BLACK AND WHITE AFTER *BROWN*: CONSTRUCTIONS OF RACE IN MODERN SUPREME COURT DECISIONS

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This essay examines one dimension of a quite broad-ranging topic: how modern American law is explicitly and implicitly constructing the racial identities of contemporary American citizens. I focus on two contrasting conceptions of "white" and "black" racial identity visible in decisions of the United States Supreme Court during the post-Jim Crow era.[1] I term these the "damaged race" and the "racial irrelevance" views (though the latter is more customarily referred to as "color-blind" constitutionalism).[2] I argue that both these conceptions are flawed, because both can easily be understood to imply that whites today are as a group superior to blacks in America, and belief in such superiority can in turn support policies and practices that continue to privilege white interests.

I suggest that a third conception, that of "distinct racial damages," does more to make sense of how the law has helped create the racial identities that Americans still experience themselves as possessing. It holds that *both* "blacks" and "whites" today should be seen as social groups that are still harmed by the consequences of past official constructions of race, though in very different ways. This conception of contemporary racial identities is, I believe, simply accurate; it may also serve as a better guide to legal and political action on race-related issues. Though I think that this analysis can be extended to encompass the great variety of racial identities in past and present

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[1] I place "white" and "black" in quotation marks to indicate that here these terms refer to legally constructed, not biologically natural, categories. Other such terms are similarly signaled. I trust that in context it will be evident when, instead, quotation marks indicate the citation of a footnoted source.

[2] Though these terms are interchangeable, the "racial irrelevance" label seems more precise, because on this view the law is not supposed to be literally "blind" to color. It instead treats it as irrelevant for virtually all, if not all, public purposes.

America, I confine the argument here to Supreme Court depictions of "blacks" and "whites." Those constructions have, I believe, done the most to shape the law's approach to racial topics.

I. PRELIMINARIES: RACE AS A POLITICAL AND LEGAL CONSTRUCTION

My arguments are premised on what is now a widely accepted belief: that, because racial categories do not make biological sense and yet have been pervasive in United States history, they must be seen as social and political constructions, and law must be seen as an important contributor to those constructions.[3] Accordingly, I view racial classifications fundamentally as invented labels embraced by political actors to help assign different statuses to different populations, generally for purposes of economic exploitation and consolidation of group power. The inventors of the labels have often been scientists, theologians, historians, journalists, and contributors to popular culture, but the official codification of these labels into law does much to increase their power to shape social experiences and opportunities

[3] Some scholars, to be sure, still vigorously defend biological conceptions of race. *See, e.g.*, J. PHILIPPE RUSHTON, RACE, EVOLUTION AND BEHAVIOR: A LIFE HISTORY PERSPECTIVE (1995) (arguing that substantial differences, including brain size and thereby intelligence, exist among races because of evolution). For influential discussions of the social and political construction of racial identities, see generally NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1995) (examining the connections between concepts of race and acts of oppression, focusing on the Catholic Irish who were oppressed in Ireland and became part of an oppressing race in America); MATTHEW FRYE JACOBSON, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE (1998) (describing how conceptions of race were public fictions that rose and fell in American social consciousness); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S (2d ed. 1994) (discussing the theory of racial formation processes, including the question of racism and race-class-gender interrelationships); DAVID R. ROEDIGER, TOWARDS THE ABOLITION OF WHITENESS: ESSAYS ON RACE, POLITICS, AND WORKING CLASS HISTORY ix (1994) (suggesting that "race and class are so imbricated in the consciousness of working class Americans that we do not 'get' class if we do not 'get' race"); DAVID R. ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (1991) (exploring the development of the identity of "whiteness" among the white working class). For discussion of the legal construction of racial identities, see generally IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (examining how the concepts of "whiteness," race, and law have been influenced by social and legal constructs); EFRÉN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO (2001) (examining the history of the relationship between the United States and Puerto Rico from a socio-legal perspective, and illuminating the role of law in the construction of relationships of subordination). *See also generally* Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923 (2000) (arguing that race law consists of antidiscrimination law as well as law pertaining to the formation, recognition and maintenance of racial groups and the legal regulation of relationships among these groups); and many other works by scholars associated with the "Critical Race Theory" movement in American law schools.

and thereby to constitute identities. For science, theology, history, and culture have always offered up many often contradictory conceptions of race. Politics and law put the coercive force of government behind some of those conceptions, institutionalizing them in many arenas of life. Consequently, I see politics and law as playing the most decisive roles in constructing the racial identities that become part of the everyday lived experience of great numbers of people. I therefore join emphatically with Angela Harris and other legal scholars associated with Critical Race Theory, who argue that we must attend today to the ways that "race law" has contributed "to the formation, recognition, and maintenance of racial groups," not just to whether "relationships among these groups" have been sufficiently "equal," important though that is.[4]

But because racial labels have been such a large part of lived experience in America, it would be misleading to think that they exist simply as governmentally imposed devices that work to privilege some and oppress others. The long-exploited and oppressed populations on whom such labels have been imposed have often embraced them as defining their "real" identities, sometimes even more explicitly and fervently than those whom the labels have directly benefited. This is perfectly understandable, politically and psychologically. The identities that are used to define and justify subjugation become for that very reason categories of shared experiences and interests, of "linked fate," to use Michael Dawson's term, that can unite the oppressed.[5] They are in fact almost inescapable bases for building senses of solidarity, for achieving mutual comfort, expressing cultural creativity, and constructing social lives, as well as for organizing joint political resistance to unjust treatment. In all these regards, there are strong tendencies to take the labels that are used as pejoratives by oppressors and redefine them as indicators of virtue and worth.

The philosopher-psychologist Friedrich Nietzsche saw such redefinitions as characteristic of all subjugated peoples, even if he derided what he called the "slave" moralities that resulted.[6] James C. Scott has argued persuasively in recent years that these sorts of "inversions" of the categories, symbols, and concepts used to defend domination constitute one of the "weapons of the weak," employed when

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[4] Harris, *supra* note 3, at 1928.

[5] For the "linked fate" argument, see MICHAEL C. DAWSON, BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS 76-80 (1994).

[6] *See* FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS AND ECCE HOMO 33-43 (Walter Kaufmann ed., 2d ed. 1969).

more direct forms of resistance are not practical.[7] These realities mean that even though the labels "white" and "black" (and "red" and later "yellow") may have been officially propagated by Americans of European descent to justify their seizure of lands from the native tribes, their imposition of chattel slavery on Africans, and later immigration restrictions, it is wrong to see the various non-white identities as simply invidious inventions. Most of these labels have long since become categories that many so classified now esteem and regard as deeply constitutive, not only of who they are, but also of who they wish to be.

That reality raises normative complexities to which we will return. It is in contrast a fairly straightforward task to show that racial identities in America have been extensively structured by laws and by the politics that has generated those laws, and that racial identities have changed historically as American law and politics have changed. The task is straightforward because this dimension of *United States* history has been extensively explored by a wide variety of scholars in recent decades. It has also formed one central theme of my own work on American citizenship laws.[8] In brief, from 1790 until the mid-twentieth century, federal naturalization laws made being "white," and then being "white" or of "African" descent, legal requirements for foreign-born persons to become United States citizens. Late nineteenth and early twentieth century courts struggled mightily to decide who was and was not "white," finally settling on the conceptions that a long history of legal racial construction had made to seem "commonsensical" to most Americans.[9] The Court's rulings, in turn, partly determined who could "pass" as a genuinely free and equal white person, as well as who could be a citizen. Similarly, from the Chinese Exclusion Act[10] through the National Origins Quota laws[11] that lasted from the 1920s to 1965, immigration statutes incorporated shifting

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[7] *See* JAMES C. SCOTT, DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS 166-72 (1990).

[8] *See especially* ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997) (arguing that denial of legal access to full citizenship because of race, ethnicity, or gender has defined U.S. civic identity and driven political development).

[9] The most accessible discussion is LÓPEZ, *supra* note 3, but see also the seminal essay by Stanford M. Lyman, *The Race Question and Liberalism: Casuistries in American Constitutional Law*, 5 INT'L J. POL. CULTURE & SOC'Y 183 (1991).

[10] Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943) (suspending immigration of Chinese Laborers for 10 years and barring Chinese from naturalization).

[11] Immigration Act of 1924, ch. 190, 43 Stat. 153 (repealed 1952) (limiting immigration from a country to two percent of that nationality's proportion of foreign-born individuals in the United States, according to the 1890 census).

racial definitions that helped decide who had access to American shores and, thereafter, citizenship.[12]

Domestically, a variety of antebellum state laws and twentieth century Jim Crow laws offered differing definitions of "blackness," so that for many decades a person of mixed ancestry could change racial identities simply by crossing state lines.[13] Census categories have long included (and indeed still include) racial categories, often contested and frequently altered, that have always reflected different politically potent conceptions of race. Those categorizations, in turn, affect eligibility for governmental benefits, and they also shape processes of political coalition building.[14] And for decades, twentieth century federal policies authorized various forms of racial red-lining in real estate and loan industries as well, greatly contributing to the patterns of hyper-segregation that have done so much to foster distinct and highly unequal racial experiences in America.[15] The list goes on and on.

Although these laws were not the original sources of conceptions of race nor were they the only routes through which notions of "whiteness" and "blackness" were institutionalized, no one can credibly deny that they mattered greatly. In the absence of such legal measures, it is far from clear that racial identities would have achieved such salience in American lives and come to seem so "natural" and "primordial" as they did; they almost certainly would not have had the same specific content. It is also likely that many more Americans would have been of Asian descent through much of our history; many more African-Americans and Mexican Americans would have achieved socioeconomic statuses comparable to "whites" much sooner; and many of the most violent and destructive chapters in American history might never have been written.

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[12] *See* DANIEL J. TICHENOR, DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA (2002) (providing a valuable new overview and analysis of how immigration policies have shaped American identity).

[13] *See, e.g.*, JOEL WILLIAMSON, NEW PEOPLE: MISCEGENATION AND MULATTOES IN THE UNITED STATES (1980) (discussing various states' attempts to define exactly what constituted a "negro").

[14] For a useful recent discussion that includes an international comparative perspective, see generally MELISSA NOBLES, SHADES OF CITIZENSHIP: RACE AND THE CENSUS IN MODERN POLITICS (2000), which uses the censuses from both the United States and Brazil to explore racial categorization.

[15] The most compelling single study remains DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 1 (1993) ("Most Americans vaguely realize that urban America is still a residentially segregated society, but few appreciate the depth of the degree to which it is maintained by ongoing institutional arrangements and contemporary individual actions.").

Within the American legal system, the voice of the United States Supreme Court speaks with particular prominence on a wide range of matters, arguably including matters of race. It is plausible to think, for example, that if the Supreme Court had not legitimated Jim Crow segregation in *Plessy v. Ferguson*,[16] the American version of apartheid might never have become so deeply entrenched in our national life as it did over the next half century. One can reasonably question how extensively the conceptions of race advanced in little-read Supreme Court decisions actually shape popular thinking or public policies over time. I cannot provide empirical evidence for that impact here. But I can provide some documentation for how Supreme Court racial formulations come to be echoed throughout American law, and it seems reasonable to suppose that those widespread echoes have some effect on broader political and popular discourses. It is plausible, in other words, to agree with Fran Buntman, that legal notions of race are often "incorporated into the mainstream and hegemonic culture once the Supreme Court asserts them as part of what the Constitution requires, or, even more crudely, as part of the meaning of being American."[17] And if this incorporation occurs to any degree at all, it is important for scholars of American politics as well as law to attend to the conceptions of race that the Court is propagating.

II. *BROWN V. BOARD OF EDUCATION* AND THE "DAMAGED RACE" CONCEPTION

Although it is not difficult to see that American statutes had a significant role in constructing American racial identities prior to the 1950s, matters changed greatly with the landmark Supreme Court ruling in *Brown v. Board of Education*.[18] That decision not only signaled the constitutional invalidity of all existing forms of Jim Crow segregation; many have long perceived it as expressing a renewed commitment to conceptions of racial equality throughout American law. Though it did not eliminate all uses of racial classifications in state and federal statutes, it did seem to end the longstanding role of the law in constructing American racial identities as a system of white supremacy. One might think, in fact, that it represented a retreat

[16] 163 U.S. 537 (1896).

[17] Fran Lisa Buntman, *Race, Reputation, and the Supreme Court: Valuing Blackness and Whiteness*, 56 U. MIAMI L. REV. 1, 3 (2001).

[18] 347 U.S. 483 (1954).

from using the law to define racial identities and statuses in the United States altogether.

Yet because courts and lawmakers at the time of *Brown* and ever since have confronted a society that remains massively shaped by the consequences of past racial constructions, they have never been able to avoid adopting some stance, however implicit, toward America's existing racial groupings. Those stances inescapably convey some sense of what "race" is and should be in America today, and it is those conceptions I seek to discover and analyze here.

There are doubtless a great number of racial conceptions that can be discerned in modern American legislative histories, statutory language, and judicial rulings, but two appear particularly prominent. Both take as their starting point the historic opinion by Chief Justice Earl Warren in the original *Brown* decision. From 1954 to the present, many federal judges have continued to cite Warren's reasoning about race favorably, none more frequently or influentially than Justice Thurgood Marshall, who as an advocate helped shape Warren's ruling in the case and who as a jurist sought, with very mixed success, to keep *Brown*'s spirit alive. They are the proponents of what I call the "damaged race" conception of American racial identities.

But in the last two decades, other judges have explicitly criticized the aspects of Warren's opinion that most clearly express this conception, none more frequently or influentially than Marshall's successor, Justice Clarence Thomas. Throughout his career, Justice Thomas has consistently championed what I term the "racial irrelevance" conception of the place of race in American law, which he refers to as "color-blind" constitutionalism. To grasp these opposing conceptions, it is useful to begin with what Chief Justice Earl Warren wrote in *Brown*.

Doing so is not so simple as one might expect. Chief Justice Warren's remarkably brief opinion includes no definitions of "races" or "racial groups." It takes their existence for granted. Warren frequently and unselfconsciously refers to "the Negro race" and to "Negro" and "white" children.[19] Though by 1954 the concept of biological races had been under attack for years by anthropologists Franz Boas, Ruth Benedict, Ashley Montagu and others, and though the political environment of the 1950s fostered new receptivity to those arguments, most Americans had gone no further than to begin to think of the "races" as ancestral cultural identities so firmly established as to be relatively fixed.[20] In any case, Chief Justice Warren chose not to

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[19] *Id.* at 487, 490.

[20] *See, e.g.*, DAVID A. J. RICHARDS, CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY AND LAW OF THE RECONSTRUCTION AMENDMENTS 156-70 (1993) (attacking racial theory as scientifi-

delve into debates over race as a legal classification; contrary to many later interpretations, he does not even say racial classifications are "suspect." On its face, the *Brown* decision is not nearly so much about racial equality as it is about educational equality.

Even so, Warren's opinion does highlight how governmental educational policies and practices have shaped at least one racial group, African-Americans, and it presents them as a severely damaged race. His arguments on this point have been so widely cited for so long that for many, the phrases have acquired almost the historical grandeur of the speeches of Lincoln or the central clauses of the Constitution itself. To others, however, they have always seemed deeply offensive.

Chief Justice Warren begins by contending that:

> [E]ducation is perhaps the most important function of state and local governments . . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.[21]

Without an adequate education, "it is doubtful that any child may reasonably be expected to succeed in life."[22] That is why, when the state undertakes to provide education, it must "be made available to all on equal terms."[23]

But, Warren next argues, the requirement of equality is not met by school systems segregating children by race. That practice deprives "the children of the minority group of equal educational opportunities."[24] Warren adds nothing here or elsewhere in the opinion about segregation's effects on the "majority group," nor was this a theme in any of the briefs submitted to the Court. Instead, next and most monumentally, the opinion specifies just how the education of minority children is hampered: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[25] How are their hearts and minds affected? Citing the African-American sociologist Kenneth Clark, Warren wrote that "[a] sense of

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cally unsound). Mark Weiner examines what he terms the new "ethno-juridical" conceptions of race visible in the *Brown* decision in Mark Stuart Weiner, *Race, Citizenship and Culture in American Law, 1883-1954: Ethno-Juridical Discourse from* Crow Dog *to* Brown v. Board of Education, Publication (forthcoming 2003) (manuscript at 230-72, on file with Yale University Library).

[21] *Brown*, 347 U.S. at 493.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* at 494.

inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children."[26] That is why "[s]eparate educational facilities are inherently unequal."[27]

There can be little doubt that this reasoning stemmed in large part from a humane and sympathetic awareness that segregation was unjustly injurious to many black Americans. It is also certain that Chief Justice Warren felt legally impelled to find that segregation harmed blacks in some way in order to hold that it denied them equal protection of the laws. Yet as many critics have long contended, on their face Warren's words present a devastating picture of black Americans raised under segregation. As a group, he suggests, they have comparatively little motivation to learn, resulting in the retardation of their "mental development." Their educational shortcomings mean they are deficient in "the very foundation of good citizenship," in their "cultural values," in their readiness for professional training, and in all their abilities simply to "adjust normally" to society.[28] These maladjusted, educationally retarded persons cannot "reasonably be expected to succeed in life."[29] And all these conditions represent harms to their hearts and minds that are "unlikely ever to be undone."[30] It is not their fault, and it is not due to biological inferiority. The problem is the governmentally created segregated education system. Still, as Chief Justice Warren describes them, black Americans are in many very important respects severely damaged, and they are likely to remain so. It also follows that even if their children are not educated in legally segregated schools, they will still be raised by severely damaged parents. It is not hard to see how this fact might raise questions about how those children are likely to fare, and about those children's children.

Read literally, then, the *Brown* opinion can seem a scathing derogation of the capabilities of most American blacks living in 1954 and for many years to come, right up to the present. It is therefore understandable that in their 1967 manifesto, *Black Power*, Stokely Carmichael and Charles Hamilton denounced such reasoning as reinforcing "among both black and white, the idea that 'white' is automatically superior and 'black' is by definition inferior."[31] For this

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[26] *Id.*

[27] *Id.* at 495.

[28] *Id.* at 493.

[29] *Id.*

[30] *Id.* at 494.

[31] STOKELY CARMICHAEL & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA 54 (1967).

reason, they charged, "'integration' is a subterfuge for the maintenance of white supremacy."[32] In a similar spirit, many legal scholars have since sharply criticized *Brown* for, in Michael Middleton's words, "perpetuat[ing] the myth of Black inferiority" even as it sought to oppose it.[33] Perhaps most prominently, Derrick Bell, whose work has done so much to inspire Critical Race scholarship, has long attacked the notion that the presence of white students *per se* forms an adequate or appropriate remedy for the harms inflicted by the Jim Crow system.[34]

Though they clearly have strong foundations, at times such criticisms have gone too far by failing to acknowledge that Chief Justice Warren attributed black inferiority strictly to de jure segregation, not to anything that he depicted as truly inherent in black identity. I nonetheless believe that he portrayed the harms done to blacks as deeper, more pervasive, and most of all, as far more ineradicable than he had any justification for doing. But it is also only fair to recognize, as all these legal scholars do, that in the circumstances of the case, these negative characterizations of American blacks were difficult to avoid. Again, to rule that segregation was denying equal protection, Warren had to rule that it was in some way harming blacks, not "protecting" them, and that in so doing, it was not really treating them "equally" to whites. If there had been no harm, or perhaps even if there had been equal harms, then arguably there would have been no constitutional foul. Still, in reasoning the way he did, there can be no denying that Warren said much that could be construed as implying that those blacks educated in segregated systems were, and were likely to remain, substantially inferior to whites. Presenting blacks as the "damaged race" could easily seem, in short, still to present whites as the "superior race."

One might ask how Chief Justice Warren could possibly have avoided this result, while still reaching the result he most wanted: the constitutional invalidation of racial segregation. I have long favored the view that Warren should have rested his case not on the history of the Fourteenth Amendment and the intent of its framers, nor on

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[32] *Id.*

[33] Michael A. Middleton, Brown v. Board*: Revisited*, 20 S. ILL. U. L.J. 19, 31 (1995). *See also* John Sibley Butler, *The Return of Open Debate*, SOC'Y, Mar./Apr. 1996, at 11-18 (questioning both the logic of *Brown*, which held that "separate but equal" was inherently unequal and not simply unconstitutional, and *Brown*'s impact on the black population of America).

[34] *See* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (discussing problems with racial balancing remedies and noting that racial "mixing" does not necessarily make black schools more educationally effective, or change attitudes and beliefs about racial inferiority).

contemporary social psychological studies.[35] A more reliable foundation was available in the legislative history of school segregation laws as elements in the Jim Crow system that spread after *Plessy*. Many southern, white lawmakers were not particularly discreet. There is an abundance of evidence that they explicitly advanced Jim Crow laws as a means to restore what they regarded as the just and natural system of white supremacy. Many legislators openly acknowledged that "separate but equal" provisions were only legal fig leafs to get around the Fourteenth amendment's misguided Equal Protection Clause, and when it came to the distribution of political and legal power, they did not risk even "separate but equal" arrangements. Using other means, they labored mightily and largely successfully to exclude blacks from the franchise and from juries. Neither in intent nor effect were segregation laws aimed at "equal protection" for African-Americans.[36]

Still, that line of argument had several disadvantages that may have deterred Chief Justice Warren. As the twentieth century proceeded, more legislators were careful to profess their sincere belief in the benefits of segregation for both races, so the historical evidence of discriminatory intent, while clear on balance, was disputable.[37] And however accurate, such an imputation of invidious intentions to southern lawmakers would also have been politically explosive—though they railed against the decision with near-unanimity anyway. In addition, ruling in this way would not have clearly established that, even absent white supremacist aims, "separate but equal" was *inherently* unconstitutional, as the NAACP Legal Defense Fund lawyers wished the Court to do.[38] They hoped to avoid having to sue each school district and public institution to prove that segregation was unconstitutional as practiced in every particular locale.[39] Finally, though such reasoning would have dwelt on legislative history more than psychological and educational consequences, it would still have involved the claim that segregation harmed blacks in ways that were

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[35] *See, e.g.*, Rogers M. Smith, *The Inherent Deceptiveness of Constitutional Discourse: A Diagnosis and Prescription*, *in* INTEGRITY AND CONSCIENCE 218, 242 (Ian Shapiro & Robert Adams eds., 1998) (arguing that *Brown* was not well-grounded in terms of the Fourteenth Amendment's original intent).

[36] *See, e.g.*, PHILIP A. KLINKNER WITH ROGERS M. SMITH, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA 94 (1999) (noting that while laws were written in race-neutral language to evade constitutional challenges, their intent was clearly to discriminate and eventually eliminate black voters). *See generally id.* at 88-105.

[37] *See, e.g.*, RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 334-35 (1976).

[38] *See id.* at 645-46.

[39] *See id.*

not true of whites. Hence, though its rhetoric might have been less disturbing to racial egalitarians, it might still have been possible to read into the *Brown* opinion an implication of enduring white superiority.

But is that implication really there? To answer that question, we must consider a further topic that has been much less discussed in the vast literature on the case: the question of how the *Brown* opinion implicitly presents or constructs white identities. As Kevin Brown has noted, "[f]or the Court to have avoided replicating the message about the inferiority of African-Americans in desegregation, the Court would have also articulated how de jure segregation harmed Caucasians as well."[40] Many readers of the opinion, certainly many critics, probably many supporters, and perhaps Warren himself, have often assumed that it implies just the opposite.[41] Because blacks are portrayed as harmed or damaged by segregation, the logical corollary, they understandably infer, is that whites must be conceived of as the "unharmed" or "undamaged," and thus superior, race. Segregated education must have rendered them comparatively more motivated to learn, better educated in the foundations of good citizenship, in cultural values, more ready for later professional training, and superior in their abilities to adjust normally to social life.

To be sure, both subsequent commentators and litigants have sometimes contended that, although Chief Justice Warren did not say so, in fact segregated schooling was not really good for whites or blacks, and that both continue to gain from integrated education.[42] But the most frequent theme in support of this claim has been that all people benefit educationally from a racially diverse student body. The University of Michigan has especially stressed this argument in its ongoing efforts to defend the affirmative action admissions policies of its undergraduate and law programs in litigation that is before the

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[40] Kevin Brown, *The Legal Rhetorical Structure for the Conversion of Desegregation Lawsuits to Quality Education Lawsuits*, 42 EMORY L.J. 791, 816 (1993).

[41] *See* Sally Ackerman, *The White Supremacist Status Quo: How the American Legal System Perpetuates Racism As Seen Through the Lens of Property Law*, 21 HAMLINE J. PUB. L. & POL'Y 137, 152-57 (1999) (discussing the *Brown* Court's assumption that black children feel inferior to white children, without addressing the equally detrimental effect of segregation on white children).

[42] *See, e.g.*, Wendy Brown-Scott, *Justice Thurgood Marshall and the Integrative Ideal*, 26 ARIZ. ST. L.J. 535, 545-46 (1994) (claiming that although Thurgood Marshall argued that segregation injured white children, the Court ignored evidence of the detrimental effects of segregation on white children); Middleton, *supra* note 33, at 29 n.45 ("More recently, advocates have argued that segregation also produces educational deficits in majority group children as well.").

United States Supreme Court as I write this article.[43] Yet to assert the splendors of diversity in general is not enough to come to grips with the ways de jure segregation, and modern judicial decisions, have constructed white racial identities, nor is it enough to grasp what must be done to address the harms of those constructions. We need to focus not only on diversity, but on the specific shortcomings of the processes of socialization that whites commonly experience, in order to make the case for the special desirability of racial diversity.

To do so, we need to recognize first that it is in fact not logical to infer on the basis of *Brown*'s reasoning that segregated education made whites, on balance, genuinely superior to blacks. That reasoning is, I submit, more logically read to imply that those the law treated as "whites" were also damaged by Jim Crow segregation—not in the same ways, but in ways that are nonetheless enormously significant.[44]

To see why, we should ask, what message did segregation laws convey to white students about their "status in the community?" In all likelihood, many whites understood those laws to indicate that the authorities governing their society regarded them as the intrinsically superior race and were prepared to extend to them superior opportunities and advantages. That, after all, was the case. What are the probable consequences of such understandings? I think it likely that many whites readily concluded that the government was correct to treat them in this favored fashion, just as most recipients of any sort of favorable recognition, however unwarranted, tend to do. Whites educated in segregated schools were, then, likely to believe in a false myth of the greater intrinsic worth of their race. And even those who did not really believe in their own superiority surely felt some sense of investment, of psychological and material attachment to, perhaps even dependence on, the ideologies and institutions that accorded them privileged status. Indeed, those who doubted their own superiority might well have had such feelings most strongly. But whether

[43] For the most recent lower court decision, see *Grutter v. Bollinger*, 288 F. 3d 732, 735-37 (6th Cir. 2002) (discussing the law school's goal of enrolling a diverse class and the various factors considered for admission).

[44] I do not mean that whites have been damaged in ways that might justify lawsuits seeking redress for torts inflicted upon them. I use "damages" here interchangeably with "harms" and simply mean to suggest that in considering how to respond to the range of enduring harms resulting from de jure segregation, policymakers and judges should recognize that there have been distinctive harms to those legally labeled "white" as well as to those labeled "black."

one sees oneself as superior or needy, to be treated in such a fashion is clearly very tempting and widely desired.[45]

Still, do we really want to say that such an education advances the civic aims that Warren argued modern public education systems must do? Do we really regard an education that fosters a sense of one's racial superiority and of one's material and psychological stake in sustaining white supremacy as an education in "good citizenship?" Would we deem this an education in appropriate "cultural values," preparing white students for desirable performance in professional careers or "normal," well-adjusted social existence?

I suggest not. I think it is more logical to see such beliefs and psychological and material attachments and dependencies, and the racist behavior they are likely to spawn, as representing forms of bad citizenship, harmful cultural values, and as damaging professional and social conduct. If so, the correct conclusion is that the reasoning in *Brown*, fully pursued, implies that segregated education was damaging for whites—indeed, in many cases deeply corrupting and debilitating—even as it more obviously and materially damaged blacks. The damages are very different. There is still nothing genuinely "equal" about "separate but equal" as practiced in the Jim Crow era. But there is also not really any "protection," not even for many of the core interests of those designated "white," because their racial identities are being constructed in ways that ultimately harm them.

I fully recognize that this may seem a rather bizarre, perhaps silly claim. The inescapable reality is that whites received special educational advantages and vastly greater economic, political, and social opportunities under segregation. They were undeniably a greatly privileged class. How can that be regarded as harmful?

I believe it was harmful in two basic ways, though I concede that I cannot provide irrefutable evidence for either of them. First, even though segregation did indeed give whites some real material benefits, I am not persuaded that it actually made them better off in material terms than they would have been in a more genuinely free and equal economy and society. As libertarian (though not social) conservatives have long argued, and as scholars on the left have recently affirmed, segregation was economically costly.[46] It prevented many

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[45] I am grateful to Katharine Jackson for elaborating this line of argument in my "Race, Ethnicity, and American Constitutional Politics" seminar at the University of Pennsylvania in the spring of 2002 in ways that have influenced my thinking in this essay.

[46] *See, e.g.*, RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992); JOE R. FEAGIN & HERNÁN VERA, WHITE RACISM: THE BASICS (1995). I am grateful to Jane Gordon for calling Feagin and Vera's analysis to my attention.

black Americans from fully developing their talents and realizing their productive potential. It stifled profitable economic transactions many might otherwise have undertaken. And it required ongoing, often costly coercive enforcement to overcome the angry resistance it engendered, and to quiet the guilty fears it bred. It is, quite simply, expensive and inefficient to maintain stability in a society built upon volatile foundations of hatred and repression. Whether these various costs actually made segregation less materially advantageous to the whites who were privileged by it is a complex empirical question that I cannot resolve here. But it is, at a minimum, not silly to think that even in material terms, most whites who thought they were better off under Jim Crow than they would have been without it may well have been short-sighted—and that they were made so in part by the delusion-filled segregated education they had received.

The second harm they experienced is impossible to substantiate with material evidence, but I believe it was real nonetheless. When a segregated education led many whites to shape their lives and conduct around the vicious myth of their intrinsic racial superiority, when it made many of them feel psychologically and materially dependent on the maintenance of radically unjust institutions, I think that it did them severe moral damage. From a moral point of view, there can be nothing beneficial about living a lie, or about grounding one's existence on the perpetuation of injustices. Those who believe these things to be good and morally defensible must be viewed as profoundly flawed.

So though I would like to have had the opinion written very differently, I believe Warren was right to argue that segregation significantly harmed black Americans, even if he greatly exaggerated how ineradicable those harms were. But we should also say that segregation damaged whites too, in different ways, to be sure, but nonetheless in ways that mean we cannot see it as having left them, on balance, the "superior" race. Instead, segregation damaged all Americans in ways that made no one better off than they would have been without it. And it left legacies of harm that all Americans have an interest in overcoming. For if it is plausible to think that the constrained opportunities afforded to many black Americans for so many years have had consequences lasting to the present, then it is equally plausible to believe that the false senses of entitlement and the dependency on social privileging to which whites were long accustomed have also had lasting effects. In my view, segregation did indeed produce not a "damaged race" but extensive "distinct racial damages" that have burdened the lives of all, in ways that we still need to address.

But that is not the argument Warren made in *Brown*, nor, indeed, is it one that American courts have since endorsed in any very clear and full fashion. Instead, a Lexis-Nexis search indicates that many justices on the "liberal" side of the constitutional and political spectrum on racial issues, from Abe Fortas and William Brennan through Harry Blackmun and David Souter, have long continued to articulate the more one-sided "damaged race" view, often citing the famous passages in *Brown* discussed above.[47] Kevin Brown confirms that, even when these particular phrases are not invoked, many opinions continue to suggest that black Americans have been stunted in their mental and educational development due to de jure segregation and its consequences.[48] Wendy Brown-Scott has shown how Justice Thurgood Marshall, in particular, remained wedded to the "stigmatic injury theory" of the damages to blacks from segregated education all through his career.[49] He cited it repeatedly. During his last term on the Court, he contended in his passionate dissent from the Court's abandonment of demanding desegregation remedies in *Board of Education v. Dowell*, that remedying the "evil" done to black "hearts and minds" and "preventing its recurrence were the motivations animating"[50] the Court in its most aggressive desegregation decisions, *Green v. County School Board*[51] and *Swann v. Charlotte-Mecklenburg Board of Education*.[52] For him, the "damaged race" conception of black identity continued to be fundamental to his understanding of race in America. He believed, moreover, that it justified ongoing, affirmative governmental action to assist black Americans through a wide variety of race-conscious measures. It is on that point that proponents of the "damaged race" view differ most sharply from those advocating its leading rival, the "color-blind" or "racial irrelevance" conception.

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[47] *See, e.g.*, Bush v. Vera, 517 U.S. 952, 1055 (1996) (Souter, J., dissenting); Hudson v. McMillian, 503 U.S 1, 16-17 (1992) (Blackmun, J., concurring in judgment); Evans v. Abney, 396 U.S. 435, 454 (1970) (Brennan, J., dissenting); Avery v. Midland County, 390 U.S. 474, 498 n.2 (1968) (Fortas, J., dissenting). A Lexis-Nexis search conducted by Ferdous Jahan also identified forty-seven lower federal court cases that explicitly cited the damaged "hearts and minds" sections of *Brown*, usually as authoritative for equal protection analysis. A much larger number of cases refer to these themes in *Brown* without citing the specific sentences.

[48] Brown, *supra* note 40, at 809-12.

[49] Brown-Scott, *supra* note 42, at 543-49.

[50] Bd. of Educ. v. Dowell, 498 U.S. 237, 252 (1991) (Marshall, J., dissenting). Marshall also explicitly cited the passages under discussion in *Rhodes v. Chapman*, 452 U.S. 337, 376 n.8 (1981) (Marshall, J., dissenting); *City of Memphis v. Greene*, 451 U.S. 100, 153 (1981) (Marshall, J., dissenting); *Castaneda v. Partida*, 430 U.S. 482, 503 n.2 (1977); *Jefferson Parish School Board v. Dandridge*, 404 U.S. 1219, 1220 (1971), and he referred to this reasoning indirectly on many other occasions.

[51] 391 U.S. 430 (1968).

[52] 402 U.S. 1 (1971).

III. AGAINST STIGMA: THE "RACIAL IRRELEVANCE" CONCEPTION

By the time Justice Marshall invoked *Brown*'s view of the harms of segregation for the last time in 1991, he and others had become accustomed to doing so in dissent. And from that time to the present, a majority of the bench has been increasingly inclined to embrace the view of equal protection long articulated, on and off the bench, by the jurist who followed Marshall on to the high court, Justice Clarence Thomas. Though his position has shifted over time in one important respect, Thomas has been a vocal critic of Warren's reasoning in *Brown* and the "damaged race" view ever since he first came to public prominence as Chairman of the Equal Employment Opportunity Commission (EEOC).

In his EEOC days, Thomas contended that Warren's account of how black Americans were psychologically harmed by de jure segregation represented the "great flaw" in a decision that was correct in its result, but wrongly justified.[53] That flaw, he argued, made *Brown* a "missed opportunity," like "all its progeny, whether they involve busing, affirmative action, or redistricting."[54] Thomas maintained that the Court should simply have followed Justice Harlan's famed dissent in *Plessy v. Ferguson* and its argument that our Constitution is "color-blind."[55] The Court should have declared that de jure segregation violated basic individual freedoms guaranteed to all by the Constitution and also the higher law principles invoked in the Declaration of Independence.[56] After his ascent to the Supreme Court, Thomas has continued to decry the part of the *Brown* decision on which Marshall most relied. But in his most extensive assault on *Brown*, his concurrence in *Missouri v. Jenkins*, Justice Thomas contended that it is actually a "misreading" of *Brown* to say that the decision rested on claims of educationally-inflicted psychological harms to blacks.[57] Instead, Thomas sought to identify other grounds for the decision, and he insisted that *Brown* "did not need to rely upon any psychological or social-science research" to find de jure racial segregation unconstitutional—though he offered no explanation for why the Court had so centrally emphasized the arguments he had himself previously

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[53] Clarence Thomas, *An Afro-American Perspective: Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983, 990 (1987).

[54] *Id.* at 991.

[55] Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

[56] *See* Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63, 68 (1989).

[57] Missouri v. Jenkins, 515 U.S. 70, 114, 119 (1995) (Thomas, J., concurring).

stressed.[58] He did charge quite explicitly that the notion that segregation "retards" the "mental and educational development" of African-Americans "not only relies upon questionable social science research rather than constitutional principle, but it also rests on an assumption of black inferiority."[59] Hence it could not be understood to be consistent with the principle of human equality that he has always seen as the true foundation for the result in *Brown.*

Thomas has sought to disavow what he now calls the prevalent "misreading" of *Brown* precisely because figures like Marshall have used the psychological harm argument to contend that law and public policy must recognize blacks as still in need of special public assistance, in the form of mandatory school desegregation, affirmative action, remedial majority-minority districting, and other race-conscious measures.[60] Thomas does not simply regard all those positions and their underlying philosophy as inconsistent with a genuine commitment to equal human rights. He also believes they are profoundly damaging to black Americans. He has objected that "the *Brown* psychology" falsely treats "the legal and social environment" as "all-controlling" in shaping human behavior.[61] Such reasoning leads to what Thomas has denounced as "the victim plague"[62] and the "ideology of victimhood,"[63] which he defines as "the practice of blaming circumstances for one's situation rather than taking responsibility for changing things for the better."[64]

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[58] *Id.* at 120. Thomas sought to reconcile his support for *Brown*, his originalist jurisprudence, and his dismissal of claims of psychological harm by citing Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995). I have argued that McConnell's "originalist" defense of *Brown* is unconvincing, as it relies mostly on congressional discussions from the 1870s, after the Fourteenth Amendment was ratified, discussions concerned with congressional power to ban certain forms of racial segregation, not judicial authority to do so. For that critique and McConnell's reply, see Smith, *supra* note 35, and Michael W. McConnell, *The Asymmetricality of Constitutional Discourse, in* INTEGRITY AND CONSCIENCE 300 (Ian Shapiro & Robert Adams eds., 1998). McConnell contends there that the fact that no Congressman ever mentioned any judicial authority to ban any form of segregation under the amendment (as opposed to bans on exclusions of blacks) is "beside the point." *Id.* at 312. I find this contention, that anything Congress has discretion to do under Section Five can also be required by the courts as a constitutional mandate, rather preposterous and unlikely to be defended by McConnell in most contexts.

[59] *Jenkins*, 515 U.S. at 114 (Thomas, J., concurring).

[60] *Id.* at 119.

[61] Thomas, *supra* note 56, at 991.

[62] The Hon. Clarence Thomas, Victims and Heroes in the "Benevolent State," Address at the Eighth Annual Federalist Society Lawyers Convention, *in* 19 HARV. J.L. & PUB. POL'Y 671, 671 (1996).

[63] *Id.* at 675.

[64] *Id.* at 671.

This ideology infuriates Thomas. He has repeatedly condemned it scornfully, asserting that "the very notion of submitting to one's circumstances was unthinkable in the household in which I was raised."[65] He also contends that because of the sort of reasoning Warren advanced in *Brown*, "our political and legal systems now actively encourage people to claim victim status and to make demands on society for reparations and recompense."[66] Thomas does not repudiate these demands because he sees American society as "free from intractable and very saddening injustice and harm."[67] That, he accepts, is simply not true.[68] Yet, he contends, "the idea that government can be the primary instrument for the elimination of misfortune is a fundamental misunderstanding of the human condition."[69] We can "never eliminate oppression or adversity completely, though we can and should fight injustice as best we can."[70] But Justice Thomas believes that to foist that task on government instead of taking it on ourselves, to see ourselves as victims who need governmental assistance to succeed, "destroys the human spirit."[71] It denies "the very attributes that are at the core of human dignity," especially "the ability to endure adversity and to use it for gain."[72]

The only way that law can help black Americans, Thomas believes, is to abandon giving any explicit legal recognition or standing to racial identities at all. Governments must treat race as simply irrelevant for all purposes of public policy, except for the enforcement of laws that encode this principle of "racial irrelevance" by outlawing specific acts of racial discrimination. In his concurring opinion in *Missouri v. Jenkins*, written with a passion equal to that of Justice Marshall in *Board of Education v. Dowell*, Thomas writes that "[a]t the heart" of his view of the Equal Protection Clause "lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups."[73] If the law does not treat race as irrelevant, if it is not color-blind, if it permits forms of special assistance for blacks, Thomas believes it will be in effect perpetuating false, destructive beliefs in black inferiority and white superiority, and worse, encouraging a "victim plague" among black Americans that will make

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[65] *Id.*
[66] *Id.* at 672-73.
[67] *Id.* at 682.
[68] *See id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] Missouri v. Jenkins, 515 U.S. 70, 120-21 (1995) (Thomas, J., concurring).

those views seem true.[74] Those are consequences which Justice Thomas cannot abide. Many members of the current Supreme Court appear to accord Thomas's views on racial issues generally special respect, and it is likely that a majority now agrees with him on all these points.

Though Thomas believes the law should not treat people in terms of racial categories, he is vividly aware that racial identities remain important social realities in American life.[75] What does his "color-blind," "racial irrelevance" view imply for how we should conceive of those black and white racial identities today? By rejecting the "damaged race" position, Thomas proudly implies that African-Americans stand today and have long stood fundamentally undamaged and unbowed, able to succeed on their own merits, without any governmental aid. As I have noted, he proffers this view of black Americans despite his vivid awareness that racial injustices have long existed and still exist in the United States. He believes the best way to combat those injustices is to adopt a distinctive attitude toward American racism that represents, I think, a contemporary version of what W. E. B. Du Bois famously termed the "double consciousness" of black Americans.[76] In Thomas's version, African-Americans must both affirm and deny that anti-black racism is a major factor in their lives. They must recognize and fight against specific acts of racism whenever they encounter them. Yet they must also always act as if racism is not a major, systematic barrier to their ability to get ahead on their own. If they do not act that way, then they allow racism to demoralize and defeat them, to deprive them of dignity, to make them victims—and Thomas refuses, and believes all blacks should refuse, to let that happen.

There is clearly much that is understandable and much that is commendable, indeed inspirational, in this view of contemporary black identity. Like Nietzsche's invocation of "noble" morality in place of "slave" moralities, it can spur people to strive for and to achieve much more than they might otherwise do.[77] And again, that includes resisting specific expressions of racism. Thomas is not recommending any form of acquiescence: his form of "double consciousness," which sees race as something that both is and is not im-

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[74] Thomas, *supra* note 62, at 671.

[75] Though he maintains that we already have what we should see as a "color-blind Constitution," he does not pretend that we have a "color-blind society," though he suggests that as a goal. Thomas, *supra* note 53, at 992 n.37.

[76] W. E. B. DU BOIS, THE SOULS OF BLACK FOLK 3 (1903).

[77] NIETZSCHE, *supra* note 6, at 36-39.

portant to African-Americans, cannot fairly be interpreted as urging blacks to endure acts of racial injustice passively, in "Uncle Tom" fashion.

But now let us ask, as we did of Warren's "damaged race" view in *Brown*: what does this "racial irrelevance" conception imply for how we should think of white racial identities today? Here, the logical corollary seems to be that whites should think of themselves with a perfectly symmetrical form of double consciousness. They should be aware that racism, including anti-black racism, exists and they should oppose it whenever they encounter concrete expressions of it. Yet they should not think of it as pervasive; they should see whites, like blacks, as fundamentally an "undamaged race," not scarred by any legacies of past legal systems of white supremacy. Instead, they, too, should think of themselves as living in a society in which every individual has a substantially equal opportunity, and responsibility, to get ahead on his or her own merits. That, they should believe, is how most white people, like most black people, actually succeed in America.[78]

When we surface this conception of white identity as an implication of Thomas's "racial irrelevance" or "color-blind" legal view, I think we can see how, despite its real attractions, it is in the end a dubious guide to understanding the place of race in America's past and present. To sustain his depiction of the United States as basically a genuinely equal opportunity, color-blind political system, Thomas is driven to mischaracterize American constitutional history and, I believe, current realities, painting them as less damaging to blacks and whites than they actually have been and are. He feels compelled to endorse what is, sadly, probably the unduly optimistic view of Abraham Lincoln and Frederick Douglass, that "the Founders" meant for their Constitution to put slavery on the path to "eventual abolition."[79] He also grasps hopefully at Michael McConnell's very strained claim that we can understand the powers the Fourteenth Amendment

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[78] Here again, we can imagine a different, to my mind more logical, inference. If Thomas's view implies that blacks should think of themselves as subjected to specific acts of discrimination, but not as systematically prevented from succeeding on their merits, the reverse implication might well be that whites should see themselves as succeeding on their merits in certain regards, but as still the often-involuntary beneficiaries of systemic inequities. That view would be similar to what I am terming the "distinct racial damages" conception, for it would similarly suggest that we need to address systemic injustices, though it would not feature notions of damaged white identities to the same extent. It is clear, however, that this is not the corollary that Justice Thomas draws: he insists we must dismiss all claims of systemic group disadvantages and focus strictly on individuals.

[79] Thomas, *supra* note 56, at 64-66.

framers meant to give to courts by examining, not what they collectively said or did in 1868 (when they passed the Amendment and also funded segregated schools in the District of Columbia), but by what many of them said Congress should do in the 1870s.[80] And Thomas has come to abandon his own earlier recognition that the *Brown* opinion did indeed rest on the psychological "damaged race" view he despises, in favor of a pretension that it somehow relies instead on grounds the Court did not advance.

Thomas is driven to these inaccuracies, I believe, because otherwise he would have to recognize that the original Constitution, the Fourteenth Amendment, and indeed *Brown* itself all did in some ways countenance and perpetuate notions of racial inferiority. If Thomas were to acknowledge that, he could perhaps still insist that governmental aid is no part of the answer to the problems of black Americans. But he could not so easily claim that America has been and is a political system in which, despite individual acts of racism and some mistaken governmental policies, most blacks are able and have long been able to succeed on their own merits.

Yet even if Thomas's "racial irrelevance" view pushes him toward rather rose-tinted views of American political and legal history, we might still reasonably conclude that this is a small price to pay. His position may well help many African-Americans resist demoralization, and it also treats whites in generous and respectful ways that are not likely to provoke racial anger and division.

I fear, however, that Thomas's position actually has different, more destructive consequences. The undeniable reality is that America is still a society marked by sharp racial inequalities—in wealth, in housing, in the holding of political offices, in educational attainments, in memberships in the professions, in life expectancy, in regard to virtually every arena of conventional success that we can name, apart from professional athletics and the military.[81] In such a society, what does it mean to say to whites that race is not something that really gets in the way of any individual's advancement, and that it has nothing to do with their own individual successes? What are the likely results of telling whites that they need not see themselves as in any way "damaged," so that they can trust themselves not to permit any advantages they may possess as the result of racial discrimination to bias their judgments about appropriate public policies? What is

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[80] Missouri v. Jenkins, 515 U.S. 70, 120 (1995) (Thomas, J., concurring).

[81] *See, e.g.*, ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1995) (using statistical analysis to demonstrate racial disparities in major areas of American life and why these divisions still persist).

the probable impact of conveying to them that they are unlikely to have received any unjust benefits from, or to be in any way invested in, American racial inequalities which, after all, have not really been all that oppressive anyway?

At a minimum, I think such messages are likely to foster complacency and indifference toward persisting racial inequalities among whites. At worst, they may foster an even more pernicious conclusion: since there are no major obstacles to blacks getting ahead on their merits in American society, then the extensive existing array of racial inequalities must simply be due to the fact that whites do, after all, possess superior qualities. I am afraid that the "color-blind," "racial irrelevance" view that Justice Thomas has long persistently advocated has indeed had both these consequences: it has helped many whites to feel comfortably complacent about American racial problems, and it has permitted some to continue to believe in white superiority. That has certainly not been Thomas's intention, just as it was not the intention of Earl Warren to brand blacks as ineradicably inferior. But it may well be the effect of Justice Thomas' conception of racial identities, which is now being extensively incorporated into American law.

If so, then I believe we must conclude that neither of these dominant understandings of race in modern American law is satisfactory. If we stress, with Warren and Marshall, that the law should recognize that racial discrimination has harmed blacks in ways that support race-conscious remedies, we may perpetuate notions of blacks as the damaged and inferior race. If we stress, with Thomas, that the law should treat race as irrelevant, we may perpetuate beliefs that government need do nothing about racial inequalities, that any problems blacks may have are basically their own fault, and that the superior socioeconomic positions that whites visibly possess are due to their superior merits. Either way, we still seem to be constructing racial identities through laws in ways that reflect and reinforce notions of white superiority.

IV. A THIRD WAY—"DISTINCT RACIAL DAMAGES"

How might we do better? Perhaps we can do so by building on my earlier suggestion that, in reality, segregation should be seen not only as having harmed blacks, but also as having, in different ways, harmed whites—by making whites feel attached to, invested in, even dependent on, a set of unjust privileges that ultimately were deeply damaging to American society as a whole. If we see modern white racial identities as having been constructed in those terms, then it cannot be appropriate for whites to presume that racism still exists, but that they

and everyone who really wants to actually gets ahead on individual merit alone. Instead, the presumption of all Americans must be that, though in fact virtually everyone does need to work hard to get ahead, our society may well still be riddled with systems of racial inequity that whites are reluctant to give up—and that it is nonetheless in the best interests of everyone in our society to end those systems of racial inequity.

Philip Klinkner and I have argued that the question that must be asked, in equal protection law and even more in governmental policymaking, is not whether a law or policy is "color-blind," or even whether it harms blacks or whites as distinct groups.[82] The question should be whether the law or policy is helping to alleviate, or serving to exacerbate, the patterns of racial inequity and disadvantage that our laws and politics have done so much to create. The vision of race that this approach reflects is one in which systematic racial inequalities eventually are so substantially diminished that race is no longer a powerful predictor of personal life chances. It is not, however, a vision of race in which racial identities themselves ultimately disappear, or at least not necessarily. As I argued at the outset, whatever their origins, these are identities that many have come to see as tremendously important to their senses of themselves and of their preferred communities. If people wish to value and sustain their memberships in social groups that are commonly labeled "black" or "white" or "Asian" or anything else, they should certainly always be able to do so. But if racial identities could be transformed so that they were no longer systematically associated with highly unequal resources and opportunities, these identities would be valued, if they were valued at all, for their own sakes.

Although I think this is the right direction to move in, I acknowledge that it does not provide clear and certain answers to the persistent and intractable problem of how the law should treat race. Most importantly, there is unfortunately still room for sharp disagreement on the crucial question of whether race-conscious measures are essential to, or antithetical to, the goal of freeing American racial identities from their origins in systems of exploitation and oppression and their entanglement with ongoing structures of inequality. I believe that in many instances, these measures are indeed essential, but that we must judge each particular mechanism for change on *its* own merits, as defined by the general guideline that Phil Klinkner and I have advanced.[83] Working out the implications of that guideline is, how-

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[82] KLINKNER WITH SMITH, *supra* note 36, at 347.

[83] *Id.*

ever, a task for many other occasions. If the preceding analysis has persuaded you that modern law is continuing to construct racial identities in America, whether we wish that to be the case or not, and that the dominant conceptions visible in modern law remain deeply problematic, then it has, I hope, provided some useful insights into the current state of America's most enduring political dilemma.