

[Home](#) [Sources](#) [How Do I?](#) [Site Map](#) [What's New](#) [Help](#)

Search Terms: 29 U.S.F.L. Rev. 889

FOCUS™

[Edit Search](#) Document 1 of 1. Copyright (c) 1995 University of San Francisco School of Law
University of San Francisco Law Review

Summer, 1995

29 U.S.F.L. Rev. 889

LENGTH: 10111 words**ARTICLE:** An Agenda for the Post-Civil Rights Era**NAME:** By John A. Powell ***BIO:**

* Professor of Law, University of Minnesota. Former Legal Director of the A.C.L.U. The author would like to thank Jeff Rutherford for research assistance.

SUMMARY:

... NOW IS A PERFECT TIME to consider the effect of what has become known as the civil rights movement. ... Importantly, there is a twist in the focus of this assumption of the colorblind position: The major evil presented by discrimination is the use of race as a category, not the eradication of racism or racial hierarchy. ... When society had a formal racial "dictatorship" that expressly denied services and opportunities to blacks and other persons of color, the concept of a colorblind law and the goal of formal equality played limited, but useful roles in the fight against racial subordination. ... In fact, if eradicating racism is the goal of the civil rights movement, a colorblind approach to ending discrimination, as well as any ostensibly neutral solution to racial injustice, is a substantial impediment to achieving substantive racial justice. ... In fact, modern commentators, scholars and jurists frequently evoke the first Justice Harlan when espousing the concept of a colorblind Constitution, often cited as an enlightened position on racism and the law during a period when our country openly embraced racial domination. ... Thus, black nationalism – and with it race consciousness or the anti-colorblind position – represented a threat to racial justice, rather than serving a "positive and liberating role." ...

TEXT:

[*889]

NOW IS A PERFECT TIME to consider the effect of what has become known as the civil rights movement. n1 This year marks the thirtieth anniversary of the Voting Rights Act of 1965 n2 and the forty-first anniversary of Brown v. Board of Education, n3 both landmark products of the civil rights era. It is also appropriate, if not necessary, at this time to consider the movement's successes and failures; to assess what has worked and what still needs to be done; and to articulate the primary goals, objectives, and strategies of this great movement.

This task could prove problematic. There is not complete agreement as to what the civil rights movement was supposed to have achieved, nor is there agreement as to what the civil rights movement, in fact, accomplished. This state of affairs may help explain why we have had some difficulty assessing its success, and why we have not even been able to agree whether we are still in the civil rights era or have moved into a post-civil rights period.

There is substantial agreement, however, on some aspects of the civil rights movement. It is beyond dispute that the civil rights movement directly challenged a large number of federal, state and local laws that explicitly discriminated against blacks and other racial minorities. There is also [*890] agreement that the civil rights movement largely eradicated explicit, state-imposed racial inequality. Racially discriminatory laws once pervaded government at every level and comprised part of a racial caste system that controlled the lives of blacks and other minorities and subordinated them relative to whites.

Nevertheless, there are still important areas about which we do not necessarily agree. While these areas might seem subtle or nuanced, they are fundamental both to deciding what the civil rights movement meant and what it

was, and to what the agenda for the post-civil rights period should be. Take, for example, the laws from the civil rights era that clearly discriminated. Many of these laws were ostensibly "neutral," not only as to statutory language, but arguably even in application. Laws barring blacks from riding with whites on passenger trains also barred whites from riding with blacks, n4 and laws that prohibited blacks from marrying whites also prohibited whites from marrying blacks. n5 As a purely logical matter, these laws appear to be neutral and symmetrical. Other discriminatory laws, on their face, more explicitly favored whites and subordinated blacks, such as those laws that barred blacks from serving as jurors n6 and from voting. n7

There is broad consensus that the civil rights movement was designed to attack and repeal the more explicitly racist laws, but what about the other laws, those that were racial but that appeared to be "neutral" and "symmetrical"? Here the consensus begins to disintegrate. Some argue that so long as laws are logically neutral, racial classification per se is not problematic. n8 Others argue that it is the effect of the law, examined contextually and historically, that determines its permissiveness, and that any ostensibly neutral law that has a discriminatory effect is problematic. n9 Some argue that the [*891] civil rights movement only fought against formal inequality and governmental acts. n10 Others argue that the civil rights movement focused not only on eradicating explicitly racist state laws, but also on private acts of discrimination against racial minorities. n11

These issues raise the question of the proper scope of the civil rights movement: Is it appropriate for the civil rights movement to move beyond fighting only state-imposed or explicit discrimination, and if so, what would be the limiting principle? Lawyers and scholars have confronted this question in the context of equal protection law when the public-private distinction is made in regard to the existence (liability) or nonexistence (no liability) of discriminatory state action. n12 Furthermore, by focusing on discrimination as a logical issue instead of looking at the racial conditions and practices in our society, we are pulled into the neutral and symmetrical context that discrimination suggests. According to this neutral and symmetrical context, the major problem facing society is discrimination. Therefore, any discrimination is bad, including discrimination that burdens whites and benefits blacks and other minorities. n13 This position can aptly be described as the ostensibly neutral "colorblind" position. n14 The colorblind position has [*892] become the dominant narrative associated with the civil rights movement. This narrative is one of the major impediments to developing a thickly textured civil rights movement. As a logical matter, it might have great appeal, but as a practical matter, in the context of our history, it is the narrative of continued racial hierarchy. It must be discarded.

I. The Colorblind Position

The colorblind position supports a legal skepticism of racial categories and racial classification. To the colorblind position, it matters not who benefits and who is burdened by a race-conscious act. The apparent goal is to treat everyone equally without reference to context, situation, history or culture. On its face, the position is ostensibly neutral, in keeping with the dictates of procedural fairness and formal equality. However, the colorblind position is anything but neutral in effect and, in practicality, treats differently situated persons similarly. n15 As Neil Gotanda stated, "[a] color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans." n16 A number of important assumptions inform the colorblind position. First, the colorblind position assumes that the law does not recognize groups, only individuals. Second, the colorblind position assumes that race is irrelevant and that law should avoid any recognition of race at all costs. Racial discrimination is therefore a subcategory of the colorblind position. n17 Importantly, there is a twist in the focus of this assumption of the colorblind position: The major evil presented by discrimination is the [*893] use of race as a category, not the eradication of racism or racial hierarchy. Within that assumption, the focus is on ending all racial discrimination. Third, the colorblind position assumes that the world is, for the most part, racially fair. One who challenges this position faces a heavy burden. Moreover, if challengers can prove that the world is not basically fair, the colorblind position allows only limited remedies to correct extraordinary injuries.

This colorblind, race-neutral position currently occupies center stage in the American debate on race, both in politics and in the law. It is against this background of colorblindness and neutrality that conservatives can plausibly attack race-conscious programs like affirmative action. It is the power of the colorblind position that makes it difficult for liberals to defend race-conscious strategies. Indeed, much of the rhetoric and many of the stated goals of the civil rights movement advocated moving toward the creation of a colorblind society. The concepts of neutrality and colorblindness, however, both as goals and as strategies, have always been extremely limited and problematic in terms of racial justice. Today, colorblindness is extremely pernicious and detrimental to the interests of the vast majority of persons of color in the United States. n18

When society had a formal racial "dictatorship" n19 that expressly denied services and opportunities to blacks and other persons of color, the concept of a colorblind law and the goal of formal equality played limited, but useful roles in the fight against racial subordination. But the scope of the colorblind concept was never intended to eradicate racial hierarchy and racial subordination. Indeed, the basic assumption that informed Justice Harlan's use of colorblindness is that colorblindness would comfortably co-exist [*894] with racial subordination. n20 This limitation, however, often eluded civil rights leaders who, during much of the early years of the movement, focused on challenging and destroying the vast structure of formal racial inequality that pervaded American

society up until the late 1960s. To the extent that we have dismantled America's racial dictatorship and formal racial caste system, there is much for the civil rights movement to celebrate. Many brave people put their lives on the line to end formal manifestations of racism. As successful as it was, though, it failed to reach beyond formal racism.

For example, school desegregation, certainly the greatest victory of the civil rights movement, failed to eclipse formal racism. In 1954, the Supreme Court, in *Brown v. Board of Education*, struck down the doctrine of "separate but equal" and ordered an end to state-sponsored racial segregation in America's public schools. n21 While this decision changed the landscape of American law, it did not achieve equality on a substantive level. This was not just a failure of application. In subsequent rulings, the Court limited *Brown* in ways that made it impossible to reach some of the most persistent and virulent forms of racial subordination. The Court, for example, has held that *Brown* did not stand for integration, but only against state-sponsored segregation. n22 In one case, the Court held that even within a school district, *Brown* only applies to intentional, state-sponsored segregation. n23 In another case, the Court held that suburban whites who separated themselves residentially from blacks could not be ordered to participate in desegregating inner-city school districts. n24 *Brown* was an appeal to end formal inequality in education and to get segregation off the books, not to equalize educational resources or ensure that every child has an equal educational experience. n25 Also, the remedy in *Brown* was in no way designed to disturb racial hierarchy. n26 [*895]

Racism is not a single concept. n27 If the goal of the civil rights movement was to end all racism – not just one form of racism – then there is still much work to be done. In fact, if eradicating racism is the goal of the civil rights movement, a colorblind approach to ending discrimination, as well as any ostensibly neutral solution to racial injustice, is a substantial impediment to achieving substantive racial justice.

Some may find it strange that a colorblind approach actually hinders understanding and movement towards racial justice because the vision of a colorblind society has long been closely associated with racial justice. However, its transformative value was always limited to attacking the racial caste system, not to disturbing and dismantling racial hierarchy. n28

The concept of a colorblind law was first articulated by Justice Harlan in his dissent in *Plessy v. Ferguson*. n29 In the late 1800s, Justice Harlan was the Supreme Court's progressive on racial issues. n30 At first blush, his views on racial justice seem more in keeping with views expressed today than with those held by most of his contemporaries. n31 In fact, modern commen- [*896] tators, scholars and jurists frequently evoke the first Justice Harlan when espousing the concept of a colorblind Constitution, n32 often cited as an enlightened position on racism and the law during a period when our country openly embraced racial domination. Although he was undoubtedly enlightened for his time, a closer reading of Justice Harlan's dissent in *Plessy* reveals that his concept of racial justice would hardly be considered enlightened today. n33 In his dissent in *Plessy* he states:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty ... But in the view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is colorblind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. n34

Justice Harlan's concept of colorblindness challenged the renewed racial dictatorship, but at the same time embraced racial hierarchy and subordination. n35 He was only concerned with challenging the explicit racial dictatorship that existed during the Jim Crow era. Indeed, he assumed that [*897] whites were at the time, and always would be, superior as a race. Colorblindness in this extreme form makes it difficult to identify and address substantive racism. n36

This is not to say that the colorblind position does not have a certain rhetorical force. It does. Those who embrace the colorblind doctrine, for instance, can point to the improvement of socio-economic status of African Americans and persons of color in the United States over the last one hundred years as proof that racial subordination in the United States has ended. They can argue that much of the change came about as a result of the efforts of the civil rights workers who pursued an ideal of a colorblind society. Indeed, we may have slain or seriously wounded the one form of racism that the civil rights movement explicitly attacked – formal racial inequality.

Furthermore, because race is closely associated with racism, there is the suggestion that those who insist on talking about race or thinking in racial terms are perpetuating racism. n37 Take, for example, the direction that race consciousness took in the late 1960s. Largely integrationist and integrated organizations, such as the

NAACP and the SCLC, dominated the civil rights movement into the mid-1960s. By the late 1960s, most of the vestiges of state-imposed, explicit racism – formal racial inequality – had been eradicated. For many blacks, however, life had not substantially improved, particularly in the urban centers. The more mainstream civil rights organizations were not equipped to speak to the complex needs of the urban racial poor, leaving a vacuum.

Into this vacuum stepped black nationalist groups who espoused more militant, race-specific language. These groups were extremely critical of the white power structure. Whites were expelled from many of the organizations, and the issue of inclusion of whites in the movement to improve the lives of blacks led to deep splits within the black political community. n38 These groups often times reflected the very real anger and pain of the urban communities that would explode during the riots of 1968, following the [*898] deaths of Martin Luther King, Jr. and Robert F. Kennedy, Jr. Racial integration and the dream of a colorblind society became part of the dominant cultural – white – rhetoric. n39 The result of this schism was to place negative connotations on race consciousness, and to make more palpable, especially to liberal whites and integrationists, the rhetoric of colorblindness. As Gary Peller has noted: "the rageful rhetoric of hate against whites adopted by many nationalist groups and leaders seemed to confirm to whites the idea that black nationalism and white supremacy were identical manifestations of irrational and indiscriminate hate." n40 He continues, stating:

But the equation of black nationalists and white supremacists assumes a neutral standard from which to identify race consciousness as a deviation, and from which to link race inherently to prejudice and domination. When viewed in terms of the actual context of history and power relations between racial groups in America, however, white supremacy and black nationalism embodied very different understandings of race. n41

Thus, black nationalism – and with it race consciousness or the anti-colorblind position – represented a threat to racial justice, rather than serving a "positive and liberating role." n42

Another concern is that the colorblind position effectively erases race from the analysis. For instance, it allows for a black woman to be seen in anti-discrimination terms as a woman only, or, a woman first and as an African American second, if at all. Gender somehow seems fundamental, and race indeterminate. The effective erasure of race has been pointed out by Patricia Williams. n43 This prompted two commentators to respond:

Williams's powerful description of racism as the phantom affecting everyone in society explains much about the [dynamic of the confirmation hearings of Clarence Thomas]. The rendering invisible of Professor Anita Hill's race, its exclusion from a discussion of her sexual harassment charge, meant racism/white supremacy was not discussed. Professor Hill made her charge as an African-American woman in a society [*899] dominated by white male values. The erasure of her race allowed racism to act as a phantom once again. n44

The colorblind position is given even more credence by the increasing acknowledgment that race is less a function of biology and more a function of social construction. In other words, it looks less like gender and more like class. Consequently, one could argue that if race is not scientifically grounded, why not simply stop organizing ourselves around it as if it is a necessary truth. n45 Currently, there is talk of the United States Census Bureau effectively dropping racial categorization from the census count in the year 2000. n46 This approach is misguided. Although race may be questionable as a scientific reality, it remains powerful as a social fact.

Race remains important despite the fact that it is to a great degree a social construction. For instance, Barbara Fields contends that race is an ideology, not an idea. n47 To remain a part of the culture, it must be reaffirmed. n48 She states, "an ideology must be constantly created and verified in social life; if it is not, it dies, even though it may seem to be safely embodied in a form that can be handed down." n49 One could argue that the law has played a role in "verifying" race. n50 Racial classifications shape how we talk about race. While racial classifications in the law may constrain the ability of the law to effectively address the needs of certain communities, racial classifications at the same time work to give credence to certain historical narratives. Thus, the continuing use of the racial category of "black" may hamper our ability to effectively address the needs of those African-American communities caught at the intersection of race and poverty. Dropping the use of the racial category – erasing race as the colorblind position would advise – effectively erases the historical experience of African Americans from having any legal or moral force. [*900]

The Supreme Court, all too eager to embrace a colorblind position in law and end the use of race as a legal category, is making it more difficult to identify and address the forms of racism. n51 The Court has trivialized and delegitimated any discussion of race and racism, except when discussing the receded history of slavery. "Race," as it is imagined by the Court, has been stripped of its historical meaning and is now divorced from its economic, cultural and political contexts. It has, essentially, been individuated into impotence. What remains in the Court's new world are biological individuals who, alone or in occasional aggregates, are guided by their competitive desires or limitations, by their genetic or psychological urgings or limitations, or by their ability or inability to access political power. n52 Their membership in a disempowered or marginalized group, such as a racial minority, is of little consequence. n53 Most importantly, if race is a correlate of any of these capacities, it is through the work of nature and not via the constructions of the state. In rejecting the social constructions of race, the Supreme Court proffers a view that is contradicted by history and empirical data, refuted by virtually every

social science and natural science theorist, and embarrassed by the experience of every American. n54 Ultimately, the Court eludes the truth that race is a political reality in America.

These failings aside, what the Court offers is a defensible conception of "race." If one accepts this concept of race, unmoored from history and social reality, then the Court's colorblind claims seem reasonable and even necessary. Accordingly, the conservative members of the Court seem most concerned with protecting against the use of any race-conscious strategy, even if it would help blacks and other minorities. n55 In 1989, Justice Mar- [*901] shall foreshadowed the implication of the colorblind doctrine by observing that one would think from the majority's opinion that white men were the racially oppressed group in the United States. n56 Moreover, Congress and the President, again apparently adhering to the colorblind doctrine of the Court's conservative majority, have decided to call for a reexamination of affirmative action. n57

There are continuing, and in some cases widening, disparities between blacks and whites in the United States. n58 The per capita wealth differential between blacks and whites is 1 to 11. n59 Along virtually every social and economic indicator, blacks fair substantially worse than whites. n60 Certainly Justice Harlan's prediction and Professor Derrick Bell's claim that blacks will never achieve equality with whites appears to be a reality that will describe the rest of our lives.

While there is some focus on the subordinate position of blacks, there is no mention of racism as a continuing and viable cause for that subordina- [*902] tion. This ignorance remains despite repeated studies showing blacks and other minorities continue to experience wide-spread discrimination. n61 Most black children continue to attend segregated schools. n62 Blacks and whites continue to live in segregated neighborhoods. n63 As a group, black schools are underfunded and students perform considerably worse. n64 Black neighborhoods are isolated from jobs and adequate educational and vocational institutions. n65 The best indicator that someone lives near a toxic waste site is the person's race. n66 Whether one looks at the employment rate, n67 the infant mortality rate, n68 or the administration of the death penalty, n69 blacks consistently fare worse than whites. Thus, the colorblind doctrine does not square with the reality that race continues to be a dominant factor in distributing opportunities in the United States.

When the Supreme Court is confronted with these statistics, it often adopts the position that the statistical disparities and extreme inequality between blacks and whites do not suggest racism per se, but something else. n70 [*903] It is certainly true that a strong correlation with race or a significant statistical disparity does not mean that racism is at play. However, given the history of explicit racism in our society, the ostensibly neutral colorblind position adopted by the Court simply lacks credibility. n71 If the Court finds that other non-racial factors contribute to such disparities, it is usually too willing to assume that the existence of these non-racial factors is proof positive that race plays no part. Yet in life, and even in law, events are created and maintained by multiple causation, and it is obvious, often painfully so to persons of color, that one aspect of these causations is certainly racism.

The colorblind doctrine suggests that, because the Government's explicitly sponsored racism is largely a thing of the past, so must racism be a thing of the past. As previously stated, proponents of the colorblind position assume that things are basically fair and there is now a "level playing field" between the races. Therefore, colorblind proponents consider any initiative that benefits someone or some group based on race unconstitutional, even if such an initiative helps to close the disparity between the races. n72 Not only does this viewpoint undermine efforts to address the true disparity between the races, it also invites new racially charged explanations justifying the disparity. These explanations include dismissing the disparity as a product of the culture of poverty, n73 or asserting that blacks themselves are the principle cause of the disparity because they refuse to pull their own weight n74 and are incapable of doing any better. n75 These explanations create the perfect a backdrop for the writing of a book like *The Bell Curve*. n76

Instead of assuming that racial inequality is natural or caused by a legitimate, "neutral force," such as the market of personal initiative, we could assume that racial equality, in form and substance, is natural, and that racial inequality is caused by illegitimate forces, such as institutional racism and personal bigotry. If one assumes the former, any effort to redistribute [*904] opportunity, resources, or goods and services is suspect and requires substantial justification. If one assumes the latter, the extreme inequality between the races requires an affirmative strategy to correct the disparities. Otherwise, the inequality must be justified by a demonstration that it is the result of some legitimate, non-racist scheme.

Which of these assumptions actually operates in society is not simply a question of logic. Further, neither assumption can be justified by the principle of neutrality. n77 Regardless, we need not be limited by appeals to neutrality or logic. In fact, where race and racism have played such pivotal roles in the organization of our society, there is strong justification for assuming that racial inequality is suspect and the product of illegitimate forces. Yet the colorblind doctrine is used to support the position that the inequality existing today is racially neutral and that colorblind laws stand as barriers to anything that might change the existing racial order. Whichever position is assigned the burden of proof in court will be put on the defensive, and, as we have seen in civil rights law, especially after *Washington v. Davis*, n78 will most often lose.

Furthermore, the Court has adopted the perspective that racial inequality is the result of natural or legitimate causes. Thus, any effort to remedy racial disparity raises serious questions of legitimacy as well as the burden it might have on the so-called "innocent whites" who are required to give up something in order to effectuate the change. But these whites are innocent only if the system is basically fair and whites have not benefited from structure at the expense of persons of color. One can obviously benefit without consciously or intentionally supporting a system of racial hierarchy.

The current state of black America is strong evidence that the old-school civil rights approach cannot effectively address the problems confronting the poor and persons of color now or in the future. Life has improved greatly for persons of color over the last one hundred years, especially over the last four decades. While this improvement is due in large part to the brave and innovative work of civil rights lawyers and activists, the doctrine of the classical civil rights community was and is inherently limited: it focused on individuals and individual discrimination. Hence, its remedies were, and are, also individuated.

Kenneth Karst has pointed out that "racial segregation not only stigmatizes its victims: it also excludes them from full participation as members of society, treating them as members of a subordinate caste." Karst points out that the Supreme Court's attack on caste employed the rhetoric of individualism, aiming to "treat each person as an individual, not on the basis of group membership." The failing in this approach is that it underplayed the importance of group membership in shaping and directing the way that individuals act toward one another. As Karst concludes, "if much remains for America to do to end racial domination and its harmful effects in this country – and it does – then it is hard to see how that task will be made easier if government is constitutionally required to ignore that a black person is black." In fact, Karst seems to argue that "equal citizenship" will be achieved only by converging the goals of formal equality, which may not challenge the racial structure, and substantive equality, which does.

The misguided goal of formal equality has led, in the current political climate, to pessimistic proclamations such as those made by Derrick Bell, who believes that

Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary "peaks of progress," short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This is a hard-to-accept fact that all history verifies. We must acknowledge this and move on to adopt policies based on what I call: "Racial Realism." This mind-set or philosophy requires us to acknowledge the permanence of our subordinate status. That acknowledgement enables us to avoid despair, and frees us to imagine and implement racial strategies that can bring fulfillment and even triumph.

According to Bell, despair is not caused by actual racial domination that blacks experience, but by the false belief that things can get better and that eventually equality will be achieved. This assessment wholly lacks a structural critique. The same may be said of the civil rights movement generally – it largely lacked a structural critique. As such, the structure that causes the despair of so many persons of color, the structure of racism, goes unchallenged.

II. The Post-Civil Rights Agenda Must Focus on Anti-Subordination

If colorblindness is not an appropriate focus to achieve racial justice, then what is? Because of the changing and multiplying forms of racism, we must guard against a single solution for all times. It might be easier to state the goal than to settle on the solution or strategy. Our goal must be to end racial hierarchy and racial subordination. Our goal must be to achieve an inclusive racial democracy. Our efforts must be what Mari Matsuda calls normatively pragmatic. We minorities must take on the challenge of describing and naming and renaming our racial order. Formal equality and colorblindness support the existing racial domination and subordination by making it difficult to recognize them. They do this by denying the historical and functional role of race and racism. Any serious effort to address racial problems requires the recognition of both race and racial subordination, something that the modern colorblind doctrine fails to do, because it lacks an analysis of subordination.

The traditional civil rights focus on individual rights will not provide us with the best tools, either theoretically or practically, to tackle or understand the nature of the racial hierarchy as it exists today. Despite the serious crisis that minority communities in general and the black community in particular face, society's focus on race is expressed in terms of excess benefits that blacks and other minorities have received from race-conscious programs. Whites are perceived as being burdened by any benefit that would go to blacks. Yet, when talking about white racism, there is seldom a discussion about how whites benefit from the structure of racial hierarchy.

Whites are seen as innocent and racial minorities as undeserving. For example, when a black gets an important position, she is stigmatized by the assumption that she only received it because of affirmative action. Guilty until proven innocent. Whereas when a white gets a desired position, it is assumed he deserved it. Innocent until proven guilty.

We must reconstruct a civil rights or post-civil rights agenda that is capable to addressing the real needs of blacks and other racial minorities. Because the conditions that are to be addressed are substantially the result [*907] of a functioning racial hierarchy, the post-civil rights movement must continue to be race-conscious and race-sensitive. n86 This reconstruction has already begun.

A number of scholars and jurists have called for a different paradigm that is not based on intentional discrimination or formal equality. n87 Some have called for a substantive formulation of equality that would produce an equality of results or at least substantially change the structure that distributes opportunity in American society. n88 Others have attempted to expand the narrow way in which we discuss discrimination by suggesting a model that is not wedded to discrimination. n89 For example, a number of scholars have defined the goal of the post-civil rights era as anti-subordination, not anti-discrimination. n90 One scholar usefully distinguishes between anti-differentiation and anti-subordination. n91 Anti-differentiation is a function of the colorblind, n92 they do not see racial differences. n93 "It is equally invidious for white men to be treated differently from black women as for black women to be treated differently from white men under [the anti-differentiation] perspective, because both situations violate the preeminent norm of equal treatment." n94

Anti-subordination, on the other hand, "seeks to eliminate the power disparities between men and women, and between whites and non-whites, through the development of laws and policies that directly address those disparities." n95 It is group based, in that it focuses on society's role in creating subordination and the way in which subordination affects groups of people. n96 Anti-subordination, then, necessitates race-specific policies intended [*908] to redress the subordination of racial minorities. Such a position obviously renders different results than the colorblind test in evaluating affirmative action or in deciding whether to apply a particular level of scrutiny for an equal protection violation.

In their book *Racial Formation in the United States From the 1960s to the 1990s*, Howard Winant and Michael Omi squarely face the question that is key to shaping a new civil rights agenda: What is racism? n97 They point out that the civil rights movement had a limited definition of racism, and that this limited definition resulted in litigation aimed only at eradicating discrimination. n98 They also point out that successive movements either focused entirely on structure, rendering a hopeless and pessimistic theory of racism, n99 or defined race as ethnicity and declared it inconsequential. n100 According to the authors, neither movement appreciates the problems faced today, nor is up to the task of confronting them.

Omi and Winant advocate instead that we employ a racial formation theory. n101 They first differentiate between race and racism, contending that they are separate and separable and should not be used interchangeably. n102 They recognize that racism, like race, has transformed over time. They argue that "there can be no timeless or absolute standard for what constitutes racism, for social structures change and discourses are subject to rearticulation." n103 To Omi and Winant, a "racial project can be defined as racist if and only if it creates or reproduces structures of domination based on essentialist categories of race... Or definition ... focuses ... on the [*909] "work' essentialism does for domination, and the "need' domination displays to essentialize the subordinated." n104 They continue by stating:

In order to identify a social project as racist, one must in our view demonstrate a link between essentialist representations of race and social structures of domination. Such a link might be revealed in efforts to protect dominant interests, framed in racial terms, from democratizing racial initiatives. But it might also consist of efforts simply to reverse the roles of racially dominant and racially subordinate...

Obviously a key problem with essentialism is its denial, or flattening, of differences with a particular racially defined group. n105

The authors also state that "racial ideology and social structure ... mutually shape the nature of racism in a complex, dialectical, and overdetermined manner." n106 This characterization lends itself well to an anti-subordination approach to ending manifestations of racial domination and should be viewed as an essential element of understanding race for any post-civil rights agenda.

Conclusion

All of these models are a vast improvement over the dominant colorblind paradigm, however, there are additional steps that we can take to further this improvement. First, we must better articulate what we are for, not just what we are against. Second, we should also strive for an inclusive racial democracy. n107 Third, whatever strategy we adopt to fight racism must be capable of mutating, because racism is not a single concept, and, in fact, mutates. Finally, in order to make room for an appropriate model, the colorblind model must be displaced. This model is

not just inadequate, it also supports the existing racial hierarchy. Those who claim that racism and its effects have ceased to exist must be required to demonstrate when it ended and to justify the continuing and, in some cases, worsening racial disparities in American society. n108 Colorblindness would only be an appropriate strategy if it could be effective in transforming the racial hierarchy. However, if, as conceived by the first Justice Harlan, it allows or even supports racial hierarchy, then it must be challenged. [*910]

We have already achieved many of the purported goals of the civil rights agenda: most importantly, we have achieved an end to formal inequality. However, to the extent that these goals have already been achieved, they were never bold enough in their reach to achieve substantive equality and structural change of racial hierarchy in the United States. The purported goals of the old civil rights agenda were inherently incapable of compelling structural reform. The post-civil rights agenda must focus on subordination and exclusion. The key to this focus is understanding that racial discrimination and economic deprivation are not only oppressive, but they are also structural and institutional. Without characterizing oppression as structural, and without developing an agenda that is oriented toward destabilizing and disturbing this structure, any formal or individual progress will be largely rendered impotent by the greater institutional mechanisms.

FOOTNOTES:

n1. When I refer to the "civil rights movement," I am referring primarily to the more mainstream African American organizations, such as the National Association for the Advancement of Colored People ("NAACP") and the Southern Christian Leadership Conference ("SCLC"), that worked to end racial discrimination from the 1930s to the 1960s. The common thread among the organizations under the umbrella of the "civil rights movement" is that they worked in large part to desegregate and integrate institutions that either barred blacks or had subjected them to inferior treatment based on race. The black nationalist and black power organizations that became prominent in the late 1960s and early 1970s do not fall into my grouping for the sake of this Article.

n2. Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. 1971, 1973 through 1973bb-1 (1988)).

n3. 347 U.S. 483 (1954).

n4. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896).

n5. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967).

n6. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1879) (striking down as unconstitutional a West Virginia state law that declared blacks ineligible to serve on grand or petit juries).

n7. See, e.g., *Nixon v. Herndon*, 273 U.S. 536 (1927) (invalidating a 1927 Texas state statutory provision that expressly excluded blacks from voting in the state Democratic primary).

n8. See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

n9. This is one of the central positions of Critical Race Theory. See Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 Va. L. Rev. 461 (1993); see also Kimberle W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331 (1988); Neil Gotanda, *A Critique of "Our Constitution in Color-Blind,"* 44 Stan. L. Rev. 1 (1991); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987); John A. Powell, *The New Property Disaggregated: A Model to Address Employment Discrimination*, 24 U.S.F. L. Rev. 363 (1990). Other theorists have also argued for the effects-test or for a more contextualized approach to analyzing race. See, e.g., Ronald Dworkin, *Taking Rights Seriously* (1977); C. Edwin Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. Pa. L. Rev. 933 (1983); Alan Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical View of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049 (1978).

n10. See, e.g., Thomas Sowell, *Civil Rights: Rhetoric or Reality?* (1984).

n11. See, e.g., Ira Nerken, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory*, 12 Harv. C.R.-C.L. L. Rev. 297 (1977).

n12. See Symposium, *The Public-Private Distinction*, 130 U. Pa. L. Rev. 1289 (1982). The Supreme Court stopped most efforts after the Civil War to limit racial discrimination, operating under the theory that Congress lacked the power to regulate private discrimination. See, e.g., *The Civil Rights Cases*, 109 U.S. 3 (1883). Many scholars continue to be critical of the public-private distinction. See, e.g., Alan Freeman & Elizabeth Mensch, *The*

Public-Private Distinction in American Law and Life, 36 *Buff. L. Rev.* 237 (1987); Gotanda, *supra* note 9, at 7-16. The current status of governmental power is less clear. While the main provision of the Fourteenth Amendment is limited to state action, Congress can pass statutes – and has passed statutes – pursuant to its power under the Thirteenth Amendment that reach discriminatory acts made by private actors. See, e.g., 42 U.S.C. 1981 (1988) (barring discrimination in contractual transactions); *id.* 1982 (barring discrimination in property transactions); see also *Runyon v. McCrary*, 427 U.S. 160 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

n13. While the law has carved out a narrow set of exceptions to this general rule against any form of "discrimination," challengers face a heavy burden when attempting to overcome the operation of this principle. See, e.g., *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); *Washington v. Davis*, 426 U.S. 229 (1976). For a discussion of the burdens imposed by the Court on parties that wish to prove discrimination, see Derrick Bell, *Race, Racism, and American Law* 854-64 (3d ed., 1992); Crenshaw, *supra* note 9; Freeman, *supra* note 9; Lawrence, *supra* note 9.

n14. The term "colorblind" is really a misnomer. The issue is not color, but race. In fact, the plaintiff in the seminal race case, *Plessy v. Ferguson*, was white in color. "The petition for the writ of prohibition averred that petitioner was seven-eighths Caucasian and one-eighth African blood; that the mixture of colored blood was not discernible in him." *Plessy v. Ferguson*, 163 U.S. 537, 541 (1896). He was being denied the right to take advantage of his white color because of his black race. See Cheryl Harris, *Whiteness as Property*, 106 *Harv. L. Rev.* 1709 (1993).

n15. Colorblindness, with its formal approach to race, disconnects race from its history and social origins. Gotanda, *supra* note 9, at 37. It was this disembodied approach that allowed the Court in *Plessy* to argue that whites and blacks were being treated the same. Subordination was excluded from consideration. When the argument for formal equality was raised in *Shelley v. Kraemer*, the Court noted that both blacks and whites theoretically could use restrictive covenants to exclude the other race, however, it was only whites that used this practice to exclude blacks. 334 U.S. 1, 22 (1948). The Court looked at the actual practice in real life, found that the practice was used by whites to subordinate blacks and concluded: "The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten." *Id.* at 23.

n16. Gotanda, *supra* note 9, at 2-3.

n17. A number of conservative commentators and scholars, including members of the current Supreme Court, now argue that racial discrimination must be analyzed within a colorblind context. See, e.g., *Holder v. Hall*, 114 S. Ct. 2581 (1994) (Thomas, J.); *Shaw v. Reno*, 113 S. Ct. 2816 (1993) (O'Connor, J.); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (Kennedy, J., concurring); *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (Scalia, J., dissenting). See also Charles J. Cooper, *The Coercive Remedies Paradox*, 9 *Harv. J.L. & Pub. Pol'y* 77 (1986). This position was foreshadowed in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

n18. Colorblindness is based on both a false neutrality and a false symmetry that simultaneously hides and supports racial domination. The true lack of symmetry between races is implicit in how it is decided who is "white" and who is "black." See Harris, *supra* note 14, at 1737-45 (discussing white legal identity). The plaintiff in *Plessy*, remember, was white for all intents and purposes. See *Plessy*, 163 U.S. at 541. White is purity, black is contamination. The lack of symmetry is noted by the question posed by the rap group, Public Enemy, who ask: "Why is it that a white woman can have a black baby, but a black woman cannot have a white baby." The formal approach to ending equality does not disturb these asymmetrical assumptions. Indeed, the Court has often stated that race is immutable, ignoring the fact that race has and will continue to mutate as a function of its social construction. See, e.g., Thomas W. Simon, *Suspect Class Democracy: A Social Theory*, 45 *U. Miami L. Rev.* 107, 147-49 (1990) (discussing immutable characteristics and strict scrutiny review). See also Gotanda, *supra* note 9, at 24-26 (discussing rule of hypodescent).

n19. Howard Winant uses the term "dictatorship" to describe the racial condition in the United States prior to the civil rights movement. Howard Winant, *Racial Condition: Politics, Theory, Comparisons* (1994).

n20. See *infra* notes 29-35 and accompanying text (discussing Harlan's dissent in *Plessy v. Ferguson*).

n21. *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

n22. *Freeman v. Pitts*, 112 S. Ct. 1430 (1992).

N23. *Austin Indep. Sch. Dist. v. United States*, 429 U.S. 990 (1976) (remanding school desegregation case in light of purpose-and-intent standard set in *Washington v. Davis*, 426 U.S. 229 (1976)).

n24. *Milliken v. Bradley*, 418 U.S. 717 (1974).

n25. In 1973, the Court dispelled any doubt of this reading of *Brown*. See *San Antonio Indep. Sch. Dist. v.*

Rodriguez, 411 U.S. 1 (1973) (refusing to hold as unconstitutional an egregiously unequal state-wide educational funding scheme based on local property taxes).

n26. Take for example, the Court's willingness to allow states to desegregate schools with "all deliberate speed" rather than immediately. See *Brown v. Board of Educ.*, 349 U.S. 294 (1955). This allowed states violating the Constitution a grace period during which they could continue to deprive African-American children of access to white schools. The Court could have, but chose not to, declared all segregative law immediately unenforceable and void. In fact, this was the remedy that the Court ordered to enforce its decision against the ban on birth control pills. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

n27. See David T. Goldberg, *Racist Culture: Philosophy and the Politics of Meaning* 90-116 (1993). Goldberg warns us not to search for a universal, a historical, a contextual, simplistic definition of racism. Rather, he asserts that racism is always culturally and temporally specific. Indeed, he would even say that there are many "racisms." Racisms are exploitations, but more importantly and more often they are exclusions. He notes that the concept of race is a social construct, and it has its genesis in the period of liberalism. In fact, as best as could be determined, the word "racism" itself is only about fifty years old. And, before there was race in the modern sense, there was not a notion of "white" in the modern sense. Universality then meant white substantively, but looked formally neutral. Because racism as such is coterminous with liberalism, it is dependent upon liberalism for its definition and survival. So in changing the terms of the racist discourse, we may need to change the very discourse of liberalism. In other words, racism might not be able to be fixed within the discourse of liberalism. Finally, as Goldberg states, racism continues to mutate based on changed conditions.

n28. Kimberle Crenshaw notes that formal equality initially served a transformative purpose, though that is no longer true. See Crenshaw, *supra* note 9. Derrick Bell argues that we have not made any appreciable progress racially, and he concludes that equality is not a useful concept. See Derrick Bell, *Racial Realism*, 24 *Conn. L. Rev.* 363, 373 (1992). For a response to Professor Bell, arguing that as the nature of the racism changes, the appropriate strategy to combat racism must also change, see John A. Powell, *Racial Realism or Racial Despair?*, 24 *Conn. L. Rev.* 533 (1992) (agreeing with Bell's critique of formal equality, but arguing that his analysis is limited because he does not distinguish adequately between formal and informal equality).

n29. 163 U.S. 537 (1896).

n30. He is most famous for his dissenting opinions in two cases considered to be an embarrassment to American jurisprudence. See *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting); *The Civil Rights Cases*, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

n31. Justice Harlan was the lone dissenter in both *Plessy* and *The Civil Rights Cases*. For a good discussion of the mood and racial animus of the time, see Eugene D. Genovese, *Roll, Jordan, Roll: The World the Slaves Made* (1976); C. Vann Woodward, *The Strange Career of Jim Crow* (1955).

n32. See, e.g., *Shaw v. Reno*, 113 S. Ct. 2816, 2824 (1993); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 521 (1989); *Fullilove v. Klutznick*, 448 U.S. 448, 522 (1980); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 355 (1978).

n33. Justice Harlan's view of colorblindness was complex and ambiguous. While he clearly recognized and accepted the private domination of whites over blacks, his views of governmental subordination were not merely formal. As Gotanda points out, Harlan used a historical racial analysis for government action and a formal racial analysis for private action. Gotanda, *supra* note 9, at 39. While Harlan's use of colorblindness may have continued this distinction, modern jurists have unambiguously embraced colorblindness as the equivalent of formal equality. *Id.* at 40. See *infra* note 55 (listing use of term "colorblind" in Supreme Court opinions).

n34. 163 U.S. at 559. The first part of this paragraph, if taken out of the context of this opinion, would sound to a modern-day reader like an excerpt from a white supremacy propaganda sheet. I think that even when read in context, Justice Harlan's view of white structural and cultural power is instructional. Harlan is telling us that whites dominate – structurally, economically, and politically. He also tells us that under the best reading of the Constitution, when "holding fast to the principles of constitutional liberty," white domination will remain undisturbed. *Id.* This makes his subsequent advocacy for a "colorblind" Constitution seem very geared not only to a notion of formal inequality under the law, but of a notion of "equality" that will not and cannot change the structural inequities of racial hierarchy in the United States. This instructs us that we need not change who is "humble" and who is "powerful," to use Harlan's phrase, in order to achieve formal equality, only to achieve substantive equality.

n35. Harlan's language in *Plessy* shows us something else that is instructive: it shows us that there has not always been exclusion and domination of African Americans only; exclusion and domination has historically affected groups other than simply African Americans. For instance, Justice Harlan notes that the Chinese are a "race so different from our own that we do not permit those belonging to it to become citizens of the United

States. [Chinese] are, with few exceptions, absolutely excluded from our country." *Id.* at 561.

n36. Justice Powell recognized this concept. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Even in the recognition of the need to see race, he still embraced the goal of moving to a colorblind society. *Id.* at 289–90. "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." *Id.*

n37. In other words, the colorblind position allows us to pretend to fight discrimination without having to bring up the uncomfortable topic of race. See John A. Powell, 31 *Hungry Mind Rev.* 15 (1994).

n38. Possibly the most notable of these were the rifts created within the Student Nonviolent Coordinating Committee ("SNCC") and the Black Panther Party. See generally *Black Protest Thought in the Twentieth Century* (A. Meier, et al. eds., 2d ed. 1971); Harold Cruse, *The Crisis of the Negro Intellectual* (1967); Herbert H. Haines, *Black Radicals and the Civil Rights Mainstream: 1954–1970* (1988).

n39. The rhetoric of a colorblind law and the rhetoric of integration is universalist and contextual, inclusive of both blacks and whites. This universalist positioning gives the rhetoric the enlightenment veneer of reason and equity. Race, then becomes subordinated to such issues as gender and class. Race-conscious rhetoric is situational. Thus, it appears unenlightened and exclusionary.

n40. Gary Peller, *Race Consciousness*, 1990 *Duke L.J.* 758, 837–38 (emphasis added). Peller explains that "through the ideological filters of integrationism, black nationalism and white supremacy appear essentially the same because both are rooted in race consciousness, in the idea that race matters to one's perception and experience of the world." *Id.* at 790.

n41. *Id.* (emphasis added).

n42. *Id.* at 761.

n43. See generally Patricia J. Williams, *The Alchemy of Race and Rights* (1991).

n44. Adrienne D. Davis & Stephanie Wildman, *The Legacy of Doubt: Treatment of Sex and Race in the Hill-Thomas Hearings*, 65 *S. Cal. L. Rev.* 1367, 1382–83 (1992).

n45. William Julius Wilson unfortunately legitimized this position. See generally William J. Wilson, *The Declining Significance of Race* (1978) (arguing that while race historically had determined black life chances, since 1965 black life chances have been determined by class status, and arguing that non-racial economic and social policy correctives could remedy the woes of black America better than anti-discrimination measures). Wilson's position has been criticized by a number of commentators. See, e.g., John O. Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 *Or. L. Rev.* 201, 210–15 (1982) (discussing the continued significance of race).

n46. See *Racial/Ethnic Categories – Symposium, Poverty & Race*, Jan.–Feb. 1995, at 7; Lawrence Wright, *Racial/Ethnic Categories: Do They Matter?*, *Poverty & Race*, Nov.–Dec. 1994, at 1.

n47. Barbara J. Fields, *Slavery, Race and Ideology in the United States of America*, *New Left Rev.* 95, 101 (1990).

n48. *Id.*

n49. *Id.* at 112.

n50. Thank you to Sara Gurwitsch for helping me on this point.

n51. See *Adarand Constr., Inc. v. Pena*, 115 S. Ct. 2097 (1995).

n52. If race were simply formal or a biological fact, then there would be no need for the Court to protect it with a review of strict scrutiny. The use of strict scrutiny can only be supported because of the historical use of race in our country. As Gotanda points out, there is a different racial history for blacks and whites. See Gotanda, *supra* note 9, at 32–34.

n53. For instance, the Court has stated that "racial and distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978). Consequently, the ideal of a neutral "equality" means that the law will no longer account for race in a historical or cultural sense. Anti-discrimination law then gets stripped of its normative underpinning. As Justice Blackmun later stated, "sadly ... one wonders whether the ... [Court] still believes that race discrimination – or, more accurately, race discrimination against nonwhites – is a problem in our society, or even remembers that it ever was." *Wards*

Cove Packing Co. v. Atonio, 490 U.S. 642, 662 (1989) (Blackmun, J., dissenting).

n54. As Neil Gotanda contends, "colorblind constitutionalism supports the supremacy of white interests... By fixating on formal race and ignoring the reality of racial subordination, the Court ... risks establishing a new equivalent of Plessy v. Ferguson." Gotanda, *supra* note 9, at 67.

n55. The word "colorblind" has appeared in twenty Supreme Court opinions since 1945 (based on Lexis and Westlaw searches). Three of these cases were procedural. In only two cases of the remaining seventeen in which the nonwhite party won was the word "colorblind" used on the winning side, and both of those cases were early civil rights decisions of the Warren Court. In four out of the six wins by whites, the word colorblind appeared on the winning side. In all but one case in which the term colorblind was used as a positive, it was so used by the Justices who supported the white party. In every case in which it was rejected, it was rejected by the Justices writing in support of the nonwhite party. Colorblind then has become synonymous with the white or non-nonwhite position in Supreme Court jurisprudence.

The overall tally for cases in which "colorblind" has appeared since 1945: Blacks: 10; Whites: 5; and Women: 1. See *United States v. Hays*, 115 S. Ct. 2431 (1995); *Adarand Constr., Inc. v. Pena*, 115 S. Ct. 2097 (1995); *Holder v. Hall*, 114 S. Ct. 2581 (1994); *Shaw v. Reno*, 113 S. Ct. 2816 (1993); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); *Johnson v. Transportation Agency*, 480 U.S. 616 (1987); *United States v. Paradise*, 480 U.S. 149 (1987); *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO v. City of Cleveland*, 478 U.S. 501 (1986); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *United Steelworkers of Am., AFL-CIO v. Weber*, 443 U.S. 193 (1979); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Taylor v. McKeithen* 407 U.S. 191 (1972); *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971); *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1 (1971); *Bell v. State of Md.*, 378 U.S. 226 (1964); *Garner v. State of La.*, 368 U.S. 157 (1961).

n56. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 551-53 (1989) (Marshall, J., dissenting).

n57. See, e.g., Susan Page, *A Turning Point: A Debate Heats Up, Affirmative Action's Future is in Doubt*, *Newsday*, Mar. 12, 1995, at A20; Steven Roberts, et al., *Affirmative Action on the Edge*, *U.S. News & World Rep.*, Feb. 13, 1994, at 32; Halle Shilling, *Affirmative Action is Latest Program Under GOP Microscope*, *State News Service*, Mar. 22, 1995.

The recent decision by the Regents of the University of California to eliminate affirmative action programs exemplifies the colorblind doctrine and the reexamination of affirmative action. Susan Ferriss, *UC Fears Fallout on Affirmative Action Vote: Officials Weigh Fed's Threat to Funding*, *S.F. Examiner*, July 24, 1995, at A1. Further, California's Governor, along with other presidential candidates, has indicated that the elimination of affirmative action will be the centerpiece of his campaign for the presidential elections. *Id.*

n58. National Urban League, *The State of Black America* (1994).

n59. *Id.* at 213-16.

n60. *Id.*

n61. See, e.g., Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (1993); The Urban Institute & Housing and Urban Dev., *National Fair Housing Audit* (1989); Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 *Harv. L. Rev.* 817 (1991).

n62. See generally Jonathan Kozol, *Savage Inequalities: Children in America's Schools* (1991); Gary Orfield, National School Board Association, *The Growth of Segregation in American Schools: Changing Patterns of Separation and Poverty Since 1968* (1994).

n63. See generally Massey & Denton, *supra* note 61.

n64. See generally Orfield, *supra* note 62.

n65. See generally Massey & Denton, *supra* note 61; William J. Wilson, *The Truly Disadvantaged* (1994).

n66. *Race and the Incidence of Environmental Hazards: A Time for Discourse* (B. Bryant & P. Mohai eds., 1992).

n67. National Urban League, *supra* note 58.

n68. *Id.* The overall mortality rate for blacks is also higher. Larry Schuster, *Disparity in Health Widens Among Groups*, *UPI*, June 20, 1994, available in LEXIS, Nexis Library, UPI File. In fact, black youths are eight times more

likely to be a victim of homicide than are white youths. *Id.*

n69. See Erik Eckholm, *Studies Find Death Penalty Tied to Race of the Victims*, *NY Times*, Feb. 24, 1995, at B1.

n70. In *Milliken v. Bradley*, the Court found that the segregation suffered by students in the Detroit public school system was a result of the housing market. 418 U.S. 717 (1974). They also found that there was no indication that racial discrimination was at the root of the segregated housing pattern that caused the segregated school districts. *Id.* at 748. However, the plaintiffs in *Milliken* introduced evidence that the housing segregation in the Detroit metropolitan area was caused by discrimination. *Id.* at 728 n.7. Similarly, in *McCleskey v. Kemp*, the petitioner, a death row inmate in Georgia, presented one of the most extensive arrays of statistical evidence presented to the Court on race – the Baldus study – which demonstrated an overwhelming correlation between death sentences and the race of the victim. 481 U.S. 279 (1987). The study controlled over two hundred other non-racial variables, and concluded that a black person who killed a white person was far more likely to receive the death penalty for that crime in Georgia than would a black person killing another black or a white killing another white. The study also found that no white person had ever been given the death penalty in Georgia for killing a black person. Nonetheless, the Court still found that there was not sufficient proof that racism was a factor. The death penalty or the judicial and prosecutorial workings that administered the death penalty in Georgia were therefore constitutional. *Id.* at 313.

n71. For a discussion of how the Court could develop a more historically sensitive approach to statistics and race, see Lawrence, *supra* note 9.

n72. See, e.g., *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

n73. *The Poor: A Culture of Poverty or a Poverty of Culture?* (J. Alan Winter ed., 1971).

n74. Charles A. Murray, *Losing Ground: American Social Policy 1950–1980* (1984).

n75. Richard J. Herrnstein & Charles A. Murray, *The Bell Curve: Intelligence and Class Structure in American Life* (1994).

n76. *Id.*

n77. John Rawls argues that justice as fairness requires us to assume the equal distribution of goods and social opportunity. See John Rawls, *A Theory of Justice* (1971). He therefore would require a justification for any inequality. Rawls asserts that inequality can be justified if it operates to improve the lives of those disfavored by the inequality. He believes that this can be defended based on neutrality. At least one theorist has argued that Rawls' equality principle is anything but neutral. See Robert Nozick, *Anarchy, State, and Utopia* (1974).

n78. 426 U.S. 229 (1976).

n79. Just one example of how civil rights groups traditionally focus on race alone and the legal services community traditionally focuses solely on issues of poverty. These universalist approaches have largely failed to ameliorate the problems confronting poor, urban African Americans; specific needs are not met by a race approach that lacks a poverty focus or a poverty approach that fails to specifically target racial minorities. See generally John A. Powell, *Race and Poverty: A New Focus for Legal Services*, 27 *Clearinghouse Rev.* 299 (Special Issue 1993).

n80. Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 *N.C. L. Rev.* 303, 323 (1986) (footnotes omitted).

n81. *Id.* at 324.

n82. *Id.*

n83. *Id.* at 327–29 (discussing achieving status goals and ameliorating status harms).

n84. Bell, *supra* note 28, at 373.

n85. Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 *S. Cal. L. Rev.* 1763 (1990).

n86. This does not mean that all the problems that minority individuals and communities face can be explained solely in terms of racism. What I am suggesting is that the disparity cannot be explained or addressed without an account of racism that is not limited to individual, intentional and purposeful discrimination.

n87. See, e.g., Crenshaw, *supra* note 9; Lawrence, *supra* note 9; Peller, *supra* note 40; Simon, *supra* note 18.

n88. See Michel Rosenfeld, *Affirmative Action and Justice: A Philosophical and Constitutional Inquiry* (1991).

n89. See Lawrence, *supra* note 9.

n90. Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 *Yale L.J.* 1329 (1991); Robin West, *Progressive and Conservative Constitutionalism*, 88 *Mich. L. Rev.* 641 (1990).

n91. Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 *N.Y.U. L. Rev.* 1003 (1986).

n92. *Id.* at 1005-06.

n93. The author explains that anti-differentiation is an individual rights perspective, because it focuses on institutional or individual behavior without regard to social context, and it focuses on the specific effect of discrimination on a individual instead of on a group. *Id.* at 1005.

n94. *Id.* at 1006.

n95. *Id.* at 1007.

n96. *Id.* at 1008-10.

n97. Michael Omi & Howard Winant, *Racial Formation in the United States from the 1960s to the 1990s* (2d ed. 1994).

n98. The authors state:

Since the ambiguous triumph of the civil rights movement in the mid-1960s, clarity about what racism means has been eroding. The concept entered the lexicon of "common sense" only in the 1960s. Before that, although the term had surfaced occasionally, the problem of racial injustice and inequality was generally understood in a more limited fashion, as a matter of prejudiced attitudes or bigotry on the one hand, and discriminatory practices on the other. Solutions, it was believed, would therefore involve the overcoming of such attitudes, the achievement of tolerance, the acceptance of "brotherhood," etc., and the passage of laws which prohibited discrimination with respect to access to public accommodations, jobs, education, etc. The early civil rights movement explicitly reflected such views. In its espousal of integration and its quest for a "beloved community" it sought to overcome racial prejudice. In its litigation activities and agitation for civil rights legislation it sought to challenge discriminatory practices.

Id. at 69 (footnotes omitted).

n99. *Id.* at 69-70.

n100. *Id.* at 70.

n101. *Id.* at 71.

n102. *Id.*

n103. *Id.*

n104. *Id.*

n105. *Id.* at 72.

n106. *Id.* at 72-73.

n107. This concept is used by a number of scholars. See, e.g., Cornel West, *Race Matters* (1994).

n108. Saying that minority communities live in despair or exist within a culture of poverty begs the question.

Unless we can show that racism has been functionally eliminated and the effect is reflected in people's lives as opposed to laws written in books in a library, we can expect continued despair among African Americans and other people of color in the United States regarding the barriers they face.

□ Document 1 of 1. □

[Terms & Conditions](#) [Privacy](#) [Copyright ©](#) 2005 LexisNexis, a division of Reed Elsevier Inc. All Rights Reserved.