Georgia State University Law Review

Volume 19
Issue 2 *Winter 2002*

Article 6

12-1-2002

Public Opinion and the Demise of Affirmative Action

Stephen A. Plass

PUBLIC OPINION AND THE DEMISE OF AFFIRMATIVE ACTION

Stephen A. Plass*

INTRODUCTION

It has become increasingly difficult to generalize about blacks as a racially oppressed group in America. This is not due to the fact that discrimination has ceased, or because the barriers to success have been removed, or because substantial equality has been achieved.[1] Arguments that blacks are disadvantaged now compete with positive media images reflecting black success as both fact and fiction. For example, Colin Powell's appointment as Secretary of State and Condoleezza Rice's appointment as National Security Advisor by President George W. Bush are prominent indications that blacks have made it.[2] The Monica Lewinsky scandal depicted to the nation Vernon Jordan's prominence as a lawyer and his closeness with President Clinton. Furthermore, the decisions of Presidents George W. Bush and Bill Clinton to fill many cabinet posts with blacks reflect success stories at the highest levels.[3] On a wider scale, the presence and activities of black professionals who number in the millions and spend several hundred million dollars each year at hotels and on conventions further portray black success.[4]

Black presence in business and social settings and media images suggest that America is a place of racial cooperation where bigotry is an aberration. Such portrayal of our nation's racial condition is a successful commercial formula that seemingly meets the needs of

---

* Professor of Law, St. Thomas University School of Law.

1. *See* WILLIAM A. DARITY, JR. & SAMUEL L. MYERS, JR., PERSISTENT DISPARITY: RACE AND ECONOMIC INEQUALITY IN THE UNITED STATES SINCE 1945, 1-10 (1998).

2. *See* Stephen Hess, *The Presidency Transition: Less Seems to Be More, It's Been a Good Month for Bush*, L.A. TIMES, Feb. 25, 2001, at M1; Jim VandeHei, *Extending Diversity to Bush Subcabinet Will Be Tough Task*, WALL ST. J., Feb. 2001, at A20.

3. *See* Eleanor Clift, *Clinton's Cabinet: Beyond White Men*, NEWSWEEK, Dec. 22, 1992, at 32; *see also The Face of America in Clinton's Cabinet*, DES MOINES REG., Dec. 21, 1996, at 1.

4. *See* Joyce Jones, *Sleeping With the Enemy: Hotel Industry First Target of NAACP Payback Initiative*, BLACK ENTERPRISE, June 1, 1997, at 29.

both black and white audiences.[5] On the side of fiction, television shows now routinely depict blacks as, among other things, surgeons, lawyers, and police chiefs.[6] One blockbuster movie cast a black male in the role of saving the universe,[7] and in another film, a black female firmly implements White House policy.[8]

Conspicuous consumption by blacks helps reinforce perceptions that American society has removed most barriers to equal opportunity and achievement.[9] Significant and repetitive positive images of blacks tend to undermine a general contention that to be black is to be disadvantaged.[10] Major movies have suggested that blacks share power with whites at all levels.[11] Mainstream movies

5. *See Guess Who's Coming to the Rescue*, NEWSWEEK, Nov. 13, 2000, at 14.

6. *See, e.g., ER* (NBC television series, Warner Bros., 1994-Present); *The Practice* (ABC television series, Twentieth Century Fox, 1997-Present); *Scrubs* (NBC television series, Touchstone Television, 2001-Present).

7. INDEPENDENCE DAY (20th Century Fox 1996). In this movie, black actor Will Smith plays the role of a Marine Corps fighter pilot who saves America from alien invaders.

8. CONTACT (Warner Bros. 1997). In *Contact*, black actress Angela Bassett plays the role of a Presidential aide who ensures that information gathered in the course of interplanetary research is managed consistent with White House policy.

9. For example, seeing blacks in luxury automobiles is not uncommon because blacks tend to prioritize vehicles in their consumer spending. *See* Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 764-65 (1996) (noting that Black families place a lesser share of their wealth in income-producing assets such as farms, other real estate, and business equity). As a result, "although whites on average own more total vehicle equity, even after controlling for income and other measures of status, blacks indisputably invest a higher percentage of their wealth in vehicles than whites do." *Id.* at 780. *See also* Mary C. Daly, *Rebuilding the City of Richmond: Congress's Power to Authorize the States to Implement Race-conscious Affirmative Action Plans*, 33 B.C. L. REV. 903, 952 (1992) ("Black wealth equity is concentrated in equity in homes, cars and trucks (64.4 percent for blacks versus 37.4 percent for whites)."). Not only do blacks spend more hard-earned income on vehicles than whites do, they also pay a substantial "color-premium" for those vehicles. *See* Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 872 (1991) ("[B]lacks annually pay $150 million more for new cars than they would if they were white males.").

10. *See generally infra* note 20.

11. *See, e.g.*, COURAGE UNDER FIRE (20th Century Fox 1996) (featuring Denzel Washington as an army lieutenant colonel charged with investigating a deceased female helicopter pilot's suitability for a Medal of Honor); CRIMSON TIDE (Hollywood Pictures 1995) (featuring Denzel Washington as the temperate and moral executive officer aboard a nuclear submarine); THE PELICAN BRIEF (Warner Bros. 1993) (featuring Washington as an investigative reporter attempting to unravel the killing of Supreme Court Justices); and PHILADELPHIA (Tristar Pictures 1994) (featuring Washington as a lawyer hired to represent another lawyer who contends that he was wrongfully discharged by a major Philadelphia law firm because he contracted AIDS).

regularly depict the still-taboo subject of interracial romance, thereby suggesting general recognition of black equality.[12]

Although no one can generally demonstrate that it is better to be black,[13] encountering black success as fact or fiction has served to magnify the plight of less privileged whites. Not that long ago, black disadvantage was ubiquitous. Today, however, subtle and sometimes complex racial practices accommodate avoidance of the more general realities of black existence.[14] For example, governments built highways over and around black communities and thereby allowed commuters to bypass the depressing realities of poor black neighborhoods.[15]

In addition to discriminatory highway planning, housing segregation remains a national problem partly facilitated by private groups and the federal government. Although many factors contribute to white flight from the inner cities to the suburbs or other isolating enclaves, negative perceptions about blacks remain an

---

12. *See, e.g.*, BAD COMPANY (Touchstone Pictures 1995) (depicting intense love affair between black male and white female blackmailing team); BODYGUARD (Warner Bros. 1992) (depicting love affair between black female singer and her white bodyguard); MONSTER'S BALL (Lions Gate Films 2002) (depicting love affair between black female and white male who overcomes his initial racist attitudes toward her); OTHELLO (Castle Rock Entm't 1995) (featuring black African General romantically involved with and married to a white Italian aristocrat); RICH MAN'S WIFE (Hollywood Pictures 1996) (depicting black female married to wealthy white businessman); SWORDFISH (Warner Brothers 2001) (featuring black female romantically involved with lead character).

13. *See* ANDREW HACKER, TWO NATIONS 31-32 (1992) (arguing that, although most whites feel that blacks have achieved substantial equality with whites, whites would demand about one million dollars a year to live in America as a black person because they recognize the oppression they would experience if they were viewed as black); David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 925 (1996) ("[s]cholars have found ample evidence that we continue to be a society in which great privileges are afforded to white men not by virtue of their personal merit, but because of the accident of their birth."); *see also* Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707 (1993) (detailing how the law has accommodated and protected a wide variety of privileges and benefits tied to whiteness).

14. Federal highway and home-ownership policies as well as the zoning and development practices of state and local governments augment the problem of isolation of racial minorities. *See* Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047 (1996). For a stinging indictment of the federal government's contribution to isolation of the races through housing law and policies, see generally Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285 (1995), and Florence Wagman Roisman, *Intentional Racial Discrimination and Segregation by the Federal Government As a Principal Cause of Concentrated Poverty: A Response To Schill and Wachter*, 143 U. PA. L. REV. 1351 (1995).

15. *See* Andrea Eaton, *Impact of Urban Renewal or Land Development Initiatives on African-American Neighborhoods in Dade County Florida*, 3 HOW. SCROLL 49 (1995).

integral part of the whites' decision to segregate.[16] Federal highway and home ownership policies, along with zoning and development practices of state and local governments, augment the problem of isolating racial minorities.[17] Despite the realities of racial division, whites have changed their perception of black existence. Most Americans, confronted by personal obligations and stresses, are inclined to rely on personal experiences and anecdotal data.[18] Individualist pursuit of a better quality of life forces greater reliance on racially stereotyped socialization and media snippets.

Changing perceptions about black achievement and white vulnerability have helped change the conversation and attitude about racial issues. This changing perception, in its more strident forms, has changed both the debate and direction of affirmative action.[19] The way in which marginal black achievement has been linked to white disadvantage is equally damaging to the survival of affirmative action.[20] This linkage between white disadvantage and black success

16. *See generally* Reginald Leamon Robinson, *White Cultural Matrix and the Language of Nonverbal Advertising in Housing Segregation: Toward an Aggregate Theory of Liability*, 25 CAP. U. L. REV. 101 (1996) (discussing generally the conscious housing discrimination practices of white Americans and specifically, the race-based practices of real-estate advertisers).

17. *See* discussion *supra* note 14.

18. Despite the appearances of success, blacks continue to trail whites in virtually every area of consequence. For example:

> The average black household's net worth, measured in financial assets, is still a tenth that of whites, according to the most recent U.S. census data. And for every $1 that the average white worker earns, the average black worker earns 62 cents. Blacks account for 10.1 percent of the U.S. work force, but for a host of reasons they are vastly underrepresented in professions like medicine, law, journalism, and engineering.

U.S. NEWS & WORLD REPORT, Mar. 24, 1997, at 48. *See also* DARITY & MYERS, *supra* note 1.

19. Perceptions about the black condition have reshaped attitudes, practices, and law as it relates to affirmative action. For example, in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the United States Supreme Court rejected any presumption that low participation by minority contractors in public contracted projects was a product of discrimination by the city. Justice O'Connor's world view as articulated in *Croson* typifies the national sentiment. For example, Justice O'Connor suggested that white contractors would hire minority firms even in the absence of set-aside programs. *Id.* at 502. She added that limited minority access might be due to career and entrepreneurial choices. *Id.* at 503.

20. An op-ed article in *The Washington Post* highlights this sentiment. *See* Richard Cohen, *Affirmative for Whom?*, WASH. POST, Sept. 9, 1997, at A19. The writer states:

> Once, I suppose, the racial situation in this country was so dire that on balance the good that affirmative action did outweighed the bad. This was especially the case when those being helped were precisely the same people who once had been victimized. Now, though, we are usually one or two generations from the actual victims of racist bigotry, making it much harder – if not impossible – to justify what inevitably is victimizing someone on the basis of race.

has garnered a strong following. The idea that black success is achieved on the backs of whites has prompted the necessary popular outcry to vote certain affirmative action programs out of existence.[21] It has also resulted in President Clinton modifying his position of strong support for schemes that benefit minorities.[22] White vulnerability tied to affirmative action also has captured the attention of legislators seeking to end any scheme that provides assistance on the basis of race.[23] Furthermore, the Supreme Court has determined that affirmative action programs now cast blacks in the role of discriminator rather than victim.[24]

Skewed perceptions about the black condition and a quiet avoidance of racial realities now dominate discussions about race. It is common to hear that discrimination is not a norm but an aberration, and that white disadvantage mirrors that of blacks. Part I of this article evaluates the link between increasingly widespread images of black success and declining realities of whiteness as privilege[25] and its impact on the future of affirmative action. Part II shows that tying white disadvantage to black opportunity and achievement is not new and has always been strong currency in Supreme Court civil rights jurisprudence. Part II also shows that, while available scholarship has focused on the interpretive aspects of the Court's affirmative action jurisprudence, it has paid little or no attention to the role of public perception in redirecting the Court's attention to the concerns of whites. Part III of this article argues that

---

Id.

21. California took the lead by invalidating affirmative action programs sponsored by state and local governments through a 1996 ballot initiative called Proposition 209. This initiative has effectively abrogated preferential schemes that benefit minorities and women in the areas of public education, contracting, and employment. *See* Connerly v. State Pers. Bd., 112 Cal. Rptr. 2d 5 (3d App. Dist. 2001).

22. President Clinton amended the eligibility rules for small business set-aside programs to include whites, and reversed his position of support for a black teacher in an affirmative action case before the Supreme Court. *See* Clarence Page, *Diversity vs. Affirmative Action,* CHI. TRIB., Aug. 27, 1997, at 19.

23. Members of Congress have been debating and receiving testimony regarding the Civil Rights Act of 1997, 143 CONG. REC. S6195-01 (1997), a bill that seeks to end all federal affirmative action programs. *See also*, Act to End Unfair Preferential Treatment S. 497, 104th Cong. § 1 (1995); Civil Rights Restoration Act of 1995, S. 318, 104th Cong. § 1 (1995); Equal Opportunity Act of 1995, S. 1085, 104th Cong. § 1 (1995).

24. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

25. *See generally* Harris, *supra* note 13.

public mood and opinion are more powerful than the constitutional and statutory provisions implicated in the affirmative action debate because public opinion is a key force driving the interpretation given to those provisions. Part IV evaluates the effect of public opposition to racial competition and the theory of colorblindness on affirmative action programs in the areas of education, voting, and employment. This article contends that we must recognize racial discrimination and continue to work at eradicating such practices. Identifying how discrimination against blacks continues will serve as a counterweight to perceptions of black advantage and will minimize the public outcry against affirmative action.

I. BACKGROUND

Scholars have theorized that the Court's civil rights jurisprudence is majoritarian[26] or political,[27] among other things. Although these critical assessments have merit, they do not fully evaluate the reasons for the Court's majoritarian or political tendencies. This article suggests that the Court has always assumed responsibility for the plight of proletarian or working class whites.[28] Unfortunately,

26. In the civil rights context, majoritarianism contemplates the Court's deference to the policy choices of the white majority even when those choices are arbitrarily in derogation of racial minority interests. *See* Charles M. Freeland, *The Political Process as Final Solution*, 68 IND. L.J. 525, 570 (1993) (asserting that the Court sides with the political majority over objecting minorities because of its conviction that the majority knows best and should have unlimited reach over the individual in making policy choices); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 592-601 (1993) (stating that the Court often consults majoritarian sources in its ordering of constitutional rights so decisions that invariably reflect majoritarian desires are unsurprising); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996) (arguing that Court decisions are grounded in strong national consensus, not a desire to protect minorities from oppressive majorities); Suzanna Sherry, *Issue Manipulation by the Burger Court: Saving the Community from Itself*, 70 MINN. L. REV. 611, 650-62 (1986) (arguing that the Court pursues a majoritarian agenda grounded in "community consensus" which systematically eliminates the counter-majoritarian protections provided to minorities by the constitution); Girardeau Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1423-24 (1995) (arguing that the Supreme Court has consistently subordinated the interests of racial minorities to that of the white majority).

27. *See* Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 2032-33 (1990) (concluding that the Supreme Court is a political body that lacks counter-majoritarian capacity, therefore, minorities would be better off relying on overtly political branches of government rather than judicial review to advance their interests).

28. "Proletarian" is commonly defined as the laboring or working class. However, in this article, "proletarian" refers to working class whites only. To some extent, proletarianism and majoritarianism are the same because both prioritize the interests of a white majority. However, a proletarianism

arguments that portray blacks as an obstacle to white opportunity and achievement have continuously blinded the Court. Restrictive civil rights decisions reflect attempts to adjust the balance of power in favor of opportunities for working class whites. Moreover, the Supreme Court now openly views less-privileged whites as the victims of affirmative action programs.[29]

The notion that affirmative action harms whites provides significant justification for applying strict scrutiny requirements to programs that benefit minorities. Under this analysis, if such programs exclude whites, they are presumptively illegitimate.[30] However, eliminating such programs would mean that efforts to remedy the harm of slavery and its legacy have officially come to an end. It would also confirm the public sentiment and the Court's perception that, in large measure, equal opportunity exists for all races, and that discriminatory acts are exceptional events. By rejecting minority-friendly schemes as unconstitutional, the Court promotes the belief that civil rights laws have removed discrimination as a barrier to equal opportunity.

If our existing civil rights laws truly removed the barriers to equal opportunity, scaling back affirmative action may not stir much controversy. However, available data shows that legal declarations of civil rights have not reduced America's race-consciousness or race-specific behavior. Civil rights laws have not torn down these barriers to equal opportunity, and color-blind schemes have promoted more racial division than racial solidarity.[31]

---

conclusion has not created the analytic quandary that majoritarianism has. *See, e.g.*, Spann, *supra* note 27, at 2012-16 (noting that even the Court's quintessential counter-majoritarian decision, *Brown v. Board of Education*, 347 U.S. 483 (1954), may be viewed as majoritarian because the white majority supported *Brown* more for its rhetoric than the decision's ability to facilitate actual change); *see also* Friedman, *supra* note 26, at 608 (citing polls that showed a majority of Americans supported the *Brown* decision). Friedman also argues that majoritarianism is an incoherent concept, partly evidenced by the Court's willingness to defy majority will on many occasions and the fact that even the Court's most controversial decisions are often majoritarian. *Id.* at 605-09.

29. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

30. *See Adarand*, 515 U.S. at 227.

31. For example, Proposition 209 was credited with reducing the number of minorities at California public universities. Supporters of affirmative action argued that the University of California system was "reverting to a period of segregation." *See* NAT'L L.J., July 14, 1997, at A8.

Alternative preferential schemes grounded in economic disadvantage are not specifically designed to address racism and minority underachievement tied to it. Although white privilege has declined since the days of slavery and Jim Crow, partly due to affirmative action's creation of opportunities for blacks, this process should not be viewed as a regressive trend.

Civil rights advocates must persuade the Court that these developments are desirable in a progressive democracy. To sustain remedial efforts labeled as affirmative action, they must convince the Court that the greatest barrier to equality is racism, not affirmative action. They must also convince the Court that, despite appearances, black success is not that far-reaching, and whites have not paid a heavy price for the real gains blacks have made. It seems possible to persuade the Court if popular attitudes shift.

II. MAJORITARIANISM AND WHITE PRIVILEGE

Legal scholarship routinely characterizes Supreme Court civil rights decisionmaking as majoritarian.[32] This characterization has merit, but is not always adequate. Beginning with the Court's most notorious civil rights decision, the *Dred Scott* case,[33] the Court acceded to a strong national desire to protect the interests of slaveowners.[34] At the same time, the Court rejected as unconstitutional an arguably majoritarian enactment that prohibited slavery in the Louisiana Territory.[35] The Court's subsequent narrow interpretations of the Fourteenth Amendment and related civil rights statutes may also be characterized as contrary to a strong national will.[36] Even *Brown v. Board of Education,*[37] the Court's star civil

32. *See supra* note 26.

33. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

34. *Id.*

35. *See id.* at 451-52. The Court ruled that Congress could not limit a slaveowner's property rights in his slave because of express constitutional protection of such rights. *Id.*

36. For a discussion of how the Court retarded the potential for equality embraced by these laws, see Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion,* 40 AM. U. L. REV. 1307 (1991). Although I argued in that article that the Court's civil rights jurisprudence has been a function of majoritarian convenience, the Court's refusal to activate majority-legislated civil rights laws for the benefit of minorities is arguably counter-majoritarian behavior.

37. 347 U.S. 483 (1954).

rights decision, can be interpreted as either majoritarian or countermajoritarian.[38] More recently, the Court's rejection of federal set-aside initiatives may be regarded as trumping the majoritarian process.[39] The Court now seems poised to reject any affirmative action program that operates as a pure minority preserve.[40]

Whether these decisions are labeled majoritarian or countermajoritarian, one thing remains true for all of them, that is they all account for public sentiment or national will. When the Court accommodated slavery, it accounted for the views of a significant portion of the nation. Limiting the reach of reconstruction civil rights laws also effectuated a national will to relegate blacks to an inferior position. Moreover, limiting the speed with which desegregation occurred responded to a national desire that change should not occur overnight.

During the slavery era, all whites were truly privileged to the extent that whiteness was a bar to enslavement.[41] But all whites were

---

38. Even though *Brown* rejected the separate but equal doctrine that was structurally advantageous to whites, a majority of whites supported the decision. *See* Friedman, *supra* note 26 at 608 (citing three polls that showed *Brown* had majority support).

39. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); *see also* Kathleen Sullivan, City of Richmond v. J.A. Croson Co.: *The Backlash Against Affirmative Action,* 64 TUL. L. REV. 1609 (1990) (arguing that democratically created set aside programs that benefit blacks are rejected by the Court because of white resentment toward such programs).

40. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 116, 105 Stat. 1079 (current version at 42 U.S.C. § 1981). This section provides: "Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law." *Id.* On the date that this provision became law, certain race and sex-based preferences were regarded as constitutionally permissible. *See* United Steelworkers v. Weber, 443 U.S. 193 (1979) (holding that a plan that granted employment preferences to black employees was permitted by Title VII); *see also* Johnson v. Transp. Agency, 480 U.S. 616 (1987) (holding that an employer could prefer a female over a male who had a higher interview score because of its affirmative action plan to increase opportunities for minorities and women). However, the Court granted certiorari in *Piscataway Township Bd. of Educ. v. Taxman*, 521 U.S. 1117 (1997) to decide whether an employer could use race in deciding who to lay off between two equally qualified teachers with equal seniority. Fearing an adverse ruling, civil rights groups raised the funds needed to pay the white teacher in order to settle the case. *See* Jack Greenberg, *In "Piscataway," Rights Groups Lost Control*, NAT'L L.J., Dec. 15, 1997, at A19. It would have been remarkable for the Court to conclude in *Piscatawy* that an employer could prefer a black employee on diversity grounds under these circumstances, in view of the Court's recent denunciation of the use of race. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

41. *See generally* A. LEON HIGGINGBOTHAM, JR., SHADES OF FREEDOM: RACIAL PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS (1996) (noting that blacks were regarded as inferior beings and therefore could be treated as property and enslaved); Harris, *supra* note 13, at 1721 (asserting that whiteness meant protection from being regarded as property and thereby constituted a property of freedom).

not equally advantaged; most whites were not wealthy planters.[42] The dismantling of slavery eliminated one advantage of whiteness, but the passage of racially discriminatory laws facilitated the perpetuation of most of the economic privileges of whiteness. The subsequent destruction of separate but equal and other Jim Crow laws[43] further reduced many benefits and opportunities associated with whiteness and simultaneously created opportunities for blacks. Affirmative action programs transformed legal equality and opportunity into tangible achievement in areas that traditionally had been white preserves.

The entry of blacks and other minorities into these areas has forced the nation to reexamine the nature and extent of America's obligation to them. Their new participation and gains have upset a historical pattern of racial separation and subordination.[44] During the last generation, white distaste for black encroachment grew along with claims of reverse discrimination. As whites lose opportunities to minorities, the rhetoric that whites stand to lose opportunities and "vested benefits"[45] if remedial schemes are allowed becomes public opinion.

Historical concern about minority suffering has changed to a consideration of white deprivation and exclusion under remedial schemes.[46] In fact, civil rights planning now requires consideration

42. *See infra* note 58 and accompanying text.

43. For a good discussion of the nature and extent of Jim Crow laws and how they operated to suppress blacks, see C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1974).

44. In fact, Justice Scalia declared in *Adarand* that we are now one race under the constitution--American, and the white race owes nothing to the black race or minorities. *See Adarand*, 515 U.S. at 239 (Scalia, J., concurring).

45. *See, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (discussing the importance of job seniority for white employees and the need to protect such benefits).

46. The appropriation of laws intended to assist with the material self-development of blacks is not new. *See, e.g.*, Lively & Plass, *supra* note 36, at 1308 nn.3-4 (1991) (noting that although the central concern of the Fourteenth Amendment was to protect blacks from discrimination, the Amendment was used as the basis for granting unrelated fundamental rights). Now, however, white proletarian interests appear to dominate the substantive and interpretive possibilities for civil rights legislation. For example, laws such as The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976) and The Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1990) were not enacted to protect minorities in particular, although they are modeled after other statutes designed to protect minorities. Title VII of the 1964 Civil Rights Act increasingly has been used to provide protection against sexual harassment and reverse discrimination, although the Title's original concern was

of the interests of disadvantaged whites to be perceived as legitimate.[47] The concern about white disadvantage is not new[48] but is especially powerful now because of available evidence of minority achievement. Popular perceptions and rhetoric about black opportunity and gains are now capable of terminating the tangible efforts at racial remediation.

III. MOOD-BASED JUDICIAL REVIEW

Popular will has taken the Court down paths treacherous for blacks.[49] In 1856, the Court decided that slavery was proper legal and social policy by holding that practice constitutionally sound.[50] Unfortunately, the emancipation of blacks from slavery did not free them, or the Court, from pro-slavery attitudes and ideology. As a result, equality accorded by the abolition of slavery[51] and early civil

---

prohibiting employment discrimination against blacks. *See* 110 CONG. REC. 6547-48, 6554, 6562 (1964).

47. For example, the Clinton administration adopted the Bush administration's position that a black teacher cannot be selected over a white teacher on diversity grounds when an employer is making a decision about two equally qualified and equally senior employees. *See* John Aloysius Farrell, *Affirmative Action Tops Court's Docket,* BOSTON GLOBE, Oct. 3, 1997, at A1; *see also* Steven A. Holmes, *Affirmative Action May Soon Help White-Owned Firms,* MIAMI HERALD, Aug. 15, 1997, at 21A ("The Clinton administration on Thursday set in motion changes in one of its premier affirmative action programs that would make it easier for white-owned firms to qualify for government contracts that have been reserved almost exclusively for minorities.").

48. *See infra* notes 69-71 (discussing white concerns about opportunities granted to blacks from the time of emancipation).

49. Two of the Court's most notorious expeditions are documented in the decisions *Dred Scott v. Sandford,* 60 U.S. (19 How.) 393 (1856) and *Plessy v. Ferguson,* 163 U.S. 537 (1896). In *Dred Scott,* the Court held that blacks were not citizens entitled to constitutional protection and therefore could be legally regarded as property and subjected to slavery. *Dred Scott,* 60 U.S. (19 How.) at 406. The *Plessy* decision is famous for its "separate but equal" doctrine, which bifurcated equality by distinguishing between equality before the law and equality in fact. The Court ruled that the law could not protect blacks against social distinctions made on the basis of race. *Id.* at 551.

50. *See Dred Scott,* 60 U.S. (19 How.) at 452. There is no shortage of commentary denouncing this decision. *See, e.g.,* Paul Finkelman, *The* Dred Scott *Case, Slavery and the Politics of Law,* 20 HAMLINE L. REV. 1, 4 (1996) (stating that *Dred Scott* is the "quintessential bad case"); Nelson Lund, *The Constitution, the Supreme Court, and Racial Politics,* 12 GA. ST. U. L. REV. 1129, 1141 (1996) (stating that the *Dred Scott* decision was "disastrous"); Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?,* 25 LOY. L.A. L. REV. 1159, 1174 (1992) (stating that *Dred Scott* was morally and legally wrong).

51. U.S. CONST. amend. XIII provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

rights statutes[52] competed with popular initiatives intended to reinstitute slavery-like conditions.

Once slavery was abolished, states began enacting legislation designed to perpetuate the inferior status of blacks. For example, state laws limited the ability of blacks to vote, use public accommodations, or attend schools.[53] Faced with competing racial demands, the Court adopted popular views that called for narrow interpretations of civil rights laws intended to ensure equality of the races.[54] As a result, early civil rights laws never realized the substantive equality they were designed to achieve.

---

52. Reconstruction civil rights statutes were enacted to implement the Thirteenth, Fourteenth, and Fifteenth Amendments. *See, e.g.,* The Civil Rights Act of 1866, ch. 31, 14 Stat. 27. Section 1 of this statute provides:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, 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.

Id. Recognizing the magnitude of deprivations slavery imposed on blacks, Congress attempted to close every avenue of abuse previously utilized by specifying wide-ranging equal rights to secure the material self-development of freed blacks. *See* Civil Rights Act of 1871, Act of April 20, 1871, ch. 22, 17 Stat. 13 (prohibiting denial of equal rights under color of law); Civil Rights Act of 1870, ch. 114, 16 Stat. 140 (providing equal voting rights for all citizens).

53. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70 (1872).

> Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value . . . . They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain . . . .

Id.

54. In *McCabe v. Atchison*, 235 U.S. 151 (1914), the Court upheld a statute that sanctioned racial discrimination in railroad accommodations. In *Hodges v. United States,* 203 U.S. 1 (1906), the Court stated that civil rights laws could not protect black workers from armed and dangerous whites who forced them to abandon their jobs because the laws of the United States could not regulate such private behavior. Justice Harlan, who is famous for his dissent in *Plessy*, also dissented in the *Hodges* case. He took issue with the majority's view that "Congress cannot make it an offense against the United States for individuals to combine or conspire to prevent, even by force, citizens of African descent, solely

By the end of the Nineteenth Century, the Court had ensured that racial equality remained merely aspirational by constitutionalizing inequality.[55] During the slavery era, whites did not worry much about encroachment because blacks were educationally, politically, and economically powerless.[56] However, emancipation and formal equality in the form of civil rights laws raised the specter of competition for limited resources.[57] Legal declarations of equality presented challenges for less-privileged whites who were not the real beneficiaries of slavery.[58] As a result, affirmative assistance to freed

---

because of their race, from earning a living." *Id.* at 36 (Harlan and Day, JJ., dissenting). Justice Harlan further noted:

> Such is the import and practical effect of the present decision, although the court has heretofore unanimously held that the right to earn one's living in all legal ways, and to make lawful contracts in reference thereto, is a vital point of the freedom *established by the Constitution*, and although it has been held, time and again, that Congress may, by appropriate legislation, grant, protect and enforce *any* right, derived from, secured or created by, or dependent upon that instrument. These general principles, it is to be regretted, are now modified, so as to deny to millions of citizen-laborers of African descent, deriving their freedom from the Nation, the right to appeal for National protection against lawless combinations of individuals who seek, by force, and solely because of the race of such laborers, to deprive them of the freedom established by the Constitution of the United States, so far as that freedom involves the right of such citizens, without discrimination against them because of their race, to earn a living in all lawful ways, and to dispose of their labor by contract. I cannot assent to an interpretation of the Constitution which denies National protection to vast numbers of our people in respect of rights derived by them from the Nation. The interpretation now placed on the Thirteenth Amendment is, I think, entirely too narrow and is hostile to the freedom established by the supreme law of the land. It goes far towards neutralizing many declarations made as to the object of the recent Amendments of the Constitution, a common purpose of which, this court has said, was to secure to a people theretofore in servitude, the free enjoyment, without discrimination merely on account of their race, of the essential rights that appertain to American citizenship and to freedom.

Id. at 36-37.

55. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

56. Slavery jurisprudence made it impermissible for blacks to vote, get an education, or pursue entrepreneurial opportunities. *See* Robert A. Sedler, *The Constitution, Racial Preference, and the Equal Participation Objective*, *in* SLAVERY AND ITS CONSEQUENCES: THE CONSTITUTION, EQUALITY, AND RACE 123, 126-27 (Robert A. Goldwin & Art Kaufman eds., 1988).

57. In 1861, President Lincoln issued the emancipation proclamation, which outlawed slavery in the rebellious southern states. Emancipation Proclamation (Jan. 1, 1863), *reprinted in* AMERICAN HISTORICAL DOCUMENTS 1900-1904, at 344 (Charles W. Eliot ed., 1910). Subsequently, Congress adopted the Thirteenth Amendment, which abolished slavery everywhere in the United States. U.S. CONST. amend. XIII. For a summary discussion of earlier abolition decisions by northern states, see Spann, *supra* note 27, at 2001-02 n.84.

58. According to the 1790 census, only 23% of all families had slaves, with an average of 7.3 slaves per family. The 1850 census showed a decrease with just 10% slave-holding families, with an average of 9.2 slaves per family. U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, THE SOCIAL AND

blacks triggered concerns about unequal treatment. Some viewed black civil war refugees receiving assistance from the federal government as unfair beneficiaries of educational, political, employment, and economic opportunities.[59] Popular calls for protection from black encroachment began once opportunity and access were granted.

The Court responded to public concerns about black encroachment by supporting schemes designed to expand and perpetuate white preserves.[60] The Court used the Constitution to accommodate white concerns about black access.[61] Although wrapping the Constitution around white preserves excluded blacks and other non-whites from America's bounty, the Court determined this to be the proper ordering of civil rights.[62] By creating a dual landscape for the races, whites were able to appropriate all desirable opportunities, which over time became regarded as entitlements.[63] From the outset, a desire to protect and perpetuate white opportunity and achievement rather than adopt or follow any particular model of judicial review greatly influenced the Court.[64] The Court had a very basic concern

---

ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES: AN HISTORICAL VIEW, 1790-1978, Series P-23, No. 80, 12. In his messages opposing assistance to blacks newly freed from slavery and made refugees by the civil war, President Andrew Johnson noted that, "millions of the white race [were] honestly toiling from day to day for their subsistence." *See* Message of President of the United States, EXEC. DOC. No. 39-25, at 4 (Feb. 19, 1866). For a discussion of the employment tensions between white planters and poor whites, see JACQUELINE JONES, THE DISPOSSESSED: AMERICA'S UNDERCLASS FROM THE CIVIL WAR TO THE PRESENT 25-26 (1992).

59. *See* Donald L. Beschle, *"You've Got to Be Carefully Taught": Justifying Affirmative Action After* Croson *and* Adarand, 74 N.C. L. REV. 1141, 1147-48 (1996).

60. The Court deferred to schemes designed to exclude blacks from educational, voting, and social opportunities. *See* Berea College v. Kentucky, 211 U.S. 45 (1908) (upholding legislation that permitted a private college to discriminate on the basis of race). The Court did not strike down poll taxes until it decided *Harper v. Virginia Bd. of Elections,* 383 U.S. 663 (1966). The Court tolerated the prohibition of social mingling of the races through miscegenation statutes until it decided *Loving v. Virginia*, 388 U.S. 1 (1967). *See also* McLaughlin v. Florida, 379 U.S. 184 (1964).

61. The Court shielded private discriminatory conduct by ruling that the Constitution only prohibits racially discriminatory state action. *See* The Slaughter House Cases, 83 U.S. (16 Wall.) 36, 81 (1872).

62. In the *Civil Rights Cases,* 109 U.S. 3, 25 (1883), the Court ruled that bare discrimination on the basis of race would not qualify as badges or incidents of slavery entitled to legal protection.

63. *See* Hodges v. United States, 203 U.S. 1 (1906). The Court did not prohibit the destruction of employment opportunities for blacks even though tolerating this conduct would leave recently freed blacks destitute. *Id.* at 7-8. Marauding white citizens then had notice that they could perpetuate the inferior condition of blacks through force and violence.

64. The basic concept of judicial review can be traced back to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), where the Court established its power to determine the constitutionality of acts of

about protecting the popular or national will, which called for a hierarchical relationship between the races. As a result, judicial review in the civil rights area often was not steered solely by textual signals in the Constitution or statutory prescriptions. Instead, the extent to which equal rights laws negatively impacted the national mood determined in significant part the constitutionality of these laws.

Faced with popular opposition, the Court did not favor many equality principles announced by white legislators. For the most part, national sentiment only permitted the Court to protect racial equality when it did not impinge on the preferred status of whites. The legal prescriptions for racial equality remained aspirational. Additionally, the Court could predict little resistance from Congress because there would be little popular outcry if the Court rendered interpretations seemingly at odds with the Constitution or statutory mandates. Well into the Twentieth Century, Congress implicitly confirmed the Court's assessment of popular will by deferring to the Court's ordering of racial affairs.[65] The Court's mood-based interpretations provided the insulation needed to limit black entry and achievement.

---

coordinate branches of government. With the power of judicial review came the potential to protect minorities from exploitative legal prescriptions fashioned by the majority, that is, the power to behave in a counter-majoritarian manner. Alexander Bickel is credited with making counter-majoritarianism the center of the judicial review debate by writing that "[t]he root difficulty is that judicial review is a counter-majoritarian force in our system." ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (2d ed. 1957). The reality that the Court could strike down acts of coordinate branches controlled by the majority highlighted the potential for minority protection by the judiciary but simultaneously raised concerns about the legality and propriety of tramping the majority's wishes in a democracy. However, the Court turned out to be the governmental branch least sympathetic to the claims of blacks. *See* HIGGINGBOTHAM, JR., *supra* note 41, at 82-91 (noting that the Supreme Court has always been hostile to black civil rights and has struck down laws designed to ensure racial equality); *see also* Clarence Thomas, *Victims and Heros in the "Benevolent State,"* 19 HARV. J.L. & PUB. POL'Y 671, 675 (1996) (asserting that courts are a tougher forum than the political branches when one is making legal demands).

65. From the late Nineteenth Century to the mid-Twentieth Century, Congress essentially remained silent on race matters and allowed the Court to establish its own model of equality by acquiescing to the Court's constitutional interpretations. *See* Spann, *supra* note 27, at 2005 (referring to congressional inaction as a "post-Reconstruction lapse in congressional responsiveness to minority interests").

IV. PUBLIC OPPOSITION TO RACIAL COMPETITION

In many ways, the status of our constitutional democracy today mirrors that of the late Nineteenth Century when the opportunity for real racial equality emerged. Today, just as over a century ago, the nation must contend with claims that programs designed to help blacks infringe on the legal and economic rights of whites. Such claims effectively advance "white reconciliation," which coalesces into a national will to limit preferential schemes intended for minority upliftment. Even Civil War and Reconstruction presidents prioritized protecting white preserves, which helped set the stage for diminished attention to the realities of black existence in a nation adjusting to declared equality.[66] Today's Congress, like the Reconstruction Congresses, lacks a popular mandate to create

66. Presidents Lincoln and Johnson prioritized reconciling with the South by issuing a series of pardons to civil war rebels and traitors. *See* Proclamation No. 11, 13 Stat. 737 (Dec. 8 1863). This proclamation pardoned

> all persons who have, directly or by implication, participated in the existing rebellion, except as hereinafter excepted, that a full pardon is hereby granted to them and each of them, with restoration of all rights of property, except as to slaves, and in property cases where rights of third parties shall have intervened, and upon the condition that every such person shall take and subscribe an oath, and thenceforward keep and maintain said oath inviolate; and which oath shall be registered for permanent preservation, and shall be of the tenor and effect following, to wit: -- "I, __ __ , do solemnly swear, in presence of Almighty God, that I will henceforth faithfully support, protect, and defend the constitution of the United States and the Union of the States thereunder; and that I will, in like manner, abide by and faithfully support all acts of congress passed during the existing rebellion with reference to slaves, so long and so far as not repealed, modified, or held void by congress, or by decision of the supreme court; and that I will, in like manner, abide by and faithfully support all proclamations of the President made during the existing rebellion having reference to slaves, so long and so far as not modified or declared void by decision of the supreme court. So help me God."

Id. at 737-38. *See also* Proclamation No. 14, 13 Stat. 741 (Mar. 26, 1864) (clarifying that the proclamation of Dec. 8, 1863 applies to insurgent enemies at large who voluntarily come forward and take the oath and also allowing prisoners to apply to President for clemency); Proclamation No. 37, 13 Stat. 758-60 (May 29, 1865) (providing general pardon by President with a provision for "liberal" clemency for excepted individuals upon special application to the President); Proclamation No. 3, 15 Stat. 699 (Sept. 7, 1867); Proclamation No. 6, 15 Stat. 702 (July 4, 1868). Instead of embracing blacks newly freed from an ignoble institution, the executive branch pursued pardons "to remove all appearances or presumptions of a retaliatory or vindictive policy on the part of the Government, attended by unnecessary disqualifications, pains, penalties, confiscation, and disenfranchisements, and, on the contrary, to promote and procure complete fraternal reconciliation among the whole people, with due submission to the Constitution and laws." Proclamation No. 6, 15 Stat. 702 (July 4, 1868).

minority preserves.[67] This sentiment leaves the Supreme Court with great discretion in choosing a constitutional formulation of equality that could limit minority achievement.[68] Ironically, the Court hears many of the same arguments that were presented in the late 1800s.[69]

In the past the Court faced little or no resistance from chief executives or Congress because it was responding to national will. Achieving equal opportunity becomes even more daunting when Congress and the President oppose programs favoring minorities.[70] Executive misunderstanding or mischaracterization of the black condition[71] helps reinforce national will opposing affirmative action.

---

67. *See, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 116, 105 Stat. 1079 (current version at 42 U.S.C. § 1981 nt). Congress avoided the affirmative action issue and essentially left the Court to shape the law in this area.

68. Because constitutions and statutes do not directly address affirmative action, the Court has been the leader and decider on this subject. *See, e.g.*, *supra* note 66.

69. At the end of the Civil War, Congress created the Freedmen's Bureau, which focused primarily on assisting with the material self-development of blacks. *See* Freedmen's Bureau Acts, ch. 90, 13 Stat. 507 (1865); *id.* ch. 200, 14 Stat. 173 (1866); *id.* ch. 135, 15 Stat. 13 (1867). Congress also enacted, over the veto of President Andrew Johnson, the Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866), which granted blacks citizenship and equal rights. However, white opposition to the equal rights prescriptions and aspirations of such laws was strong from the outset, particularly in the South. *See, e.g.*, EXEC. DOC. No. 39-6, at 24, 31, 32, 61 (Jan 3, 1867). Popular condemnation of governmental remedial efforts designed to assist blacks came soon after emancipation. *See* Ernest L. Johnson, *The System Gives It and the System Takes It Away: When Do We Get Off This Merrygoround,* 23 S.U. L. REV. 145 (1996) (noting that even slavocrats lined up to argue that government assistance to newly freed slaves constituted reverse discrimination). Early attempts at remediation also had to overcome detractors in Congress and President Johnson. *See* Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment,* 138 U. PA. L. REV. 437, 480-85 (1989) (recounting congressional opposition to a Freedmen's Bureau bill and President Johnson's marketplace rationale for vetoing the legislation).

70. For example, in objecting to the extension of assistance to blacks made refugees by the Civil War, President Andrew Johnson contemplated a nation where blacks had separate jobs, separate neighborhoods, and separate schools. *See* Message of the President of the United States, EXEC. DOC. No. 39-25. (Feb. 19, 1866). President Johnson noted:

> Neither is sufficient consideration given to the ability of the freedmen to protect and take care of themselves. It is no more than justice to them to believe that as they have received their freedom with moderation and forbearance, so they will distinguish themselves by their industry and thrift, and soon show the world that in a condition of freedom they are self-sustaining, capable of selecting their own employment and their own places of abode, of insisting for themselves on a proper remuneration, and of establishing and maintaining their own asylums and schools. It is earnestly hoped that, instead of wasting away, they will, by their own efforts, establish for themselves a condition of respectability and prosperity. It is certain that they can attain to that condition only through their own merits and exertions.

Id.

71. As early as 1866 President Andrew Johnson argued that blacks were not vulnerable but occupied a position of power. *See* EXEC. DOC. No. 39-25 (Feb. 19, 1866). The President stated:

When members of any branch of government advocate the view that minorities are equally capable of succeeding in America if they work hard, they implicitly suggest that the law should not be a tool for infringing on traditional white preserves.[72] Executive misperceptions coupled with congressional impotence provide a good opportunity for the Court to reject color-conscious schemes that might alleviate the racial handicap and stratification accomplished through law.[73]

A. Colorblindness As Public Opinion

Recent Supreme Court decisions constricting the remedial potential of civil rights legislation reveal the coalescing of events that favor eradicating affirmative action programs and thereby reducing the opportunities available to minorities. The desire to move to a non-racial standard has always been part of the Court's affirmative action jurisprudence. As early as the *Bakke* decision, the Court articulated an interest in protecting whites from black encroachment.[74] By the time the Court decided *Adarand*, concerns

---

> Undoubtedly the freedman should be protected, but he should be protected by the civil authorities, especially by the exercise of all the constitutional powers of the courts of the United States and the States. His condition is not so exposed as may at first be imagined. He is in a portion of the country where his labor cannot well be spared. Competition for his services from planters, from those who are constructing or repairing railroads, and from capitalists in his vicinage or from other States, will enable him to command almost his own terms. He also possesses a perfect right to change his place of abode, and if, therefore, he does not find in one community or State a mode of life suited to his desires, or proper remuneration for his labor, he can move to another where that labor is more esteemed and better rewarded.

Id. at 5.

72. Some of the national mood-based glosses imposed on the Constitution and equal-rights laws include: a finding that the Fourteenth Amendment can only be activated by state action, The *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 81; a determination that discriminatory intent must be proved in civil rights cases, *see e.g.*, *Washington v. Davis*, 426 U.S. 229, 239 (1976); and the more recent refrain that the Constitution is colorblind and therefore efforts to assist blacks must be subjected to strict scrutiny, *see Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and *City of Richmond v. J.A. Croson Co.*, 448 U.S. 469 (1989).

73. The Constitution ensured from the outset that blacks would be a servant class in American society by treating blacks as three-fifths humans and perpetuating the slave trade until 1808. U.S. CONST. art. I, §§ 2, 9. For a short discussion of the Constitution's color consciousness, see Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337 (1987).

74. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). More recently, the Court acquiesced to the invalidation of a law school's efforts to admit blacks, which potentially reduced the

about white suffering had surpassed the troubling reality that legal declarations of equality have not substantially changed the country's racial landscape.[75] These decisions and others demonstrate that protecting white preserves remains an important consideration in determining the constitutional legitimacy of programs designed to assist non-whites.[76]

Supreme Court Justices are acutely aware of the country's racial divide, even though they sometimes appear to be in denial.[77] Modern Court decisions readily acknowledge and document the continuum of racial stratification the law has facilitated.[78] The notion that past calls for colorblindness were advanced to perpetuate racial stratification also has merit.[79] However, some things have changed both superficially and practically. One key change is the reduction in overt discrimination and violence associated with creating and maintaining white preserves.[80] Affirmative action programs started a

---

number of whites eligible for admission. *See* Hopwood v. Texas, 78 F. 3d 932 (5th Cir. 1996), *cert. denied*, 533 U.S. 1929 (1996).

75. For example, in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), the Court fatally applied strict scrutiny to a lay-off plan that benefited black teachers.

76. For example, in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Court protected small white contractors by ruling that a city ordinance that set aside contracting opportunities for minorities must be subjected to strict scrutiny. The Court rejected the city's plan as an unconstitutional attempt at racial balancing. *Id.* at 505-08. Recently, the Court revisited the public contracting issue and again struck minorities a harmful blow—in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), the Court ruled that federal contracting programs must be subjected to strict scrutiny. This decision rejected the Court's prior interpretation that a lesser level of scrutiny was appropriate for federal schemes designed to assist minorities. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980). Additionally, in 1993, the Court ruled that a state plan to assist minority voters is subject to strict scrutiny even absent a claim or proof that the plan dilutes white voting power. Shaw v. Reno, 509 U.S. 629, 643-45 (1993).

77. *See* Charles R. Lawrence, III, *The Epidemiology of Color-Blindness: Learning to Think and Talk About Race, Again*, 15 B.C. THIRD WORLD L.J. 1, 7 (1995) ("The Justices deny their own life experiences in clubs, communities and jobs where blacks are rarely seen.").

78. The Court now commonly acknowledges the harm discrimination has inflicted on blacks. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) ("The unhappy persistence of both the practice and lingering effects of racial discrimination against minority groups in this country is an unfortunate reality . . . ."); City of Richmond v. J.A. Croson Co., 448 U.S. at 499 ("[T]here is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs . . . ."); Wygant v. Jackson Bd. Of Educ., 476 U.S. 267 (1986) ("No one disputes that there has been serious racial discrimination in this country.").

79. *See* Jamin B. Raskin, *From "Colorblind" White Supremacy to American Multiculturalism*, 19 HARV. J.L. & PUB. POL'Y 743 (1996).

80. A good example of general public opposition to racial violence was demonstrated in the consistent national outcry to the police beating of Rodney King. *See* Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63, 63 (1993)

small revolution, not only because they made minority achievement possible, but because they increased competition and reduced resources normally available to whites. As such, affirmative action programs became an obstacle to white achievement. The reduction of opportunities to whites along with the increase in minority success stories have helped galvanize many whites in their opposition to such programs.

Colorblindness is more forceful as a constitutional requirement today than it was fifty years ago because it is now a polished concept with mass appeal. Colorblindness had already taken shape with the advent of formal equality, but affirmative action gave it the legitimacy it had been lacking. In its contemporary form, colorblindness views most blacks and whites as alike in their disadvantaged status.[81] Whites who are portrayed as lacking privilege thereby take on a sort of blue-collar appeal. Viewed in this

---

(noting that upon observing police brutality against black motorist Rodney King, "[m]ost Americans reacted with shock and outrage to this apparent police rampage and the Department's subsequent cover-up attempt." (footnotes omitted)).

81. *See, e.g.*, Robert Perkin, *Real Leaders Focus on All the People,* ARIZONA REPUBLIC/PHOENIX GAZETTE, June 11, 1996, at B4. In an editorial criticizing both black and female political leaders, Perkin wrote:

> As education and job opportunities have continued to improve for these "victims," the special laws that gave them an advantage have remained on the books. Consequently, after 30 years of affirmative action, the children of a black professional still have an edge in the selection process for school enrollment and scholarship aid over white children from a poor household.

Id. See also ATLANTA J. & CONST., February 15, 1996, at H10, where some readers vented that:

> Today, each African-American person in this country has exactly the same rights as anybody else. What we do with these rights is our choice. We can use them to our advantage to get ahead and be successful in the world or we can abuse them badly enough to get them revoked.

Id. Another editorial from Virginia states, "[o]ur governments don't owe [blacks] anything more than they owe any other citizen. And that they already have: the right to education, equal protection under the law, and all the civil rights that everyone else has." Editorial, *What Can We Do to Improve Race Relations?,* ROANOKE TIMES & WORLD NEWS, Oct. 31, 1995, at A5. North Carolina residents voiced similar sentiments in a local paper. *See* Ben Stocking, *Definition, Worth of Affirmative Action Still Divisive,* NEWS & OBSERVER (Raleigh, NC), July 8, 1995, at A1. Commenting on affirmative action, a white grocery store owner stated, "It's something for nothing. Rather than reach for handouts . . . blacks should apply themselves and strive for success." *Id.* She added,

> All men are created equal . . . . [Blacks] shouldn't get more than the whites, and whites shouldn't get any more than the blacks. They can do anything that they want to, as long as they put their mind to doing it. I work 15 hours a day to get what I have. Everybody else can too.

Id.

light, colorblindness acquires a moral legitimacy, if not a constitutional validity. Depicting whites as struggling for opportunities and making colorblindness a working-class ideology nurtures the growth of the moral, intellectual, and constitutional appeal of colorblindness.

B. The Rise of Colorblindness

In 1896, colorblindness was relegated to the status of dissent in *Plessy*.[82] Even then, however, it did not contemplate equality in a pure sense.[83] Colorblindness remains a troubled theory.[84] Colorblindness has always contemplated preservation of the advantages that slavery and discrimination gave whites over blacks. Justice Harlan confirmed this in *Plessy*.[85] Then and now, colorblindness envisages continuing inequality among the races because a fair redistribution of white gains was never a goal of formal equality.[86]

---

82. As part of his dissent in *Plessy,* Justice Harlan wrote:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

Plessy v. Ferguson, 163 U.S. 537, 559 (Harlan, J., dissenting).

83. Justice Harlan's color-blind model envisioned whites maintaining their position of dominance. *Id.*

84. The theoretical force of colorblindness is hard to resist. In the Nineteenth Century, it was revolutionary in its vision of equality despite its acknowledgement of white supremacy for all times. Today it is equally compelling because it excises slavery and subsequent black oppression and focuses on disadvantaged whites struggling for limited prized resources such as education, contracts, and jobs.

85. *See supra* note 82.

86. In fact, Congress ensured that whites who have secured economic advantage via discriminatory practices can hold on to those benefits. For example, in the field of employment, many whites benefit from discriminatory conduct that deprives minorities of jobs and other employment benefits. These benefits are protected when employers and unions negotiate seniority policies that ensure that "innocent" white workers are prioritized for job benefits. Despite congressional recognition that seniority policies may preserve past discrimination, facilitate future discrimination, and perpetuate inequality, Congress immunized seniority policies from attack by specifically requiring proof of

Because slavery facilitated a tremendous head start for whites in every area of American life, Justice Harlan saw no setback in legally recognizing the races as equal. In theory, even with the concession that the races were physically equal in 1896,[87] the earlier centuries of subjugation ensured inequality in the future, even with formal or substantive legal equality after 1896. This fact, coupled with lingering thoughts of black inferiority,[88] probably allayed reservations about whether white gains or advantage were protected in perpetuity. Other leading figures besides Justice Harlan contemplated colorblindness as a model for perpetuating inequality. Abraham Lincoln understood that legal declarations of equality did not automatically translate into actual equality in American life.[89]

---

discriminatory intent to challenge such policies. *See* Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § § 701-718, 78 Stat. 241 (1964). It provides:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

Id. § 703(h).

The Supreme Court noted in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977), that Congress immunized seniority systems despite its recognition that such systems would protect benefits to whites accrued as a result of employer discrimination. *Int'l Brotherhood of Teamsters*, 431 U.S. at 352-53. The Court added that a seniority system may be bona fide even if it perpetuates pre- or post-Act discrimination. *Id.*

87. Continuing into the Twentieth Century, lingering doubts about the human status of blacks was articulated by some Presidents. For example, President Harding stated that there were "fundamental differences" between the races, and President Roosevelt, while a student at Harvard, referred to blacks as "semi-beasts." *See* EARL OFARI HUTCHINSON, BETRAYED 13, 27 (1996).

88. For a good discussion of how slavery jurisprudence molded and perpetuated a precept of black inferiority, see generally HIGGINBOTHAM, JR., *supra* note 41. Professor Higginbotham documents that the perceived inferiority of blacks was part of a white state of mind that blacks were not really human. *Id.* This belief became so firmly rooted during slavery that it is difficult to abandon even today. *Id.* at 7-19.

89. Although Lincoln was comfortable with blacks having some of the accoutrements of citizenship, he did not support total equality. In his 1858 debates with Douglas, Lincoln stated:

> I will say then, that I am not nor ever have been in favor of bringing about in any way, the social and political equality of the white and black races . . . that I am not, nor ever have been in favor of making voters of the negroes, or jurors, or qualifying them to hold office, or having them to marry with white people. I will say in addition, that there is a physical difference between the white and black races, which I suppose will forever forbid the two races living together upon terms of social and political equality, and inasmuch, as they cannot so live, that while they do remain together, there must be the position of superior and inferior, that I as much as any other man am in favor of the superior position being assigned to the white man.

Another President, Andrew Johnson, was rabid in his conviction that actual equality with whites was never meant for blacks.[90]

Today, colorblindness poses the threat of minority underachievement that affirmative action effectively repaired. But now colorblindness currency is a valuable trading device because it has mass appeal. With formal equality, available symbols of black success, and the absence of publicly violent acts of repression against blacks,[91] colorblindness is now akin to a powerful working-class rhetoric. In fact, colorblindness has become so compelling that all branches of government must respond to its demands.[92] Colorblindness today depicts affirmative action as a conscience-clearing device for many privileged white liberals and their minority counterparts. The rhetoric posits that race-conscious remedial programs really never threatened the truly privileged.[93] However,

---

HAROLD HOLZER, THE LINCOLN-DOUGLAS DEBATES: THE FIRST COMPLETE, UNEXPURGATED TEXT 189 (1993).

90. *See* S. Exec. Doc. No. 39-31 at 1-8 (May 27, 1866).

91. Racial animosity is the most common motivating factor for bias crimes in America. *See* David E. Rovella, *Hate Crime Stats Show Race Is Key,* NAT'L L.J., Nov. 25, 1996, at A7. However, lynchings and arbitrary executions of blacks are not as commonplace as they had previously been. For a quick survey of the extent and forms of race-based violence from the late Nineteenth Century to present, see Paul Finkelman, *The Rise of the New Racism,* 15 YALE L. & POL'Y REV. 245, 251-53 (1996). Recent publicized cases of extreme police violence against blacks do raise concerns about the extent of continuing racial violence. *See* Blaine Harden, *Angry Giuliani Orders Shake-Up at Police Station,* WASH. POST, Aug. 15, 1997, at A3 (reporting black man's accusation that white New York police officers "stripped off his pants . . . shouted racial insults at him . . . ordered him into a bathroom . . . shoved the wooden handle of a toilet plunger up his anus and then stuck it in his mouth, breaking off several of his top front teeth.") This incident is particularly alarming because only a few years ago, the nation reacted with outrage to the cruelty levied on Rodney King by white officers from the Los Angeles police department.

92. Congress has introduced a variety of measures designed to end affirmative action. For example, on July 9, 1997, the House Judiciary Committee's subcommittee on the Constitution approved a bill titled "The Civil Rights Act of 1997." This legislation proposes the elimination of all federal preferential schemes that benefit minorities and women. *See Federal Bill Seeks an End to All Affirmative Action,* NAT'L L.J., July 21, 1997, at A10. The Clinton Administration, while openly supportive of affirmative action, was forced to "mend" existing programs so that disadvantaged whites can share opportunities previously reserved for minorities. *See* Steven A. Holmes, *Affirmative Action May Soon Help White-Owned Firms,* NAT'L L.J., Aug. 15, 1997, at 21A.

93. *See, e.g.,* EXEC. DOC. No. 39-120, at 48 (May 26, 1866) ("Nearly all the planters in the state [of South Carolina] will acknowledge that the [Freedmen's] [B]ureau is necessary for the welfare of all classes . . . ."); EXEC. DOC. No. 39-6, at 32 (Jan. 21, 1867) ("The intelligent planters of Arkansas admit that, without the supervising influence of officers of the bureau, they could not have succeeded in cultivating their cotton fields the present season.") *See also* Neal Devins, Adarand Constructors, Inc. v. Pena *and the Continuing Irrelevance of Supreme Court Affirmative Action Decisions,* 37 WM. & MARY L. REV. 673, 696-97 (1996) (noting that big business supports affirmative action for any number of

working class whites pursuing opportunities as students,[94] small businesspersons[95] or employees[96] feel victimized when they see opportunities slated for minority group members. Because black gains are now viewed as white losses, the interest of less-privileged whites in defining constitutional equality is stronger and well-distanced from the raw rules of slavery or violent practices of segregation. Moreover, new images of black success reinforce

---

reasons including increased productivity, improved public image, and reduced employment discrimination litigation).

94. The most famous student protester is Alan Bakke because the Supreme Court decided to hear his complaint that he was denied admission to medical school because of a preference policy for minorities. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). A few years prior, the Court avoided reviewing a law school's admissions preference policy for minorities in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), on mootness grounds. Some white law students still regularly find black presence in the classroom objectionable, partly because of preferential admissions programs. Many white students feel that their "spot" at a more prestigious school was filled by an undeserving minority, or that the minority bodies in the classroom are not their intellectual equals, thereby degrading the quality of their institution. *See UM Points Finger at Paper: The Law School Paper Is Accused of Stealing Student Records for an Article on Admissions Standards*, ORLANDO SENTINEL, Sept. 29, 1995, at D5 ("Private student records allegedly were stolen by the University of Miami Law School's newspaper in an effort to prove that minority students get preferential treatment in admissions and scholarship"); *see also* Marianne Lavelle, et al., *Campus Unrest*, NAT'L L.J., May 27, 1991, at 18 (discussing the case of a white law student at Georgetown University who took confidential statistics from minority student files and included them in a derogatory article about black achievements).

95. *City of Richmond v. J.A. Croson Co.*, 448 U.S. 469 (1989), exemplifies the small white businessperson's feelings when a minority set-aside program operates to deny contracting opportunities. White contractors typically respond that such programs give minorities an unfair and illegal advantage and should be struck down. *See also Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County*, 1996 WL 560171 (S.D. Fla. 1996) (holding that county set-aside program is unconstitutional); Tony Pugh, *Minority Set-Asides Go on Trial in Dade; Program Backers are Wary of Judge*, MIAMI HERALD, Dec. 11, 1995, at 1A (reporting on white contractors that sued alleging that "the [county's] set-asides exclude white contractors from the bidding process and are tantamount to reverse discrimination"). The belief that setting aside contracting opportunities for minorities is unfair is clearly evidenced by the many legal challenges to such schemes. *See, e.g.*, Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50 (2d Cir. 1992); Associated Gen. Contractors of Am. v. City of Columbus, 936 F. Supp. 1363 (S.D. Ohio 1996); Pettinaro Constr. Co., Inc. v. Del. Auth. for Reg'l Transit, 500 F. Supp. 559 (D. Del. 1980); Wright Farms Constr., Inc. v. Kreps, 444 F. Supp. 1023 (D. Vt. 1977).

96. Reverse discrimination claims in the field of employment are now very common. *See, e.g.*, Dallas Fire Fighters Ass'n v. City of Dallas, 150 F.3d 438, (5th Cir. 1998) *cert. denied*, 526 U.S. 1046 (1999) (white firefighter's successful challenge to city's race- and gender-based promotion policy); Peightal v. Metro. Dade County, 26 F.3d 1545 (11th Cir. 1994) (challenge by white applicant for firefighter position); Stock v. Universal Foods Corp., 817 F. Supp. 1300 (D. Md. 1993) (white applicant's challenge to hiring of black applicant on reverse discrimination grounds); Hollander v. Sears, Roebuck & Co., 450 F. Supp. 496 (D. Conn. 1978) (white male's claim he was denied summer internship by employer because of his race); Detroit Fire Fighters Ass'n v. Dixon, 572 F.2d 557 (6th Cir. 1978) (appeal from order that the promotions of minority fire fighters constituted reverse discrimination).

beliefs that black failure is generally the product of choice rather than continuing bias.

The passage of time has made tying the advantages of bigotry around the necks of whites increasingly difficult. As a result, claims of innocence are in their purest forms today. Guilt-creating reminders that blackness means oppression are now absent. The dismantling of legal segregation, coupled with evidence of black success, causes many whites to view themselves as being in the same disadvantaged position as or worse off than blacks.[97] Although poor whites share racial identity with the empowered policy-making elite, they regard the responsibility for remedying slavery's legacy as an unfair burden.

The rhetoric suggests that the costs of "making it" are just as great on working-class whites as they are on most blacks. "Making it" in American society includes the challenges of finding and keeping a job, owning and operating a small business, or getting a decent education. The reality and appearance of black achievement and the decline of white privilege combine to bolster the argument that whites also qualify for any program that breaks down barriers to achievement.

However, including whites in affirmative action schemes would signal the beginning of the final accounting for slavery and the discrimination that followed. Slavery and discrimination created a privileged white and an underprivileged black society in America. The prospect of phasing out minority-specific advancement programs potentially freezes the inequality that legal declarations have never repaired because discriminatory practices continue. Affirmative action has functioned as an effective bulwark against unequal treatment, which legal declarations have been ineffective at combating.

97. Blacks have always been regarded as the "floor" of society; any image that suggests blacks are more successful than whites magnifies white discontent. *See* Jennifer M. Russell, *The Race/Class Conundrum and the Pursuit of Individualism in the Making of Social Policy,* 46 HASTINGS L.J. 1353, 1354-56 (1995).

C. Retained Advantage and Colorblind Government

1. Education

The problem with colorblindness is that it can be an effective tool for leaving blacks behind. Slavery effectively excluded blacks from desirable educational opportunities. In fact, it was so important to ensure that blacks remained intellectually inferior that South Carolina regarded educating a slave as a more serious crime than a slave running away from servitude.[98] Georgia legislated a penalty for educating slaves that was fifty times greater than the penalty for maiming enslaved blacks.[99] After slavery was abolished, the government provided limited assistance for black education.[100] Such assistance, albeit colorblind,[101] was so unpopular that black schools were burned,[102] teachers for black schools were abused,[103] and black

98. *See* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 198 (1978).

99. *Id.* at 258.

100. One of the Freedmen's Bureau's goals was to provide educational assistance to blacks. The statute allocated certain lands for "school farms." *See* Freedmen's Bureau Act, ch. 200, § 6, 14 Stat. 173, 173 (1866). The law further provided for the sale of such lands and the allocation of sale proceeds "to the support of schools, without distinction of color or race." *Id.* § 8. The statute also facilitated black education by providing:

> That the commissioner shall have power to seize, hold, use, lease, or sell all buildings and tenements, and any lands appertaining to the same, or otherwise, formerly held under color of title by the late so-called confederate states, and not heretofore disposed of by the United States, and any buildings or lands held in trust for the same by any person or persons, and to use the same or appropriate the proceeds derived therefrom to the education of the freed people; and whenever the bureau shall cease to exist, such of said so-called confederate states as shall have made provision for the education of their citizens without distinction of color shall receive the sum remaining unexpended of such sales or rentals, which shall be distributed among said states for educational purposes in proportion to their population.

Id. § 12. In addition, the Bureau was empowered to:

> cooperate with private benevolent associations of citizens in aid of freedmen, and with agents and teachers, duly accredited and appointed by them, and shall hire or provide by lease buildings for purposes of education whenever such associations shall, without cost to the government, provide suitable teachers and means of instruction; and . . . shall furnish such protection as may be required for the safe conduct of such schools.

Id. § 13.

101. The Freedmen's Bureau was as concerned about educating poor whites as it was about educating emancipated blacks. *See* S. EXEC. DOC. NO. 39-11, at 34 (Dec. 19, 1865). ("School buildings should not be exclusively for freedmen, for any aid given to educate the numerous poor white children of the South will be most important, and conducive to the object our government has in view; I mean the harmony, the elevation, and prosperity of our people.").

102. *See* EXEC. DOC. NO. 39-120, at 30 (May 26, 1866).

school children stoned,[104] thereby stymieing black intellectual curiosity[105] and capacity.[106]

The popular view that blacks should not be equally educated was strong currency in the Supreme Court until the middle of this century when the Court rejected the theoretical underpinnings of that view.[107] Although the Court rejected any educational system built on racial separation in *Brown v. Board of Education,* the decision has not served as a comprehensive vehicle for actual educational equality. While the Court ruled that separate education was legally unjustifiable, it also accommodated the barriers to achievement that

---

103. *See id.* ("Our schools, teachers, and the whole educational enterprise are regarded by the best class of citizens here with indifference rather than active opposition, by others with contempt, and by others still (a lower class) with unconcealed hostility."). *See also* EXEC. DOC. NO.39-6, at 66 (Jan. 21, 1867).

> Many of the schools have met with strong opposition from a class of white malcontents who style themselves 'regulators,' and aside from the assistance and protection afforded by the bureau, the colored people meet with but little encouragement in their efforts to organize schools. In some places they have been broken up, and the teachers driven from their posts.

Id. at 66. Reports also indicated that "in the beginning great opposition was everywhere manifested against freedmen's schools, varying in intensity in proportion to the ignorance and prejudices of the community. In some places school houses were burned and teachers driven off, in others the teachers were insulted and abused . . . ." *Id.* at 58.

104. *See* EXEC. DOC. No. 39-6, at 58 (Jan. 21, 1867).

105. *See id.* at 13. Abundant evidence shows that emancipated blacks had an insatiable appetite for education. One report noted that: "Too much cannot be said of the desire to learn among this [black] people. Everywhere, to open a school has been to have it filled." *Id.*; *see also id.* at 66 ("There is a very general desire on the part of the colored people to attain knowledge and to provide a suitable means for the education of their children.").

106. *See* H.R. REP. No. 121, at 22-23 (1870). A Minister of Education from France who visited black schools in the United States noted:

> I was full of the memories of the most flourishing schools in the East, and I was well qualified to judge for myself of the differences in intellectual aptitudes of the two races. I must say that I have been unable to discover any. All the teachers, both male and female, that I have consulted on that point are of the same opinion. My opinion of the intellectual aptitudes of colored children is shared by men of good faith who have, like me, visited the schools of the South. An English traveler, Dr. Zincke, in an account of his travels in America says: "I must confess my astonishment at the intellectual acuteness displayed by a class of colored pupils. They had acquired, in a short space of time, an amount of knowledge truly remarkable: never in any school in England, and I have visited many, have I found the pupils able to comprehend so readily the sense of their lessons; never have I heard pupils ask questions which showed a clearer comprehension of the subjects they were studying."

Id. at 23.

107. The Supreme Court rejected the separate but equal doctrine in *Brown v. Board of Education,* 347 U.S. 483 (1954).

seem to flourish in colorblind environments.[108] As a result, from the 1950s to the present, significant educational disparities continue to exist despite the declared constitutional dictate of equal education.

The Court's declaration that separate but equal is an unconstitutional doctrine has not translated into colorblind educational behavior. Predominantly minority schools continue to trail behind, and addressing the needs of such institutions without raising the angst of poor white school districts will be difficult. The Court's current lack of interest in school cases partly evidences this reality.[109] The declaration that education in America must be colorblind has shifted the Court's focus to the needs of whites who feel victimized by the award of educational opportunities to minorities. More recently, the white students' needs have taken center stage while the blacks' poor educational condition, caused by slavery and discriminatory educational practices, has been struggling for attention.[110]

2. Voting

Color consciousness has been particularly troubling for blacks in the area of voting rights. Race-biased voting schemes effectively

---

108. *See Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (holding that desegregation must be undertaken "with all deliberate speed"). *Id.* This phrase was consciously chosen over the word "immediately" and facilitated foot-dragging and resistance to the Court's order. *See* Krista L. Cosner, *Affirmative Action in Higher Education: Lessons and Directions from the Supreme Court,* 71 IND. L.J. 1003, 1013 (1996). For a discussion of the political considerations that affected the Justices' thinking on the speed with which desegregation should occur, see Mark Tushnet & Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867 (1991).

109. The Court's lack of interest in school cases has been interpreted as indifference to the equality prescriptions of *Brown. See* John E. Nowak, *The Rise and Fall of Supreme Court Concern for Racial Minorities,* 36 WM. & MARY L. REV. 345, 447-55 (1995).

110. For example, in *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), the Court seemed to prioritize the goal of educating more white doctors over the interest of qualified blacks who for years were unconstitutionally barred from the medical profession. More recently, the Court upheld a lower court decision that invalidated a law school's use of race in its admissions decisionmaking. *See* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *cert. denied,* 533 U.S. 1929 (1996). The denial of certiorari in *Hopwood* suggests that the Court will defer to other white grass roots efforts to return educational opportunity to the status of white privilege. *See* Chris Klein, *California's Ban on Preferences Short-Circuits Minorities at Boalt,* NAT'L L.J., May 26, 1997, at A16 (noting a drop in admissions offers to blacks from 9.2% to 1.8% at the University of California - Berkeley School of Law after California voters elected to ban racial preferences in public education).

denied blacks voting rights straight into the Twenty-first Century.[111] Congress did not seriously address political inequality until the 1960s when it passed the Voting Rights Act.[112] However, legal rules intended to sift racial factors out of the voting arena must still compete with subtle and sophisticated practices designed to deny black voting rights. Recent national elections spotlight some of the many barriers that black voters continue to face.[113] Theoretically, the Court rejects unequal voting rights as unprincipled, and would invalidate express practices that seek to achieve that end.[114] But increasingly the Court must contend with claims that remedial legislative schemes to protect blacks negatively impact white voting rights. The competing concerns of whites reduce the Court's sensitivity to policies and practices that dilute minority voting rights[115] and force strict scrutiny of plans designed to assist minority voters.[116]

Rhetoric that all races have equal voting rights creates the perception that neutral schemes designed to avoid voter dilution will impact both white and minority voters. Moreover, schemes designed solely for the benefit of minorities will infringe on historical white control of the political arena. In this new anti-affirmative action environment, the Court is now poised to criticize any new protective scheme that does not include the interest of white voters.

---

111. In the 2000 national elections, black Florida voters saw their ballots discarded at a disproportionately high rate. *See* Andrea Robinson, *Even Though Ballots May Not Count, Disappointed Voters Aren't Giving Up: Black Precincts Posted High Discard Rates,* MIAMI HERALD, Dec. 22, 2000, at 25A.

112. In 1965, Congress enacted the Voting Rights Act, outlawing schemes designed to impede minority participation in the political process. Pub. L. No. 89-110, 79 Stat. 437 (1965).

113. For example, faulty voting machines were a particular problem in black precincts. See Andrea Robinson, *Machines Didn't Pass Polling Test,* MIAMI HERALD, Dec. 22, 2000, at 1A. An investigation by the Commission on Civil Rights found that in the 2000 presidential elections, black voters' ballots were rejected at ten times the rate of rejection for whites. *See* Robert E. Pierre & Peter Slevin, *Florida Vote Rife with Disparities, Study Says: Rights Panel Finds Blacks Penalized,* WASH. POST, June 5, 2001, at A1.

114. The Voting Rights Act barred the use of literacy tests, and a constitutional amendment prohibited poll taxes. *See* U.S. CONST. amend. XXIV. The Court upheld the prohibition of discriminatory testing requirements in the Voting Rights Act in *South Carolina v. Katzenbach,* 383 U.S. 301 (1996), and the Court upheld an invalidation of poll taxes in *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966).

115. *See, e.g.,* Whitcomb v. Chavis, 403 U.S. 124 (1971).

116. *See* Shaw v. Reno, 509 U.S. 629 (1993).

3. Economics/Public Contracting

Similar problems arise in the area of public contracting. The desire to empower blacks economically when slavery ended was rather limited.[117] Some efforts were made at the federal level after blacks were emancipated, but even those meager initiatives were challenged as unconstitutionally race conscious. Additionally, reparations as a remedial device have never resonated with the federal government.[118] After breaking some public contracting barriers in the Twentieth Century, attention shifted from governmental responsibility for remediation to governmental exclusion of white contractors.

Disadvantaged white entrepreneurs have refocused the national debate from concerns about excluded minority contractors to the needs of white businesspersons. As in other areas, colorblind theory has created an imaginary equality that avoids accountability for past and present discriminatory racial practices while permitting a restructuring of the victim pool. By rejecting racial contract-letting schemes that helped blacks, the Court implicitly promoted public contracting for white contractors better equipped to secure such

---

117. Reparations were not paid nor were slaveowners' lands confiscated and parceled out to freedmen. Legislatures provided only a limited opportunity to lease and buy land. *See* Freedmen's Bureau Act, ch. 90, § 4, 13 Stat. 507 (1865). The Act stated:

> [T]he commissioner, under the direction of the President, shall have authority to set apart, for the use of loyal refugees and freedmen, such tracts of land within the insurrectionary states as shall have been abandoned, or to which the United States shall have acquired title by confiscation or sale, or otherwise, and to every male citizen, whether refugee or freedmen, as aforesaid, there shall be assigned not more than forty acres of such land, and the person to whom it was so assigned shall be protected in the use and enjoyment of the land for the term of three years at an annual rent not exceeding six per centum upon the value of such land . . . . At the end of said term, or at any time during said term, the occupants of any parcels so assigned may purchase the land and receive such title thereto as the United States can convey, upon paying therefor the value of the land, as ascertained and fixed for the purpose of determining the annual rent aforesaid.

Id. President Andrew Johnson ensured that not a single acre of land was distributed to emancipated blacks. *See* H.R. REP. NO. 30, at 4 (1868).

118. For a discussion of the obstacles to reparations, see Derrick A. Bell, Jr., *Dissection of a Dream*, 9 HARV. C.R.-C.L. L. REV. 156 (1974). A more recent and convincing call for reparations can be found in RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS, 1-9 (2000), which argues that the legacy of slavery persists and America must assume responsibility for harming blacks and must compensate for the wealth and status generated on the backs of blacks.

contracts. Past racial politics that funneled all contracts to white contractors represents a theoretically unacceptable model.[119] However, the Court will not require that white contractors bear the burdens of remediation. By distancing themselves from historical governmental abuse, white contractors have staked a compelling claim for full participation in any contract-letting scheme. Though colorblindness does not address the harm caused by past racial exclusion, it does demand that courts hear white claims of disadvantage. Accounting for those claims requires a restructuring of the public contracting process to include any disadvantaged businessperson, resulting in an inevitable reduction of opportunities for minority achievement in this area.

The Court's last two decisions on this issue highlight the clout of white entrepreneurs in shaping the affirmative action debate. In *City of Richmond v. J.A. Croson*, the Court considered the interest of a white small-business contractor affected by a governmental scheme designed to remedy years of race-based exclusion of blacks from the public contracting process.[120] Despite evidence that contract-letting agencies discriminated against blacks, the Court decided that the need to protect majority contractors was more compelling than protecting programs that facilitated entrepreneurial opportunities for blacks. The Court reaffirmed this sentiment in *Adarand Constructors v. Pena* by ruling that all governmental actors, state or federal, will

---

119. In *City of Richmond v. J.A. Croson Co.*, 448 U.S. 469, 493 (1989), the Court vented its intolerance for racial politics that facilitate race-based contract letting. Unfortunately, this message of fair play was intended to thwart the efforts of recently elected black officials who might consider establishing set-aside programs to benefit minority contractors. The Court noted:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.

Id. However, as Justice Marshall pointed out: "This history of 'purposefully unequal treatment' forced upon minorities, not imposed by them, should raise an inference that minorities in Richmond had much to remedy--and that the 1983 set-aside was undertaken with sincere remedial goals in mind, not 'simple racial politics.'" *Id.* at 554 (Marshall, J., dissenting).

120. *Croson*, 448 U.S. at 469.

be strictly scrutinized if they consider and use race to the potential detriment of white contractors.[121]

The fight over government contracts is critical because it not only confirms voting empowerment, but propels the winner to economic and social privilege. In some cases, drastic measures are taken to limit black economic development. For example, in *Presley v. Etowah County Commission*,[122] white lame duck commissioners effectively evaded the Voting Rights Act by transferring some of their budgetary powers to a county engineer when blacks were finally elected to fill their seats.[123] The transformative power of economic opportunity has kept the Court actively monitoring the economic models of equality implemented by federal, state, and local agencies. Because of past discriminatory practices, the legal promise of equality rejects an economic model where black elected officials can create programs to benefit blacks. Black elected officials must cast off their thoughts of remediation because those ideas directly conflict with the pure model of economic opportunity that assigns contracts based on "qualifications." As such, the Court is responding to the widening sentiment that the average contractor is not to blame nor should white contractors be required to bear the burden of remedying the economic disparities created by discriminatory contract-letting practices.[124] Many small white entrepreneurs now want either a dismantling of all set-aside programs or equal participation in them.

4. Employment

The Court protected the deployment of blacks as slaves when the predominant national sentiment deemed it acceptable. The Emancipation Proclamation and subsequent equal rights laws did not change general attitudes that blacks should be employed as the lowest

121. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

122. 502 U.S. 491 (1992).

123. *See id.* For a discussion of white power shifts intended to undermine newly elected black officials, see LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 8-9 (1994).

124. *See generally* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

caste.[125] As a result, blacks newly freed from slavery were forced to accept employment with slavery-like conditions[126] or become refugees and de facto slaves.[127] Planters often breached their employment contracts with former slaves thereby relegating blacks to the bottom of the employment ladder.[128]

Throughout the 1800s, raw subordination of blacks in the workforce was an accepted employment model. The sentiment that black labor was not worthy of the same respect and remuneration as white labor ensured that blacks received the least desirable work for the least desirable pay. Fair treatment afforded poor white employees was never regarded as an attribute of black employment.[129] Eventually, Congress attempted to stem the harmful effects of these practices by enacting Title VII of the Civil Rights Act of 1964.[130] However, neither this statute nor its 1991 amendments

---

125. Although slavery was abolished, white planters complained about not having a secure labor force because they desired a compulsory employment process akin to slavery. *See* EXEC. DOC. NO. 11, at 32 (Dec. 19, 1865).

126. Congress created the Freedmen's Bureau to facilitate the resettling of blacks made refugees by emancipation and Civil War. Act of Mar. 3, 1865, Ch. 90, 13 Stat. 507. This agency promoted one-year contracts between freed blacks and planters. EXEC. DOC. NO. 11, at 31 (Dec. 19, 1865). Employers treated blacks so cruelly that they fled to larger towns. One Bureau agent reported "that this [fleeing] arises from the ill-usage they have received, since their emancipation, from their employers in various ways, chiefly from being cheated and defrauded out of their portion of crops, oftentimes being driven off without receiving remuneration of any kind for their labor." *See* EXEC. DOC. NO. 40-329, at 7 (July 7, 1868).

127. Emancipated blacks either contracted with a planter or assumed "vagrant" status. Involuntary servitude was highly likely punishment for vagrancy. *See* EXEC. DOC. NO.6, at 2-3 (Jan. 21, 1867).

> The small time allowed after the expiration of one contract before a person must enter another to escape vagrancy will occasion practical slavery. The arrest of unemployed persons as vagrants upon information given by any party; his trial by a Justice of the Peace; the sale of his services at public outcry for the payment of the fine and costs, without limit as to time, and whipping and working in chain-gangs, present some of the obnoxious features of those singular laws.

Id.

128. *See supra* note 126 and accompanying text.

129. *See* EXEC. DOC. NO.39-6, at 32 (Jan. 3, 1867). Freedmen's Bureau officials commenting on the decent treatment afforded white workers noted that:

> There has not been a single failure, that has come to my knowledge, where the same treatment and tact that have been employed that is recognized as indispensable in the management of white laborers throughout the country. But, with few honorable exceptions, the people are slow to learn that honesty and fair dealing is as much due the freedmen as to the white.

Id.

130. The congressional findings on the effects of racial discrimination on employment opportunities for blacks reveal:

seem capable of realizing the equal employment goals pursued since emancipation. For a short period beginning in the late 1970s, the Court used Title VII as a workplace remedial device.[131] However, the Court's minority-friendly decisions were possible mainly because of their negligible impact on vested white interests.

White support for equal employment laws has always had its limits. Support for black opportunity always ends where loss of white opportunity and benefits begins. In several Title VII decisions, the Court erased any doubt that white workers were fully protected from loss of benefits, even if their acquisition was the product of third party discrimination. In *International Brotherhood of*

> The Negro is the principal victim of discrimination in employment. According to Labor Department statistics, the unemployment rate among nonwhites is over twice as high as among whites. More significantly, among male family breadwinners, those with dependents to support, the unemployment rate is three times as high among nonwhites as among whites. And although nonwhites constitute only 11 percent of the total work force, they account for 25 percent of all workers unemployed for 6 months or more.
>
> Discrimination also affects the jobs Negroes can get. Generally, it is the lower paid and less desirable jobs which are filled by Negroes. For example, 17 percent of nonwhite workers have white collar jobs: among white workers the figure is 47 percent. On the other hand, only 4 percent of the whites who are employed work at unskilled jobs in non-agricultural industries; among non-whites the figure is 14 percent.
>
> . . . .
>
> Even within their professions non-whites earn much less than white people. It is a depressing fact that a Negro with 4 years of college can expect to earn less in his lifetime than a white man who quit school after the eighth grade. In fact, Negro college graduates have only half the lifetime earnings of white college graduates
>
> . . . .
>
> Discrimination in employment is not confined to any region--it is widespread in every part of the country. It is harmful to Negroes and to members of other minority groups. It is also harmful to the Nation as a whole. The Council of Economic Advisers has recently estimated that full utilization of the present educational attainment of nonwhites in this country would add about $13 billion to our gross national product.
>
> So, discrimination in employment is not only costly in terms of what it does to a human being, his general nature, his attitude toward his country and himself, but it is costing the American economy billions of dollars in loss of income.

See 110 CONG. REC. 6547 (1964).

131. *See, e.g.*, Johnson v. Transp. Agency, 480 U.S. 616 (1987) (holding that Title VII does not prohibit a sex-based preferential plan); Local No. 93, Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501 (1986) (holding that a consent decree that benefitted non-victims does not violate Title VII); Local 28 of the Sheet Metal Worker's Int'l Ass'n v. EEOC, 478 U.S. 421 (1986) (holding that Title VII does not prohibit court-ordered, race-based goals that benefit non-victims); United Steelworkers v. Weber, 443 U.S. 193 (1979) (holding that Title VII permits voluntary affirmative action plans that benefit black employees).

Teamsters v. United States,[132] the Court ruled that Title VII specifically immunized seniority systems that protected whites' benefits accrued as a result of employer discrimination.[133] The Court seldom tolerates employment schemes that require some sacrifice by white workers with vested interests.[134] Given the proletarian influence on the Court's racial jurisprudence, it would have been remarkable for the Court to conclude that a white teacher may be laid off while an equally qualified and equally senior black teacher is retained to promote diversity.[135]

---

132. 431 U.S. 324 (1977).

133. *See id.* at 352-53. The Court found:

> [T]he unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII. As the legislative history shows, this was the intended result even where the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negroes. Although a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination in such cases, the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act.

Id.

By immunizing seniority systems the Court ensured not only that whites kept benefits flowing from discrimination but that blacks were locked out of valuable employment opportunities. The Court rejected the contention that any seniority system that perpetuates black disadvantage is unlawful. *See id.* at 353.

The Court consistently reaffirms this deference to destructive seniority rules. For example, in *Firefighters Local Union No. 1784 v. Stotts,* seniority rules that perpetuated discrimination triumphed over a remedial consent decree. *Stotts*, 467 U.S. 561 (1984). In *Wygant v. Jackson Board Of Education*, the Court rejected an attempt to adjust seniority rules to protect black teachers from layoffs because of the substantial equity seniority represented for first-hired white teachers. *Wygant*, 476 U.S. 267 (1986). Moreover, the Court's broad definition of what constitutes a seniority system exacerbates the harmful effects of seniority. *See* Cal. Brewers Ass'n v. Bryant, 444 U.S. 598 (1980) (concluding that a 45 week rule was a seniority system although no rights accrued from cumulative length of service).

134. For example, in *Firefighters Local Union No. 1784 v. Stotts,* white firefighters were called upon to accept layoffs as part of a consent decree establishing hiring and promotion goals for black firefighters. 467 U.S. 561 (1984). The Court ruled that, for a variety of reasons, such sacrifice was not permitted under Title VII. *See id.* at 576-80. Similarly in *Wygant v. Jackson Board Of Education*, the Court ruled that requiring white teachers to accept layoffs to protect the jobs of junior black teachers was not constitutionally permissible. 476 U.S. 267 (1986). By distinguishing between layoffs and hiring goals, the Court suggested that an employer would have more flexibility when infringing on more inchoate interests. *Id.* at 282-84.

135. *See* Piscataway Township Bd. of Educ. v. Taxman, 521 U.S. 1117 (1997) (granting certiorari to decide this issue).

5. The Taxman Case

In 1997, the Court decided to hear an employment affirmative action case for the first time since Congress amended Title VII in 1991.[136] In *Taxman*, the township's Board of Education retained a black teacher over an equally qualified and equally senior white teacher, Sharon Taxman, as part of a reduction in force.[137] The Board chose the black teacher because she was the only non-white teacher in the business department, and the Board concluded that her retention would promote diversity as envisioned by its affirmative action plan.[138] The decision was in no way tied to remedying past or present discrimination in the school system.[139]

The white teacher, Sharon Taxman, successfully challenged the board's decision as a violation of Title VII's prohibition of race discrimination.[140] In upholding the lower court's decision, the court of appeals offered classic "vested interest" reasons as to why employers could not prioritize a black worker over a white worker with regard to employment benefits. Specifically, the court found "that the harm imposed upon a non minority employee by the loss of his or her job is so substantial and the cost so severe that the Board's goal of racial diversity, even if legitimate under Title VII, may not be pursued in this particular fashion."[141] Despite findings of widespread discrimination in educational institutions,[142] and acknowledgment that such discrimination is uniquely harmful,[143] the court ruled that

136. *See* Taxman v. Bd. of Educ., 91 F.3d 1547 (3d Cir. 1996).

137. *Id.* at 1551.

138. *Id.* at 1563.

> The Board admits that it did not act to remedy the effects of past employment discrimination . . . . Nor does the Board contend that its action here was directed at remedying any *de jure* or *de facto* segregation . . . . Rather, the Board's sole purpose in applying its affirmative action policy in this case was to obtain an educational benefit which it believed would result from a racially diverse faculty.

Id.

139. *See id.*

140. The district court granted summary judgment for plaintiff. *See* United States v. Bd. of Educ., 832 F. Supp. 836 (D.N.J. 1993).

141. Taxman v. Bd. of Educ., 91 F.3d 1547, 1564 (3d Cir. 1996).

142. *Id.* at 1559.

143. *Id.*

the laudable goal of diversity was not a congressional objective when Title VII was enacted.[144]

To support its interpretation of Title VII, the court of appeals relied on two Supreme Court cases holding that the vested interests of whites could never be sacrificed in pursuit of even *identified* congressional objectives such as remediation.[145] For example, in *United Steelworkers v. Weber,*[146] the Court approved an employer's remedial affirmative action plan only because it threatened no vested interest of whites. No white employee faced job loss, only fifty percent of craft *training* openings were temporarily reserved for blacks, and opportunities for whites remained otherwise available.[147] Similarly, in *Johnson v. Transportation Agency,*[148] the complaining white employee had no vested right in a promotion, faced no job loss, and retained other opportunities for advancement.[149]

The lower court's assessment that employment affirmative action plans could never trump vested white interests is accurate, and has never been seriously challenged in Congress or the Supreme Court. White proletarians challenge remedial schemes calling for burden sharing. Because of powerful proletarian advocacy, the Court will be less receptive to "benevolent" schemes designed to respond to ground lost for blacks as a result of discrimination. The benefits of racial inclusion must now compete with white emotional distress caused by encroachment on vested rights.

Congress had an opportunity to clarify whether Title VII permits or forbids any form of employment affirmative action. However,

---

144. *Id.* at 1558.

145. *See generally* Taxman v. Bd. of Educ., 91 F.3d 1547 (3d Cir. 1996).

146. 443 U.S. 193 (1979).

147. *See id.* at 203-08. Quoting from *Weber,* the court of appeals in *Taxman* found that the plan in *Weber* was approved only because it advanced a statutory goal and did not unduly trammel the interests of whites. It noted:

> "The plan does not require the discharge of white workers and their replacement with new black hires. Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance."

Taxman, 91 F.3d at 1555 (quoting *United Steelworkers v. Weber,* 443 U.S. 193, 208(1979)).

148. 480 U.S. 616 (1987).

149. *Id.* at 638.

proletarian advocacy of colorblindness prevented affirmative action advocates from securing provisions codifying existing Court-approved programs.[150] The Supreme Court is now free to determine whether past liberal interpretations of Title VII approving narrow remedial schemes can be expanded to apply to non-remedial infringement on working class whites. In view of Title VII's textual failure to resolve this issue in conjunction with unwavering vested-interest jurisprudence, civil rights leaders made a smart decision to pay off Sharon Taxman and defer the day when the Court can rule that such decision-making is unconstitutional.

CONCLUSION

Opportunities created for blacks by majoritarian schemes and black perseverance have helped change national class perceptions about black disadvantage and white responsibility. The argument that innocent whites are losing not only opportunity, but *vested benefits* due to the creation of black opportunity has struck a chord with the United States Supreme Court. Implicit limits on minority advancement have existed throughout the nation's history. Those limits become explicit when minority-friendly schemes encroach too much on white opportunity, or worse, vested benefits. Although proponents of colorblindness advance it as the fairer model, they say little about continuing disabling racial practices that colorblindness does not alleviate.

The mass appeal of absolute equality closes the chapter on reckoning for past wrongs, avoids addressing continuing racism, and insulates the inequity of vested benefits. Fault as a predicate for remediation becomes increasingly difficult to establish, and notions of white innocence continue to gain strength. When white

150. Supporters of affirmative action had to settle for neutral language, which provides: "Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law." Civil Rights Act of 1991, Pub. L. No. 102-166, § 116, 105 Stat. 1079 (current version at 42 U.S.C. § 1981 nt). This language gives the Court broad discretion to conclude that Congress could not resolve the affirmative action controversy and decided that the Court should have the final say. The Court used this interpretive route to resolve the controversial issue of whether the 1991 amendments were retroactive. *See* Landgraf v. USI Film Prods., 511 U.S. 244 (1994); Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994).

perceptions and realities of disadvantage are combined with experiences of minority encroachment or success, affirmative action buckles. With the addition of legal glosses such as colorblind theory, these factors coalesce into a sleek argument that the Constitution mandates only formal equality while implicitly tolerating retention of discrimination-related benefits and the perpetuation of minority disadvantage. In the hands of the masses, colorblind theory is powerful and attractive. It is so compelling that the sole black Supreme Court Justice subscribes to it.[151]

As courts curb affirmative action programs, the future will require a great deal of black industry and self help. Blacks must help change the national mood and with it the Court's interpretive inclination. The nation must be persuaded that blacks are not taking over. Blacks own and control very little and enjoy no luxury or privilege in being black. Whites must know that rampant discrimination relegates whole classes of people to a miserable existence. Whites must be convinced that civil rights laws have not equalized the landscape and much more is necessary for racial equality to materialize. These "proofs" are necessary to change the national mood and ultimately the Court's attitude about affirmative action.

151. For a sampling of Justice Clarence Thomas' views on this issue, see Clarence Thomas, *Victims and Heros in the "Benevolent State,"* 19 HARV. J.L. & PUB. POL'Y 671 (1996). But Justice Thomas also wrote: "For some white men, preoccupation with oppression has become the defining feature of their existence. They have fallen prey to the very aspects of modern ideology of victimology that they deplore." *Id.* at 680.