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Affirmative Action, A Look at South Africa and the United States: A Question of Pigmentation or Leveling the Playing Field?

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AFFIRMATIVE ACTION, A LOOK AT SOUTH AFRICA AND THE UNITED STATES: A QUESTION OF PIGMENTATION OR LEVELING THE PLAYING FIELD?

LUNDY R. LANGSTON*

For it is the dawn that has come, as it has come for a thousand centuries,
never failing. But when that dawn will come, of our emancipation from
the fear of bondage, and the bondage of fear, why, that is a secret.

ALAN PATON, CRY THE BELOVED COUNTRY (1948)

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INTRODUCTION

Affirmative action is one of the most divisive issues in the United States today.¹ Proponents of affirmative action argue that the United

1. See Gabriel Chin et al., *Beyond Self Interest: Asian Pacific Americans Toward A Community of Justice, a Policy Analysis of Affirmative Action*, 1 UCLA ASIAN PAC. AM. L.J. 3 (forthcoming 1997) (describing and discussing the nature of affirmative action). Affirmative action takes precedence over abortion and family value issues. Family values divide America, like affirmative action, along race and class lines. Affirmative action includes quotas, preferences, anti-discrimination programs, as well as programs that contain goals or timetables. Affirmative action refers to:

[A] broad array of race—, ethnicity . . . programs, enacted by the government and private sector, voluntarily or by court order, to promote equality of opportunity and racial diversity. It includes outreach programs, targeted at specific groups, to notify them of employment, education, and contracting opportunities. It also includes programs that favor—among similar candidates, who satisfy necessary qualifications—members of historically underrepresented groups. These programs act as a small counterweight to the various discriminations—sometimes purposeful, sometimes negligent—that people of color face daily, throughout their lives. They provide a rough and meager remedy for the felt impact of such unfair treatment, which for some reach back for generations.

Id.

A personal encounter with affirmative action parallels the divisions in America today. Although I am an affirmative action beneficiary, one of my first “formal” encounters with affirmative action occurred when I was a graduate student at Columbia University Law School in the early nineties. I completed a seminar class composed of sixteen students from around the globe who were interested in teaching the law. During the course, the professor placed the students in groups of two and assigned each group to teach a class. My assigned partner was a white male from Mississippi; I am an African-American female from North Carolina. The professor assigned us to teach: (1) Affirmative Action in Law Faculties and (2) Responding to and Teaching Under-Represented Student(s). He also took the liberty of assigning the faculty topic to himself and the student topic to me. The night before our presentation, I received a call from my partner who informed me that he had learned that one of the white males in the class, Terry, had planned to sabotage our presentation. I asked why and how? Terry felt he was being discriminated against, as a white male, while merit-less African-Americans were getting law teaching jobs. My partner said he thought I should know and that there was probably nothing we could do about it except be prepared. He did not say what I should actually prepare for—I was expecting “terror.” During the presentation, Terry asked a question, along the “merit-less” line and I responded directly to him.

During the critique of my teaching, the professors fast-forwarded the tape to my response to Terry’s question and asked why I did not respond by bringing in a student who I knew was non-threatening. They believed that it would have been a better teaching tool if I responded to Terry by bringing in a woman who was a feminist and allowing her to make the necessary points for Terry. I told the professors that the question was on race, not gender. I emphasized that it was more ef-

States has not come far enough in leveling the playing field. They argue that affirmative action programs are needed as much today—if not more—than when the balancing policies initially took effect. Opponents of affirmative action argue that race-based decision-making is undemocratic and discriminates against the majoritarian members in United States society.

As we prepare to exit the twentieth century, we are confronted with the need to resolve the affirmative action dilemma. Do we eliminate affirmative-action programs altogether and institute purely color-blind policies? Is a middle-ground possible, or do we simply start anew?²

As the second millennium approaches, W.E.B. DuBois's observation that the twentieth century must confront the problem of the color-line becomes even more apparent.³ As we come to the close of this century we must ask ourselves, in light of the continued problems brought on by race,⁴ if problems of the persisting color-line can be addressed with affirmative action policies—policies that are designed to eliminate past and present discrimination based on race, color, religion, sex, or national origin. If we ask the question today, with an honest outlook for tomorrow, our response has to be in the affirmative.⁵ A negative response is simply a lie.⁶ The answer is

fective, for both Terry and me, to respond to his statements from my personal perspective. Besides, which student in the class was non-threatening?

2. See Jeffrey Rosen, *Affirmative Action: A Solution*, 22 NEW REPUBLIC 20 (1995) (discussing affirmative action and possible options).

Color-blindness, for all its moral and political appeal, is not really a practical option.

When asked point-blank, few conservatives are honestly willing to accept the widespread re-segregation that would follow from a rigid ban on racial preferences

The expectation that each race and gender should, always and everywhere, be represented in numbers that reflect its position in society at large is doomed to fail, and to stir racial resentment at the same time.

Id.

3. See generally W.E.B. DUBOIS, *THE AUTOBIOGRAPHY OF W.E.B. DUBOIS: A SOLILOQUY ON VIEWING MY LIFE FROM THE LAST DECADE OF ITS FIRST CENTURY* (1994) (discussing the dynamics of race relations throughout the twentieth century).

4. See *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978) (holding that an affirmative action admissions program guaranteeing positions for minority students at a state medical college was unlawful). Problems continue because the United States Supreme Court has stated that, at least in educational institutions, there is no responsibility to counter the effects of societal discrimination with affirmative action programs. See *id.*

5. See Leroy D. Clark, *A Critique of Professor Derrick A. Bell's Thesis of the*

“yes.” We know that “faces remain at the bottom of the well,” and we recognize the color of those faces.⁷

Permanence of Racism and His Strategy of Confrontation, 73 DENV. U. L. REV. 23, 25 n.11 (1995) (citing DERRICK BELL, *CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER* 12 (1994)). Bell wrote:

Black people will never gain full equality in this country. Even those Herculean efforts we hail as successful will produce no more than temporary “peaks of progress,” short-lived victories that slide into irrelevance as racial pattern adapt in ways that maintain white dominance. This is a hard-to-accept fact that all history verifies.

Id. There are many who resent Bell’s statement, but Western civilization hinges on dichotomies, and some group has to be subordinated. If not blacks, then who? See Kimberle W. Crenshaw, *Race, Reform, Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1373 (1988) (discussing the dichotomies of society).

Western thought has always been structured in terms of dichotomies or polarities: good vs. evil, being vs. nothingness, presence vs. absence, truth vs. error, identity vs. difference, mind vs. matter, man vs. woman, soul vs. body, life vs. death, nature vs. culture. . . . These polar opposites do not, however, stand as independent and equal entities. The second term in each pair is considered the negative, corrupt, undesirable version of the first, a fall away from it In other words, the two terms are not simply opposed in their meanings, they are arranged in a hierarchical order which gives the first term priority.

Id. (quoting JACQUES DERRIDA, *DISSEMINATION* at viii (B. Johnson trans. 1981)). Priority gives authority. Blacks have been and continue to be the “polar” or “other”—the evil, the nothingness, the unnatural, the absent, the dead or the different. *See id.*

6. See Jodi A. Enda, *Clinton Challenges America to Lift ‘The Burden of Race’* MIAMI HERALD, June 15, 1997, at 1A (reporting on an address President Clinton made in support of affirmative action). At the University of California San Diego 1997 graduation address President Clinton told the class: Of all the questions of discrimination and prejudice that still exist in our society, the most perplexing one is the oldest, and in some ways today the newest, the problem of race.” *Id.*; see also Steven A. Holmes, *New Survey Shows Americans Pessimistic on Race Relations*, N.Y. TIMES, June 11, 1997, at A12 (describing the results of a Gallup Poll, which showed that fifty-five percent of blacks and whites believe that relations between blacks and whites will always be a problem in the United States). In the survey, whites generally opposed and African-Americans supported affirmative action programs. *See id.* The poll indicated that seventy-six percent of black college graduates said, “race relations would always be troublesome for the country,” while fifty-six percent without college degrees agreed. *Id.* Forty-eight percent of white college graduates voiced agreement and fifty-six percent of whites without college degrees voiced that “no solution to animus between the races would ever be found.” *Id.* The survey consisted of 3,036 adults over the age of 17; 1,269 were African-Americans. *See id.*

7. See RONALD J. FISCUS, *THE CONSTITUTIONAL LOGIC OF AFFIRMATIVE ACTION* 17-18 (1992) (describing how people treat others based on physical attributes).

[A] number of studies have strongly suggested that most of us treat people differently according to their physical attractiveness, even when we are not aware of it

If the answer should be in the affirmative, then why does a debate exist over the continuation of affirmative action programs?⁸ The only debate that should exist is how to make affirmative action programs work for the “faces at the bottom of the well.”⁹ The self-named “victims” of affirmative action programs are not faces at the bottom of the well. These self-named victims, the white members of the majority, are screaming for an end to openly sanctioned affirmative action programs because they believe such programs result in discrimination against the white majority.¹⁰ What they really mean is that there should be no more attempts at leveling the playing field for the faces at the bottom of the well.¹¹ They do not mean discontinuing the good old boy affirmative action club; they know their club will continue as long as the color-line remains problematic in United States society.¹² There has always been and will always be a need for affirmative action in United States society. There will always be informal policies where members of United States society will be hired without regard to their merit, will be admitted into schools even though they fall below the admission criteria, and who will be granted loans even though they come within the no loan risk zone. Formal affirmative action policies simply tell members of the majority that they have to hire, admit, and loan to minorities.¹³

[S]uch behavior . . . systematically rewards and penalizes individuals on a basis other than merit . . . If all of us unconsciously prejudge each other . . . on the basis of physical traits, then clearly differences in skin color present multiple opportunities for [racism].

Id.

8. See generally Donald L. Beschle, “You’ve Got To Be Carefully Taught”: *Justifying Affirmative Action After Croson and Adarand*, 74 N.C. L. REV. 1141 (addressing the validity of continuing affirmative action programs).

9. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

10. See David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 131 (discussing the opponents’ beliefs that affirmative action causes discrimination against the majority).

11. See Leland Ware, *Tales From the Crypt: Does Strict Scrutiny Sound the Death Knell for Affirmative Action?*, 2 J.C. & U.L. 43, 44 (1996) (stating that some critics of affirmative action view themselves as victims of programs that guarantee inclusion of members of minority groups that have suffered past exclusion because of race).

12. See DUBOIS, *supra* note 3, at 393 (discussing that although progress in race relations has been achieved, the color-line still persists).

13. See Paul F. Butler, *Affirmative Action and the Criminal Law*, U. COLO. L. REV. 841, 843 (1997) (stating that the benefits of affirmative action have only ex-

What discrimination claim do the self-named victims make?¹⁴ The victims want color-based affirmative action programs to become nonexistent¹⁵ because affirmative action programs: (a) will never overcome the color problem in the United States; or (b) they, the victims, do not need them; or (c) the faces at the bottom of the well are no longer in need of them; or (d) the programs disadvantage the self-proclaimed victims.¹⁶

South Africa, like the rest of the globe, is setting the stage for the twenty-first century. Black South Africans have suffered throughout this century with oppression caused by a minority of the country's white inhabitants.¹⁷ Both South African and United States oppressive practices were, and still are, based on the race of the group oppressed, and the races of both oppressed groups share the same skin pigmentation.¹⁸

As South Africa charts its future democratic society with a mission to do the right thing, what route will it take for uplifting the oppressed group—a leveling of the playing field laden with affirmative action policies, like the United States, or a new and different course?

This article will compare South Africa's future of righting the wrongs the minority in its society carried out against members of its majority with the United States' stance on remedying past discrimination.¹⁹ Although this article parallels the United States with South Africa, minority members did not cause the oppression in the United

tended into certain areas).

14. See Ware, *supra* note 11, at 44 (stating that opponents of affirmative action believe that they are victimized when programs replace qualified members of the majority with less qualified members of the minority).

15. See generally BOB ZELNICK, *BACKFIRE* (1996) (criticizing affirmative action programs because they result in reverse discrimination and are ineffective in including minorities who have suffered from past discrimination).

16. See Beschle, *supra* note 8, at 1148-51 (discussing the critics' arguments in the affirmative action debate).

17. See Christopher A. Ford, *Challenges and Dilemmas of Racial and Ethnic Identity in America and Post-Apartheid South African Affirmative Action*, 43 *UCLA L. REV.* 1953, 1956 (1996) (stating that approximately 87% of the population was disadvantaged by the formal race classifications the white majority implemented).

18. See generally *id.* (discussing oppressing practices).

19. See Butler, *supra* note 13, at 844 (arguing that the behavior of the white majority has resulted in a lack of achievement by the minority).

States as they did in South Africa.²⁰ In the United States' truer sense of democracy, majority members caused the oppression.²¹ This article compares these two countries because the oppressed people share some commonalities, namely their skin pigmentation, which appears to be an easy target for discriminatory purposes, and the continent of their ancestry.²²

South Africa's approach to righting the wrongs suffered by so many and caused by so few is intriguing. Why is South Africa discussing affirmative action? How is it, then, that in a democratic society members of the majority need affirmative action incentives to overcome race problems brought on by members of the minority? How could oppressed people vote to oppress themselves? Why would they? Should we suggest to black South Africans that they should simply use their majority status as the minorities did? In South Africa, the fact that a majority democratic dark-skinned group is in need of affirmative action suggests that perhaps the color of one's skin is at issue—not simply any darkened skin color, but a color that designates African descent.

The 1996 United States presidential election vibrantly depicts the

20. See Ford, *supra* note 17, at 1956 (discussing the oppression).

21. See *id.*

22. See Videotape: *Eye of the Beholder* (Ann Bishop, 1987) (showing Ann Bishop stating that "how we treat one another has a lot to do with how we see one another. It is all in the "eye of the beholder.""). *Id.* See generally FISCUS, *supra* note 7 (describing the extent to which physical traits may affect assessments of merit). When Martin Luther King, Jr. was assassinated, Jane Elliot, a third grade teacher in a small, rural, farming town in Riceville, Iowa conducted a lesson with her third graders on prejudice and discrimination. See *Eye of the Beholder, supra*. In 1970, Riceville was an all white, all Christian community with a population of approximately one thousand. See *id.* She separated her third graders, none of whom were black, by the color of their eyes (blue eyes and brown eyes) in order to conduct a demonstration on the meaning of discrimination and prejudice. See *id.* The blue eye children were privileged on the first day of the demonstration, they would be the first to drink at the water fountain, the only ones to play on the toys at recess, etc. See *id.* In order to prevent brown eyed children from pretending to be blue eyes, Jane placed collars on the underprivileged kids so there would be no mistake as to their eye color. See *Eye of the Beholder, supra*. The collars were a mechanism that was more closely associated to the skin color and made it easier to determine into which group students fell. See *id.* This was used to show the third graders that blacks were being discriminated against because of their skin color, something they had no control over, like the color of their eyes. See *id.* The blue eyed students immediately began to discriminate against their brown eyed counterparts. See *id.*

furor of affirmative action.²³ During an election year divisive issues tend to come to the forefront because politicians know that these issues get excellent media attention that influences potential voters.²⁴ Politicians go for the “jugular” without regard to the pain caused, proclaiming on the nightly news and advertising programs picayune resolutions to important issues. Rather than bring forth the same old arguments of the politicians and media gurus, this article examines affirmative action through South Africa’s prism²⁵ and suggests solid resolutions the United States can use in righting its wrongs.

Part I of this article examines affirmative action in the United States and discusses majority versus minority oppression and the significance of skin pigmentation. Part II compares and contrasts South Africa’s approach of rewriting its constitution to include the oppressed group with the United States’ addition of amendments to its constitution in trying to include members of the oppressed group. Part III makes recommendations for resolving affirmative action concerns in an effort to allow all members of society to embrace the twenty-first century in a way that enhances our communities without regard to skin color.

I. AFFIRMATIVE ACTION GO HOME—

A. TO THE UNITED STATES?

Affirmative action programs in the United States stem from attempts to remedy discrimination caused by the United States’ legacy of slavery.²⁶ As a result of the Civil War, Congress instituted

23. See David S. Broder, *A Party Welcome Tinged with Anxiety*, WASH. POST, Aug. 10 1996, at A1 (discussing issues, including affirmative action that were crucial to the 1996 presidential campaign).

24. See, e.g., Rajiv Chandrasekarsen, *Politics Finding a Home on the Net: Post Election Survey’s Show the Web Gains Influence Among Voters*, WASH. POST, Nov. 22, 1996, at A4 (discussing the great extent to which media coverage, including the internet, influences voting decisions).

25. See ALBIE SACHS, *PROTECTING HUMAN RIGHTS IN A NEW SOUTH AFRICA* 160 (1990) (discussing the struggle for equal rights in South Africa). In South Africa, physiognomy was destiny; skin color determined rights, duties, and how and where those rights and duties would be exercised. See *id.* at 161.

26. See Carl E. Brody, Jr., *A Historical Review of Affirmative Action and the Interpretation of Its Legislative Intent by the Supreme Court*, 29 AKRON L. REV. 291, 294 (1996) (discussing the Freedman Bureau Bill of 1865 as the beginning of

amendments to the United States Constitution in an effort to elevate the status of African-Americans.²⁷ Slavery was abolished, freed slaves became national and state citizens, and the newly freed slaves were empowered with the right to elect their governing officials.²⁸ The Fourteenth and Fifth Amendments provided equal protection to freed slaves.²⁹ The Fourteenth Amendment prohibited the state from engaging in discriminatory³⁰ activity while the Fifth Amendment

United States action to lend assistance to groups who suffered as a result of past discrimination).

27. See U.S. CONST. amends. XIII, XIV, XV (abolishing slavery and providing certain rights to freed slaves in the United States).

28. See *id.*; see also Brody, *supra* note 26, at 294 (describing the impact of these amendments).

The Thirteenth Amendment, while liberating former slaves, did not solve the problem of racism directed toward newly-freed slaves by their fellow citizens, nor did it address the problem of assimilating the newly-freed slaves into white society. As a result, Congress proposed the 1864 Freedmen's Bureau Bill with the specific intent to provide special assistance to the newly freed slaves. This legislation specifically designated African-Americans as the beneficiaries of programs meant to assist in the transition of slavery. Proponents of the bill argued that it was necessary in order to atone for the past discrimination visited against the former slaves. They also argued that the provision of race specific benefits would allow the former slaves to become self-sufficient, and would prevent them from becoming wards of the nation. Thus, as is the case today, proponents of race conscious measures advanced the ideology that providing measures to assist those who have been and are presently discriminated against benefits the nation as a whole, because these members of society will be able to contribute to the community, and will not exist as liabilities to the nation.

Id.

29. U.S. CONST. amends. V, XIV.

30. See U.S. CONST. amend. XIV, § 1 (proclaiming that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws"); see also Brody, *supra* note 26, at 294 (explaining that the government enacted the Fourteenth Amendment primarily to guarantee the constitutionality of the race conscious measures established in the Freedmen's Bureau Acts, which were subsequently affirmed through the Civil Rights Act of 1866 and to address the problems of racism during the post Civil War period). President Johnson's decision to veto the original versions of the 1866 Freedmen's Bureau Act and the Civil Rights Act of 1866 necessitated amendments to the Constitution. See *id.*

Both the Freedmen's Bureau and Civil Rights Act of 1866 were meant to provide the newly freed slaves with some opportunity to become viable members of the society. Achieving this goal necessarily required measures that applied directly to the group that had been wronged for the previous three centuries. Yet when Congress attempted to enact such a remedy, those against providing assistance to the downtrodden determined that the one characteristic that caused the former slaves to be enslaved, i.e., the color of their skin, could not now be used to thwart efforts to ameliorate the condition of ex-slaves.

Id. at 297.

prohibited the federal government from such activity.³¹ These new citizens brought equal protection claims in an effort to eliminate their subordination as well as to elevate their self development status.³² Later, the United States Supreme Court imposed a high level of scrutiny on the states when engaging in discriminatory conduct on the basis of race.³³ The Court held that race is a suspect classification and the state must show a compelling interest in order to restrict persons based on their race.³⁴

However, when the Supreme Court approved, among other things, state-imposed racial segregation in public transportation under the "separate-but-equal" doctrine,³⁵ it fertilized a growing inferiority en-

31. See U.S. CONST. amend. V (applying the protections of the Fourteenth Amendment to the federal government).

32. See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that a "separate-but-equal" doctrine was constitutional). In the late 1800s, Plessy brought an action challenging the constitutionality of an act that provided for separate railway carriages for the white and "colored" races. See *id.* at 539. The act was attacked on the ground that it conflicted with the Thirteenth Amendment, which abolished slavery and the Fourteenth Amendment, which restricted states from infringing on the rights of its citizens. This "separate-but-equal" doctrine cemented the race-based fragmentation of Americans that began with slavery and continued with the amendments. See *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 393 (1978) (Marshall, J., concurring in part and dissenting in part) (stating that *Plessy v. Ferguson* halted the legal progression toward equality until the decision in *Brown v. Board of Education* and the Civil Rights Act of 1964).

33. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (requiring courts to apply strict scrutiny to affirmative action programs developed by state and local governments); *Adarand Constructors, Inc., v. Peña*, 515 U.S. 200 (1995) (extending *Croson* to affirmative action programs established by the federal government); see also *Ware*, *supra* note 11, at 89 (arguing that the application of strict scrutiny to affirmative action cases has led to its downfall). "Affirmative action in the educational setting is predicated on a justification that is different from the rationale used in employment or public contracts. The importance of promoting student body diversity was one of the key lines of reasoning in Justice Powell's opinion in *Bakke*." *Id.* at 85. "This decision provided for the use of race as factor in determining diversity." *Id.* at 67.

34. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (adopting the strict scrutiny standard for state and local affirmative action programs); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (holding strict scrutiny as the standard for affirmative action programs established by the government); see also Elaine R. Jones, *Race and the Supreme Court's 1994-95 Term*, in *THE AFFIRMATIVE ACTION DEBATE* 148, 150-52 (George E. Curry ed. 1996) (discussing the Supreme Court's application of a strict scrutiny standard and the effect it will have on affirmative action cases).

35. See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (adopting this doctrine).

vironment.³⁶ As a result, the nineteenth century ended with an erosion of some earlier attempts at eliminating the negative status of African-Americans.³⁷ Due to the failure of the legal system to eradicate discrimination, which had thrived so well under the auspices of slavery, subordination of blacks continued in the twentieth century in much the same way it was practiced in the nineteenth.

Despite continuing oppression in the twentieth century, African-Americans have won major legal battles in fights over education,³⁸ housing,³⁹ employment,⁴⁰ and interstate travel.⁴¹ Midway through the century, claims were brought challenging affirmative action and race preference programs that were instituted as a consequence of slavery and its discriminations.⁴² Opposition to affirmative action programs came "from a wide variety of ideological vantages."⁴³ Just as Afri-

36. See *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 393 (1978) (Marshall, J., concurring in part and dissenting in part) (stating that the "separate-but-equal" doctrine had a significant negative effect on race relations).

37. See Drew S. Days III, *The United States: An Historical Perspective On Affirmative Action, Development and Democracy, Affirmative Action in India, Malaysia, Sri Lanka, and the USA*, in *DEVELOPMENT & DEMOCRACY*, Sept. 6, 1993, at 58 (discussing the erosion at the end of the nineteenth century).

38. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (holding that laws permitting racially segregated schools violate equal protection).

39. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (upholding a 1866 federal law that prohibited discrimination in the lease, rental, or sale agreements of real and personal property).

40. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that tests used to screen potential employees were discriminatory and unlawful if the results had no correlation to the demands of the job and if minorities failed at significantly higher rates than whites).

41. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (holding that denying accommodations to African-Americans inhibits the right to travel and therefore adversely affects interstate travel).

42. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding that a program requiring a number of city construction contracts be reserved for minorities violates the Equal Protection Clause since it could not be established that there was a history of discrimination in that municipality and, thus, no compelling government interest in the program); see also Days, *supra* note 37, at 59 (discussing the challenges to affirmative action and racial preference programs).

43. RANDAL KENNEDY, *THE UNITED STATES: THE CURRENT DEBATE ON AFFIRMATIVE ACTION, DEVELOPMENT AND DEMOCRACY* 66, 67-68 (1993) (discussing problems and solutions for affirmative action programs).

One category of opposition stems from a strain in American life that is as ugly as it is old: the tradition of white supremacist longings. . . . One powerful current of opposition to affirmative action springs from a strain in American political culture that views as illicit all policies, public or private, that use race as a criterion of judgment, even

can-Americans brought claims asserting equal protection of the laws, majority members of society are now bringing claims asserting the same protections.⁴⁴ But, for African-Americans the opposition is two-fold. Not only do members of the majority oppose affirmative action programs, but so do some members from within the African-American community.⁴⁵

“Everyone knows there are two nations in [the United States], one white and one black.”⁴⁶ The Kerner Commission Report noted the separateness between blacks and whites in the United States in 1968.⁴⁷ Andrew Hacker reported the same black-white division in a sequel to the Kerner Report, published in 1992.⁴⁸ The statistics on

when the purpose of doing so is thought to be remedial and beneficial. Those who embrace this tradition oppose affirmative action because they believe that, as a strategy and as a goal, resolute indifference to racial distinctions in the making of policy—“color-blindness”—is the only way that American society can transcend its racist past. *Id.* “Another current of opposition springs from the belief that, under contemporary conditions in the United States, racial preferences on behalf of historically subordinated racial groups hurt them more than it helps them.” *Id.* at 68. Other arguments opposing affirmative action programs are:

(1) [A]ffirmative action is not worth what it costs politically . . . it “costs people of color by eroding the strength of the overall struggle for social justice. . . .” (alienates people who would advance the cause of social justice but not based on race); and by mainly benefiting the middle class.

(2) A social economic approach is the best way to handle problems of racial subordination rather than race based remedies.

(3) [P]referring people of color who are less skilled than their white competitors has ramifications throughout society that detrimentally affect everyone “When quotas replace merit, everybody suffers.”

Id.

44. See *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978) (holding for a white male plaintiff who claimed he was discriminated against by the university’s affirmative action admissions program).

45. See STEPHAN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* 69 (stating that affirmative action programs perpetuate an assumption, disliked by some African-Americans, that minorities are unable to compete on level ground with whites).

46. Henry Louis Gates, Jr., *Two Nations . . . Both Black*, *FORBES*, Sept. 14, 1992, at 132.

47. See *id.* at 132 (discussing the Kerner Report). See generally THE NAT’L ADVISORY COMM’N ON CIVIL DISORDERS (1968) (commonly referred to as the Kerner Commission Report) (responding to an executive order by President Lyndon Johnson to investigate, explain, and record the incidences of racial violence in 1967); ANDREW HACKER, *TWO NATIONS* (1992) (commenting on the ubiquitous role of race in family, education, politics, and crime in the United States today).

48. See Gates, *supra* note 46, at 132 (discussing the new report by Andrew Hacker).

public health, educational attainment, and income pointed to the same results: that "African-Americans are the ultimate unassimilable of the American mix, the pebble in the ethnic soup."⁴⁹ The Court, however, has suggested that certain societal problems in the United States cannot be fixed with affirmative action programs.⁵⁰ As a result, the courts no longer sanction affirmative action quota

49. *Id.* Although Gates' efforts are to seek recognition for the black middle class and resist lumping all blacks in one class, he finds that himself and others like him, namely, as he calls them, "the heirs of the Talented Tenth," share problems of racism. *Id.* at 134. He states "we [grandchildren of the Talented Tenth] are isolated from the black underclass and yet still humiliatingly vulnerable to racism." *Id.* at 135. Even though Gates and those like him were

trained to succeed, geared to prosper, adequately trained by family and teachers to "cross over" into the white world once the walls of segregation came tumbling down . . . [T]he most pernicious forms of racism—the stereotyping of an individual by the color of her skin—still pervade white America. And caught in this no-man's land of alienation and fragmentation is the black middle class.

Id. at 135-38. Gates wants out of negative stereotyping affirmative action quota identification programs. *See id.* at 132. He wants identification not as a black but as a black bourgeoisie. *See id.* He is disturbed because by American standards he would be an elite member of society. He cannot reach his pinnacle, however, because of racism in our society. *See id.* at 135. Gates believes, however, that members of the black underclass can elevate their status by accepting individual responsibility and embracing social programs designed to motivate people upward. *See id.* at 138. He believes that affirmative action programs prevent people from being a non-racial member of society because white people see the programs as a free ticket to success. *See id.* at 135. Does Stephen Carter, an affirmative action baby, or Clarence Thomas, an affirmative action beneficiary, want the same as Gates? Stephen Carter, an heir of the Talented Tenth, unlike Gates, admits his "heirship" is due to affirmative action programs, but he questions the significance of such programs since they simply elevate the middle class rather than those who are truly in need. *See generally* CARTER, *supra* note 45 (criticizing some aspects of affirmative action). *But see* Charles Daye, *On Blackberry Picking, Generations of Affirmative Action, and Less Dangerous Enterprises: An Open Letter to Stephen Carter*, 45 STAN. L. REV. 485, 494 (1993) (positing to Carter whether "circumstances are so improved that the benefits of affirmative action are institutionalized and thus no longer needed"). Daye stated that the nature of affirmative action is a benefit to all in society and "[i]n time . . . may alleviate racism and other spurious factors that lead to societal divisions." *Id.* at 492; *see also* JONES, *supra* note 34, at 156 (discussing that Clarence Thomas "believes that there is 'a moral constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race'").

50. *See Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 280 (1978) (stating that although the government may have had a compelling interest in remedying societal discrimination, the affirmative action admissions program was not the appropriate remedial mechanism).

programs.⁵¹ Affirmative action programs in the United States, therefore, must take on a new look.⁵² These programs must have the appearance of assisting members of a minority group, but without regard to race or skin color. In response to the continued challenges against affirmative action programs, the United States Supreme Court has “gaveled” which programs will pass constitutional muster.⁵³ The Court seems to be comfortable with programs that remedy actual discrimination, but it frowns on programs intended to remedy benign societal discrimination and improve the condition of minorities.⁵⁴ With respect to educational institutions, the Court has held that there shall be no more race-based affirmative action programs, unless the programs are to remedy present effects of past discrimination to achieve diversity.⁵⁵ In order to use affirmative action programs to remedy past discrimination, there must be a showing that the institution itself was the subject of “judicial, legislative, or administrative findings of constitutional or statutory violations.”⁵⁶ The Court stated that affirmative action programs could not be used to remedy societal discrimination.⁵⁷

51. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 472 (1989) (stating that the setting of racial quotas should not be used to remedy past discrimination because the quotas do not reflect case by case facts).

52. See *Enda*, *supra* note 6, at 14A (noting that at the University of California San Diego 1997 graduation address, President Clinton charged that “[i]n our efforts to extend economic and educational opportunity to all our citizens, we must consider the role of affirmative action). “[A]ffirmative action has not been perfect in America . . . [b]ut when used in the right way, it has worked.” *Id.*

53. See *Ware*, *supra* note 11, at 44 (noting that the strict scrutiny standard of review severely limits the opportunity to find affirmative action programs constitutional).

54. See Erin M. Hardtke, Note, *Elimination of Race as a Factor in Law School Admissions: An Analysis of Hopwood v. Texas*, 80 MARQ. L. REV. 1135, 1159 (1997) (discussing that in which the court decided that in assessing the constitutionality of affirmative action programs the remedial purpose should be limited to correcting past discrimination at the institution implementing the program).

55. See *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978). *But see Hopwood v. Texas*, 78 F.3d 932, *cert. denied*, 116 S. Ct. 2581 (1996) (holding that the state university law school’s admissions program, which discriminated in favor of minority applicants by giving substantial racial preferences in its admission program, violated equal protection).

56. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496 (1989).

57. See *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 306 (1978).

Society has accepted that race is a social construct.⁵⁸ If this is so, and if societal discrimination continues to heavily disadvantage blacks, then what relief can blacks have at employment, education, and economics without affirmative action programs? Although the Court frowns on affirmative action programs that are solely race-based, it has found programs purporting to diversify student bodies to be constitutional.⁵⁹ One could make the anti-*Plessy* argument⁶⁰ that blacks are, in fact, different from whites and, therefore, may affirmatively receive benefits. The problem with this argument is that the more “white-like” a black is, the more chance he has in having the privileges of whites—privileges that were so important to *Plessy*. Dark-skinned people want to be different and yet treated the same as whites. The problem of being dark-skinned is that it is deemed an inferior difference to whites, and, therefore, blacks will not be treated the same as whites.

White supremacists believe that people of color are somehow different and inferior to whites.⁶¹ People of color, therefore, are not equals in the cultural, social, and political company of whites. This belief is ingrained in United States history and society, with enormous consequences for people of color.⁶² White supremacy, as a la-

58. See Michael Omi & Harold Winnat, *Racial Formations*, in RACE, CLASS & GENDER IN THE UNITED STATES: AN INTEGRATED STUDY 26-33 (Paula Rothenberg ed., 2d ed. 1992) (stating that “[r]acial categories and the meaning of race are given concrete expression by the specific social relations and historical context in which they are embedded”).

59. See *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 311-12 (1978) (stating that affirmative action programs that diversify student bodies may be constitutional).

60. See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that a “separate-but-equal” doctrine was constitutional).

61. See FISCUS, *supra* note 7, at 16, 24 (noting that “[w]hen one finds race-based differences within a society there are but two possible explanations: racial superiority/inferiority at birth, or racism in the society”). “[O]nly a hard core racist posits racial differences at birth.” *Id.* But see Cornel West, *Affirmative Action in Context*, in THE AFFIRMATIVE ACTION DEBATE, *supra* note 34, at 31-35 (arguing that affirmative action is a weak response to white supremacy). “More drastic and re-distributive measures are needed . . . measures that challenge the maldistributions of wealth and power and that will trigger cultural renewal and personal hope.” *Id.* at 34-35.

62. See Steven A. Holmes, *New Survey Shows America Pessimistic on Race Relations*, N.Y. TIMES, June 11, 1997, at A16 (noting that “55 percent of both blacks and whites . . . believe that relations between blacks and whites will ‘always be a problem’”).

tent belief, is widespread.⁶³ As an explicit ideology, it is re-emerging in the form of separatist militia groups.⁶⁴ People of color cannot run a fair race because they live in a racist society.

Throughout United States history the problems created by skin-color divisions have been dealt with by numerous approaches.⁶⁵ Various Presidents issued executive orders that fostered affirmative action-type programs.⁶⁶ President Lyndon B. Johnson actually used the term "affirmative action" and utilized a sports metaphor to illustrate the need to level the playing field.⁶⁷ "Racism raised high hur-

63. See John O. Calmore, *Exploring Michel Omi's "Messy" Real World of Race: An Essay for "Naked People Longing To Swim Free,"* 15 LAW & INEQ. J. 25, 52 (1987) (explaining how neo-conservatives and the far-right have "camouflaged" their racial politics and expanded their political base by appealing to the "common sense" of the masses).

64. See Armetta Landrum, *Trial by Fire, Hate Groups Fanning the Flames of Racism Across America*, CIN. CALL & POST, July 11, 1996, at 1A (describing the burning of black churches as an expression of white hatred and intolerance).

65. See Brody, *supra* note 26, at 293-300 (discussing different approaches to address race problems in the United States).

66. See Brody, *supra* note 26, at 309-13 (examining executive orders issued for the enforcement of Titles VI and VII). President Franklin D. Roosevelt issued Executive Order 8,802, which prohibited the federal government, defense-related industries, and federal contractors from discriminating against minorities. See Exec. Order No. 8,802, 3 C.F.R. § 957 (1938-1943). President Kennedy issued Executive Order 10,925, which directed federal contractors to take action to ensure that applicants are employed and that employees are treated during employment, without regard to their race, creed, color, or national origin. See Exec. Order No. 10,925, 3 C.F.R. § 448 (1959-1963). Kennedy's order did not require reporting or monitoring systems. In 1965, President Johnson issued Executive Order 11,246, prohibiting discriminatory employment practices by government contractors. See Exec. Order No. 11,246, 3 C.F.R. § 339 (1964-65); Brody, *supra* note 26, at 309-310. President Johnson's order required the Department of Labor to monitor employment practices and to determine if minorities were being underutilized. See Brody, *supra* note 26, at 310. If the Labor Department found non-compliance, it could cancel, suspend, or terminate the contract. See *id.* In 1969, Present Nixon issued Executive Order 11,478, which required federal agencies to establish affirmative action programs for civilian employees within each department and agency. See Exec. Order No. 11,478, 3 C.F.R. § 803 (1966-1970).

67. See Chin, *supra* note 1, at 3 (describing affirmative action as necessary to level the playing field); see also Lyndon B. Johnson, *To Fulfill These Rights, in THE AFFIRMATIVE ACTION DEBATE*, *supra* note 34, at 16 (declaring the necessity of government solutions to aid the black community). "[T]he great majority of [black] Americans . . . still are another nation." *Id.* at 18-19. The "devastating heritage of long years of slavery . . . of oppression, hatred and injustice . . . must be faced and dealt with and overcome if we are ever to reach the time when the only difference between [blacks] and whites is the color of their skin." *Id.* at 20.

dles and made it impossible for otherwise equal runners to compete. Thus, when [blacks] passed the baton to the next generation, they did so running with less speed, having covered a shorter distance, and having less stamina that they would have in a non-racist society.”⁶⁸

This position on the race-based track field decreased the economic, social, and cultural capital passed on from one generation to the next.⁶⁹ Not only did blacks receive less material wealth, they also inherited less “insider knowledge” and fewer social contacts—both instrumental to educational and professional advancement.⁷⁰ Although “runners” today might compete on more equal footing, this unequal situation remains. Race-based motives place runners in an unfair position and ensure their inability to win. Although the event may be a mile run or a relay race, blacks have to jump hurdles that are unfairly placed in their lanes.

An example of a “hurdle race-based policy” was the colorblindness of the 1934 Fair Housing Act (“FHA”).⁷¹ Mortgage-lending policies blocked blacks’ efforts at home ownership. Reportedly, loan officers preferentially ranked mortgage candidates as follows: (1) English, Germans, Irish, Scandinavians, and Scots; (2) Northern Italians; (3) Bohemians and Czechoslovakians; (4) Poles; (5) Lithuanians; (6) Greeks; (7) Russian Jews of lower classes; (8) Southern Italians; (9) Negroes; and (10) Mexicans.⁷² Homer Hoyt, consultant to the FHA, noted that “except with the Negroes and Mexicans, these racial and national barriers disappear as the ‘group’ rises on the economic scale or conforms to the United States standard

68. Chin, *supra* note 1, at 3.

69. See Calmore, *supra* note 63, at 78-80 (theorizing that whites cling to supremacist beliefs because of the social, economic, and cultural advantages conferred by whites’ position in society). *But see* Leroy D. Clark, *A Critique of Derrick A. Bell’s Thesis of the Performance of Racism and His Strategy of Confrontation*, 73 *DENV. U. L. REV.* 23, 42 (1995) (advocating that the economic and social problems facing society as a whole may be “merely aggravated” in the black community).

70. See Calmore, *supra* note 63, at 78-80 (explaining that blacks have cultural and social disadvantages).

71. Fair Housing Act §§ 804-06, 42 U.S.C. §§ 3604-06 (1994); see Chin, *supra* note 1, at 32 n.9 (describing the Fair Housing Act as an inequitable government initiative).

72. See Chin, *supra* note 1, at 32 n.9 (listing the preferential ranking of home-mortgage candidates by race).

of living.”⁷³ Between 1946 and 1959, blacks purchased less than two percent of all houses financed with FHA backing.⁷⁴ This system cemented racial segregation, and whites were ensured a disproportionate advantage in post-war suburban home ownership, one of the most reliable indicators of wealth in United States history.⁷⁵

“This sort of unfairness compounded generation after generation, has left racial minority groups with less wealth, fewer social services, and cultural resources than they would have had otherwise.”⁷⁶ Over time, racism carved derogatory stereotypes into the bedrock of United States culture. These stereotypes have invariably portrayed people of color as “undesirables.” Although most United States citizens, regardless of race, publicly reject racist generalizations, no one “can claim complete immunity to stereotypical thinking.”⁷⁷ “Furthermore, prejudice can work its way into social institutions and cultural practices in ways difficult to notice . . . [and therefore materialize] in all walks of life.”⁷⁸ Anti-discrimination laws, passed during the Civil Rights era, should have put an end to racism but “naked prejudice is kept safely hidden.”⁷⁹

B. TO SOUTH AFRICA?

In terms of oppression, the history of dark-skinned people in South Africa parallels the history of dark-skinned people in the United

73. *Id.*

74. *See id.* at 3 (indicating that discrimination in home-mortgage lending lead to minimal home ownership by blacks).

75. *See id.*

76. *See id.* (describing discriminatory lending practices as bon one example of hurdles that whites have placed in the way of blacks success); *see also* FISCUS, *supra* note 7, at 20-21 (hypothesizing about a society that had attempted to eradicate de jure and de facto segregation). That society had even amended its constitution to end legal racism. *See id.* at 20. More than one hundred years later, there was still widespread race-based residential differences in the hypothetical society. *See id.* “[A]fter a century of putative freedom to move in pursuit of economic opportunities, racial patterns in residence can only be explained by continuing racism.” *Id.* at 21.

77. *See* Chin, *supra* note 1, at 4 (suggesting that all Americans have engaged in some form of racism).

78. *Id.* at 4.

79. *Id.* (hypothesizing that legislation is ineffective at adjusting racial attitudes).

States. With a population of almost forty million,⁸⁰ South Africa is a racial rainbow.⁸¹ Blacks make up more than seventy percent of the population; thirteen percent are white.⁸² "Coloureds," or people of mixed races, make up eight percent, and about three percent are Indian.⁸³ The term "black" identifies three subgroups—Africans, Coloureds, and Indians.⁸⁴ People of European descent are classified as white; African refers to the indigenous people of South Africa.⁸⁵ Coloured refers to people of mixed descent—Malay, Khoi, and European; Indian or Asian refers to people of Asian descent.⁸⁶ Japanese descendants are not included in the Asian population; they are classified as honorary whites.⁸⁷

The South African legal system is rooted in both Roman-Dutch law and, like the United States, the common law of England.⁸⁸ The South African tragedy of race-based disparate treatment began in 1652.⁸⁹ Jan van Riebeeck and eighty employees of the Dutch East India Company established a refreshment station for trading ships on the Cape of Good Hope.⁹⁰ In a series of wars, lasting over 300 years,

80. See Daisy M. Jenkins, *From Apartheid to Majority Rule: A Glimpse into South Africa's Journey Toward Democracy*, 13 ARIZ. J. INT'L & COMP. L. 463, 474 (1995) (describing the history of South Africa). The most recent census in South Africa is from 1991. See *id.*

81. See *id.* (describing the South African population by race).

82. See *id.*

83. See *id.* (explaining the racial terminology used in the South African census); see also LEONARD THOMPSON, *A HISTORY OF SOUTH AFRICA* 171 (1990) (describing South Africa's population divisions in terms of race and cultural backgrounds).

84. See Jenkins, *supra* note 79, at 474 (including "coloured" and Indian within the definition of black).

85. See *id.* (describing the classifications of groups of people in South Africa).

86. See *id.*

87. See *id.*

88. See THOMPSON, *supra* note 83, at 68 (describing the gradual replacement of the Dutch legal system by the British common law system via the appointment of a British judiciary).

89. See Jenkins, *supra* note 80, at 466 (describing the Dutch settlers use of slave labor in the settlement and development of South Africa).

90. See JACQUELINE DROBIS MEISEL, *SOUTH AFRICA AT THE CROSSROADS* 16 (1994) (explaining the advancement of European settlers throughout the African continent). The first Europeans encountered the Khoikoi, who were sheep, goat, and cattle herders who settled in South Africa approximately two thousand years ago. See *id.* In the 1400s, Portuguese sailors encountered the Bantu, who arrived in South Africa in approximately the year 1200. See *id.* The Portuguese bartered with the Khoikoi and the Bantu for food. See *id.* The Dutch, however, with the Dutch

great African warrior nations, such as the Zulus, Xhosas,⁹¹ and Sotho, valiantly fought, and often defeated, both the Afrikaners (the Dutch Boer settlers)⁹² and the English.⁹³ Ultimately, even the most ingenious African weaponry could not match the Boers' artillery. The Boers used firearms against African spears.⁹⁴ The victorious white settlers established a tyrannical state, based on slavery and the forced labor of the Africans.⁹⁵ In 1910, the southern Africa region became the Union of South Africa, a white-settled country within the British Empire.

In 1961, South Africa left the British Commonwealth and became an independent republic.⁹⁶ Africans continued to rebel, defying the European settlers who forced the Africans to live on less than ten percent of their forefathers' land.⁹⁷ In 1912, a group of black South African leaders organized the African Native National Congress, which would later become the African National Congress ("ANC").⁹⁸ The ANC was one of many protest organizations that openly opposed the country's policy of apartheid, a strictly enforced

East India Company, put down roots. *See id.* Over time, the Khoikoi and Bantu realized the Dutch disrupted their way of life. As a result, they tried to make the Dutch leave the Cape. *See id.* Some of the Khoikoi left, while others remained and became paid servants. *See id.* The trading station eventually became a colony that not only imported silk and spices from the East but also engaged in the buying and selling of slaves. *See id.* at 16-17; *see also* THOMPSON, *supra* note 83, at 32 (describing the shipping industry's influence on the colonization of the Cape).

91. *See* MEISEL, *supra* note 90, at 16 (noting that Xhosa was a Bantu speaking tribe).

92. *See id.* (noting that the Dutch, French, and German immigrants who came to live at the Cape adopted the Dutch language and later became known as "Afrikaners—the white tribe").

93. *See id.* at 18 (describing the British controlled portions of South Africa, first from 1795-1802 and then again in 1806).

94. *See* THOMPSON, *supra* note 83, at 71 (describing the whites' technological advantage over the blacks). Although traders sold guns to the Africans, these guns were of poor quality and generally old models inferior to the weaponry of the settlers. *See id.*

95. *See* MEISEL, *supra* note 90, at 16-17 (explaining the development of a slavery system).

96. *See* THOMPSON, *supra* note 83, at 219 (explaining the continuing cultural and economic ties between England and South Africa).

97. *See id.* at 221.

98. *See* NELSON MANDELA, NELSON MANDELA SPEAKS FORGING A DEMOCRATIC, NONRACIAL SOUTH AFRICA 118, 122 (Steve Clark ed. 1993) (noting that the ANC is "the leading force in the struggle of oppressed masses for an end to racism and the establishment of a nonracial, nonsexist, and democratic state").

system of racial segregation and inequality.⁹⁹ The government did everything it could to destroy the organization, but the spirit of the ANC and other protest groups was indomitable.¹⁰⁰ The ANC's national anthem, *Nkosi Sikelel'i-Afrika* (God Bless Africa), eloquently captures this spirit.¹⁰¹

In 1948, the National Party won power and used the legal system to formalize racial discrimination, much like the United States.¹⁰² The first order of business for Malan, the Prime Minister, and his National Party was the enactment of the Population Registration Act.¹⁰³ The Population Registration Act authorized the government to classify all South Africans according to race.¹⁰⁴

The arbitrary and meaningless test in deciding black from coloured, or coloured from white, often resulted in tragic cases where members of the same family were classified differently, all depending on whether one child had a lighter or darker complexion. Where one was allowed to live and work could rest on absurd distinctions such as the curl of one's hair or the size of one's lips.¹⁰⁵

After the government classified the population according to race, the Group Areas Act was passed in 1950.¹⁰⁶ The Group Areas Act

99. See *id.* at 123 (stating that "the banning of our organizations left us with no choice but to . . . take up arms to win our country back from the racists").

100. See *id.* at 153 (describing the ruling party's secret agenda and the violent methods they used to destroy the anti-apartheid movement).

101. See *id.* at 278 n.64 (noting that Enoch Mankayi Sontonga composed the national anthem of the ANC in 1897).

102. See MEISEL, *supra* note 90, at 8 (noting that D.F. Malan became South Africa's Prime Minister in 1948). Malan's election campaign was based on the principles of apartheid. See *id.* After his election, Malan and his National Party instituted the apartheid policy. See *id.*; see also Anthony Lewis, *South Africa: Building A Culture of Law*, 2 ANN. SURV. INT'L. & COMP. L. 1, 3 (1995) (discussing the evaluation of the South African legal system as a tool to advance the goals of apartheid); cf. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (ruling that "separate-but-equal" is a justifiable rationale for distinction of the races).

103. See NELSON MANDELA, *LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA* 106 (1994) (describing the Population Registration Act's effects in South Africa).

104. See MEISEL, *supra* note 91, at 16; see also MANDELA, *supra* note 103, at 132. "There were many practical advantages to being classified as Coloured rather than African, such as the fact that Coloured men were not required to carry passes." See *id.*

105. See MANDELA, *supra* note 103, at 106.

106. See THOMPSON, *supra* note 83, at 194; see also MANDELA, *supra* note 103,

was the foundation of residential apartheid. Under its regulations, each racial group could own land, occupy premises, and trade only in its own separate area. Thus, Indians could only live in Indian areas, Africans in African areas, and Coloureds in Coloured areas. The Group Areas Act initiated the era of "forced removals," where African communities, towns, and villages in areas designated as "white" urban areas were violently relocated because the nearby white landowners did not want Africans living near them or they simply wanted their land.¹⁰⁷

In 1951, The Separate Representation of Voters Act¹⁰⁸ and the Bantu Authorities Act ("BAA")¹⁰⁹ were enacted. The Separate Representation of Voters Act provided for the transfer of Coloureds to a separate voters roll in the Cape, diluting the franchise rights that had been in place for more than a century.¹¹⁰ The BAA provided for a hierarchical system of tribal chiefs who were to be appointed by the government.¹¹¹ The BAA also abolished the Natives Representative Council, an indirect forum of national representation for Africans.¹¹²

While African-Americans fought diligently to end Jim Crow laws in the United States during the sixties, Mandela's clients' sufferings were parallel. For example:

[I]t was a crime to walk through a "Whites Only" door, a crime to ride a "Whites Only" bus, a crime to use a "Whites Only" drinking fountain, a crime to walk on a "Whites Only" beach, a crime to be on the streets past eleven, a crime not to have a pass book and a crime to have the wrong signature in that book, a crime to be unemployed and a crime to be employed in the wrong place, a crime to live in certain places and a crime to have no place to live.¹¹³

at 99 (Malan described the Group Areas Act as "the very essence of apartheid").

107. *See id.* at 106.

108. *See* MANDELA, *supra* note 103, at 113, 122-23.

109. *See id.* at 182-83, 191.

110. *See* D.S.K. Culhane, *No Ease Talk: South Africa & The Suppression of Political Speech*, 17 *FORDHAM INT'L L.J.* 896, 899-900 n.13 (1994) (discussing the effects of the Separate Representation of Voters Act).

111. *See* Jerome Wilson, *Ethnic Identity & the Right to Self-Determination*, 11 *CONN. J. INT'L L.* 433, 446 (1996) (discussing the Bantu Authorities Act).

112. *See* ZIYAD MOTALA, *CONSTITUTIONAL OPTIONS FOR A DEMOCRATIC SOUTH AFRICA* 73 n.35 (1994) (explaining that by 1951 the goal of the National Party was to establish "independent" homelands for black South Africans).

113. *Id.* at 149.

For black South Africans, like African-Americans, “everything in relation to land utilization was organized on an explicitly racial basis: loans from the Land Bank, credit, marketing, the provision of services, subsidies, the extension of transport, the system of taxation, and exemptions.”¹¹⁴

Also like the African-American struggle, the South African struggle moved from protests to demonstrations, boycotts, and strikes.¹¹⁵ “Following the brutal Sharpeville and Soweto massacres, the ANC embarked on an armed struggle that continued until the prison release of Nelson Mandela in 1990 and the negotiated revolution that ended South African apartheid.”¹¹⁶

On the day of [his] inauguration, [Mandela] overwhelmed with a sense of history [wrote]: “In the first decade of the twentieth century, a few years after the bitter Anglo-Boer War and before my own birth, the white skinned peoples of South Africa patched up their differences and erected a system of racial domination against the dark-skinned peoples of their own land. The structure they created formed the basis of one of the harshest, most inhumane societies the world has ever known. Now, in the last decade of the twentieth century, and my own eighth decade as a man, that system had been overturned forever and replaced by one that recognized the rights and freedoms of all peoples regardless of the color of their skin.”¹¹⁷

In 1997, race continues to be a significant issue in South Africa.¹¹⁸

114. SACHS, *supra* note 25, at 107; *see also*, Michael Asimov, *Administrative Law Under South Africa's Interim Constitution*, 44 AM. J. COMP. L. 393, 394 (1996) (citing Ellmann, *The New South African Constitution and Ethnic Division*, 26 COLUM. HUM. RTS. L. REV. 5, 34-40 (1994)) (noting that Ellman suggested that South Africa engage in redistributive programs, such as land restitution and affirmative action). Asimov queried that redistribution and/or affirmative action programs could only be done through the administrative bodies of the executive branch—bodies that remained largely dominated by officials appointed during the apartheid era.

115. *See* MEISEL, *supra* note 90, at 8 (providing examples of such demonstrations). For example, in 1952, black South Africans boarded a restricted European-Only train to “protest the rigid segregation and strict racial policies of apartheid.” *Id.*

116. Linda C. Jones, *From Apartheid To The Rainbow Nation*, EBONY, Aug. 1, 1994, at 3.

117. MANDELA, *supra* note 103, at 621.

118. *See* Reitumetse Obakeng Mabokela, *Race and Higher Education in South Africa*, BLACK ISSUES IN HIGHER EDUC., May 1, 1997, at 68 (examining the Eurocentricism of higher education in South Africa).

C. MAJORITY VS. MINORITY RULE OR DOES SKIN PIGMENTATION REALLY MATTER?

That one drop of Negro blood—because just one drop of black blood makes a man colored. One drop—you are a Negro! Now, why is that? Why is Negro blood so much more powerful than any other kind of blood in the world? If a man has Irish blood in him, people will say, “He’s part Irish.” If he has a little Jewish blood, they’ll say, “He’s half Jewish.” But if he has just a small bit of colored blood in him bam!—“He’s a Negro!” Not, “He’s part Negro.” No, be it ever so little, if that blood is black, “He’s a Negro!” Now, that is what I do not understand—why our one drop is so powerful . . . Black is powerful. You can have ninety-nine drops of white blood in your veins down South—but if that other one drop is black, shame on you! Even if you look white, you’re black. That drop is powerful.¹¹⁹

“If you go by the American one-drop rule, the [ancient] Egyptians would be [B]lack.”¹²⁰ What is the reasoning for the statement, which suggests that the ancient Egyptians were not black and to presume of them as such would be unspeakable? Either way, black was and still is not good.¹²¹ Although there is a complex color-line in the United States today,¹²² the black-white paradigm persists.¹²³

119. LANGSTON HUGHES, *SIMPLE TAKES A WIFE* 85 (1953).

120. Ellen K. Coughlin, *Not Out of Africa*, *CHRON. HIGHER EDUC.*, Feb. 16, 1996, at A6 (quoting scholar Mary Lefkowitz who recites the Afrocentric notion that Western civilization derives from Africa and the ancient Egyptians).

121. See Crenshaw, *supra* note 5, at 1373-75 (noting that if white is good then black is bad); Leonard Pitts, Jr., *Yes, Racial Identity in the United States is Skin Deep*, *MIAMI HERALD*, Apr. 25, 1997, at 1A, 21A (referring to white golfer Fuzzy Zoeller’s disparaging remarks about Tiger Woods as an illustration that racial biases continue to be widespread in the United States). It is tradition that the winner of the Masters Golf Tournament is responsible for deciding the menu for next year’s Champion’s dinner. See *id.* Zoeller fretted that the “little boy” might “serve fried chicken next year . . . or collard greens or whatever the hell they serve.” *Id.* “[I]t wasn’t [Woods’] Asian ancestry, his Indian roots or, Lord knows, his Caucasian-ness that drew Zoeller’s nasty humor. Rather it was the fact of being black.” *Id.* at 21A.

122. See Calmore, *supra* note 63, at 56 (stating that “[d]uring the civil rights movement of the 1960s, the racial population of the nation was roughly about 90% white and 10% black”). Of the “other” populations, Asians and Pacific Islanders made up 0.5%, Native American Indians, Eskimos, and Aleutians 0.3%. See *id.* Latinos were noted as black or white. See *id.* By 1990, 25% identified themselves as people of color, with blacks comprising 12.1%. See *id.* at 56.

123. See John A. Powell, *Living and Learning: Linking Housing and Education*, 80 *MINN. L. REV.* 749, 793 n.152 (1996) (explaining that the “black-white para-

When the European settlers disembarked upon the African continent, they carried the same belief that dark skin was not good.¹²⁴ The pigmentation of the natives indicated an uncivilized nature that needed to be conquered and tamed.¹²⁵ Dark-skinned people, who are the majority in South Africa, experience the same stereotypes as those in the United States who share their skin pigmentation, even though the ones in the United States are members of the minority. Today, the status of blacks in South Africa is similar to that of blacks in the United States after the Civil War. In order to prevent the naked prejudice that continues to reign in the United States, South Africa should not seek "unbridled capitalism," which would require major redistribution and economic restructuring and reforms, nor should it seek a socialist appropriation of resources.¹²⁶ Rather, South Africa should provide for wide discretion through a democratic process with guarantees of protection of fundamental human rights.¹²⁷ Although fundamental rights of free speech and free assembly were written into the new South African Constitution, some believe that South Africa should utilize a private initiative while achieving social equality, rather than providing for the redistribution of property and assets.¹²⁸ It will be interesting to see if the historical authoritative oppressiveness caused by the economically advantaged minority will allow for disadvantaged members of the majority to determine economic policies for this post-apartheid democratic society. Will the economically advantaged minorities allow for economic change through a democratic process when the process could allow dark-skinned economically disadvantaged members of the South African society to determine policy? If this is possible, then why was there a need to state affirmative action policies in the rewritten South African Constitu-

digm is not descriptive of people who make up this country, but of the racial order that is still largely defined in terms of black and white").

124. See generally SACHS, *supra* note 114 (describing the European settlers' beliefs).

125. See NELSON MANDELA, *THE STRUGGLE IS MY LIFE* 12 (1986) (stating that "[t]he majority of white men regard it as the destiny of the white race to dominate the man of colour.").

126. See MOTALA, *supra* note 112, at 241 (suggesting that major redistribution and economic restructuring are not realities for South Africa, and that "state socialism, where the state appropriates all the resources in the supposed interest of the majority has proved to be impractical").

127. See *id.* at 242.

128. See *id.*

tion?

D. IS IT SIMPLY A QUESTION OF RIGHTS: HUMAN, INDIVIDUAL, OR GROUP?

There is much talk about “the rights of the people.” Affirmative action programs ensure that African-Americans are afforded rights. From what are these rights derived? They did not derive from the United States Constitution because African-Americans were not “of the people.” Did they derive from the amendments to the United States Constitution? What rights are people referring to—individual rights, group rights, or both?

In the United States during the seventies, a group of legal scholars from the top United States law schools engaged in discussions on individual rights. These scholars, deemed Critical Legal Studies scholars (“CRITS”), determined that rights are indeterminate and cause alienation.¹²⁹ They wrote that since rights are created or recognized through the passage of laws there are no real “rights.”¹³⁰ Rights are “reified” or “thingified” and, therefore, conceived as real entities

129. See Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1574-77 (1984) (noting that “laws define how we are ‘allowed to act’ in the form of ‘rights’”).

A “right” has three phenomenological dimensions. First, to the extent that individuals are represented as “having” rights, these rights signify social experiences that are merely possible rather than the experiences themselves. To the extent that we think we have “the right to free speech,” “the right to make contracts,” and so forth, we represent each individual ontologically as being a passive locus of possible action, rather than as in action with others already. Second, these rights are conceived as being granted to the individual from an outside source, from “the State” which either creates them [or] recognizes them . . . through the passage of “laws.” Thus insofar as the individual emerges from his passive station to act and interact with others on the basis of his rights, he does so because he has been “allowed” to do so in advance. Third, intersubjective action itself is conceived to occur “through” or “by virtue of” the “exercise” of these rights . . . Seen as a whole . . . the “world” of this rights-based schema is one in which originally passive and disconnected individuals enter into relations with each other because they are allowed to, relations which have the quality of “okayed in advance” because they occur only in so far as one is engaging in the right to do them.

Id. at 1576-77.

130. See *id.* at 1574; see also, Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1364-69 (1984) (explaining that rights are meaningless outside of their specific cultural and social setting and can only be discussed within that context).

solidifying the correctness of the existing social and legal order.¹³¹ If the state creates rights, then there can be no real “right” because the state can remove the right just as easily as it gave it. The creation of rights by the state promotes the state as a reviewing agency that serves as the authority for individuals’ alienated or delayed action.¹³² Since there are no birth rights, the state dictates what one can or cannot do.¹³³

The public-private sectors add to the problems created by rights. “In the private realm we assume that we operate within a protected sphere of autonomy, free to make self-willed individual choices and to feel secure against the encroachment of others.”¹³⁴ The public-private split, however, is “merely an artificial construct.”¹³⁵ Privacy simply means alienation, which causes the erection of “fantasy walls” and a denial of access.¹³⁶ The fantasy exists because even if we have so called rights dealing with reproduction or sexuality, we are still bound by laws that are socially constructed. With respect to abortion, a privacy right, limits are placed on who can obtain an abortion, when it can be procured, and how it is carried out.¹³⁷ Sexuality, also a privacy right, is restricted in terms of what acts can be done, even within one’s home.¹³⁸ The CRITS proposed a system where the community, rather than individuals, would prevail.¹³⁹

131. See Tushnet, *supra* note 130, at 1364-69 (describing rights as entities).

132. See Gabel, *supra* note 129, at 1579 (arguing that individuals collectively agree to vest authority in the state, thus legitimizing the state’s rights-making capacity); see also Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 36 (1984) (noting that “every time you bring a case and win a right, that right is interpreted within an ideological framework that has as its ultimate aim the maintenance of collective passivity”).

133. See Gabel, *supra* note 129, at 1578 (stating that by allowing the state to have authority to create rights, individuals award it the power to define them).

134. Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFF. L. REV. 237, 237 (1987).

135. *Id.* at 238.

136. See *id.* (defining “privacy”).

137. See *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992) (ruling that state regulation of abortions is permissible up until the point that it places an “undue burden” on a woman’s ability to decide to terminate her pregnancy).

138. See Freeman, *supra* note 134, at 250 (discussing the privacy rights associated with sexual activity); see also *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding the prohibition against voluntary consensual acts of sodomy).

139. See Crenshaw, *supra* note 5, at 1357 (noting that “the most troubling aspect of the Critical program . . . is that ‘trashing’ rights consciousness may have the unintended consequences of disempowering the racially oppressed while leav-

Rules would be set by small groups and remain subject to constant renegotiations, with the good of the community as the focus.¹⁴⁰ If rights are socially constructed and the United States Supreme Court cannot prevent societal discrimination based on race, then what real rights do African-Americans have? And if they have rights, what are the benefits of these rights? If only members of the majority enjoy state-sanctioned rights, then why did African-Americans not agree with the CRITS notion to “trash” them?

Another group of scholars, scholars of color, challenged the CRITS suggestions of “trashing rights.” The Critical Race Scholars (“Race Theorists”) contend the enforcement of rights was a legitimating and empowering force for blacks.¹⁴¹ Race Theorists assert that rights empower minority groups and that rights prevent a discretionary policy, which may promote racism.¹⁴² Blacks used rights to mobilize state power to benefit themselves against symbolic oppression.¹⁴³ A

ing white supremacy basically untouched”).

140. See Joseph William Singer, *The Player and The Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

We should prevent cruelty We should alleviate misery Without arguing about whether these are rights, or what sort of rights they are . . . people should have adequate and not merely minimal allotments of food, clothing, medical care, shelter We should democratize illegitimate hierarchies We need to increase the amount of collective participation in all sorts of decisions and settings in our economic lives We should alter the social conditions that cause loneliness [O]ur public lives should somehow come to resemble our private lives. I do not know how we can accomplish this. But the loneliness of the world of the market is wrong.

Id. at 67-69.

141. See Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 430 (1987) (arguing that blacks and whites view rights differently because of their disparate experiences and need for rights). “Blacks believed in [rights] so much and so hard that we gave them life where there was none before. We held onto them, put the hope of them into our wombs, and mothered them—not just the notion of them. We nurtured rights and gave rights life” *Id.*

142. See *id.* at 430 (describing that blacks truly believe in these rights). Blacks held onto these rights, “not just the notion of them.” *Id.*

143. See Crenshaw, *supra* note 5, at 1377 (describing blacks’ use of these rights).

Blacks were formally subordinated by the state. Blacks experienced being the “other” in two aspects of oppression . . . symbolic and material. Symbolic subordination refers to the formal denial of social and political equality to all Blacks, regardless of their accomplishments. Segregation and other forms of social exclusion . . . reinforced a racist ideology that Blacks were simply inferior to whites and were therefore not included in the vision of America as a community of equals. Material subordination, on the other hand, refers to the ways that discrimination and exclusion economically subordinated

focus on the best interests of the community suggests the nonexistence of racism.¹⁴⁴ The rights rhetoric allowed blacks to successfully bring a close to race-based laws and practices.¹⁴⁵

The struggle for the right to be treated equally and the fight for the right to remain different are characterized by blacks' resistance against apartheid in South Africa.¹⁴⁶ Is their cry for rights any different than the cry of African-Americans?¹⁴⁷ South Africans cry for their individual right to be free and at the same time to be a member of a group.¹⁴⁸ The Race Theorists would invite South Africans, as they chart their future, to carefully consider their rights rhetoric.

The making of something out of nothing took immense alchemical fire: the fusion of a whole nation and the kindling of several generations. The illusion became real for only a very few of us; it is still elusive and illusory for most. But if it took this long to breathe life into a form whose shape had already been forged by society and which is therefore idealistically if not ideologically accessible, imagine how long would be the struggle without even that sense of definition, without the power of that familiar vision.¹⁴⁹

If the South African community did not carry the band of racism,

Blacks to whites and subordinated the life chances of Blacks to those of whites on almost every level. This subordination occurs when Blacks are paid less for the same work, when segregation limits access to decent housing, and where poverty, anxiety, poor health care, and crime create a life expectancy for Blacks that is five or six years shorter than for whites.

Id.

144. See Crenshaw, *supra* note 5, at 1369 (describing the relationship between racism and the best interests of the community).

The failure of the [CRITS] to consider race in their account of law and legitimacy is not a minor oversight: race consciousness is central not only to the domination of Blacks, but also to whites' acceptance of the legitimacy of hierarchy and to their identity with elite interest . . . [E]xposing the centrality of race consciousness shows how the options of Blacks in American society have been limited, and how the use of rights rhetoric has emancipated Blacks from some manifestations of racial domination.

Id. at 1369.

145. See Crenshaw, *supra* note 5, at 1381 (identifying blacks' use of rights to fight Jim Crow laws).

146. See SACHS, *supra* note 25, at 160-61 (describing the struggles).

147. See Robin M. Fields, Note, *In Search of Democracy: Reconciling Majority Rule, Minority Rights, and Group Rights in South Africa and the United States*, 16 B.C. THIRD WORLD L.J. 65 (1996) (comparing majority-minority group rights in South Africa and the United States).

148. See *id.* at 69 (discussing this contrast).

149. Williams, *supra* note 141, at 430.

the interests of the community would be the focus of South African rights rhetoric. With race, the focus must be on individual rights.¹⁵⁰ By focusing on individual rights, South Africans will face the same dilemma encountered by the CRITS.¹⁵¹ The CRITS' belief that individual rights are non-existent is demonstrated in the new South African Constitution.¹⁵² The section concerning the limitation of rights provides that "the rights in the Bill of Rights may be limited . . . to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom" ¹⁵³

II. AFFIRMATIVE ACTION IN THE CONSTITUTION? THE CONSTITUTIONS SO HOLD

A. SOUTH AFRICA'S PREAMBLE TO HER NEW CONSTITUTION

We, the people of South Africa,
 Recognize the injustices of our past;
 Honour those who suffered for justice and freedom in our land;
 Respect those who have worked to build and develop our country; and
 Believe that South Africa belongs to all who live in it, united in our diversity,
 We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to—
 Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
 Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
 Improve the quality of life of all citizens and free the potential of each

150. See Vivienne Goldberg, *South Africa: Private Law In Transition/The Effect of the New Constitution*, 33 U. LOUISVILLE J. FAM. L. 495 (1994-95) (noting that "[t]he most fundamental feature of the new Constitution is Chapter Three, which provides for the protection of fundamental rights . . . the right not to be unfairly discriminated against on the ground of race, gender, religion, ethnic or social origin, colour, sexual orientation, age, disability, conscience, belief, culture or language."); see also S. AFR. CONST. ch. 3, § 8 (1996).

151. See Samuel J.M. Donnelly, *Towards a Personal Jurisprudence: Basic Insights and Concepts*, 28 LOY. L.A. L. REV. 547, 612 (1995) (discussing the dilemma involved in reconciling commitment to respect persons and framing decisions which reflect this commitment).

152. See generally S. AFR. CONST. (1996).

153. S. AFR. CONST. ch. 2, § 36 (1996).

person;

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people

Nkosi Sikelel' Afrika. Morena boloka setjhaba sa heso.

God seen Suid-Afrika. God bless South Africa.

Mudzimu fhatutshedza Afrika. Hosi katekisa Afrika.¹⁵⁴

In an attempt to right the wrongs by the minority upon the oppressed majority, South Africans wrote affirmative action into the new constitution. Unlike the United States, which chose to expand its constitution, South Africa chose to rewrite its constitution. In the preamble, the South African writers mentioned the discriminatory activities of the past¹⁵⁵ and incorporated affirmative action policies within the new constitution.¹⁵⁶

After the elections in the 1940s, the Afrikaner National Party, comprised of South Africans of Dutch descent, instituted an apartheid regime out of concern for maintaining control in South Africa. The apartheid system dictated separation of people based on race.¹⁵⁷ During the years following the National Party's election, the party began to enact laws to carry out the apartheid regime.¹⁵⁸ One such law, the Group Areas Act,¹⁵⁹ segregated every locality by race.¹⁶⁰ This race segregation was further refined by the fact that the "races" were told where they could live. This law completely disempowered the dark-skinned people who were forced, by law, into urban areas.¹⁶¹ Residing in urban areas disempowered black South Africans by de-

154. S. AFR. CONST. preamble.

155. *See id.*

156. *See id.* ch. 9, § 2 (indicating that "[t]o promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken"). "Discrimination . . . is unfair unless it is established that the discrimination is fair." *Id.* § 5.

157. *See* Fields, *supra* note 147, at 90 (discussing the system of apartheid).

158. *See id.* at 90-91 (discussing the government's use of apartheid).

159. *See* THOMPSON, *supra* note 83, at 194.

160. *See* Bronwen Manby, *South Africa: Minority Conflict and the Legacy of Minority Rule*, 19 FLETCHER F. WORLD AFF. 27, 28 (1995) (discussing the Group Areas Act).

161. *See* Jenkins, *supra* note 80, at 470 (discussing the segregation of races and restrictions on where certain races could live).

nying them traditional methods of social empowerment, such as land ownership and the payment of taxes.¹⁶²

As South Africans contemplated rewriting the constitution, several questions needed to be answered. On what should the Constitution focus—individual or group rights¹⁶³ or a focus on the exchange of power from the minority to the majority? Unless a true non-racial democracy can be achieved, blacks in South Africa should carefully contemplate the future of their rights. The purpose of any constitution is to serve as an instrument that guarantees conditions in which all citizens, independent of race, color, or creed, can make their contribution to society and live in dignity and peace.

The attempt to eradicate all notions of apartheid and to give black South Africans equal rights under the law served as the founding principle for rewriting South Africa's constitution.¹⁶⁴ Rewriting the constitution provided an opportunity to treat all South Africans as equal citizens under the law. From a human rights perspective, the focus should revolve around the notion that South Africa belongs not only to a small racial minority but to all that live in it.¹⁶⁵ Unfortunately, because of South Africa's past, South Africans cannot pretend that racism will automatically cease to exist.

The South Africans sought to create a Bill of Rights to enumerate explicit guarantees of liberty and equality to serve as the framework for the new Constitution.¹⁶⁶ A Constitutional Court was created to en-

162. See *id.* at 469-70 (describing the impact of restricted living conditions on blacks in South Africa).

163. See, e.g., Josiah A.M. Cobbah, *African Values and the Human Rights Debate: An African Perspective*, 9 HUM. RTS. Q. 309 (1987) (arguing that Africans are community or group oriented rather than individualistic). "Every society accords its members certain rights by virtue of the fact that they are human beings." ABDULLAHI AHMED AN-NA'IM & FRANCIS M. DENG, HUMAN RIGHTS IN AFRICA—CROSS-CULTURAL PERSPECTIVES 168 (1990). Even if African communities are more communal, individual rights are significant in a communal setting. See *id.* "Rights-based protections of African individuals against the state also mean protections against the group . . ." *Id.*

164. See Jenkins, *supra* note 78, at 479-80 (stating that the drafting of South Africa's Constitution reflects "an effort to redress the oppression of apartheid").

165. See Manby, *supra* note 160, at 30 (quoting the declaration of the 1955 Freedom Charter which proclaimed that South Africa "belongs to all who live in it").

166. See Lewis, *supra* note 102, at 10 (discussing the goals of the South African Constitution).

force the terms of the new Constitution.¹⁶⁷ The new Constitution is a “total reversal of the old system: the law as servant instead of master.”¹⁶⁸ In pursuit of a democratic society, Mandela’s party, the ANC, led the demand for a unitary state and a policy of equal rights for all South Africans—minority and majority members.¹⁶⁹ The ANC also sought the right of self determination by any group sharing a common language and cultural heritage.¹⁷⁰ Even though the ANC sought a de-linking of ethnic identity due to its commitment to a centralized state, recognition of diversity is as essential to South Africa’s reconstruction as it was to the United States.¹⁷¹

South Africa, like the United States, is a pluralistic society.¹⁷² The South African society has various diverse cultures—from communities of chiefs, such as Chief A.N.M.G. Buthelezi of the Zulus, to all white communities.¹⁷³ Despite the ANC’s commitment to a unitary state and equal rights for all South Africans, suspicions concerning the protection of minorities justifiably arise when looking at the United States and South African race-based parallels.¹⁷⁴ In seeking equality for all South Africans, there are also questions about what affirmative action means in South Africa. “The ANC conception of affirmative action is more expansive, yet more fundamental than the United States conception because it not only includes measures to redress past discrimination, but also requires public and private actors to build an equal society through redistribution and corrective policies.”¹⁷⁵ Nevertheless, the ANC’s vision, like the United States’, also includes race-based preferences for individuals in hiring, promotion, or admission to educational institutions. Unlike in the United States, affirmative action under the ANC included “programs designed to direct relief and development aid to impoverished commu-

167. *See id.* (discussing the establishment of a Constitutional Court).

168. *Id.*

169. *See* Manby, *supra* note 160, at 27-28 (describing the demand for equal rights for all South Africans).

170. *See id.* at 28 (discussing the right of self-determination in South Africa).

171. *See id.*

172. *See* Fields, *supra* note 147, at 69 (describing South Africa’s various racial, ethnic, and ideological factions).

173. *See id.* (describing the cultures found in South Africa).

174. *See id.* at 30 (citing Sachs, *Towards A Bill of Rights in South Africa*, SOUTH AFRICAN J. HUM. RTS. 6 (1990)) (describing South Africa’s movement toward a unitary state and equal rights).

175. Ford, *supra* note 17, at 1965.

nities disproportionately made up of members of a particular racial group.”¹⁷⁶ Ensuring equality for all in both the private and public sector, will be an arduous task for South Africa. Perhaps the only way to ensure equality for all is to write a new Constitution.

B. THE UNITED STATES' WE THE PEOPLE

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.¹⁷⁷

When the Founding Fathers used this phrase [“We the People”] in 1787, they did not have in mind the majority of America’s citizens. “We the people” included, in the words of the framers, “the whole Number of free Persons” Negro slaves were excluded, although they were counted for representational purposes—at three-fifths each.¹⁷⁸

. . . .

No doubt it will be said . . . that the Constitution was a product of its time, and embodied a compromise which, under other circumstances, would not have been made. But the effects of the framers’ compromise have remained for generations. They arose from the contradiction between guaranteeing liberty and justice to all, and denying both to Negroes.¹⁷⁹

176. *Id.* at 2029 (quoting the South African Minister of Public Service and Administration Moltin Paseka Ncholo who defined “affirmative action” as giving people “treatment that makes them equal,” including, *inter alia*, providing housing, improved transportation, training, and development aid).

Nelson Mandela himself has downplayed the role of American-style affirmative action “quotas” in his vision for South Africa, emphasizing instead the centrality of massive education and training programs to his Reconstruction and Development Program. Because of such efforts, Mandela has declared, “The whole social program of the new democratic government which we envision for South Africa will be one of affirmative action.”

Id. at 2029.

177. U.S. CONST. preamble.

178. Thurgood Marshall, *Reflections on The Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987). The author maintains the use of the term Negro within quote passages, but she prefers the term African-American.

179. *Id.* at 4.

The original intent of the phrase, "We the People," was far too clear for any ameliorating construction. Writing for the Supreme Court in 1857, chief Justice Taney penned the following passage in the Dred Scott case, on the issue of whether, in the eyes of the framers, slaves were "constituent members of the sovereignty," and were to be included among "We the People:" We think they are not, and that they are not included, and were not intended to be included They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race . . . and so far inferior, that they had no rights which the white man was bound to respect; and that the Negro might justly and lawfully be reduced to slavery for his benefit [A]ccordingly, a Negro of the African race was regarded . . . as an article of property, and held, and bought and sold as such [N]o one seems to have doubted the correctness of the prevailing opinion of the time.¹⁸⁰

180. *Id.* at 4; *see also* Scott v. Sandford, 60 U.S. 393, 410-11 (1856) (referred to as the Dred Scott decision).

The brief preamble sets forth by whom it was formed, for what purposes, and for whose benefit and protection. It declares that it is formed by the people of the United States; that is to say, by those who were members of the different political communities in the several States; and its great object is declared to be to secure the blessings of liberty to themselves and their posterity. It speaks in general terms of the people of the United States, and of citizens of the several States, when it is providing for the exercise of the powers granted or the privileges secured to the citizen. It does not define what description of persons are intended to be included under these terms, or who shall be regarded as a citizen and one of the people But there are two clauses in the Constitution which point directly and specifically to the Negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed One of these clauses reserves to each of the thirteen States the right to import slaves until the year 1808 And by the other provision the States pledge themselves to each other to maintain the right of property of the master, by delivering up to him any slave who may have escaped from his service, and be found within their respective territories And these two provisions show, conclusively, that neither the description of persons therein referred to, nor their descendants, were embraced in any of the other provisions of the Constitution; for certainly these two clauses were not intended to confer on them or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen.

Id.

Can a Negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all rights and privileges, and immunities, guaranteed by that instrument to the citizen.

Id. at 403.

The Court stated that the plea applied only to that class of persons whose ancestors were Negroes of the African race and imported into this country to be sold and held as slaves. *See id.* The issue before the Court was "whether the descendants of such slaves, when they shall be emancipated, or who are born of parents

What is striking is the role that legal principles have played throughout the United States' history in determining the condition of African-Americans. They were enslaved by law, emancipated by law, disenfranchised and segregated by law, and finally, they have begun to win equality by law. Along the way, new constitutional principles have emerged to meet the challenges of a changing society.¹⁸¹

Although "[w]e the People' no longer enslave[s] . . . the credit does not belong to the framers. It belongs to those who refused to acquiesce to outdated notions of 'liberty,' 'justice,' and 'equality,' and who strived to better them."¹⁸² The United States had its Constitution, a bloody civil war, and the adoption of the Thirteenth Amendment, which legally abolished slavery. It was the Fourteenth Amendment, however, which offered a promising basis for justice and equality.¹⁸³

The object of the [Fourteenth] Amendment . . . [however,] was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory

who had become free before their birth, are citizens of a State [as] the word citizen is used in the Constitution of the United States." *Id.* at 403. The Court answered in the negative. Therefore, they were not entitled to the rights the constitution afforded to whites.

181. See Marshall, *supra* note 178, at 5 (articulating the role of the legal system in the enslavement and emancipation of African-Americans).

182. *Id.* at 5 (noting that Justice Marshall viewed the original Constitution as a document of defects). Marshall called upon us to recognize the Constitution as a living document, which included the Bill of Rights and the other amendments. Combined, all three protect individual freedoms and human rights. Marshall stated that the founding fathers could not have accepted the fact that a man of color, or a woman, would one day construe the document they drafted. See *id.* at 5.

183. See Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 376 (1992) (describing the path toward equality in the United States). Bell states:

Traditional civil rights law is highly structured and founded on the belief that the Constitution was intended—at least after the Civil War Amendments—to guarantee equal rights to blacks. The belief in eventual racial justice . . . was always dependent on the ability of believers to remain faithful to their creed of racial equality, while rejecting the contrary message of discrimination that survived their best efforts to control or eliminate it.

Id.

to either.¹⁸⁴

In *Plessy v. Ferguson*, Justice Brown, writing for the majority stated that “[i]f the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.”¹⁸⁵ Justice Harlan in his dissent stated that “[o]ur constitution is color-blind.”¹⁸⁶ He also added:

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.¹⁸⁷

While Justice Harlan stated that the constitution is “color-blind” he demonstrates the significance of pigmentation in this country, regardless of the Constitution’s view. He stated:

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But, by the statute in question, a Chinaman can ride in the same passenger coach with white citizens . . . while citizens of the black race . . . who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race.¹⁸⁸

Under South Africa’s Bill of Rights “everyone is equal before the law and has the right to equal protection and benefit of the law.”¹⁸⁹ Equality is defined by the South African Bill of Rights to include “the full and equal enjoyment of all rights and freedoms.”¹⁹⁰ The legislature is designed to serve as a safeguard for those rights and

184. *Plessy v. Ferguson*, 163 U.S. 537, 538-39 (1896) (denying petitioner who was seven-eighths Caucasian and one-eighth African all the rights, privileges, and immunities accorded to United States citizens).

185. *Id.* at 552-53.

186. *Id.* at 559.

187. *Id.*

188. *Id.* at 561.

189. S. AFR. CONST. ch. 2, § 9(1)-(2) (1996).

190. *See id.* § 9(2) (indicating the importance of the legislature).

protections afforded to all citizens in the Bill of Rights.¹⁹¹ The Bill of Rights is designed to promote the achievement of equality and protect those citizens who may be disadvantaged by unfair discrimination.¹⁹² States are prohibited from discriminating “directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.”¹⁹³ Discrimination is deemed unfair by the South African constitution, unless the discriminator establishes that the discrimination is fair.¹⁹⁴ In order to prove that the discrimination was fair, discriminators simply need to show that the discrimination was based on something other than the unfair grounds specified in the Constitution.¹⁹⁵

The need to place a non-discriminatory protection clause in the new constitution is troubling.¹⁹⁶ What is more troubling is that even with the creation of a new Constitution there is still the likelihood of discrimination against members of the black majority by the white minority.¹⁹⁷ It is surprising that the majority members, in a democratic society constructed on majority rule, need protections guaranteeing non-discriminatory practices by members of the minority. This clearly demonstrates that the race problem continues to be pervasive.¹⁹⁸ Furthermore, it raises the question: How do we begin

191. *See id.* (providing protections from discrimination).

192. *See id.*

193. *Id.* § 9(3).

194. *See* S. AFR. CONST. ch. 2, § 9(3).

195. *See id.*

196. *See* Fields, *supra* note 147, at 69 (noting that “not only is South Africa divided racially and ethnically, but it is also polarized across racial groups”). It is troubling because as we embark upon the new millennium, racism, now over 400 years old, still permeates an entire country.

197. *See* ROBERT A. LICHT & BERTUS DE VILLIERS, SOUTH AFRICA'S CRISIS OF CONSTITUTIONAL DEMOCRACY 35 (1994) (discussing this type of discrimination). Majoritarianism is “only the foundation for the structure of constitutional democracy.” *Id.* The American notion of equality in liberty or in rights was foreshadowed by failed democracies based on the same principles in Greci-Romany city-republics, republics of Italians, and republics of the German Middle Ages. *See id.* The American founders knew that democracies did not protect human rights, rather they protect individual rights, which is problematic for members of the society who can be easily discriminated against by nothing more than skin color. *See id.* at 35-36.

198. *See* Fields, *supra* note 147, at 69 (discussing this problem).

eradicating this color issue as we enter the second millennium?

C. SOUTH AFRICA VS. THE UNITED STATES, FOR BETTER OR FOR WORSE?

Should we rewrite or amend our Constitutions? Which is better? What works? If the purpose of rewriting or amending is to rectify past injustices, is the goal the pursuit of a non-racial democracy? If a non-racial democracy is the goal, then is equality the measuring rod? Is an egalitarian concept attainable?

The Fourteenth Amendment to the United States Constitution was enacted in 1868 to serve the purpose of achieving a non-racial democracy.¹⁹⁹ As we approach the second millennium, however, that goal still has not been reached. Moreover, many people have acquiesced to believing that equality, without regard to race, is not attainable.²⁰⁰ Minority members of society were empowered with individual rights afforded to them by way of the Fourteenth Amendment's prohibition of discrimination by the state.²⁰¹ Although the Fourteenth Amendment applied to all citizens, its enactment was related, in large part, to the desire to provide civil rights to those individuals who were disenfranchised because of slavery.²⁰²

South Africa, on the other hand, has historically focused on the rights of the group.²⁰³ South Africa premised its practices of racial exclusion and group privilege on the belief that physiognomy predetermined a person's destiny.²⁰⁴ Skin color determined an individual's

199. See U.S. CONST. amend. XIV, § 1.

200. See Bell, *supra* note 183. See generally MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995) (discussing past egalitarian principles with respect to gender and their application to minorities).

201. See U.S. CONST. amend. XIV, § 1 (prohibiting discrimination by the state).

202. See Brody, *supra* note 26, at 296-97 (discussing the impact of the Fourteenth Amendment).

203. See Jenkins, *supra* note 80, at 474 (describing the power of white supremacy).

[T]he ideology and culture of white supremacy . . . turned communities of color against one another by creating hierarchies of privilege and access, and by assigning racially subordinated groups different places within those hierarchies. Groups assigned a higher status by the [then] white power struggle [found] that their belief in the inferiority of another group [gave] them an investment white privilege.

Id.

204. See MOTALA, *supra* note 112, at 251-54 (discussing the definition of the

rights, the execution of such rights, and the extent to which such rights would be respected.²⁰⁵ Even though group rights were significant, skin pigmentation determined the quality of life for South Africans.²⁰⁶

Today, in the United States, there is a push by those with one drop of African-American blood and ninety-nine drops from another ethnic group to be referred to as bi-racial or multi-racial, rather than as African-American.²⁰⁷ Are they promoting their heritage, or are they simply trying to avoid being identified with the group whose faces are at the bottom of the well?²⁰⁸

“For it is the dawn that has come.”²⁰⁹ The dawn did come for

term “black” and its significance).

205. *See id.*

206. *See* Jenkins, *supra* note 80, at 465 (discussing the poverty, broken homes, and crushed ambitions of blacks in South Africa).

207. *See* Pitts, *supra* note 121, at 1A (describing this desire by persons with diverse ancestry).

208. *See* Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 1 (1994) (discussing *Hudgins v. Wright*, 11 Va. (1 Hen. & M) 134 (Va. 1806), which involved two slave women seeking freedom on the ground that their maternal heritage was of Native American descent). A person born to a slave woman was a slave, one born to a free woman was free. *See id.* at 1-2. The women stated that their complexions and the length and texture of their hair proved that they were descendants of Native Americans and should be free. *See id.* The Wrights could not prove they had a free maternal ancestor, nor could their owner, Hudgins, show their descent from a female slave. *See id.* The court ruled that Hannah's long black straight hair was of the native aborigines of this country and declared them free. *See id.* at 40-41. Judge Tucker, in ruling for the court, devised a racial test. *See id.*

Nature has stamped upon the African and his descendants two characteristic marks, besides the difference of complexion, which often remain visible long after the characteristic distinction of colour either disappears or becomes doubtful; a flat nose and woolly head of hair. The latter of these disappears the last of all; and so strong an ingredient in the African constitution is this latter character, that it predominates uniformly where the party is in equal degree descended from parents of different complexions, whether white or Indians So pointed is this distinction between the natives of Africa and the aborigines of America, that a man might as easily mistake the glossy, jetty clothing of an American bear for the wool of a black sheep, as the hair of an American Indian for that of an African, or the descendant of an African. Upon these distinctions as connected with our laws, the burden of proof depends.

Id. at 39-40. Members of bi-racial parentage may seek to identify with members of the majority for the same reasons as Hannah. They may disassociate themselves from slave roots because of the negativity that attaches.

209. ALAN PATON, *CRY THE BELOVED COUNTRY* 277 (1948).

South Africans. They rewrote their constitution so there would be no mistake as to who the people of South Africa are.²¹⁰ Should the United States follow South Africa? Has the dawn come for the United States?

Who is white and who is not is a matter of politics, not biology, and it is important that our children understand this The vast majority of whites don't acknowledge how much racism pervades our society and shapes the daily lives of blacks. Perhaps this is something that we should bring to our children's attention, not something that we should be helping them ignore.²¹¹

Rewriting a constitution to include all people may be the best way to rectify past discrimination. Nonetheless, focusing on group rights recognizes prejudices and biases as the norm. Will writing a new constitution for all the people of South Africa, noting similarities and differences, allow black South Africans to be the same, yet different and not alienated? Perhaps our children should rewrite our Constitution and include the need to be the same, yet different and not "other."

CONCLUSION

Imagine seven runners competing in the 4x400-meter run. Initially the runners are staggered across the track, one in each lane. The runner in the first lane appears disadvantaged because he is the farthest back on the track. The runner in lane seven appears to have an advantage because he is far ahead of all the other runners. The gun goes off and the runners begin the lap around the track. During the first

210. See S. AFR. CONST. ch. 2, § 31 (1) (1996) (indicating who are South Africans). Even though the new South African Constitution provided for individual rights, it also maintained group rights.

Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of their community, to (a) enjoy their culture, practice their religion and use their language; and (b) form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

Id.

211. Lawrence Hirschfeld, *A New Look At An Old Nation Seeing Race, Michigan Today*, 28 U. MICH. J.L. REFORM 2, 3 (1996). "Talk of race is everywhere and incessant in America, the din of discourse emanating from all ranks and stations, all age groups, all creeds, all parts of the political spectrum and all manner of news and cultural media." *Id.* at 2.

lap the runners must remain in their designated lanes. After the first lap around the track, however, the runners move as close to the first lane as they can because the first lane is the shortest distance around the track.

The runner in lane seven begins his move to lane one, to better position himself in order to win. As he crosses over to lane six, even though this is the mile relay race, there is a hurdle in lane six. In order to get to lane five, he has to jump the hurdle in lane six, at the same time maintaining a pace that will allow him to win the race. After hurdling the obstacle in lane six, he is now faced with another hurdle in lane five, then in lane four, lane three, lane two, and he finally gets to lane one.

The hurdles are better known as societal racism, the type of racism recognized by the United States Supreme Court. The Court, however, proclaimed that it can do nothing to move these hurdles. The race, nevertheless, must go on. Societal racism is paramount because it is determined simply by skin color, a phenomenon only Michael Jackson, with his millions, came close to erasing when he changed the color of his skin. What Michael apparently did not understand is that his dark colored skin was known, and therefore, he could not change the fact that he would always be seen as dark-skinned.

The history of the dark-skinned people of South Africa, like the history of the dark-skinned people in the United States, includes deliberate oppression, exploitation, and impoverishment. Both histories have remained a constant, even though the United States Constitution was amended to denounce those practices. The Court has stated that the United States Constitution is to be color-blind, but the incorporation of dark-skinned individuals as citizens remains outside the framework of the Constitution and is found in the preamble.²¹² They are still not within "we the people." As we approach the second millennium, the "outsider" remains a constant and dark skin continues to be categorized as "other."²¹³

212. See U.S. CONST. preamble; see also *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J. dissenting).

213. "Being born in America doesn't make you an American. Why if birth made you American, you wouldn't need . . . any amendments to the Constitution . . ." Malcolm X, quoted in Carlos J. Nan, *Adding Salt to the Wound: Affirmative Action and Critical Race Theory*, 12 LAW & INEQ. 553, 569 n.136 (1994); see Charles E. Daye, *Monday Morning Blues, Or Is Race Really Insignificant*, 47 J.

In the sixties, President Lyndon Johnson stated the need for affirmative action. In 1997 President Clinton is still stating that need. President Clinton's message alerts the United States people that as the year 2000 nears, there is a need to lift the burden of race in order for a non-racial society to exist in the 21st Century.²¹⁴ President Clinton urges that the need for affirmative action programs remains because of continued race-based prejudices.²¹⁵ He recognizes that prejudices continue to be on the black-white paradigm²¹⁶ and recommends that in order "to lift the heavy burden of race from our children's future"²¹⁷ that "[w]e must begin with a candid conversation on the state of race [and] [w]e must be honest."²¹⁸ "It's high time that we . . . talk . . . with each other."²¹⁹ President Clinton's recommendation for the future concerning racial strife has a ring of urgency and necessity. Newt Gingrich, the Speaker of the United States House of Representatives, responded to President Clinton's statements on race and said:

This question of race is at the heart of America's darkest moment [As] W.E.B. DuBois observed, the 20th century has in some ways been defined by the color line . . . [and as] we move into a new century, we have to look at what has worked when it comes to race, what hasn't and what lessons we should learn.²²⁰

LEGAL EDUC. 122 (1997) (discussing a Fifth Circuit decision that prohibited a law school from considering the race of applicants in making admissions determinations and that rejected any use of race as a factor contributing to educational diversity within a student body).

214. See *Enda, supra* note 6, at 14A (describing President Clinton's message).

215. See *id.*

216. See *id.* "Clinton's appeal for racial unity marked the start of what he promises will be a yearlong initiative to determine how best to heal the historic rifts between blacks and whites." *Id.* President Clinton, however, also raised concerns about "the newer ones," meaning prejudices that have developed involving Hispanics, Asians, and other groups. See *id.*

217. *Id.* In the new South African Constitution, unlike the United States Constitution, children were given rights. For example, every child has the right to family care, parental care or appropriate alternative care when removed from the family environment. See S. AFR. CONST. ch. 2, § 28(1) (1996). In section 28(2) it is stated that "[a] child's best interest is of paramount importance in every matter concerning the child." *Id.* This section suggests rights, which may override the interests of the parent(s) or guardian(s).

218. *Enda, supra* note 6, at 14A.

219. *Id.*

220. *Excerpts from a Speech By Gingrich About Race*, N.Y. TIMES, June 19,

Gingrich stated that we need to treat individuals as individuals, and “we need to address discrete problems for the problems they are—and not presume them to be part of an intractable racial issue which [will] never be torn out.”²²¹ He continued:

Instead of focusing on broad sweeping generalizations about race, the President’s commission needs to focus on practical, doable, immediate action, steps that can solve America’s problems. If Americans get busy enough working together to achieve real goals, racism will recede. Perspiration and teamwork will dissolve racism faster than therapy and dialogue.²²²

The problem with Gingrich’s solution is that the United States Constitution has always been interpreted to afford individual rights, and we have always looked at individuals as individuals. White individuals, however, are treated differently than black individuals. For Gingrich to suggest resolving the issue of racism by rolling up our sleeves and “working together to achieve real goals” does not recognize the permanency of racism. He pretends that individuals are not defined by race. He purports to give us the CRITS response that if we focus on what is best for the community, then the race problem will go away. My query to him is that if you knew that the racial hurdles were on the track, would you continue running in the outside lane throughout the race, knowing you would lose, but hoping that the hurdles would someday be removed? Or would you attempt to win by moving over to the inside lane and dealing with the racial hurdles as you reach them? Or would you simply stop running, roll up your sleeves, and remove the hurdles and thereby lose the race, knowing that in the next race, the hurdles would again be on the track? Continuing to run in the outside lane is not a viable way of working together with your team in the 4x400 meter race—unless your goal is to lose. Failing to focus on the issue of race will not cause the hurdles to disappear any faster.

This article advocates that black South Africans reject Gingrich’s notions that racism, based on skin color, is not permanently rooted in either United States or South African society²²³ and that by not fo-

1997, at A12.

221. *Id.*

222. *Id.*

223. See Clark, *supra* note 69, at 28-29 (suggesting that Derrick Bell’s procla-

cusing on it, it will go away. As South Africa charts its future, it cannot forget that a minority, a "non-colored" group, did dominate a majority of "colored" skinned people in our present century.²²⁴ This article recommends that South Africa carefully consider the similarities of our histories and not close its eyes to our "presents."²²⁵

Will the hurdles remain on the South African track? Can the diamonds and gold of the country change the hue of South Africans' skin? Is that necessary when the oppressed are members of the majority? The majority rewrote the South African constitution. Therefore, they are now true citizens and partners of their land. They are members of the group that comprises all South Africans. They are all equal, yet, they too, pondered affirmative action policies.²²⁶ They have a constitutional court to ensure that their constitution "is the dawn." Yet, it was still necessary that their newly written constitution contain affirmative action policies.

mation that "[no]body can free us but ourselves," is wrong). Clark is disturbed that Bell fails to mention the "few" whites who have helped the black cause and he eludes that there will be a less strife-ridden, more harmonious society in the long run as the United States society continues to search for racial equality. *See id.* The problem with Clark's observation is that he doesn't tell us "how long" we should continue to seek this racial equality. He is aware of when our racial equality quest began, and as we enter the next millennium, he suggests that we continue to seek it, but he fails to specify when this search should end.

224. *See generally* Derrick Bell, *The Permanence of Racism*, 22 SW. U. L. REV. 1103 (1993) (describing the domination by the minority in South Africa).

225. *See* Ford, *supra* note 17, at 2012 (discussing the "presents"). Our "presents" include our presence, i.e. our physiology, our "color." *See id.* Ford believes that there may be call for concern in the United States, "where population ratios suggest a significant danger that white defensive mobilization will be politically effective." *Id.* By contrast, he believes that the inverted ratio of whites will provide for fewer political obstacles. *See id.* The author also believes that "South Africa's population ratios have long provided at least some economic incentives for increased integration irrespective of the adoption of formal 'affirmative action' goals." *Id.* at 2012.

Ford seems uncaring about the fact that blacks in South Africa were used in the labor force as slaves were used in the United States. Throughout the article the author capitalized whites, while lower casing blacks. Perhaps he saw the need to continue the empowerment of the apartheid-empowered group.

226. *See* Ford, *supra* note 17, at 1968 (noting that "[t]he question of the legality of affirmative action in South Africa [was] clearly answered, so to speak, in the affirmative").