THE FASHION AND PEDIGREE OF CONSERVATIVE RACE RHETORIC

Christopher A. Bracey

Abstract

For nearly a quarter century, post-civil rights era dialogue on the state of American race relations has stood at an unhealthy and unproductive rhetorical impasse. Conflicting perceptions of the nature and extent racial injustice and divergent visions of what a racially just society entails has led to an abandonment of reasoned debate as the primary mode of engagement. Today, race relations discourse cycles uncomfortably within a cul-de-sac of stubborn ideological rhetoric. This article seeks to deepen our understanding of the nature of this impasse by examining the dominant rhetorical strategies employed by racial conservatives to oppose progressive racial reform. It identifies and explores the principal body of arguments used by contemporary legal actors to oppose the hallmark of progressive racial reform in the modern era – race preferences in employment and education – and maps the pedigree of these arguments by locating their late nineteenth and twentieth century origins. Given the dramatic transformation in American society that occurred over the intervening 150 years, one might reasonably anticipate that the rhetoric of racial conservatism would exude the dynamism and improvisation necessary to keep pace with societal evolution. Interestingly, this has not been the case. To the contrary, the basic set of arguments deployed by racial conservatives today bear a striking family resemblance to core arguments advanced by nineteenth century legal actors to stymie preeminent racial reform efforts following the Civil War. Because rhetoric, ideological conservatism, and racial repression exist in a dialectical relationship in which each mutually reinforces, nurtures, and sustains the others, the longevity of these rhetorical forms in our legal conversations about race prove particularly troubling. It offers a painful reminder of just how contested and deep-seated the disagreement is regarding the current state of American race relations, and how much of our odious racial history remains fundamentally unresolved. At the same time, a deepened understanding of conservative race rhetoric reveals critical points of departure for renewed dialogue on the future of American race relations.

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I. INTRODUCTION

Ideological conservatism is indisputably fashionable these days. Insurgent socio-religious conservatism, exemplified by pervasive grassroots organizing among religious communities and the return of the Religious Right to political prominence, has captivated American politics and powerfully shapes local and national debate on the propriety of gay marriage¹ and the preservation of a “culture of life.”² Foreign policy has similarly taken a decisively conservative turn, evidenced by the prevailing doctrine of preemption, which displaces measured diplomacy with swift militaristic intervention as the opening strategy for global conflict resolution,³ as well as a general disdain for coordinated

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¹ See Yonat Shimron, A Grass-roots Star Rises on the Right, NEWS & OBSERVER (RALEIGH) July 10, 2005, at A1 (recounting the ascendancy of conservative Christian anti-gay-marriage activist Steve Noble); Michael Van Sickler, St. Pete Pride Festival; Celebration, Condemnation... But a Heroine to Her Constituents, ST. PETERSBURG TIMES, June 26, 2005, at 1B (detailing the success of County Commissioner Ronda Storms in convincing the Hillsborough County, Florida commissioners not to recognize gay pride events); Elisabeth Bumiller, Same-Sex Marriage: The President; Bush Backs Ban In Constitution On Gay Marriage, THE NEW YORK TIMES, Feb. 25, 2004, at A1 (noting that President Bush’s announcement was a response to “enormous pressure from conservative supporters, who insisted that he speak out in an election year on a matter of critical importance to many of his Christian backers.”); see also Laurie Goodstein, The 2004 Campaign: The Policies; Personal and Political, Bush’s Faith Blurs Lines, THE NEW YORK TIMES, Oct. 26, 2004 at A21 (observing that “dozens of conservative religious leaders, including evangelical Christians, Catholics and Jews, exulted at the unprecedented access they had had to this White House and the ways in which Mr. Bush had found common cause with them”).

² See Luiza Savage, With Schiavo Dead, Bush Emphasizes ‘Culture of Life’, N.Y. SUN, Apr. 1, 2005, at 1 (recounting President Bush’s response to Terri Schiavo’s death); Andy Soltis, Bush Joins Mourning as Pro-Lifers Voice Anger, N. Y. POST, Apr. 1, 2005, at 7 (recounting the responses of several conservative leaders to Schiavo’s death); Sheryl Gay Stolberg, The Schiavo Case: The Legacy; A Collision of Disparate Forces May Be Reshaping American Law, THE NEW YORK TIMES, April 1, 2005, at A18 (describing the life and death of Terri Schiavo as “a touchstone in American culture” and observing that “[r]arely have the forces of politics, religion and medicine collided so spectacularly, and with such potential for lasting effect”); Laurie Goodstein, The Schiavo Case: Religious Groups; Schiavo Case Highlights an Alliance Between Catholics and Evangelicals, THE NEW YORK TIMES, Mar. 23, 2005, at A20 (chronicling a “growing alliance of conservative Roman Catholics and evangelicals who have found common cause in the "culture of life" agenda articulated by Pope John Paul II”).

³ See Editorial, Beyond Words, RICHMOND TIMES DISPATCH, June 30, 2005, at A-10 (Asserting “The war is just. Pre-emption defines a sound doctrine.”); Steven R. Weisman, A Nation at War: A New Doctrine; Pre-emption: Idea With a Lineage Whose Time Has Come, THE NEW YORK TIMES, Mar. 23, 2003, at B1 (observing that “pre-emption has taken hold in the administration, transforming a once obscure idea that had been floating around conservative policy circles since at least the first Bush administration, into a powerful policy strategy”); see also Scott Atran, Who Wants to Be a Martyr?, THE NEW YORK TIMES, May 5, 2003, at A23 (noting Virginia Senator John Warner’s position that “the new security doctrine including
international responses to geopolitical crisis. Neo-conservatism in economic policy is most profoundly revealed in the ongoing effort to reduce tax burdens on the wealthy along with a concomitant contraction of welfare state protections for poor and working class Americans. Even the traditionally liberal realm of news and entertainment has followed the trend toward conservatism, as right-wing ideologues and media icons now reign supreme in the “infotainment” sector of print, television, and radio.

But ideologies (and the socio-cultural movements and institutions they sustain) have lifecycles. An ideology that reaches the height of fashion invariably experiences the inevitable fall from grace. Indeed, there are growing indications of a decline in

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conservative ideological fervor\(^7\) – a telling sign of fashion moment entering its final stages of decline.

Whereas much of today’s fashionable expressions of ideological conservatism face a near certain future among the ranks of outmoded or aborted trends, certain aspects of ideological conservatism may prove more durable. Chief among these is racial conservatism – especially racial conservatism on issues relating to the status of blacks in American life. Racial conservatism has enjoyed remarkably enduring cult appeal.\(^8\) The history of racial progress for African Americans has been one largely defined by intermittent liberal insurgency against the great weight of sustained mass scale reluctance and resistance. Early twentieth century racial conservatism among intellectual elites, grounded largely in assumptions of biological inferiority of blacks, fueled lowbrow sentiments of racial animus and expanded the scholarly appeal of the burgeoning Eugenics movement.\(^9\) Racial conservatism among the masses was tragically manifested

\(^7\) See Richard S. Dunham & Ann Therese Palmer, Independents Are Having Buyer’s Remorse; The Schiavo Case Has Led Many Swing Voters To Turn Their Backs on the GOP, BUSINESS WEEK (NEW YORK), July 18, 2005, at 49 (describing widespread discontent among swing voters with the Republican’s handling of the Terri Schiavo case); Colleen McCain Nelson, A Rumbling on the Other Side of the Church Aisle: Progressive Christians Speak up to Counter Conservative Faithful, DALLAS MORNING NEWS, July 17, 2005, at 1A (describing the moderate Christian backlash against the conservative Christian domination of politics); Rupert Cornwell, America Turns on Bush over Iraq; Three in Five Want Troops Out as President Vows to Stay, INDEPENDENT (LONDON), June 25, 2005, at 1 (describing widespread discontent with President Bush’s launching and handling of the war in Iraq); Vincent Schodolski, Schwarzenegger Loses Some Muscle; Unpopular Moves and the Perception that He’s Just another Partisan Politician Help Sour the Public’s Opinion of California’s Formerly Formidable ‘Governator’, CHICAGO TRIBUNE, June 30, 2005, at 19 (noting Republican governor Arnold Schwarzenegger’s precipitous decline in popularity).


in widespread lynchings throughout the south and the west,\textsuperscript{10} race riots in urban areas,\textsuperscript{11} and the extreme elaboration of \textit{de jure} segregation throughout the nation.\textsuperscript{12} Structural manifestations of racial conservatism in the middle to late twentieth century – \textit{de jure} and \textit{de facto} segregation, fear of equal citizenship, and wholesale rejection of political equality – were sustained by claims of biological inferiority as well as deep-seated belief in presumptive cultural inferiority of blacks.\textsuperscript{13}

Today, racial conservatism and its structural manifestations – staunch opposition to affirmative action, sustained support for racial profiling, tacit endorsement of \textit{de facto} segregation in neighborhoods, schools, churches, fraternities and clubs, for example – remain partially grounded in assumptions of cultural inferiority.\textsuperscript{14} Assumptions of black cultural inferiority, however, are not the exclusive domain of white racial conservatives. Indeed many cultural critics of color – linguist John McWhorter,\textsuperscript{15} public policy analysts Dinesh D’Souza\textsuperscript{16} and Shelby Steele,\textsuperscript{17} entertainer Bill Cosby,\textsuperscript{18} and economist Thomas

\textsuperscript{10} For a discussion of the tragic practice of Negro lynching in early American history, see infra text accompanying notes __ to __.


\textsuperscript{12} For a discussion of the explosion in segregation laws across the country following the Court’s decision in \textit{Plessy}, see THE ORIGINS OF SEGREGATION (JOEL WILLIAMSON ED. 1968); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 97-109 (3D ED. 1974) (noting spread of Jim Crow laws both before and after \textit{Plessy}, which had the effect of “constantly pushing the Negro farther down”); C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH 1877-1913, 211-12 (WENDELL HOLMES STEPHENSON & E. MERTON COULTER EDS., 1951) (“It took a lot of ritual and Jim Crow to bolster the creed of white supremacy in the bosom of a white man working for a black man’s wages”); see also RICHARD H. FALCON, JR., IMPLEMENTING THE CONSTITUTION 57 (2001) (noting that “in the wake of \textit{Plessy}, legally mandated race-based segregation had suffused the social and political fabric of many states, especially in the South”); but see MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 48 (2003) (concluding that “the spread of segregation to new social contexts is also more plausibly attributable to factors other than \textit{Plessy}” and noting that “white southerners generally codified that racial preferences first and tested judicial receptivity later”).

\textsuperscript{13} See Herbert Hovenkamp, Social Science and Segregation Before Brown, 1985 DUKE L.J. 624, 651-56 (1985) (exploring the science and social science racial inferiority theories of the late nineteenth and early twentieth centuries that would create anxieties regarding about racial mixing and prompt the passage of strict segregation legislation).

\textsuperscript{14} See Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331, 1378-79 (1988) (“The rationalizations once used to legitimate Black subordination based on a belief in racial inferiority have now been reemployed to legitimate the domination of Blacks through reference to an assumed cultural inferiority.”); see also LAWRENCE D. BOBO & RYAN A. SMITH, FROM JIM CROW RACISM TO LAISSEZ-FAIRE RACISM: THE TRANSFORMATION OF RACIAL ATTITUDES, in BEYOND PLURALISM: THE CONCEPTION OF GROUPS AND GROUP IDENTITIES IN AMERICA 186 (Wendy F. Katkin et al. eds., 1998). (“Laissez-faire racism blames blacks themselves for the black-white gap in socioeconomic standing and actively resists meaningful efforts to ameliorate America's racist social conditions and institutions.”).

\textsuperscript{15} See JOHN McWHORTER, LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA (2001).


\textsuperscript{18} See Cosby Attacks Lower Class African-Americans, WORLD ENT'RT' NEWS NETWORK, May 20, 2004, available at 2004 WL 76881415 (describing Comments made by Bill Cosby at a May 2004 ceremony that
Sowell, to name a few – have advanced the notion that blacks possess an inferior cultural sensibility that largely explains persistent racial disparities in health, wealth, and society.

More recently, however, racial conservatives have sought empirical support for opposition to traditionally progressive racial reforms. For instance, Professor Richard Sander has recently advocated the dismantlement of affirmative action policy in law school admissions on the ground that black students with comparably weaker credentials than their white counterparts tend to be overmatched in the classroom. The “mismatch effect,” according to Sander, results in black students scoring more poorly on exams throughout law school and passing the bar exam at a disproportionately low rate. Thus, Sander concludes that such programs should be discarded because they appear to have the effect of reducing the overall number of black lawyers.

Many of today’s popular expressions of cultural inferiority therefore possess demonstrable linkages to positions staked out the past. Hernstein and Murray’s infamous *Bell Curve* seems to resurrect and redeploy late nineteenth and early twentieth century paid tribute to the Brown v. Board of Education decision in which Cosby chastised poor black people, or some of them, as “knuckleheads” who mangle the English language; *Cosby Has More Harsh Words About Black Community*, ORLANDO SENT., July 2, 2004, at A6 (noting Cosby told a room of activists that too many black men are beating their wives while their children run around not knowing how to read or write). For a response to Cosby’s comments, see Theodore Shaw, *Beyond What Cosby Said*, THE WASH. POST, May 27, 2004 at A31 (arguing “[P]redictably, conservatives are applauding Bill Cosby for saying that the problems of the black community stem primarily from personal failures and moral shortcomings. But just as we in the progressive African-American community cannot countenance the demonization of poor people, we must not cede the issue of personal responsibility to ideological conservatives. Most poor black people struggle admirably to raise their children well. Parents, including single mothers, work for low wages, sometimes in multiple jobs, to support their families.”).

19 See Thomas Sowell, *Crippled by Their Culture*, THE WALL STREET JOURNAL, Apr. 26, 2005, at A15 (arguing that the ills of poor black folk is, and always been, caused by an inferior culture absorbed from southern white folks, observing that “Today the last remnants of that culture can still be found in the worst black ghettos, whether in the North or the South, for the ghettos of the North were settled by blacks from the South...” and suggesting that “the counterproductive and self-destructive culture of black rednecks in today's ghettos is regarded by many as the only ‘authentic’ black culture -- and for that reason, something not to be tampered with.”); see generally THOMAS SOWELL, BLACK REDNECKS AND WHITE LIBERALS: AND OTHER CULTURAL AND ETHNIC ISSUES (2005).


A similar turn to empiricism has appeared in the law enforcement context, with some authors presenting empirical support for and against racial profiling. See Heather MacDonald, *The Myth of Racial Profiling*, 11 CITY J. 14, 26 (2001), available at http://www.city-journal.org/html/11_2_the_myth.html (offering empirical support for support for racial profiling in drug interdiction); but see Katherine Barnes, *Assessing the Counterfactual: The Efficacy of Drug Interdiction Absent Racial Profiling*, 54 DUKE L. J. (forthcoming 2005) (identifying methodological errors in previous studies, and concluding that racial profiling provides little benefit to drug interdiction based upon her own studies).

claims of Negro genetic inferiority. Similarly, the arguments advanced by McWhorter, D’Souza, Cosby, and Sowell bear more than a passing resemblance to claims by unreconstructed racists of the early twentieth century regarding Negro cultural inferiority. These arguments may appear fashionable – as fresh and new – but our preoccupation with that freshness and newness obscures the essential dialogue that all modern artists and intellectuals share with those that have come before them.

Modern American society is captivated by renovation and redefinition, and to be fashionable today is to indulge in the shapeshifting, rearticulation, and strategic appropriation of alternative styles so as to project an image of superficial freshness. But that freshness is premised upon a thoroughgoing recycling of historical artifacts and expressions. Proponents of today’s cultural inferiority idiom appear to operate much like popular music producers in the recording studio, who use digital samplers to pick and choose what works for them, and shape it to their own ends. The end product may be consistent or diverge from the source. In either case, the final product comments on both its origins and manipulations. The arguably retrograde pedigree of the racial conservatism of Herstein and Murray or Thomas Sowell pushes these popular expressions of racial conservatism beyond fashion and into the more dubious realm of the tragically hip.

But what about law and legal expressions of racial conservatism? Is racial conservatism in the law similarly suspect? If today’s conservative legal arguments on race matters can be understood as rearticulated or re-imagined arguments that were principally relied upon by unreconstructed racists of the late nineteenth and early twentieth century to do the dirty work of white supremacy, what does this tell us about the nature of these arguments, those who continue to advance them, and importantly, the prospect of future progress in American race relations?

This article offers a transhistorical analysis of the structure and content of conservative racial legal rhetoric that seeks to answer these important questions. It identifies and explores the principal body of arguments used by contemporary legal actors to oppose the hallmark of progressive racial reform in the modern era – race preferences in employment and education – and maps the pedigree of these arguments by locating their late nineteenth and twentieth century origins. My focus on race preferences in these pages is purely an instrumental one. I do not present a liberal defense of race preferences, although I think such policies are entirely defensible. Rather, I focus on legal disputes involving race preferences because they offer a fairly complete recitation of modern conservative race rhetoric that can be examined, compared and contrasted with nineteenth century disputes over progressive racial measures viewed by historical actors at the time to be legal mechanisms that gave preference or “special” treatment to blacks.

Given the dramatic transformation in American society that occurred over the intervening 150 years, one might reasonably anticipate that the rhetoric of racial conservatism would exude the dynamism and improvisation necessary to keep pace with societal evolution. Interestingly, this has not been the case. To the contrary, the basic set of arguments deployed by racial conservatives today bear a striking family resemblance.

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22 The prevailing trend toward faux industrial décor in home furnishings, the sampling and looping of analog musical productions to drive post-modern digital audio expression, and the use of modern film production techniques to retell classic stories such as The Passion of the Christ, Titanic, and, more recently, the Manchurian Candidate and Phantom of the Opera, are but a few examples.
to core arguments advanced by nineteenth century legal actors to stymie preeminent racial reform efforts following the Civil War such as the Freedmen’s Bureau initiatives, Negro citizenship, and a host of Reconstruction era proposals designed to ease the transition of newly-emancipated blacks into American society.

Understanding the pedigree of the rhetoric of racial conservatism is important for a number of reasons. First, such an inquiry reveals the crucial role of rhetoric in defining individual and collective identities, and in the perpetuation of a subordinating racial ideology. Race ideology, at bottom, is an expression of political imagination – a vision of social ordering that explains how the world is or ought to be. Rhetoric and conversation are crucial elements of the ideological enterprise because it is through rhetoric and conversation that the vision is projected and ultimately proffered to the public for mass scale approval and acceptance. As society transforms and evolves, each succeeding generation chooses how to interact and respond to the racial world it inhabits. It is critical, then, that we understand the intellectual history of ideas and arguments that comprise the modern conversation that generates our sustained allegiance to the prevailing conservative legal order in which racial subordination remains commonplace.

Second, a deepened understanding of the rhetoric of racial conservatism proves helpful in discerning pathways for constructive dialogue regarding racial progress. National conversation on race is in discursive crisis. For nearly a quarter century, post-civil rights era dialogue on the current and future state of American race relations has stood at an unhealthy and unproductive rhetorical impasse.23 Racial progressives continue to highlight the myriad ways in which individual and institutional practices reinforce the subordinated status of racial minorities as evidence of a need for a more robust, substantive, and race-conscious approach to regulate racial interaction. Racial conservatives acknowledge persistent racial disparities in health, wealth, and society, but point to substantial advances in modern race relations as a testament to the virtues of colorblindness and a process-based approach designed to enhance formal racial equality. Impassioned disagreement is inevitable, given the extended legacy of racial oppression, conflicting perceptions of racial injustice, and divergent visions of what a racially just society entails. The tragedy of contemporary race relations discourse, however, is that we have largely abandoned sincere and conscientious debate as the primary mode of

engagement. Today, race relations discourse cycles stubbornly and uncomfortably within a cul-de-sac of disengaged ideological rhetoric.

Racial discourse proves divisive because it is clouded by a palpable sense of normative skepticism and intellectual distrust generated in large part by the way in which we have chosen to discuss race in this country. Rhetoric employed by nineteenth century racial conservatives was tragically infused with the brute racism and subordination that defined the era. Modern racial conservatives who choose to deploy fashionably modern variants of these anachronistic forms of argument implicitly (and perhaps unconsciously) draw upon and continually resurrect the vulgar content of that retrograde era. For racial progressives, it is exceedingly difficult to separate modern conservative race rhetoric from the tragic structural manifestations of past and present racial conservatism. Questions of dishonesty and insincerity abound in racial discourse because opponents of progressive racial measures avail themselves of the same body of conservative rhetoric. My hope is that shedding light on the form and function of this rhetoric will clear the way for a more transparent and engaging racial dialogue.24

Third, a deepened understanding of the pedigree of racial conservatism provides the basis for questioning the legitimacy of any institution that continues to avail itself of these traditional arguments. The longevity of these rhetorical forms in our legal conversations about racial policy prove troubling for those concerned about the increasingly contentious nature of the public debate on race in this country. The durability of these forms offers a painful reminder that much of our shared racial past remains fundamentally unresolved. At the same time, the persistent reliance upon rhetorical themes that date back to the nineteenth century suggests a real deficit in our political imagination when it comes to matters of race in this country. Americans work incessantly to come up with new ways in which to envision the world around us. Yet in the racial context, we remain captured by and continue to struggle against our racial inheritance, taking shape within and against a cage of reality bestowed upon us at birth. As James Baldwin famously lamented, “[i]t is exceedingly difficult for most of us to discard the assumptions of the society in which we were born, in which we live, to which we owe our identities; . . . virtually impossible, if not completely impossible, to envision the future, except in those terms which we think we already know.”25 An exploration of conservative race rhetoric allows us to expose the underlying values – the ghosts in the machine – so that we may ultimately understand more fully the complex of images and ideas implicated whenever we engage in serious conversation on matters of contemporary racial justice.

The article proceeds as follows. Part II explores the dialectic relationship between rhetoric, ideological conservatism, and community identity formation. In particular, I argue that rhetoric and conversation play a crucial role in defining communities and sustaining racial conservatism over time, and explain how an analysis of conservative race rhetoric proves useful in deepening our understanding of national identity and the collective struggle for racial progress. Part III discusses the dominant

24 As Justice Brandeis famously observed, “sunlight is said to be the best of disinfectants.” LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT, 63 (Richard M. Abrams, ed. 1967) (1914)
rhetorical themes used by racial conservatives today to oppose progressive racial policy, and compares and contrasts these modern expressions with their nineteenth century counterparts. In particular, I argue that the novelty of the affirmative action issue – admittedly unique to the late twentieth and early twenty-first century – only superficially masks the more established rhetorical moves that were the hallmark of nineteenth century racial conservatism. In Part IV, I examine possible explanations for the longevity of these rhetorical forms in our ongoing conversations about race in American society. Part V arguing that sustained, meaningful dialogue is essential to the task of achieving continued racial progress, and offers concrete insight on how the public conversation on race ought to proceed in the wake of these revelations. Part VI concludes.

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

This places some important limits on the normative implications that can be drawn from the descriptive accounts of race rhetoric. To be clear, this project is neither a crusade to identify unreconstructed racists, nor an attempt to ascribe racist motivations to all individuals who oppose progressive racial measures. Rather, my purpose is deepen the racial conversation in this country by drawing attention to the arguments deployed in opposition to progressive racial measures and the underlying interests they advance or protect. Engaging the rhetoric of racial conservatism is a crucial first step in providing a foundation for renewed dialogue on race matters. Contemporary notions of race and racial identity carry forward the heavy baggage of centuries of devastating racial oppression. This devastation was premised upon an enduring belief in the salience of the racial divide. Americans must remain vigilant in their interrogation of and efforts to overcome this divide. We ignore this crucial, but unsettling, task at our own peril.

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

27 RALPH ELLISON, SHADOW AND ACT 54 (1972).
II. RHETORIC, IDEOLOGICAL CONSERVATISM, AND COMMUNITY IDENTITY FORMATION

[T]he duty and office of Rhetoric is to apply Reason to Imagination for the better moving of the Will.

– Francis Bacon

Communities are largely defined by language they use to characterize both themselves and others. An examination of how and why particular words are used, and the effects those words bring about, illuminates substantial areas in the political and legal culture. For instance, much of what we understand of the essentialized American identity is shaped by political discourses of freedom, individual rights, and the rule of law. Our Declaration of Independence states emphatically that “[A]ll men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. . . . . That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”

Importantly, we understand these fundamental characteristics as naturalized – “self evident” in the words of the Framers – and grounded in a moral (if not divine) imperative. The foundation of the American identity, then, can be understood largely by reference to political ideas and a shared allegiance to the “American Creed” of liberal democracy.

Although communities are often defined in terms of shared belief in affirmative values articulated by legal and political decisionmakers, communities are likewise defined through the rhetoric of negation – the identification and rejection of that which is understood as outside the community. As Roderick Hart explains, “[f]or each community in existence, . . . there is also an ‘uncommunity,’ an assembly of the befouled and besotted who have heard the Word and rejected it.”

For instance, the American national identity has historically rejected, among other things, formal aristocracy and state-sponsored religion. To advance either of these positions would pose a threat to one’s inclusion in the American community. The use of negation to define community has occurred throughout American history. Consider the American Puritans’ use of torture and trial by ordeal to remove “witches” from the community, or Senator Joseph McCarthy’s famous pursuit of communists who, in the view of many, posed a substantial

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29 See Decl. of Independence, para. 2 (U.S. 1776).
30 In this sense, the American national identity is somewhat unique. See SAMUEL P. HUNTINGTON, AMERICAN POLITICS: THE PROMISE OF DISHARMONY 23 (1981) (noting that, for most nations, “national identity is the product of a long process of historical evolution involving common ancestors, common experiences, common ethnic background, common language, common culture, and usually common religion.”).
threat to American values. In each instance, these practices were animated and justified by rhetoric employed in negative fashion to identify and ostracize those whose values run counter to those held by the community. Or in Hart’s words, rhetoric provides the means to “spot[] the enemy’s precise movements near the gates of the city.”

“[F]orewarned and forarmed,” he continues, “we march to the barricades.” In this way, communities are constituted and sustained by the words chosen by intellectual, political and cultural elites to characterize both themselves and others.

The manner in which we choose to talk about issues shapes the character and health of community and culture. The rhetorical strategies we employ can and often do lead to a greater constructive unity. In the nineteenth century, the rhetoric of respect, dignity, and inclusion advanced by noted abolitionists such as Frederick Douglass and William Lloyd Garrison exemplified the best of inclusionary racial politics of that era. Similarly, the civil rights rhetoric of Martin Luther King, Jr. exemplified the best of twentieth century American discourse on racial unity.

Following the attacks of September 11th, 2001, we witnessed an outpouring of rhetoric imploring Americans of all

33 For a documentary history of McCarthyism, see McCARTHYISM: THE GREAT AMERICAN RED SCARE (Albert Fried ed. 1997). For a collection of historiographic essays on McCarthy’s methods and political ascension, see MCCARTHYISM (Thomas C. Reeves, ed. 1973).
34 Hart, Community by Negation, supra note __ at xxvi.
35 Id. at xxvi.
36 See Frederick Douglass, What to the Slave is the Fourth of July?: An Address Delivered in Rochester, New York (July 5, 1852) in 2 FREDERICK DOUGLASS PAPERS 359 (JOHN BLASSINGHAM, ED. 1982) (“You are all on fire at the mention of liberty for France or for Ireland; but are as cold as an iceberg at the thought of liberty for the enslaved of America. . . . You profess to believe “that, of one blood, God made all nations of men to dwell on the face of all the earth,” and hath commanded all men, everywhere to love one another; yet you notoriously hate, (and glory in your hatred), all men whose skins are not colored like your own.”)
37 See William Lloyd Garrison, William Lloyd Garrison Admits of No Compromise With the Evil of Slavery (1854), in Selections from the WRITINGS AND SPEECHES OF WILLIAM LLOYD GARRISON (1968) (“I am a believer in that portion of the Declaration of Independence in which it is set forth, as among self-evident truths, “that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.” Hence, I am an abolitionist. Hence, I cannot but regard oppression in every form – and most of all, that which turns a man into a thing – with indignation and abhorrence. . . . Convince me that one man may rightfully make another man his slave, and I will no longer subscribe to the Declaration of Independence . . . . I do not know how to espouse freedom and slavery together.”).
38 See Martin Luther King, Jr., The Ethical Demands for Integration, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 122 (JAMES M. WASHINGTON, ED. 1986) (“At the heart of all that civilization has meant and developed is ‘community’ – the mutually cooperative and voluntary venture of man to assume a semblance of responsibility for his brother. What began as the closest answer to a desperate need for survival . . . was the basis for present day cities and nations. Man could not have survived without the impulse that makes him the societal creature he is.”); Martin Luther King, Jr., Negroes Are Not Moving Too Fast, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 180 (JAMES M. WASHINGTON, ED. 1986) (“The best course for the Negro happens to be the best course for whites as well as the nation as a whole.”); Martin Luther King, Jr., I Have a Dream Speech, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 220 (JAMES M. WASHINGTON, ED. 1986) (“And when we allow freedom to ring, when we let it ring from every village and hamlet, from every state and city, we will be able to speed up the day when all God’s children – black men and white men, Jews and Gentiles, Catholics and Protestants – will be able to join hands and to sing the words of the old Negro spiritual, ‘Free at last, free at last; thank God Almighty, we are free at last.’”).
persuasions to unite against the threat of terrorism. More recently, political discourse of the Democratic Party has reflected a dramatic embrace of rhetoric strategies designed to evoke a greater constructive unity.

Rhetorical strategies can also exacerbate community divisions. The ideology of white supremacy, which animated much of American political discourse from the founding of this Nation well into the twentieth century, the legacy of hostility towards non-European immigrants, the rhetoric of separatist black nationalism, and the more recent vilification of Japanese Americans, Muslims, and Americans of Arab ancestry in times of national crisis, are but a few examples.

See, e.g., Remarks by the President at the Islamic Center of Washington, Islam is Peace (Sept. 17, 2001) (“Both Americans and Muslim friends, tax-paying citizens, and Muslim nations were just appalled and could not believe what we saw on our TV screens . . . . And that made brothers and sisters out of every race – out of every race . . . . Muslims are doctors, lawyers, law professors, members of the military, entrepreneurs, shopkeepers, moms and dads. And they need to be treated with respect. In our anger and emotion, our fellow Americans must treat each other with respect.”); President George W. Bush, Address to a Joint Session of Congress and the American People, Sept. 20, 2001 (transcript available from Office of the Press Secretary, at http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html) (“In the normal course of events, Presidents come to this chamber to report on the state of the Union. Tonight no such report is needed. It has already been delivered to the American people . . . . We have seen the state of our Union in the endurance of rescuers, working past exhaustion. We have seen the unfurling of flags, lighting of candles, the giving of blood, the saying of prayers – in English, Hebrew, and Arabic.”); Rudolph Giuliani, Speech to the United Nations, transcript available at http://www.un.org/terrorism/statements/giuliani.html (“We’re defined as Americans by our beliefs, not by our ethnic origins, our race or our religion. Our belief in religious freedom, political freedom, economic freedom, that’s what makes an American. Our belief in democracy, rule of law and respect or human life, that’s how you become an American . . . . [The war on terrorism] is not a dispute between religions or ethnic groups. All religions, all decent people are united in their desire to achieve peace and understand that we have to eliminate terrorism. We’re not divided about this.”).

See, e.g., Barak Obama, Keynote Address: Out of this Long Political Darkness a Brighter Day Will Come, Democratic National Convention, July 27, 2004) (“Now even as we speak, there are those of us who are preparing to divide us, the spin masters, the negative ad peddlers, who embrace the politics of anything goes. Well, I say to them tonight, there is not a liberal America and a conservative America — there is the United States of America. There is not a Black America and a White America and a Latino America and an Asian America — there’s the United States of America.”) (transcript available at www.dems2004.org); John Edwards, Keynote Address, Democratic National Convention, July 28, 2004 (“And the heart of this campaign — your campaign — is to make sure that everyone has those same opportunities that I had growing up — no matter where you live, who your family is, or what color your skin is. This it the America we believe in.”) (transcript available at www.dems2004.org).

See, e.g., Louis Farrakhan, Challenge to Black Men Delivered at the Million Man March (Oct 17, 1995) (noting that “[t]here’s still two Americans, one Black, one White, separate and unequal” and observing that “[t]here is a new Black Man in America today . . . . Whenever you return to your cities and you see a Black man, a Black woman, don’t ask him what is your social, political or religious affiliation, or what is your status? Know that he is your brother.”); Stokely Carmichael, “Black Power” (speech delivered in Berkley, 1966) (“We cannot have white people working in the black community — on psychological grounds. The fact is [sic] that all back people question whether or not they are equal to whites, since every time they start to do something, white people are around showing them how to do it. If we are going to eliminate that for the generation that comes after us, then black people must be in positions of power, doing and articulating for themselves. That’s not reverse racism; it is moving on healthy ground; it is becoming what the philosopher Satre says, an ‘antiracist racist.’”).

In addition to shaping individual and community identity, rhetoric plays a crucial role in the articulation and maintenance of ideology, including racial ideology. It is easy to forget that race ideology, at bottom, is political imagination naturalized through conversation. The content of race ideology itself is sourced from a multitude of conflicting and often confrontational principles, beliefs, and impulses. But every racial ideology—from white supremacy to colorblindness to identity politics—is an expression of political imagination insofar as it projects upon the world a vision of racial ordering to explain how the world is or ought to be. Racial ideology is not content with mere expression, however. It is a political instrument designed to protect or advance the interests of those who wield it. The utility of racial ideology is a function of its social and institutional acceptance. The end-game for all racial ideology is naturalization—the total absorption and marbling of policies and moral imperatives into the flesh of society, instantiation into individuals and institutions to the point that the form of racial ordering appears as an inevitable, mundane and ordinary feature of everyday life.

Rhetoric and conversation are the principal but surely not the sole means through which we eventually subscribe to a race ideology and come to believe that a particular form of racial ordering is correct or just. This is especially true of racially subordinating ideologies. The rhetoric of racial conservatism has always been accompanied by violence or elements of coercion. An account of white supremacist ideology of the late

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43 See Cole, supra note ___ at 47 (“By January 2002, just four months after the attacks of September 11, the Council on American-Islamic Relations had already received 1,658 reports of discrimination, profiling, harassment, and physical assaults against persons appearing Arab or Muslim, a three-fold increase over the prior year. The reports included beatings, death threats, abusive police practices, and employment and airline-related discrimination.”); Eric K. Yamamoto, American Racial Justice On Trial – Again: African American Reparations, Human Rights, and the War on Terror, 101 Mich. L. Rev. 1269, 1278 (2003) (noting that, in the wake of the September 11th attacks, “Peter Kirsanow, a controversial Bush appointee to the Commission on Civil Rights, predicted the broad-scale internment of Arab Americans if another terrorist attack occurs in the United States”). For a detailed account of the negative portrayal of Arabs in entertainment and news media, see Jack Shaheen, Reel Bad Arabs: How Hollywood Vilifies a People (2001) (chronicling over 1000 movies which portray Arabs as villains); Jack Shaheen The TV Arab (1984) (describing the villainization of Arabs in television and news media sources).

nineteenth and early twentieth century is incomplete without reference to private and public acts of racial terror. Separatist ideology underlying expansive segregation policies that defined much of the twentieth century cannot be properly understood unless one also takes into account the concomitant enforcement strategies of violence, humiliation, and indignity. Likewise, the subordinating ideology of colorblindness, rhetorically grounded in the discourse of individualism, equality, and neutrality, is only fully revealed when one appreciates the manner in which it neglects structural racism and material conditions of oppression so as to simultaneously lock in current racial inequalities and fortify structural barriers to racial progress in health, wealth, and society.

We can understand the relationship between rhetoric, ideological conservatism, and racial repression as a dialectic in which each mutually reinforce, nurture, and sustain one another. As Americans, we are a nation of people who self-consciously chose to adopt a vision of society that embraced lofty ideals of individual freedom and democracy along with powerful mechanisms for devastating racial oppression. Our history is

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45 See, e.g., Philip Dray, At the Hands of Persons Unknown 23, 27 (2002) (giving an account of the 1935 lynching of dozens of slaves and their alleged white conspirators who were suspected of plotting an insurrection, and describing the South’s use of armed patrollers “whose purpose was to restrict slave movement . . ., inhibit slaves from congregating or visiting, and intimidate any who had designs of running away . . . . Whippings and other punishments were common. The system intensified in brutality and paranoia as abolitionist sentiment increased in the 1850s . . . .”); Kenneth M. Stampp, The Peculiar Institution 190-200 (1956) (observing that following Nat Turner’s rebellion, lynchings as deterrence for insurrections increased throughout the South).

46 See, e.g., Stewart E. Tolnay and E. M. Beck, A Festival of Violence: An Analysis of Southern Lynchings 55-82, 131 (1995) (analyzing the possible explanations and motives for the practice of lynching, but noting that “[e]ventually these brutal acts degenerated simply into a method to keep African-Americans in their “place,” even to the extent of picking out the occasional sacrificial lamb whose killing, racists knew, would terrify other blacks and tend to even further docilize them…. [P]ressure exerted by the Klan and other white supremacists kept all but a relative handful of opponents from challenging these tactics.”); Jerrold M. Packard, American Nightmare: The History of Jim Crow 132 (2002) (noting that, during the Jim Crow era, “the racial atmosphere was so warped that murdering blacks became almost a socially acceptable tool for embedding white supremacy in the region’s social fabric.”).


48 Western-style racism and race consciousness are truly distinctive when viewed against the backdrop of the global history of racism precisely because each developed within an overarching cultural mindset premised upon human equality. See George M. Fredrickson, Racism: A Short History 12 (2002) (“It is uniquely in the West that we find the dialectical interaction between a premise of equality and an intense prejudice toward certain groups that would seem to be a precondition for the full flowering of racism as an ideology or worldview.”).

The United States Constitution itself embodies a powerful contradiction—a guarantee of individual freedom for all, and an explicit endorsement of Negro slavery. Compare U.S. Const. pmbl. (“We the people of the United States, in order to . . . secure the blessings of liberty to ourselves and our posterity do ordain and establish this Constitution . . . .”), with U.S. Const. art. I, § 2, cl. 3 (counting Negro slaves as three-fifths of one person for political representation purposes), and U.S. Const. art I, § 9, cl. 1 (allowing for the importation and federal taxing of slave labor until the 1808), and U.S. Const. art. IV, § 2, cl. 3 (creating a constitutional right to the return of fugitive slaves), and U.S. Const. art. V (prohibiting amendment of the slave importation and taxation provision of the Constitution prior to 1808). Although the words slave and slavery are studiously excluded from the Constitution, I think former president John
replete with instances of differential treatment on account of race—slavery being only the most egregious example—that achieved the desired effect of generating remarkable disparities in socioeconomic well-being among individuals and between different racial groups. Such disparities are not simply historical artifacts. They are facts of the contemporary American racial landscape as well. Racial disparity in socioeconomic well-being has always been, and continues to be, a central feature of American life.

Quincy Adams put it best when he remarked that “circumlocutions are the fig leaves under which these parts of the body politic are decently concealed.”


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

Each of us comes to understand, to a greater or lesser extent, the vital importance of race in shaping our individual destinies through the day-to-day observations that comprise our life experience. Whether we experience racial inequality through the prism of privilege or poverty, it is difficult to ignore this crucial aspect of our existence. Moreover, each of us invariably must come to terms with racial inequality. Racial ideology helps us to reconcile this troubling contradiction, to rationalize, compartmentalize, or explain this phenomenon. It is the mechanism through which we integrate our “raced” existence into our aspirational view of the world.

The lifecycle of any single racial ideology and the longevity of its manifold expressions are contingent upon social acceptance, and that acceptance is achieved through persuasion. As society transforms and evolves, each succeeding generation chooses how to interact and respond to the racial world in which we inhabit. It is critical, then, that we understand the intellectual history of ideas and arguments that comprise the modern conversation that moves many of us to embrace an ideology of racial conservatism in the face of pervasive structural manifestations of racial injustice.

III. THE FASHION AND PEDIGREE OF CONSERVATIVE RACE RHETORIC

In constitutional law, the language of race (i.e., the language concerning Negroes in America) is of especial concern because of its ethical dimension, its long history, and its contemporary relevance.
— Charles A. Miller

Although the struggle for racial justice is perhaps best understood as struggle for basic dignity, respect and inclusion in society, the various battlegrounds for progress have shifted noticeably over time. In the wake of the Civil War and ratification of the 13th Amendment, legal and political elites were faced with the daunting task of delineating a path of transition for blacks from slavery to freedom. Although it was clear that blacks would no longer be enslaved, the status that blacks would assume was far less certain. For the remainder of the nineteenth and much of the early twentieth century, the struggle for racial progress centered on defining the status of the Negro as American citizen, securing the full range of political rights accorded to all citizens, and demarcating a pathway to social equality for blacks – each step undertaken in the face of deep and sustained white resistance.

Today, we live in a relatively enlightened period in which de jure segregation no longer exists and explicit claims of inherent racial inferiority are unacceptable in public racial discourse. We generally disavow the crass and racist practices that defined race relations well into the twentieth century, and mutually acknowledge a collective sense of shame whenever we reflect upon this tragic history.

Despite this progress, most commentators agree that modern racial conversation is at an impasse. Historically contentious issues of citizenship, voting, and access to public

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

52 Charles A. Miller, Constitutional Law and the Rhetoric of Race, 5 PERSPECTIVES IN AMERICAN HISTORY 147 (1971).
accommodations have been supplanted by the equally contentious issues of how to best respond to the vestiges of the old racism regime; racial disparities in health, wealth, and society; the emergence of “new racism” — including, but not limited to, the widespread acceptance of destructive stereotypes;\(^53\) the disabling consequences of seemingly innocuous subtle forms of racial bias — not full blown racist acts, but more or less acts of racial carelessness;\(^54\) and the unexamined acceptance of so-called societal discrimination.\(^55\)

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

Despite the inherent dynamism of American race relations, rhetorical forms to oppose racial progress have proven remarkably static. From the mid-nineteenth century onward, legal rhetoric of racial conservatism — be it opposition to full Negro citizenship, legal restrictions on voting, and legal challenges to desegregation — have been supplanted by the equally contentious issues of how to best respond to the vestiges of the old racism regime; racial disparities in health, wealth, and society; the emergence of “new racism” — including, but not limited to, the widespread acceptance of destructive stereotypes;\(^53\) the disabling consequences of seemingly innocuous subtle forms of racial bias — not full blown racist acts, but more or less acts of racial carelessness;\(^54\) and the unexamined acceptance of so-called societal discrimination.\(^55\)

\(^{53}\) One particularly pernicious effect of pervasive racial stereotypes is the phenomenon of “stereotype threat” identified by psychologist Claude Steele. Steele’s research demonstrates that stereotypes be self-confirming in that they can be deployed in social interaction to influence and shape outcomes consistent with the stereotype. According to Steele, stereotype threat may explain racial disparities in performance on standardized tests:

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


\(^{54}\) See Peggy Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1565 (1989) (describing microaggressions as “subtle, stunning, often automatic, and non-verbal exchanges which are ’put downs’ of blacks by offenders which can be viewed “as ’incessant and cumulative’ assaults on black self-esteem.”); see also ROY BROOKS, *INTEGRATION OR SEPARATION? A STRATEGY FOR RACIAL EQUALITY* 109 (1996) (describing dignity harms as “macrosystemic” and “ubiquitous and permanent because they result from racialized ways of feeling, thinking, and behaving toward African Americans (and other minorities) that emanate from the American culture at large”).

\(^{55}\) See, e.g., Croson, 488 U.S. at 505-06 (O’Connor, J., plurality opinion) (rejecting “societal discrimination” as a justification for affirmative action); Wygant v. Jackson Bd. Of Educ., 476 U.S. 267 (1986) (same); Regents of Univ. of Cal. V. Bakke, 438 U.S. at 307-08 (Powell, J., plurality opinion) (expressing deep skepticism that affirmative action may be used to address “societal discrimination”). For a fuller discussion of the evolution of new racism in the post-civil rights era, see EDUARDO BONILLA-SILVA, *WHITE SUPREMACY AND RACISM IN THE POST-CIVIL RIGHTS ERA* 89-136 (2001).
support for segregation, or opposition to affirmative action policy – has trafficked in four principal themes: (1) innocence; (2) merit; (3) stigma; and (4) domestic tranquility. In this Part, I present and analyze each of the aforementioned rhetorical themes in generic form, then offer examples of how these themes are expressed by modern racial conservatives in legal disputes involving race preferences. Next, I locate the pedigree of the rhetorical theme in nineteenth century legal discourse, and compare the modern expressions with those of historical actors in legal disputes involving a host of post-Civil War reforms designed to secure and promote racial justice for historically free and newly-emancipated blacks.

Although in most instances, the family resemblance is quite striking, it is worth noting that the pedigree is not always so obviously present in the modern incarnation. Nearly a century of thought and social development separate today’s racial conservatism from its pedigree, and few if any ideas survive the generations in absolutely pristine form. Moreover, the legal disputes from which the examples are drawn share neither a single factual context nor a distinct procedural posture – both of which work to shape not only the presentation of the argument, but reader perception of the argument as well. Nevertheless, as a descriptive matter, the similarities between these ancient forms and their modern iterations prove too great to simply ignore. How we interpret this family resemblance and choose to respond, as a normative matter, are the subject of Parts IV and V.

A. Innocence

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

The rhetoric of innocence proves particularly useful for racial conservatives because it projects both the image of innocent victims and a class of tormentors who victimize them. When innocence rhetoric is mapped on to the prototype of racial discrimination, racial minorities are usually understood as victims of discrimination rather than perpetrators of such acts. However, when innocence rhetoric deployed by

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56 To be sure, racial conservatives have relied upon other thematic material in deciding race cases – federalism, separation of powers, and colorblindness, for example. However, these themes are more or less reified interpretations of constitutional text or doctrine. By contrast, the dominant rhetorical themes discussed in these pages represent grand, ideological precepts exogenous to any specific text or doctrine.
58 Ross, Innocence, supra note __ at 310.
59 See, e.g., United Steelworkers v. Weber, 443 U.S. 193 (1979) (observing that “to be sure, the reality of employment discrimination against Negroes provided the primary impetus for passage of Title VI”); The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873) (observing that “the one pervading purpose” of the reconstruction amendments was “[t]he freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had
racial conservatives who view racially progressive measures as a form of “reverse discrimination,” then the paradigm is inverted and this enables whites to claim the status of innocent victim, which in turn, conjures up the image of minorities as perpetrators of racial harm.

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

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

Although the rhetoric of racial innocence is steeped in the idea of individual blame, its proponents curiously ignore the extended history of systematic state-sanctioned racial oppression and embraces a narrative of racial discrimination characterized by free will and moral responsibility. Often, those who advance the rhetoric of racial innocence categorically reject the possibility that racism can become naturalized, marbled into institutions and practices – that racial subordination can be instantiated in “procedures that [] become conventional, part of the bureaucratic system of rules and regulations.”

The eschewal of a structural account of racism, which does not rely upon a finding of prejudice as motivational force for racial subordination, affords racial “innocents” the comfort of individual blamelessness. Thus, innocence rhetoric enables whites –

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60 See Ross, Innocence, supra note  at 310.
61 See Alan D. Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 MINN. L. REV. 1049, 1052 (1978) (criticizing prevailing equal protection doctrine for focusing exclusively on the subjective intent of the individual actor, rather than on the nature of the injury to the victim); see also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1509 (2d ed. 1988) (observing that the search for intent under the Equal Protection Clause is premised on the “search for a bigoted decision-maker”); Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 322 (1987) (criticizing the limitation of equal protection doctrine to cases where there is proof of subjective discriminatory intent and noting that “a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation”).
62 ROBERT BLAUNER, RACIAL OPPRESSION IN AMERICA 9 (1972).
63 In this sense, innocence rhetoric reflects the prevailing view in American law criminal law that “state of mind” matters, and that intentional acts warrant greater punishment than unintentional ones. See Robert
Unconscious Racism

But as Barbara Flagg points out, a principle failing of this requirement is that it allows unconscious race discrimination to flourish. White Consciousness and the Requirement of Discriminatory Intent, 91 MICH. L. REV. 953, 1017 (1993) (addressing the merits and ramifications of a strict liability standard in ADEA disparate treatment cases).

L. Wax, TRANSFORMING DEMOCRACY 267-68 (2002) (recounting claims from disgruntled students not admitted to public universities that “unqualified black and brown students are taking the place of more qualified white applicants.”) The zero-sum conception of racial progress continues to resonate in the affirmative action context despite arguments that the benefits of diversity accrue to everyone and in the face of evidence that very few whites have their educational

individually or collectively – to argue that they too have been “victimized” by racist acts insofar as they are asked to bear some of the costs of racial progress.

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

64 LANI GUINIER & GERALD TORRES, THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 267-68 (2002) (recounting claims from disgruntled students not admitted to public universities that “unqualified black and brown students are taking the place of more qualified white applicants”). See also TERRY EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR A COLORBLIND SOCIETY (1996) (claiming that “[w]hoever would have been admitted to a school, or won the promotion or the contract, but for race, has suffered discrimination – and there is no good discrimination”); DINESH D’SOUZA, THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY 10 (1995) (quoting anonymous flier at the University of California at Berkeley: “When I see you in class it bugs the hell out of me because you’re taking the seat of someone qualified.”); RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE 470 (1994) (concluding that “some number of white students are denied places at universities they could otherwise have won, because of affirmative action”); Jacques Steinberg, AFFIRMATIVE ACTION FACES A NEW WAVE OF ANGER, N.Y. TIMES, Jan. 5, 2003, at 3 (National Edition) (reporting that opposition to affirmative action, “in the form of white applicants...who argue that their rightful places at the top schools are being given to black and Hispanic students of lesser ability, has been gaining momentum once again.”).
opportunities negatively impaired by such policies. Historic opposition to integration of public schools by Professor Herbert Wechsler and others was similarly rooted in the idea that the benefits of integration for blacks could only be obtained by running roughshod over the associational rights of whites. Indeed, the prevailing justification for scapegoating black criminality rests on the assumption that racial progress is rarely, if ever a “win-win” situation. Current Fourth Amendment doctrine works to protect the interests of the white majority, who are largely indifferent to racial harms caused by aggressive search and seizure practices and to justify disparate law enforcement policy. As David Cole explains, it is easy for “conservatives living in the comfort of more privileged neighborhoods to argue that the reduction in crime outweighs the intrusions on citizens’ constitutional rights [because] their rights are not threatened [and they] do not have to bear the cost of their positions, so long as they do not live in the inner city.” In each instance, the zero-sum assumption reinforces the erroneous notion that racial progress for minorities of any sort is presumptively a windfall sourced from the unjust suffering of whites.

Innocence rhetoric is actually comprised of two related strands – individual white innocence and collective white innocence. The strand of innocence rhetoric deployed is dependant upon the posture and particular factual circumstances of the case. Individual white innocence figures most prominently in cases in which the progressive racial policy is directed at a limited set of targeted beneficiaries and the brunt of such policy is borne by a limited set of readily identifiable whites. In these cases, the argument advanced is that the burdened individuals are individually innocent of any racial wrongdoing and ought not be individually “penalized” for racial transgressions which have been committed by others. Collective white innocence, by contrast, is typically deployed to stymie broadly conceptualized racial reform that purports to provide group based relief in

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


67 DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 46 (1999); see also STEPHEN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE 285 (1997) (“If the African-American crime rate suddenly dropped to the current level of the white crime rate, we would eliminate a major force that is driving blacks and whites apart and is destroying the fabric of black urban life.”); Andrew E. Taslitz, Racial Auditors and the Fourth Amendment: Data With the Power to Inspire Political Action, 66 L. AND CONTEMPT. PROBL. 221, 277 (2003) (noting that “[w]hites, feeling their lives and property threatened, ‘seek to eliminate that threat as expeditiously as possible,’ thus favoring harsher criminal sentences and scapegoating black criminality as emblematic of the breakdown in social order.”).
response to a perceived injustice sustained by all members of the group. In these cases, racial conservatives argue that that racially progressive measures burden innocent whites as a collective because it brands all whites with the unproven charge of racial discrimination. Although the two strands of innocence rhetoric are present in both nineteenth century and modern race cases, it is the more focused claim of individual white innocence that has proven most resilient in modern legal discourse.

1. Racial Innocence Rhetoric in Modern Legal Discourse

_**Richmond v. Croson**_ provides a particularly useful point of departure to gain an appreciation of the modern expression of individual white innocence rhetoric. As an initial matter, _Croson_ represents the first instance in which a majority of the Court agreed to subject race-conscious affirmative action programs to the highest level of scrutiny, thereby equating efforts to achieve racial integration in the labor market with white racial discrimination against racial minorities. _Croson_ also carries with it the dubious distinction of being the first case in which the Court struck down an affirmative action program and rejected the prevailing view at that time that affirmative action was a necessary tool to remedy the effects of past racial discrimination against African Americans. An essential feature of shift in sensibility was the invocation of innocence rhetoric by multiple Justices, which had the effect of enshrining this particular rhetorical form as a credible argument to contest affirmative action policy in the future.

Indeed, _Croson_ provides perhaps the most thoroughgoing modern articulation of presumptive white racial innocence ever advanced by the Court. Interestingly, arguments of racial innocence were not limited to the “conservative” Justices. Although Justice Scalia offered the bluntest articulation of racial innocence rhetoric, Justice Stevens availed himself of the same rhetorical theme. Thus, collection of opinions in _Croson_ offers a none-too-subtle reminder that racial conservatism (and racial politics in general, for that matter) does not map neatly onto the prevailing liberal/conservative ideological spectrum.

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

> Apart from their societal effects, however, which are ‘in the aggregate disastrous,’ it is important not to lose sight of the fact that even “benign” racial quotas have individual victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race.\(^70\)

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\(^69\) Prior to _Croson_, the Court had been sharply divided over what standard of review it ought to use to examine the constitutionality of affirmative action programs. _See, e.g._, Fullilove v. Klutnick, 448 U.S. 448 (1980).

\(^70\) _Croson_, 488 U.S. at 526.
Justice Stevens shared Scalia’s concern that race preferences might stigmatize presumptively innocent whites in the aggregate, but was especially consumed with the notion that the Richmond Plan stigmatized the limited class of white Richmond contractors with the “unproven” charge of past racial discrimination:


[I]t is only habit, rather than evidence or analysis, that makes it seem acceptable to assume that every white contractor covered by the ordinance shares in that guilt. Imposing a common burden on such a disparate class merely because each member of the class is of the same race stems from reliance on a stereotype rather than fact or reason. 71

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

The constitutional prohibitions against the enactment of ex post facto laws and bills of attainder reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens. It is the judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed. 72

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

This position is not altogether removed from the position advanced by Justice Rehnquist in Weber v. Steelworkers. 73 In Weber, the Court reviewed a challenge to a voluntary affirmative action program that mandated a one-for-one quota for minority workers who wished to participate in an on-the-job training program. The defendant, Kaiser Aluminum and Chemical Co., had developed the plan to eliminate racial imbalances in Kaiser’s then almost exclusively white craftwork forces by reserving half of the openings in in-plant craft-training programs for black employees until black representation in skilled-jobs mirrored black representation in Kaiser’s overall labor force. 74 Dissenting from the majority’s endorsement of this program, Justice Rehnquist rushed to the defense of innocent whites who, in his view, were severely burdened by the voluntary affirmative action policy undertaken by Kaiser and the Steelworkers:

Now we are told [by the majority] that the legislative history of Title VII shows that employers are free to discriminate on the basis of race: an employer may, in the Court's words, ‘trammel the interests of the white employees’ in favor of black employees in order to eliminate ‘racial imbalance’. . . . To be sure, the reality of employment discrimination against Negroes provided the primary impetus for passage of Title VII.

71 Croson, 488 U.S. at 516-17.
72 Croson, 488 U.S. at 513-14.
But this fact by no means supports the proposition that Congress intended to leave employers free to discriminate against white persons.\textsuperscript{75}

A similar argument was advanced by Justice Stewart in \textit{Fullilove v. Klutznick},\textsuperscript{76} a predecessor case to \textit{Richmond v. Croson} in which the Court upheld a Public Works program that required at least ten percent of federal funds granted for local public works projects to be used by state and local grant recipients to obtain services or supplies from minority-owned businesses. In defense of innocent white victims, Stewart chastised the Court for upholding a statute that granted preferences to “citizens who are ‘Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts’” in the name of promoting the public good, when that same rationale had been used to justify the segregation of railroad cars in \textit{Plessy v. Ferguson}.\textsuperscript{77}

For Stewart, equal protection ensured that government may never act to the detriment of a person solely because of that person’s race, and the rule is not different when persons injured are not members of a minority. Moreover, Stewart believed that the benefits of equal protection are a personal right. From the point of view of injured person – and here, the injured are a limited set of white business owners seeking public works contracts – it does not matter whether the distinction is purportedly for the promotion of the public good or otherwise.\textsuperscript{78} Thus, Justice Stewart lamented that the Court’s decision in \textit{Fullilove} was “wrong for the same reason that \textit{Plessy v. Ferguson} was wrong.”\textsuperscript{79}

In \textit{Croson}, Justice O’Connor’s concern about the threat to innocent victims of the Richmond Plan helps explain her insistence that discriminatory acts be identified with particularity:

> While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief . . . . The ‘evidence’ relied upon by the dissent, the history of school desegregation in Richmond and numerous congressional reports, does little to define the scope of any injury to minority contractors in Richmond or the necessary remedy. The factors relied upon by the dissent could justify a preference of any size or duration.\textsuperscript{80}

The problem, according to O’Connor, is that the remedy proved too broad and had “has no logical stopping point.”\textsuperscript{81} As O’Connor explained, “a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.”\textsuperscript{82} Interestingly,

\begin{itemize}
  \item Weber, 443 U.S. at 221, 229.
  \item 448 U.S. 448 (1980).
  \item \textit{Fullilove}, 448 U.S. at 523.
  \item \textit{Fullilove}, 448 U.S. at 526.
  \item Id. at 523.
  \item \textit{Croson}, 488 U.S. at 504-505.
O’Connor seeks to buttress her view that only individual racists acts are remediable by grounding her position the principle of colorblindness. According to O’Connor, if the Court accepted past societal discrimination as a basis for remedial action, then “[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.”

O’Connor’s skepticism that any race preference could serve a benign purpose would gain full voice in *Metro Broadcasting, Inc. v. FCC.* In *Metro Broadcasting,* the Court upheld as constitutional a program that gave preference to minority-owned firms in competitive bidding for new communications licenses and provided for “distress sales” of a limited category of existing radio and television stations to minority controlled firms. Throughout the case, the FCC maintained that, although the program took race into account, the use of race was benign and hence did not run afoul of the general prohibition on the use of race in governmental decisionmaking. Justice O’Connor forcefully rejected the characterization of the FCC’s program as benign:

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

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

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

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

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83 Croson, 488 U.S. at 505-506. Note that Justice O’Connor’s invocation of the principle of colorblindness works to deflect the criticism that she is engaging in policymaking while at the same time suggests that this precisely what proponents of race preferences are undertaking.

85 Metro Broadcasting, 497 U.S. at 609.
86 Id. at 609-10.
87 288 F.3d 732, 790 (6th Cir. 2002) (Boggs, J. dissenting).
As I put it to counsel for the Law School in oral argument, if Herman Sweatt, the plaintiff in the famous case Sweatt v. Painter [] had been able to ask the Dean of the University of Texas Law School, “Dean would you let me in if I were white?,” the dean, if he were honest, would surely have said “Yes.” I then asked counsel, “If Barbara Grutter walked in to whoever the current Dean of the Law School is and said, “Dean, would you let me in if I were black?” wouldn’t he have to honestly say either “Yes” or “pretty darn almost certain[ly]”?88

For Boggs, Barbara Grutter is no less a victim of racial injustice than Herman Sweatt. Notably absent from Boggs’s account is a serious comparison of the hostilities that provide the relevant context in which the purported racial discrimination took place. For instance, twelve years prior to Sweatt, the Supreme Court declared that Lloyd Gaines had been unjustifiably excluded from the University of Missouri Law School on account of his race. Unlike Herman Sweatt, who eventually attended classes at Texas Law School, Gaines suspiciously disappeared prior to oral argument of his case and was never heard from again. Most commentators agree that he was lynched to ensure that the Missouri Law School would remain racially segregated.89 The climate of racial hostility in which Herman Sweatt lived and Lloyd Gaines died helps us to appreciate the difference between race distinctions rooted in white supremacy and race distinctions that serve some less malign purpose.

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

The struggle for civil rights in America, going back well over a century, can certainly be characterized as a righteous war. . . . In this case, the “spoils” [of war] that are involved are the individual rights to equal treatment of real people like Barbara Grutter. If, in the words of Abraham Lincoln, society chooses that “every drop of blood drawn by the lash shall be paid by another,” then that bill should be paid by the whole society . . . . Though

88 Id. at 790.
89 Gaines’ curious disappearance shortly before oral argument in the case remains a mystery. Missouri historian Richard Kirkendall provided the following explanation:

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

the war may be righteous, such spoils taken from the Barbara Grutters of our society are not just.  

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

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

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

Although modern racial conservatives rely heavily upon the notion of individual white innocence, they have also periodically advanced the idea of collective white innocence to undermine progressive racial policy. In Metrobroadcasting, Justice Kennedy shared Justice O’Connor’s reservations about the harm to innocent victims caused by awarding race preferences in the distribution of broadcast licenses. According to Kennedy, “[t]here is the danger that the ‘stereotypical thinking’ that prompts policies such as the FCC rules here ‘stigmatizes the disadvantaged class with the unproven charge of past racial discrimination.’”  

“Whether or not such programs can be described as ‘remedial,’ continued Kennedy, “the message conveyed is that it is acceptable to harm a member of the group excluded from the benefit or privilege.” However, Justice Kennedy viewed the FCC policy as implicating collective white innocence as well. As Kennedy explained,

If this is to be considered acceptable under the Constitution, there are various possible explanations. One is that the group disadvantaged by the preference should feel no stigma at all, because racial preferences address not the evil of intentional discrimination but the continuing unconscious use of stereotypes that disadvantage minority groups. But this is not a proposition that the many citizens, who to their knowledge “have never discriminated against anyone on the basis of race,” will find easy to accept.

But it is Justice Scalia, in Adarand v. Peña, who subscribed most fully to the idea that whites as a collective should be free from bearing the burden of the history of racial

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90 Id. at 775.
91 Id. at 810. The dissenting Justices in the Supreme Court case of Grutter v. Bollinger did not address the issue of white innocence directly, in part, because the issue had been framed in terms of diversity – which purportedly benefits all students – and because recent empirical studies suggested that the reduction in the probability of any white student being admitted because of the existence of an affirmative action policy was extremely modest. See Lui, supra note ___ at 1045 (arguing that far fewer whites are hurt by racial affirmative action than whites often think).
92 Id. at 636.
93 Id.
94 Id. at 636-37.
wrongdoing. In *Adarand*, the Court struck down a federal program designed to assist minority business enterprises in obtaining highway construction contracts. On the question of remedy, Scalia wrote:

> In my view, government can never have a “compelling interest” in discriminating on the basis of race in order to “make up” for past racial discrimination in the opposite direction . . . . Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race.\(^96\)

Justice Powell similarly advanced the notion that innocent whites should not be called upon to assist in remediying past discrimination most forcefully in *University of California Board of Regents v. Bakke*,\(^97\) in which the court struck down a university admissions policy that reserved 16 of the 100 positions for “disadvantaged” minority students, but a plurality upheld the possibility that race might be taken into account in admissions decisionmaking. In rejecting the specific plan advanced by the Medical School, Justice Powell declared:

> Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups . . . . [T]here is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making.\(^98\)

Moreover, Justice Powell advanced his belief that remedies should follow only from specific findings of individual racist acts. As Justice Powell explained, “[w]e have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.”\(^99\) Importantly, these remedies must be closely watched to insure that innocent victims are not harmed. “Remedial action,” Powell argued, “usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit.”\(^100\) Without such findings of constitutional or statutory violations, Powell continued, “it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another.”\(^101\)

The problem with the Medical School’s program was not one of oversight, however. According to Justice Powell, the crux of the problem was that “the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of ‘societal discrimination’ does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.”\(^102\)

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96 *Adarand*, 515 U.S. at 239.
98 *Bakke*, 438 U.S. at 298.
99 *Id.* at 307.
100 *Id.* at 308.
101 *Id.* at 308-09.
102 *Id.* at 310.
Like Justice O’Connor, Justice Powell perceived no logical stopping point to a race preference scheme grounded in societal discrimination:

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

2. The Pedigree of Racial Innocence Rhetoric

Racial innocence rhetoric is plainly an indispensable element of modern racial conservatism. Its durability in legal discourse is a testament to its intuitive appeal. The general theme of innocence may traffic in deep cultural notions of religion and morality, but there is a second, more specific pedigree of racial innocence rhetoric in legal discourse that might also be profitably explored – one with its roots in the brute racism that defined American society in the late nineteenth and early twentieth century.

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

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

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

Justice Brown’s invocation of a self-imposed stigma is grounded in the rhetoric of innocence. The argument advances the theme of innocence in two important ways. First, and most importantly, the notion of a self-imposed stigma insulated white street car

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103 Id.
104 163 U.S. 537 (1896).
105 Plessy, 163 U.S. at 544, 550.
106 Id. at 544.
107 Id. at 551.
operators and passengers from the charge that, by engaging in the customs and habits of racial segregation, they were somehow engaging in racial wrongdoing. Segregation was, in the words of the court, a “reasonable” race distinction. Members of white society that participated in this practice were, by extension, acting reasonably. Enjoyment of the privilege of racial segregation was construed as a “guilt-free” indulgence to which all whites were presumptively entitled. Second, the suggestion that any stigma imposed by segregation was self-imposed allowed Justice Brown to evade the argument that he was guilty of perpetuating notions of white supremacy. In other words, the Justices themselves were innocent of any racial wrongdoing. The racial injury, if sustained at all, was self-inflicted.

The central animation proposition in Plessy – that progressive racial measures unjustly burdened the private lives of innocent whites – had been subtly advanced two decades earlier in by the Court in the Civil Rights Cases, which declared unconstitutional provisions of the Civil Rights Act of 1875 that provided, among other things, the right of blacks to equal access to public accommodations.\(^\text{108}\) For Justice Bradley, author of the majority opinion, the Act presented an unwarranted intrusion in the private lives of individuals. He conceded that Congress may act to protect blacks from state-sponsored acts of racial subordination, but maintained that individual acts of discrimination by private persons were an entirely different matter. According to Justice Bradley,

\begin{quote}
Until some state law has been passed, or some state action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment . . . no legislation of the United States under said Amendment . . . can be called into activity . . . [To allow regulation absent state action] would be to establish a code of municipal law regulative of all the private rights of between man and man in society.\(^\text{109}\)
\end{quote}

The act of a “mere individual, the owner of the inn, the public conveyance, or place of amusement, refusing the amusement”\(^\text{110}\) according to Bradley was a “private wrong” that did not rise to the level of a constitutional rights deprivation. To the extent that any private right has been infringed, Bradley argued that “redress is to be sought under the laws of the state” first, and through legislation only to the extent that those laws fail to provide adequate protection.\(^\text{111}\) In the meantime, private individuals should remain free to engage in “every act of discrimination which a person may see fit to make as to the


\(^{109}\) The Civil Rights Cases, 109 U.S. at 22-23.

\(^{110}\) Id. at 24.

\(^{111}\) Id. at 24.
guests he will entertain, or the people he will take into his coach or cab or car, or admit to his theater, or deal with in other matters of intercourse or business.”

Bradley’s argument projects the image of himself as defender of the innocent white victims against state intrusion in their private affairs. For Justice Harlan, this claim of innocence rang hollow. In Harlan’s view, Bradley himself was guilty using the rhetoric of innocence to distort the meaning of the rights protections provided by the Reconstruction Amendments. As Harlan lamented, “[t]he substance of and the spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism. ‘It is not the words of the law but the internal sense of it that makes the law. The letter of the law is the body; the sense and reason of the law is the soul.”

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

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

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

> It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws . . . . What the nation, through Congress, has sought to accomplish in reference to that race is – what has already been done every State of the Union for the white race – to secure and protect the rights belonging to them as freemen and citizens; nothing more . . . . The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizen.

Nevertheless, the rhetoric employed by Bradley projected the image of innocent white victims, which ultimately proved more persuasive than any argument Harlan could muster.

Unlike modern racial conservatives, who draw heavily upon individual white innocence rhetoric, nineteenth century racial conservatives relied more heavily upon the notion of collective white innocence, in large part because (1) progressive racial reform was historically framed in terms of providing relief to all blacks as opposed to some limited set of black beneficiaries, and (2) the “burden” of such policies was thought to be borne by all members of white society. The earliest expression of white collective innocence appears in the Supreme Court’s infamous decision in *Dred Scott v. Sanford*, which has been universally condemned for its audacious assertion that blacks were not

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112 Id. at 24-25.
113 Id. at 26.
114 Id. at 25.
115 Id. at 61.
citizens of the United States. Chief Justice Roger Taney, the author of the majority opinion, was subsequently vilified and ostracized for orchestrating this most odious event in American legal history. Few, if any, conservatives today champion the virtues of Taney’s opinion. Indeed, most view Taney’s opinion in the *Dred Scott* case as a stain on our national honor.

Yet it is Justice Taney’s compelling use of collective white innocence rhetoric to conclude that Negroes were not citizens of the United States that, in some ways, prefigured the way in which future racial conservatives would deploy this style of argument. Much of the cultural authority of the *Dred Scott* decision was drawn from the way in which Taney framed the case as one which pitted white society as the innocent holder of citizenship and civility, and Negroes such as Dred Scott as “defiled takers” of the virtues of citizenship and political inclusion. Taney accomplished this task by appealing to the prevailing view of blacks as intellectual and cultural inferiors who posed a serious threat to white civil society. As Taney famously argued, black Americans “had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the Negro might justly and lawfully be reduced to slavery for his benefit.”

According to Taney, the Framers viewed blacks as “so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattos were regarded as

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116 *Dred Scott v. Sanford*, 60 U.S. 393 (1857) (declaring that blacks could not be citizens because they were inferior and possessed “no rights which white man was bound to respect,” and that blacks were justifiably reduced to slavery).


118 Of particular concern to both liberals and conservatives was Taney’s flagrant abuse of the Court’s authority. As Professor Mark Graber explains: Taney’s claims about black citizenship and slavery in the territories have been criticized for three distinct and inconsistent failings. One line of criticism claims that *Dred Scott* rests on a mistaken theory of the proper role of judicial institutions in a democratic society. Robert McCloskey, Alexander Bickel, Lino Graglia, Cass Sunstein and other proponents of judicial restraint maintain that the Supreme Court should not have made any authoritative attempt, even one based on the constitution, to resolve the constitutional controversy over the status of slavery in the territories. The other two criticisms claim that *Dred Scott* rests on a mistaken theory of constitutional interpretation. Robert Bork, David Currie, Don Fehrenbacher and other historicists condemn the Taney opinion for relying on personal notions of justice instead of on the specific norms set down by the constitutional framers and previous judicial precedents. Thurgood Marshall, Sotirios Barber, Christopher Eisgruber and other aspirationalists, in contrast, condemn the Taney opinion for not tempering the specific policies set out by the constitutional framers and past judicial precedents with more general notions of constitutional and human right.


119*Dred Scott*, 60 U.S. at 407.
unnatural and immoral, and punished as crimes . . .”¹²⁰ Importantly, Taney pointed out that beliefs in Negro inferiority were “fixed and universal in the civilized portion of the white race [and] regarded as an axiom in morals as well as in politics which no one thought of disputing . . .”¹²¹

In this way, Justice Taney situated himself as defender of innocent whites as a collective against the corrosive effects produced by the inclusion of blacks in the political community. Taney’s rhetorical strategy effectively projected an image of race politics in which gains for blacks could only be had at the expense of whites. Black citizenship threatened to strip innocent whites of their superior status in the racial hierarchy and destroy the prevailing conception of the American national identity. The price of inclusion of blacks in civil society was, in short, the end of white civilization as they knew it. The decision to deny United States citizenship to blacks was not simply an episode of brute racism – it could be understood on a deeper level as an act of protectionism to safeguard innocent whites from the inherently destructive nature of black inclusion in civil society.

Interestingly, Taney secondarily engaged the rhetoric of individual white innocence as Justice Brown would later do in Plessy – as a means of personally shielding himself from criticism that he is acting as an autonomous decisionmaker. His startling declaration that blacks were not citizens of the United States was plainly rooted in notions of white supremacy. Yet Taney made clear that he was innocent of the charge of racism. For Taney, the issue had already been decided by Constitution. He was simply the innocent bearer of the volatile message. He was not entirely unlike Judge Ruffin, who declared in State v. Mann¹²² twenty-five years earlier that a white man could not be criminally charged with assaulting a slave because “[t]he slave, to remain a slave, must be made sensible, that there is no appeal from his master.”¹²³ “The power of the master must be absolute, to render the submission of the slave perfect,” explained Judge Ruffin. But Judge Ruffin was clear to point out that “[t]his discipline belongs to the state of slavery,” and “I most freely confess my sense of the harshness of this proposition, I feel it as deeply as any man can.”¹²⁴

In both Dred Scott and State v. Mann, the judges were able to disavow the racist implications of their decisions. But unlike Judge Ruffin, who rested his decision on the customs and conventions of slave society, Taney accomplishes his feat of disavowal by situating his arguments in the interpretive theory of original intent. As Thomas Ross points out, “the original intent interpretive theory is not unique to the Dred Scott case, but it did permit Taney to push away responsibility for his choice.”¹²⁵ Thus, much of Taney’s argument relied upon the interpretation of the Framers’ intentions. According to Taney, the Framers were

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¹²⁰ Id. at 409
¹²¹ Id. at 407.
¹²² 13 NC (2 Dev.) 263 (1829).
¹²³ Id. at 267.
¹²⁴ Id. at 266.
¹²⁵ Ross, supra note __ at 11.
others; and they knew that it would not in any part of the civilized world be supposed to embrace the Negro race, which, by common consent, had been excluded from civilized governments and the family of nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.126

By relying upon original intent, Taney accomplished an important task in the maintenance of white racial innocence — he was able to disaggregate individual racist acts (attitudinal racism) from racism that was endemic to the framing of the constitutional order (structural racism). As Ross explains, “his originalism theory permitted him to pretend he was not saying blacks ought not be deemed citizens. He merely was saying that the Constitution, properly interpreted, did not include them.”127 Thus, Taney, innocent of any overtly racist act of his own, could evade responsibility for structural harm produced by his decision.

The themes of collective white innocence would become a staple of conservative opposition to improve upon the dire social, political, and economic plight of newly emancipated blacks. As the benefits and beneficiaries became more crisply defined, so too did the harms and identities of purportedly innocent whites “vicitimized” by such policies. One of the earliest instances involved Congressional efforts to resist the passage of the Freedmen’s Bureau Bill.128 In a report submitted by the Minority of the Select Committee on Emancipation to accompany the Bill to Establish a Bureau of Freedman’s Affairs, members expressed outrage at the idea that innocent whites might bear the burden of racial progress for blacks. Members derided the proposed Bureau as a “grand almshouse department, whereby the labor and property of the white population of this country is to be taxed to support the pauper labor of the freedmen and mendicant officials of the country.”129 “Its operations,” according to the Report, “cannot be too closely scrutinized.”130 One aspect of the program that was subject to particularly close scrutiny

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126 Dred Scott, 60 U.S. at 410.
127 Ross, supra note ___ at 11.
128 The Bureau of Refugees, Freedmen, and Abandon Lands, commonly referred to as the Freedmen’s Bureau, was established in March 1865, and commenced work shortly thereafter. According to historian John Hope Franklin, the Bureau “aided refugees and freedmen by furnishing supplies and medical services, establishing schools, supervising contracts between freedmen and their employers, and managing confiscated or abandoned lands, leasing some of them to freedmen.” JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM 306-07 (3rd. ed. 1967). Most commentators agree that the Bureau’s success was modest at best. See ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863-1877, at 70-71, 258-59 (1988) (discussing the 1865 Freedmen’s Bureau Act and the failure of the federal government to fulfill its promise of transferring forty acres of land and a mule to freed African-Americans to compensate for past wrongs done to them); W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 188 227-28 (2nd ed. 1962) (1935) (describing the Bureau’s refusal to deliver land to slaves as one of its greatest failings); Thomas Mitchell, From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common, 95 NW. U. L. REV. 505, 525-26 (2001) (nothing that “[a]lthough the Freedmen’s Bureau had 850,000 acres of land under its control in 1865, half of the land was returned to the former white owners by mid-1866”).
130 Id.
was the setting aside of portions of former plantations for farming by newly emancipated blacks. Members argued that blacks recipients of Bureau’s administered lands enjoyed an unjust windfall at the expense of hard working whites. According to the Report,

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

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

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

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

Under the Act, citizenship was defined with remarkable specificity. To be an American citizen meant that one possesses certain specific rights, such as the right to make and enforce contracts, the right to file lawsuits and participate in lawsuits as parties or witnesses, and the right to inherit, purchase, lease, sell, hold and convey real property. In defining citizenship in this manner, the Act effectively overruled state-sponsored Black Codes. At the same time, the Act’s delineation of certain rights as “civil rights” provided the first clear indication that, in the context of race relations, there were tiers of

131 See id. at 3.

132 As subsequently described by the Supreme Court in The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873), “the codes imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value . . . .” Slaughter-House Cases, 83 U.S. (16 Wall.) at 70. Against this backdrop, Congress established the Joint Committee on Reconstruction which grappled with “the question of how the liberties of the black race were to be made secure.” 6 CHARLES FAIRMAN, HISTORY OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88 PART ONE, at 117 (Stanley N. Katz ed., 1971) (quoting The Nation, Dec. 7, 1865, at 710).

133 Civil Rights Act, 14 Stat. 27 (1866).
rights at stake. Civil rights at this time were understood in terms of property rights, contract rights, and equal protection of the laws. These rights were distinctive from “political rights,” which involved the right to vote, hold public office, and “social rights,” which related to access to public accommodations and the like. The bestowal of civil rights in the 1866 Act would be followed by a grant of political rights, with social rights bringing up the rear.

In his Veto Message, President Johnson made generous use of the innocence rhetoric. According to Johnson, “[t]he Bill, in effect, proposes a discrimination against large numbers of intelligent, worthy, and patriotic foreigners, and in favor of the Negro, to whom after long years of bondage, the avenues of freedom and intelligence have just now been suddenly opened.”\(^{134}\) Indeed, Johnson perceived a fundamental defect of this act to be that it establishes:

> for the security of the colored race safeguards which go infinitely beyond any that the general government has ever provided to the white race. In fact, the distinction of race and color is by the bill made to operate in favor of the colored and against the white race.\(^{135}\)

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

### B. Merit

The concept of merit, like the idea of innocence, is deeply rooted in American culture. Indeed, the belief in individual merit and the corresponding denunciation of unearned privilege has been mythologized throughout American literature.\(^{136}\) The idea of

\(^{134}\) [5 Messages and Papers of the Presidents 3604 (1914)].

\(^{135}\) [5 Messages and Papers of the Presidents 3611 (1914)].

\(^{136}\) For examples of this in fictional works, see HORTARIO ALGER, JR., RAGGED DICK, OR STREET LIFE IN NEW YORK, reprinted in RAGGED DICK AND STRUGGLING UPWARD (1868); F SCOTT FITZGERALD, THE GREAT GATSBY (1925); EDNA FERBER, EMMA MCCHESNEY & CO. (1915); AYN RAND, ATLAS SHRUGGED (1957). For nonfictional works, see BENJAMIN FRANKIN, AUTOBIOGRAPHY (1790); BOOKER T. WASHINGTON, UP FROM SLAVERY (1901); ANDREW CARNEGIE, THE EMPIRE OF BUSINESS (1902). For an excellent discussion of the salience of merit and hard work in the American consciousness portrayed through fiction, see AYN RAND, ATLAS SHRUGGED 414 (Random House ed. 1957) (“To the glory of mankind, there was, for the first and only time in history, a country of money—and I have no higher, more reverent tribute to pay to America, for this means: a country of reason, justice, freedom, production, achievement. For the first time, man’s mind and money were set free, and there were no fortunes-by-conquest, but only fortunes-by-work, and instead of swordsmen and slaves, there appeared the real maker of wealth, the greatest worker, the highest type of human being—the self-made man—the American industrialist. . . . If you ask me to name the proudest distinction of Americans, I would choose—because it contains all the others—the fact that they were the people who created the phrase ‘to make money.’ No other language or nation had ever used these words before; men had always thought of wealth as a static quantity—to be seized, begged, inherited, shared, looted of obtained as a favor. Americans were the first to
merit permeates nearly every aspect of American life, from club memberships to education to employment. Although we often contest the criteria used to determine merit, the notion of individual merit itself has remained largely free from criticism. The promise of meritocracy is reflected in what Jennifer Hochschild describes as the fundamental tenets of the American Dream. According to Hochschild, the American Dream is: (1) available to everyone, regardless of background or origin; (2) consists of a reasonable anticipation or hopefulness of success; (3) produced by actions under one’s individual control; and (4) is inextricably linked to virtue insofar as “virtue leads to success, success makes a person virtuous, success indicates virtue, or apparent success is not real success unless one is also virtuous.”

understand that wealth has to be created. The words ‘to make money’ hold the essence of human morality.”).

137 Richard A. Epstein, A Rational Basis for Affirmative Action: A Shaky But Classical Liberal Defense, 100 Mich. L. Rev. 2036, 2053-54 (2003) (noting that the original rhetoric in support of the 1964 Civil Rights Act was grounded in a sincere belief that “disembodied merit should be the exclusive criterion on which employment (and similar decisions) were made); Mark Killenbeck, Pushing Things Up to Their First Principles, 87 Cal. L. Rev. 1299 (1999) (observing that “[m]uch of the growth and prestige of post-World War II American higher education was a direct consequence of the ability of colleges and universities to characterize themselves as institutions open to all, where individual merit and personal determination were the criteria for success or failure.”); see also Hugh D. Graham, The Civil Rights Era: Origins and Development of National Policy, 1960-72 (1990) (describing the prevailing view among race commentators that merit is, and should be, the determining factor in employment and academic selections, and noting that critics consider anti-discrimination legislation and affirmative action to be deviations from a merit-based system). For an interesting account of gender distinctions in merit-based hierarchical arrangements, see D.E. Brown, Human Universals 110, 137 (1991) (observing that men serve as military leaders and hold leadership roles in religious, social, and cultural institutions more often than women); Felicia Pratto et al., Social Dominance Orientation: A Personality Variable Producing Social and Political Attitudes, 67 J. of Personality and Social Psychology 741, 742 (1994) (citing studies demonstrating that “men hold more hierarchy-enhancing attitudes, such as support for ethnic prejudice, racism, capitalism, and right-wing political parties, than do women.”).

138 Jennifer Hochschild, Facing Up to the American Dream 23 (1995). Merit has proven a particularly divisive concept in race relations, yielding heated debate over: (1) the relevant criteria of merit; (2) the starting assumption that all candidates compete on a level playing field; (3) the hyper subjectivity of metric for measuring merit; and (4) the circumstances in which merit-based decision making is appropriate (and where it is not). See, e.g., Charles Lawrence III & Mari Matsuda, We Won’t Go Back: Making the Case for Affirmative Action 91-111 (1997) (stating that the current meritocratic system employs rhetoric which masks the reality of unfair privilege, measurements which are highly imprecise or simply subjective, and subjective value choices about what factors constitute merit). See also Nicholas Leman, The Big Test: The Secret History of the American Meritocracy 342-51 (1st rev. pbk. ed. 2000) (observing that meritocracy in America operates on an uneven playing field, presenting subjectively chosen criteria of what constitutes merit as if they were objective); John Roemer, Equality of Opportunity in Meritocracy and Economic Inequality (Kenneth Arrow, Samuel Bowles, & Steven Durlauf, eds., cloth ed. 2000) (proposing a way to purportedly “level the playing field”); Susan Strum & Lani Guinier, The Future of Affirmative Action in Who’s Qualified? 3-5 (Susan Strum & Lani Guinier eds., 2001) (stating that a meritocracy based on standardized tests does not begin with a level playing field, make truly objective measurements, or accurately measure merit, unless merit is redefined strictly as the ability to do well on standardized tests); Mary Waters & Carolyn Boyes-Watson, The Promise of Diversity in Who’s Qualified? 55 (Susan Strum & Lani Guinier eds., 2001) (agreeing with Strum and Guinier that a meritocracy based on standardized tests in “neither functional nor fair”); Robert Paul Wolff & Tobias Barrington Wolff, The Pimple on Adonis’s Nose: A Dialogue on the Concept of Merit in the Affirmative Action Debate, 56 Hastings L.J. 379, 385-92 (2005) (arguing, in the education admissions context, that the criteria constituting merit vary depending upon the goals of the admitting institution); Leon Botstein, The Merit Myth, N.Y. Times, Jan. 14, 2003, at A31 (“universities have for too
Racial conservatives have seized upon the mythology of merit throughout the ages and often in close connection with innocence rhetoric. Merit rhetoric is similar to innocence rhetoric insofar as both accept as a fundamental operating premise the zero-sum conceptualization of racial progress. However, the rhetoric of merit is distinctive insofar as it places particular emphasis on the comparative deservedness of the recipients of state beneficence. The thrust of the racial innocence argument is that measures designed to benefit minorities unfairly burden innocent non-minorities. By contrast, the thrust of the racial meritocracy argument is that minorities are comparatively undeserving of state beneficence, which arguably should be bestowed upon other, more deserving recipients. Moreover, merit rhetoric is powerfully linked to stigma rhetoric insofar as recipients of benefits dispersed in a manner that is inconsistent with the meritocracy myth are understood as distinctly lacking in virtue.

1. **Merit Rhetoric in Modern Legal Discourse**

Stevens in *Fullilove*. According to Justice Stewart, disadvantages rooted in a history of racial oppression did not necessarily make African Americans worthy beneficiaries of special consideration in federally funded public works projects. “No race,” according to Justice Stewart, “has a monopoly on social, educational, or economic disadvantage, and any law that indulges in such a presumption clearly violates the constitutional guarantee of equal protection.”\(^{139}\) Even if minorities were deserving on this score, a race preference based upon membership in a minority group still would not suffice because “the guarantee of equal protection immunize[s] from capricious governmental treatment ‘persons’ – not ‘races’ – [and] it can never countenance laws that seek racial balance as a goal in and of itself.”\(^{140}\)

Justice Stevens disagreed with Stewart’s suggestion that history of oppression was insufficient to justify a race preference. The problem in his view was that Congress had not provided sufficient evidence to explain why the program was limited to certain groups, and why it defined the preference the way it had. “[I]f Congress is to authorize a recovery for a class of similarly situated victims of a past wrong,” wrote Stevens, “it has an obligation to distribute that recovery among the members of the injured class in an evenhanded way.”\(^{141}\) Stevens’s continued, “in such a case the amount of the award should bear some rational relationship to the extent of the harm it is intended to cure.”\(^{142}\)

Justice Stevens also questioned whether the program actually benefits those who were aggrieved and thus most deserving of the race preference. For instance, Stevens argued that this limited race preference did not do enough to uproot the layers of racial oppression because members of a minority who are most disadvantaged are least likely to get the benefit but most likely to be still suffering the consequences of the past wrong. According to Stevens, “[a] random distribution to a favored few is a poor form of compensation for an injury shared by many.”\(^{143}\) At the same time, Stevens suggested that the remedy was too broad, including firms that did not deserve a preference. According to Stevens, a race preference is not narrowly tailored as long as it includes members of minority that were not hurt by discrimination – for instance, firms that were formed after

\(^{139}\) Fullilove, 448 U.S. at 529-30.

\(^{140}\) Id. at 529.

\(^{141}\) Id. at 537.

\(^{142}\) Id. at 537. Stevens criticized the plan for failing to explain, among other things, why certain racial and ethnic groups were being treated similarly, despite differing histories of racial subordination. As Stevens explained:

Quite obviously, the history of discrimination against black citizens in America cannot justify a grant of privileges to Eskimos or Indians . . . . Even if we assume that each of the six racial subclasses has suffered its own special injury at some time in our history, surely it does not necessarily follow that each of those subclasses suffered harm of identical magnitude. Although “the Negro was dragged to this country in chains to be sold in slavery,” [citing J. Marshall in *Bakke*], the “Spanish-speaking” subclass came voluntarily, frequently without invitation, and the Indians, the Eskimos and the Aleuts had an opportunity to exploit America’s resources before the ancestors of most American citizens arrived. There is no reason to assume, and nothing in the legislative history suggests, much less demonstrates, that each of these subclasses is equally entitled to reparations from the United States Government.

\(^{143}\) Fullilove, 448 U.S. at 539.
the statute was passed to take advantage of the grant, firms that could not compete due to reasons unrelated to race, or firms that had competed successfully before the statute.\textsuperscript{144}

Justice Stevens also suggested that some of the obstacles faced by minority firms were not unique to minorities. According to Stevens, some of the difficulties cited in the legislative history – “unfamiliarity with bidding procedures followed by procurement officers” and “difficulties in obtaining financing”\textsuperscript{145} – were hurdles that all new firms faced. For Stevens, it was “essential to draw a distinction between obstacles placed in the path of minority business enterprises by others and characteristics of those firms that may impair their ability to compete.”\textsuperscript{146}

In \textit{Croson}, Justice O’Connor focused on the ability of minority contractors to avail themselves of the preference. According to O’Connor, Richmond’s argument for the plan would have been strengthened if it could prove that there was a “significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors.”\textsuperscript{147} As O’Connor noted, one cannot look to general population for evidence of discrimination:

\begin{quote}
When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value . . . . [It is a] completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.\textsuperscript{148}
\end{quote}

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

Stevens likewise criticized the City of Richmond for engaging in “the type of stereotypical analysis that is a hallmark of violations of the Equal Protection Clause.”\textsuperscript{149} And just as he had argued in \textit{Fullilove}, Stevens suggested that a set-aside has ironic effects in that “minority firms that have survived in the competitive struggle, rather than those that have perished, are most likely to benefit from an ordinance of this kind.”\textsuperscript{150}

In \textit{Metro Broadcasting}, Justice O’Connor returned to her approach to questioning whether the beneficiaries of race preferences deserved the benefits of such policies. Much of O’Connor’s discussion of deservedness is situated in her discussion of diversity in broadcast viewpoints. O’Connor rejected the idea that diversity in viewpoint was a compelling interest, arguing that “[i]t is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications.”\textsuperscript{151} But even if it were, O’Connor expressed doubts as to whether the stations identified as beneficiaries of the policy were truly deserving:

\begin{flushleft}
\textsuperscript{144} \textit{Id}. at 540-41.
\textsuperscript{145} \textit{Id}. at 544.
\textsuperscript{146} \textit{Id}. at 544.
\textsuperscript{147} \textit{Croson}, 488 U.S. at 509.
\textsuperscript{148} \textit{Croson}, 488 U.S. at 501, 507.
\textsuperscript{149} \textit{Id}. at 515.
\textsuperscript{150} \textit{Id}..
\textsuperscript{151} \textit{Metro Broadcasting}, 497 U.S. at 612.
\end{flushleft}
The FCC justifies its conclusion that insufficiently diverse viewpoints are broadcast by reference to the percentage of minority-owned stations. This assumption is correct only to the extent that minority-owned stations provide the desired additional views, and that stations owned by individuals not favored by the preferences cannot, or at least do not, broadcast underrepresented programming.\cite{152}

In O’Connor’s view, minority owned stations were in no better position to advance diversity of viewpoints than non-minority owned ones. O’Connor believed that all firms were essentially driven by market concerns, and thus each would approach the issue of diverse programming in the same way. According to this view, there is no reason to prefer minority ownership because it rests on the dubious assumption that “preferences linked to race are so strong that they will dictate the owner’s behavior in operating the station, overcoming the owner's personal inclinations and regard for the market.”\cite{153}

The struggle over the link between diversity and deservedness of a race preference also figured prominently in university admissions. In \textit{Hopwood v. Texas},\cite{154} the 5th Circuit rejected the link between race and diversity. According to the \textit{Hopwood} court, “[t]he use of race, in and of itself, to choose students simply achieves a student body that looks different.”\cite{155} The court continued, “Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants.”\cite{156}

In the court’s view, diversity takes many forms. “To foster such diversity,” the court maintained, “state universities and law schools and other governmental entities must scrutinize applicants individually, rather than resorting to the dangerous proxy of race.”\cite{157} Furthermore, to the extent that the university wished to make use of the proxy, the Court warned that the use should be extremely modest – that it must carefully limit the “plus” given to applicants to remedy that harm.\cite{158}

Judge Daniel Boggs’ lower court opinion in the \textit{Grutter} case echoed many of these sentiments. Judge Boggs chastised the Michigan Law School’s consideration of race as a criteria of merit, arguing that this practice was fundamentally violative of the principle of merit. As Judge Boggs explained,

\begin{quote}
Mentioning status as an under-represented minority in the same breath, the Law School generalizes, in the abstract, that it would also give preference to an applicant with ‘an Olympic gold medal, a Ph.D in physics, the attainment of age 50 in a class otherwise lacking anyone over 30, or the experience of having been a Vietnam boat person. \textit{Yet to equate} bare racial status \textit{with the experiential gains of these generally remarkable (and exceedingly rare) achievements demonstrates the Law School’s desired diversity is unrelated to the experiences of its applicants.} \cite{159}
\end{quote}

\begin{thebibliography}{99}
\bibitem{152} Id. at 618-19.
\bibitem{153} Id. U.S. at 619.
\bibitem{154} 78 F.3d 932 (5th Cir. 1996).
\bibitem{155} Hopwood, 78 F.3d at 946.
\bibitem{156} Hopwood, 78 F.3d at 946.
\bibitem{157} Id. at 947.
\bibitem{158} Id. at 950.
\bibitem{159} Grutter v. Bollinger, 288 F.3d at 790 (emphasis added).
\end{thebibliography}
For Boggs, using race as a criteria of merit produced glaring absurdities. “When it comes to a choice between admitting a conventionally liberal (or conventionally conservative) black student who is the child of lawyer parents living in Grosse Pointe, [Michigan] just like the previous ten white admittees,” lamented Judge Boggs, “the black student will be given a diversity preference that would not be given to a white or Asian student, her unique experience notwithstanding.”\footnote{Id. at 790-91.}

2. The Pedigree of Merit Rhetoric

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

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

A proposition to establish a bureau of Irishmen’s affairs, a bureau of Dutchmen’s affairs, or one for the affairs of those of Caucasian descent generally, who are incapable of properly managing or taking care of their own interests by reason of neglected or deficient education would, in the opinion of your committee, be looked upon as a vagary of a diseased brain. No one would, for a moment suppose that it would receive serious consideration of any Congress; yet, equally strong claims upon the score of humanity and philanthropy might be urged with great force in their behalf. Why the freedmen of African descent should become these marked objects of special legislation, to the detriment of unfortunate whites, your committee fails to comprehend. . . . The propriety of laying a tax upon the labor of the poor, and perhaps, less favored white men to defray it, is very questionable and, in the opinion of [this] committee, unwise and unjust, even admitting it to be lawful.\footnote{Congressional Globe, 38th Cong., 1st Sess., Rep. No. 2, at 2 (Jan. 18, 1864).}

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

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

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

Merit rhetoric also underlies Johnson’s explicit questioning of whether newly emancipated blacks are qualified to become citizens in his Veto Message to Congress opposing the Civil Rights Act of 1866:

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

Johnson objected to granting civic equality to blacks because they are not well schooled in liberal democratic ideas. According to Johnson, “[h]e must of necessity, from his previous condition of servitude, be less informed as to the nature and character of our institutions than he who, coming from abroad has, to some extent, at least, familiarized himself with the principles of a Government to which he voluntarily entrusts ‘life, liberty, and the pursuit of happiness’.” In this way, Johnson reveals that beneath his procedural objection is a deeper objection that blacks are undeserving of citizenship, and that other (presumably white) candidates are more deserving recipients of preference:

[N]ow it is proposed, by a single legislative enactment, to confer the rights of citizenship upon all persons of African decent born within the extended limits of the United States, while persons of foreign birth who make our land their home must undergo a probation of five years, and can only then become citizens upon proof that they are “of good moral character . . .

The ratification of the 14th Amendment laid to rest arguments questioning the freedmen’s deservedness of the basic rights of citizenship. Social equality was an entirely separate matter, however. Not surprisingly, opponents of progressive racial

\[162\] 5 Messages and Papers of the Presidents 3599 (1914).
\[163\] 5 Messages and Papers of the Presidents 3604 (1914) (emphasis added).
\[164\] 5 Messages and Papers of the Presidents 3605 (1914).
\[165\] 5 Messages and Papers of the Presidents 3604-05 (1914).
measures designed to promote greater social inclusion continued to press the issue of merit.

Justice Bradley’s arguments against the 1875 Act further exemplified this approach. For Bradley, access to public accommodations was a social privilege enjoyed by whites unrelated to the core privileges of citizenship. Bradley acknowledged that the 13th and 14th Amendments were enacted to abolish slavery and protect the civil rights of freedmen from abrogation by the State and conceded that the freedmen deserved protections of this sort. But such protections did not entitle freemen to free and open access “to all the privileges enjoyed by whites citizens.” For Bradley, blacks had not yet earned the privilege of social interaction with whites, and neither Amendment empowered Congress to legislate social equality.

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

C. Stigma of Dependence

Stigma associated with dependence on government has proven particularly useful for opponents of racial progress. The extensive literature that speaks of race relations as “the Negro problem” or “Indian problem” or “the White Man’s Burden” revel in the twin images of white benefactor (or savior) and the dark-hued suppliant. At the same time, opponents of racially progressive measures often argue that dependence upon the State is fundamentally degrading and stigmatizing. Historically, stigma rhetoric was used to oppose programs such as the Freedmen’s Bureau, which some derided as a “new system of vassalage [that] revives the most odious features of slavery without its name.”

Modern race preference programs, such as minority set-aside contracts and affirmative action in admissions to institutions of higher education, are similarly opposed on the ground that such programs stigmatize purported minority beneficiaries.

For racial conservatives who embrace the idea of stigma of dependence, progressive racial policies that single out racial minorities as beneficiaries are harmful to them in at least two important ways. First, they are harmful because they threaten to undermine the beneficiary’s sense of pride in personal accomplishment. As American poet and essayist Ralph Waldo Emerson once observed, “[e]very body likes to know that his advantages cannot be attributed to air, soil, sea, or to local wealth, as mines and quarries, nor to laws and traditions, nor to fortune; but to superior brain, as to make the

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166 The Civil Rights Cases, 109 U.S. at 25 (emphasis added).
167 See, e.g., 1 GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 215 (1944) (describing issues in American race relations as “the Negro problem” and noting the prevailing view among intellectuals that “Negroes are the wards of white people”); see also MICHAEL K. BROWN, RACE, MONEY AND THE AMERICAN WELFARE STATE 3 (1999) (noting that “[m]any, perhaps most, whites believe blacks are the authors, defenders, and prime beneficiaries of wasteful, feckless social policies that do more harm than good”).
168 Congressional Globe, 38th Cong., 1st Sess. HR. 2, at 2, 3 (Jan. 18, 1864).
169 See infra text accompanying notes ___ to ___.

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praise more personal to him.” As Emerson’s comment suggests, personal accomplishment figures prominently in the American cultural consciousness. Opponents to racially progressive measures seize upon this idea and denounce policies designed to produce greater equality among the races as fundamentally violative of this hallowed principle.

Second, such programs are stigmatizing to the extent that they invoke or reinforce existing racial stereotypes. Erving Goffman’s pioneering work on the nature of stigma proves particularly illuminating on this point. According to Goffman, a stigmatized individual “possess[es] an attribute that makes him different from others in the category of persons available for him to be, and of less desirable kind – in the extreme, a person who is quite thoroughly bad, or dangerous, or weak.” Among the criteria for delineating individuals worthy of stigma are “race, nation, and religion.” Individuals who are not different – who do not depart from pre-existing expectations – are viewed as “normal.” By contrast, those who do depart from pre-existing expectations are stigmatized, viewed as either “discredited” or “discreditable,” and presumptively excluded from the community.

Under this view, members of social groups denoted as beneficiaries of racially progressive policies are stigmatized simply by virtue of having been singled out for differential treatment. Differential treatment – especially when that treatment is viewed as preferential – becomes the source of deep suspicion. This alone is sufficient to generate the sort of stigma described by Goffman. However, the stigmatic harm is only

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170 Ralph W. Emerson, *English Traits* (1856) in *The Complete Works of Ralph Waldo Emerson* 46 (Centenary Ed. 1903).

171 This general approach is exemplified in traditional opposition to progressive welfare policy. See Paul M. Sniderman & Edward G. Carmines, *The Moral Basis of Color-blind Politics*, in *The African American Predicament* 183 (Christopher H. Forman, Jr. ed., 1999) (noting that “[w]hen a group like blacks is perceived to benefit disproportionately from a program of government assistance and simultaneously is seen as not having tried to be self-reliant, there is risk of being stigmatized”); Martha A. Fineman, *The Inevitability of Dependency and the Politics of Subsidy*, 9 STAN. L. & POLICY REV. 89, 90 (1998) (noting that the pejorative use of the term “dependency” in welfare debate “justifies, even compels, negative judgments of individuals”; Lucie E. White, *No Exit: Rethinking “Welfare Dependency”*, 81 GEO. L. J. 1961, 1989 (1993) (observing that women “face shame if they stay on welfare” and noting that “the exits they are offered are really traps”); Robert Moffit, *An Economic Model of Welfare Stigma*, AMERICAN ECONOMIC REVIEW, Vol. 73, No. 5, at 1033 (1983) (modeling the decision to participate in welfare programs and concluding that stigma of participation arises “mainly from the act of welfare participancy per se”); Charles A. Reich, *Social Welfare in the Public-Private State*, 114 U. PENN. L. REV. 487, 491 (1966) (observing that “receipt of government aid by the poor has carried stigma whereas receipt of government aid by the rest of the economy has almost been made in to a virtue”); see also Michael K. Brown, *Race, Money, and the American Welfare State* 3 (1999) (observing that “[m]any, perhaps most, whites believe blacks are the authors, defenders and prime beneficiaries of wasteful, feckless, social policies that do more harm than good” and that “blacks [] are lazy, do not try hard enough to overcome economic liabilities, and are overly ‘dependent’ on welfare”); Paul M. Sniderman & Thomas Piazza, *The Scar of Race* 97 (1993) (noting that the stigma of dependence provokes opposition to additional welfare spending); Donald R. Kinder & Lynn M. Sanders, *Divided by Color: Racial Politics and Democratic Ideals* 121-22 (1996) (same).


173 Id. at 4-5.

heightened when differential treatment is placed against the backdrop of prevailing perceptions of racial minorities as educationally deficient or culturally inferior. Importantly, the stigma attaches whether one conforms to or deviates from prevailing perceptions. Conformity renders the individual, in Goffman’s words, “discredited,” while the absence of confirmation places the individual into the category of persons who are potentially “discreditable.” Thus, it matters not whether the individual actually receives differential treatment. In either case, proponents of this view believe that stigma attaches.

1. Stigma of Dependence Rhetoric in Modern Legal Discourse

Stigma rhetoric has proven a remarkably durable element of modern racial conservatism. Beginning in Fullilove, Justice Stevens warned that race-based preferences rooted in a history of oppression pose an inherent stigma because that history can be used “as a permanent source of justification for grants of special privileges.” For Stevens, such preferences posed a threat of dependence and fostered the assumption that minorities are less qualified solely because of race. His view that race preferences may impose a greater stigma on its supposed beneficiaries would later resurface in his concurring opinion in Croson.

But it is Justice O’Connor who makes the point most explicitly in Croson, where she proclaimed “[c]lassifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.” Justice O’Connor would return to this issue in Metro Broadcasting, where she argued that “[r]acial classifications, whether providing benefits to or burdening particular racial or ethnic groups, may stigmatize those groups singled out for different treatment and may create considerable tension with the Nation’s widely shared commitment to evaluating individuals upon their individual merit.”

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

So-called “benign” discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively,

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175 As Goffman writes:

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

Id. at 4.

176 Fullilove, 448 U.S. at 539.

177 Croson, 488 U.S. at 516-17.

178 Id. at 494.

179 Metro Broadcasting, 497 U.S. at 604.

180 Adarand, 515 U.S. at 241.
provoke resentment among those who believe that they have been wronged by the government’s use of race.\textsuperscript{181}

But it is Justice Thomas’ dissenting opinion \textit{Grutter v. Bollinger} that invokes the idea of stigma most forcefully. As Justice Thomas wrote,

The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the ‘beneficiaries’ of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma – because either racial discrimination did play a role, in which case the person may be deemed ‘otherwise unqualified,’ or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.\textsuperscript{182}

Justice O’Connor undoubtedly shared Justice Thomas’ concern regarding the stigma of dependence. Although she found diversity a compelling interest that warranted limited race preferences, her suggestion that “[w]e can expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interests approved today” arguable evinces a concern about the stigmatizing effect of long-standing reliance upon race preferences.\textsuperscript{183}

2. \textit{The Pedigree of Stigma of Dependence Rhetoric}

Modern fascination with the purportedly stigmatizing effects of being denoted a beneficiary of a race preference is arguably rooted in a deep disdain for racial paternalism and benign aspirations of achieving colorblind racial equality. Although stigmatic rhetoric is largely confined to debate over race preferences in education and employment, its lineage is traceable to disputes over racial reform designed to achieve mere equal citizenship for newly-emancipated blacks. Ironically, much of what was understood to comprise citizenship for whites at the time was characterized by nineteenth century racial conservatives as outside the scope of Negro citizenship. Importantly, any attempt to secure those features was roundly criticized as paternalistic and stigmatic.

Consider the debate over the establishment of the Freedmen’s Bureau. In addition to concerns about whether newly emancipated blacks were worthy of the bestowals offered by the Freedmen’s Bureau, opponents criticized the Act on the ground that it would only serve to reinforce black dependence on the State. In a report submitted by the Minority of the Select Committee on Emancipation to accompany the Bill to Establish a Bureau of Freedman’s Affairs, Congressmen Martin Kalbfleisch and Anthony Knapp condemned the Bill for creating a “new system of vassalage” reminiscent of slavery.\textsuperscript{184} According to the minority committee, the Bureau administrators would simply step into the shoes of the former master. “[T]he number of [bureau administrators] shall equal or

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\item \textsuperscript{181} Adarand, 515 U.S. at 241.
\item \textsuperscript{182} Grutter v. Bollinger, 123 S.Ct. 2325, 2362 (2003) (Thomas, J., dissenting).
\item \textsuperscript{183} \textit{Id.} at 343. However, to the extent that Justice O’Connor found the program objection at all, one might imagine that she would necessarily want to limit the program’s duration.
\item \textsuperscript{184} Congressional Globe, 38\textsuperscript{th} Cong., 1\textsuperscript{st} Sess., Rep. No. 2, at 2 (Jan. 20, 1864).
\end{itemize}
exceed the number of overseers formerly in use upon slave plantations,” and the organizing and coordination of freedman labor and land issues only “revives[s] most of the odious features of slavery without its name.” Under the Bill,

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

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

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

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

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

The significance of this point was not lost on Justice Harlan. In his dissenting opinion, Justice Harlan attempts in vain to persuade his colleagues of the folly of this reasoning. For Harlan, the 1875 Act was not a shameful measure that stigmatized newly emancipated blacks. To the contrary, it was a necessary in order to overcome the inertia


185 Id. at 3.
186 Id.
188 Congressional Globe, 39th Cong., 1st Sess., S.P. 917 (Feb. 19, 1866).
189 The Civil Rights Cases, 109 U.S. at 25.
The 1875 Act was fundamentally protective in Harlan’s view and no more or less stigmatic than the Bill of Rights. Nevertheless, the view that progressive racial policy posed a significant stigmatic threat would soon dominate nineteenth century racial jurisprudence, and continue to thrive in the modern era as well.

D. Domestic Tranquility

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

Three strands emerge in the rhetoric of domestic tranquility. The first and mildest of these strands is a claim of discomfort associated with the upheaval of established social norms and customs privileging whites. The threat of erosion of naturalized white privilege has fueled opposition to a host of reform measures, from segregation in railroad cars to opposition to interracial marriage to the siting of public housing developments to affirmative action.

The second strand is an expression of anxiety about escalating racial tension and, in particular, encouraging white racial hostility. White hostility, like minority reprisal for past injustices, poses a substantial threat the peaceful ordering of society. According to this view, progressive racial measures may benefit minorities in the short term, but they also serve to engender longstanding resentment among whites. Historically, opponents of progressive measures suggested such measures could incite outright violence. According to the modern restatement of this view, progressive racial measures not only risk exacerbating racial tensions, but also engender underground acts of racial retaliation. \(^{191}\)

\(^{190}\) Id. at 61-62.

\(^{191}\) See Richard A. Epstein, Forbidden Grounds 30 (1991) (arguing that employment discrimination laws actually serve to exacerbate discrimination in private transactions by reducing the flow of permissible information to employers, causing employers to resort to “crude proxies” in assessing employees). As Epstein explains, “To the extent, therefore, that the present anti-discrimination law imposes enormous restrictions on the use of testing, interviews, and indeed any information that does not perfectly individuate workers, then by indirection it encourages the very sort of discrimination that the law seeks to oppose.” Id. at 40.

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

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

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

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

Although the *Nation* report is a parodic response to the authentic accusation that newly-emancipated blacks would all become Mormons and use newfound political power to legislate polygamy, it nevertheless reveals something about the depravity of non-parody discourse of many nineteenth century public intellectuals who endorsed a grossly exaggerated image of Negro savagery to stoke white fears of racial retaliation. The image of racial retaliation was similarly, albeit less fantastically, invoked by Justice Scalia in *Richmond v. Croson*, when he questioned the intent of the majority-black Richmond City Council’s program that gave preference to minority contractors. Characterizing the Richmond plan as a form of racial payback, Scalia remarked “[w]here injustice is the game, . . . turnabout is not fair play.”

1. Domestic Tranquility Rhetoric in Modern Legal Discourse

The three strands of domestic tranquility rhetoric remain indispensable elements of modern racial conservatism. Consider the mildest strand of this rhetoric – the claim that racially progressive measures engender discomfort among whites who are called upon to endure radically destabilizing changes in prevailing modes of social interaction.

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192 *New Danger to the South*, *The Nation* (Vol. 1, No. 6 Oct. 19, 1865).
193 *See, e.g.*, J.H. Van Evrie, *White Supremacy and Negro Subordination* 314 (1868) (describing free blacks of Maryland and Virginia as “vicious as well as idle and non-productive, and every one of them a disturbing force – a dangerous element – which, in conjunction with a monstrous theory like those miscreants at Harpers Ferry, are always liable to be made instruments of fearful mischief.”); *see also Thomas Nelson Page*, *The Negro: The Southerner’s Problem* 115 (1904) (arguing that social equality has been understood by “the ignorant and brutal young Negro” to signify “the opportunity to enjoy, equally with white men, the privilege of cohabitating with white women,” and that the lynching of blacks was done largely to stall the “ravishing and tearing to pieces of white women and children”); George Fitzhugh, *Sociology for the South; or the Failure of Free Society* 82 (1854) (arguing the slavery is a civilizing institution for Negroes, without which the Negro “would become idolatrous, savage and cannibal”).
As Justice Rehnquist noted in *Weber*, fear of rapidly changing conventional practices that preserved the racial status quo in employment figured prominently in the minds of opponents to Title VII. According to Rehnquist, opponents were assured that:

> It is likewise not true that the Equal Employment Opportunity Commission would have power to rectify existing “racial or religious imbalance” in employment by requiring the hiring of certain people without regard to their qualifications simply because they are of a given race or religion. [It was generally understood that] [o]nly actual discrimination could be stopped [and that] [q]uotas are themselves discriminatory.\(^{195}\)

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

> Kaiser and the Steelworkers acted under pressure from an agency . . . which found that minorities were being “underutilized” at Kaiser’s plants . . . . Bowing to that pressure, Kaiser instituted an admissions quota preferring blacks over whites, thus confirming that the fears of Title VII’s opponents were well founded. Today, §703(j), adopted to allay those fears, is invoked by the Court to uphold imposition of a racial quota under the very circumstances that the section was intended to prevent.\(^{196}\)

Justice Rehnquist is not alone in his views. Like Justice Stevens in *Fulliove*, who saw far-reaching harms associated with the endorsement of a race preference in hiring, Justice O’Connor viewed the effects of race preference in the sale of broadcast licenses in *MetroBroadcasting* as “trivializ[ing] the constitutional command to guard against such discrimination and [advancing] a potentially far-reaching principle disturbingly at odds with our traditional equal protection doctrine.”\(^{197}\) Court endorsement of race preferences, in O’Connor’s view, threatened domestic tranquility insofar as it advanced social norms in tension with status quo equal protection jurisprudence.

The Ninth Circuit in *Hopwood* amplified the Court’s concerns in the educational context, invoking the specter of never-ending race preferences in its opinion. As the court observed, “[i]f a state can “remedy” the present effects of past discrimination in its primary and secondary schools, it also would be allowed to award broad-based preferences in hiring, government contracts, licensing, and any other state activity that in some way is affected by the educational attainment of the applicants.”\(^{198}\)

This is not unlike the argument advanced by the Supreme Court in *Washington v. Davis*,\(^{199}\) in which the Court refused to allow a litigant could use disparate impact theory to advance an Equal Protection challenge.\(^{200}\) The sheer breadth of transformative possibilities presented by the constitutionalization of this more thoroughgoing racial remedial scheme gave the Court substantial pause. As the Justice White explained, “[a] rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a

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\(^{196}\) Id. at 246.

\(^{197}\) Id. at 613.

\(^{198}\) Id. at 950.

\(^{199}\) 426 U.S. 229 (1976).

\(^{200}\) Davis, 426 U.S. at 239.
whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.\footnote{Davis, 426 U.S. at 248.}

In addition to expressing discomfort regarding changes in social norms, modern racial conservatives express deep concern that racially progressive policy might exacerbate racial tension and provoke white hostility. One of the most poignant expressions of these sentiments was advanced by Justice Stewart, who likened the federal codification of a race preference challenged in \textit{Fullilove} to the passage of odious Jim Crow legislation half a decade earlier. According to Justice Stewart, “[O]ur statute books will once again have to contain laws that reflect the odious practice of delineating the qualities that make one person a Negro and make another white.”\footnote{Id. U.S. 532.} Race preferences would not only reinforce the salience of the colorline, but also sanction racial animus and fuel the prospects of white retaliation:

Most importantly, by making race a relevant criterion once again in its own affairs, the Government implicitly teaches the public that the apportionment of rewards and penalties can legitimately be made according to race – rather than according to merit or ability – and that people can, and perhaps should, view themselves and others in terms of their racial characteristics. Notions of “racial entitlement” will be fostered, and private discrimination will necessarily be encouraged.\footnote{Id. at 532-33.}

Justice Stevens likewise expressed concern over the threat to domestic tranquility posed by race preferences. According to Stevens, a race preference “creates a monopoly for class of investors defined solely by racial characteristics [and monopolies not only lead to] high prices and shoddy workmanship, [but] engender animosity and discontent as well.”\footnote{Id. at 545.} Not only would this race preference fail to remedy current racial discrimination, but it would likely “engender resentment from [competitor] firms and skepticism on the part of customers and suppliers aware of the statutory classification.”\footnote{Id. at 545.}

The fear of stoking white hostility figured prominently in the Court’s rhetoric in \textit{Croson}. According to Justice O’Connor, “[c]lassifications based on race carry a danger of stigmatic harm.”\footnote{Id. at 494.} “Unless they are strictly reserved for remedial settings,” she continued, “they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”\footnote{Id.} The fear that attention to race – even for purportedly benign purposes – would result in racial balkanization also figured prominently in O’Connor’s rejection of the FCC’s race preference program in \textit{Metro Broadcasting}. According to O’Connor, “[t]he dangers of such classifications . . . clearly endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict.”\footnote{Metro Broadcasting, 497 U.S. at 603.} For O’Connor, some of this hostility stems from staunch adherence to the concept of merit. “Racial classifications,” she argued, “whether providing benefits to or burdening particular racial or ethnic groups, may stigmatize those

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\item[\footnote{Davis, 426 U.S. at 248.}]
\item[\footnote{Fullilove, 448 U.S. 531.}]
\item[\footnote{Id. U.S. 532.}]
\item[\footnote{Id. at 532-33.}]
\item[\footnote{Id. at 545.}]
\item[\footnote{Croson, 488 U.S at 494.}]
\item[\footnote{Id.}]
\item[\footnote{Metro Broadcasting, 497 U.S. at 603.}]
\end{itemize}
groups singled out for different treatment and may create considerable tension with the Nation’s widely shared commitment to evaluating individuals upon their individual merit.”

Concerns about exacerbating racial tensions frequently appear in arguments against race preferences in the education setting as well. Justice Powell, in *Bakke*, remarked that “[d]isparate constitutional tolerance of such classifications well may serve to exacerbate racial and ethnic antagonisms rather than alleviate them.” This theme is developed more fully in *Hopwood*, where the court proclaimed that “[d]iversity fosters, rather than minimizes, the use of race.” According to the *Hopwood* court, such a policy “treats minorities as a group, rather than as individuals” and while this “may further remedial purposes [it is] just as likely [to] promote improper racial stereotypes, thus fueling racial hostility.” The court also noted “one cannot conclude that a hostile environment is the present effect of past discrimination. Any racial tension at the law school is most certainly the result of present societal discrimination and, if anything, is contributed to, rather than alleviated by, the overt and prevalent consideration of race in admissions.”

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

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

In this case, blacks constitute approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks. The concern that

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209 *Id*. at 604.
211 *Hopwood*, 78 F.3d at 945.
212 *Hopwood*, 78 F.3d at 945.
213 *Id*. at 953.
214 *Grutter*, 539 U.S. at 377.
215 *Id*. at 394 (Kennedy, J., dissenting).
216 *Id*. 

a political majority will more easily act to the disadvantage of a minority based on
unwarranted assumptions or incomplete facts would seem to militate for, not against, the
application of heightened judicial scrutiny in this case. 217

Justice Scalia reinforced this claim. He too observed that in this instance, it was a
majority black city council that was advancing a race preference for minorities. Invoking
fears of minority retaliation, Scalia noted “Where injustice is the game, however,
turnabout is not fair play.” 218 Scalia maintained that, under the circumstances, the
Richmond legislature simply could not be trusted to advance a fair policy. He offered a
formal justification for this, remarking that Congress can legislate remedial actions
because of explicit power granted in 14th Amendment, not granted to states. 219 In
making this argument, however, Scalia suggested Congress possessed “dispassionate
objectivity” to mold race-conscious remedies which the Richmond city council lacked in
his view. 220

Nevertheless, Scalia went on to argue that race preferences, whether advanced by
Congress or a local legislature, threaten domestic tranquility because they only serve to
draw attention to race distinctions. According to Scalia, “[r]acial preferences appear to
‘even the score’ (in some small degree) only if one embraces the proposition that our
society is appropriately viewed as divided into races, making it right that an injustice
rendered in the past to a black man should be compensated for by discriminating against
a white.” 221 “Nothing,” he argued, “is worth that embrace.” 222 Or as Justice Kennedy
put it in his concurring opinion, “[w]e are left with an ordinance and a legislative record
open to the fair charge that it is not a remedy but is itself a preference which will cause
the same corrosive animosities that the Constitution forbids in the whole sphere of
government and that our national policy condemns in the rest of society as well.” 223

2. The Pedigree of Domestic Tranquility Rhetoric

The fact that modern racial conservatives, in the face of persistent racial
disparities in health, wealth and society, continue to highlight the possibility that
progressive racial measures may engender white discomfort, fuel white resistance, and
spark black reprisal, serves as an important reminder that a great deal of racial tension
remains fundamentally unresolved. Given that the historic origins of this tension, it is
perhaps unsurprising that nineteenth century racial conservatives, acutely aware of the
transformative possibilities presented by Reconstruction era racial reform, viewed much
of the proposed legislation as a supreme threat to white domestic tranquility. Much like
their modern counterparts, early racial conservatives articulated fears ranging from
psychic discomfort caused by mundane intrusions into everyday life to deep concerns
about the threat posed by the free exercise of black human agency and political power.

217 Id. at 495-96.
218 Id. at 524.
219 Id. at 521-22.
220 Croson, 448 U.S. at 522.
221 Id. at 528.
222 Id. at 528.
223 Id. at 519-20.
Concerns that progressive racial policy would upset the prevailing order of white privilege figured prominently in opposition to post-Reconstruction Civil Rights legislation. Consider the comments of Illinois Congressman Anthony Thornton:

I insist, sir, that the construction given to the [13th] constitutional amendment by gentlemen who advocate this bill is too broad, too latitudinarian. The sole object of that amendment was to change the status of the slave to that of a freeman; and the only power conferred upon Congress by the second section of that amendment is the power to enforce the freedom of those emancipated. Is it necessary to constitute a man a freeman that he should have conferred upon him all the civil rights and immunities provided for in this bill? [. . . ] Look at the conditions of those whom this bill is most to affect. Reflect upon the relations between the late master and his late slave. These relations have been such for long series of years as to engender a state of feeling which will prevent the Negro from being impartial and unbiased witness in controversies between white men . . . . I cannot consent to force upon the people of the Southern states, or of any of the States, the provisions of this bill. 224

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

That the immutable laws of God have affixed upon the brow of the white races the ineffaceable stamp of superiority, and that all attempts to elevate the Negro to a social or political equality with the white man are futile and subversive to the ends and aims for which the American government was established, and contrary to the doctrines and teachings of the Father of the Republic. 225

Domestic tranquility concerns similarly animated President Johnson’s explicit federalism objection to the Act. Johnson criticizes that Act as attempt to achieve “perfect equality of the white and colored races . . . fixed by Federal law in every state of the Union,” which, in Johnson’s mind, unduly imposes on state sovereignty. 226 According to Johnson, “In the exercise of State policy over matters exclusively affecting the people of each State it has frequently been thought expedient to discriminate between the two races.” 227 As an example of a State’s power to regulate its own citizenry, Johnson invokes the lightning rod of interracial intimacy:

By the statutes of some of the States, Northern as well as Southern, it is enacted, for instance, that no white person shall intermarry with a Negro or mulatto . . . . I do not say this bill repeals State laws on the subject of marriage between the two races, . . . I cite this discrimination, however, as an instance of the State policy as to discrimination, and to inquire whether if Congress can abrogate all State laws of discrimination between the two races in matters of real estate, of suits, and of contracts generally Congress may not also repeal State laws as to the contract of marriage between the two races. 228

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224 Congressional Globe, 39th Cong., 1st Sess. At 1156 (March. 2, 1866).
226 5 Messages and Papers of the Presidents 3605 (1914).
227 Id.
228 Id.
Beneath Johnson’s federalism objection, then, lies a deeper concern that the race preferences contemplated by the Act pose a viable threat to establish social hierarchy between the races.

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

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

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

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

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

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

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

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233 Id. at 2.
Nevertheless, the opponents to the 1875 Act held fast to the argument that such a progressive measure posed a threat to domestic tranquility.

The wholesale acceptance of this strand of domestic tranquility rhetoric by the end of the nineteenth century is perhaps exemplified by Justice Brown’s opinion in *Plessy*, which summarily declared that racial separation was both desirable and comfortable for whites and blacks alike. The Louisiana ordinance mandating segregation in railroad cars, according to Brown, was a “reasonable” race regulation that had been enacted “with a view to the promotion of [] comfort and the preservation of the peace and good order.”

The Court’s explicit endorsement of the comforts of white supremacy signaled the radical expansion of Jim Crow legislation, much of which was justified on similar grounds of domestic tranquility.

Nineteenth century racial conservatives also expressed deep reservations about the efficacy of empowering blacks as full citizens. Indeed, in his opposition to the 1866 Act, Johnson rhetorically speculates on just how far the Act might go in terms of upsetting domestic tranquility:

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

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

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

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235 For a discussion of the explosion in segregation laws across the country following the Court’s decision in *Plessy*, see *The Origins of Segregation* (Joel Williamson ed. 1968); C. Vann Woodward, *The Strange Career of Jim Crow* 97-109 (3rd ed. 1974) (noting spread of Jim Crow laws both before and after *Plessy*, which had the effect of “constantly pushing the Negro farther down”); C. Vann Woodward, *Origins of the New South* 1877-1913, 211-12 (Wendell Holmes Stephenson & E. Merton Coulter eds., 1951) (“It took a lot of ritual and Jim Crow to bolster the creed of white supremacy in the bosom of a white man working for a black man’s wages”); see also Richard H. Fallon, Jr., *Implementing the Constitution* 57 (2001) (noting that “in the wake of *Plessy*, legally mandated race-based segregation had suffused the social and political fabric of many states, especially in the South”); but see Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 48 (2003) (concluding that “the spread of segregation to new social contexts is also more plausibly attributable to factors other than *Plessy*” and noting that “white southerners generally codified that racial preferences first and tested judicial receptivity later”).

236 5 Messages and Papers of the Presidents 3606 (1914).

During a spirited debate, Congressman A. J. Rogers elaborated on his position:

Mr. Rogers: “. . . If you pass this bill, you will allow the Negroes of this country to compete for the high office of President of the United States. Because, if they are citizens at all, they come within the meaning and letter of the Constitution of the United States, which allows all natural born citizens to become candidates for the Presidency, and to exercise the duties of that office if elected.

Member: Are you afraid of that?

Mr. Rogers: I am afraid of degrading this Government. I am afraid of danger to constitutional liberty. I am alarmed at the stupendous strides which this Congress is trying to initiate. And I appeal in behalf of my country, in behalf of those that are to come after us, of generations yet unborn, as those now living, that conservative men on the other side should rally to the standard of sovereign and independent States, and blot out this idea which is inculcating itself here.”

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

IV. REASONS FOR THE REMARKABLE LONGEVITY OF CONSERVATIVE RACE RHETORIC

As demonstrated above, the dominant themes of racial conservatism have evolved little over the past 150 years. Their resilience presents a remarkable curiosity, especially given the radical societal transformation that occurred during this same period. American society has rejected explicit white supremacy in favor of the principle of colorblindness. The race relations debate has shifted from emancipation to citizenship to political rights to social quality to economic and educational opportunity. Yet the arguments to oppose racial progress remain fundamentally unchanged and, indeed, flourish in the modern era, despite the benefit of historical hindsight – hindsight that exposes the absurdity of previous opposition to racially progressive measures and reveals the pernicious origins of those arguments in the demonstrably retrograde political climate of the nineteenth century.

As the foregoing makes clear, these rhetorical forms are not mere vestiges of some bygone era. Human agency is everywhere and we choose how to respond to contentious issues of race. We inherit the world left by those who have come before us, but each generation decides on its own whether to stay the course or proceed headlong into new and unfamiliar territory. Indeed, progress in American race relations is a testament to the exercise of human agency. The situation is not different for those who oppose racial progress.

An examination of how and why particular words are used, and with what effects, illuminates substantial areas in the political and legal culture. Race rhetoric is the principal means through which we articulate racial ideology, and form our understanding

\[238\] Congressional Globe, 39th Cong., 1st Sess., H.P. 1122 (March 1, 1866).
of community and ultimately national identity. Thus, conservative race rhetoric can be powerfully understood to articulate and advance a racial ideology opposed to racial progress, and to construct and project an idealized form of national identity. This transhistorical national identity of racial conservatism can be understood as one that is: (1) collectively free from guilt associated with racial past because it understands racism as a function of individual racist acts rather than structural oppression; (2) grounded in a deep appreciation of merit that rewards only those that meet specific criteria of worthiness; (3) inclined to view progressive racial policy as stigmatizing of minorities; and (4) hesitant to adopt any approach that engenders discomfort of the majority or otherwise purports to upset the “natural” order of things. How we choose to talk about race tells us a great deal about who we are as Americans. It is crucial, then, that we attempt to account for the lasting attraction of conservative racial rhetoric. Possible explanations for this phenomenon are explored below.

A. The Durability of White Privilege

Perhaps the most attractive explanation for the continued reliance upon the basic rhetoric of racial conservatism is the durability of white privilege. Rigid notions of white supremacy in this country, instantiated in nearly every facet of intellectual, cultural, and political life, has been largely eradicated. But gauzy notions of exalted status possessed by virtue of being white or associated with whiteness linger and often crystallize into concrete and meaningful racial disparities. White privilege lives on in public education, reflected in entrenched segregation of schools and dramatic disparities in the quality of teachers and educational facilities.239 It persists in law enforcement, evidenced by ongoing disparities in automobile stops and searches and how whites interpret strategies of disparate law enforcement.240 It affects our perceptions of who is presumptively

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

240 See, e.g., DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 30 (2002) (noting that hit rates, defined at “the rates at which police actually find contraband on people they stop,” for African Americans and Latinos is the same or lower than the rate for whites); Samuel R. Gross & Katherine Y. Barnes, Road Work: Racial Profiling and Drug Interdiction on the Highway, 101 MICH. L. REV. 651, 655 (2002) (noting that in the period from 1997 to 2000, African Americans were seventeen percent of the drivers on a highway near Baltimore but that twenty-eight percent of those stopped were black and fifty-one percent of those searched were black). White privilege also affects community perceptions of racial disparities in law enforcement. As Donna Coker explains:
employable, and who should be denied a job opportunity.\textsuperscript{241} It shapes our retail purchasing experiences.\textsuperscript{242} It colors our perceptions of minority creditworthiness.\textsuperscript{243} It reinforces patterns of housing segregation\textsuperscript{244} and, by extension, exacerbates racial

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

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

\textsuperscript{241} Recent empirical studies demonstrate the benefits of whites in the employment context. In a recent study, researchers found that job candidates with “black sounding” names were significantly less likely to receive callback interviews. See Marianne Bertrand & Sendhil Mullainathan, Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination (July 2003), available at http://www.nber.org/papers/w9873. The authors sent resumes in response to help-wanted ads in Chicago and Boston newspapers, randomly assigning “very white sounding names (such as Emily Walsh or Greg Baker)” to half the resumes, and very African American sounding names (such as Lakisha Washington or Jamal Jones) to the other half.” Id. at 2. The researches discovered a 50 percent variance in callback rates. According to the authors of the study, “a White name yields as many more callbacks as an additional eight years of experience.” Id. at 3. Interestingly, the researchers found that firms listed as “equal opportunity employers” discriminate as much as other employers. See id. at 17. These findings are similar to those of a 1990 study conducted by the Urban Institute. See Margery Austin Turner et al., Opportunities Diminished: Racial Discrimination in Hiring, 11 URBAN INST. REPORT 91-9, (1991) (using pairs of trained auditors, one black, one white, to respond to newspaper advertisements for jobs in the Chicago and Washington D.C. area, and finding that the white auditors both advanced further in the hiring process and received job offers at a significantly higher rate than black auditors). However, some commentators maintain that class is more significant than race in shaping the employment opportunities of Blacks in postindustrial markets. See Chuck Collins & Felice Yeskel, Economic Apartheid in America: A Primer on Economic Inequality and Insecurity 45 (2000); Arthur Sakamoto & Jessie Tzeng, A Fifty-Year Perspective on the Declining Significance of Race in the Occupational Attainment of White and Black Men, 42 SOC. PERSP. 157, 170-74 (1999).

\textsuperscript{242} For a discussion of discrimination in retail purchases, see Ian Ayres, Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause, 94 Mich. L. Rev. 109, 116 (1995) (finding that black males received final offers that were, on average, $1,132 higher than those offered to white males); Ian Ayres, Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, 104 HARV. L. REV. 817 (1991) (reporting similar results using a smaller sample of testers).


\textsuperscript{244} Joe R. Feagin & Melvin P. Sikes, Living with Racism: The Black Middle Class Experience 269 (1994) (estimating that 60 percent of black home seekers face discriminatory treatment each year); see also Lawrence Mishel et al., The State of Working America: 2002/2003 at 283, 292 (2003) (observing
The presumption of entitlement and bestowal of credibility are but a few of the ways in which white privilege continues to shape our lives and institutions.

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

Critics point out, however, that eliminating consideration of race from our discourse leads to the opposite result of further entrenching racial disparities and solidifying core notions of white privilege. As Neil Gotanda explained, “Nonrecognition [of race] fosters the systematic denial of racial subordination and the psychological repression of an individual’s recognition of that subordination, thereby allow such subordination to continue.”

As Justice Blackmun argued in *Bakke*,

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

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

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245 See Margalynne Armstrong, *Race and Property Values in Entrenched Segregation*, 52 U. Mia. L. Rev. 1051, 1059 (1998) (observing that “white refusal to purchase property in locations where there are significant numbers of African-Americans means that the pool of potential buyers decreases, cutting the number of potential competing bidders for the property, resulting in lower purchase prices for black-owned property”); Melvin L. Oliver & Thomas M. Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Inequality* 147-51 (1995) (observing that the rate of appreciation in property values for whites was roughly double that for blacks).

246 William Van Alstyne, *Rites of Passage: Race, the Supreme Court and the Constitution*, 46 U. Chi. L. Rev. 775, 809-10 (1979).

247 Gotanda, *supra* note at 12.

248 Bakke, 438 U.S. at 407.

249 See e.g., *The American Heritage® Dictionary of the English Language* (4th ed. 2000) (defining privilege as “a special advantage, immunity, permission, right, or benefit granted to or enjoyed by an individual, class, or caste”); Webster’s Revised Unabridged Dictionary (1998) (defining privilege as “a peculiar benefit, advantage, or favor; a right or immunity not enjoyed by others or by all; special enjoyment of a good, or exemption from an evil or burden; a prerogative; advantage; franchise”); Black’s Law Dictionary (6th ed. 1990) (defining privilege as “a particular or peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of other citizens”).

surprisingly, a great deal of American popular culture is dedicated to both the pursuit and
demystification of privileged status. For better or worse, we all aspire to be privileged
in some way and, once obtained, privilege proves notoriously difficult to relinquish. This
is especially true in the American racial context where white-skin privilege has thrived
unabated for nearly four centuries.

Conservative race rhetoric may prove transhistorically seductive because it
appeals to and reinforces core aspects of white privilege. In this way, it proves attractive
to attitudinal racists and non-racists alike. The attitudinal racist subscribes to white
supremacy and self-consciously supports individual and institutional practices that
explicitly and implicitly promote white privilege and affirm the exalted status of whites.
It declares whites innocent of racial wrongdoing while simultaneously casts proponents
of racially progressive measures as political insurgents (or worse yet, “reverse racists”)
who seek to upset the natural order of American life. Conservative race rhetoric is
appealing because it functions as a competent mechanism through which the attitudinal
racist can project and protect the image of a racially hierarchical society.

By contrast, the non-racist does not self-consciously subscribe to individual and
institutional practices that work to subordinate racial minorities. But the non-racist does
indulge in and enjoy the benefits of white privilege. For the non-racist submerged in the
privilege of whiteness, arguments steeped in resistance rhetoric resonate deep within, and
such individuals may find themselves drawn in naturally. The tacit embrace of
conservative race rhetoric by non-racists, though notably distinct from the self-conscious

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251 America’s longstanding obsession with celebrity status and “VIP treatment” is most powerfully
reflected in today’s television offerings directed at America’s youth audience. Reality television series
such as Fox’s American Idol, CBS’s Survivor and Big Brother, and NBC’s The Apprentice offer the
promise of instant celebrity and presumptive privileged status. Other examples include: Home Box
Office’s new dramatic series “Entourage,” which chronicles the fictional lives of the friends and groupies
of a new Hollywood star; Cable Television VH1 Channel’s documentary series “The Fabulous Life of . . .”
which offers viewers a “fast-paced, first class joy ride of lavish living, as we check out the fortune building
careers and businesses of the extremely rich and famous and the incredible indulgences that come with it,”
see advertisement copy, available at http://www.vh1.com/shows/dyn/fabulous_life_of/series.jhtml; and
VH1’s sister network, Music Television (MTV)’s “Newlyweds” reality series, which attempts to demystify
the celebrity lifestyle by offering a “realistic” glimpse into the lives of recording artist Nick Lachey (former
lead vocalist of 98 Degrees) and pop icon Jessica Simpson.

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

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

BARBARA J. FLAND, WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW 146
of white supremacy, whites gain positive associations of honesty, reliability, industry, intelligence, and
morality in comparison to blacks. To increase the status of blacks in society means that these positive
associations must be weakened or eliminated.”). For a fuller discussion of white privilege, see STEPHANIE
embrace of attitudinal racists and arguably less retrograde, is nonetheless deeply troubling.

B. The Desire for Psychic Comfort

The seductiveness of conservative race rhetoric is also attributable to the myriad forms of psychic comfort they engender. Consider the rhetoric of racial innocence. The rhetoric of racial innocence is particularly comforting because it rejects structural accounts of racism and racial subordination in favor of a purely attitudinal model of racism that focuses exclusively upon bad racial actors. It absolves those whites who benefit from racial privilege of any responsibility for the sorry state of race relations and any duty to undertake efforts to ameliorate racial disparities in the material conditions of racial minorities.

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

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


254 For an analysis of the quest for educational and occupational credentials in American society, see DAVID K. BROWN, DEGREES OF CONFLICT: A SOCIOLOGY OF EDUCATIONAL EXPANSION AND OCCUPATIONAL CREDENTIALIZATION (1995) and Randall Collins, Functional and Conflict Theories of Educational Stratification, 36 AMERICAN SOCIOLOGY REVIEW 1002-119 (1971). For an analysis of social climbing and the pursuit of social capital in the employment context, see STEPHEN J. McNAMEE & ROBERT K. MILLER, JR., THE MERITOCRACY MYTH 71-94 (2004). For an interesting economic analysis of the “snob” effect and efforts to achieve social status through acquisition of fashion accessories, see Philip R. P. Coelho and James E. McClure, Toward an Economic Theory of Fashion, 31 ECONOMIC INQUIRY 595, 600 (1993) (noting that “fashion goods signal status” and that fashionable clothing must change because “[t]o be an effective signal, the fashion good must be more costly to obtain for those who do not possess the status than for those who do”).

Comfort in the illusion of merit is enhanced because it explains and ameliorates suspicion triggered by demonstrable disparity. Progressive racial policies pose a direct challenge to the legitimacy of racial hierarchy by calling attention to inequalities among groups and highlight the social and cultural insecurities of those with whom they interact. Merit rhetoric reduces the shock value of racial disparities because it not only justifies inequality, but envelopes inequality within an aura of naturalness. It seduces whites into attributing social rank to efforts of the individual and evading contemplation of exogenous explanations for natural hierarchy. This evasion of structural accounts of racial subordination has led some commentators to question whether whites continue to believe that racism affects the life chances of minorities.\textsuperscript{256}

Finally, the remarkable effectiveness conservative race rhetoric in stymieing racial progress is comforting to those who are resistant to social change of any sort. One of the principle arguments confronting civil rights proponents was that transformations in law and political discourse were outpacing changes in the hearts and minds of people. The interest in gradualism was exemplified by William Graham Sumner’s proclamation that stateways cannot change folkways\textsuperscript{257} and the Supreme Court’s “all deliberate speed” pronouncement in \textit{Brown II}, which implicitly sanctioned resistance to desegregation efforts.\textsuperscript{258} Martin Luther King, Jr. famously warned Americans during the civil rights era that “this is no time to engage in the luxury of cooling off or to take the tranquilizing drug of gradualism.”\textsuperscript{259} Resistance rhetoric remains seductive because it satisfies our desire to remain comfortably ensconced in the pleasures of the status quo.

\textbf{C. The Pursuit of Analytic Elegance}

Conservative race rhetoric may prove particular seductive to lawyers and politicians because it promotes the illusion of administrative ease and analytic elegance. The \textit{Plessy} Court’s suggestion that segregation was simply a “reasonable” race distinction innocently deployed in accordance with established usages and customs provided an elegant resolution to the issue because the habits and customs were well

\begin{itemize}
\item \textsuperscript{256} See \textit{Wards Cove Packing Co. v. Atonio}, 490 U.S. 642, 662 (1989) (Blackmun, J., dissenting) (“One wonders whether the majority [of the Supreme Court] still believes that race discrimination – or, more accurately, race discrimination against nonwhites – is a problem in our society, or even remembers that it ever was”); Kimberlé Crenshaw, \textit{Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law}, 101 HARV. L. REV. 1331, 1348 & n.66 (1988) (most white Americans do not believe that racism still denies equal social and economic opportunities to blacks); Mari Matsuda, \textit{Public Response to Racist Speech: Considering the Victim’s Story}, 87 MICH. L. REV. 2320, 2327 (1989) (observing that whites tend to deny the reality of racism).
\item \textsuperscript{257} \textit{WILLIAM GRAHAM SUMNER, FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS} 77-78 (1906) (lamenting the “vain attempts . . . to control the new [racial] order by legislation” following the Civil War and observing that “what one thinks ought to be, but slightly affects what, at any moment, is”).
\item \textsuperscript{258} For an interesting discussion on the comfort engendered by racial segregation on college campuses, see Dennis Chong, \textit{Values Versus Interests in the Explanation of Social Conflict}, 144 U. PENN. L. REV. 2079, 2114 (1996) (noting that “[a]lmost Cornell University, the comfort and appeal of one’s own racial and ethnic group conventions has promoted several minority groups to establish separate dormitories on campus, which has intensified the pattern of voluntary housing segregation that already existed.”).
\item \textsuperscript{259} Dr. Martin Luther King, Jr., \textit{Address at the March on Washington, Washington, D.C.} (August 28, 1963) in \textit{A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.} 218 (JAMES M. WASHINGTON, ED. 1986).
\end{itemize}
known expressions of white supremacy. The prevailing opposition to affirmative action likewise reflects a similar desire to achieve analytic elegance. This position is exemplified by Justice O’Connor’s argument in Adarand that all racial classifications – federal and state, benign and invidious – should be subject to strict scrutiny and tested against the moral imperative of colorblindness. But as a number of commentators point out, the analytic elegance comes at a price. Beneath the veneer of elegance lie a host of critical assumptions about the nature of racism, the kinds of conduct that will be deemed actionable, but most importantly, the appropriate means of engaging matters of race. As Daniel Farber suggests, “a Court obsessed with theoretical consistency might be less able to play a useful role in the practical tasks of democratic government.”

One of those practical tasks is to protect the interests of minorities against retrograde political choices of the majority, and this entails consideration of the impact of such policies. The simple elegance of the ideal of colorblindness and deductive logic thwarts this important function.

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

D. The Effects of Interest Divergence

Professor Derrick Bell’s analysis of interest convergence may also help to explain why traditional conservative race rhetoric has proven so durable. Bell developed his theory of interest convergence to reconcile the principled success and practical failure of school desegregation efforts. The Supreme Court’s unanimous declaration that segregation in public education was unconstitutional and inherently unequal was, in the view of many, a milestone achievement in the legal struggle for racial justice. Yet as historians and social scientists point out, desegregation remedies failed to live up to Brown’s promise.

According to Bell, the promise and concomitant failure of Brown could be explained in terms of interest convergence. According to Bell, “[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”

“[T]he Fourteenth Amendment, standing alone,” Bell wrote, “will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior society status of middle- and upper-middle class whites.” Bell argued that the interests of whites and blacks were aligned when it came to asserting a principled objection to segregation in public schools. As an initial matter, Bell argued that the Brown decision lent credibility to American Cold War efforts to persuade emerging third-world countries to reject communism. Second, Bell observed, “Brown offered much needed reassurance to American blacks that the precepts of equality and freedom so heralded during World War II might yet be given meaning at

262 Bell, supra note __ at 523.
In this way, *Brown* helped to quell rising anger, resentment, and disillusionment among blacks that posed a threat to national stability. Third, Bell suggested that many whites viewed the presence of segregation, especially in the South, as a threat to further industrialization. As Bell recounted, “there were whites who realized that the South could make the transition from rural plantation society to the sunbelt with all its potential and profit only when it ended its struggle to remain divided by state-sponsored segregation.”

By contrast, the interests of whites and blacks diverged when it came to the issue of remedy. This was especially true among poor whites, noted Bell, who stood to lose control over their local school systems. Poor whites experienced a sense of betrayal when it came to the issue of desegregation because, as Bell explained, “[t]hey had relied, as generations before them, on the expectation that white elites would maintain lower-class whites in a societal status superior to that designated for blacks.” Subsequent court decisions that retreated from the bold relief pronounced in *Brown* proved evidence that “the convergence of black and white interests that led to *Brown* in 1954 and influenced the character of its enforcement had begun to fade.”

It is arguable, then, that modern racial conservatives continue to rely upon the same forms of resistance rhetoric simply because they have proven particularly effective a thwarting racial justice initiatives when political interests diverge. Note that, under this view, one who avails himself of the rhetorical forms need not subscribe fully to the historic or contemporary ideology of racial subordination from which these rhetorical forms emanate. Sincere belief in white innocence or the stigmatizing effects of

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263 Bell, *supra* note __ at 524.
264 Bell, *supra* note __ at 525.
265 Bell, *supra* note __ at 526-27.
266 Bell, *supra* note __ at 525-26.

For discussion on the limited practical impact of the *Brown* decision on school segregation, see GERALD N. ROSENBERG, *The Hollow Hope: Can Courts Bring About Social Change?* 157 (1991) (concluding that there is “little evidence that the judicial system, from the Supreme Court down, produced much of the massive change in civil rights that swept the United States in the 1960s”); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 10, 13 (1994) (using empirical evidence to support an argument that little changed in the South immediately post-*Brown* and noting that *Brown’s* short-term effects were “indirect” and “almost perverse”); Stuart Scheingold, *Constitutional Rights and Social Change: Civil Rights in Perspective, in Judging the Constitution: Critical Essays on Judicial Lawmaking* 73, 80 (Michael W. McCann & Gerald L. Houseman eds., 1989) (“[C]ourts have sufficient power to politicize—to provoke a crisis—but not to effect social change on their own.”).

affirmative action, for instance, typically do not figure into the traditional libertarian approach to affirmative action policy. The objection is grounded typically in a sincere belief that government regulation is usually less efficient than private ordering, that racial discrimination is inefficient, and that market-based approaches to racial regulation will produce the optimal level of deterrence for bad actors. Yet to the extent that the interest of libertarians and minorities diverge on the issue of affirmative action, libertarians may choose to deploy traditional forms of conservative race rhetoric simply to protect their interests. Thus, principal arguments of racial conservatism remain a part of the political repertoire mainly due to their efficacy. Furthermore, one can imagine that, should these arguments lose that efficacy, racial conservatives would freely abandon these forms for new ones that more adequately protected their interests.

**E. The Deficit of Political Imagination**

Although the logic of interest convergence is compelling, one might also attribute the longevity of conservative race rhetoric to a sheer deficit of political imagination. For many Americans, it is impossible to image a world in which consideration of race does not present a catastrophic threat to either the lives of whites or minorities. Conservative race rhetoric capitalizes on prevailing perceptions that racial progress is a zero-sum affair and that taking race into account necessarily harms whites, minorities, or both. As Justice Thomas declared in the Court’s most recent race case, race-based decisionmaking is categorically “demeaning to us all.”

Conservative race rhetoric also revels in racial tension, seeking to inflame the passions of whites in order to rally against the perceived racial and cultural insurgency that threatens to undermine the virtues of American society. Continued reliance upon conservative race rhetoric reinforces the emaciated view of the world around us.

In a very real sense, racial conservatism works not only to stifle racial progress, but also stunts the growth of our political imagination. Racial progressives seek to challenge prevailing notions of political community by brushing traditional understandings of equality and inclusion against the grain. Progressive racial measures attempt to expand opportunities for racial minorities and, in turn, realize the democratic possibilities of American society. Staunch adherence to traditional forms of resistance rhetoric not only signals a commitment to stifle racial progress, but exudes a nostalgia for uninspired democracy.

The essential task is to persuade racial conservatives to muster the courage to imagine greater possibilities of racial inclusiveness, and to inspire a critical intelligence that disciplines the almost reflexive impulse to view racially progressive measures in tragic or catastrophic terms. The genius of our Founding Fathers was that they understood the organic nature of democracy and the vital role of political imagination in maintaining and ensuring national stability and longevity. The race issue has proven particularly divisive throughout history precisely because it calls upon each of us to imagine an American democracy capable of confronting and responding meaningfully to the absurdity of racial injustice. In this way, political imagination serves as both the

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268 Grutter, 538 U.S. at 377.
269 Operationalizing political imagination undoubtedly carries with it substantial risks. But as Cornel West remarks in his most recent meditation on the future of American democracy, “if we lose our precious
first and final frontier for conscientious dialogue on the future prospects of racial progress.

V. A FOUNDATION FOR RENEWED RACIAL DIALOGUE

Our failing public conversation on race matters not only presents a particularly tragic moment in American race relations, but evinces a greater failure of democracy. Sustained, meaningful dialogue is critical, if not indispensable feature of our liberal democracy. It is through meaningful public conversation about what actions government should take (or refrain from taking) that public policy determinations ultimately gain legitimacy. Conversation is particularly important in our democracy, given the profoundly diverse and often contradictory cultural and political traditions that are the \textit{sin qua non} of American life. Under these particular circumstances, “persons ought to strive to engage in a mutual process of critical interaction, because if they do not, no uncoerced common understanding can possibly be attained.”

Sincere deliberation, in its broadest idealized form, ensures that a broad array of input is heard and considered, legitimizing the resulting decision. Under this view, “if the preferences that determine the result of democratic procedures are unreflective or ignorant, they lose their claim to political authority over us.” In the absence of self-conscious, reflective dialogue, “democracy loses its capacity to generate legitimate political power.”

In addition to legitimizing the exercise of state authority in a liberal democracy, dialogue works to promote individual freedom. The power to hash over our alternatives democratic experiment, let it be said that we went down swinging like Ella Fitzgerald and Muhammad Ali – with style, grace, and a smile that signifies that the seeds of democracy matters will flower and flourish somewhere and somehow remember our gallant efforts.”

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\textsuperscript{271} \textsc{Robert Post}, \textit{Constitutional Domains} 143 (cloth ed. 1995).

\textsuperscript{272} \textsc{James Fishkin}, \textit{Democracy and Deliberation: New Directions for Democratic Reform} 29 (1991).

\textsuperscript{273} \textsc{James Bohman}, \textit{Public Deliberation: Pluralism, Complexity, and Democracy} 238 (cloth ed. 1996).
is an important exercise of human agency. If democracy is taken to mean rule by the people themselves, then conversation and deliberation are the principal means through which we declare and assert the power to shape our own belief systems. The roots of this idea of dialogue as freedom-promoting are traceable to the Kantian view that individual motivation that is either uncriticized or uncontested can be understood on a deeper level as a mode of subjugation. As Frank Michaelman explains, “in Kantian terms we are free only insofar as we are self-governing, directing our actions in accordance with law-like reasons that we adopt for ourselves, as proper to ourselves, upon conscious, critical reflection on our identities (or natures) and social situations.” Because “self-cognition and ensuing self-legislation must, to a like extent, be socially situated,” Michaelman continues, “norms must be formed through public dialogue and expressed as public law.” In this way, dialogue as democratic modus operandi can be understood both as a material expression of freedom and as a mechanism to promote individual freedom.

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

For these reasons, the collective aspiration of those interested pursuing serious, sustained, and policy-legitimating dialogue on race matters must be to cultivate a reasoned discourse that is relatively free of retrograde ideological baggage that feeds skepticism, engenders distrust and effectively forecloses constructive conversation on the most corrosive and divisive issue in American history and contemporary life. As the foregoing sections suggest, the pedigree of modern racial conservatism and the continued reliance upon nineteenth century conservative race rhetoric has and continues to poison racial legal discourse. But what impact should this pedigree and its longevity in modern racial discourse have? How does this revelation impact the future of conversation on race matters?

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276 Id. at 27.
279 See Elster supra note __ at 12-13; Festenstein supra note __.
280 GUNDERSEN, supra note __ at 121-22.
One can imagine at least three responses. As an initial matter, one might subscribe to the view that pedigree is not destiny, and thus conclude that the family resemblance that modern racial conservatism shares with nineteenth century racial conservatism tells us little, if anything, about the normative commitments of modern racial conservatives. Consider the argument that the benefits of white privilege do not extend equally among all whites, and that policies that treat all whites as equally guilty of racial subordination advance a theory of undesirable rough justice. Although this argument is a staple of modern racial conservatives, it would be a mistake to conclude that it can only be deployed by those persons who normatively oppose race preferences. Indeed, one might very well support race preferences, but believe quite strongly that such programs should be particularly sensitive to individual candidate qualifications.

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

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

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

At the other end of the responsive spectrum is wholesale rejection. One might view the pedigree of modern racial conservatism as providing good reason to dismiss racial conservatives entirely. Proponents of this view may choose to indulge fully this liberal skepticism, and simply reject the message along with the conservative

283 See Lui supra note 65.
The tradition of legal discourse on American race relations has been one steeped in racial animus and characterized by circumlocution, evasiveness, reluctance and messenger. The tradition of legal discourse on American race relations has been one steeped in racial animus and characterized by circumlocution, evasiveness, reluctance and...

denial. Racial conservatism, instantiated in law and legal institutions, provided a robust architecture for a system of devastating racial oppression from which blacks have yet to fully recover. When modern racial conservatives avail themselves of rhetorical strategies used by nineteenth century legal elites, they necessarily invoke the specter of this tragic racial past. In the nineteenth century, conservative race rhetoric was inextricably linked to a deep normative commitment to racial subordination. Modern racial conservatives openly profess their commitment to racial egalitarianism. However, their continued reliance upon traditional conservative race rhetoric to justify a system that only modestly responds to persistent racial disparities in the material lives of racial minorities suggests a deep, unarticulated normative commitment to preserving the racial status quo in which whites remain comfortably above blacks. Thus, the steadfast reliance upon traditional conservative race rhetoric, coupled with a profound disconnect between claims of racial egalitarianism and material conditions of racial subordination as a result of persistence racial disparities, spoils the credibility of modern racial conservatives and creates an incentive for racial progressives to dismiss conservatives without serious interrogation, consideration, and weighing of the arguments they advance.

The principal deficit of this approach is that it would serve only to concretize the existing conversational impasse and subvert the larger aspiration of seeking constructive solutions to pressing racial issues. It creates an incentive to view race matters in purely ideological terms, and further subverts the possibility of reasoned policy debate. Speaking of race matters in purely ideological terms poses a serious impediment to racial conversation because, in advancing one’s position, one essentially argues that a particular set of circumstances demands a particular outcome. In this way, purely ideological race rhetoric functions much like philosopher Immanuel Kant described in The Groundwork of the Metaphysics of Morals. According to Kant, a moral imperative is categorical insofar as it is presented as objectively necessary, without reference to some purpose or outcome. The imperative is the end in and of itself. As Kant explained, the moral imperative “has to do not with the matter of the action and what is to result from it, but with the form and the principle from which the action itself follows; and the essential good in the action consists in disposition, let the result be what it may.” Because the moral imperative embodies that which is morally good, it necessarily makes a claim about justice. In short, an act is deemed morally just to the extent that it retains fidelity to the moral imperative.

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

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286 IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (Mary Gregor Transl. 1997).
287 Id. at 27.
288 Culp, supra note ___ at 170; see also Linda H. Edwards, The Convergence of Analogical and Dialectical Imaginations in Legal Discourse, 20 LEGAL STUD. F. 7, 10 (1996) (describing policy arguments as arguments about the way the world works, or arguments that a proposed rule will benefit society by serving a particular social function); Wilson R. Huhn, Teaching Legal Analysis Using a Pluralistic Model of Law, 36 GONZ. L. R. 433, 485 (2001) (noting that “[t]he distinctive feature of policy arguments is that they are consequentialist in nature”).
Neither side of a moral debate is likely to be persuaded by proof that the policy claims support or discredit their moral positions. Policy arguments can be disproved by empirical evidence and challenged by showing in some situations the policy does not work or has contrary results. To refute a moral claim, however, first requires some agreement on the moral framework. Only then can one discuss whether the moral policy advocated conforms to the agreed-upon framework.  

Speaking about race matters in purely ideological or moral terms creates the impression that a particular racial policy is rooted in some theory of what is morally just. In this way, racial conservatism is made to appear “above the fray” of politics and less susceptible to public choice debate. In addition, it enables opponents of racial progress to claim that racially progressive measures merely reflect the political whims of its proponents, unanchored by principle or a coherent theory of social justice.

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

A third, and perhaps more promising path, involves a partial embrace of liberal skepticism with a view toward stimulating improved dialogue and the transparent, healthy exchange of ideas. Under this view, modern racial conservatives who traffic in nineteenth century rhetorical styles and argument trigger a strong, but rebuttable presumption that modern racial conservatives are self-consciously engaged in a project of racial subordination fundamentally at odds with their professed aspiration of producing a racially egalitarian society. But rather than reject racial conservatism categorically, proponents of this view may call upon racial conservatives to rebut this presumption by laying bare their normative commitments and subject those normative commitments to

[289] Id. at 170.
[291] See infra text accompanying notes (describing the prevailing view that current racial legal discourse is plagued by bitterness and resentment).
closer scrutiny. Rebutting this presumption would require modern racial conservatives to acknowledge the devastating effects of racial conservativism in the past (in order to establish baseline credibility), and offer a convincing explanation of how today’s racial conservativism purports to do something other than perpetuate status quo inequality.

The rebuttable presumption framework is an important feature of antidiscrimination law precisely because it facilitates deep interrogation of motives for conduct that often appears superficially free of bias, but where there is strong reason to believe otherwise. For instance, an individual who claims to have been racially discriminated against by a would-be employer carries the initial burden of establishing a prima facie case of racial discrimination by showing that he or she (a) belongs to a racial minority; (b) applied for a job for which the employer was seeking applications; (c) was rejected despite being qualified for the position; and (d) that after the complainant’s rejection, the employer continued to seek applications. Once the complainant establishes these facts, the burden shifts to the employer to show some legitimate, non-discriminatory reason for the employer’s adverse decision to the complainant. Then, the complaint must be given the opportunity to show that the employers purported decision is a pretext for a racially discriminatory decision.

Courts employ a similar framework to interrogate lawyer’s motives in striking jurors from cases. In addition to challenges for cause – in which a juror may be eliminated for a specific, articulated reason – a lawyer may also use a limited number of preremptory strikes to eliminate potential jurors without providing an explicit reason for doing so. However, if it appears that a potential juror was eliminated on the basis of race or gender, the lawyer may be called upon to explain the race-neutral or gender-neutral motivation for striking that particular juror. However, the lawyer’s strike may still be

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overturned if the complaining party can convince the Court that the explanation offered is a mere pretext.\textsuperscript{293}

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

Ideally, the burden shifting framework provides a mechanism through which we gain a deeper understanding both of the conduct at issue and the underlying motives and normative commitments of those who engage in such conduct. However, this ideal proves far more elusive in practice. As scholars have pointed out over the years, lower courts often reduce the “burden” on those accused of discrimination in jury selection through non-critical acceptance of a host of race- and gender-neutral explanations for peremptory strikes.\textsuperscript{294} Moreover, racial discrimination in the employment context is particular difficult to discern. For instance, an interviewing panel might claim that the job applicant did not interview particularly well – a claim that is incredibly difficult to refute. The same is likely true of the contention is that the applicant did not demonstrate strong “people skills” during the interview process. Moreover, it would be equally difficult to argue that these proffered explanations are a mere pretext.

Despite these shortcomings, the presumption framework provides the most compelling prospect for achieving robust, constructive dialogue on race matters. As an initial matter, it avoids the destructive closing-ranks mentality. It also may prove effective in de-escalating racial hostilities because it provides a mechanism for structured interrogation of the conservative position that acknowledges and affirms liberal skepticism, but highlights a pathway for continued dialogue that steers clear of the


\textsuperscript{294} See United States v. Martinez, 168 F.3d 1043, 1047 (8th Cir. 1999) (noting that poor eye contact is a legitimate race-neutral reason for striking a juror); United States v. Fields, 72 F.3d 1200, 1206 (5th Cir. 1996) (same); Polk v. Dixie Ins. Co., 972 F.2d 83, 85-86 (5th Cir. 1992) (same); United States v. Bishop, 959 F.2d 820, 821, 827 (9th Cir. 1992) (Holding that the potential bias of minority jurors living in low income neighborhoods is a legitimate race-neutral reason for striking a juror); Rice v. State, 746 S.W.2d 356, 357 (Tex. App.--Fort Worth 1988, pet. ref’d) (holding that poor spelling on a juror information card is a legitimate race-neutral reason for striking a juror).
nihilism and despair that plagues many racial progressives. Because the presumption is rebuttable, the framework may prove effective in breaking the cycle of resentment.

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

Although the burden shifting framework provides a useful mechanism to promote democracy-enhancing dialogue on race matters, one can anticipate a number of objections that may problematize the ability to capitalize on this approach in this particular context. First, modern racial conservatives may bristle at the idea that the mere deployment of traditional conservative race rhetoric should trigger elevated scrutiny of the normative commitments of the speaker. However, the history of American race relations and the persistence of racial disparities in health, wealth, and society suggest that a presumption of good faith is simply not warranted. Nineteenth century racial conservatism nurtured and sustained devastating modes of racial oppression. Although modern racial conservatism has largely broken free of its white supremacist origins, it nevertheless works to concretize the current state of racial inequality. If modern racial conservatives are to be viewed as partners in the search for a clear vision of the public good, then their underlying normative commitments must be professed and scrutinized.295

Second, one may argue that the additional burden of having to lay bare one’s normative commitments whenever advancing traditional conservative arguments may create an incentive to avoid inflammatory rhetoric, but may also motivate racial conservatives to “disguise” race rhetoric in order to mask the motive, or refrain from dialogue altogether. As Richard Epstein once observed,

Any sound overall assessment cannot ignore the material effects that such litigation has on the creation of new jobs for other workers. Tracing down these consequences will be hard. Firms are not likely to announce that their decisions are made to minimize the adverse effects of the civil rights laws. They are not likely to broadcast their strategy. The effects are likely to be large and significant, but they also will be hidden from view. They may involve decisions on where to build the next new plant; or to decide which of two plants the firm will expand and by how much; or to decide which plant the firm will shut down.296

Although the risk that some modern racial conservatives, wary of exposing their true beliefs, might seek to mask their normative commitments and subvert the dialogue is real, it nevertheless reveals something about the nature of their commitment to the purportedly shared enterprise of racial progress. The burden shifting framework structures dialogue in a way that tends to expose insincere posturing, thereby creating an incentive not to

295 Moreover, there is no reason to think that this framework should not apply to racial progressives as well – the virtue of transparency is good for all sides of the debate.
participate in an overly strategic fashion. If nothing else, simple confirmation that these individuals lack the will to engage in serious, transparent dialogue will work to undermine their credibility and effectively diminish the persuasiveness of their positions.

Third, conservatives may be skeptical that the burden shifting framework will produce that sort of engaged dialogue that it promises, given the entrenched nature of the liberal and conservative positions. Constructive dialogue presupposes that conversants are willing to move a meaningful distance from their initial position. But this is not always possible. Consider the example of a religious fundamentalist. Not only is it central to her religious beliefs that she is one hundred percent correct and everyone else is one hundred percent incorrect on certain issues, but the basic presupposition that makes dialogue function to legitimate public policy is incompatible with her beliefs. Indeed, the prospect of dialogue is particularly dim precisely because what the fundamentalist believes is diametrically opposed to the nature of deliberative dialogue itself.297 Within the framework of dialogue, the fundamentalist is the prototype of the immovable deliberator.298

William Simon identifies subscribers to identity politics as a second class of immovable deliberators. According to Simon, minorities who subscribe to identity politics feel their sense of self-worth is so bound up with affirmative action that the validity of race preferences is simply not open to debate.299 Taken together, one might hypothesize that any time an issue becomes bound up too tightly with one’s identity – be it religious identity, racial identity, or any other kind of identity, one can no longer hear debate about that issue without hearing debate about oneself, which makes addressing arguments qua arguments on the merits exceedingly difficult.

To be sure, the presence of immovable deliberators may result in a conversation on race matters that falls short of the idealized form envisioned by a burdenshifting framework, but imperfect dialogue is arguably better than no dialogue at all. Moreover, reasoned dialogue on race matters is not the be-all-end-all of American race relations. Indeed, sustained, meaningful conversation may not be the sliver bullet that will end racial conflict for all time.300 However, it is perhaps the most important tool we have to provide a deeper understanding of the normative and substantive terrain that must be negotiated as we strive collectively toward the larger goal of racial justice in the most diverse civilization on earth.

300 See Iris Marion Young, Activist Challenges to Deliberative Democracy, in Debating Deliberative Democracy 102-19 (James Fishkin and Peter Laslett Eds., PBK. Ed. 2003) (arguing that the principle of resolving political issues via dialogue may be at odds with the tradition of social activism, which occasionally produces laudable results).
VI. CONCLUSION

Fashion is made to become unfashionable.

— Coco Chanel

In this article, I have argued that conversations on matters of race remain contentious because the terms of engagement, rhetorically speaking, have evolved little over the past 150 years. The struggle for racial progress remains a struggle for dignity as it relates to material conditions of oppression and meaningful inclusion in society. At stake is nothing less than the national identity. Sadly, the pace of national progress on the race question has slowed noticeably, as has our collective effort to speak openly and honestly about the future of American race relations. The impasse in our conversations about racial progress is, in some sense, a reflection of our perpetual struggle to define who we are as Americans. Our collective failure to resolve the contradiction produced by our longstanding commitment to racial hierarchy and the professed American ideals of freedom an equality has induced a cycle of deep resentment.

A deepened understanding of the fashion and pedigree of conservative race rhetoric provides the foundation for renewed racial dialogue. As an initial matter, this inquiry provides a welcome opportunity for legal and political actors to pause and reflect on the trajectory of racial conservatism in American culture. As Charles Miller wrote some time ago, “[b]oth statutory and judge-made law have played important roles in the history of American race relations, and race weighs heavy in the American constitutional tradition.”

To be sure, legal pronouncements on the preeminent racial issues of the day are not the be all-end all of American race relations. But the reach of such pronouncements can and does extend beyond their specific legal holdings to exert a profound influence on our culture, and the evaluation of this influence is well served by a rigorous consideration of the structure and style of reasoning used to justify the prevailing racial legal order.

An appreciation of the pedigree of conservative race rhetoric also serves to vindicate the deep skepticism shared by many racial progressives regarding the chic allure of modern racial conservatism. This vulgar pedigree not only provides the basis for questioning the application of these arguments in a contemporary setting, but also raises serious questions about the normative commitments of those who advance them. Given the history of American race relations and the pedigree of modern conservative race rhetoric, skepticism regarding the normative commitments of racial conservatives is not completely unwarranted.

At the same time, an exploration of this pedigree allows modern racial conservatives the opportunity to respond to this skepticism by elaborating on the reasons for opposing modern racial reform in a manner that dispels the presumptive linkages to the reasoning and discourse that defined retrograde nineteenth century racial politics. This would necessarily entail open acknowledgment and engagement with the unpleasantness of past racial discourse, but such an unpleasant recognition may be the proverbial “brook of fire” that cleanses individuals and institutions that promote modern

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301 Interview, LIFE MAGAZINE (New York, Aug. 19, 1957).
302 Miller, supra note ___ at 200.
racial conservatism and illuminates the pathway for renewed dialogue on the future of American race relations.