

## CONFERENCE

# RACE, LAW AND JUSTICE: THE REHNQUIST COURT AND THE AMERICAN DILEMMA

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### INTRODUCTION

On September 21, 1995, the Law and Government Program of the Washington College of Law, the Asian-Pacific American Law Students Association, and *The American University Law Review* hosted a conference addressing recent Supreme Court jurisprudence on race. The conference brought together many leading scholars involved in this area of law.<sup>1</sup> *The Law Review* is honored to publish three panel discussions entitled "Color-Blindness Versus Racial Justice: The Supreme Court's 1994-95 Term and the Struggle to Define Equal Protection," "Beyond Black and White: Race-Conscious Policies and the 'Other Minorities,'" and "'Creditor and Debtor Races': Is It Time to Get Beyond Race?". *The Law Review* is also proud to include the

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1. Brief biographies of the participants are set out in Appendix I.

luncheon keynote address by Angela Davis.<sup>2</sup> Many of the panelists wrote Essays subsequent to the Conference that expanded upon the issues raised during the panel discussions. These Essays appear after this conference transcript.

### I. COLOR-BLINDNESS VERSUS RACIAL JUSTICE: THE SUPREME COURT'S 1994-95 TERM AND THE STRUGGLE TO DEFINE EQUAL PROTECTION

DEAN RASKIN: Good morning, welcome to the Washington College of Law and the American University. We are proud to receive so many distinguished visitors here at WCL.

Today's conference is a timely and important event. W.E.B. DuBois said that the problem of the twentieth century is the problem of the color line.<sup>3</sup> And just four years away from the next century, we have not been able to prove him wrong.

The Supreme Court and our justice system are central actors in the American attempt to wrestle with the color line and racism, which is America's original sin.

Today we have many of the nation's leading lawyers, writers, and public intellectuals to debate race and the Rehnquist Court. When we met last year, our focus was *Shaw v. Reno*,<sup>4</sup> and whether that case held out a new conservative jurisprudence of race for the Supreme Court.

That new jurisprudence may have arrived. In three five-to-four decisions last Term, the Supreme Court took a hard turn to the right. It further reduced the ability of states to create majority black and Hispanic congressional and state legislative districts,<sup>5</sup> curtailed federal affirmative action programs,<sup>6</sup> and reduced the remedial power of federal district courts to order magnet programs and higher teacher pay in order to accomplish desegregation.<sup>7</sup>

Today we want to examine the new activist, conservative racial jurisprudence, where it comes from, what it means, how new or old it is, how logical and consistent it is, how it relates not just to whites

2. The participants and *The Law Review* staff made minor editorial changes to the transcript when necessary for clarity. *The Law Review* staff also supplied the citations.

3. William Edward Burghardt DuBois, *To the Nations of the World: Address to the Pan-African Conference in London (1900)*, reprinted in DAVID LEVERING LEWIS, W.E.B. DU BOIS: BIOGRAPHY OF A RACE, 1868-1919, at 251 (1993).

4. 113 S. Ct. 2816 (1993).

5. See *Miller v. Johnson*, 115 S. Ct. 2475 (1995).

6. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995).

7. See *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995).

and blacks, but to other minority groups, and whether we as a society and a nation under law can in fact get beyond race.

Let me begin by coming to Charles Cooper. Has a new jurisprudence of race evolved in the Supreme Court with last Term? And does this jurisprudence conform to constitutional requirements as you see them?

MR. COOPER: First, let me say thank you, Jamin. It's a pleasure to be with you.

Good morning, ladies and gentlemen.

I don't think that a new jurisprudence of the Equal Protection Clause developed during the last Term. I rather think that the Court's jurisprudence was extended and elaborated in the last Term, and moved incrementally towards color-blindness. That is what we witnessed last Term.

I think that the Court's current equal protection jurisprudence is a return to *Brown v. Board of Education*.<sup>8</sup> In fact, what we're seeing is the Court evolving incrementally full circle to the *Brown v. Board of Education* decision.

Let me take the cases very briefly, piecemeal, to illustrate this point. In *Adarand Constructors, Inc. v. Peña*<sup>9</sup> the Court applied strict equal protection scrutiny to what essentially amounted to racial preferences in the government business contracting area.<sup>10</sup> That case is actually an extension and elaboration of an earlier case, *Richmond v. J.A. Croson*.<sup>11</sup> While *Adarand* overruled *Metro Broadcasting, Inc. v. FCC*,<sup>12</sup> it is my view that *Metro Broadcasting* actually is the aberration, in at least the Court's recent jurisprudence.

The *Miller v. Johnson*<sup>13</sup> case, a Georgia case that dealt with electoral redistricting, indicated very clearly that strict judicial scrutiny applies to the use of race in the drawing of electoral boundaries.<sup>14</sup> Judging by the Court's rhetoric, a very strict standard of scrutiny would be

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8. 347 U.S. 483, 495 (1954) (holding that segregation in public schools, solely on basis of race, deprives children in minority groups of equal educational opportunities in contravention of Equal Protection Clause).

9. 115 S. Ct. 2097 (1995).

10. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2113 (1995).

11. 488 U.S. 469, 510 (1989) (holding that city plan requiring prime construction contractors to subcontract at least 30% of dollar amount to minority business enterprises failed to show compelling state interest and was not narrowly tailored).

12. 497 U.S. 547, 568-69 (1990) (holding that FCC preferential licensing treatment of minority businesses did not violate Equal Protection Clause), *overruled by Adarand*, 115 S. Ct. at 2097.

13. 115 S. Ct. 2475 (1995).

14. *Miller v. Johnson*, 115 S. Ct. 2475, 2482 (1995).

applied. But that case seems to me to be a natural follow-up to *Shaw v. Reno*, the case that this symposium examined specifically last year.

*Missouri v. Jenkins*<sup>15</sup> was a school desegregation case dealing with, essentially, the point at which school districts are entitled to be released from judicial supervision, and from earlier desegregation orders.<sup>16</sup> In *Oklahoma City v. Dowell*,<sup>17</sup> the Court articulated, I think more clearly than it had previously, the standards for ending desegregation decrees and restoring educational policy decisionmaking to the elected and appointed local school officials.<sup>18</sup> So *Jenkins* is not a startling result. It's one that I think was fairly predictable from the Court's jurisprudence, both in *Dowell*, as I mentioned, and in a case called *Freeman v. Pitts*,<sup>19</sup> which also preceded the *Jenkins* case.

Finally, there was another case that I think is noteworthy, not because it was decided on the merits by the Supreme Court last Term, but because the Supreme Court refused to consider it.<sup>20</sup> And while it has no precedential value on the merits, we may be able to draw some insights concerning the Court's direction. That's the *Podberesky v. Kirwan* case, which dealt with racially exclusive college scholarships at the University of Maryland.<sup>21</sup> The Fourth Circuit struck down that program at the University of Maryland as unjustifiable under the strict scrutiny test applicable under the Equal Protection Clause,<sup>22</sup> and the Supreme Court decided not to review it.<sup>23</sup>

Last Term, the Supreme Court continued an evolutionary process in four different cases, arguably four, certainly three, indicating again incremental progress, in my view, towards color-blindness and away from racial preferences.

I would close this response by saying that I think the idea of racial preference is under serious scrutiny, not only in the courts, but throughout our society. The clearest and most pressing danger to the use of racial preferences in the many areas that they now are commonplace in our society is coming from the political process; the issue has been brought very publicly to the surface by the California

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15. 115 S. Ct. 2038 (1995).

16. *Missouri v. Jenkins*, 115 S. Ct. 2038, 2055-56 (1995).

17. 498 U.S. 237 (1991).

18. *Oklahoma City v. Dowell*, 498 U.S. 237, 247-48 (1991).

19. *Freeman v. Pitts*, 503 U.S. 467, 490 (1992) (holding that district court may relinquish supervision of school district in incremental stages before full compliance with desegregation decree has been achieved).

20. *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), cert. denied, 115 S. Ct. 2001 (1995).

21. *Id.* at 161.

22. *Id.*

23. *Podberesky v. Kirwan*, 115 S. Ct. 2001 (1995), denying cert. to 38 F.3d 147 (4th Cir. 1994).

Civil Rights Initiative.<sup>24</sup> That initiative, more than anything else, is really fueling the extraordinary public debate that we're seeing on affirmative action generally, and racial preferences specifically.

DEAN RASKIN: Frank Parker, let me come to you. Is Chuck right?

PROF. PARKER: With all deference to Chuck Cooper, I think most constitutional scholars would disagree. I think a majority of observers would argue that the decisions of the past two Terms of the Supreme Court are a striking departure from what has gone before.

Any time the Court overrules *Metro Broadcasting*<sup>25</sup> and seriously cuts back, and in fact overrules *Fullilove v. Klutznick*,<sup>26</sup> two of the major affirmative action decisions of the Burger Court, and strikes down congressional districts under the Equal Protection Clause for racial discrimination without proof of discriminatory purpose,<sup>27</sup> it is, I think, definitely striking out into new territory, and is departing in a major, major way from the prior decisions and prior constitutional doctrine.

I think what we see here is the Court attempting to redefine racial discrimination in terms of racial classifications, primarily, in a way that seriously departs from prior constitutional doctrine, under which the Court, in a series of cases going back to 1976,<sup>28</sup> has said, "You can't have illegal racial discrimination under the Equal Protection Clause without proof of discriminatory purpose" for black plaintiffs.<sup>29</sup>

The Court has now dispensed with the requirement of discriminatory purpose for white plaintiffs, and has redefined or attempted to redefine racial discrimination in a way that totally departs from prior constitutional doctrine.

DEAN RASKIN: David Kairys.

PROF. KAIRYS: I have to agree with Chuck that the change last Term isn't that great to me. It seems to me that the new conservative approach was quite apparent by 1993. I outlined my view of it that year.<sup>30</sup>

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24. See Max Vanzi, *Affirmative Action Opponents File Initiative with State Officials*, L.A. TIMES, Aug. 8, 1995, at A3. The California Civil Rights Initiative (CCRI) recently submitted to the state attorney general as the first step in an effort to qualify it as a 1996 ballot initiative, would ban the practice of granting preferences based on race, color, or gender in state hiring, contracting, and college admissions. *Id.*

25. See *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2116 (overruling *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990)).

26. 448 U.S. 448 (1980).

27. See *Miller v. Johnson*, 115 S. Ct. 2475 (1995).

28. See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that law or other official act is not unconstitutional solely because it has racially disproportionate impact).

29. See *id.*

30. See DAVID KAIRYS, WITH LIBERTY AND JUSTICE FOR SOME 129-45 (1993).

Certainly, by *Shaw v. Reno* last year, the new approach was clear. There are really two aspects to what they've done.<sup>31</sup>

First, the public I think has been greatly deceived in terms of what the Court has been doing, really since the mid-70s, not just in the last few Terms, regarding discrimination claims of African Americans, other minorities, and women.

Those claims, starting in the 1970s, were rendered nearly impossible to prove. This was accomplished by a series of what purported to be just evidentiary and burden rules. But in these decisions, there is a distinct theme that discrimination by white people is over. There is skepticism towards anyone who says that white people have discriminated, and basically a dismissal of such claims, even when there's strong proof, very strong circumstantial proof.

The second branch of what I consider a dual system of equality rules—one that applies to minorities, another that applies to white people—is newer. The claims of white people that they have been disadvantaged have been greatly facilitated and enlarged.

They have next to no burden. They don't have to prove purposeful discrimination with any kind of detailed proof. The moral tone of the opinions is a strong moral repudiation. There's judicial activism without a mention of the judicial restraint language that fills the opinions when minorities or women raise discrimination claims.

To me, this was very clear—the two branches of the dual system—by 1993, and certainly by *Shaw*. I differ with what they did last Term, but I agree it's not all that new.

DEAN RASKIN: Professor Butler?

DR. BUTLER: I would agree that new jurisprudence or color-blindness is consistent with precedent. I would, however, take the precedent back a little earlier, to *Plessy v. Ferguson*,<sup>32</sup> where we see the Court engaged in the same kind of willful blindness.

This illusion of color-blindness that the Court advocates now is an echo of Justice Taney's opinion in *Plessy*. Taney said that there was no equal protection problem with the Jim Crow laws because those laws were also color-blind.<sup>33</sup> If blacks felt stigmatized by the Jim Crow laws, that was because of the construction that they put on those laws. We see rhetoric very similar to that in the three cases from the last Term.

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31. See David Kairys, *Race Trilogy*, 67 TEMPLE L. REV. 1 (1994).

32. 163 U.S. 537 (1896).

33. *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896) (explaining Jim Crow laws as neutrally enforcing separation of races).

DEAN RASKIN: If color-blindness is either the new or the old ideology of the Court, where does this doctrine come from and to what extent is it really compelled by either the language of the Equal Protection Clause, or the structure of the Constitution?

Let me pose that to Jeff Rosen.

MR. ROSEN: The great race cases of 1995<sup>34</sup> are wonderfully ironic because throughout the rest of the Term, you have these spectacular debates, which are jeweled with references to constitutional history, Lincoln versus Hamilton, and the Anti-Federalists versus Federalists.

But in the three great race cases, references to constitutional history, to the history of Reconstruction, are nowhere to be found. The conservative justices, who purport to be devoted to original intentions, don't even bother to examine the history.

I think it's not a coincidence because when you do take a peek, as many of the people on this panel have, you discover that in all three cases, the positions of the conservative Justices, are directly inconsistent with the original understanding of the Reconstruction Amendments.<sup>35</sup>

This is not the place to do the dark and lonely work of historical excavation, but we can sketch out a few basic principles that are not terribly controversial. I'm stating the consensus view of the most conservative historians of Reconstruction.

The current notion of the Equal Protection Clause, which tries to root out intentional discrimination across the entire range of state action, would have been unfamiliar to the Reconstruction Republicans. Instead of focusing on purposeful discrimination, they emphasized limited equality of civil rights.

In the odd nineteenth century locution, they distinguished between civil rights, which were understood to be protected by the Fourteenth Amendment,<sup>36</sup> and political and social rights, which explicitly were not protected. Over and over again in the Reconstruction debates, you have the sponsors and the opponents as well saying, "Of course, the Fourteenth Amendment will not protect political rights."<sup>37</sup>

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34. See *Miller v. Johnson*, 115 S. Ct. 2475, 2478 (1995); *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995); *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995).

35. U.S. CONST. amend. XIII.

36. U.S. CONST. amend. XIV.

37. See *Giles v. Harris*, 189 U.S. 475, 486-88 (1901) (arguing that political rights, such as voting, are not civil rights within meaning of Fourteenth Amendment); see also T. Alexander Aleinikof, *Re-Reading Justice Harlan's Dissent in Plessy v. Ferguson: Freedom, Antiracism, and Citizenship*, 1992 U. ILL. L. REV. 961, 963-64 (discussing Justice Harlan's view of Reconstruction Amendments and explaining that Supreme Court has distinguished "civil" rights from "political" rights, describing latter as "conditional" and "dependent on the discretion of the elective or

In fact, the conservative judicial revolution of the 1970s, embraced by Robert Bork, was founded on the principle that the Fourteenth Amendment had nothing to say about political rights. Bork evoked Justice John Harlan, the second John Harlan's dissent in *Reynolds v. Sims*,<sup>38</sup> the great "one-man-one-vote" case, where he exhaustively examined the history and concluded "I think it's obvious that the Fourteenth Amendment was not intended to affect political rights."

So for consistent originalists, as Justice Thomas and Justice Scalia claim to be, the clear conclusion would be that the Fourteenth Amendment has nothing to say about race-conscious districting, and *Miller v. Johnson* and *Shaw v. Reno* were just flamboyantly inconsistent with the original understanding.

The Fifteenth Amendment<sup>39</sup> is a little trickier. But there again, the understanding is much narrower than even the most conservative modern justices assume.

It was intended not only to leave untouched discriminatory voting qualifications, like literacy tests, that had a disparate impact on blacks, but also qualifications that were explicitly intended to disenfranchise blacks. So to locate a broad color-blind principle in the Fifteenth Amendment is equally unpersuasive.

The affirmative action cases are hard, and I think I won't address them right now, but a little bit later in the panel.

But the point I think that's useful to make right now is, the notion of a broad color-blind principle across the board cannot be plausibly located in American history. In fact, I might close by noting that Professor Butler referred to *Plessy v. Ferguson*. Justice Harlan's dissent in *Plessy*, which the conservatives like to invoke on behalf of their vaunted color-blindness, stressed the political rights/social rights distinction.<sup>40</sup>

Harlan said, "In respect of civil rights, all citizens are equal before the law."<sup>41</sup> Then he went on with that ode to white supremacy about whites being the dominant race, which reflected the Lincolnian Reconstruction Republican moderate liberal view that you could have civil equality co-existing with social racism and white dominance.<sup>42</sup>

So, I do hope, in conclusion, that if in the three race cases of 1995, the conservatives again evoke a broad color-blind principle and try to

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appointing power").

38. 377 U.S. 533 (1964).

39. U.S. CONST. amend. XV.

40. *Plessy v. Ferguson*, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting).

41. *Id.* at 559 (Harlan, J., dissenting).

42. *Id.* at 559-63 (Harlan, J., dissenting).



strike down affirmative action, all race-conscious voting districts exclusively, then we as good partisans of original intent can exercise the sovereign prerogative of philosophers, which is laughter.

DEAN RASKIN: What about that, Roger? Have the great champions of original intent and originalism suddenly started to fingerpaint on the Constitution, and introduce an idea of color-blindness that is not rooted in the history of the text of the Constitution?

DR. PILON: It's my view that color-blindness is indeed written in at least the theory of the Constitution, if not in the history of the Constitution.

In fact, in listening to this debate this morning—and the debate of the last thirty years, if I may, going back to our attempts to rectify what you rightly called, Jamin, our original sin, and a real and a deeply troubling sin it was—I'm struck by how often the debate takes on the cast of the Ptolemaic theorists and their mighty efforts to preserve the geocentric view of the world by drawing epicycle upon epicycle to explain the motions of the planets, as against the Copernicans.

We are often at cross purposes in this debate because we are trying to build everything on the principle of equal protection, when in fact the Privileges and Immunities Clause<sup>43</sup> of the Fourteenth Amendment is the proper place to begin this discussion, as indeed those who ratified it thought.

When you do that, you discover that the affirmative action efforts of the past thirty years, about which conservatives so often are found reeling, are necessary outgrowths—logical entailments, indeed, as the EEOC saw early on in the late sixties—of the effort to prohibit private discrimination.

Why? For reasons that René Descartes pointed to when he pointed to the problem of “other minds.” Discrimination is a natural phenomenon. What is wrong with discrimination, if it is wrong, is not the act of hiring or firing, refusing to promote, etc., but the *reason* for which it was done. If it was done on forbidden grounds, then it becomes wrong. If it's done for a nonforbidden reason, then it's all right.

So you have to get into the mind of the person alleged to be discriminating. That means that you're going to find yourself looking at numbers. You're going to find yourself reversing the burdens of proof. Eventually, by way of remedies, you're going to find yourself with quotas, timetables, and various other forms of affirmative action,

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43. U.S. CONST. amend. XIV.

because it's the only way to enforce this so-called right against being discriminated against.

In my examination of the matter, that's exactly what I would call into question, namely, that if we are serious about freedom, if we're serious about freedom of association, then we will recognize that in looking at that concept, it is the freedom *not* to associate that is the crucial concept in freedom of association, or the right to associate only on terms that are mutually agreeable, at least in the private sector.

This means that you're going to have to take a serious look not simply at the Civil Rights Act of 1991<sup>44</sup> but at the Civil Rights Act of 1964<sup>45</sup>—not that portion that did away at last, and not a moment too soon, with Jim Crow, but that part that prohibited private discrimination, which is a right that was recognized under the Privileges and Immunities Clause. Indeed, it's one of the basic entailments of the right to be free.

The Civil Rights Act of 1868<sup>46</sup>—reaffirmed in 1870, a month after the Fourteenth Amendment was ratified—and the debates that surrounded that Act and surrounded the ratification of the Fourteenth Amendment spoke of property, contract, the right to sue, and the right to give testimony, the right to personal security, and so forth.

*These* are our basic civil rights. There is nothing at all in those debates about any right not to be discriminated against. That is a right we have only against government. Because government belongs to all of us, unlike private parties, it cannot discriminate.

DEAN RASKIN: Roger, let me just get this straight here. Your point is that the Civil Rights Act of 1964 is itself unconstitutional under the Privileges and Immunities Clause.

DR. PILON: You're a good listener, Jamin. That's exactly my point. It is unconstitutional because it requires individuals to forfeit rights that they have as citizens of the United States that are guaranteed under the Privileges and Immunities Clause, properly understood, a clause that we lost, of course, in the *Slaughterhouse Cases*.<sup>47</sup>

DEAN RASKIN: Brenda Wright, let me come to you. My question is whether we have a growing double standard in constitutional law.

44. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 1981 (1994)).

45. Pub. L. No. 102-166, 105 Stat. 1071, 1074-79 (1991) (codified at 42 U.S.C. § 2000e (1994)).

46. Pub. L. No. 101-511, Title VIII, § 8077(b)-(c), 104 Stat. 1892 (1990) (codified at 25 U.S.C. § 1301 (1994)).

47. 83 U.S. (16 Wall.) 36 (1873) (holding that Fourteenth Amendment forbids infringement of national citizenship rights, not state citizenship rights).

It's increasingly tough for minorities to get the Equal Protection Clause to work for them, but whites suddenly have been granted all kinds of new protections, specifically in the voting rights area. Does the Equal Protection Clause serve the majority now more than minorities?

MS. WRIGHT: I think that is one of the chief problems that has come out of the decisions that we have had from the Rehnquist Court in the last few years. I think that there is probably no way to give you a better example of that than by citing an exchange that occurred during the argument of the *Shaw v. Reno* case, which was a 1993 decision regarding North Carolina's congressional districts that got all of this started in the recent redistricting cases.<sup>48</sup>

During that case—and of course, this example also allows me to move from the world of René Descartes to the world of Chicago ward politics—one of the questions that Justice Stevens asked the lawyer for the plaintiffs, the white plaintiffs in that case, was to respond to the question, if he was correct about the impermissibility, the total impermissibility of considering race or ethnicity in the redistricting process, was he saying that it was unconstitutional to draw a Polish ward for the city council in Chicago, or to draw an Irish ward or an Italian ward?<sup>49</sup>

The plaintiff's attorney stopped for a moment, and I think struggled with the question, and then said, "Well, of course not. Of course that would not be unconstitutional."<sup>50</sup> And Justice Stevens in his very gentle way—he's from Chicago, and he knows the landscape there—said, "Well, why wouldn't that be a problem? What's the difference here?"<sup>51</sup> The plaintiff's attorney responded that a Polish ward would not be based on stereotypes.<sup>52</sup> The courtroom erupted into laughter.

I think that those of us who were sitting in the courtroom at the time felt that the plaintiffs were certainly not going to win that case because I think that Justice Stevens' question had so clearly exposed the problem that this color-blind jurisprudence was going to impose on the redistricting process.

The problem that if you set up the rules the way the Supreme Court has now set them up, what you have done is deprived minority citizens of the opportunity to achieve the same rights that all other

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48. *Shaw v. Reno*, 113 S. Ct. 2816, 2819-21 (1993).

49. *Reno*, No. 92-357, 1993 WL 751836, at \*54-55 (U.S. Oral Arg. Apr. 20, 1993).

50. *Id.*

51. *Id.* at \*55.

52. *Id.*

groups in society still have the option of seeking through the political process, through the redistricting process.

It remains perfectly all right to talk about drawing a Polish district under the theory that the plaintiffs put forward and was accepted by the Supreme Court. But if you ask the legislature, if you go in as minority citizens, say in Louisiana, a state that has a thirty percent black population, and that has not elected a single black person to any statewide office in this century, has never elected a black person to the state legislature from a majority white district in this century, and did not elect a black person to Congress during this century until 1990, when the first majority black district had been created.<sup>53</sup>

You look at a state like that and say that minorities now, if they go to the legislature, and say, "Please, for the first time, create a majority black district to permit us to attain representation in Congress," under the Supreme Court standards that becomes proof of the district's unconstitutionality.

So the problem of the double standard is not a remote or abstract or theoretical one. It's one that we are dealing with right now. We're looking at the very real possibility of a Congress that will become completely purged of its minority representation.

Of the thirty-nine African-American representatives in Congress currently, only three are elected from districts with majority white populations.<sup>54</sup> That is because voting patterns in this country are not color-blind. People do not act in a color-blind manner when they go into the voting booth.

So, if we try to project onto this political process a theory of color-blindness that is not reflected in the way society behaves, you end up departing completely from the principle of equal protection.

So to that extent, I do agree with what some people have said, that the principle of color-blindness and the principle of equal protection are not the same thing. I think that in American society, our history tells us that we need to be devoted to the principle of equal protection in order to secure the kind of society that we want.

DEAN RASKIN: Clarence, let me come to you. Do equal protection and color-blindness mean the same thing in your mind? Should they mean the same thing?

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53. See Kenneth J. Cooper, *Blacks in Congress Express Concern Political Landscape May Be Redrawn*, WASH. POST, Jan. 15, 1994, at A3 (noting that Rep. William J. Jefferson's (Dem.) election in 1990 marked first time that Louisiana had black house member since 1877).

54. JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES, BLACK ELECTED OFFICIALS: A NATIONAL ROSTER, at xxvi, tbl. 5 (1993).

MR. PAGE: No, they don't. In a context in which colors are not equal, since we've been going back slowly through time in this discussion to *Brown v. Board*, or *Plessy v. Ferguson*, precedential I'd like to go back to *Dred Scott*,<sup>55</sup> where Supreme Court Justice Roger Taney said the black man has no rights that the white man is bound to respect.<sup>56</sup>

One could make a wonderful scholarly argument for him being correct in saying that. We've got history, looking at the writing of the Constitution, with Article I, Section 2, Clause 3, where all others are to become accounted for reapportionment purposes as three-fifths of a person.<sup>57</sup> They couldn't even bring themselves to use the word "slave" in this august document, so they said "other Persons."

One could make the argument that this nation was founded on hypocrisy, and that it was founded on ambivalence around the question of race, and they'd be correct there once again, too.

As someone else has said on this panel, there is a difference between the intent or the spirit of the Constitution, as opposed to the reality.

The great thing about the Founders, to me—and Thurgood Marshall said this—the Constitution is a horribly flawed document, but it has the potential for correction over time, and for improvement over time. We're still involved in that improvement.

Yes, the current Court has been moving in a pendulum swing away from black rights and toward white rights. We still haven't got it right. We still cannot talk about color-blindness. We have to talk about the law having equal impact on everyone, and when you have terrific racial imbalance, as we have in our society, which has been referred to here coming from Chicago.

I'm very much familiar with the history of the voting rights decisions you talked about, and the history of redistricting, and the old type of affirmative action that they had in Chicago called patronage.

That worked in such a way that when Scandinavians and Germans headed city hall, the jobs went to them and away from Irish and Italians. When the Irish and Italians moved into city hall, they began to get the jobs. When Chicago, during the reign of Harold Washington and Bill Singer in 1983, when the Southeast Side, which had always been terribly antisemitic in its voting patterns, suddenly went

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55. 60 U.S. (19 How.) 393 (1856).

56. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 407 (1856).

57. U.S. CONST. art. I, § 2, cl. 3.

enthusiastically for Bill Singer against Harold Washington, the first black candidate, Mike Royko, my colleague, was asked, "Do you think Southeast-siders will ever support a black candidate?" And he said, "Sure, as soon as a Puerto Rican runs."

That's called ethnic succession. This is a reality of urban life, ladies and gentlemen. This is how America works.

Is it necessarily bad? Over time, it's proved to be quite good. We're not a melting pot; we're a Mulligan stew. The pieces don't melt. They keep their identity, but they absorb some of the pot, and they lend flavor back to the pot.

The color-blind ideal, we have not gotten there yet. But to paraphrase another Supreme Court Justice, Justice Blackmun, in the *Bakke*<sup>58</sup> case, who said, "[in] order to get beyond racism, we must first take account of race."<sup>59</sup>

But this is what the Court has been doing all along. And it's still in a situation of determining, how do we take race into account while trying to get race? Which I think raises a big question about, what is affirmative action for?

In order to determine how we move past affirmative action toward a color-blind society, we have to argue the same terms. And so far, we've been having difficulty in doing that.

To some degree, affirmative action is for reparations. To some degree, it's an anti-poverty program. To some degree, it's a diversity program. To some degree, it's a program for social justice. In many cases, affirmative action comes about as a result of a court judgment in a very specific case.

I have to sympathize, Jamin, with the argument declaring the Civil Rights Act of 1964 to be unconstitutional if it means that it frees up everybody in the private sector to discriminate in favor of black people, to discriminate in favor of minorities who have been left out, to discriminate in favor of women.

If that were the case in society today, if we are indeed past race and we're ready to make amends, or ready to equalize opportunity, great. We don't need a Civil Rights Act, do we?

Yesterday I was at a luncheon meeting with Francis Fukuyama who has a new book called *Trust*,<sup>60</sup> who looks at different societies around the world. I came down to the question, "Why do some societies fail

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58. 438 U.S. 265 (1978).

59. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part).

60. FRANCIS FUKUYAMA, *TRUST: SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* (1995).

while others succeed? Why do some nations succeed much better than others economically?"

He looks at the trust factor. "High-trust societies," as he puts it, are societies where people have so much trust that handshake agreements work. You have more corporations, you have more relationships outside the immediate family, and the law is written that way. In "low-trust societies," you have lots of contracts, lots of bureaucracy, lots of central control, and lots of lawsuits.

America is in a period where it's moving from being a high-trust to a low-trust society. One problem with the affirmative action debate is that the victims of the past have very little trust in their historical victimizers. That is why the arguments for color-blindness right now ring hollow, when the victims right now, women and minorities, feel so vulnerable.

So as a result, we're going to see legal arguments shift back and forth, as we hear them on this panel today. I think right now I have a very dire short-term prediction for the current course of this Court. One more statement about the political process that's been mentioned.

In the political process right now, the pro-affirmative action side has dropped the ball for about twenty or thirty years, and allowed the debate to be shifted toward the question of preferences, which we've heard several times in this panel.

I didn't hear the word "inclusion" mentioned at all. When polling is phrased in such a way that you ask American people, "Do you favor programs for more inclusion of women and minorities?," they favor that. In other words, programs that target women and minorities for more inclusion, for more opportunity. When you put it in terms of preferences, they don't like that.

So obviously, the entire nation is ambivalent about this question, and the law is going to reflect that.

DEAN RASKIN: Chuck Cooper, let me come back to you as a model conservative, a conservative with a conscience.

If the color-blindness idea has uncertain historical and doctrinal underpinnings, as Jeff Rosen and Frank Parker have argued, and it doesn't deal with the very strong moral claims emerging from a history of slavery and oppression and discrimination, then why should we adopt this idea? What is its utility?

MR. COOPER: First, I dispute, at least at a modest level, Jeff's and Frank's premise regarding color-blindness. I'm glad you asked this question because I think Jeff's point regarding the historical evidence

surrounding the Equal Protection Clause really makes a point different from the color-blindness point.

I think he makes a point that, at least insofar as he references the inapplicability of the clause to the political process and political rights, he makes a point about the scope of the Fourteenth Amendment, and one on which the history is quite extensive, and the body of work is quite persuasive, though I haven't done that long, lonely, and dark task myself. But I've seen some of the work that others have done.

Jeff's making a very good point. The Fifteenth Amendment, after all, would not be necessary if the extension of the Fourteenth Amendment to political rights was intended by the Framers.

DEAN RASKIN: The Fifteenth Amendment, we should say, denies the ability of states to discriminate against people in voting on the basis of their race.<sup>61</sup>

MR. COOPER: Obviously if the Fourteenth Amendment would not reach a law prohibiting minorities, racial minorities, from voting at all, it's difficult to understand how the Fourteenth Amendment embraces districting that disadvantages one race over the other.

But if you do accept that the Amendment extends to political rights, and it certainly extends to some things, if not political rights, it's a different question whether it expresses a value of color-blindness versus a value of some kind of color-consciousness, or some approach which prohibits some color classifications, but allows other color classifications, based upon whether or not the majority of the Supreme Court thinks one is benign and the other is not.

So that's, I think, a point that is open to debate. I think the case for a color-blind Equal Protection Clause is not foreclosed by the history of the Amendment itself.

With respect to the value of color-blindness, I would like to turn that question around. Where is color-consciousness taking us? If there is agreement that color-blindness is the ultimate goal—and that is obviously the premise of the notion that we have to take race into account if we're to get beyond race—then are we hastening the day when that happy arrival takes place? I don't think so.

Are we becoming less conscious of color? It seems to me the evidence overwhelmingly disputes that notion. Our government in

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61. U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").



fact has insured that color permeates every aspect of our lives, every aspect of society, every opportunity available to the American people.

In employment, in education, in government contracting, in government licensing, racial and other minority preferences abound. Race permeates the electoral process, the political process itself, even the Tax Code—Viacom recently tried to sell \$2 billion worth of assets to a minority business enterprise because the parties would have gotten a \$400 million tax break.<sup>62</sup>

Senator Dole recently had the Congressional Research Service survey the U.S. Code. It came up with 160 different racial preference schemes.<sup>63</sup> Is the government's use of race, its preoccupation with race, bringing about greater harmony, racial harmony in the country? I don't think so.

But there are a lot of others who don't think so, either. Shelby Steele recently noted that, "after thirty years of these racial preference programs, tensions between the races are as high as [he has] ever seen them in [his] lifetime, and maybe higher."<sup>64</sup>

I guess I am a proponent of the school of thought that believes that, while we are certainly not a color-blind society and while the day may never come when racist thoughts and impulses are cleansed from the human heart, it is imperative that our government be color-blind with respect to its citizens, and with respect to the opportunities and the resources that are available to the community at large.

DEAN RASKIN: David, Paul, and then Clarence.

PROF. KAIRYS: I think the color-blind word—we have to give it its due, shall I say, in the current context. It implies, the way it's used so far in the panel, and certainly in the culture, in the society at large, that blacks have gotten too much. That's the essence of it. Things have gone too far, and color-blindness brings things back to neutral.

Now, I look around, in at least my part of the United States of America, and it's hard for me to see that. I look around at the neighborhoods, I look around at who holds what positions. I see some progress. But it's hard for me to see ways in which it's gone too far.

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62. Paul Farhi, *Viacom Selling Assets to Minority Company*, DENVER POST, Jan. 4, 1995, at C1 (explaining that tax program permits companies to defer paying capital gains taxes for two years if company sells media property to minority buyer).

63. Kevin Merida, *Rights Debate: Both Sides Uneasy: Review for Dole Finds Affirmative Action Usually Doesn't Mean Quota*, WASH. POST, Feb. 23, 1995, at A13 (noting that Dole requested list of all federal statutes, regulations, programs, and executive orders that grant preferences based on race, sex, national origin, or ethnic background).

64. Ben Wattenberg, *Clinton Crossroads on Race Preferences*, WASH. TIMES, July 20, 1995, at A22 (quoting Shelby Steele, author of *The Content of Their Character: A New Vision of Race in America*).

I think we're seeing—and the Court is doing something that is very much part of the the society at large—a basic reversal of the social roles regarding race. We're seeing a successful challenge to the notion that the presumptive victims of racism are black, and the presumptive racists are white.

To me, the import of this development goes back even to the notion of *Brown v. Board of Education*. Are we going to have an integrated society? The problem isn't that we've gone too far. The problem is that we've made some positive steps some people don't like. Membership in Congress numbers thirty-something black representatives.<sup>65</sup> This is very upsetting.

When the old system of segregation and exclusion has broken down to some significant level, which I think it has, we're seeing a reaction to progress. And the reaction is being led by people who were against integration all along, like Chief Justice Rehnquist.<sup>66</sup>

DR. BUTLER: I know when the original FCC originally granted licenses to radio broadcasters, everyone who got a license was a white male. When I see a new FCC program that comes in and grants some preferences, if you will, to African Americans and to women and to other minorities, I don't see the government as putting race in it.

I see the government as recognizing that race has always been in it, and trying to make amends for that.

I'm a little wary of going back to the good old days when the government didn't recognize that. I don't see that those were particularly racially harmonious times. Maybe you didn't hear from the black people, but that did not mean that they were content.

DEAN RASKIN: Clarence?

MR. PAGE: Quite right. In fact, my book is called *Showing My Color*,<sup>67</sup> which is an old black community expression. Our parents all told us, if we acted up, "Don't show your color now," especially around white people. We've always repressed our real feelings about this.

But you know, the National Urban League President Hugh Price talks about blacks and whites today being like two escalators both

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65. See *The Freshman-Elect, Profiles of the New Members of the 104th Congress*, CONGRESSIONAL Q., Nov. 12, 1994, at 10 (noting that there are 39 black Representatives and 1 black Senator in 104th Congress).

66. See DAVID SAVAGE, TURNING RIGHT, THE MAKING OF THE REHNQUIST SUPREME COURT 46 (1992).

67. See CLARENCE PAGE, SHOWING MY COLOR (1947).

going down, but not really seeing each other, communicating with each other.<sup>68</sup>

I'm hearing hints of that in this discussion, which is appropriate because this is the crux of our problem. Do we have more racial tension now than before? Are we more race-conscious than before? Well, white people are. Men are. Men are more gender-conscious. I sure as heck am.

But you can't tell me—you know, Shelby Steele was a year older than I am. I don't believe him when he says he sees more tension than ever, or as much tension as ever.

When we were kids, we had segregated water fountains, for pete's sake. I was six-years old, visiting Alabama for the first time. I've seen two water fountains: One says "white," one says "colored." I immediately ran over to the one that said "colored," and I turned it on, and was very disappointed to see the water was clear, like back up North. This was the lessons that black people grew up with. And my parents told me, "Look. White people write the rules, and they don't want us to be near them."

You tell me we've got more tension now? Shelby Steele refers to such classic anecdotes—these could be chestnuts now—like the segregated dining tables, right?<sup>69</sup> I'm sure here in America you walk into a college dining hall and you see blacks over here, whites over there, you know?

But does anybody stop to think about the other segregation that goes on, fraternity people over here, sorority people over here, jocks over here, the artsies over here, the metal heads over here?

People segregate according to their interests. It just so happens it goes along racial lines. We say, "Oh, my gosh, we've got self-segregation here."

The University of Michigan did a very interesting study a few years ago.<sup>70</sup> They surveyed white, black, Hispanic, and Asian students on a couple of dozen different campuses around the country. And they found, when they asked them questions like, "If you were dining with

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68. See Hugh Price, Address at the Annual Convention of the National Urban League (July 24, 1994). The essence of Mr. Price's speech was his recognition that the catastrophic circumstances enveloping so many African Americans are, in a large part, the result of changed economic conditions that are having a devastating effect on many whites as well. *Id.*

69. See generally SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* (1991).

70. *Students Self-Segregation Questioned by New Study*, BALTIMORE SUN, Apr. 5, 1994, at 6A (stating study's finding that minority college students are more likely to socialize with people outside their race than white students are to socialize outside their race).

somebody of another race . . . ” and “Have you gone out with somebody of another race in the last few months?”

Right down the list, they found that the minority students, the students of color, as they are called these days—we used to be “colored people.” We’re now “people of color.” That’s progress.

(Laughter.)

MR. PAGE: They found that the students of color had integrated a lot more than the white students had.<sup>71</sup> The students of color were more than twice as likely to have dined, socialized, worked together with people of other races than the white students were.<sup>72</sup>

But, you know, again we’re looking at the law, not through a prism of color, but through a prism of whiteness, and saying, “Oh, my gosh, we’re conscious of color now.”

Yes, that’s right. But black folks have always been conscious of color; we had to be. Women have always been conscious of gender; they had to be. The victim is always conscious.

When we have a situation—Andrew Hacker, author of an excellent book, *Two Nations*, recently declared in regard to the affirmative action debate right now, that for the first time white males are getting a taste of what blacks and people of color and women have had to experience all along.<sup>73</sup> They don’t like it, they want to get rid of it, and they don’t want it to happen again. Who can blame them?

I don’t blame them at all. That’s what the debate is really about right now. Let’s really be honest.

DEAN RASKIN: Frank next and then Roger.

PROF. PARKER: I think we need to examine the ideology of this color-consciousness principle, or color-blind principle. I think Chuck Cooper expressed it quite well.

I think what the Supreme Court seems to be saying in these decisions is that racial classifications are really the source of racism in American society; that we have racism in American society because of affirmative action plans, because of what the University of California at Davis did in setting aside certain slots for minorities in the medical school, because of minority redistricting.<sup>74</sup> The Court seems to be

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71. See Reynolds Farley & William H. Frey, *Changes in the Segregation of Whites from Blacks During the 1980s: Small Steps Toward a More Integrated Society*, 59 AM. SOC. REV. 23, 27-28 (1994) (finding that racial segregation between whites and blacks persist, but that peak segregation has passed and black-white segregation is declining unevenly).

72. *Id.*

73. See generally ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992) (discussing two dramatically distinct realities in which black and white Americans are raised and live as reflected in familial relationships, income level, schools, educational achievement, employment, politics, and crime).

74. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

saying: If we eliminate all the racial classifications in American society, we'll eliminate racism. That's wonderful, isn't it? *Shaw v. Reno* and *Miller v. Johnson* and *Adarand v. Peña* are going to eliminate racism in American society. We're not going to have any more racial discrimination anymore because all the racial classifications will be done away with.

The problem with minority redistricting is that it encourages racially polarized voting. So if we eliminate the majority-minority districts, then we'll have more minorities in Congress because we'll have done away with racially polarized voting.

I think that's it. I can't figure out any other explanation for these decisions. So it becomes quite bizarre because it's not redressable. You don't redress racially polarized voting by eliminating the majority-minority districts. There's no relationship between the two.

There was racially polarized voting before the majority-minority districts; there will be racially polarized voting after the majority-minority districts are eliminated, probably more. There's no relationship between the two.

Now, the second element is the remedy. How can you attain color-blindness with the remedy that's available?

Okay. Here's the situation. We have to eliminate majority-minority districts where race was the predominant factor, and we have to do that to preserve the principle of color-blindness. How do we do that?

Okay. We examine the legislative history of how these districts were adopted. We look to see whether or not race was a factor. That's not color-blindness. That's race consciousness.

In order to attain the principle of color-blindness, you have to use race consciousness as sort of a detection of whether race was involved. So not only doesn't it make any sense, but it's also inconsistent because any attempt to achieve the principle of color-blindness requires the use of race-consciousness as an effort to determine whether or not race has been used.

So it actually increases race consciousness in American society because legislatures, when they're drawing districts, have to always keep in mind, according to these principles, these decisions, that we can't talk about or think about race, and they have to concentrate on race.

It's like trying to not think about a white elephant. It actually increases race consciousness rather than decreases it.

DEAN RASKIN: Your point is that we have to be color-conscious to enforce and police the idea of color-blindness. In other words, it's a Freudian point. The thing that you try to repress always returns.

PROF. PARKER: What I'm trying to say is that this notion of color consciousness versus color-blindness really has nothing to do with racial discrimination that exists in American society today, and, therefore, is totally irrelevant to the basic problem of modern-day racial discrimination, which has to do with minority students being disproportionately disadvantaged by college admissions tests, and employment testing, which has to do with minorities being excluded from Congress because of racial bloc voting by white voters that prevents the election of minorities, and all these other elements of racial discrimination, which are the major problems of American society today, are totally unaddressed by this color-blindness principle.

DEAN RASKIN: Roger?

DR. PILON: I want to take exception to at least one of the formulations that I just heard; namely that the majority on the Supreme Court in the recent Opinions seemed to be saying that if you eliminate these race conscious remedies, you will eliminate racism.

I think that is not at all what the Court's majority was saying there. I think they were saying something much simpler than that, namely, that these race-conscious remedial schemes are themselves part and parcel of the racism that we see in the country today, and are contributing to it, which by no means would be the case if they were eliminating racism.

To take up on some of the themes, the other themes Frank raised and that Clarence Page raised earlier, the problem of racism in America is of course very real. It is not simply racism that we have here. It is classism, if you will, and all kinds of classes, the issue of prejudice generally.

It has always been with us. It will always be with us. It is part and parcel of the human condition.

The only interesting question is, what do we do about it? And we can address it on two levels. We can address it on the social level, the interpersonal level, and attempt through measures of moral suasion to do what we can to redress the problems of classism, if I may.

Or we can attempt to remedy or address these questions through force of law. We have taken the latter route since 1964, and I think that we've gone down some very wrong-headed paths in doing so, and have indeed exacerbated the problem of racism.

I think that Shelby Steele may be closer to the college campuses than you, Clarence, and therefore he may be pointing to what he sees there, more so than what we see in the larger community, although even in the larger community, in the employment context, one hardly

has to think long and hard when one's been in the real world because you run into it all the time, when people are concerned that their colleague has gotten the leg up because of race or gender, his ethnicity, whatever the case may be.

This is the kind of suspicion that permeates a society necessarily that is so conscious of categorization by race, gender, ethnicity, what-have-you, and is attempting to distribute benefits through public instrumentalities on that kind of basis. It necessarily has to follow.

I will give you one example that's drawn from Jeff Rosen's colleague, Michael Kinsley's essay in *Time* magazine at the end of last month, of how it is that it seems to me both liberals and conservatives are wrong on this issue.<sup>75</sup>

He cites the case of an eighty-seven-year-old black washerwoman in Hattiesburg, Mississippi, who managed to save up \$150,000 over the course of her long life, and now wants to donate it to the University of Southern Mississippi at Hattiesburg, I believe, for a scholarship for black students.<sup>76</sup>

The question arises, what will a conservative who wants color-blindness say about this? "Uh-uh," the person would say. "That is discrimination on the basis of race." Michael Kinsley, to his credit, says, "If it's a white woman, no, that shouldn't be permitted. But if it's a black woman, it should be permitted."<sup>77</sup> He's right up front with his inconsistencies.

However, it is to my mind a very simple case to be answered by a very simple question: Whose money is it, anyway? If she wants to dedicate her money to a black scholarship, and a white woman in the exact same circumstances wants to dedicate her money to a white scholarship, that's their money, after all, and they can give it to whomever they want, either through wills or other such instruments. They can dedicate it through a scholarship in just that form.

So, when we come to basic questions, such as whether the Chinese restauranteur should be able to hire only Chinese waiters—that's a two-fer; he's discriminating against non-Chinese and discriminating against women—you have to ask the question: Whose restaurant is it, anyway?

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75. Michael Kinsley, *Generous Old Lady or Reverse Racist?*, TIME, Aug. 28, 1995, at 76 (arguing that true meaning of civil rights principles does not require either individuals or government to act in ways that are strictly race neutral).

76. *Id.* The Hattiesburg business community contributed another \$150,000, bringing the total of the Oseola McCarty Scholarship to \$300,000. *Id.*

77. *Id.*

So we come back to the fundamental distinction that I tried to press in my first go-round, between private and public. In the private sector, we should allow discrimination and condemn irrational discrimination, just like we do in the First Amendment speech area.

We all understand the difference between defending someone's right to speak and defending the speech that flows from the exercise of that right. It's a distinction that goes back at least to Voltaire, who said "I may disagree with what you say, but I will defend to the death your right to say it."<sup>78</sup>

When you defend the right to discriminate, you're going to be defending some pretty sleazy people. I will be out there, marching with you against those people, condemning their discrimination, up until the point that you want to bring the law in to force them not to discriminate.

Then I'm going to switch over to their side, and defend them, not because I agree with defending what they're doing, but because they have a right to do it.

DEAN RASKIN: *The New Republic* was invoked. So Jeff, you get the first shot here. Then David wants to get in.

MR. ROSEN: It's really not a *New Republic* point. I think the consensus that's emerging on this wonderful panel may be to pick up Roger's impulse and intuition, which is, there's something unsatisfying, both with the notion of complete radical color-blindness on the right, and unapologetic racialism on the left, the notion that any preferences or affirmative action efforts, no matter what their impacts or burdens on third parties, are permissible.

But I think in order to avoid the descent into Sandra Day O'Connor-ism, where you close your eyes, commune with the skies, and say, "Well, I like that one, I don't like that one," we want to come up with certain principles to guide our attempt to figure out what is constitutional and what isn't.

The minority scholarship program that Mike Kinsley alluded to, I think is a very profound and useful hypothetical for us to think about.

My intuition is that, if our core concern is that the benefits of affirmative action should be spread out equally, and the burdens should be spread out equally, and society as a whole is going to benefit from increased diversity, we shouldn't single out a couple of individuals and ask them to bear the entire price of the program.

Then we might think minority scholarships are problematic because they're the quintessential example of a program that is reserved for

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78. See BARLETT'S FAMILIAR QUOTATIONS 344 (Emily Morison Beck ed., 15th ed. 1980).



one racial group and denied to another. In other words, they're formally closed to non-minorities.

In the University of Maryland case, it was a Hispanic student who was excluded, not a white, from the scholarship.<sup>79</sup> But if our quintessential example is that there are certain civil rights—education is one—that can't be denied to one race if given to another, then minority scholarships, although as a policy matter I think they're defensible, might be constitutionally problematic.

On the other hand, let's take two more examples, to spell out how the liberal members of the Supreme Court, the moderate members who don't embrace radical color-blindness, might think about affirmative action in the coming years.

The *Adarand* case, again, constitutional history on judicial restraint grounds. As a policy matter, it's really problematic. Here is a case where you have four firms competing for a construction contract in Colorado.<sup>80</sup> One was white, Randy Pash, and the other three I think were woman-owned, Hispanic-owned, and black-owned.<sup>81</sup>

Poor Randy Pash said that "[w]henever I bid, the next lowest bid is taken. Whenever I don't, the lowest bid is taken."<sup>82</sup> And the other competitors in that particular case were disadvantaged.

So we think about burdens. What notion of social justice would single out one particular businessman like Randy Pash, and ask that he pay the entire price of diversifying the Colorado construction industry?

On the other hand, there is the question of university admissions, the great case now being challenged at the University of Texas,<sup>83</sup> which may be the next *Bakke*. I think university admissions is less problematic on burden grounds.<sup>84</sup>

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79. See *Podberesky v. Kirwan*, 38 F.3d 147, 161 (4th Cir. 1994) (holding that race-conscious remedial scholarship program under which only African-American students are eligible, violates Equal Protection Clause), *cert. denied*, 115 S. Ct. 2001 (1995).

80. *Adarand Constructors, Inc. v. Pena*, 790 F. Supp. 240, 241 n.1 (D. Colo. 1992), *aff'd*, 16 F.3d 1537 (10th Cir. 1994), *vacated*, 115 S. Ct. 2097 (1995).

81. *Id.*

82. *Id.*

83. See *Hopwood v. Texas*, 861 F. Supp. 551, 579 (W.D. Tex. 1994) (holding that state university law school's affirmative action admissions program was not narrowly tailored where it treated minority pool of applicants as separate class). The court further held that while race or ethnicity could be considered a positive factor in evaluating applicants, equal protection required a comparative evaluation among all individual applicants in determining which were best qualified. *Id.* at 578.

84. *Id.* at 579-81. The court stated that where a plaintiff establishes a constitutional deprivation, the burden shifts to the defendant to establish a legitimate, nondiscriminatory reason for the action. *Id.*

No one has an expectation of being admitted to a university. There are a huge number of qualified applicants. The benefits are widely dispersed, and the rejected applicants have other places to go. So you can't just say, "Well, there are one or two Randy Pash's who have been asked to bear this burden."

That's why I think, in conclusion, that there is something equally distressing about the sort of radical color-blindness of the conservatives. I would say President Clinton's unreflective and perhaps not-terribly nuanced defense resorts to euphemism and avoids tough questions, like who should bear the burdens, and how can we distinguish sensible defenses of the programs from other ones?

I think the challenge in the next couple of years will be to do that in a very scrupulous and non-hysterical manner.

DEAN RASKIN: David Kairys.

PROF. KAIRYS: I'd like to come back to Roger's disagreement with Frank. To me, the crucial question, in terms of looking at the Court, is, what do they seem to view as racism? And what manifestations of that are they prepared to do something about?

By "do something about," I mean give somebody a remedy. If you look at that, they are very upset about white people who, because of the Voting Rights Act, have to be represented by a black member of Congress.

There seems to be a developing constitutional right, a new violation of the Constitution. It alone secures standing in a very strange way because the statewide apportionments, both of the ones they're talking about here in *Shaw* and in *Miller*, don't overrepresent black people, by any means.

So if we look at how they define racism and what triggers relief, what we see is that the clearest, most moral repudiation of racism comes in *Shaw*. The establishment of new lines, where, for the first time since Reconstruction, there are some black members of Congress from North Carolina—still not up to their proportion of North Carolina residents—is labeled apartheid and segregating voters.

They have appropriated the rhetoric of what was after all a very progressive struggle, around the world really, against racism. And they've appropriated it for this narrow class of cases, where they perceive white people as disadvantaged.

You can easily see the dual system I'm talking about by comparing cases in which African Americans have been disadvantaged. For example, blacks can be kept out of the job of police officer in this city based on a test that blacks fail four times more often than whites, even though the test has no relationship to performance as a police

officer.<sup>85</sup> This, they say, is a situation where the plaintiffs haven't met their burden. They have an extraordinary, almost impossible burden to meet, to show that it was purposely done to disadvantage blacks rather than just, it's done, and there's no reasonable explanation for it.

DEAN RASKIN: Paul, then Chuck, and then Brenda.

DR. BUTLER: Jamin, when you told me what this panel was going to be about, I thought that we might be able to have a new and creative discussion about what equal protection means, and what it should mean.

In fact, I had intended to make an argument that equal protection jurisprudence ought to be based on disparate effects, that a court should be able to look at a law or a program and consider the effect of that program on minorities. If those effects had adverse racial consequences, regardless of the intent, that would be a sufficient equal protection case.

But that is not the kind of conversation we've had and I want to make an analogy between what's happened on this panel and what's happening in the African-American community overall. What we're doing on this panel is responding to a very conservative notion of what equal protection means. Similarly, in the black community we expend much of our political and legal energies defending moderate racial reforms that, in the long term, fail substantially to improve our position.

Chuck asked what has race consciousness wrought? It's a good question. My answer is not enough to make conservatives as protective as they are of white rights. But at the same time, I don't want to dismiss too quickly what we have gained through affirmative action.

One gain is approximately forty black Congressmen. In the absence of a race conscious program like the Voting Rights Act, there would not be forty African Americans in Congress. I will tell you that until the 1990 presidential election and the 1992 congressional elections, when we saw the full fruit of the Voting Rights Act, I never felt so proud to be an American. I felt that at last I, as an African American, was part of the American family. Forty blacks in Congress was close to proportional representation. It felt like progress.

It was, however, moderate progress. Even with forty black congressmen, even with an expanding black middle class, the majority of African Americans are still poor. African Americans are still

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85. See *Washington v. Davis*, 426 U.S. 229, 250 (1976).

disproportionately the victims of crime. We are disproportionately the victims of racist police officers. And we are not talking about any of that now, at a forum that is supposed to be about race and justice.

Black people, in our political activity, are in the position of responding to a conservative Supreme Court and Congress, instead of working for real justice, which will come only with fundamental change.

MS. WRIGHT: I want to go back for at least a moment, if I could, to what Roger was saying earlier. And in his first remarks about the Civil Rights Act of 1964, and the proposed principle that we could now address many of the problems we face in society and its racial polarization by eliminating any legal prohibition against racial discrimination and making private racial discrimination totally legal, getting rid of the employment laws that prevent employers from discriminating on the basis of race and so forth.

I think that is an idea that needs some response. What it reminds me of a little bit is that there is a yearning, when people talk about racial issues in this society, I think there is a deep yearning to find a simple solution, a simple, clean solution in which you could sort of wave a magic wand, and take care of the problems that are created by the fact that we are a multi-racial society, where not everyone is comfortable with the prospect of members of other races having access to the same jobs and the same opportunities for schooling that the white majority has always enjoyed.

I think that the proposal, if there is a proposal coming out of this, for abolishing laws such as the Civil Rights Act of 1964, maybe does indicate that the Supreme Court has wrought more of a revolution recently than people realize, if these ideas are being seriously discussed as the natural outgrowth of the Rehnquist Court.

I think I'd have to be disturbed about that. The reason is this: There is an old observation that I think is very pertinent here, that the law, in its majestic impartiality, prevents the rich and poor alike from sleeping under bridges.

I think that the proposal to get rid of racial discrimination in the private sphere, or any concern about racial discrimination in the private sphere, by making it legal for employers now to discriminate on the basis of race sort of turns that a little bit inside out, and says, "It shall now be permissible for black multi-millionaire business owners, as well as white multi-millionaire business owners, to discriminate in their hiring practices." There is a deep empirical problem with that proposition, as appealing as it may sound in its

simplicity, and that is that there are almost no multi-millionaire black business owners in this country.

There is certainly only a tiny, tiny fraction of businesses of any size in this country that are owned and operated by African Americans and other minorities, in comparison to the businesses that employ the vast bulk of citizens in the United States.

To say that employers should now be free to discriminate on the basis of race and that that will make things all right because black employers will have the same opportunity, I just don't think is a proposal that can realistically deal with issues of racial justice and economic justice in the United States at the end of the twentieth century, although I quite understand the intellectual appeal for conservatives, and the conceptual issues that thinkers who propose this step are trying to bring to the forefront in making this proposal.

But I think that we have to, when we're dealing with American society today, we have to take into account that we are in the fourth quarter, in a sense, of a football game where the rules were rigged in favor of one team for a very, very long time in this nation's history.

You cannot get to equality by suddenly saying, "Okay, now in the fourth quarter, we're going to declare that the rules will be neutrally applied from here on out."

DR. PILON: Could I respond to something?

DEAN RASKIN: Then Clarence, and then I'm afraid we're going to have to end.

DR. PILON: The straw man has at last arisen. I just want to make it very clear beyond peradventure of a doubt that in calling for a simple solution, I was not calling for a simplistic solution, nor was I suggesting that the solution I called for would make all things all right.

I think I was quite clear that racism has always been with us—classism, as I prefer to think of it—it will always be with us. There is rational racism, classism; there is irrational racism and classism.

To advert to the Chinese waiter example I mentioned earlier, it certainly does make life in the kitchen a lot easier if all employees there speak Chinese. That's just a digression.

I certainly am not of the view, as was implicitly ascribed to me that not everyone is comfortable with other races having access to privileges enjoyed by white men.

MS. WRIGHT: I did not mean to ascribe that view to you. That was not my intent. I was talking about the problems that would arise

if your rule were imposed because of the attitudes of many in this society.

DR. PILON: In fact, I submit that the problems would be far less rather than far greater. And I submit that simply because there is no virtue in forced association. It merely creates animosity. The only kind of healing of the heart, if you will, that is possible is when people come together voluntarily.

I do think that there will be, as there is today, discrimination. And there will continue to be discrimination. That's not my point.

My point is I want to get the forced association out of the system because I don't think that it works, for any class, if so forced.

Oftentimes when I speak on these issues I find women raising the issue of association in the context of exercise groups. The question arises, should you have the right to have an all-female exercise group if you want to, and exclude men?

Well, I am perfectly agreeable with that. That's what freedom of association is all about. And it isn't that men's clubs shall not be allowed to discriminate, but women's clubs shall be allowed to discriminate.

I think that people should be allowed to associate on terms that are mutually agreeable. The idea that we will never get to equality, as Brenda said, through this route, is perfectly correct. We will never get to equality, and we shouldn't expect that we will ever get to equality.

Why do we suppose that any work force, from accountants to auto mechanics to truck drivers to secretaries and nurses, should "look like America," to use the phrase that comes out of 1600 Pennsylvania Avenue? Why do we suppose that?

People go different paths in life for reasons that are peculiar to them, and they should be allowed to do so. Indeed, there should be no forced association. Again, I come back to that because that, in the end, is what we're talking about.

DEAN RASKIN: Thank you, Roger.

Clarence, and then I did skip over David and Chuck, who gets the last word.

MR. PAGE: Thanks, Jamin.

What are the consequences of forced association? An excellent question, which was at the heart of the '64 civil rights debate. Please, I defer to the legal scholars here. I don't recall the right to associate being in the Constitution. If it is, let me know. I think it's a highly debatable issue, and well it should be.

By the way, Roger, I was delighted to discover recently that the chief chef in my favorite sushi restaurant is Filipino. I presumed he

was Japanese, incorrectly, and I praised the manager for his diversity hiring. This is America to me.

People ask me, "Have you ever benefitted from affirmative action?" I answer boldly, quite rightly, "Yes, a program called urban riots."

(Laughter.)

MR. PAGE: You young people here, for your benefit, thirty years ago, in 1965 to '68, we had over 400 urban riots in this country. Over 400, which is why I don't listen to those who say we have more tension now than before. I don't say we're out of the woods.

But I was hired—just last week—Mel Goode, the first black network correspondent died at age 87. He was hired in '63, as I recall, the first black network correspondent, the Jackie Robinson of our industry. They still didn't have any women, by the way. They still didn't have any Asians or Hispanics on the networks.

But I came along just in time in the late '60s at a time when the newspapers of this country and the news rooms decided, maybe we ought to have a few people we could send out to the "ghetto" without looking too conspicuous. That's how the free market operates.

I am a free marketeer. However, there was a very slow trickle. My newspaper, for example, hired one black reporter in '67, Joe Boyce, a former Chicago cop. And he's on *The Wall Street Journal* now. It took over two years to hire another one, me. Joe helped to pave the way, you know. But these things happen very slowly.

Yes, I'm a social engineer, and proud of it. I think that forcing association in some cases does do some good. It helps to break down barriers of social segregation, helps to break down barriers of misunderstanding and prejudice and resentments. That is a social good.

We Americans must ask ourselves, what kind of country do we want? That's the fundamental question here, ladies and gentlemen. And, can we use the law to move us in that direction, or do we have a hands-off approach, and let things go the way they would under the free market, rational and irrational discrimination going on with all of its associated tensions?

I answer, we need to use the law because the law has never been color-blind anyway. We've got to correct the mistakes of the past in order to get to that wonderful future to which we are aspiring.

After I leave here, ladies and gentlemen, I'm going over to BET, Black Entertainment Television, to tape a weekly program called *Lead Story*. I call it The Black Folks McLaughlin Group.

(Laughter.)

MR. PAGE: It is an opportunity because of the wonderful choices we have in this country, we do have a black channel.

But I go over to BET. I'm going to walk in there and see a lot of white folks operating cameras, working behind the scenes over there at this black-owned company. That's wonderful. We ought to have diversity hiring everywhere. I love to talk to the white folks there privately. "How does it feel to be a minority for a change?" Many of them say, "It's been an enlightening experience on a lot of different levels."

But that's the kind of country we want, I think.

So, yes. Whenever you do social engineering, you're going to have some negative consequences along with the positive ones. But I think we have much more positive consequences as a result of changes we've made in the last thirty years.

DEAN RASKIN: Thank you, Clarence. Jeff?

MR. ROSEN: One point that I want to end with is the one that Chuck Cooper and the conservatives began with. The great virtue of the conservative judicial revolution—although we've been criticizing it, today—was its emphasis on judicial restraint, and the importance of solving agonizing political problems through the political process, and not through the courts.

So I think that while Roger Pilon's proposal is provocative, if Congress wants to repeal the Civil Rights Act, let it repeal it. If Congress wants to forbid affirmative action, let it forbid it.

But nine impatient judges in black robes should not step in and, inventing dubious and shaky constitutional principles, make precisely the mistake that they've been criticizing liberals for making during the past thirty years, preempting this great national debate. The race questions should be settled in Congress, not in the courts.

DEAN RASKIN: Thank you for your cogency.

Frank?

PROF. PARKER: I want to respond briefly to something Jeff said.

Before affirmative action, one percent of all American businesses were black-owned. Since affirmative action has been instituted in the programs that Jack and others have discussed, black businesses have risen to over three percent.<sup>86</sup>

While you can say it's only three percent of all businesses, black people are twelve percent of the country,<sup>87</sup> and it is a three-fold

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86. See Joyce E. Allen, *The Growth and Diversification of Black Businesses*, 18 FOCUS 5-6 (1990).

87. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: RESIDENT POPULATION BY RACE 18 (1995).



increase. And black businesses now account for one percent of all the gross sales and revenues, business sales, and business revenues in America.<sup>88</sup>

Do we want to go back? Is that the role of the Supreme Court decisions? By eliminating all the affirmative action programs, or requirements affecting all this scrutiny, is the goal to go back to black-owned businesses being only one percent of all the businesses in America?

DEAN RASKIN: Paul or David?

PROF. KAIRYS: I think Clarence raised the central question that I hoped we would get into more. That is, what's the social vision of this color-blindness idea? Where does it get us? What kind of society does it lead us to?

You have to take that in context. If you just view it as a society where race would be eliminated or racism would be eliminated, that's really much too simple because we're in a particular context. There is a racial edge to contemporary life in the United States of America. There's a racial edge to politics.

Color-blindness hides that edge. It's a mechanism, a codeword, rhetorically quite significant, that basically clothes this racial edge with a mantle of antiracism.

What is it hiding? To me what it's hiding is that we're in a tough economic time, we've got unemployment and poverty, which in whites is seen as kind of unfortunate, but tolerable. In blacks it's seen as deserved and unchangeable.

This is what we're moving towards. We're moving towards separate communities. We're moving towards separation in the name of color-blindness.

To me, it heralds a new American apartheid. I don't mean that it's going to look like the South African apartheid. We're going to have our own version if we continue on this route.

The question is, don't we want to try and live together? Can't we do some things with the resources we have, and with the talents we have, to live together and to cooperate, and to integrate this society, which we started as a project some thirty or forty years ago?

Color-blindness is not going to do that. I don't know if we can survive as a nation if we keep on this route.

DEAN RASKIN: Paul Butler?

DR. BUTLER: Jamin, just to underscore that point, and with emphasis.

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88. Ronda Richards, *Outlook for Minority Businesses*, USA TODAY, July 24, 1991, at 1B.

Most of us on the panel seem to agree that there are three great race cases from the last Term, great or horrible cases, depending on how one interprets those cases. Many of us also believe that these cases are not consistent with precedent, even recent precedent.

What does that mean? That means that when the Supreme Court looks at the rights of black people it doesn't apply the rule of law. What are the implications of that? Why is that happening?

I emphasize the racial reforms that the Court is eliminating are moderate reforms. For example, after affirmative action, the earnings of black businesses increased from about one percent to about three percent of the earnings of all businesses. That counts for something but ultimately not a whole lot.

The conversation we had today, we had in the '70s about *Bakke*. We're still having it today. Meanwhile, black people are still poor, still being locked up, still dying. Lorraine Hansberry asked, "What happens to a dream deferred? Does it fester like a raisin in the sun, or does it explode."<sup>89</sup>

I think we are going to see an explosion if things don't get better, and soon.

DEAN RASKIN: Chuck Cooper?

MR. COOPER: Whenever I've been given time to rebut, it's not adequate, and it's not this time. But I will limit my comments to just one theme. That is essentially to focus on David's point.

I agree that we are moving to separateness. I recoil from using the word "apartheid," but I do believe we are moving to separateness. But I don't think it's because we are gradually now embracing color-blindness. I think it's because we have dismissed color-blindness and traveled away from color-blindness in recent times.

I celebrate the fact that there are forty black Congressmen. But I'm not willing to celebrate that fact without taking account of the costs. I'm also not willing to pay some of those costs.

The costs most directly involved obviously are the fact that electoral districts were drawn to separate people. They were drawn around clusters of racial minorities in order to segregate voters. That coarse description is not an exaggeration and is not putting it too high. But that's not the only cost of the break from color-blindness, and the use of racial preferences.

Ask yourself: "in what facets of your relationship with your government, is your race utterly unimportant and irrelevant?" Very few. Certainly I can think of none. Has your race become less relevant

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89. LORRAINE HANSBERRY, A RAISIN IN THE SUN 3 (1959).

over the course of the last 10 or 15 or 20 years? I would suggest to you the answer is no. It has become, if not the most important determining criterion, certainly among the most important criteria determining the opportunities available to you, with respect to your relationship with your government.

I think that if that continues, we will not hasten the day when we arrive at this place where we all agree we ought to be. We will retard it. In fact, we will not reach it.

DEAN RASKIN: All right. It goes against my best instincts, but I will let my friend Chuck Cooper have the last word.

(Laughter.)

DEAN RASKIN: I want to salute all of our panelists for their moral seriousness and intellectual honesty today.

Please thank our distinguished panelists.

(Applause.)

## II. BEYOND BLACK AND WHITE: RACE-CONSCIOUS POLICIES AND THE "OTHER MINORITIES"

DEAN RASKIN: The question we want to look at is to what extent is the current jurisprudential and political debate over affirmative action, voting rights and preferences, skewed by a myopic and outdated focus on the relationship between the white community and the African-American community?

I would kick us off with just one fact, which is that in 1960, African Americans constituted ninety-six percent of the total minority population in the United States.<sup>90</sup> Today, African Americans make up just over half of the minority population.<sup>91</sup> Many studies suggest that by the time we get into the next century, Latinos will be the largest minority in the country.<sup>92</sup>

To what extent is the debate we're having—the kind of debate we saw in the last panel—outstripped by events and reality?

So, let me come to you first, Robert. To what extent does the discourse that is framed by the Supreme Court deal with new realities?

MR. CHANG: I'm going to talk a little bit more generally about this panel.

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90. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, UNITED STATES CENSUS OF POPULATION: 1960, NONWHITE POPULATION BY RACE tbl. A (1963).

91. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 13 (1994).

92. See Remarks on Signing the Executive Order on Education Excellence for Hispanic Americans, 30 WEEKLY COMP. PRES. DOC. 344, 345 (Feb. 22, 1994) (stating that projections indicate that in next century, Hispanics will pass Blacks as largest minority population); see also Alex M. Johnson Jr., *The Voice of Color* 100 YALE L.J. 2007, 2063 (1991).

It's called *Beyond Black and White*, and I want to connect it up to the panel that took place before, which was a discussion about color-blindness and race consciousness, because we can think about this idea of trying to get beyond black and white as raising this question. Color-blindness might be seen as one model for getting us beyond this question of black and white.

The other model, of course, would be race consciousness. A more nuanced race consciousness would recognize the multiplicity of races, the different groups that are involved.

The questions or the comments that the earlier panelists ended with are very important. For example, they talked about what sort of vision of the world they want. And I wanted to talk about the recent changes, the recent legislative reforms pushed by the Right, which include restrictions on immigration, the reform of affirmative action, and changes to the welfare system.

I also want to connect it to the fear that I see coming, this fear of the coming majority of color, that seems to have compelled people—or I should say whites, to try to consolidate and protect years of accumulated privilege.

Now, I want to talk a little bit about the ideology of white supremacy because the previous panel talked about racism. And I'm not sure that racism is a useful term, really, to begin with. So I want to think about what white supremacy has done historically.

White supremacy has enabled the genocide of Native Americans, the enslavement of Africans, the conquest and dispossession of Mexicans, and the exclusion of Asians.

Now, okay, that's history. What does that have to do with the present?

Well, let's think about those changes that are being proposed. We have immigration reform. We have a new form of exclusion that's coming out. Let's keep the Mexicans, let's keep the Asians out of here. And I find it interesting that the Right talks about this, but doesn't also mention that there are certain things like a lottery to encourage the immigration of the Irish.

So I wonder about that.

And then you have affirmative action. Okay, we keep people out at the borders; that will help us with the demography, so that the coming majority of color doesn't happen as quickly. But then you also have to protect the integrity of the institutions. And so we have a border, a new border being created there. And then the welfare reform measures. Clearly, that implicates the division of society that we have.

So on the one hand, we want color-blindness. We don't want to consider race. We keep talking about this idea of equal opportunity.

Then on the other hand, we have this idea of welfare reform, and the tremendous impact it's going to have on the communities of color, in particular upon black children. That is the group that will bear the greatest burden. And so, if we get rid of these things like affirmative action, what are we going to do for the children?

I would like to turn it over here.

DEAN RASKIN: Very good.

One of the things that struck me in the last panel is that we have a constitutional discourse which is very formal and sterile to a certain extent, in trying to deal with the issue of race. And we have sort of a mad rush to try to get to color-blindness, an idea that doesn't allow us to look at race, at least in formal terms.

On the other hand, we have a political and public discourse that is now getting much more rich and nuanced about the relationship between groups. I'm wondering, are there ways that we can promote new values and new ideas, that make their way into the law?

PROF. WU: I'll answer that question by talking a little bit about some of the campaigns in California in 1994, and the ones that are going on now, that I think reveal how the process that we're seeing, the politics around race are pitting Asian Americans in particular, and other non-white, non-black minority groups against people of color.

So it's putting communities of color into conflict with one another. And although I do want to acknowledge that of course there are tensions among racial minority groups, and they can sometimes be facile and glib to say people of color are minorities, without explaining them further, it's important, whether or not you agree with anything else that I say, not to see this as a zero-sum game, as a conflict where one side has to win and the other side has to lose.

That's what we're seeing.

Let me give you an example of Proposition 187 in California,<sup>93</sup> and what can be properly regarded as its successor, the California Civil Rights Initiative (CCRI) campaign going on.<sup>94</sup>

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93. CAL. EDUC. CODE §§ 48215, 66010.8 (West 1995) (codifying California's controversial Proposition 187); CAL. GOV'T CODE § 53069.65 (West 1995) (same); CAL. HEALTH & SAFETY CODE § 130 (West 1995) (same); CAL. PENAL CODE § 113 (West 1995) (same); CAL. WELF. & INST. CODE § 10001.5 (West 1995) (same). Proposition 187 would ban illegal immigrants from receiving public education, non-emergency health care, and social welfare services, and would require officials to report suspected illegal immigrants to state and federal authorities. See Paul Feldman, *Judge Delays Prop. 187 Ruling for a Month*, L.A. TIMES, Sept. 8, 1995, at A3.

94. See *supra* note 24 (discussing California Civil Rights Initiative).

Proposition 187, as you all know, passed, and is probably unconstitutional, at least in part if not in full.<sup>95</sup> One of the interesting things about the campaign was the appeal made to African Americans that there was a conscious effort to reach out to African American voters.

The campaign focused on the theme of “these new immigrants are stealing your jobs.” They’re using government services and benefits intended for you.

So what was given to African Americans was the implicit promise to keep out Asian Americans, or keep out Asians who want to become Americans. Keep out Mexicans, keep out people from South and Central America, and you will benefit. That will help you.

That was a false promise.

Why do I say it was a false promise? Because first, it’s hotly disputed whether or not the economic impact of newcomers is detrimental to the disadvantaged in our society.

But more important than that, even if you accept that argument, that somehow adding more people to the population is going to hurt the disadvantaged, what’s most interesting about Proposition 187 is that before and after its passage, there was no intention ever to use any of the savings or any of the money generated to help disadvantaged, native-born citizens.

It was a false promise. It was a false appeal made politically to divide these communities of color.

Now, what’s happened this year with the CCRI, the anti-affirmative action measure, has a similar appeal, this time to Asian Americans. The organizers of CCRI are very clever. They are appealing to Asian Americans, and their pitch is “abolish affirmative action.” Abolish everything that helps African Americans, and your own upward mobility will be enhanced.

So now you see the perfect reversal of this tactic. As the same groups in government—Pete Wilson, who backed Proposition 187, is a prominent supporter of CCRI—turn now to a different community of color and say, “Now, why don’t you help keep down this other minority group?”

Of course, what is never revealed is that you can have affirmative action without harming Asian Americans.

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95. See Paul Feldman, *Judge Hints That Prop. 187 May Be Unconstitutional*, L.A. TIMES, July 27, 1995, at A3. U.S. District Court Judge Mariana Pfaelzer indicated that she has serious questions regarding the constitutionality of the controversial illegal immigration initiative. *Id.* Many legal observers believe the case will eventually reach the U.S. Supreme Court, a process that will take several years and keep the ballot measure on hold. *Id.*

This is a theme I'd like to return to later, time permitting, to examine how, in reality, what's hurting Asian Americans, as concerns of affirmative action and other racial policies, is by no means affirmative action for African Americans, but rather affirmative action for whites, which is practiced at U.C.-Berkeley,<sup>96</sup> and Lowell High School, the flagship public high school of San Francisco,<sup>97</sup> which is practiced in a variety of forms, very explicitly and openly.

DEAN RASKIN: You don't mean that in rhetorical terms?

PROF. WU: No. I'll give you an example. The college admissions controversy, which many of you may be familiar with in the 1980s, arose when Asian-American high school students noticed that their test scores and grades were going up.<sup>98</sup>

Yet, the rate at which they were admitted to prestigious Ivy League schools, other top public universities and other programs like that had hit a plateau, and in some instances was declining,<sup>99</sup> this again despite, in pure meritocratic terms, the fact that they were doing better. In fact, they were fully competitive, if not more so than the white applicants.

Now, government investigations into this issue concluded that the reason for this, the reason Asian Americans were being held back, that their numbers hit the plateau, was for two reasons.

First, the definition of merit had shifted. At the same time, the college admission officials saw that Asian Americans were doing better and better. They said, "We don't want to look at the numbers anymore. We don't want people that are too bookish. We want well-rounded people. We want athlete-scholars, not just scholars."

So what you see is the concept of merit gets abused and turned on the group that has done well, to enhance the admission potential of the whites in the applicant pool.

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96. See Larry Gordon, *UC Admissions Study Fails to Resolve White-Asian Bias Issue*, L.A. TIMES, Oct. 8, 1987, at A1. A study by the University of California, Berkeley, concluded that white students have a slightly easier time than Asian students in gaining admission to U.C.-Berkeley. *Id.*

97. See Nanette Asimov, *A Hard Lesson in Diversity: Chinese Americans Fight Lowell's Admissions Policy*, S.F. CHRON., June 19, 1995, at A1. Lowell's system of affirmative action, which like the rest of the San Francisco school district requires that at least four ethnic groups be represented at each school but that no one group can exceed 40% of its enrollment, has produced only modest gains for its intended beneficiaries, blacks and Latinos, while aiding a group not generally thought to need help, whites. *Id.*

98. See Gordon, *supra* note 93, at A1. The 230-page report found that the admissions rates of whites were higher than Asians in 37 out of 49 categories, even though the whites had lower high school grades and entrance test scores in 12 of those 37 categories. *Id.*

99. See Fox Butterfield, *Why Asians Are Going to the Head of the Class: Some Fear Colleges Use Quotas to Limit Admissions*, N.Y. TIMES, Aug. 3, 1986, § 12, at 22. Remarkable success of Asian Americans has sparked debate that some colleges are limiting their admissions by quota. *Id.*

Not only that, the second aspect of this—and this is much more explicit—government investigators concluded, and most top universities openly admit this, they have a form of preference for alumni children, just unquestioned. They admit alumni children who otherwise are under-qualified, who would not otherwise be admitted, period.

So clearly, if you're a big believer in merit and only letting in the most qualified, you should be out there protesting this. Yet there's no organized opposition to this form of preference.

Who does this form of preference overwhelmingly benefit? As it happens, it overwhelmingly benefits whites, not just whites, but privileged whites whose parents were fortunate enough to attend Harvard or Yale or Princeton in the '40s, '50s, and '60s and now want to send their children there.

So there what you see is, in order to admit legacies, there is again the alumni children, predominantly white. What was done was the number of Asian-American applicants was kept down and they were not admitted. So it was not at all affirmative action, but rather this other form of affirmative action, which isn't even called that, which is unquestioned, and is practiced still today.

DEAN RASKIN: Let me pick up where you've left off. Which way does that push you? That is, not necessarily just you, Frank, but which way should that push us? That is, I can see one conceivable response to any Asian-American community as, "Look, we've got to get away completely from the idea of racial preferences, or planning out racial diversity within our institutions, and get to some neutral meritocratic idea of color-blindness." Or does it push you in another direction?

MR. NASH: First of all, I want to say, it's a privilege to be the third Asian American speaking on a panel, and there's a fourth here. So I don't have to deal with some of the issues that Bob and Frank dealt with.

I'd like to take your question back even further than Frank has gone. When I originally learned of the topic of this panel, *Beyond Black and White*, it struck me that we have to put more of a historical context on this.

Part of the context, we have to realize, is that the only group explicitly mentioned in the Constitution is Indians.<sup>100</sup> Other people

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100. U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union according to their respective numbers, which shall be determined by adding to the whole number of free persons . . . excluding Indians not taxed . . ."); U.S. CONST., art. I, § 8, cl. 3 ("The Congress shall have



are referred to as “people,” and there are some people who are free people, and then there are some people who are referred to as “all other persons,” which, as we know because there are three-fifths of them, we now know that that was the word used for slaves.

But non-white, non-black people have always been mentioned because there’s an example in the Indian group. We have also been explicitly there in the peonage cases<sup>101</sup> in a number of instances where we brought about the Thirteenth, Fourteenth, and Fifteenth Amendments. We’ve been involved; it’s just that we haven’t always been noted.

The second thing I want to mention is that the debate that we’re having today or the discussion we’re having today is often framed by terminology that is not very helpful to the discussion.

For example, we accept without question the notion that people like my family—the Nash family got here in the 1600s. We don’t call them immigrants. We don’t call them conquerors. We don’t call them the people that gave smallpox blankets to the Indians. We call them settlers, which is a neutral term.

Now, the Heltika family came in my grandparents’ generation, just seventy years ago. When they came in, they were called immigrants, and they were called a lot of other ugly names I can’t say in a public setting.

There is a difference in terminology that I think is very, very important. It frames our discussion. And I want to lose that.

The third thing that Neil Gotanda, Bob Chang, and a lot of us here and in other places have mentioned, the notion of foreignness as that applies to American law. Foreignness is a concept that I don’t have time to get into explicitly today. But we’ve always been seen as “sojourners,” people who are here temporarily and we’re going somewhere else.

Our labor is being used. We’re coming from places where it really wasn’t that good anyway, and we’re going back there. Current people coming in, either refugees or immigrants, say, “I like it here. I want to stay here.” There is still this notion that they don’t belong here,

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Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”).

101. *See, e.g.*, *Hodges v. United States*, 203 U.S. 1, 17 (1906) (discussing Thirteenth Amendment’s application to white men conspiring to obstruct and intimidate African Americans from fulfilling a business contract); *Clyatt v. United States*, 197 U.S. 207, 218 (1905) (upholding conviction of businessmen for forcefully returning African Americans to condition of slavery); *United States v. Wong Kim Ark*, 169 U.S. 649, 677 (1898) (stating that Thirteenth, Fourteenth, and Fifteenth Amendments provide protection to all races, not just African Americans from slavery).

it's not their country, even though there are people who have been here sometimes four, five, six generations, if you go through California and Hawaii.

DEAN RASKIN: Nell Newton, let me come to you. We have mentioned the historical atrocities committed against the Indians. To what extent does the new constitutional jurisprudence deal with the reality of the Indian population and Indian law itself?

PROF. NEWTON: Let me begin by picking up on the theme of borders because I think that the Rehnquist Court has been very active in the area of Indian law by narrowing borders that define Indian tribes politically in cases in which white interests are threatened by exercises of tribal power.

One way to present Indian law and the status of Indian people is to say that the paradigm has from the beginning not been the race paradigm, but a paradigm based upon being a member of a tribe, a political paradigm. This political paradigm might be richly resonant with ideas of group rights, of ability to govern in your own territory. The Supreme Court has invoked this political paradigm to insulate some Indian tribal benefits from equal protection challenges, such as preferential hiring programs<sup>102</sup> and the exercise of treaty-based hunting and fishing rights.<sup>103</sup>

So, Indian tribes have been divided from other minority groups often by being told, "You're not like them. Your interests are not like theirs. You're totally different because you are members of a political group. And so the rules and the doctrines of Indian law are really based on your political status."

For instance, Indian tribes refused to join in *DeFunis v. Odegaard*<sup>104</sup> and the *Bakke* debate, on the advice of attorneys who represented them, most of whom were white, as I am.

These attorneys advised them: "You don't need affirmative action. You don't need to get involved in that. You already get to have affirmative action because magically you're not a racial group. You're a political group."

But any really close study of the paradigms that have been used in Indian law would reveal that Indian tribal people are often treated as

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102. See *Morton v. Mancari*, 417 U.S. 535, 554 (1974) (applying rationality review to preferential hiring and promotion program in the Bureau of Indian Affairs for Indian tribal members).

103. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979) (upholding treaty right to harvest one-half salmon runs in Washington state and rejecting equal protection challenge).

104. *DeFunis v. Odegaard*, 416 U.S. 312, 319-20 (1974) (dismissing as moot a challenge to law school preferential admissions program).

political groups as a way to subordinate them without running into the rhetoric of race. At the same time they are treated as racial groups when they get some benefits under a law. All of a sudden, those benefits are characterized as racial privileges.

Recently the Rehnquist Court has acted as if members of the Court have suddenly discovered the fact that Native Americans are often members of a racial group.

Let me just give a brief background. From the beginning, even though Indians were a political group, theoretically a political group having a measure of sovereignty in the United States, their sense of group identity was racialized by American law.

For instance, Indian people who were accustomed to adopt and take new members into the tribe by virtue of people coming and living there, or marrying into the tribe, were told in the 1840s by the Supreme Court that a white man who had married an Indian woman, had been taken into the tribe, and was a member of all the tribal ceremonial groups that were appropriate for his family, couldn't be treated as an Indian for purpose of an immunity granted to Indians because he was white.<sup>105</sup>

In effect, the Court stated: "We don't care that he's adopted. We don't care that the Cherokee nation has said, 'He's one of us.' He's white, he's always going to be white, and there's nothing you can do about it." So we're going to racialize the tribal group against the tribe's customs and wishes.

During this period of overt racialization of Indian law, burdens imposed on Indian people, or privileges denied to white people incorporated into the tribe were unquestioned. At the same time, after the Reconstruction amendments raised question about obvious racial classifications, the Court announced that burdens imposed on tribal people were the result of their political status and thus uncontroversial.<sup>106</sup> This characterization was one of the bases for the Court's upholding of "genocide-at-law," to use Rennard Strickland's famous phrase<sup>107</sup> describing the process of dividing up Indian reservations and sale of so-called "surplus" lands to non-Indians

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105. See *United States v. Rogers*, 45 U.S. (4 How.) 567, 573 (1846) (holding that white male accused of murder was not considered Cherokee Indian for purposes of jurisdiction despite his marriage to Cherokee woman and complete incorporation into Cherokee tribe).

106. See *Elk v. Wilkins*, 112 U.S. 94, 109 (1884) (upholding state denial of Fifteenth Amendment right to vote to Indian who had left tribe and settled in Nebraska because he was not a citizen of United States, but of his tribe).

107. See Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 KAN. L. REV. 713, 719-21 (1986) (arguing that federal actions dispossessing Indian tribes from their lands during 19th century and attempting to force tribal people to assimilate should be characterized as genocidal in impact).

during the period of the late nineteenth and early twentieth centuries known as the Allotment Era.<sup>108</sup>

Of the actions during most of the nineteenth and even the twentieth century—large-scale takings of property from groups and awarding it to individuals<sup>109</sup> or taking of tribal money and giving it to missionaries to educate the Indians<sup>110</sup>—none caused any blip on the constitutional radar because it was so convenient at that point to justify these actions by asserting: “Well, this isn’t a race problem, because we are not dealing with a racial classification.”<sup>111</sup>

In the 1970s, the Burger Court made that very explicit in an affirmative action case, saying that giving out affirmative action to Indians in the BIA is not a racial classification.<sup>112</sup> It’s a political classification.<sup>113</sup>

But then at the same time, the Court began to see that exercise of political power by Indian tribes was going to cause some more problems. So the Rehnquist Court has begun redrawing the boundaries of Indian reservations in a way that is, in my opinion, designed to take white people out from under tribal political authority.

I can’t go through all the cases, but that is my reading. Justice Rehnquist began this process in two cases, *Rosebud Sioux*,<sup>114</sup> and the *Oliphant*<sup>115</sup> case, by basically saying that Indian tribes can’t govern non-Indians, and we’re either going to redraw the physical boundaries of the reservation, or we’re going to explicitly say, “You can’t have jurisdiction over non-Indians,”<sup>116</sup> as they did.

108. See generally ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW: CASES AND MATERIALS* 147-53 (3d ed. 1991) (describing impact of assimilation on Indian people and allotment on tribal land holdings).

109. See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-66 (1903) (upholding congressional power to abrogate treaties with Indian tribes without payment of compensation and allot tribal land without tribal consent).

110. Cf. *Quick Bear v. Leupp*, 210 U.S. 50, 78-79 (1908) (upholding use of tribal trust money to pay for mission schools as not violating federal statute barring use of public money for sectarian schools).

111. See Joseph Williams Singer, *Legal Theory: Property and Sovereignty*, 86 NW. U. L. REV. 1, 29-30 (1991) (criticizing Court’s adoption of rules of formal inequality, including rule characterizing taking of property from group and transferring it to individuals as not taking of property for which just compensation must be paid).

112. See *Morton v. Mancari*, 417 U.S. 535, 553 (1974) (holding that employment preference for American Indians by Bureau of Indian Affairs was not racial classification, but rather political action to further Indian self-government).

113. *Id.* at 553 n.24.

114. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

115. *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978).

116. See *id.* at 195 (holding that Indian tribal courts do not have criminal jurisdiction over non-Indians); *Rosebud Sioux Tribe*, 430 U.S. at 587 (finding Congress could unilaterally diminish boundaries of Indian reservation).

So it's back and forth. Indian tribes are characterized as political entities when it hurts Indian tribes; they are characterized in racial terms when it hurts them. And I think that Indian people have begun to recognize these racialized aspects of Federal Indian law and to become much more aware of the commonalities that they have with other racial minorities.

DEAN RASKIN: We have all of these groups in American society who have been, alternately, visible or invisible at different points in our history, from an official perspective or a systemic perspective.

Asian Americans, Latinos, Hispanic Americans, Native Americans—to what extent does their experience teach us something different about this language of color-blindness?

You seem to be suggesting now that color-blindness is a fiction. It's an invention that has nothing to do with the actual history of the country. But does it mean that it's not an ideal that should motivate us?

For example, I'm thinking back to Frank's point about affirmative action for white people. It might be that the conservatives who are now promoting color-blindness and denouncing affirmative action might turn around if Bob's coming majority of color in fact materializes.

Should there be affirmative action for white people? Is that something we should think about, where whites are in the minority? Or do we in fact follow Justice Scalia and in effect say: "Well, let's just get away from the whole business of even recognizing race?"<sup>117</sup> What can we learn from the perspectives of people who are not caught up, necessarily, in the black-white dichotomy?

Stuart, if I could come to you on that?

MR. ISHIMARU: There has been ups and downs of where these other groups have been in the process. Not being a historian, but knowing where some of the litigation has been over the years, there have been people in other minority groups who have been playing in the legal field.

And if you look back at the early part of this century, in looking at cases brought by Asians, for example, there's a whole school of cases. And you learn this during various coursework you take during school.

In the last fifteen or twenty years there has been a maturation in the political process, and a development of institutions here in

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117. *See Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2118 (1995) (Scalia, J., concurring in part and concurring in judgement) ("Government can never have a 'compelling interest' in discriminating on basis of race in order to 'make up' for past racial discrimination . . . . In the eyes of the government, we are just one race here. It is American.").

Washington, that deal with issues facing Asians, Hispanics, and other minority people.

That has brought about a change, I think, in the whole political dynamic, in the voting rights area, in equal employment area, in the fair housing area, as people are dealing with new issues, issues that have gone beyond black and white.

You will see more of that as time goes on. You know, as the population shifts, whether you'll see the demographic changes so whites are in the minority. You have to look then, I think, at whether whites face barriers to advancement, in fact.

And I think when people in the political debates today talk about barriers, they don't always look at whether minority people are in fact being excluded. They instead say, "Let's go to this color-blind ideal."

I believe it should be an ideal. But the real question is, do we have it yet? And if we don't have it, how do we get there? That's something that has not been fully debated on Capitol Hill. The ideal is thrown out there, and everybody sort of jumps back and says, "Yes, we want to get there."

But the next question of how we get there really has not been debated yet. And in the rush, as we've seen, to change in the last nine months or so, on Capitol Hill, the reasoned debate that one would hope for hasn't been happening, but hopefully will.

But you have to ask these questions. Do people really have an equal shot at opportunity? And, how do we look beyond the two groups that we've been looking at historically, certainly over the last forty or fifty years, black and white? How do we expand this to new groups and new people who have different experiences that don't always track the framework that's been laid out?

DEAN RASKIN: Bob?

MR. CHANG: I want to follow up on a comment that Stuart just made about the idea of whites as a minority and this idea of the coming majority of color.

It already exists in many geographic and political areas. Most of our major cities have majorities of color. The idea of a majority of color came up in *Croson*,<sup>118</sup> which dealt with minority business set-asides by local governments. Justice O'Connor's opinion expresses the skepticism about what happens when a majority of color votes in remedial measures that benefit them.

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

She cites approvingly John Hart Ely,<sup>119</sup> who states that when whites do things that benefit themselves, then we should be suspicious of that; but equally, when people of color do the same thing, then we should be suspicious of that.<sup>120</sup>

So it seems then that minorities are left depending on white beneficence. That's a real problem. It creates real challenges for the current political process.

DEAN RASKIN: In the closing decision, the Richmond City Council, which was majority black, set aside thirty percent of public contracts, construction contracts, for minority-owned businesses.<sup>121</sup>

PROF. NEWTON: I think this has now pretty much been said. But I would focus on actual subordination of whites at a time when a community of color in fact has the majority. I would focus on the impact of what they're doing to these white folks, instead of just saying, "The Richmond City Council is majority black." They're setting a thirty percent set-aside. They can't do that.

I would say, what is the impact? Is the set-aside working? How is it redressing the past? And what is the extent of the impact on whites, and how is this power being exercised for evil purposes?

DEAN RASKIN: Phil?

MR. NASH: To take us back through history one more time, if you look at Asian-American history specifically, we have as a group helped to shape American law in a way that's not generally understood in most law schools.

If I can take just one second to review a couple of cases. If you go back to the time when there was a separate-but-equal situation in this country after *Plessy v. Ferguson* in the late nineteenth century, you had people like Gong Lum trying to put his daughter into a school.<sup>122</sup> Which one did he try to put her in? Not a black school—in a white school.<sup>123</sup>

Here officially the government said, it's separate but equal. Somebody on the ground said, "Excuse me. I can see they're not equal." It's very clear he wants to go to one school when his daughter Martha is not able to.

But there are a number of other cases. We have the case of Mr. Thind, Mr. Ozawa, and Mr. Toyota, and a number of people who

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119. *Id.* at 496 (citing John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 732-33, 739 n.58 (1974)).

120. *Id.*

121. *Id.* at 747-48.

122. *See Lum v. Rice*, 275 U.S. 78, 94 (1927) (holding that high school's decision to deny admission to Chinese girl did not violate Fourteenth Amendment).

123. *Id.* at 80.

tried to be defined as white, not because they're ashamed of who they are, but because they realize there are advantages to being white in this society.<sup>124</sup>

So Asian-American history, I think, is very instructive in helping us to see the true nature of the separate-but-equal, as one of the legal fictions that we've dealt with in this country.

The second point I'd like to make, getting back to the question that Stuart left us with, is "how do we get there?" How do we get to the place we want to be?

My reading of history, informed by people like Derrick Bell, Dudziak, John Torok, a number of people who have been looking at it, is something called interest convergence.

Often what has happened historically is, when it is something in the interest of the dominating groups in the society, we get social change. So if you look at something like *Brown v. Board of Education*, it doesn't happen out of nowhere.

Yes, Rosa Parks sat down on the bus. That's a fact. But on top of that, we had things like the Bandung Conference taking place.<sup>125</sup> We had a lot of other issues taking place, where this country was concerned, where the leaders of this country were concerned about the rise of communist threats around the world. They were trying to make an impression on people by saying, "Yes, we are free and everybody loves each other. And, whoops, by the way, we've got segregation here. What are we going to do about that?"

So this interest convergence sometimes has led to changes in the law that I think are very striking, particularly if you look at Asian-American history, to the extent that Professor Bell has studied African-American history as well.

PROF. DAVIS: Let me start by saying that I, as a black woman, am a very proud beneficiary of affirmative action. Regarding this panel, I want to pick up on some of the things other people have been saying.

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124. See *Toyota v. United States*, 268 U.S. 402, 411 (1925) (holding that citizens of Philippines were not eligible for naturalization because they were not "aliens" within meaning of naturalization statute); *United States v. Thind*, 261 U.S. 204, 213 (1923) (holding that Hindu person was not "white person" under Naturalization Act, which permitted free white persons to become naturalized citizens of United States); *Ozawa v. United States*, 260 U.S. 178, 198 (1922) (holding that person of Japanese race, born in Japan, was not "white person" under Naturalization Act).

125. See No-Hyoung Park, *The Third World as an International Legal System*, 7 B.C. THIRD WORLD L.J. 37, 45-46 (1987) (describing history behind and purpose of 1955 Bandung Conference, which created awareness of need for economic cooperation among Third World nations).



First of all, there is importance in thinking of the racial dynamics of the country as white supremacy versus the more neutral term of racism.

That's important, because as Frank was saying, when we look at efforts in California and across the country to divide people of color and to pit us against each other, it's never any group of color that benefits. It's always white people.

So I think it's very important that we think of the racial dynamics in terms of white supremacy. The black-white paradigm is an intriguing piece of white supremacy. Although I am black, I will not defend it because black people certainly didn't set up this paradigm. You know, we must refuse to defend it.

But I think the larger question here is, where does the paradigm come from? As Phil very accurately pointed out, this paradigm has force. Other people of color have tried to argue their differences from black Americans so that they won't be treated like black Americans. *Legally*, it's a perfectly defensible strategy.

Unfortunately, in the current *political* context, it's had some really detrimental effects particularly as far as doing cross-cultural organizing.

But where did this paradigm originate? Where I've been able to trace it to is a very early case, *Hudgins v. Wright*.<sup>126</sup> I think it was in the very early 1800s, and this has been written about by Professor Lopez in *The Harvard Civil Rights and Civil Liberties Law Review*.<sup>127</sup>

In *Hudgins v. Wright*, a master was claiming a woman as his slave, and indeed he had owned her, had possessed her and her children for many years. And she was able to somehow get herself into a situation where she could bring a suit for her freedom. Her claim was that she was not a slave because she descended from free Indians, and had been wrongfully enslaved.<sup>128</sup>

Well, the legal issue the court had to resolve was, who had the burden of proof? Did the burden of proof lie on the claiming master to prove that this woman—I believe her name was Hannah—that Hannah was his slave? Or did the burden of proof rest on Hannah to prove somehow that she was free? In this time period, you can imagine that proving something like this would be very difficult.

The court came up with a very interesting analysis. The court decided to allocate the burden of proof according to how Hannah

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126. 11 Va. (1 Hen. & M.) 134 (Sup. Ct. App. 1806).

127. Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

128. *Hudgins v. Wrights*, 11 Va. (1 Hen. & M.) 134 (1806).

looked. If the adjudicating party, the judge, determines that you look white.<sup>129</sup>—and the judge then went through and described how white people looked to him—“If you look white, then the burden of proof is on the claiming master, and the presumption of freedom is on your side as a slave. If you look Native American”<sup>130</sup>—and then the judge went through and described what it meant to look Native American, jetty black hair, copper skin, prominent nose,<sup>130</sup> “then the burden of proof is on the claiming master.” “If you look African, then the burden of proof is on the slave.”<sup>131</sup> And he went through and described how it is that Africans looked.<sup>132</sup>

This is the earliest I can trace the black-white paradigm. In this case, Hannah won because she was able to demonstrate that she looked Native American, and she was able to demonstrate that her ancestors were Native American.<sup>133</sup> It’s a classic case of someone wanting to distinguish herself from being black American, for obvious reasons.

The paradigm has really put us in a current situation in which there is a lot of hostility and tension between groups of color. But it’s very important that we remain historically grounded because one of the things the Rehnquist Court so excellently does—as discussed in the last panel—is to claim to be doing original intent, while remaining ahistorical.

I want to talk briefly about some of the other historical parallels between African Americans and other groups, that have contemporary meaning. When I looked at Proposition 187, and in particular in the reporting requirements—public officials are required to report people suspected of being undocumented workers<sup>134</sup>—I can’t help but think back to the slave patrol laws, in which any white person was authorized to stop anyone suspected of being a slave, and demand papers demonstrating freedom.<sup>135</sup> If the person did not have their papers on them, they could be jailed, imprisoned, and returned to whoever claimed them as a slave.<sup>136</sup>

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129. *Id.* at 139-41.

130. *Id.* at 140.

131. *Id.* at 141.

132. *Id.* at 139-40.

133. *Id.* at 43.

134. See *supra* note 93 and accompanying text (providing that public school officials, public health care providers, public social service providers, and law enforcement officials must report suspected undocumented aliens to U.S. Immigration and Naturalization Service).

135. See Paul Finkelman, *Symposium: Criminal Law, Criminal Justice, and Race*, 67 TULANE L. REV. 2063, 2068-69 (1993) (discussing presumption of guilt that allowed white citizens to demand from black persons papers demonstrating their freedom).

136. *Id.* at 2069.

With this background in mind, how exactly does the reporting requirement of 187 function? How do we determine who's going to be reported? And keep in mind here that those suspected of being undocumented workers, are going to be those people who *look like* they may have come from "someplace else," people who *look like* they might be Latino/a, people who look like they might be Asian.

I want to stress that Black Americans are not going to escape from this. When I lived in San Francisco, people routinely thought that I was Latina. We will have people being judged on skin color, accent, surname. This is going to have an impact on every person of color in California. They will now have a burden of proving that they are in fact documented. Every non-white is now suspected of being foreign, unless they can prove otherwise.

The only other point I want to raise is that, at the turn of the century, during the height of the racial exclusion cases against Asian Americans<sup>137</sup>—primarily Chinese Americans, subsequently Japanese Americans, and then litigation around other Asian Americans—the actual justifications for excluding Asian Americans were economic, to protect white workers.

However, the rhetoric that the U.S. Supreme Court used, and that other courts used, was the same rhetoric of racial purity and national purity that was used to justify the antimiscegenation statutes in the South that prevented blacks and whites from marrying.<sup>138</sup> So again, the rhetoric of white supremacy is consistent.

I really am happy to be a member of this panel because we don't seem to have any nationalists here among us. But what I personally feel is that in order for all groups of color to continue forward movement—first to stay where we are—and then hopefully to continue to move forward, we really are going to have to find ways to, as Professor Chang always says to me, negotiate the politics of difference effectively. This includes finding ways to stay historically grounded without allowing that history to divide us.

DEAN RASKIN: Thank you.

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137. *See, e.g.,* *Lees v. United States*, 150 U.S. 476, 480 (1893) (upholding constitutionality of act imposing penalties for assisting or attempting importation of illegal aliens); *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) (affirming absolute power of Congress to exclude aliens); *Chae Chan Ping v. United States*, 130 U.S. 581, 603-04 (1889) (upholding act prohibiting Chinese laborers from entering United States despite fact that it violated treaty with China).

138. *See* *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that statutes aimed at preventing interracial marriages based solely on racial classifications violated Equal Protection and Due Process Clauses of Fourteenth Amendment); *see, e.g.,* VA. CODE ANN. § 20-58 (assigning punishment for leaving state to evade miscegenation law); *id.* § 20-59 (defining punishment for violation of § 20-58 as confinement for "not less than one nor more than five years").

Alexandra Natapoff's article, *Trouble in Paradise: Equal Protection and the Dilemma of the Interminority Group Conflict*<sup>139</sup> contends that the idea of color-blindness does not fit either with constitutional requirements or the nation's history. What we call multi-culturalism might just be the newest version of good old-fashioned Madisonian factionalism. This might be the real American creed.

Alexandra, would you like to inject something into this discussion?

MS. NATAPOFF: Thank you. I'd like to pick up on what Professor Davis said, especially with the eye toward cross-cultural and multi-racial organizing. And I take it this was discussed earlier this morning, that the notion of color-blindness really puts people of color in all different racial groups at a competitive disadvantage.

On the one hand, the Supreme Court has said in its voting rights cases that race is essentially an illegitimate basis for interest group politics.<sup>140</sup> African Americans and Latinos cannot go to their legislatures and lobby for a race-based legislation. People of color can't organize the way farmers organize or the way other groups organize, on the basis of interest group.

That prescription really sets aside the notion of racial interest group politics and identity politics as something particularly bad, and particularly set apart from the traditional notion of competition in the political marketplace. But that is really at odds with the Court's professed desire to assert a color-blind standard.

One can imagine, if our system were truly color-blind, that different groups of color, for example, different Asian subgroups, as Frank Wu has written about,<sup>141</sup> might want to assert different interests from other members of their larger ethnic group or racial group. But the Court has said that's illegitimate.

That really puts groups of color in a bind. On the one hand, they're not permitted to organize around group-based political interests. On the other hand, the Court has also said, "What is available to you as a group? Remedies for race discrimination, affirmative action, the Voting Rights Act. But we're going to make

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139. Alexandra Natapoff, Note, *Trouble in Paradise: Equal Protection and the Dilemma of Interminority Group Conflict*, 47 STAN. L. REV. 1059 (1995).

140. See *Miller v. Johnson*, 115 S. Ct. 2475, 2843 (1995) (holding that racial and ethnic classifications are inherently suspect and call for "the most exacting judicial examination"); *Shaw v. Reno*, 113 S. Ct. 2816, 2825 (1993) (holding that redistricting that is so bizarre on its face as to be "unexplainable on grounds other than race" is subject to same scrutiny as other laws that classify by race).

141. See generally Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225 (1995).

the burdens of proof so heavy that you're not going to even be able to get the benefits that we claim that you're entitled to."<sup>142</sup>

So on the one hand, you can't play politics as usual, on the other hand, you can't get remedy for the discrimination that the Court has made it harder and harder to show.

I think that it really threatens to undermine what might otherwise be natural competition and natural interaction, and the development of a more equal multi-racial and multi-cultural society and polity, because the Court puts so much pressure on racial groups to justify their ability to operate in a different sphere.

For those of us who are interested in organizing across lines of race and ethnicity, the Court has done a huge disservice.

DEAN RASKIN: Can you just explain how that might work in concrete terms?

MS. NATAPOFF: In San Francisco for example—and Selena Dong has written about this<sup>143</sup>—there are interesting examples of highly multi-cultural and multi-racial situations where you have, for example, school systems where the issue is no longer merely black or white but many groups vying for essentially a limited good, a scarce good, whether it's space in good schools, or, like *Bakke*, spaces in the institutions of higher education.

In those instances, where the issue of race has led us to carve out certain rules about the allocation of scarce goods, we have affirmative action programs, we have magnet schools, we have remedies for segregation based on a recognition of the detriment that race has played in allocating those goods. The burden is now on groups of color to compete with each other for a shrinking piece of the pie, whether it be space in these schools, or jobs, or set-asides, or any other good that was initially redistributed on the basis of inequity and past discrimination.

I think it plays out very concretely in these tensions. On the one hand a racial remedy has been put forward in order to remedy discrimination. On the other hand, different racial groups are now

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142. See, e.g., *Johnson v. DeGrandy*, 114 S. Ct. 2647, 2658 (1994) (holding that plaintiff must show history of discrimination reflected in voting bloc behavior in order to prove that voting districts deny equal political opportunity); *Holder v. Hall*, 114 S. Ct. 2581, 2586 (1994) (holding that voting practice may not be challenged under Voting Rights Act, § 2, where there is no "objective and workable" benchmark by which to evaluate that practice); *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986) (holding that claim of vote dilution requires three factors: (1) that minority group be sufficiently large, and geographically compact to form majority in single-member district; (2) that group must be politically cohesive; and (3) that white majority vote as block to defeat minority candidates).

143. See Selena Dong, Note, "Too Many Asians": *The Challenge of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action*, 47 STAN. L. REV. 1027, 1030 (1995).

forced to make claims against each other, and to distinguish themselves from each other in order to get a piece of what is admittedly a very small pie.

DEAN RASKIN: Frank.

PROF. WU: If I can just react to the notion of some form of affirmative action for whites, and whether that would be constitutionally permissible or desirable, I think it's important to trace how Asian Americans got drawn into this debate.

It's impossible for Asian Americans to stay neutral. They shouldn't try to stay neutral. Race is highly charged. You can't find a neutral place in the debate. But if you look at how Asian Americans are drawn in, you can see how they've also been used.

I should preface this by saying that you can be very ambivalent about affirmative action as an Asian American or white or just in general. You can be ambivalent about affirmative action and yet still be appalled by the Supreme Court's recent decision in *Adarand*.

You can have doubts about whether affirmative action is the best thing to do, and wonder whether there may be other means to advance racial justice. But what the Court has done, and what conservative commentators urge is that we give up the effort entirely, that instead we pretend that there aren't appreciable problems of racism and poverty that are linked.

But how Asian Americans get drawn into this, in the earliest Supreme Court cases, in *DeFunis v. Odegaard*,<sup>144</sup> the now virtually forgotten 1974 case, Justice Douglas, in his separate opinion, the very strange opinion in which, in a footnote, he defends the internment decision—this is in 1973, he defends the internment decision as correctly decided.<sup>145</sup> I believe he was the last member of the Court who decided those internment decisions.

DEAN RASKIN: You're referring to Japanese-American internment?

PROF. WU: During World War II, *Korematsu*<sup>146</sup> and two other decisions.<sup>147</sup>

Justice Douglas then writes, and I quote: "[N]o Western state which can claim that it has always treated Japanese and Chinese in a fair and

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144. 416 U.S. 312 (1974).

145. *DeFunis v. Odegaard*, 416 U.S. 312, 339-40 n.20 (1974) (Douglas, J., dissenting) (stating that, in retrospect, it is easy to denounce decisions upholding internment policy, but at time, "extreme war conditions" existed).

146. *Korematsu v. United States*, 323 U.S. 214 (1944).

147. See *Ex parte Mitsuye Endo*, 323 U.S. 283, 300-01 (1944) (holding that evacuation of citizens of Japanese ancestry was allowable in war conditions); *Hirabayashi v. United States*, 320 U.S. 81, 101-02 (1943) (holding that Congress could prescribe curfew for citizens of Japanese ancestry as emergency war measure).

even-handed manner.”<sup>148</sup> You would think that he would have it written out that he would support affirmative action, specifically affirmative action for Native Americans.

He goes the other way. He says, “Nor will the problem be solved if next year the law school included only Japanese and Chinese, for then Norwegians and Swedes, Poles and Italians, Puerto Ricans and Hungarians, and all other groups which form this diverse Nation would have just complaints.”<sup>149</sup> That’s his reasoning there. That’s the first time Asian Americans appear in the legal discourse on affirmative action.

The next time is in *Bakke*, where there in a footnote—and this is it. This is really it, these two very brief mentions. In a footnote in *Bakke*, Justice Powell’s opinion, he decides that the U.C.-Davis program that was being challenged by *Bakke* is “especially curious”—that’s his phrase—“especially curious in light of the substantial number of Asians admitted through the regular admission process,”<sup>150</sup> and that’s it, just a passing reference.

So now, twenty years later, what has happened? Suddenly Asian Americans have become prominent in the affirmative action debate. Newt Gingrich, Pete Wilson, the organizers of CCRI, have all extolled the abilities of Asian Americans.

They make two arguments. The first is, “Well, look at these Asian Americans. They’re doing well, they’re a minority. They’re not white. If they can do well, so can African Americans. You don’t need affirmative action.” So that’s the first argument.

The second argument is, “Well, not only that, affirmative action really hurts Asian Americans because if you didn’t have affirmative action, you’d have so many more Asian Americans at Berkeley and other top schools,” and that’s another reason why Asian-Americans should oppose affirmative action.

I would like to suggest the contrary. What’s being done here is that Asian Americans are just being used to attack affirmative action because really the concern, as it always has been, is about affirmative action and its impact on white males.

Let me give you a recent example. Charles Krauthammer, writing in *The Washington Post* on September 1st, on this case that recently occurred where two Asian children wanted to transfer from one

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148. *DeFunis*, 416 U.S. at 339 (Douglas, J., dissenting).

149. *Id.* at 340 (arguing that applicants should be treated in “racially neutral way” otherwise all other groups would have just complaints).

150. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 309 n.45 (1978).

school to a different school with a special language immersion program, and they weren't allowed to.<sup>151</sup>

The school board subsequently changed its mind.<sup>152</sup> But meanwhile, before that occurred, Charles Krauthammer wrote this very interesting column. He goes on and on as most columnists do about how terrible affirmative action is for Asian Americans, listing examples like admission quotas at U.C.-Berkeley.

Then strangely, after devoting an entire column to the argument that Asian Americans are hurt by affirmative action, this is his point. His point really is that affirmative action is bad because its principle has been "stretched, diluted, and corrupted beyond recognition, . . . to diversity for all, except, of course, white males."<sup>153</sup>

So he goes from this big long argument about how Asian Americans are hurt, to his conclusion. Really, who's hurt? Well, white males.

But you can't have it both ways. Either he really means that Asian Americans are hurt, and something ought to be done about that, or he means white males are being hurt. But instead, what he tries to do is use Asian Americans, this convenient prop, to say, "Well, look here, here's a racial minority that's being hurt like white males. And that shows how white males are being hurt."<sup>154</sup>

That brings us sort of full circle to this idea of affirmative action for white males or for whites because what's happened is now people are saying, "Well, Asian Americans, they're doing so well, they're competing unfairly. It's unfair that Berkeley is thirty percent Asian American. Something's got to be done, or soon there won't be any whites at U.C.-Berkeley."

So we move through this image of Asian Americans as this exemplary racial group, first from the argument that this image shows why affirmative action is bad. Then the argument of why, because Asian Americans are so successful and so frightening, why you have to have affirmative action for whites.

So I think, as you observe that transition, you realize that, again what's being done here is, Asian Americans are being drawn into this debate. Whether or not Asian Americans are in fact in some way harmed by affirmative action, whether they should support it or not, they should at least oppose people who have never cared one bit

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151. Charles Krauthammer, *Counting by Race*, WASH. POST, Sept. 1, 1995, at A23.

152. Dan Beyers, *Montgomery Reverses Itself, Lets Asian Girls Switch Schools*, WASH. POST, Sept. 14, 1995, at A1 (stating that because school board did not want to limit educational opportunities for students, two Asian girls would be allowed to transfer schools).

153. See Krauthammer, *supra* note 151, at A23.

154. See Krauthammer, *supra* note 151, at A23.



about discrimination against Asian Americans, suddenly standing up and pointing at them to use them to drive a wedge.

DEAN RASKIN: Frank, let me push you on this for a moment. We did invite Charles Krauthammer to be here, and he was unable to come. But he might answer something like this.

There's a real division within the Asian-American community about the question of affirmative action. Just as there are so-called innocent whites who are damaged by affirmative action programs, there appears to be evidence that there are a lot of innocent Asian Americans who have benefited, rather who are disadvantaged by affirmative action.

Wouldn't they in fact benefit by dismantling the idea of racial preferences entirely, and going to a system of neutral merit?

PROF. WU: I'll give you several answers to that. First, Asian Americans who have that view should realize that they too have benefited directly from the civil rights movement, and they owe a debt of gratitude for the legal reforms that have occurred, of which affirmative action is one, one of many that protect them, as they protect whites as well.

The other response I would give is, well, we don't have a color-blind meritocracy, and Asian Americans certainly should be aware of this.

Let me address both points. Color-blindness—if you're really color-blind, if you really want to be color-blind, you can't also say, "Well, by the way, look at those Asian Americans, aren't they doing well?" If you're color-blind, you can't point at Asian Americans as a group. So the argument sort of self-destructs.

If you believe in color-blindness, you can't also believe that Asian Americans are this wonderful racial group that is crippled by affirmative action. It's internally inconsistent to believe that.

Not only that, you see in the efforts to close the borders and to prevent more people from coming here—and of course, the people coming here are predominantly today non-white—you can't believe both that we should have a color-blind society, and oh, by the way, we should keep out all these non-whites, and just not let them join the society. It's also inconsistent there.

You see, this color-blindness is not really something that's being sincerely proposed.

If anyone doubts this, I'll give you a very concrete example. Probably the most prominent Asian American today is Judge Lance Ito. Native-born, he's fully assimilated. He speaks English without an accent. He wears an impressive robe, and he's presiding over the trial of the century.

Okay. So this is someone you think would be respected. Yet, he's continually mocked in newspapers, on TV shows, radio talk shows, by members of the Senate, for his racial ancestry, for this idea that, well, really he should go back to where he came from, which, for anyone who knows, is an internment camp.

So it's really quite ironic. There is an example of how Asian Americans are not regarded in this color-blind world, whether or not you have affirmative action. They're nonetheless picked out and singled out.

Nor are Asian Americans, nor do they benefit from a meritocracy. I mentioned the college admissions scandal. What happens when Asian Americans start doing really well by meritocratic standards? College admissions officials change the meritocratic standards.

If Asian Americans think that affirmative action is the major impediment to their suddenly becoming, say, fifty percent of the entering freshman class at the University of California at Berkeley, or twenty percent of the class at Harvard, or twenty percent of the class here at American University, they're in for an unpleasant surprise because if affirmative action is abolished, I'll bet anyone here any amount of money they'd like to bet that Asian Americans will not suddenly assume the numbers you would think that they would assume under meritocratic standards because they would just overwhelm college campuses.

DEAN RASKIN: Adrienne?

PROF. DAVIS: I also want to point out that it's disturbing to hear Asian Americans talked about as a monolithic group. What this does is mask the fact that affirmative action does benefit many Asian Americans. There are many people who tend to think, imagine, that all of the Asian Americans who are here have been here for a long time, and have achieved the mode of success that Judge Ito, for instance, has.

And we forget that there are still new immigrants coming all the time, and many of them are people for whom English is a second language and many are desperately poor.

These are people who work very hard, and there are people who deserve to have their hard work, and perhaps a language disadvantage, taken into account when they apply to colleges and other benefits. So Asian Americans also can and do benefit from affirmative action.

Sometimes there's a tendency to only focus on second, third, fourth-generation Asian Americans as the only Asian Americans in the country. And that's not a mistake. That's the rhetoric of the Newt

Gingriches in the world who want to point to fully assimilated people as the model of what minorities should be doing.

MR. NASH: Three very fast points.

First of all, Professor Okihiro up at Cornell has documented very clearly how there has been throughout the history of Asian Americans a moving back and forth from the notion of "yellow peril" to "model minority," back to "yellow peril."<sup>155</sup>

So we have to be careful. Anything that treats us as something special—you've got short hair, eyes that go a certain way, you're good in math, if you have hair that's a certain length—any time you can characterize people a certain way, it has its bad side and its good side. Asian Americans are very aware of that.

A second important point is that we are in the midst right now of a reconsidering of our census categories. And the Census Bureau and the Office of Management and Budget are trying to decide right now whether to include a multi-racial census category.

The thing that's very dangerous about this notion, myself being multi-racial—I imagine just about everybody here is multi-racial if you go back historically. But the thing that's very important is, we want to be able to honor every part of your person, no matter what your geographic origin, what your ancestry was like, your sexual orientation, your racial origin.

But it's important that we have monitoring and enforcement of some of the laws that we've had just in the last thirty years. If we start to inject a multi-racial category into the existing five categories, which admittedly are very flawed, the history of racial categorization in this country will be even more obscured.

For example, Asian Indians, in 1920s, '30s, and '40s were characterized as Hindu, and then in the 1950s and '60s were characterized as white.<sup>156</sup> Since 1970, they've been considered Asian and Pacific Islanders, and that's just one group.

So the census categories admittedly are flawed. But I think it's very important that we, law students, lawyers, and other Americans be very

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155. See GARY Y. OKIHIRO, MARGINS AND MAINSTREAMS: ASIANS IN AMERICAN HISTORY AND CULTURE 118-48 (1994) (discussing contradictory, but enduring, images of Asians as "yellow peril" and "model minority" in European and American consciousness).

156. See NATIONAL RESEARCH COUNCIL, MODERNIZING THE U.S. CENSUS 142-45 (1995) (discussing history of and changes in racial and ethnic categorization in U.S. Census over 200 years); see also *United States v. Thind*, 261 U.S. 204 (1923) (holding that although Thind, who was of Indian ancestry qualified as "Caucasian" in anthropological terms, he did not qualify as "white person" under common terminology). See generally Neil Gotanda, *A Critique of "Our Constitution is Color Blind"*, 44 STAN L. REV. 1 (1991) (criticizing current determination of racial categories).

Careful about this multi-racial census category because I want to be able to characterize myself any way I can.

At the same time when I walk into a grocery store, I may be seen as somebody who maybe needs to have my green card checked, or something else, despite my having been here throughout my whole life, and being an American citizen. I want to have the protection of those laws, and the monitoring that Stuart Ishimaru and other people in the Justice Department are doing to help us.

So we do need to have the five existing categories, at least for the time being. If we want to have the multi-racial category, that's not going to be included with those five, not adding up to 100%, that's fine.

DEAN RASKIN: Just to clarify that, you're saying it would be okay to have the original five, then an option to check additionally the multi-racial category?

MR. NASH: Right. So those five categories, black, Asian, Latino, Native, and white, could add up to 100%. Then if you also want to check off if you're multi-cultural, that's fine.

A final point I want to make is one that was made by many people before, but I just want to repeat it. Affirmative action, like many other things that we enjoy in this country, is flawed. But some people are saying, "Let's get rid of it."

Well, if you look at democracy, democracy is flawed. Voting rights in this country are flawed. Defense procurement procedures are flawed. I would say that affirmative action is flawed, but we don't throw it out. We're not throwing out any of these other procedures.

I think we really have to be strong as Asian Americans and other people in our defense of affirmative action.

DEAN RASKIN: Let's pose this question. To the extent that a group is historically oppressed, subordinated, or marginalized, the declaration of racial solidarity and racial pride is a progressive thing. It helps them to break out of a kind of cage.

But to what extent—and this follows up on your point, Phil, about the census—to what extent is race now a prison that everybody is trapped in? To what extent does race keep us all in a cage, and to what extent should we follow those people who are willing to declare themselves multi-racial and simply get rid of the whole concept of race?

Bob?

MR. CHANG: The discourse going on now about the multi-racial categories offers a unique opportunity to see racial formation actually

happening. It ruptures the present racial categories in very interesting ways.

Angela Harris in a recent article in the forward to a symposium in *The California Law Review* tells us that we must get rid of, or lose our romantic myth of, the racial community.<sup>157</sup> For example, with Proposition 187, what does it mean that large numbers of Asian Americans and Hispanics—I'm using the official Census categories, although I should probably use Asian and Pacific Islanders—voted in favor of Proposition 187? I think what we see then is that identity, as we've characterized it in its essential form, is both over-inclusive and under-inclusive. And I want to bring this back then to this idea of, okay, well, what is it that we're trying to do? What vision of America are we trying to go toward? And also then negotiating this thing of getting beyond black and white?

What I really want to talk about is politics because that's what it is. It really is politics. We need to understand identity is political, not essential. So I want to begin articulating a people-of-color subject position, a people-of-color identity that comes with certain political commitments because that's the thing that's happened.

These categories have had political content taken away from them. For example, history shows us that the term "black" came back into the discourse in the '60s as a term of racial pride. But it also had political commitments. When you said, "I am black," that meant something.

Okay, let's take another context. In Britain, black has been constructed as an Afro-Asian category by certain people on the left. As an Afro-Asian category, then, people who have been identified as black have a deeper identification with those others who are, perhaps not within their narrow cohort, whether it's Pakistani, Indian, or Caribbean.

I think that's something that we need to move toward. I call this a project of radical democracy following Ernesto Laclau and Chantal Mouffe. We must deepen the chain of equivalencies between the different struggles for rights.

So when we talk about race throughout this discussion, I've been bothered by the fact that gender and sexual orientation have not come up. And if we're going to have a real progressive political agenda, we need to show the inter-connectedness of these different

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157. Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 783-84 (1994).

forms of oppression because otherwise our progressive agenda will fail politically, ethically, and morally.

MS. NATAPOFF: Just to continue on that question, I thought it was interesting the way you posed it, to equate somehow the Court's notion or the notion of color-blindness with this notion that we're all sometimes multi-racial or multi-cultural.

There are similarities between those two concepts, but they're not the same. The differences have been brought out in this discussion, that there are different political, ideological, and cultural assumptions that go with each of those two assertions, even though in some formal sense they might seem similar.

I think it's interesting to look—and this might go to the question of why we might not want at this historical point to give up the notion of race, race specificity in the sense of categorizations.

If you look at the language that the Court has used in justifying its retreat from affirmative action, starting in *Bakke* or even all the way back to *DeFunis* and up through *Shaw* and the more recent cases, it's interesting to see that the Court discusses at some length the notion of the United States as a multi-racial polity, as a melting pot, as a land of many immigrants, many groups.

What the Court has argued is, how can you make a judgment, a moral or a legal judgment about entitlements for one group, as opposed to another. Isn't that really at the heart of what we mean by democracy, that all these groups should be able to fight it out, without so-called special preferences being given to one or another?

So, I think that the Court actually hasn't ignored multi-culturalism. It has sort of appropriated it, and said, "Well, we are a multi-racial culture and society, and therefore the special preferences that we may have at one time thought were appropriate for African Americans are less appropriate now."

I think that it is important, given this Court and the composition of the Court, and the kind of opinions that it has been handing down, for those of us who are both interested in the identity debate and interested in groups and subgroups, not only along racial, but also along ethnic and sexual orientation and other lines, to focus on the ability of groups to define themselves. At the same time, we should also be aware that that very diversity is also being co-opted and used as a way of saying that affirmative action, which is an identifiable preference for an identified group, undermines the ability of groups to compete democratically. That might be a reason, for example, why we'd be suspicious of the category of multi-racial on the census.

DEAN RASKIN: Would it be possible to defend affirmative action and other race-conscious remedies in order to rectify injustices and oppression visited upon groups in the past as a juridical matter, but still try to deny as an ethical matter the existence of different racial groups, that you can put everybody into?

PROF. WU: I'll share a personal anecdote about how we see race. I teach at Howard, which as most of you know, is a predominantly African-American institution, and historically has been so. One of the interesting things that happened to me when I took the job at Howard is that people would ask me—by "people" I mean people of all races, Caucasians, Asian Americans, African Americans—they would say, "Well, won't that be a little strange? You're going to be the first and only Asian American there. Are you worried about fitting in? Are you worried about being a minority?"

And really, it was a puzzling question, and brought home to me clearly, however we talk about race abstractly, in very concrete terms we are conscious of race and see it in certain ways we are not even aware of. And here's what I mean.

If you reflect for just a moment, if I'd gone to any other law school to join the faculty there, I also would have been the first and only Asian American at the vast majority of the law schools. And I would have been in the minority, and it would have been the same questions. But no one thinks to ask that, or very few people think to ask that.

I would suggest to you that the reason why is that because, whether or not we're conscious of it—I don't want to call it racism. It may in some instances go that far. But in other instances it may just be color-blindness in a negative sense. We just don't realize how we assume the norm, or the ideal. Or the default is toward whiteness.

So that for someone who's not white and not black to go to a white institution, well, that's a good thing, that's a normal thing, that's upward mobility. That's assimilation. But if you choose to go the other way, that's bizarre and curious and worthy of commenting on.

That's a very concrete answer to your question. How can we get beyond race while still seeing race? Or should we want to see race?

I would assert that we do. We see race in so many ways that we're not aware of, and that it's only by being conscious of it in the law and in our thinking about race that we can recognize these things.

DEAN RASKIN: Professor Newton?

PROF. NEWTON: Indians really destabilize the concept of race in so many ways. Most non-Indians don't know that Indian people have a card, a Certificate of Indian Blood (CIB) card, which they carry

around with them, and thus the phrase, "I'm a card-carrying Indian" is one that you hear sometimes when you're talking to reservation people. This is because the tribal category was racialized by telling Indian people, "Okay, you have to give us a list of who belongs to your tribe, because any moment now we're going to cash out your reservation. We're going to give the resources to the individuals."

Then that's a pretty powerful temptation to have relatively limited definitions of who belongs to the tribe. And those definitions have been racialized much more by U.S. law than by Indian people themselves.

What I think is a very exciting thing that's been happening among Native Americans in the last twenty years is a pan-Indian movement, a conscious decision to say, "I may not have a Certificate of Indian Blood card. I may not be formally enrolled in the tribe. But I have Indian roots in the community, and I think of myself as a member of this whole pan-Indian movement that is not just mired by tribe or by some such strictly blood quantum characteristics."

That's been a very interesting development.

DEAN RASKIN: Adrienne?

PROF. DAVIS: I want to start by saying, if you ask the question, should we just get away from race, what is it we're getting away from? In other words, what is race?

Phil brought up the fact that he is multi-racial. In the United States, even though we don't think of it in this way, race is culturally constructed. That means, when you look at the legal categories, they are by necessity legally corrupt categories.

I'll tell my own little anecdote. Growing up in Washington, D.C., I always had a sense of myself as African American. I never thought that I didn't *look* African American to anyone because people always *knew* I was African American. So I always assumed that's what I was, and there was no issue.

I traveled to France with my sister who has a skin tone very similar to mine. People would say, "Are you mixed?" because in France we looked like the children of people who are Algerian and white French. You know, we said, "No, no, absolutely not. We have two parents who are African American," which has meaning in the States.

When I went to Nicaragua, I became a spectacle for a week, where children on the streets playing would stop and tug on their parents' skirts and point and say, "What is she? Who is that?" I looked to them, as best I can make out, to be probably a blend of African, Miskito Indian, and Spanish, which they didn't see in the part of Nicaragua where I was.



Indeed, when I came into Nicaragua, the customs officials were very suspicious of me. I don't speak Spanish, and they thought I was trying to pull something. I've never been so relieved as when I got back to Miami, and I was back in the United States and I was black again. I've never been so relieved to be black.

But it demonstrates to me that it's only in the United States, and indeed only in certain parts of the United States, that I am clearly an African American. And what that means, in terms of our legal history of race, to be white means that you must have no traceable ancestry of color. So whiteness is actually a racially pure category.

When you contrast the fluidity of my own race with the historical obsession of race tracking in the United States, you see how absurd it all is. What is important to note is that, despite my own mixed ancestry, because I do not have one non-black parent, I am not considered multi-racial. If I already have white (and Spanish) ancestry, how could a child of mine be considered "bi-racial"? Most blacks in the country are "multi-racial." What, then, are the politics behind the bi-raciality movements, at least in the black-white context?

So the categories themselves, I think, are very, very troubling. That takes us back to the question, why have them?

Well, I'm not exactly sure what it would mean to say, "Well, let's get rid of race."

Would it mean that structurally—I attended a wonderful panel sponsored by the Hispanic law students last week, and on it one of the panelists made the really troubling point, or the statistic the Latino women with college educations earn less than white men with high school degrees. If we got rid of paying attention to race, would that go away? All it would mean is that we couldn't track it anymore.

Even though race itself is a very problematic legal and social construct, it doesn't mean that it doesn't have material significance for people's daily lives. And I think being able to pay attention to racial dynamics is extremely important.

DEAN RASKIN: As we move into our final section here, I'd like to return us to the political question.

A number of panelists have directed our attention to the fact that African Americans have been mobilized against immigration. Meanwhile, Latinos and Asian Americans have been mobilized against affirmative action. There have been very successful political and cultural strategies for dividing different communities of color.

To the extent that we see this as a damaging thing, what are the strategies for realigning the political fault lines here, and developing a different direction for the country?

MR. NASH: Realigning fault lines is something that may be a little bit beyond me, but I'll take a guess. What I think has to happen first is for everyone in this country to become aware of the history of race in this country. What that means is getting beyond the thirty-second sound bites, beyond just the glib phrases about, "We're color-blind, we love each other, blah, blah, blah."

I think it means that every one of us has to make a commitment to spend a little bit of time getting to know our own background. I don't care what your background is. Every single one of us who isn't indigenous to this country is an immigrant. Where did your family come from? What were they doing? Get to know a little bit about the struggles they went through.

See how women had aspirations, maybe as high as the men, that weren't realized. Why is that? Look at the history of racism and sexism, as Bob pointed out, and see the intersection of these different oppressions.

Once we start with that, each of us makes a commitment to getting to know a little bit about our own history. Then the next step is to look at the ways that we've worked together in the past.

I know in the little bit I've learned about Asian-American history, there are significant areas where in 1903, the sugar beet workers of Japanese ancestry and Mexican Americans got together and fought for higher wages.<sup>158</sup> But how come that's not part of our textbooks? It's always seen as, oh, these people—Latinos, Asians, blacks—they're all fighting each other.

There are significant stories. The United Farm Workers was not founded by Cesar Chavez and the Mexican Americans alone. Filipino Americans were very strong components of that. Why is this not part of our history?

We need to go back and talk to our elders, talk to other people who know something about this, and start to construct an identity that's based on reality, not based on thirty-second sound bites.

At that point, I think we have to commit ourselves to reaching out and trying to deal with the structural problems in this society, one person at a time. For me, what that means is working with one person or another person, helping them to get a job, helping them to get a scholarship, mentoring students, whatever it takes to help pull

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158. See Thomas Almaguer, *Racial Domination and Class Conflict in Capitalist Agriculture: The Oxnard Sugar Beet Workers' Strike of 1903*, 25 LAB. HIST. 325, 325-50 (1984) (discussing successful 1903 strike by Mexican-American and Asian-American beet workers).

each other along, because we're all part of a continuum. We're all part of a ladder that's come up a certain way.

All of us have been beneficiaries of affirmative action and other types of direct governmental and personal help. I think we have to commit ourselves to that. Once we've done all that, I think it's a bigger agenda of forming political third parties, looking at other things that, frankly are beyond this discussion. But I think we have to be very serious about them because they are part of changing the political landscape.

DEAN RASKIN: Alexandra, you've written something about this. Would you like to say a closing word?

MS. NATAPOFF: In a practical sense, as lawyers, I think it's important to recognize the impact that your work can have on racial relations and the ability to form coalitions.

Some interesting and very brave work that's been written about has been in the context of what might at one point have been traditional affirmative action cases, class action litigation where the attorneys have really tried to reach out beyond the initial class to try to make those cases a vehicle for organizing and communication, as well as education between different groups.

I think, given the divisiveness that racial remedy has itself become, both within communities of color, because of the pressures put on them from the outside, but also politically more generally as a way of legitimatizing, for example, the welfare reform that we're seeing now, the implications of those cases can be very positive, as well as negative.

For example, by including people in coalitions and in classes and in litigation that you might not necessarily initially consider in the traditional sense, we can learn from that litigation, and that litigation will then have a different impact on changes in the law, and the way we can perceive affirmative action and voting rights remedies.

DEAN RASKIN: Who's next?

MR. ISHIMARU: Somehow advocates need to get better at the thirty-second sound bite. These are difficult issues, but advocates need to find methods to get their message out. If there's one silver lining in this whole line of Court cases, in recent years, it's that the Court has rejected color-blindness across the board. The Court realizes these are difficult, difficult issues and often require complex solutions. But this has not been explained.

Most people frankly only have time for the thirty-second sound bite, and sometimes we as lawyers get so wrapped up in the legal arguments that we can't translate this to real people out there.

Take, for example, the Proposition 187 debate last year. We didn't do a good job in getting our message out to folks. In the end it was too little, too late. I think advocates learned from that experience. But it's a very difficult issue to have to crunch down hard issues to a thirty-second, or a ten-second sound bite. We cannot reject that as being silly politics out there.

That's the reality for most people. They're going to get their news and information from a blurb on TV or from scanning *USA Today*, and they aren't going to have the time to get it in a much more packaged fashion.

The question is, how do we break through that? How do we play in that game as well? If you're going to play, you've got to play. You can't ignore the reality you face.

DEAN RASKIN: Professor Newton?

PROF. NEWTON: Two points. First I think if you work with a particular group, you do unearth and talk a lot about the links between that minority group and others. Indians have deep links with Mexican Americans, especially, and African Americans. There was a lot of intermarriage between African Americans and Indians and tribal communities were on the underground railroad. Unearthing those things, talking about it a lot is very good.

But also, an outsider who's also an insider, somebody like me who is white, I believe that—progressive white people should be working on racial issues all the time, working with people of color all the time, but understanding that working with people of color doesn't mean you get to call the shots, which is why I think a lot of white folks, progressive white folks, are not as comfortable working in people of color communities. But to me, those are the communities that are the most important to work with.

PROF. DAVIS: I think we have to learn to make politics a litmus test for joining a political struggle, rather than identity. It doesn't make a whole lot of sense to spend all of your time trying to convince conservative African Americans that life expectancy, infant mortality, and poverty are real for black people, and that we need real concrete solutions. It makes more sense to connect with other progressive people of color, and progressive whites to do that.

It also, I think, is imperative that those of us who have the luxury of the ivory tower get more involved with our communities. It's incredibly important that we actually be there during the discussion and planning phases of how to fight back.

If we try to come in at the end when other groups of color have been identified as the problem and say, "Oh, no, you've got it all

wrong, you're targeting the wrong people," we're going to have real problems on our hands. I really commend the progressive activists who worked with the African American community in the San Francisco Bay Area to convince people that Proposition 187 was not the way to go. They said, "This is not going to help you."

So we need to be there throughout, rather than just when the crisis comes up.

DEAN RASKIN: Bob?

MR. CHANG: I think people have been talking about working with other communities, building bridges. But I think that when we do this work, we need to approach it with humility.

DEAN RASKIN: Frank?

PROF. WU: I have several thirty-second sound bites. The first is that minority does not mean black. The second is, as importantly, American doesn't mean white. And this has never been a black and white country. There have always been Asians, there have always been Mexicans, there have always been Native Americans, there have always been others.

But we're only now starting to recognize that there are these other groups out there. And the question is, what should we be doing? What should the law do?

I have two proposals. The first is building on some comments made earlier that we should understand that this is complex. Race and culture are not the same thing. There are lots of Asian Americans out there who don't speak an Asian language, and there are lots of Caucasians out there who speak Chinese and Japanese and read and write those languages fluently. Race and culture do not have to be fixed and biologically identified as things determined. They're fluid. We make them up.

We make them up on census forms and legal cases. You have the power, and we collectively have the power to redefine race.

My final point is—and this is my second solution—you want to solve these problems of race? Marry someone who's of a different race.

(Laughter.)

PROF. DAVIS: Bob, will you marry me?

DEAN RASKIN: I want to thank all the panelists for their energy and their insight this morning. You have helped to dismantle some barriers, some false constructs in our minds. I thank you for your participation.

## III. KEYNOTE ADDRESS: ANGELA DAVIS

DEAN RASKIN: It's my great pleasure and privilege to introduce my friend Angela Davis.

(Applause.)

PROF. DAVIS: Thank you, Jamin.

Race—it's an issue that we deal with every day of our lives. If we're black, white, yellow, brown, red, we encounter it, we confront it, we deal with it in some form or another almost every day.

We don't always acknowledge the issues, nor should we acknowledge it all the time, but it's always there. Sometimes it's in our conscious minds, and sometimes its presence in our subconscious minds causes us to behave and to react in certain ways.

There are so many wonderful things about race. It's the characteristic that makes us look the way we do, and yes, sometimes act the way that we do. And guess what, Justice Kennedy? People of the same race do have similar interests, and we don't feel demeaned or stigmatized by that fact.

This country is a better place because of the existence of different races and ethnic groups. It's more interesting. It's more beautiful, and it benefits us all in so many ways, intellectually, educationally, and socially. And what a pity it would be if we were color-blind. We wouldn't be able to see it, to enjoy, to learn, to benefit from the fact of race. We're not one race, Justice Scalia, nor should we want to be.

But then there are the not-so-wonderful consequences of race. When instead of acknowledging and respecting and enjoying its existence, some use it to promulgate hatred and ignorance and subjugation. When race is used to foment racism, it becomes negative and undesirable. Whether the racism is subtle or obvious, overt or institutional, it's destructive and oppressive. So it is racism, not race, that we should seek to eliminate.

Unfortunately, racism is as much a part of our lives as is race. The subtle kind and the not-so-subtle varieties seem to be more prevalent today than ever before. The subtle variety of racism that people of color seem to recognize more readily than white people is so commonplace that most people of color and white people have become almost numb to it. It's when ten cabs pass you by, no matter what you have on, or when a passenger on an airplane asks you to bring him a drink when you're walking down the aisle to your seat. Or when your liberal colleagues repeatedly remark about how articulate you are, as if they're surprised that a black person can put a sentence together.

These are all forms of racism. They may not be intentional or conscious acts of racism but they still hurt.

Then there's the subtle variety that has an even more devastating effect—the missed job promotions, the job interviews that never turn into jobs (if you even get the interview in the first place), the missed contracts, and the rejection letters from universities.

It's this type of institutional racism that fosters economic and social oppression on top of psychological harm. But these days, just when some people thought the not-so-subtle variety of racism was dead and gone, we get the Rodney King beating and Mark Fuhrman and Alfonse D'Amato—and those are just the incidents that were taped and publicized. We know that they're just the tip of the iceberg.

Despite the fact that race and racism are prevalent and alive and well, we don't talk about them at all, much less deal with them. And we have a Supreme Court that tells us that they don't exist. Or maybe the Court is saying that we should pretend that they don't exist.

In *Adarand Constructors, Inc. v. Peña*, it seems as if the Court was suggesting that if we pretend that race and racism don't exist, and if we just ignore race, eliminate laws that acknowledge racism and attempt to correct it, and just act as if things are the way we want them to be, someday we'll somehow evolve into this picture-perfect color-blind society with one race—the American race.

Give me a break. That's not even naiveté. That's intentional, pseudo-idealistic drivel. More importantly, it's disingenuous. We need to be honest about racism, and so does the Supreme Court. There's not a single issue confronting American life today that is not affected by, or in some instances controlled by, the issues of race and racism.

The issue of crime, for example. It's probably the one issue Americans are most concerned about, black and white, brown, yellow, and red. The prison industry is the fastest-growing industry in this country, and the prisons are overflowing with young African-American men.

They constitute the majority of the prisoners in this country, yet they are not committing the majority of the crimes.<sup>159</sup> Unfortunately, most Americans don't know that fact. Most Americans are unaware of the racism that's rampant in the criminal justice system. Most are

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159. See generally FEDERAL BUREAU OF INVESTIGATION (FBI), U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES (1994). Although the *Uniform Crime Reports* show that African Americans are disproportionately arrested for certain types of crimes, they do not show that they commit a majority of the crimes.

unaware of the discriminatory sentencing laws, the fact that possession and distribution of crack is penalized 100 times greater than powdered cocaine, even though they are the same drug;<sup>160</sup> the fact that most of those arrested and prosecuted for crack offenses are African Americans.<sup>161</sup>

Despite the fact that most crack users are white,<sup>162</sup> and most of those prosecuted for powder offenses are white, white affluent drug users go to the Betty Ford Clinic or go home, and young black men go to federal prison for many, many years.<sup>163</sup> That's just one example of the widespread institutional racism in our criminal justice system.

What do politicians do about this? They give us Willie Horton. They give us almost fifty new death penalty offenses. They cut education budgets and after-school programs and other preventive measures, and build more prisons—a lot more prisons.

And what about the issue of jobs? Most Americans today are working longer hours than their parents. And the money doesn't seem to go as far. Many of them are losing their jobs, as large corporations merge into larger corporations, and as others downsize and go abroad, where they exploit labor in other countries, while abandoning workers in America.

What do politicians do about that? They blame affirmative action. "It's those black people and those women who are taking your jobs," they say to white men. Never mind that these people of color and women are losing their jobs, also, to mergers and downsizing. Never mind that affirmative action primarily involves timetables and goals, and when it does involve set-asides it usually involves a very small percentage, five percent in the case of some business contracting plans, to which no one, not even white males, have a proprietary interest or proprietary right.

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160. See 18 U.S.C.S. App. § 2D1 (Law. Co-op. 1995) (treating 1 gram of "crack" cocaine same as 100 grams of powdered cocaine for sentencing purposes). See generally Jason Gillmer, Note, *United States v. Clary: Equal Protection and the Crack Statute*, 45 AM. U. L. REV. 497 (1995) (raising equal protection challenge to enhanced penalty provisions for crack cocaine by considering historical and social context in which Congress made alleged discriminatory decision).

161. See generally MARC MAUER, *THE SENTENCING PROJECT, YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM* 3 (1990) (stating that almost one in four black men (23%), between ages 20 and 29, are under some form of criminal restraint); U.S. SENTENCING COMM'N REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 36-49 (Feb. 1995) [hereinafter COCAINE AND FEDERAL SENTENCING] (concluding that race is significant factor in drug use).

162. COCAINE AND FEDERAL SENTENCING, *supra* note 161, at 38-39.

163. COCAINE AND FEDERAL SENTENCING, *supra* note 161, at 156.



Never mind that, although white males are only forty-three percent of the work force,<sup>164</sup> they hold ninety-five percent of all senior management positions in the nation's largest corporations.<sup>165</sup> But it's the politics of division and hatred, and it diverts attention from the real issues, like the downsizing of our economy, and the millions of dollars of tax subsidies to the very corporations that are exploiting American workers and all of us.

Welfare. Everybody's in an uproar about welfare. Most people think that the majority of people on welfare are young African-American women. The fact is that most people on welfare are white.<sup>166</sup> But that doesn't matter; it's not important. What's important is that most people on welfare, black, white, or brown, don't want to be on welfare. They want to work. But jobs are scarce, and most employers don't provide child care or means for training.

So what do politicians do? They do nothing to dispel the myth of the so-called "welfare queen." In fact, they perpetuate that myth. They tell young women to get a job, while they support businesses that eliminate jobs. They literally take food from the mouths of poor mothers and children.

More generally, many of these politicians are responsible for creating and fostering a climate of intolerance and hatred in this country. When a Senator can stand on the floor of the Congress and threaten the President; when a Speaker of the House can call the First Lady a bitch<sup>167</sup>—and let's remember he never denied it—when a Senator can freely mimic an Asian judge,<sup>168</sup> his apology aside, they

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164. See Laura Goldberg, *Blacks' Discipline Rate High - Nearly 50% of Cases Against 20% of Workforce*, CINCINNATI ENQUIRER, May 5, 1995, at C1 (stating that percentage of white males in work force is approximately 50%).

165. See Jim McKay, PITTSBURGH POST-GAZETTE, Apr. 16, 1995, at D1 (citing glass ceiling commission report that found approximately 97% of senior managers for 1500 of nation's biggest companies were white and almost same percentage were males).

166. See Maureen Harrington, *Welfare Myths: Rampant Perceptions of Poor Clouded by Emotion*, DENVER POST, June 19, 1995, at A1 (stating that in 1992, 5 million blacks received Aid to Families With Dependent Children (AFDC), while 5.3 million whites received AFDC); Scott MacKay, *Rhode Island Advocates for Poor Fear the Worst: They Say Eliminating the Government's Guarantee to Support Poor-Single-Parent Families Will Create Legions of Homeless Children*, PROVIDENCE J. BULL., Sept. 20, 1995, at 8A (quoting Professor Gerwitz of Rhode Island College who asserted that majority of welfare recipients are white); Muriel Whetstone, *The Untold Story: Whites and Welfare*, EBONY, Aug. 1995, at 124 (stating that majority of welfare recipients are white).

167. See Ed Bark, *An Unsparing Look at Newt on PBS*, DALLAS MORNING NEWS, Jan. 16, 1996, at 1C (referring to CBS interview by Connie Chung, where Gingrich's mother told Chung that her son, Newt, called First Lady Hillary Rodham Clinton a bitch).

168. On April 4, 1995, Senator Alfonse D'Amato (R-N.Y.) made remarks during a radio interview that allegedly mocked California Superior Court Judge Lance Ito's Japanese heritage. See Lawrence Van Gelder, *D'Amato Mocks Ito and Sets Off Furor*, N.Y. TIMES, Apr. 6, 1995, at B1 (discussing public outrage over D'Amato's offensive statements).

create a climate of intolerance, and a comfort zone for the Fuhrmans, Murrays, and D'Amatos of the world.

And politicians are masters at the perversion and adulteration of the very principles that guided the civil rights movement. If Ralph Reed or Newt Gingrich misquotes Martin Luther King one more time, I'm going to scream. Martin Luther King did not say that we should not consider the color of a man's skin, only the content of his character. He didn't say that.

He said he looked forward to the day when all men would be judged, not by the color of their skin, but by the content of their character.<sup>169</sup> And unfortunately, that day has not yet arrived.

These politicians won't acknowledge that fact. And obviously the Supreme Court won't acknowledge that fact. There was once a day when people of color had a recourse from all of this, from the politicians, from this kind of behavior in society. They had a refuge, a haven of justice, if you will. And that haven was the courts.

When the legislative and executive branches abandoned us, there was always the judiciary. There was a Bull Connor and a George Wallace, but there was also a Frank Johnson and ultimately a Thurgood Marshall.

The courts, particularly the federal courts, were always the bastions of justice for people of color. They protected the minority from the tyranny of the majority. During the years of the Warren Court, the Supreme Court stood for this principle. But no more.

The theory then and now is that the federal courts were isolated from the vagaries of politics. Judges were appointed, not elected, for life, not for a term of years. So they were free, theoretically, to judge and apply the laws fairly, free from the influences of politics and public opinion.

It's an interesting and very appealing idea. And sometimes it works. But it's a theory, based on the assumption that judges themselves are not political animals with their own agendas and philosophies, and not just legal philosophies but political philosophies.

We now know that the appointment of a Supreme Court Justice is probably one of the most political phenomena of our day. The nomination and confirmation process could not be more political.

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169. In August 1963, Martin Luther King, Jr. concluded the march on Washington with his "I Have a Dream" speech before 250,000 people at the Lincoln Memorial. Dr. King said he dreamed of a day when his four children would not "be judged by the color of their skin, but by the content of their character." Martin Luther King, Jr., *I Have a Dream Address at the Lincoln Memorial* (Aug. 28, 1963), *reprinted in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* (James M. Washington ed., 1986).

And the Rehnquist Court, particularly the Rehnquist Court during the last two terms, illustrates this fact.

Several cases during the last term exemplify the political nature of this court, and how the Court, like many of the Republican politicians, has bastardized the very principles for which so many fought and died during the civil rights movement.

These cases illustrate how this Court, through its mechanical, simplistic, and inapposite application of legal principles has created a legal fiction that's absolutely irrelevant and removed from reality.

These cases—*Adarand Constructors, Inc. v. Pena*, *Missouri v. Jenkins*, and *Miller v. Johnson*—have the potential of wiping out the accomplishments of the civil rights movement, which resulted from decades of struggle.

The irony is that this Court uses the very principles for which so many people fought and died, against the very people whom they were established to protect.

In *Adarand*, the case which applied the strict scrutiny standard to an affirmative action program—specifically the 8A and 8D programs of the Small Business Administration<sup>170</sup>—the Court totally misappropriates the concept of discrimination. It confuses benefit, equal opportunity, and inclusion with burden, discrimination, and exclusion.

The application of the same standards to all people, regardless of their background, their circumstances or their status in life, flies in the face of everything that we know about fair and equitable treatment.

White people do not have a history of seven centuries of enslavement, another century of legalized discrimination, nor do they suffer from race discrimination today. They are not disadvantaged or oppressed because of their race.

African Americans have that history, and all people of color continue to experience discrimination today in 1995. And let's be clear, Justice Scalia, we're not talking about a debtor and a creditor race. It's not about paying for the sins of the forefathers. The history is important, not because we want to punish white people today for what their ancestors did centuries ago. It's important because the effects of past discrimination still linger on and probably help to explain why there is still discrimination today.

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170. *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2113 (1995) (holding that "all racial classifications, imposed by whatever federal, state, or local governmental actor must be analyzed by a reviewing court under strict scrutiny").

Racism and discrimination are not distant memories of the past. They are ugly realities of today. And a mere twenty-five years of a conservative remedy like affirmative action has only just begun to right the wrongs of centuries of enslavement and discrimination.

And Justice Thomas is ashamed, embarrassed, and stigmatized by a legal remedy—a legal remedy that seeks to correct illegal, unconstitutional forms of discrimination.<sup>171</sup> When the plaintiffs in a class action suit receive a legal remedy from the courts after they've been damaged or harmed by some corporation, are they ashamed? Do they feel embarrassed by this?

"Remedy" does not mean "remedial," Justice Thomas. They are two different words. Remedy doesn't mean that people of color are inferior and need some kind of remedial assistance. That's not what it means. It means relief, a cure, a means to correct or redress a wrong that has been done.

I've never felt ashamed to be a beneficiary of affirmative action because I know that it was simply a means to open doors to me that were once closed because of my race. I know that I would not have gotten into the law school that I attended without affirmative action. But I also know that once I got in, I had to pass the exams, and I had to pass the bar myself. I didn't get any extra points on my exams because I was black.

But without affirmative action, I never would have had the opportunity to take the exam. It's just that simple. So Justice Thomas, don't be ashamed that race was a factor in your admission to college and to the Yale Law School and your appointment to the EEOC and to the federal court and to the Supreme Court—don't be ashamed.

I'm not saying that you shouldn't be ashamed, because you certainly have reason to be ashamed, but not because of affirmative action.

(Laughter.)

PROF. DAVIS: As Justice Stevens points out in his dissent in *Adarand*, the Court ignores a difference between oppression and assistance: "[T]he consistency that the Court espouses would disregard the difference between a 'No Trespassing' sign and a welcome mat."<sup>172</sup> It ignores the racism and discrimination that still continue to subjugate people of color.

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171. See *id.* at 2119 (Thomas, J., concurring in part and concurring in judgment) ("These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences.").

172. *Id.* at 2121 (Stevens, J., dissenting).

Then, in *Missouri v. Jenkins*, the Court ignores the fact that the Kansas City School System is as segregated today as it ever was.<sup>173</sup> And it pulls the plug on court orders to remedy this segregation.

Again, the reasoning of the Court is almost embarrassing. Apparently, it goes something like this: The white flight to the suburbs was not because of segregation, it was because of integration. Therefore, the Court can't provide a remedy.<sup>174</sup> It's beyond me.

Now Justice Rehnquist should be ashamed and stigmatized by that distinction. It's not worthy of discussion.

As with affirmative action, a couple of decades—in fact, just eighteen years in this particular case, a conservative remedy is not enough to cure centuries of discrimination. As Justice Ginsburg pointed out in her dissent: “[C]ompared to more than two centuries of firmly entrenched official discrimination, the experience with the desegregation remedies ordered by the District Court has been evanescent.”<sup>175</sup>

Then there is *Miller v. Johnson*. Once again, the Court confuses inclusion with exclusion, treats white voters in Georgia the same as black voters, and assumes that white voters are hurt if black voters in Georgia achieve some political power.<sup>176</sup>

White voters in Georgia do not need protection, and never have. Black voters do share the same political interests. And Justice Kennedy, most of us are not stigmatized or demeaned by that fact. Apparently he talked to Justice Thomas a lot, who was apparently very embarrassed and stigmatized by this.

(Laughter.)

PROF. DAVIS: But most of us are not to be ashamed of this group that we're in. No, we're not all the same. But regardless of our social or economic standing, there are some things we have in common, like the fact that we're all victims of discrimination, regardless of our socio-economic standing.

And as Justice Ginsburg points out in her dissent, ethnicity has always been a relevant factor in drawing the lines of voting dis-

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173. *Missouri v. Jenkins*, 115 S. Ct. 2038, 2052 (1995) (finding it beyond scope of district court's broad remedial authority to create "magnet district" in order to attract minority students from surrounding districts in pursuit of "desegregative attractiveness").

174. *Id.* at 2053 (stating that white flight does not provide justification for remedy).

175. *Id.* at 2091 (Ginsburg, J., dissenting).

176. *Miller v. Johnson*, 115 S. Ct. 2475, 2490 (1995) (opining that state redistricting was not motivated by need to remedy past discrimination, but simply to satisfy Justice Department's preclearance demands under Voting Rights Act and holding that such "ameliorative" redistricting violates equal protection).

tricts.<sup>177</sup> It continues to be, except apparently for African Americans and Latinos.

Black people are discriminated against because of their membership in the black race, in this group. This whole notion of the Constitution providing remedies for individuals and not groups ignores that fact. I'm not discriminated against because I am Angela Davis, the individual. I'm discriminated against because I'm black, because I'm a woman, because I belong to these groups.

These cases are devastating in so many ways, not only because of the damage that they do to the achievements of the civil rights struggle, but because of their potential effect on so many important issues and problems that we face in America today, like crime and education and unemployment.

If we end up with no people of color in the Congress, who will care that young black men comprise fifty-three percent of the population of this country's prisons?<sup>178</sup> Who will fight to eliminate discrimination in our criminal justice system, and in our society as a whole? Who will fight for the interests of the oppressed? For jobs and education? Hopefully, some will.

How will people of color in this country ever overcome past and present discrimination in education and employment, since *Adarand* has made it more difficult to sustain the remedies provided by affirmative action programs?

We all have a role to play, and there is something that we all can do. First of all, conferences like this are important because education is the very first step. Scholarship is extremely important, as was pointed out earlier. This Court certainly needs help with that. And those Justices who are fighting to preserve the constitutional rights of all people need ammunition to fight.

But law professors and lawyers must do more. I'm sure I don't need to tell you that the Rainbow Coalition, the NAACP, and many other organizations that are fighting the legal and political battles necessary to effect change could use the assistance of able lawyers and law professors.

Many Congressmen and women could use this assistance, and many of you do provide that assistance. We need more people to volunteer their time and energy, to become politically involved. And believe me, it's not always pleasant.

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177. *Jenkins*, 115 S. Ct. at 2500 (Ginsburg, J., dissenting).

178. MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* 58 (1995).

I don't think it's pleasant. I was a public defender for twelve years, and I decided, because I was so disgusted with everybody on every ballot, that although I voted defensively, usually against someone, not for someone, for many years, I was so turned off by politics that I decided that my way of fighting for freedom was to free people from prison, one by one.

I think that's wonderful. And it's so important. It's one of the most important things that people can do. But we can't just fight that way, because as long as bad laws continue to be passed, and we don't do anything about it, fighting like that is too difficult. We have to fight on both fronts.

We must work with organizations that are educating and organizing people in the communities. It worked for the Christian Coalition. It certainly did. And we have to do the same thing. We have to help to empower people so that they have a voice. People in Congress understand votes and phone calls and letters.

Unfortunately, many poor people and people of color don't feel inspired to do any of this. They don't feel that it will make a difference.

And when you look at the choices on election day, you understand why they feel that way. But we can't afford to ignore the political process. Those folk on the Hill are making decisions that affect the lives of all of us. So we have to get involved.

Most people in this country don't think like Newt Gingrich. I don't believe that. I refuse to believe that. They just didn't vote last November; that's what happened.

(Laughter.)

PROF. DAVIS: So now you have this Congress, but that can change. If we fight with our pens and our voices and our votes, we can win. And for the sake of all people in this country, we must.

Thank you.

(Applause.)

#### IV. "CREDITOR AND DEBTOR RACES": IS IT TIME TO GET BEYOND RACE?

DEAN RASKIN: Creditor and debtor races is a phrase that comes from Justice Scalia's concurring opinion in the *Adarand* case,<sup>179</sup> where he essentially articulates the doctrine of complete color-blindness; that is, under our Constitution, the government may take

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179. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2118 (1995) (Scalia, J., concurring).

no cognizance of race, ethnicity, or color in any kind of decision-making.<sup>180</sup>

Justice Scalia wrote, "Under our Constitution, there can be no such thing as either a creditor or a debtor race."<sup>181</sup>

So I wanted to try to frame our discussion around two different themes. First is the policy question of whether we should be trying to get beyond race in terms of the structuring of goods, services, and institutions in our society. Second we move from the policy question to the constitutional question: should the Constitution itself, as Justice Scalia suggests, move beyond race and refuse to allow government to take race into account?

The reason I want to structure it like that is that it seems in our prior discussions, we began with the legal or constitutional question, and then moved to the policy question. Not surprisingly, people's views of the Constitution ended up mirroring pretty closely what they wanted to do as a matter of policy.

So I thought for this one, we could at least begin with the policy point and from there move to the legal analysis.

Having said that, I'd like to begin by calling on Rich Kahlenberg to address the question, is it time to get beyond race? Can we, and how?

MR. KAHLENBERG: Thank you, Jamin. It seems to me that, for those of you who were here for the earlier panels, there was a general consensus that we do want a color-blind society at some point in the future. There was a disagreement on essentially whether we are ready today to embrace the color-blind notion.

Defenders of the racial preference system argue that we need to overcome our history first, that we are not ready to become color-blind, that in fact to be color-blind in the short term would not get us to the point where we want to be in the future.

And I think some of the arguments there made sense.

On the other side, there were the color-blind advocates who said, if we want to get to color-blindness, there's no better way to do it than to start today. That using racial means as a way of getting to a color-blind future is to use means that contradict the end. I think that argument makes some sense as well. The argument that I make in *The Remedy: Class, Race, and Affirmative Action* is that because it is both true that we need to address our past history, *and* that the current system of racial preferences has not gotten us closer to the goal of

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180. See *id.* at 2119 (Scalia, J., concurring) ("In the eyes of the government, we are just one race here. It is American.").

181. *Id.* at 2118 (Scalia, J., concurring).



color-blindness because the means contradict the end, that we need a third way. We need to come up with a better solution to get us to the color-blind future.

The third way that I propose in the book is something called class-based affirmative action. It's preferences based on class rather than race.

Now, I am painted as kind of a neo-conservative, or even a conservative for making this argument. I actually consider myself to the left of most of those who advocate racial preferences. But in the current climate, that's how I'm seen. So I think it's important to look back at the history of the early civil rights movement, and see what some of those people were saying about how we should get to a color-blind future.

I've got a quote from Martin Luther King, and I think for those of you who were here at the luncheon, Angela Davis made an excellent point. She's sick and tired of hearing conservatives quoting Martin Luther King on the need for being color-blind. And many on the right, I think, have twisted his words.

But having said that, I think it is important to look back and see what King did argue. In his 1964 book, *Why We Can't Wait*,<sup>182</sup> he makes both the liberal and the conservative argument on racial preferences.

His first point is that we need to do something to address our nation's history. We cannot simply pass civil rights laws, and then say that we can be color-blind, or that nothing else needs to be done.

He says, "[T]he nation must not only radically readjust its attitudes towards the Negro in the compelling present, but must incorporate in its planning some compensatory consideration for the handicaps he has inherited from the past."<sup>183</sup>

So he wants to do something affirmative, to take some sort of affirmative step. Outlawing discrimination is not enough.

But then he proposes something very different from the system of racial preferences that we have today. He calls for a Bill of Rights for the Disadvantaged generally.<sup>184</sup> And I think he has two insights here. The first is that, because of the legacy of past discrimination, African Americans and other minorities are disproportionately poor.

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182. MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* (1964).

183. *Id.* at 134.

184. *Id.* at 137.

Therefore, any program that is based on class or disadvantage generally will disproportionately benefit people of color. So there are, in other words, non-racial ways to remedy past racial wrongs.

But his second insight was that, in addition to compensating for past discrimination, we have to consider what the impact will be on equal opportunity today. And he argues that poor whites deserve a leg up as well. He says, "It is a simple matter of justice that America, in dealing creatively with the task of raising the Negro from backwardness, should also be rescuing a large stratum of the forgotten white poor."<sup>185</sup>

This argument that he makes in 1964 is reaffirmed later in 1967, when he testifies before the Kerner Commission.<sup>186</sup> He quotes from *Why We Can't Wait* verbatim. He still believes in this strategy.

Then in 1968, of course, he moves toward the Poor People's Campaign, which is a class-based, race-neutral system, or set of proposals, for addressing inequality.

In sum, to answer Justice Scalia's question, I think, yes, it is time, for the most part, to move beyond race. There are a couple of caveats that we can get into later. Clearly we still need a Civil Rights Act to address ongoing discrimination.

I was disturbed by the panel this morning in which there were at least two people who seemed to be for repealing the Civil Rights Act. So an argument that once was considered quite marginalized and crazy is now seeming to move some into the mainstream.

When I say "get beyond race," I certainly don't mean that.

The other caveat is that, when we are dealing with particular situations where a particular employer has a history of past discrimination where there's a narrow remedy, to address that specific case, I think that clearly a race-specific remedy is justified, along with a broader class-based affirmative action program.

But in the vast majority of cases, I think that we can get beyond race in a way that is cognizant of our history, by giving preferences based on class instead of race.

DEAN RASKIN: We have sort of a bold challenge here, which is that the progressive attitude toward making social change is not one that's based on race, but based on what you're calling class or disadvantage. Is that right?

MR. KAHLLENBERG: Socio-economic status.

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185. *Id.* at 138.

186. See National Advisory Commission Meeting, Oct. 23, 1967, cited in JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION* (forthcoming).

DEAN RASKIN: Katheryn?

DR. RUSSELL: I like the idea that Rich has proposed. I think, however, it takes us one step ahead of where we are. That is, we have not dealt with race adequately in this country, whether with regard to how we talk about reforms of welfare or the criminal justice system, of education, of the work place in general. So until we deal with race, the problems of racism in this country, we cannot jump to socio-economic status as a determinant for whether we're going to have affirmative action for a whole host of things.

This still is going to come down to the situation, for example, in a job application, or an application to graduate school, law school, what have you, where you have a black middle class student and a poor white student. The advantages of being middle class in this society merely temper the burdens of race.

The burden of race and the prevalence of racism work to the disadvantage of that black applicant. Until we deal with those problems, I don't think we can jump to socio-economic status.

DEAN RASKIN: Professor Wechsler? Thank you for joining us.

PROF. WECHSLER: I want to make sure I don't say, "Here are the few remarks I intend to make later." I just want to give a little background to this matter.

It starts with the opening shots. In 1965, in President Johnson's inaugural address, written by Moynihan and Goodwin, there are two conflicting positions. They reflect Moynihan's own essential contradictory position.<sup>187</sup>

Attention must be paid to 200 years of oppression. Number one: and I'm reframing it—this is still a profoundly racist country. Second, you can't sell affirmative action to whites. Therefore, you've got to pretend like what you're doing is being done for everybody.

That's the origin of this discussion.

This idea—doing it for everybody—was supplemented in Moynihan's famous report on what he described as the dissolution of the black family.<sup>188</sup> That is then picked up by the Chairman of the

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187. See President Lyndon B. Johnson, Presidential Inaugural Address of January 20, 1965, reprinted in *PUBLIC PAPERS OF THE PRESIDENTS: LYNDON B. JOHNSON 71-74* (1965) ("Justice requires us to remember: when any citizen denies his fellow, saying 'his color is not mine' or 'his beliefs are strange and different,' in this moment he betrays America, though his forbears created this nation.")

188. See DANIEL PATRICK MOYNIHAN, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* 48 (1965). The report describes the "national effort" as follows:

The policy of the United States is to bring the Negro American to full and equal sharing in the responsibilities and rewards of citizenship. To this end, the programs of the Federal government bearing on this objective shall be designed to have the effect, directly or indirectly, of enhancing the stability and resources of the Negro

Sociology Department of the University of Chicago, William Julius Wilson, who writes of the declining significance of race.<sup>189</sup> He says the problems are primarily class not race problems.<sup>190</sup> I disagree, but I respect him. In terms of African Americans, I believe that race and class are interlocked.

Wilson continues his thesis—the declining significance of race—in his second book a couple of years later.<sup>191</sup>

And in case you haven't read Dinesh D'Souza,<sup>192</sup> you ought to. It got a full page ad in *The New York Times* this week.

It's the end of racism, he says. We've reached nirvana. Like Fukuyama, it's *The End of History*.<sup>193</sup> So we're left with capitalism with all its distortions, because it's so terrific nothing new can ever take place that could be better. And now that racism has passed us, we can move on to other problems.

So beware of arguments about the end of history. Nirvana is not here. Neither is the end of racism.

DEAN RASKIN: Who else wants to respond to Rich?

MR. NASH: It's hard to get into the substance of what I want to say, given the initial dichotomy that Jamin set up for us, which is, staying within the bounds of a policy discussion without getting to the constitutional question.

I guess I'll sidetrack a bit by going into a historical discussion, which is somewhat historical, somewhat policy, and somewhat constitutional.

But if we look at the original writing in *Adarand*, Justice Scalia says, "Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race."<sup>194</sup>

Well, that is just factually wrong. If you look at the Constitution, Article I, Sections 2 and 8, the only race that's mentioned is Indians.<sup>195</sup> There's no other race. Everybody else is a person. And it's

American family.

*Id.*

189. See WILLIAM J. WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* 144-54 (1978) (discussing interrelationship between race and economic class).

190. *Id.* at 3 (delineating modern, industrial, post-World War II era as third stage in black-white racial stratification characterized by "progressive transition from racial inequalities to class inequalities").

191. WILLIAM J. WILSON, *THE GHETTO UNDERCLASS, SOCIAL SCIENCE PERSPECTIVES* (1989).

192. DINESH D'SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* (1995).

193. FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

194. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2118 (Scalia, J., concurring).

195. See U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective

pretty clear who the persons were. When you were three-fifths a person, you knew who you were. And when you were a free person, it was clear who you were.

There were things about migrating and importing certain persons. When we finally get to Article IV, Section 2, we talk about no person held in service or labor shall be discharged and have to be delivered back to the master.<sup>196</sup> Okay, so it was clear that there were persons. But the only mention of race per se was the Indian race.

One thing about the race discussion, we're always using "race" like it's a word that means something. When you get back into discussions of race, and my favorite writer on this is Stephen Jay Gould, everybody should start with his *Mismeasure of Man*,<sup>197</sup> which gives some of the background on some of these discussions.

Because if you look at how some of these racial categories were set up, they were not just set up to be free-to-be-you-and-me black, white, yellow, whatever. They were supposed to be a hierarchy. They were supposed to be whites at the top.

The fifth category, Malay, was set up because if you had four, you couldn't have a triangle with whites at the top, Asians in the middle, and Reds on the bottom on the side. There's nobody to be in the middle for blacks on the other side. So they had to have Malays that fit in the middle here, going down this other side of the pyramid.

Again, when you start to realize how these things were set up, by people who were trying to use a Linnean way of categorizing people, it's pretty frightening.

Anyway, so I think we agree that these racial categories have been social and political constructs from the time they were set up. All that being said, I think the Constitution clearly has mentions of people. It's not like it's racially neutral. It does say some people are going to be enslaved.

It doesn't say anything about Asian Americans and others, who we came to find out later on in the peonage cases, in *Yick Wo*<sup>198</sup> and a

number, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed . . . "); U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have the power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes . . .").

196. U.S. CONST. art. IV, § 2, cl. 3 ("No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.").

197. STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 322 (1981) (stating that there is "remarkable lack of genetic differentiation among human groups").

198. *Yick Wo v. Hopkins*, 118 U.S. 356, 366 (1886) (striking down ordinances giving San Francisco board of supervisors power to grant or deny permission to citizens to carry on lawful

lot of other cases where Asian Americans, Latinos, and others suddenly appear.

We had a role in shaping the constitutional law that we all study. In fact, it was very nice to read *Adarand* and see people arguing about *Korematsu*.<sup>199</sup> It's nice to see that Asian Americans have made such a big impact on the Supreme Court.

But one thing is not clear to me when Justice Scalia talks about whether or not there are debtor or creditor races. First I disagree as to whether there are races. When he talks about debtor or creditor races, what does that mean?

As a Japanese American who was very involved in the Japanese-American redress movement to try and compensate the people who were put in the camps during World War II, I had a lot of discussions with people in our own community about whether we should press for redress. What is redress? What is making ourselves whole?

One anecdote that was a favorite of mine was said by this guy William Hohri, where he said, "I want to get a Jaguar."<sup>200</sup> And what that meant was, he wanted to get redress from the government. And damn it, he was going to spend his money on a sports car.

I remember a lot of people said, "Oh, my god, what a horrible idea." First of all, let's not rock the boat and even ask for this. Second of all, if we ask for it, the money should go to a foundation for good works, perhaps a monument on the Mall here in Washington.

And Hohri, not a lawyer, but a very prescient person, said, "Well, you know what, guys? When I get my money, I want to use that money any way I want. You know why?"

"In the Anglo-American jurisprudential system, if somebody runs over your dog, or somebody cuts off your arm, or whatever it is, you get money. That's just the way it is. And so when I get this money for being interned in camps for three-and-a-half years, I'm going to buy a Jaguar."

Well, the footnote to that story is, by the time he got the \$20,000, he couldn't buy a Jaguar anymore.

(Laughter.)

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business).

199. *Korematsu v. United States*, 323 U.S. 214 (1944).

200. Mr. Hohri was lead plaintiff in a class action lawsuit, *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984), *aff'd in part, rev'd in part*, 782 F.2d 227 (D.C. Cir. 1986), *cert. granted* 497 U.S. 960, *vacated*, 482 U.S. 64 (1987), and author of *Repairing America*. WILLIAM MINORU HOHRI, *REPAIRING AMERICA: AN ACCOUNT OF THE MOVEMENT FOR JAPANESE-AMERICAN REDRESS* (1988).

MR. NASH: So he bought a Nissan with license plates that said "Redress."

(Laughter.)

MR. NASH: But anyway, this notion of a debtor or creditor race, to my mind, is a veiled way of talking about, should blacks get some type of compensation for their years of slavery? Remember Boris Bittker's book about black redress.<sup>201</sup> This Yale law professor wrote a very interesting book that influenced myself and a lot of other advocates for Japanese American redress and got us thinking about, what is it in terms of owed to us?<sup>202</sup>

It's not like we're owed anything, having to pay something the way the 442nd regimental combat team did. They paid in blood during World War II. These are guys who said, "I'm not sure I'm a full American, so I'm going to come out from behind barbed wire, and go fight in the war in Europe, and lose more blood than any other unit of its size."

And they did that, because they felt they owed something. In return, a lot of people said, "Well, now we owe you something." So that played a part to getting some redress for Japanese Americans in the Claims Act of 1948.

But getting back to this notion of debtor and creditor. Should we get beyond the notion of race? I don't think we can at this time get beyond the notion of race.

I like to think that in my personal interactions with people, I have friends and colleagues who are of various backgrounds. And I think it's been proven by reports from the Labor Department and other places that having diversity in the workplace, in the school environment, anywhere else, creates a better product because there's more input from more people.<sup>203</sup>

There's no doubt we want to get to a place where we can interact irrespective of our race, sex, sexual orientation, where we came from, what our accent is. But until we get there, we have to look at the progress, the little bit of progress, that we've made since the 1960s, since a lot of these laws came on line.

Frankly, we still don't see enough progress. If you look at the board rooms of the *Fortune 500* companies, if you look at the faculties of law schools and other colleges, you look at a lot of other places, you don't see the progress that we need. And we frankly need more

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201. BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973).

202. *Id.*

203. See Andy Tamas, *We Must Change*, OTTAWA CITIZEN, Mar. 21, 1993, at C1 (discussing how diversity in combination with other factor leads to soaring productivity).

progress. And affirmative action may not have been the perfect vehicle to get this happening, but it certainly has been a major help to get it going.

So in responding to Richard Kahlenberg, I would say I too would like to get to a place where we see each other without seeing the color of our skin, the thickness of our lips, the kinkiness of our hair. But I don't think now is the time to start doing that.

DEAN RASKIN: Professor Hager?

PROF. HAGER: I believe in the ideal of a color-blind society. I think that the United States of America, and liberal democracy, the principles of liberal democracy, create the possibility that that might happen. I am by sympathy a strong integrationist. And as such, I have always defended affirmative action.

But I am troubled and increasingly so about affirmative action as a means of moving to a color-blind society. Mr. Kahlenberg has given me some help in thinking about this. We can think about three basic rationales for affirmative action.

One is the diversity rationale. This troubles me deeply, because I believe that it fixates us on treating individual people in terms of the racial categories that they occupy, number one; and fixates the society on a politics of racial distribution of good things, number two. That's the diversity rationale.

Then there is the compensatory rationale, the idea that there are debtor and creditor races, principally black and white. And I'll be very quick here. I think Justice Scalia is emphatically right that it is a terrible idea to think about our racial and constitutional politics in terms of creditor and debtor races.

That leaves a third possible rationale for affirmative action. Again leaning on Mr. Kahlenberg here a little, I'll call this the equal opportunity rationale for affirmative action.

If I'm right about points number one and number two—and I believe I'm right politically in terms of what the American people's moral intuitions on these questions basically are—then the defense of affirmative action needs to be couched in terms of an equal opportunity rationale. Can it be defended cogently and coherently, as bringing about an equal opportunity regime, which would be absent but for the existence of affirmative action?

We can think of two kinds of equal opportunity approaches for affirmative action. One is race-based, and the other is class-based. And Mr. Kahlenberg is advocating the latter.

Just as a thought experiment, I think it might be interesting to think about a defense of affirmative action which sort of crosses the



class and racial categories, and to make a long story short, confines the action of affirmative action to the portions of black America which are by their class position merited.

In other words, to be very blunt, a phasing out of affirmative action for middle class black America. And I'll stop right there.

DEAN RASKIN: Let me pose this question now to Professor Hager and to Rich Kahlenberg. They seem to have a strong position emerging, but the invocation of the Poor People's Campaign struck me because the people who are talking about getting rid of racial affirmative action are decisively not interested in anything like the Poor People's Campaign.

They're not interested in a massive redistribution of resources towards the dispossessed and the disenfranchised in society. So the first question that leaps to mind is, if you get rid of racial affirmative action, what makes you think that the people who have been attacking it are going to be interested at all in this economic-based affirmative action?

Secondly, what is the principled justification for it? After all, the attack on racial affirmative action is that it distorts the regime of merit and violates the principle that individuals should accomplish their jobs, their positions in school, their various social rewards on the basis of their own deeds, on the basis of their own test scores, on the basis of their own grades.

But now you want to introduce another distorting mechanism, not racial, but economic, which if anything is much less definite and much less determinate in terms of which group you want to help. How is class-based affirmative action any more compatible with an economy theoretically based on individual merit?

If you could respond to those points. Rich?

MR. KAHLENBERG: The first point, why on earth would conservatives join this bandwagon? For the most part, conservatives do not have a history of being concerned about class and equality, or being any part of a Poor People's Campaign, which is what makes the statements of certain conservatives today so interesting.

Clarence Thomas is one of the strongest proponents of class-based affirmative action. Dinesh D'Souza, before he got off onto this other stuff, was a proponent of class-based affirmative action.<sup>204</sup> Newt Gingrich has said he wants to replace race-based affirmative action with some method of helping poor people.

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204. DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* 251-53 (1991).

So I think that the affirmative action debate has moved conservatives in two ways. First, conservatives who voted against the Civil Rights Act and all these other things have discovered color-blindness. And secondly, they've discovered this notion that the poor need a leg up.

I mean, Clarence Thomas argues, how is it fair for his son to receive a preference in college admissions over a poor white from Appalachia? And in fact, I used to work for Senator Robb from Virginia. And when Clarence Thomas came in to seek Senator Robb's support, he made that precise argument to Senator Robb.

Now, it's interesting, on one level, because you have a black Judge telling a white Senator that blacks do not need special help. But more profoundly, you had a Republican Judge telling a Democratic Senator that class matters, that it is unfair to give a rich person of whatever color a preference over a poor person. Now, this is not something that Republicans traditionally argue for.

So my sense is that this is basically a liberal idea, but it's one that conservatives in attacking affirmative action, have kind of fallen into.

My argument is that progressives should essentially call their bluff, and see whether they will in fact back these class-based affirmative action programs. I think clearly it has to be a trade.

I don't advocate repealing affirmative action and then relying on the good faith of conservatives to come forward and put something in its place. I think it's got to be a trade, apples for apples.

DEAN RASKIN: Could I perhaps press you for a moment? If my position is that an African American who scores thirty points lower on the SATs, regardless of his or her background, should never be admitted over a white applicant who scored thirty points higher, to a place in the scarce commodity of, say, the freshman class at Berkeley, why would I be interested in a program that says that a person who scores thirty points less, but comes from a middle class background, should be admitted over someone who scores higher and comes from an extremely wealthy background? Assuming even you could define all of these things, it seems that once you tamper with the (in my view, illusory) objectivity of meritocracy, then you have unraveled it, and it seems to me that racism has been at least as powerful a social force as class dominance in American history.

MR. KAHLLENBERG: I think the argument is that taking class into account is actually more meritocratic in the end than ignoring class. And I think most people agree with that general sense, that if you have someone who is from a prep school, and has taken a Stanley Kaplan course and all the rest, and scores a certain score on the

SATs—let's say 1000 on the SAT—and you compare that candidate with a poor person who came from the inner city, who went to awful schools, who has faced all sorts of obstacles because of their economic status or the economic status of their parents, and they scored in your hypothetical thirty points lower, I think almost everyone in this room would agree that the person who scored 970 has a lot more potential in the end than the person who scored 1000 with all sorts of advantages.

I don't know if anyone on the panel would disagree with that. But I think it's clearly more meritocratic to judge based on scores, plus a factoring in of their economic status.

PROF. HAGER: There are two different types of class-based approaches that you could think about. One is a legal preference for opportunities on a class basis. And the other is a broad-scale set of social and economic policies that are more favorable for those in the lower positions in our society.

Because of the ambiguities that you raised, Jamin, I'm not fully persuaded by the class-preference idea. And I'd like to address just one remark to social and economic policies. What we should be looking for, not fine-tuning the preference system, but moving this country towards a different and more progressive set of social and economic policy agendas that is beneficial economically to blacks, whites, and members of other races.

And this is what William Julius Wilson stresses.

A point about affirmative action there. Social and economic changes beneficial to the poor and near-poor are not going to happen because the Republicans in Congress decide to pursue it. It's not going to happen because the current Democratic Party decides to pursue it. It's going to happen only if there is a mobilization of a political movement in this country of the economically disenfranchised that organize it and press it upon one of the political parties.

And I think if you're with me to that point, it's worth pondering whether affirmative action might be an emphasis which greatly interferes with the formation of such a political movement across racial lines.

DEAN RASKIN: So you're making the point that, as a matter of strategic politics, the existence of affirmative action, the fact that it's used rhetorically to divide people, inhibits the formation of class politics.

PROF. HAGER: It does divide people, not only rhetorically, but in their very interests. I lose a job to a person. It's not just rhetorical.

DEAN RASKIN: You're saying the existence of affirmative action inhibits the formation of something like a poor people's campaign across interracial lines?

PROF. HAGER: Which I think is precisely why King didn't go down that road. I think he had concerns about, what is the moral answer, what is the fair answer? But he also had a very keen sense of politics.

And what better way to divide the coalition of blacks and poor whites, or working class whites than to say that every advance under an affirmative action regime of African Americans will come at the expense of these other groups?

DEAN RASKIN: This is a position that has also been articulated recently by Michael Lind, who makes the point that affirmative action is an elite-based strategy that did not do much for the majority of the people who were presumably the beneficiaries.<sup>205</sup>

PROF. WECHSLER: I want to say something unkind.

(Laughter.)

PROF. WECHSLER: Nixon comes out for black capitalism, Nixon comes out for the Small Business Administration helping blacks in business. Hooray. So what do we get?

Small, highly problematic black-owned grocery stores. Burger writes *Griggs v. Duke Power Co.*,<sup>206</sup> concluding that employment discrimination only requires "disparate impact" not "intentional discrimination." He doesn't understand it, but he writes it.<sup>207</sup>

He writes *Swann v. Board of Education*,<sup>208</sup> supporting busing. He doesn't understand *Swann* either. Most of the people, the clerks, have written it for him. He didn't even know he authorized busing.

The conservatives of the early Burger-Rehnquist Court accepted affirmative action, and the liberals took it for granted for ten or fifteen years. But many liberals today are abandoning affirmative action. Much of liberalism today has been isolated and marginalized, and has succumbed to current conservative trends.

And in one sense, Reaganism and greed are synonymous. Reactionary thought rules the day. It doesn't give a shit about anyone except the wealthy and the comfortable.

DEAN RASKIN: Burt, this is going in the *Law Review*.

205. See Michael Lind, *A Radical Plan to Change American Politics*, ATLANTIC, Aug. 1992, at 73-74.

206. 401 U.S. 424 (1971).

207. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432-36 (1971) (discussing Duke Power's lack of discriminating motive in context of broader argument that Title VII is meant to remedy intentional discrimination rather than disparate performance by races).

208. *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1 (1971).

(Laughter.)

PROF. WECHSLER: I hate the word “white liberal,” because there’s an awful lot of black liberals, too. What do you mean white liberals?

I think what’s happening to part of the white left and what’s happening to guys like Wilson, whom I respect, is they’re succumbing to a very conservative era. They are succumbing to the end of the second Reconstruction; they are giving in to the new redemption, which means taking it all back again.

I think we can give all the logic we want, but that’s what’s really happening. If you look at the 1890s, the radial Republicans were gone, and the Republican Party no longer cared that much about blacks. The result: Black disenfranchisement and legal segregation.

So now we’re in the second redemption, and our weak knees are caving in.

And I want to talk about slavery in this country. Hey, you Jews, you Irish, you Polish, all you guys out there, you Hispanics. Nobody ever had it like black people in this country.

Don’t tell me, well, you know, my parents came over from Minsk. They had a lot of trouble, too. Jews, Asians, Hispanics couldn’t play on this or that golf course. Yeah? But you know, they weren’t on the plantations working twelve to fourteen hours a day as a eight-year-old child. Nobody has had it like black Americans have.

And every child in this country must learn that, in kindergarten, from then on. That’s a moral principle. And I’m not interested in equal opportunity. As a socialist I’m not just interested in equal opportunity. I’m also interested in more equal results.

And I’m not anxious to have every black kid earn \$5 million in the first place. I want white and black people to live essentially—CEOs and working class people, to live, work, and earn without *such* outrageous disparities. How do we achieve these results, and how do we do it morally?

I don’t think we do it morally by saying *Brown v. Board of Education* is well reasoned. Hey, everybody likes kids. Black kids don’t want to be hurt. Nobody wants any kid to be hurt. Psychology, footnote 11, something like that, you know.<sup>209</sup>

How about saying, this is to young, bright white law students, let me tell you about the Thirteenth Amendment<sup>210</sup> and the incidents of slavery and segregated schools coming right out of chopping cotton

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209. See *Brown v. Board of Educ.*, 347 U.S. 483, 494 n.11 (1954) (discussing detrimental psychological effects of segregation on black children).

210. U.S. CONST. amend. XIII (prohibiting slavery or involuntary servitude, except as punishment for crime for which defendant has been duly convicted).

on plantations. That's what *Brown v. Board* is all about. Where's the moral version of American history? What we did to the Indians, blacks, etc.

Let me tell you something else. It's important for all peoples to tell their nations what they've done wrong. It's important for the Japanese to tell their people about the Chinese comfort women. It's important for the Germans to tell their people about what they did to the Jews. It's important for white children in this country to know what we white people in this country did.

I have a lot more to say, but I've said too much. But how do we make it better? And I'm not suggesting reparations. I want those kids in Southeast D.C., that one year and nine-month-old-child at 14th and U and 14th and T to be speaking as well as my white grandchild at one year and nine months.

That kid born on 14th and T is semi-lost the day he or she is born. This is not just a question of getting into law school.

My favorite line in all theater, "Attention must be paid"—Linda Loman in *Death of a Salesman*.<sup>211</sup> Hey, you America. I want you to focus on race. I want you to know what you've done wrong. I want you to know about all these cases I teach in federal courts, the police brutality that is visited on black people in this country.

How many people get police brutality? Not many. That's a racial thing. It's got nothing to do with affirmative action. We're getting affirmative action, all right, a kind of affirmative action. It's a billy club for black kids.

Where is the moral outrage about what we have done and are continuing to do to blacks in this country? So now return to affirmative action and do it for everybody. We didn't "do in everybody altogether." Why then must we pretend that when we're trying to undo the past we're "doing to for everybody."

DEAN RASKIN: Katheryn?

DR. RUSSELL: I agree with just about everything that Professor Wechsler just said, with your concerns focusing or trying to chart a moral compass. I think we have to be cognizant of the fact that we haven't addressed the problems, as has already been pointed out, of slavery, through reparations, certainly not after twenty years of affirmative action programs.

And so now, with the continuing amount of racism in society that is visited upon black people in particular, but minority people in

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211. ARTHUR MILLER, *DEATH OF A SALESMAN* act 1 (1949) (Linda exhorting Biff to pay attention to Willy Loman because, despite his flaws, he is still a human being).

general—just by way of example, I wrote an article recently that looks at what I call the crime of the racial hoax.<sup>212</sup> There have been several racial hoaxes over the last decade. One of the arguments I make in the article is that they should be made criminal, pointing the finger, knowing the person who committed the crime, or that a crime didn't exist, but pointing the finger at a person of color, in particular a black person, should be a criminal offense, separate and apart from filing a false police report, given the kind of stereotypes involved in perpetuation of negative stereotyping.<sup>213</sup>

But that's just part of the problem with stereotyping. But as a black American, as an African American in this country, I am not allowed to forget my race. I can't just focus on the fact that I or that others who are born African Americans are poor. I'm not allowed to just focus on my personhood, or my humanity. I would like very much to do all of that, but that's just not an option that I have.

And once we were meeting a week ago at the Bureau of Prisons right here in D.C. And at the break, a colleague of mine and I went to the restrooms. We asked someone where the restroom was located. That person escorted us out into the stairwell, and that's where the restroom was. The door to the restroom was in the stairwell.

And the woman who was escorting us out there said, "Oh, well, this building, these restrooms were built back in the '30s or '40s, and these were the bathrooms for black people." I am reminded on a daily basis of the oppression of hundreds of years of slavery of my people. And I am unable to see any kind of real attention being paid to that fact alone, to the fact of slavery, and to how it manifests itself today.

When you're talking about police departments in Philadelphia and Atlanta, in New York or in Los Angeles, or right here in the District of Columbia. I have a million other examples of this. But I think the point is made. Again, we have to get back to how to deal with racism.

I understand that it's the case that affirmative action programs breed resentment. But for all the white males who believe that they lost a job to an unqualified minority, guess what? That's not possible because whites make up close to eighty percent of the population in this country.<sup>214</sup> So it is numerically impossible that all of these jobs were lost to minority people, and black people in particular.

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212. Kathryn Russell, *The Racial Hoax as Crime: The Law as Affirmation*, 71 IND. L.J. 593 (1996).

213. *Id.*

214. See Richard Morin, *Reality Check: Attitudes and Anxieties About Race*, WASH. POST, Oct. 8, 1995, at A1 (reporting 1992 U.S. Census figure of 74% white Americans).

So that's just not reality. I think we have to provide a more accurate picture for the public. One in three black people lives in poverty. It's not possible we are taking all of these jobs.

An additional point I want to make is that it's often the case that affirmative action is discussed as an issue of race versus merit. That dichotomy is not a real one. We're talking now about floors at which to admit people.

What also is of great concern to me is that in talking about meritocracy as though that is some objective, operationalizable term, there are a whole host of factors that go into whether or not someone is likelier to have higher probability of success through law school, through graduate programs, or through college.

Test scores are only one of those factors. So to think that we can just look at the numbers alone, and if anyone doesn't fit into this particular grid or box, that they're not qualified, is just a misnomer. There are too many who didn't fit the typical categories and have gone on to pass the bar, and have gone on to make wonderful contributions. And that cuts across race.

DEAN RASKIN: Burt, one brief intervention. Then I'll go to Phil.

PROF. WECHSLER: If we get rid of affirmative action, where are we going to get the doctors in the black community? How many white doctors do you know who settle in the black community?

I'm going to tell you something else. If you get rid of race-based affirmative action at American University Law School, you're not going to have any black students here.

I mentioned that to a colleague of mine who said, "Well, I know where we'll get our black law students. We'll get them from Harvard." I said, "What black students go to Harvard?" Well, there won't be many. How about the most prestigious law school in the country, Harvard, churning turning out elite lawyers every year? Twenty percent of Harvard students' parents went there. How's that for affirmative action?

When I went to Harvard Law School, it was a massive affirmative action program. Two thousand law students—in 1947, not a single woman and only a handful of black males. How's that for an affirmative action program? Where were all the people in this country saying we should do it for everybody? It certainly wasn't me; I didn't know any better. How come now at this point in history, we should "do it for everybody" when women and minorities have been crapped on for centuries? All of a sudden, we should do it for everybody.



When during the period that women, blacks, Hispanics, and Asians, Jews, etc. were being excluded nobody was saying we should do it for everyone. On the contrary, the idea then was we should "do them out." Think about that.

DEAN RASKIN: Let's do Phil, Rich, and Mark. Then I want to change the subject. Then we'll go to questions.

MR. KAHLENBERG: If I can just say one thing. First of all, I think it's empirically inaccurate to say that Harvard or American University or any other university will have no blacks if affirmative action is repealed. Clearly, there are a number of African Americans who would compete without any preference, and would be admitted.

I think that once you go to class-based preferences, those numbers will go up. The University of California at Berkeley did a study on what would happen if you repealed race-based affirmative action and replaced it either with a straight academic admissions system or with a class-based preference system.

When you count class as defined by income groups, Berkeley found that the number of African Americans admitted is less than under a racial preference system but greater than what you would get if you just admitted students by straight scores.<sup>215</sup>

I submit that if you use a sophisticated definition of class, which looks at the differences between black poverty in the aggregate and white poverty in the aggregate, the fact that middle class black families on average have a very low net worth, then the number of African Americans admitted under a class-based system would be even higher than Berkeley's strict income-based study suggests.

On the issue of resentment that Katheryn Russell brought up, I agree with her that in fact there are many white males who complain about losing a position through affirmative action, many more than actually do. Unfortunately, a number of employers will use that as an excuse. They'll say, "Well, we had to hire"—you know, an African American or a woman or something.

And to my mind, that argument cuts the opposite way. In fact, if the benefit to African Americans is marginal, if the resentment is compounded by a factor of, say ten, that is a reason to reconsider as a strategy using racial preferences.

My general point would be to bring back the discussion to a level of political and constitutional reality, and say, even if one does not buy the argument that I put forth that a poor white deserves a

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215. Sarah Lubman, *Campuses Mull Admissions Without Affirmative Action*, WALL ST. J., May 16, 1995, at B1.

preference more than a wealthy African American or Hispanic, even if one doesn't agree with that, we need to search. Those of us on the left need to search for some alternative.

Politically, this simply does not sell. And we now have a Republican Congress. And if the California Civil Rights Initiative (CCRI)<sup>216</sup> ends up being as powerful a force as people believe it will be, we will likely have a Republican president.

Then the African-American community is going to be in even worse shape than it is today. Constitutionally, as these cases keep coming out of the Supreme Court, and as the *Adarand* decision is implemented in a scrupulous manner, I think we're going to find that almost every federal race-based affirmative action program will fall.

The Clinton administration has given this kind of spin on *Adarand*,<sup>217</sup> that seven of nine justices had said that preferences are appropriate in certain circumstances. That is true as far as it goes. But they're applying strict scrutiny, and we all know that the last time a majority of the Court has upheld a racial classification under strict scrutiny was the *Korematsu* case.<sup>218</sup>

I think we're in a lot more trouble, those of us on the left, than we realize. And there's a lot of denial about what the future of affirmative action is going to be. So even if you don't agree with me on the merits, you need to look for alternatives that are going to further the interests of people of color in another way.

DEAN RASKIN: Professor Hager?

PROF. HAGER: Three quick points. Burt, history is important. But what will work is also important. I think it is much more important than the right level of finger-pointing. That's my first point.

Two, Burt, concern about what will happen at Harvard Law School, to the exclusion of everything else, is elitist.

And third—and this is not singling out Burt—

PROF. WECHSLER: That's okay.

PROF. HAGER: You can be in there if you want.

There is a bad habit of talking about whites or white men as the beneficiaries of everything, and the perpetrators of everything. We talk about 400 years of history, of whites, of the white race doing it to

216. See *supra* note 91 (describing initiative as proposal to abolish state and local affirmative action).

217. *Remarks by President Clinton to La Raza, U.S. Newswire, 1995, available in WL 6618837, July 19, 1995* (stating that seven out of nine Justices "reaffirmed the need for good affirmative action").

218. *Korematsu v. United States*, 323 U.S. 214, 218-19 (1944) (applying strict scrutiny to, but upholding, order permitting detention of persons of Japanese ancestry during World War II).

the black race. But it was white people doing things to black people, not the white race doing things to the black race. White people constructed the black race in order to justify what they did, and in doing so, constructed the white race.

But when you speak of the white race as having done it, and as being themselves all the beneficiary of it, they are not—many whites are not the beneficiaries of white racism. They are in part victims of white racism themselves. When you talk about race as categories in that way, you are perpetuating the construction of race. You are making it real, when it isn't and shouldn't be.

DEAN RASKIN: Phil?

MR. NASH: At this point I've got seventy-eight points I have to rebut here.

(Laughter.)

MR. NASH: Especially in a few thirty-second sound bites.

As I learned from some of the comments this morning, I think part of what needs to happen with this discussion is to look a little bit more deeply at the history of affirmative action, and at some of the original thinking that went into it.

One thing that struck me, as I started reading the documents that define affirmative action for us is that they have been supported by presidents, including Kennedy, Johnson, Nixon, Reagan, and Bush.

Affirmative action is something that is not a construct of the liberal left. There is a very prominent African American Republican who is going around the country now. In fact, he, Arthur Fleming, just decided to become a presidential candidate to remind Republicans that they in fact have been supporters of affirmative action.

You could argue that under Nixon, some implementation of the affirmative action is better than some of the rhetoric under Johnson.

But when you look also at people like Dr. King, I agree with the point that Angela made before, that King was used in many ways. And I agree with the way that Mark used Dr. King.

But realize also that Dr. King, at the end of his life, was talking about the three triplets, of militarism, racism, and colonialism, was looking at the big picture in terms of class in the original Marxian sense, looking at class as a dichotomy where working people have a surplus of their wages taken away by people who own capital, and was starting to look at things in a much broader way.

I think one thing that Richard's analysis does is blur this notion of class a little bit, and takes away this notion. And I'm glad that Burt reminded us of the socialists, that there is a notion of class struggle that goes beyond just class in its discussion here.

The third point I'd like to make is that some of the people coming on board supporting class have not supported notions of help for African-American people in the past. It reminds me of discussions I had that are supportive of abortion rights. And all of a sudden you go ahead and start having people say, "Go ahead and have those babies."

Excuse me, but what are you going to do when those babies are born? All of a sudden at that point, some of these people are saying, "Well, yes, we support adoption, you know." Kind of belatedly came to that conclusion.

But the notion of quality of life for people is something that progressives need to keep pushing on, and not just fixating on the means to that end.

The notion of merit is a very important discussion. It was mentioned early this morning, and I want to remind us this afternoon. We have always had affirmative action for people whose daddy could write out a check, for somebody who could play an oboe, for somebody from Montana. You know, if you want to get a diverse student body, you have various forms of affirmative action.

But we don't have the big ruckus that we have now, except when someone comes in looking a particular way.

Another point is the notion of interest convergence that I mentioned this morning. One argument that's been made very forcefully by Derrick Bell,<sup>219</sup> building on the work of Mary Dudziak<sup>220</sup>—and lately taken to the Asian American sphere by John Torok,<sup>221</sup> is the notion of interest convergence, where if you look at some of the gains made by African Americans and other people, they come largely at times when the group in the lead of this society want to see its interests move ahead.

One example that's pretty clear is the turnaround in racial relations in the 1950s. We had *Plessy* since 1896. It isn't like all of a sudden people got religion and decided to change things. We had a confluence of many things. We had a country that was fixated on communism. We wanted to show other countries of the world that we

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219. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1979).

220. See Derrick A. Bell, Jr. & Linda Singer, *Making a Record*, 26 CONN. L. REV. 265, 270 (1993) (citing Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988)) (noting Dudziak demonstrated that *Brown* was motivated by country's desire to diffuse foreign criticism of its treatment of African Americans and to deflate racial radicalism at home).

221. John H. Torok, *Towards a Liberatory Approach to Asian American Legal History* (June 1993) (unpublished manuscript on file with the *Harvard Women's Journal*).

were good to all people in our society so they wouldn't fall into the "communist camp."

And what happened? Some of these third world countries said, "Excuse me, guys. You've got something that looks pretty bad to us here, African Americans and the people." So that created a need to change things.

And you could also argue, for example, the *Loving v. Virginia* case. Why did that happen then? The *Naim v. Naim*<sup>222</sup> case had been decided several years before that, and did not end anti-miscegration laws.

Between '48 and '67, a lot of things happened. Well, the day after the *Loving v. Virginia* case came down, President Johnson announces that Thurgood Marshall is going to be the next Supreme Court Justice. So there is a convergence of things. You could call it circumstantial, but you could call it the interests of certain ruling elite people, and their interests coinciding with the interests of people who are dispossessed.

That's basically all I want to say. But let's remind ourselves, there is a historical piece of this that sometimes gets left out when you start talking in terms of sound bites.

One last thing. Read the EEO statistics that have been coming out recently, in terms of how many white males are being hurt by reverse discrimination. And again, I agree with Mark that we shouldn't just say white males are the problem. I myself am a white male, if I look at myself from my father's side. I think it's important to see all people as having certain unique things about them, and they should be allowed to express the full extent of their capabilities.

But the problem is that some people have just been held back. And when we see white males asserting claims for reverse discrimination, we have very, very few of those that have actually come to fruition, as far as lawsuits. I think it's six.<sup>223</sup>

So there's a lot of ruckus, a lot of discussion about angry white males and, yes, I know many of those angry white males, including people in my family. But part of the anger is because people are missing the point. They don't have any historical perspective, and they don't understand that before these changes came about, if you were a working class male from Appalachia of whatever background you could not get into certain elite situations.

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222. 350 U.S. 891 (1955).

223. See Robert L. Brady, *Reverse Discrimination: Lawsuits Are Rare*, MGMT. REV., Oct. 1, 1995, at 6.

DEAN RASKIN: I want to pose a final question. I want to start by saying that I find myself in the odd position of agreeing with everybody on a bitterly divided panel. I share the sense of moral outrage that was expressed, at least by Burt and Katheryn, and also the conviction that they expressed, along with Phil, that history must remain at the center of our analysis of the racial situation and our approach to both the constitutional and political projects of figuring out how to deal with America's dilemma.

On the other hand, I want to say a word on behalf of pragmatism generally, and also the kind of pragmatism that I think Rich and Mark are posing.

We have to deal with the reality that affirmative action is in deep political trouble, and we have to deal with the even more serious reality that in a constitutional and legal sense, it's in greater trouble.

If we're putting all of our eggs in the basket of affirmative action, we're putting our eggs into a very small basket because of what the Supreme Court has done. And unless someone is going to come forward with a magical new constitutional doctrine that's somehow going to transform the conservative hegemony of the Supreme Court, I simply see exclusive focus on affirmative action as, if not a dead end, at least a very short road.

The other point I think that is being made, at least obliquely here, and that deserves some attention, is the fact that the reason why you have Nixon and Reagan and Bush, along with a couple of Democratic presidents, supporting affirmative action is precisely because it's a very nonthreatening kind of palliative.

Let's recall that, as Clarence Page said this morning, affirmative action came about as a result of hundreds of riots and unrest and political turbulence in the country. Affirmative action didn't come as an idea from below. It came as an idea from the top as a way to calm down people below.

Affirmative action has been a modest, and in some sense, a very conservative program. Burt, I'm also interested as to why some liberals seem to abandon affirmative action, but I'm also curious at the reluctance of some people committed to building a progressive, multi-racial society, to try to invent new forms of meaningful social change.

Why is it that progressives seem to be stuck holding the bag for this program that the civil rights movement never really fought for in the first place?

PROF. WECHSLER: I feel very comfortable with that one, because I'm both a socialist and affirmative action person. So I want to put

severe limitations on the capitalist system, and give a more egalitarian position to people. So I'm very comfortable taking both of those positions.

I want to say this, too. Let me tell you this about American University Law School—I don't like WCL, American University Law School—our last meeting; who should we hire? The faculty meets at dinner. Who do we hire?

One part of the faculty that says, "Well, we have a need for a tax course, another business course, we need this, we need that." There's another part of the faculty, of which I'm a part, that says, "We are interested first, not in what our subject matter needs are, but we're interested in more minority people and women on our faculty. And we'll take a look at all of them, and work from there. But it is not the topic of the course we are most interested in."

And if you listen to Diane Rehm, not my favorite at all, or Derek McGinty, on National Public Radio, they have more black speakers. Diane Rehm has more women speakers on. With more women and minorities in leading positions, their views receive greater attention. And that will be true in the classroom.

I think it's important for a white kid in law school to see a black teacher there.

Now, we're not going to get there easily. You've got to go out and work for it. The pool is smaller. With 300 years of oppression, it's a smaller pool. And we've got to work much harder to achieve a diverse faculty and study body.

There's a big value in having a female dean. You ought to hear female teachers talk. You ought to know what I, a white male, can get away with in a classroom, that a black teacher cannot get away with. Or what I can get away with in the classroom that a woman cannot get away with.

Really, it's important to have women and minorities in the classroom.

It's important to have people of color up there to transform people's ideas. You cannot do that without taking gender and color into account.

DEAN RASKIN: Now we will take questions from the audience.

VOICE: Why not do both? Why not both racial and economic based affirmative action?

MR. KAHLLENBERG: There are a couple of answers to that. On the political side, appeals to class and race fundamentally contradict one another. There is this notion, let's just do it all. Let's do both race and class.

Every time that you say that someone who is African American, no matter what their class circumstance, deserves a preference, you get resentment from whites across the spectrum.

If you're trying to get blacks and working class whites to unite on their common interests, I think you need to point the policies to where their common interests lie. And that is class.

Then you have to look at the merits as well. What you mean when you say race plus class, is we want upper middle class African Americans and Latinos and others to continue to benefit, because African Americans and Latinos who are disadvantaged or working class would benefit already from class.

You've got to kind of focus your attention on the special case of upper middle class African Americans and Latinos. I think that's the hardest case of all to make.

Why do these particular groups of people need special help? And if you say it's got to be race plus class, I think you're highlighting the weakest argument for race-based affirmative action.

DEAN RASKIN: Mark, just take a minute because we have a bunch of people on questions.

PROF. HAGER: I really don't know where I come up on race affirmative action at the end of the day or class, but at best, I think it's fighting over deck chairs on the *Titanic*.

For eighty percent of Americans, things have been getting worse economically for the past twenty or twenty-five years. And as you rearrange the access to increasingly, not-very-nice life possibilities, you're not addressing the real problem.

The problem of the American economy is connected to developments in the world economy. And things are moving, I believe, in a generally negative direction. And things have to be done about that problem.

And what concerns me is that we not spend inordinate time and energy rearranging the deck chairs while the ship is sinking. Something needs to be done about the sinking ship.

And here again, a point of skepticism about affirmative action is, even if resentment is totally exaggerated—and I don't think the fact that there have only been six lawsuits is sufficient evidence. But I think resentment probably is exaggerated. It doesn't matter. Its interference effect on the possibility of creating a political movement that can alter the economic trajectory of this country is there, no matter what the reason for the resentment is, even if it's totally unfounded, as long as it's got a plausibility.



MR. NASH: My fundamental feeling is that this discussion about class in a non-Marxian sense is a smoke screen. We're basically getting people to fixate on saying, "This is the size of the pie. Let's fight over this." And we're not saying, "Who's got the biggest piece of this pie?"

Let's face it. Anybody who can read *The Washington Post* or *The Washington Times* can see it. The problem in this society is that some people are getting horrendously rich, and other people are getting horrendously poor.

Some of you are going to go out and work for corporations, and make \$250 an hour. Some people are going to flip burgers and make \$250 a week. Now tell me that's fair.

There are tremendous disparities present in this society. I mean, I agree with Mark to the extent that it is deck chair *Titanic* time. But the problem is, the debate has been shaped by people who have obfuscated our terminology for years.

As law students, I would ask you to write down these things, and look them up for yourself. Look up the notion of aliens ineligible for citizenship, a smoke screen term that was used to deny rights to Asian Americans. Look up the word "three-fifths of a person" in the Constitution and see how that was used to deny certain other things. Look up the notion of citizens and non-citizens, in the *Korematsu* and other Japanese-American cases.

They were aliens and non-aliens, because we didn't want to talk about people like my mother and 77,000 other people being citizens. We talk about aliens and non-aliens that had to go to camps.

Look at the notion of settlers and immigrants. When we have people coming on the *Mayflower*, they're called settlers. But when they come in later on, they're called immigrants. Look at the notion of aliens and nationals. When you come in from China, you're an alien. When you come in from the Philippines, which is a place that we expropriated, we called it, we liberated it—whatever the word is—we went in and stole the country, and Hawaii. We call them nationals.

I mean, there are things that we've done in this history to Hawaii, to Puerto Rico, to Cuba, to a lot of other countries that we're in denial about.

To come back to the question, I think that we need to defend affirmative action very strongly. And we need to stop the bull in terms of talking about affirmative action as the problem.

Affirmative action has been a great benefit to this society. You get a lot of companies that have supported affirmative action over the

years. And when you start to say that affirmative action is the problem, it's really a racialization of our discussion, a pitting of people against each other. That's a very, very dangerous trend, and I would recommend to you the writings of people in the critical race theory group.

Adrienne Davis has been one of the leaders of that. Bob Chang and a number of other people have been doing some tremendous writing, trying to get people to think about the words we're using as lawyers when we discuss these issues.

DEAN RASKIN: Professor Newton wanted to ask a question.

PROF. NEWTON: I just wanted to make a comment, sort of directed at Mark. That is, Mark, you weren't really saying that a middle class or lower middle class white person is worse off than an upper middle class, black person, did you? You made some comparison—or that he shouldn't be sacrificed?

PROF. HAGER: I think the sense is that the most disadvantaged whites in this society are worse off because of the history of racism than they would have been if we didn't have the history of racism.

In other words, if we didn't have racism in this society, they would be better off than they are now, because there would have been the possibility of creating movements and agendas from below that would have created a society that would be much better from their point of view by this point in history.

PROF. NEWTON: So people would be working together along class lines if it weren't for racism?

PROF. HAGER: Yes.

PROF. NEWTON: Then I guess my point is just the history point, that because of racism, there is a white-skin privilege, so that any white person walking down the street is going to be treated differently than any black person walking down the street.

PROF. HAGER: But the point is, how do we get—

PROF. NEWTON: How do we get beyond that, is what you're saying?

PROF. HAGER: That is the reality right now. But how do we get past that?

PROF. NEWTON: I understand what you're saying now. I guess I would say, not by these sort of incremental pragmatic points. I think of Justice Marshall's dissent in *City of Mobile v. Bolden*<sup>224</sup> as one of his most eloquent dissents. And he said, maybe black folks are going to

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224. 446 U.S. 55, 103-41 (1980) (Marshall, J., dissenting).

stop going to the courts.<sup>225</sup> Maybe going to the courts is not the answer. Instead of trying to say, "Okay, we concede affirmative action, we concede that one to you because we can't win it."

Indian law is full of all of these examples of Indian tribes losing even more lands because their attorneys said to them, "You can't make that argument. You can't win it pragmatically, so you shouldn't make it."

I would say, maybe try not to go to court, even though I make my money by teaching.

VOICE: My question is directed toward Ms. Russell. In your opening remarks, you said something about the fact that you feel this country hasn't effectively dealt with racism.

I was just wondering if you had any specific plan of action, how to deal effectively with racism that exists in this country, and how we would know whether or not we're at the stage where we can try a new alternative to deal with the more subtle types of racism that exist, that are very hard to pinpoint? I was just wondering if you had any plan of action?

MS. RUSSELL: I don't have a plan of action. But I know that without recognition of what Professor Newton just mentioned, whites getting privilege, then it's almost impossible to see why blacks, why minorities are always talking about race. It seems almost paranoid. It doesn't have context.

So without understanding contextually the history of this country, whether it's with regard to Native Americans, whether it's with regard to blacks, whether it's with regard to Latinos or Hispanics, or more broadly that there can be no way to address the problems of race because they're still not seen by whites.

I think part of what has to happen is some reflection and some real information has to be obtained.

MR. KAHLENBERG: If I could just add, I think the best way to deal with subtle forms of racism today, which undeniably continue to exist, is strict enforcement of the Civil Rights Act of 1991,<sup>226</sup> which says that if an employment practice has a racially disparate impact, the burden is on the employer to show why it is, race-neutral reasons for your numbers not working out.<sup>227</sup>

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225. *City of Mobile v. Bolden*, 446 U.S. 55, 141 (1980) (Marshall, J., dissenting) (arguing that where court fails to protect minorities it cannot expect them to continue "to respect political channels of seeking redress").

226. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 2 U.S.C., 29 U.S.C., and 42 U.S.C. (1994)).

227. 42 U.S.C. § 2000e(k) (1994).

I am for that. I think that statistics are important, but that there is an important distinction between that legal regime and one which says, even if there is a race-neutral reason for the numbers not working out right, you need to apply racial preferences anyway, to make sure that we have in the end an equality of result.

MR. NASH: For those who say, "Why can't we just settle? Why can't we have race and class?," coming back to that previous point, enforcement is a key to all this. And for me, in the Asian-American community, I look at the Immigration Reform and Control Act of 1986,<sup>228</sup> and the ways that that was supposed to help by forcing employers to start cracking down on sweatshops. It was supposed to do a lot of things to help our community.

And the Department of Labor never had the money to do that. So when Republicans are saying, "Let's do certain things," well, we've never had the money to fully implement some of the affirmative action plans and the monitoring and the enforcement that we need.

We've thrown around a lot of talismans here in Washington, like the current one. The current god that we are worshipping is called state block grants. Those of us who can think back far enough to the 1974 Housing and Community Development Act,<sup>229</sup> and certain other things that didn't quite work, we had people who were moved away from their homes, and then nothing happened. They just left empty parking spaces, so we could park downtown.

So those of us who have been on the front lines of civil rights enforcement are very paranoid, quite frankly. We want to keep the safeguards in place. And we can start talking about things like class and other things.

But let's hold on to the bottom line. Let's hold on to the census categories. Let's allow the enforcement and monitoring to go on, because those are the minimum guarantees that we've had, and they're going to slip away.

DEAN RASKIN: You and then Professor Kairys.

VOICE: One of the arguments that I've heard against affirmative action has been that we live in a color-blind society, so therefore we don't need it anymore. My question is, based on the same notion, if you do go to class-based affirmative action, sometime in the future, can I see a politician going up and saying, "Since we have class-based

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228. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3435 (1986) (codified at 8 U.S.C. § 1187 (1994)) (aiming to reduce illegal immigration into United States).

229. Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified as amended at scattered sections of 42 U.S.C.) (aiming to promote safe, clean, and healthy housing that is affordable to low income families).

affirmative action, we don't need any social programs, any welfare, because we do—everybody has equal rights to these rights.”

That's the question. Can we see that?

MR. NASH: In a socialist society that has guarantees of housing, health care, and employment, you're not going to get these things. There are inbred contradictions of capitalism. Let's face it, guys. We don't want to talk about these problems. We've got to start understanding that there are inbred contradictions in the way this economy works.

And we're talking about affirmative action, which frankly is part of a much bigger discussion.

PROF. HAGER: If I could jump in here, I think you've made a version of a point that I'm trying to make.

Not to make this overly conspiratorial, but look at the results. If you get them all wrangling about the preferences, maybe they will shut up about the general programs, and general economic agenda that could be developed that would more or less help everybody, or at least broad categories of people all at once. If we don't want to do that, it is highly advantageous, at least if we get them all wrangling, scrambling over the crumbs.

MR. KAHLENBERG: I think that's true in the race context. I think if you start people thinking about class, and do a system of class-based preferences, then the social mobility programs that you're talking about, and I also support, I think will flow naturally from them. I don't think that there is a contradiction between class-based preferences and social programs that help the lower classes. I think the first will make the second more likely.

VOICE: I understand that especially in today's climate with the legislature that we have in office and with the fear, at least my fear that we will have a Republican president in '96, that we need to search for alternatives to the affirmative action program that's in place now.

My fear with the alternative that has been expressed today is that in a climate where we have cases being made by, I believe the example this morning was an Alabama white person who is being represented by a black person in their legislature—that it makes out a case for them—that without the protection that race-based affirmative action provides, if it's based on class, that the gains that African Americans and other minorities have made to date will begin to slide backwards.

I wonder if you can address that, according to the plan of action that you've proposed.

MR. KAHLENBERG: As I say, I'm not arguing for a repeal of antidiscriminatory statutes, as some people have proposed. I think we need stronger enforcement of both the Civil Rights Act of 1964, and the Civil Rights Act of 1991. I think those, if properly enforced, provide powerful tools to address ongoing discrimination.

One of the changes in the debates you've seen over the years on affirmative action is in the justification for racial preferences. The reason racial preferences were put on the table at all was because they were supposed to address the history of past discrimination, which has a current-day legacy.

And passing the Civil Rights Act of '64 can't undo the past. So you need to do something proactive.

Today we hear more and more the argument that racial preferences are needed as an anti-discriminatory tool in itself, which I think makes very little sense. I think then the conservative argument that you don't fight discrimination with another form of discrimination actually has plausibility.

When you are dealing with a legacy of past discrimination, there is an argument for using racial preferences. When you're saying that racial preferences are mere prophylactics against future discrimination, I think the argument is much harder to make.

DEAN RASKIN: I want to ask one question. Then I'll get to David for the final question.

This is now switching to the constitutional vernacular. We never quite got back to the Constitution, but then again there was not much there to get back to.

But let me pose this question to you, Rich. Does your argument hold also in the voting rights context? That is, do you go with Justices O'Connor and Kennedy in *Shaw v. Reno*, and *Miller v. Johnson*?

The reason I ask that is because it seems clear to me, following Congress and being involved in a limited way with Congress, that the African Americans and Latinos and Asian Americans who have gotten elected to Congress are the absolute bulwark and bastion of any kind of class-based politics that exist in the country (that is, outside of the upper classes).

Thus, the creation of majority black and Hispanic and Asian American districts is the absolute prerequisite to any kind of progressive class-based politics in Congress, and by extension, in the larger society.

So if you begin to undo the minority opportunity districts, you directly undercut the class-based politics that I think you favor. This

leaves aside what is from my perspective a doctrinally unstable and incoherent decision in the *Shaw* and *Miller* cases.

MR. KAHLLENBERG: No, I don't make the class-based argument in the voting rights context. I'm not sure how that would work. In general, I think that using race as a factor in drawing lines, in voting districts, is much less objectionable than in using race as a factor in deciding who's going to get a job, or who's going to be admitted to a university.

In part because I think the concern about stereotyping is much less problematic to me in the voting context. When you're talking about 500,000 people, to say that in general African Americans have common interests, I think, is not at all a racist statement or in any sense offensive. I think when you're saying, "We are going to admit this person to a university because we think they're going to bring the black perspective, as an individual—this person will bring the black perspective by virtue of their skin color," I do find that offensive.

And so I think they are very different realms.

DEAN RASKIN: Professor Kairys?

PROF. KAIRYS: I like this talk of class. You make a good case that a lack of consciousness of class is one of the plagues of our history. I think you can make another good case that rampant, unrestrained capitalism is at the heart of most of what we're talking about in some very deep way, including to me the comodification of almost everything that's human now. It just doesn't seem to have an end.

We do have to start talking about that. But the first question for Richard, as a pragmatist, which you very much are, do you worry that the people who are now in control of the political system are going to use your theory, not to help people in the lower classes at all, but they're going to use it to under-cut affirmative action, and then they're going to do nothing on class? Do you worry about that as a pragmatist, because pragmatism is so central to your focus?

Then secondly, for Richard and Mark, I could imagine a great affirmative action program where there was enough money spent—I'm raising the question of resources, isn't that central?—to provide day care, education, training, and getting us into new areas that you could imagine spending tons of money on.

Suppose they put enough money in it, and if it were really distributed kind of fairly, and people indeed really got it, you'd have to at some point say, okay. It's like a Marshall Plan for all people in need, in the United States of America.

You don't say one group gets more of that pie than the other, if there were really the resources for everybody to get it. But we know that's not going to happen in this context.

The Senate just ended Aid to Families With Dependent Children. This is the context we're in. That was considered in the media moderate. That's moderate. So if that's the sense of the values of the period we're in, again from a pragmatic viewpoint, which you both claim to be coming from, doesn't this worry you?

We're not going to get any kind of real affirmative action for anybody in the foreseeable future. Why give up on whatever we can get out of affirmative action, which does have a history, and has done some good things?

MR. KAHLENBERG: I think, number one, that we cannot hang on to affirmative action. I don't think that's a viable alternative. I think from a political and a legal standpoint, we have to come up with an alternative to saying we're going to dig in our heels and defend this system, no matter how imperfect it might be. It's a loser. I think those who argue, no retreat, will hasten the kind of ultimate defeat of Democrats and progressives generally.

I am wary about the conservative embrace of class-based affirmative action.

When I was teaching constitutional law at George Washington University, I hardly ever agreed with Clarence Thomas, and on this issue, I find what he says resonates. So I think there is a danger that progressives will be used by conservatives to dismantle affirmative action. That's why I think it's essential that there be a simultaneous trade, if you will.

Even Gingrich is now talking about that. He realizes that there is a concern about going cold turkey, and repealing race-based practices entirely. So now he's looking for alternatives. And the key is making sure that progressives use him rather than the other way around.

DEAN RASKIN: Before you go, Mark, Professor Chang just wanted to ask a question, and you get the last word, and see if you can incorporate in any response to him what you were going to say.

MR. CHANG: I had two brief questions. One is, where is gender in all of this? The whole affirmative action debate has been incredibly racialized. I don't think sufficient attention has been paid to that.

My understanding is that white women have been the primary beneficiaries of affirmative action. And where are they in this discussion? Why do we focus on race?

Notwithstanding that this panel is called the creditor and debtor race. But I think it's something that we can still talk about.



The second question is, when you get rid of affirmative action, you talked a lot about white resentment. As a beneficiary of affirmative action, what are you going to do about my resentment and people of color, and women? What are you going to do about that?

PROF. HAGER: I don't know if I should necessarily have the last word. But I'm opposed to affirmative action on the basis of gender.

David, I'm not optimistic over the short run. I think what has to happen for things to get significantly better is very hard to foresee right now. It involves a political movement and a social economic strategy that is hard to even conceptualize, much less organize and mobilize people for.

So you've got me, at least in the short run. There's a cloud of pessimism hanging over my head there. I worry that affirmative action may retard its dawning pragmatically. But my reservations are not just pragmatic. They're also moral.

I think we are at the tipping point, where the benefits of affirmative action may be exhausting themselves. And as we perpetuate it, its negatives will become foregrounded. Its negatives being the perpetuation of the construction of race in this society.

MR. NASH: I would just say something I said earlier that bears repeating. We have discussions about whether we want to keep the racial categories. But unless we keep the five categories we've had up until the 1990 Census,<sup>230</sup> in the year 2000 Census, we're not going to be able to track any data, as far as who's getting what.

So I would argue at minimum, let's keep the five racial census categories. And as far as the multi-racial census categories, my own feeling is that it should not be totaled in with the others. We should have the five categories total 100 percent.

If you want to also check off multi-racial, as I would like to do, have that be something else independent of that. But in order to have a crosswalk between data up until the present time and into the future, we need that.

I hope while everybody's wrangling and the deck chairs are being rearranged, we can at least agree to keep those five categories.

DEAN RASKIN: Very good. I want to thank the panelists for their tremendous insight and energy in participating in this panel.

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230. See Dana Banker, *Varied Faces to Bring More Choices; Schools to Allow Use of "Multiracial" on Student Records*, FORT LAUDERDALE SUN-SENTINEL, Sept. 4, 1995, at 1B (noting that use of five categories in U.S. Census was perceived as inadequate in Florida, which added sixth category of "Multiracial").

## V. APPENDIX: BIOGRAPHIES OF PARTICIPANTS

PAUL BUTLER is an Associate Professor at George Washington University National Law Center. He teaches and writes in criminal law and race, racism, and law. Professor Butler graduated with honors from Harvard Law School. Prior to joining the academy, he was a federal prosecutor with the Department of Justice. Professor Butler's most recent publication is *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

ROBERT S. CHANG is an Associate Professor at the California Western School of Law in San Diego, California. His major publications include *Dis-Oriented: Asian Americans, Law, and the Nation-State*, which will be published in 1996 by New York University Press, and *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241 (1993) reprinted in 1 ASIAN L.J. 1 (1994). His work is the subject of a forthcoming *Colloquy* in the IOWA LAW REVIEW (contributions by Keith Aoki, Margaret Chon, Adrienne Davis, Garret Epps, Neil Gotanda, Dennis Greene, Natsu Saito Jenga, Peter Kwan, Gerald Torres, and Alfred Yen).

CHARLES J. COOPER is a partner at Shaw, Pittman, Potts, & Trowbridge in Washington, D.C., and concentrates in civil litigation and federal administrative law. He was Assistant Attorney General, Office of Legal Council at the Department of Justice where he was responsible for providing formal opinions to the President. Mr. Cooper testified before the Senate Judiciary Committee on legislation designed to reverse the Supreme Court's "flag burning" decision, *Texas v. Johnson*, and also testified on S. 34, The Judicial Prohibition Act, designed to reverse the Supreme Court's decision upholding judicial taxation in *Missouri v. Jenkins*. Mr. Cooper has published numerous articles and spoken on a wide variety of constitutional and legal policy topics, including issues relating to constitutional interpretation, federalism, separation of powers, presidential authority, religious liberty, voting rights, school desegregation, and banking regulation. He received his B.S. from the University of Alabama in 1974. While attending the University of Alabama School of Law, he was the Editor-in-Chief of the *Alabama Law Review* and graduated first in his class in 1977.

ADRIENNE D. DAVIS is an Associate Professor of Law at American University, Washington College of Law. She earned her B.A. and J.D. from Yale University. She teaches in the area of race and the law. She has written about the Hill-Thomas Hearings, and has an essay forthcoming about the significance of the *Loving v. Virginia* case.

ANGELA JORDAN DAVIS is a Visiting Associate Professor of Law at George Washington University National Law Center. She has formerly served on the adjunct faculty at George Washington, Georgetown, and Harvard Law Schools. Professor Davis is the Chair of the Board of Trustees for the National Rainbow Coalition. She is a graduate of Howard University and Harvard Law School. Professor Davis was the Director of the Public Defender Service for the District of Columbia from 1991-94. From 1988-91, she was the Deputy Director at the Public Defender Service. Prior to her tenure as Deputy Director, she served as a staff attorney at the Public Defender Service for six years, representing indigent persons charged with crimes. Ms. Davis is a former law clerk of the Honorable Theodore R. Newman, the former Chief Judge of the District of Columbia Court of Appeals.

MARK HAGER received his B.A. from Amherst College, his M.A., Ph.D., and J.D. from Harvard University. He is a Professor of Law at American University and teaches constitutional law and theory, along with other subjects. He has served on the board of the National Lawyers Guild, D.C. Chapter. Professor Hager is active in constitutional rights litigation, especially on behalf of the D.C. prisoners at the Lorton correctional facility.

STUART ISHIMARU serves as Counsel of the Assistant Attorney General for Civil Rights, Deval Patrick. He is responsible for advising Mr. Patrick on a range of issues, including legislative matters. He formerly served as Acting Staff Director of the U.S. Commission on Civil Rights (1993-94), as a Professional Staff Member of the House Armed Services Subcommittee on Research and Technology, and Subcommittee on Military Construction (1991-93), and as Assistant Counsel of the House Judiciary Subcommittee on Civil and Constitutional Rights (1984-91). At the Judiciary Committee, he had primary responsibility for the Fair Housing Act of 1988 (Public Law 100-430); Commission on Civil Rights Reauthorization Act (Public Law 101-180); Americans with Disabilities Act (Public Law 101-366); and Civil Rights Acts of 1990 and 1991 (Public Law 102-166). Mr. Ishimaru received

a J.D. from George Washington University, and an A.B. from the University of California, Berkeley.

RICHARD D. KAHLENBERG is a Fellow at the Center for National Policy in Washington, D.C. He has been a visiting Associate Professor of constitutional law at the George Washington University National Law Center, and a legislative assistant to Senator Charles S. Robb (D-VA). He is the author of *BROKEN CONTRACT: A MEMOIR OF HARVARD LAW SCHOOL* (1992) and *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (forthcoming May 1996). Mr. Kahlenberg graduated *magna cum laude* from Harvard College in 1985 and *cum laude* from Harvard Law School in 1989. His articles on affirmative action have appeared in *The Washington Post*, *The New Republic*, the *Washington Monthly* and elsewhere.

DAVID KAIRYS, Professor of Law at the Temple University School of Law since 1990, has litigated some of the leading civil rights cases over the past two decades. His most recent book is *WITH LIBERTY AND JUSTICE FOR SOME, A CRITIQUE OF THE CONSERVATIVE SUPREME COURT* (1993).

PHIL TAJITSU NASH teaches Asian American History at the University of Maryland at College Park, and has previously taught Metropolitan Studies at New York University, Asian American History at Yale University, and law at City University of New York Law School and Georgetown University Law Center. Professor Nash was a beneficiary of affirmative action at the Minority Student Program at Rutgers Law School in Newark, New Jersey. He is a member of the New York and New Jersey bars and has worked as a civil rights attorney at the Asian American Legal Defense Fund, AFSCME District Court 37 Municipal Employees Legal Services (MELS) Plan, and the Education Law Center. During 1993 and 1994, Mr. Nash served as Founding Executive Director of the National Asian Pacific American Legal Consortium, the only national legal advocacy organization for Asian Americans. He presented position papers and testimony on Asian-American issues to Congress, senior White House officials, and the United States Attorney General. Over the past twenty years, he has written many articles for academic, ethnic, and mainstream publications, and has spoken to hundreds of organizations, corporations, and government agencies, and universities on diversity, human resources, leadership, fundraising, organizational development, and Asian American issues.

ALEXANDRA NATAPOFF received her J.D. from Stanford Law School in 1995 and her B.A. in philosophy from Yale University in 1987. She is currently a judicial clerk for the Honorable Paul L. Friedman, United States District Court for the District of Columbia. She formerly served as the Issues Director for the National Rainbow Coalition and as a Research Associate at the Institute for Policy Studies. Her publications include *Trouble in Paradise: Equal Protection and the Dilemma of Interminority Group Conflict*, 47 STAN. L. REV. 1059 (1995) (Recipient, Steven M. Block Civil Liberties Award), *Counterpoint: Anatomy of a Debate: Intersectionality and Equality for Deaf Children from Non-English Speaking Homes*, 24 J.L. & ED. 271 (1995), and 1993: *The Year of Living Dangerously: State Courts Expand the Right to Education*, 92 ed. LAW REP. 755 (1994).

NELL JESSUP NEWTON is a Professor of Law at American University, Washington College of Law. She has written on American Indian legal issues since 1980. With Robert N. Clinton and Monroe Price, she is a co-author of the text, AMERICAN INDIAN LAW (3d 1991 & Supp. 1994). She and Robert N. Clinton are presently serving as editors-in-chief of a project to revise the HANDBOOK OF FEDERAL INDIAN LAW.

CLARENCE PAGE, the 1989 Pulitzer Prize winner for *Commentary*, has been a columnist and a member of the newspaper's editorial board since July 1984. His column is syndicated nationally by Tribune Media Services and he has done a twice weekly commentary on WGN-TV Chicago. He has been based in Washington, D.C. since May 1991. Page is an occasional guest on "The McLaughlin Group," a regular contributor of essays to the McNeil/Lehrer News Hour, and a host of documentaries on the Public Broadcasting System. He is a regular panelist on Black Entertainment Television's (BET) weekly "Lead Story" news panel program and a biweekly commentator on National Public Radio's (NPR) "Weekend Sunday." As a freelance writer, he has published articles in *Chicago Magazine*, *The Chicago Reader*, *Washington Monthly*, *The New Republic*, *The Wall Street Journal*, *New York Newsday*, and *Emerge*. Mr. Page received his B.S. in journalism from Ohio University in 1969. He has received honorary doctorates from Columbia College in Chicago and Lake Forest (Illinois) College.

FRANK R. PARKER is a Visiting Professor of Law at American University's Washington College of Law in Washington, D.C. He is on leave from his position as Professor of Law at the District of Columbia

School of Law. Professor Parker is the author of the award winning book, *BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965* (1990), and is currently at work on a book on affirmative action. He has written numerous book chapters and law review articles on civil rights law, most recently *The Constitutionality of Racial Redistricting: A Critique of Shaw v. Reno*, 3 D.C. L. REV. 1 (1995), and is a contributing editor of the American Bar Association's journal *Preview of United States Supreme Court Cases*. Before becoming a law professor, he was Director of the Voting Rights Project of the Lawyers Committee for Civil Rights Under Law in Washington and has litigated more than 50 civil rights and voting rights lawsuits. Professor Parker received his A.B. degree from Oberlin College and his law degree from Harvard Law School.

ROGER PILON is a senior fellow at the Cato Institute and is the director of Cato's Center for Constitutional Studies. He holds a B.A. from Columbia University, an M.A. and a Ph.D. from the University of Chicago, all in philosophy, and a J.D. from the George Washington University School of Law. He taught philosophy of law at the Emory University School of Law and was a National Fellow at the Hoover Institution at Stanford University. In the Reagan administration, Mr. Pilon held five senior posts, including director of the Asylum Policy and Review Unit of the Department of Justice and director of Policy for the Bureau of Human Rights and Humanitarian Affairs at the Department of State. He has published and lectured widely on moral, political, and legal theory. In 1989 the National Press Foundation and the Commission on the Bicentennial of the U.S. Constitution presented Mr. Pilon with the Benjamin Franklin Award for Excellence in writing on the U.S. Constitution.

JAMIN B. RASKIN is an Associate Professor of Law and Associate Dean at the Washington College of Law at American University, where he also serves as Co-Director of the Law and Government Program. A graduate of Harvard College and Law School, he has served as an Editor of the *Harvard Law Review*, and Assistant Attorney General of Massachusetts, and General Counsel of the National Rainbow Coalition. He has litigated and written widely in the field of voting rights, publishing articles on non-citizen voting in local elections, the suffrage rights of citizens in the District of Columbia, workplace democracy, and federal campaign finance reform and the "wealth primary."

JEFFREY ROSEN is the legal affairs writer of *The New Republic*, where he writes about the Supreme Court and constitutional politics. He is a graduate of Harvard College, *summa cum laude*, Balliol College, Oxford, where he was a Marshall Scholar; and Yale Law School. After clerking for Chief Justice Abner Mikva on the U.S. Court of Appeals for the D.C. Circuit, he joined *The New Republic* in September 1992. His articles and reviews have also appeared in *The Atlantic Monthly*, *The New Yorker*, *Vanity Fair*, *The New York Times*, *Constitutional Commentary*, and the *Yale Law Journal*.

KATHERYN K. RUSSELL is an Assistant Professor of Criminology and Criminal Justice at the University of Maryland, College Park, where she completed her Ph.D. dissertation, "Trial by Jury, Death by Judge: An Empirical and Legal Analysis of Jury Override in Alabama." Professor Russell received her undergraduate degree from the University of California, at Berkeley in Legal Studies. Her law degree is from the University of California, Hastings College of Law. Her writing has been in the areas of criminal law, sociology of law, race and crime. In the fall of 1994, Dr. Russell was a visiting professor at the City of New York University (C.U.N.Y.) Law School, where she taught criminal law and a seminar on race and crime. She taught at Howard University and Alabama State University. She interned at the Southern Poverty Law Center and the American Civil Liberties' Reproductive Freedom Project. She is a member of the American Society of Criminology, National Academy of Criminal Justice Sciences, and the National Conference of Black Lawyers. Dr. Russell is currently writing a book on race and crime in America.

BURTON WECHSLER is a Professor of Law at the Washington College of Law at American University, where he teaches constitutional law, federal courts, and the First Amendment. Professor Wechsler has vast experience litigating a variety of civil rights and First Amendment issues.

BRENDA WRIGHT is currently the Director of Voting Rights Project of the Lawyers' Committee for Civil Rights Under Law in Washington D.C. She oversees the Project's efforts to overcome racial discrimination in the electoral process through litigation on behalf of minority voters under the Voting Rights Act and Constitution and throughout public education and advocacy. Ms. Wright has been active in efforts to create majority African-American congressional and legislative districts and to defend such districts from reverse discrimination

challenges brought under *Shaw v. Reno*. She represented African-American voters in litigation in Florida that led to the creation of the state's first majority African American congressional districts in 1992, and is currently participating in the defense of those districts as well as the defense of Louisiana's majority-black 4th Congressional District. Ms. Wright has testified before Congress and state legislatures on issues of racial discrimination in the electoral process, and is the author of several articles on the Voting Rights Act. She is a 1982 graduate of Yale Law School.

FRANK H. WU is an Assistant Professor of Law at Howard University. He joined the faculty there following a Teaching Fellowship at Stanford University. He received his degrees from Johns Hopkins University and the University of Michigan Law School. The Washington correspondent for *Asian Week*, he is the author of *Neither Black Nor White: Asian Americans and Affirmative Action* and *The Limits of Borders: A Moderate Proposal for Immigration Reform*.