white workers may also contribute to more selfish group-benefiting behaviors, thereby adding to other emotional and behavioral moves that generate racial conflict.²²³ Moreover, inferences that whites advantaged by work culture and structures at work have more inputs than those not advantaged may result in increased feelings of entitlement to certain work cultures and institutional practices among whites and in

221. JENNIFER L. PIERCE, RACING FOR INNOCENCE: WHITENESS, GENDER, AND THE BACKLASH AGAINST AFFIRMATIVE ACTION 67–70 (2012).

222. *See supra* Section II.A.

223. *See supra* Section II.A.

decreased feelings of entitlement to other work cultures and practices among members of other racial groups.²²⁴

Finally, there is another reason we should be concerned about entitlement as it may be emerging from employment discrimination law today: the race-based benefit tends to be embedded in measures of merit. With a work culture that benefits white men, for example, as white men become confident that their benefit from that culture will not be disrupted, they are likely not only to develop feelings of group superiority and self-deservingness associated with the benefit, but also may exert less effort toward connecting across group boundaries. Connecting across difference always takes work, but research tells us that it can be particularly difficult for whites, who are likely to experience negative emotions, such as fear of being called a racist.²²⁵ We should expect racial entitlement to only harden this aversion to intergroup connection by reducing incentive to connect across difference (for example, “I don’t need to reach out because this culture works for me already, or because reaching out may limit my own advantage”) and by reinforcing and heightening another common fear: failure in work when longstanding benefits are adjusted or removed.

3. Another Way: *Ricci v. DeStefano*

Additional empirical work will, of course, help us to better understand racial entitlements and whether and how Title VII or other laws are currently acting as racial entitlements. In the meantime, the Supreme Court case, *Ricci v. DeStefano*,²²⁶ provides one additional concrete example for theorizing how interpretation of law might affect whether law amounts to a racial entitlement as well as an opportunity to show an alternative possibility. The *Ricci* case was brought by several white firefighters and one Hispanic firefighter in the City of New Haven, Connecticut.²²⁷ The firefighters in *Ricci* challenged the city’s decision not to certify the results of an examination process used in determining promotions.²²⁸ The City had decided not to certify the results after seeing the impact of the test on black firefighters and after considering whether an alternative examination process might have identified the most qualified candidates without that same impact.

Whites have long been advantaged in firefighting jobs. Across the

224. See *supra* Section II.A.

225. See Green, *supra* note 151, at 974.

226. *Ricci v. DeStefano*, 557 U.S. 557 (2009).

227. *Id.* at 562–63.

228. *Id.*

country, firefighting was a white job prior to the enactment of Title VII due both to biased decisions about whom to hire but also to hiring and promotion practices like nepotism and political patronage that favored whites.²²⁹ The City of New Haven's charter states that competitive examinations must be used to fill vacancies in fire officer and other civil-service positions. However, instead of considering what examination would "fairly measure the relative fitness and capacity of the applicants to discharge the duties of" a fire officer, as directed by the City's charter, the City adhered to a process provided in a two-decades old union contract: a written exam, which would account for 60 percent of an applicant's total score, and an oral exam, which would account for the remaining 40 percent.²³⁰

The City argued in its defense in the case that it declined to certify the test results because it didn't want to give effect to a practice with a disparate impact that was not job related and consistent with business necessity, as the law of disparate impact requires. When it saw the impact of the test, it brought in experts, one of whom testified that other cities were using tests that did a better job testing the skills needed for doing the job of fire officer and that did not have a disparate impact on racial minorities.²³¹ Some firefighters also claimed that access to materials used to study for the test was unequal, that some individuals had the necessary books even before the syllabus was issued, while others had to invest substantial sums to purchase the materials and "wait a month and a half for some of the books because they were on back order."²³² White firefighters, who were more likely to have relatives in the fire service, were also more likely to have access to the materials than their minority, first-generation counterparts.²³³

The firefighters challenging the City's decision argued that it violated Title VII because the City had decided to reject the test results on the basis of race. The district court sided with the City, and the Court of Appeals for the Second Circuit affirmed.²³⁴ The Supreme Court, in a 5-4 decision, reversed.²³⁵ It held that an employer cannot disregard the results of an administered test upon seeing the impact of the results unless the employer has a "strong basis in evidence to believe that it will be subject to disparate

229. *Id.* at 608-10 (Ginsburg, J., dissenting); *see also* Harris & Faulcon, *supra* note 117, at 88-91 (describing the history of racial exclusion nationally and in the New Haven firefighting department).

230. *Ricci*, 557 U.S. at 611-12 (Ginsburg, J., dissenting).

231. *Id.* at 612.

232. *Id.* at 613.

233. *Id.*

234. A panel of the Second Circuit affirmed; request for rehearing en banc was denied by a 7-6 vote. *Id.* at 576.

235. *Id.* at 563.

impact liability” if it certifies the results.²³⁶ And it went further. It held that the City of New Haven did not have a strong basis in evidence to warrant disregarding the test results.²³⁷

By setting a high standard for employers seeking to disrupt racial advantage, and by illustrating how high that standard really is by applying it to the facts in the case, the Court added certainty to white advantage: it will be disrupted (at least after the test has been implemented) only in exceptional cases. The Court tells whites that they are entitled to promotion based on an examination process that builds directly from a distinct history of racial advantage and that was continued without reflection or consideration of processes that might be equally effective with less built-in advantage for whites.²³⁸ In doing so, the Court creates a law that is likely to be racially entitling.

If, in contrast, the Court had said that the racial history, together with the skewed results, testimony that white firefighters had better access to materials, and testimony suggesting that the test lacked sufficient connection to the practice of the job, can be a basis for organizational disruption of racial advantage, then whites would experience uncertainty in the benefit. This alternative holding would not eliminate white racial advantage. In many workplaces, whites will continue to experience advantage, which presents its own ongoing challenges for dismantling racial discrimination and subordination in this country. However, a Title VII law that requires disruption of group-based advantage would at least work to avoid the creation of a racial entitlement.

CONCLUSION

Terminology can be easily co-opted. Racial entitlements have been with us since the beginning of our country—racial entitlements for whites, that is. Yet conservatives have managed not only to bracket the term from history but also to tie it to a decades-long wave of rhetoric pathologizing entitlements more broadly such that it became a tool for challenging civil rights protections for racial minorities. Research shows that the pathologizing of entitlements, particularly involving assumptions of

236. *Id.* at 585.

237. *Id.* at 585–93.

238. The majority’s characterization of the City’s decision to use the test and the firefighters’ interest in the test results is telling. According to the Court, the City of New Haven “relies on objective examinations to identify the best qualified candidates.” *Id.* at 561. The majority also cited extensively from Frank Ricci’s testimony stating that he had worked hard studying for the test, as if one person working hard can dilute a group’s benefit. *Id.* at 562–65, 567.

dependency from welfare benefits, has little to no empirical support.²³⁹ This research lends itself to efforts to fight back, to turn entitlement into a useful term for understanding the government's role in providing basic human needs, including rights to liberty, dignity, and privacy.²⁴⁰

What, then, of racial entitlements? To date, little attention has been paid to the concept of racial entitlements beyond its use as mere epithet. The aim of this Article is to change that. Of course, there is some risk in defining racial entitlements with a pejorative gloss, and yet it turns out that by taking the modern concept seriously, we can open up productive new avenues of research and scholarship. A modern theory of racial entitlements gives us a rich, textured way to understand how laws and government programs can interact with background social norms, social expectations, and patterns of racial inequality to entrench inequality and engender racial conflict. It also holds the promise of uncovering the background psychological and emotional costs that racial entitlements can impose on society.

More work is needed in this area, including empirical work that could test a theory of racial entitlements in specific contexts, including employment and education, but also in other settings, such as immigration.²⁴¹ If we are truly serious about rooting out racial entitlements, though, it turns out that the modern search is likely to take us in different directions than conservatives imagined. Rather than eliminating narrow, race-based provisions in current civil rights programs, we might begin by revising antidiscrimination law to better trigger structural change and to disrupt race-based advantage.

239. See *supra* notes 51–54 and accompanying text.

240. See, e.g., Camille Gear Rich, *Reclaiming the Welfare Queen: Feminist and Critical Race Theory Alternatives to Existing Anti-Poverty Discourse*, 25 S. CAL. INTERDISC. L.J. 257 (2016) (urging a reframing and reclaiming of the welfare queen and presenting a closer look at how the welfare queen construct affects views about citizenship and the relation between citizens and the state).

241. See generally CACHO, *supra* note 118 (describing how the U.S. criminal justice system builds certainty in racial advantage as whites are treated more leniently than non-whites through a lens of stereotypes and stories of individual “goodness” around wealth, advantage, and whiteness).