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THE COLOR OF PERSPECTIVE: AFFIRMATIVE ACTION AND THE CONSTITUTIONAL RHETORIC OF WHITE INNOCENCE

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This Article discusses the Supreme Court's use of the rhetoric of White innocence in deciding racially-inflected claims of constitutional shelter. It argues that the Court's use of this rhetoric reveals its adoption of a distinctly White-centered perspective, representing a one-sided view of racial reality that distorts the Court's ability to accurately appreciate the true nature of racial reality in contemporary America. This Article examines the Court's habit of using a White-centered perspective in constitutional race cases. Specifically, it looks at the Court's use of the rhetoric of White innocence in the context of the Court's concern with protecting "innocent" Whites in affirmative action cases. This Article concludes that the Court's insistence on choosing and imposing only one racialized perspective—the White-centered perspective—in racially-inflected constitutional claims is more than simply bad policy: that choice embodies an unconstitutional violation of the Due Process Clause of the Fourteenth Amendment. This Article calls for an appreciation of the dominant use and problematic character of the judicial imposition of an arbitrarily chosen racial perspective in deciding all constitutional race cases. It suggests a modification in judicial decisionmaking in which judges become conscious of the White-centeredness and arbitrariness and racial contingency of the White-centered vantage point. This Article urges a judicial appreciation of multiple levels of racial interpretation in an effort to loosen the hegemonic grip of the White-centered perspective and dilute its power on the mind and imagination of the judiciary. If this goal can be achieved, the White-centered perspective will become just one option among a multitude of equally-respected racial perspectives that can then fairly compete for both judicial recognition and legitimization.

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Once we see that any point of view, including one's own, is a point of view, we will realize that every difference we see is seen in relation to something already assumed as the starting point. Then we can expose for debate what the starting points should be. The task for judges is to identify vantage points, to learn how to adopt contrasting vantage points, and to decide which vantage points to embrace in given circumstances.[1]

INTRODUCTION

At the dawn of the twenty-first century, race and racism remain among "the central issue[s] in American life,"[2] and affirmative action remains one of its most intractable and divisive battlegrounds.[3] But there can be little question that despite its continuing salience, racism in

1. Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 15 (1987).

2. STEPHEN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE 14 (Simon & Schuster 1997).

3. *See* Neal Devins, *The Rhetoric of Equality*, 44 VAND. L. REV. 15 (1991) (characterizing the nature of the national affirmative action debate as "intractable," illustrated by the tension between the "rhetoric of innocence" and the "rhetoric of guilt").

America is not what it used to be.[4] Some argue that racism has been essentially eradicated; [5] they see neither its operation nor its effects anywhere and champion what they describe as a new common sense about race that emphasizes colorblindness.[6] Others see the operation and effects of racism almost everywhere,[7] and insist that in contemporary America, racism's "shelf life . . . in social and political behavior" is so enduring that it "is as healthy today as it was during the Enlightenment."[8] Still others urge that racism's most virulent contemporary manifestation is in fact a form of reverse racism aimed at innocent Whites, especially White males, who, it is argued, have been unfairly burdened by ancient sins that they did not commit in favor of modern claimants who have not suffered.[9]

However, there can be no question that at the beginning of the twenty-first century, American racism directed against people of color in

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4. *See* THERNSTROM & THERNSTROM, *supra* note 2, at 13 (observing the confusion surrounding the national racial debate: "There is no racism; there is nothing but racism. The issue sends people scurrying in extremist directions.").

5. *See id.* at 534 (arguing that any "serious [racial] inequality that remains is less a function of white racism than of the racial gap in levels of educational attainment, the structure of the black family, and the rise in black crime."). *See also* ABIGAIL THERNSTROM & STEPHEN THERNSTROM, NO EXCUSES: CLOSING THE RACIAL GAP IN LEARNING (2003); PAUL M. SNIDERMAN & EDWARD G. CARMINES, REACHING BEYOND RACE (1997) (arguing that based on public opinion surveys racism has decreased significantly among American Whites by reaching beyond race); SHELBY STEELE, A DREAM DEFERRED xiii (1994) (arguing that the civil rights legislation of the 1960s was a betrayal of America's best principles and was an effort at the "expiration of American shame rather than the careful and true development of equality between the races"); THOMAS SOWELL, RACE AND CULTURE (1994) (arguing for a focus on Black culture rather than White racism as the source of racial inequality).

6. *See* THERNSTROM & THERNSTROM, *supra* note 2. *See also* Michael Omi, *Rethinking the Language of Race and Racism*, 8 ASIAN L.J. 161, 161–62 (2001) (arguing that race is no longer important as a social category). *But see* MICHAEL K. BROWN ET AL., WHITEWASHING RACE: THE MYTH OF A COLORBLIND SOCIETY (2003); PATRICIA J. WILLIAMS, SEEING A COLOR-BLIND FUTURE (1997); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

7. *See* Richard Delgado, *Critical Legal Studies and the Realities of Race—Does the Fundamental Contradiction Have A Corollary?*, 23 HARV. C.R.-C.L. L. REV. 407, 407 (1988) (noting that "white people rarely see acts of blatant or subtle racism, while minority people experience them all the time .... [and] live in a world dominated by race."). *See also* DONALD R. KINDER & LYNN M. SANDERS, DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS 287 (1996) (arguing that "Meanwhile, blacks see racial discrimination as ubiquitous; they think of prejudice as a plague ....").

8. TONI MORRISON, PLAYING IN THE DARK: WHITENESS IN THE LITERARY IMAGINATION 63 (1993).

9. *See* KINDER & SANDERS, *supra* note 7, at 287. *See also* ROBERT JENSEN, THE HEART OF WHITENESS: CONFRONTING RACE, RACISM, AND WHITE PRIVILEGE 11 (2005) (noting that many contemporary Whites "simply claim that the United States has moved past racism and is not a white-supremacist society .... others claim that in recent years white privilege has eroded and been replaced by reverse racism against whites.").

general, and African Americans in particular, has changed dramatically over the last 300 years.[10] There is still much to be done before true racial equality can be realized. A matter of considerable scholarly and political debate is whether the dramatic change in the power of racism represents a real defeat or merely, in response to changing circumstances, a tactical withdrawal from the overt center stage and a redeployment in new disguises, metaphors, and surrogate discourses with the same tired unreconstructed strategic goals of total racial domination, racialized exclusion, and uncontested normative White supremacy.[11]

The very existence of this debate goes a long way toward explaining why it is so difficult for Americans to engage in candid and honest discussions about race across the color line. One of the central reasons that these discussions are so difficult was eloquently and accurately summarized by the prize winning journalist and essayist Ellis Cose when he wrote, "What one cannot refute . . . is the reality of the perceptual chasm separating so many blacks and whites. The problem is not only that we are afraid to talk to one another, it is also that we are disinclined to listen."[12] Ellis Cose's perceptive insight reveals that the racial debate in America today is in many ways truly a discourse with the deaf,[13] and thus there are few reasons to be sanguine about a positive change in this racial communicative impasse anytime soon. This theme was echoed by former New York Mayor Ed Koch who presciently observed in a 1992 speech at New York University that if Americans "are not willing to face up to the importance of who we are and where we come from, we will never have the candid dialogue and the real [racial] debate we should have."[14]

So the question remains: has the lost cause of White supremacy in America really been lost or has it merely morphed into a modern form of psychological guerrilla warfare, waged by other more subtle and perhaps

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10. *See* GEORGE M. FREDRICKSON, WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN & SOUTH AFRICAN HISTORY xxiv (Oxford Univ. Press 1981) (observing that "[a]lthough certain kinds of progress have been made in recent years toward resolving the inequalities that have long existed between whites and blacks in the United States, many serious problems remain . . . .").

11. *See id.* at xi (defining white supremacy as "the attitudes, ideologies, and policies associated with the rise of blatant forms of White or European dominance over 'nonwhite' populations.").

12. ELLIS COSE, THE RAGE OF A PRIVILEGED CLASS: WHY ARE MIDDLE-CLASS BLACKS ANGRY? 13 (1993). *See also id.* at 12 (noting that "Americans are afraid to talk honestly about race.").

13. *See* ALBERT O. HIRSCHMAN, THE RHETORIC OF REACTION 169 (1991) (describing a "dialogue of the deaf" that functions as a "continuation of civil war with other means," paraphrasing Carl von Clausewitz).

14. *See* COSE, *supra* note 12, at 12. *See also* THERNSTROM & THERNSTROM, *supra* note 2, at 14 (noting that "[t]he topic of race raises fundamental questions about who we are, where we're going, how we get there.").

even more effective means?[15] A particularly illuminating example of America's contemporary ambivalence over the accuracy or exaggeration of the reports of racism's demise can be seen in the intense and extreme polarization in the juridical, political, and public debate over the issue of affirmative action in higher education. This Article finds common cause with that side of the debate which holds, in short, that racism has not died either a quiet or ignominious death. It argues, instead, that racism has merely traded in its old and crude weapons of colonialism, slavery, Jim Crow segregation, and racial terrorism[16] in exchange for more subtle, and ultimately more effective, modern, sophisticated weaponry of metaphor, rhetoric, language, image, denial, and most importantly—perspective.[17]

The central argument of this Article is that while the legions of racism may have been driven from the open and overt battlefield of explicit public policy and naked sanction of law, they continue to wage the same war of total racial domination on a covert basis. Under this new strategy, the forces of racism and White supremacy have redirected their fire from direct assaults on the public square to the more rugged, entrenched terrain of the hills, valleys, and horizons of the juridical, political, and literary imagination.[18] This new form of White supremacy is harder to see than its

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15. *See* Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1379 (1988) (observing that "[t]he end of Jim Crow has been accompanied by the demise of an explicit ideology of white supremacy. The white norm, however, has not disappeared; it has only been submerged in popular consciousness.").

16. *See* BELL HOOKS, KILLING RAGE: ENDING RACISM 37 (1995) (quoting RICHARD DYER, WHITE (1997)) (describing "the way whiteness makes its presence felt in black life, most often as terrorizing imposition, a power that wounds, hurts, tortures . . . . "). *See also* HERBERT SHAPIRO, WHITE VIOLENCE AND BLACK RESPONSE: FROM RECONSTRUCTION TO MONTGOMERY xii (1988) (detailing the extent to which "violence in various forms has been a central ingredient of the Afro-American experience, that the lives of millions of black people have been and continue to be lived in the shadow of numberless episodes of racist brutality."); GRACE ELIZABETH HALE, MAKING WHITENESS: THE CULTURE OF SEGREGATION IN THE SOUTH, 1890–1940 238 (1998) (describing the Southern culture of spectacle lynchings that drew hundreds and sometime thousands of jubilant spectators as a form of public family entertainment, and that even after the period of great spectacle lynching ended, "whites continued to assert what they thought was their racial right to kill African Americans, albeit more privately. Private lynchings continued and may even have increased in the 1930s as some rural white southerners saw the violence as an act of southern patriotism.").

17. *See* THERNSTROM & THERNSTROM, *supra* note 2, at 14 (observing the presence of "linguistic barricades" in the contemporary racial debate and concluding that "[i]n the battleground of ideas, language is part of the territory each side seeks to capture.").

18. *See* Thomas Ross, *Whiteness After 9/11*, 18 WASH. U. J.L. & POL'Y 223, 225 (2005) (describing the contemporary anxiety of many White Americans as they "perceive themselves to be living in an increasingly 'Brown' America in which they will soon be outnumbered and in which 'being White' is given less overt cultural significance."). *See also* GEORGE LIPSITZ, THE POSSESSIVE INVESTMENT OF WHITENESS xviii (Temple Univ. Press 1998) (discussing the many ways that Whites now invest in the cash value of Whiteness

predecessor, and is more difficult to directly engage, as well as being less amenable to the mobilization of mass public protest; it is precisely for these reasons that the need for its identification, confrontation, and resistance is more urgent than ever.[19]

This Article focuses on affirmative action in higher education as but one, albeit a particularly illustrative one, of a myriad of examples of the continued strategic consistency and evolving tactical transformation of White supremacy. The principle thesis of this Article is that, at its core, the intense polarization of the debate over affirmative action is less about the surrogate discourses of diversity,[20] candor,[21] and fairness[22] and fundamentally more about the racialized perspectival chasm regarding the

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and identifying the ways "in which power, property, and the politics of race in our society continue to contain unacknowledged and unacceptable allegiances to white supremacy."); RUTH FRANKENBERG, WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS 205 (1993) (describing the "dualistic discourse on culture" that continue to maintain White supremacy); MORRISON, *supra* note 8, at 50–51 (describing the many ways that whites devised ways to "talk about [race] matters with a vocabulary designed to disguise the subject ... [through a type of] master narrative ... [a] policing narrative" in which "[s]ilence from and about the [racial] subject was the order of the day.").

19. *See* Brant T. Lee, *The Network Economic Effects of Whiteness*, 53 AM. U. L. REV. 1259, 1290 (2004) (observing that White supremacy is now expressed principally in code words "[b]ecause a strong national antiracism norm has been adopted, any explicit reference to Whiteness is now frowned upon. For Whiteness to survive as a standard, it must go undercover."). *See also* MORRISON, *supra* note 8, at 63 (observing that "the metaphorical and metaphysical uses of race occupy definitive places in American literature, in the 'national' character, and ought to be a major concern ...."); LIPSITZ, *supra* note 18, at 20 (describing how, in contemporary race relations, "Systemic, collective, and coordinated group behavior ... drops out of sight. Collective exercises of power that relentlessly channel rewards, resources, and opportunities [to whites] ... will not appear 'racist' .... [y]et they ... give racial identities their sinister social meaning by giving people from different races vastly different life chances.").

20. *See* Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding racial diversity in law school educational settings as a constitutionally permissible compelling state interest.). *But see* Darnell Weeden, *After Grutter v. Bollinger, Higher Education Must Keep Its Eyes on the Tainted Diversity Prize Legacy*, 19 BYU J. PUB. L. 161, 162 (2004) (condemning the diversity rationale of the *Grutter* decision because "race-based diversity policy promotes notions of racial superiority and racial inferiority, [and is therefore] inherently flawed."); Charles Lawrence, III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 931 (2001) (critiquing the liberal defense of affirmative action based on racial diversity because it was used "without questioning the ways that traditional admissions criteria continue to perpetuate race and class privilege ... [and has thus] pushed other, more radical substantive defenses to the background.").

21. *See* Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004). For an incisive critique of Professor Sander's article, *see* Kevin R. Johnson & Angela Onwuachi-Willig, *The Limits of "A Systematic Analysis of Affirmative Action in American Law Schools"*, 7 AFR.-AM. L.& POL'Y REP. 1 (2005).

22. *See* Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331 (2000) (suggesting a more just way to approach affirmative action through the use of race-neutral mechanisms that do not trigger strict scrutiny.).

standpoint from which racial reality is interpreted, articulated, legitimized, conceived and imagined in juridical, political, and public discourse.

The significance of this racialized perspectival chasm[23] was recently on vivid public national display, and dramatically and tragically illustrated in the distinctly racialized public reactions to the after-effects of Hurricane Katrina.[24] During the extensive media coverage of the aftermath of Hurricane Katrina[25] in the late summer of 2005, two contrasting media images from flood-ravaged New Orleans captured the public's imagination and painfully exposed the stark differences between the White-centered and the Non-White[26]-centered perspective on racial matters in contemporary

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23. *See* KINDER & SANDERS, *supra* note 7, at 287 (arguing that "the most arresting feature of public opinion on race remains how emphatically black and white Americans disagree with each other.").

24. According to recent national polls, while "six in 10 African Americans say the fact that most hurricane victims were poor and black was one reason the federal government failed to come to the rescue more quickly. Whites reject that idea; nearly 9 in 10 say those weren't factors." Susan Page & Maria Puente, *Views of Whites, Blacks Differ Starkly on Disaster*, U.S.A. TODAY, Sept. 13, 2005, at 1A .

25. *See* Anna Mulrine, *To the Rescue: After a Sluggish Response, A Rush to Help and Rebuild*, U.S. NEWS & WORLD REPORT, Sept. 12, 2005, at 22 (describing the scene as one that "didn't look like America.").

26. Following the lead of others, for the balance of this Article I have chosen to use the term "Non-White" instead of the more popular term of art "people of color" to describe that category of people that includes, among others, the traditional assortment of Blacks, Latinos, Asians, and Native Americans. This choice reflects my concern that, first, White is a color too. Thus the use of the term "people of color" to describe those who are not White, simply reinforces in Whites that they are outside of the racial project and the concept of race does not include them; it reinforces their sense of racelessness and normativity, which is precisely part of the problem. Therefore, I consider the term to be ultimately counterproductive.

Secondly, from a political perspective, the term White is both a color and a mark of social, economic, and political power. As one scholar has described it: "white is not just white, of course. White is also power. And using the terms white/non-white reminds us of that." *See* JENSEN, *supra* note 9, at 2. Moreover, I am further persuaded by Jensen's argument that the only thing that realistically links together those traditionally associated with the term "people of color" is their "common experience . . . of being on the subordinated side of white supremacy . . . and of being targeted, abused, and victimized—albeit in different ways at different times—by a white-supremacist society." *Id.* In the absence of that common experience of victimhood at the hands of White supremacy, the coherence of the group labeled "people of color vanishes." *Id.*

I agree with Jensen's observations when he notes that "nothing links [people of color] except the experience of oppression. And the group perpetrating the oppression is white, another socially created category defined by power." *Id.* at 3. So even though this term has its own drawbacks, most particularly the negative association of being defined by something that they are not, it does not carry the counterproductive baggage of empowering a White racial abstraction or of turning the focus of the discussion from White supremacy, the real source of the problem, to the many "varied cultures" and different cultural experiences of so-called "people of color." *Id.* at 3.

In the final analysis, I must reluctantly agree with Richard Dyer who writes that "[w]e need to recognize white as a colour too, and just one among many, and we cannot

America.[27] The day after the catastrophic flooding, *Yahoo News* published two pictures of the flood survivors on its website that immediately sparked a national controversy.[28] The pictures were strikingly similar in content but were accompanied by starkly different descriptive captions.

In one picture, a young Black man is shown wading through chest-high water carrying bundles of food in both hands. In the other, two young Whites, a man and a woman, are shown doing the same. However, that is where the similarity ends. The captions judgmentally describe the young Black man as a "looter;" while in sharp contrast, the similarly-situated Whites are benignly characterized as mere "finders."[29]

The only substantive difference between the two pictures, and therefore the only basis for the difference in their respective captions, is the racial identity of their subjects. Through this form of "visual rhetoric"[30] and racialized narrative, the caption characterized the Black man, solely by virtue of his skin color, as a predator exploiting a tragedy by engaging in the criminal behavior of looting—and thus as morally blameworthy and deserving of societal condemnation. In contrast, solely on the basis of their skin color, the caption characterized the White couple as innocent victims responding to a natural disaster by engaging in the non-judgmental behavior of "finding"—thus beyond the reach of moral blameworthiness or condemnation.

The difference in these captions is representative of the negative, racialized, and stereotypical representations of Blacks in the American mass media. As David Chaney has accurately observed, such racial "[r]epresentation[s], far from being pictures of the social world, [are] more profoundly understood as the endlessly negotiable ways in which the

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do that if we keep using a term that reserves colour for anyone other than white people. Reluctantly, I am forced back onto 'non-white'." *See* RICHARD DYER, WHITE 11 (1997).

27. *See* Evan Thomas, *The Lost City*, NEWSWEEK, Sept. 12, 2005, at 44 (describing "TV images of hundreds and thousands of people, mostly black and poor, trapped in the shadow of the Superdome. And most horrific: the photographs of dead people floating facedown in the sewage or sitting in wheelchairs where they died, some from lack of water.").

28. *See* Clarence Page, *Commentary: When Sluggishness Isn't OK*, CHI. TRIB., Sept. 4, 2005, § 2, at 9 ("Other e-mailers sent me copies of two news photos that revealed an apparent double standard regarding black and white flood victims in New Orleans.").

29. The actual captions read: "A young man walks through chest deep flood water after *looting* a grocery store in New Orleans" and "[t]wo residents wade through chest-deep water after *finding* bread and soda from a local grocery store after Hurricane Katrina came through the area in New Orleans." *See* Aaron Kinney, *"Looting" or "Finding"?*, http://archive.salon.com/news/feature/2005/09/01/photo_controversy/index_np.html (2005) (emphasis added). *See also* Page, *supra* note 28, § 2, at 9 (quoting a blogger who remarked "[a]pparently ... it's not looting if you are white," and noting "[s]uch are the sentiments and suspicions about race and class that churn just beneath the surface of our daily discourse.").

30. *See* DYER, *supra* note 26, chapter 2, n.4 (describing the "visual rhetoric of whiteness.").

world is being constituted and articulated."[31] This sort of racialization not only reflects and constructs public opinion but, also, "provides meaning to our experiences [and] provides the very terms of [that] experience."[32]

The disparity between these conflicting caption descriptions represents a particularly evocative example of what a recent *New York Times* poll described as the "starkly divergent perceptions" between Blacks and Whites "of many racial issues."[33] However, the photographers and editors responsible for the photos have suggested that these widely-circulated pictures and their divergent captions may have a more racially ambiguous or even a racially-neutral explanation.[34]

Notwithstanding the photographers' and editors' alleged racially-neutral explanations, their justifications are not only unsupported by any independent corroboration, but the views are themselves the by-products of their own socially mediated racialized perspectives and interpretations. More importantly, whatever the veracity of these explanations, there is no doubt that far more people saw the pictures and their disparate captions than read the online explanations offered by the publishing news services. Thus, the impact on the public imagination was affected by the visual rhetoric of the pictures in ways that, however accurate, written explanations with limited circulation could never significantly ameliorate. Once these starkly contrasting images were widely publicized, they became a part of the culture and were in effect "frozen, incapable of growth, change, innovation or transformation."[35] Given the racialized power of the media in America, "Racial representations help to mold public opinion, then hold it in place and set the agenda for public discourse on the race issue in the media and in the society at large."[36] This process is particularly important in the racial arena because "Black media stereotypes are not the natural, much less harmless, products of an idealized popular culture, [but] are more commonly socially constructed images that are selective, partial, one-dimensional, and distorted in their portrayal of African Americans."[37]

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31. DAVID CHANEY, THE CULTURAL TURN: SCENE-SETTING ESSAYS ON CONTEMPORARY HISTORY 71–72 (Routledge 1994).

32. John O. Calmore, *The Law and Culture-Shift: Race and the Warren Court Legacy*, 59 WASH. & LEE L. REV. 1095, 1106 (2002).

33. Kevin Sack with Janet Elder, *The New York Times Poll on Race: Optimistic Outlook But Enduring Racial Division*, *in* HOW RACE IS LIVED IN AMERICA: PULLING TOGETHER, PULLING APART 365, 365 (Time Books 2001).

34. *See, e.g.*, http://www.snopes.com/katrina/photos/looters.asp (*citing* Kinney, *supra* note 29) (suggesting that "the captions were a result of a combination of contextual and stylistic differences.").

35. Jannette L. Dates & William Barlow, *Introduction: A War of Images*, *in* SPLIT IMAGE: AFRICAN AMERICANS IN THE MASS MEDIA 1, 5 (Jannette L. Dates & William Barlow eds., 1993).

36. *Id.*

37. *Id.*

The "starkly divergent" perceptions of racial reality between Blacks and Whites exemplified by these now infamous pictures is a powerful reflection in a racial context of what Martha Minnow described in the epigraph to this Article as the distinctions between different "starting point[s]" or "point[s] of view."[38] Because of America's historical and contemporary "stubborn racial divide,"[39] those starting points are deeply racially-inflected and the racial perspective of the observer can—and frequently does—have a profound influence on the perception of racial reality.[40]

In analyzing the issue of affirmative action, this Article argues that one of the principal reasons for the stark divergence in views between its supporters and detractors is grounded in the different starting points or racial perspectives of the observers. The opposition to affirmative action takes its perspectival bearings from a White-centered "point in space,"[41] regardless of the individual skin color or racial self-identification of the persons involved.

This White-centered perspective operates like a powerful mythological tool that, like a " 'virus'[,] . . . infects our reasoning and our politics . . . . serv[ing] 'not to deny things' but to take the troubling images in our everyday lives—depictions resonant with our fears, our intolerance, our bigotry—and make 'them innocent . . . give . . . them a natural and eternal justification."[42] Mythology has always been a powerful force in shaping and rationalizing any society's view of itself and the world and that has been particularly true in the context of race.[43] Historically, race-based mythologies have served what has been described as "the sinister adjective of the white supremacist, delineating a whiteness that is superior, moral,

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38. Minow, *supra* note 1, at 15.

39. *See* Calmore, *supra* note 32, at 1101 (referring to "the reality that we live in a racist culture.").

40. *See* THERNSTROM & THERNSTROM, *supra* note 2, at 14 (noting that "Opposing sides in the debate over race start from different premises and see American society through very different lenses."). *See also* MATTHEW FRY JACOBSON, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRATION AND THE ALCHEMY OF RACE 10 (1998) (noting that "the eye that sees is not a mere physical organ but a means of perception conditioned by the tradition in which its possessor has been reared."); DYER, *supra* note 26, at 3 (quoting Hazel V. Carby, *The Multicultural Wars*, *in* BLACK POPULAR CULTURE 187, 193 (Gina Dent ed., Seattle Bay Press 1992)) (describing the point of view or starting point of most Whites in America as proceeding from a " '(White) point in space.' ").

41. DYER, *supra* note 26, at 3 (quoting Carby, *supra* note 40, at 193).

42. MAURICE BERGER, WHITE LIES: RACE AND THE MYTHS OF WHITENESS 96 (1999) (quoting ROLAND BARTHES, MYTHOLOGIES) (1957). *See also* COLIN FALCK, MYTH, TRUTH AND LITERATURE: TOWARDS A TRUE POST-MODERNISM xii (2d ed. 1995) (arguing for a paradigm shift in literary and poetic mythologies "which will enable us to restore the concepts of truth or of vision to our discussions . . . ").

43. *See* BERGER, *supra* note 42, at 97 (noting that "The subject of race, perhaps more than any other subject in contemporary life, feeds on myth.").

wholesome, stable, intelligent, and talented and a blackness that is inferior, stupid, shiftless, lazy, dishonest, untrustworthy, licentious, and violent."[44]

The principal purpose of the contemporary American racial myths surrounding the issue of affirmative action is to act like a "seamless narrative that tells us [that] the contradictioins [sic] and incongruities of race and racism are too confusing or too dangerous to articulate"[45] either directly or with too precise a linguistic turn. Such myths provide a type of "elegant deception" by which the dominant White culture can hide, justify, and "reinforce ... unconscious prejudices."[46] In short, as Maurice Berger has argued, "[m]yths are the white lies that tell us everything is all right, even when it is not."[47] Similarly, as Peter Fitzpatrick has correctly observed, the very act of attempting to deny the foundational nature and impact of race in modern society is itself a myth.[48]

This Article argues that the central mythological scaffolding upon which opposition to affirmative action is built is based on a juridical rhetoric of White innocence. Although this focus is both insightful and illuminative, a connection between affirmative action and an American jurisprudential rhetoric of White innocence is neither new nor particularly innovative. A number of insightful scholars have profitably mined this ground in the past.[49] This Article incorporates the insights of these other important scholars' works and builds upon them in an effort to expose and undermine more of the bedrock of the "elegant deception" of White innocence by suturing this rhetoric with the perspectival phenomenon of the White-centered perspective.

This Article argues that the rhetoric of White innocence as deployed in American affirmative action jurisprudence is not only philosophically inappropriate, but also constitutes significant constitutional violations. These violations include, but also go beyond, the traditional arguments running afoul of the equal protection guarantees of the Fourteenth Amendment. I argue that the violation also extends to a

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44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *See* PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW ix (1992) (observing that "[t]he obvious conundrum ... is how this presence of myth can be reconciled with its denial in modernity. The answer is that the denial is the myth.").

49. *See* Kathleen M. Sullivan, *Sins of Discrimination: Last Terms Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986) (arguing that the emphasis on White innocence establishes a counterproductive sin based analytical paradigm). *See also* Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990) (arguing that innocence in affirmative action jurisprudence conceals an unconscious White racism); Devins, *supra* note 3, at 16 (arguing that Thomas Ross' version of the rhetoric of White innocence is more accurately described as "the rhetoric of guilt" because it is based on unconscious racism); Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1 (1990).

fundamental breach of the Constitutional principle of due process, both substantively and procedurally, and amounts to an unprincipled, arbitrary, capricious, and irrational imposition of racial favoritism.[50]

As an analytical vehicle, this Article examines the juridical monopoly of the White-centered perspective through the rhetoric of White innocence as deployed in the Court's jurisprudence on affirmative action in higher education. Section I examines the phenomenon of the White-centered perspective and its monopolistic grip on the imagination of the Supreme Court. Section II situates the content of the ideology of White innocence within the larger context of the ideology of Whiteness. Section III discusses the Court's specific deployment of the ideology of White innocence as a counterbalance with which to measure the constitutionality of race-conscious affirmative action programs in the context of higher education. Section IV examines the extent to which the juridical monopoly of the White-centered perspective, through the deployment of the rhetoric of White innocence in affirmative action cases, constitutes a violation of the constitutional guarantees of equal protection and due process. Section V recommends ways in which the hegemonic grip of the White-centered perspective can be dismantled, not only in affirmative action cases but in other racially-inflected constitutional disputes generally. By supplanting that perspective with a constitutional racial analytic that appreciates multiple legitimate racial vantage points and perspectives, the Court may paint a more realistic, more rational, distinctly non-arbitrary and more balanced picture of the true state of racial reality in America.

A. *The White-Centered Perspective*

Although it is rarely noted or emphasized in the contemporary American racial debate, in many critical and important ways the positions that Whites and Non-Whites occupy from which they see and interpret racial reality are worlds apart.[51] This is a critical omission in both tone and emphasis because "at the center of the debate over race in America is the question of what perspective we will use to define racism and the social policies necessary to end it. From what vantage point will problems be named and solutions found?"[52] The importance of recognizing and interrogating the divergences between the White and Non-White perspectives on race cannot be overemphasized because "defining racism is not a semantic

50. *See* Charles W. Collier, *Affirmative Action and the Decline of Intellectual Culture*, 55 J. LEGAL EDUC. 3, 5 (arguing that many different factors can be used as a basis for university admission "so long as the assessment is not arbitrary or irrational.").

51. *See* BROWN ET AL., *supra* note 6, at 85 (noting the necessity of "finding common ground to bridge the racial worlds that still divide America.").

52. *Id.* at 84.

or theoretical issue,"[53] but, rather, a very real one that must take into account practical realities in order to have any meaningful impact on "bridg[ing] the racial worlds that still divide America."[54]

The failure to acknowledge and interrogate the significance of how racial arguments and conclusions are affected and often even "dictated by [racialized] vantage point"[55] is a critical omission that tends to "naturalize the racial status quo."[56] In addition, it allows many Whites to see themselves as merely innocent observers of the way things just happen to be,[57] and allows them to occupy what Stephanie M. Wildman correctly observes as "a comfort zone in whiteness, which includes whiteness as the fabric of daily life for whites" and thus renders them unconnected to and not responsible for "white participation in the construction of race from a white-privileged viewpoint."[58] Consequently, it encourages Whites to see themselves as racially innocent by engaging in what Rebecca Aanerud has described as "the false assumption that a white person who does not participate in 'extreme' racist acts (e.g. by belonging to a white supremacist group or subscribing to white supremacist ideology) is not a racist."[59]

The influence of racialized perceptions on reading and interpreting racial reality is so powerful and pernicious in operation that race itself can be understood as a type of "habit of perception,"[60] which, unless actively guarded against, can become outcome determinative. As Richard Dyer points out, this racialized mode of perception is fundamentally "inextricable from racial imagery" and functions as a distortive[61] lens through which reality is perceived that provides the basis for both conscious and unconscious "[racial] judgments ... about people's capacities and worth ...."[62] Therefore, because of America's unique history as an "overtly racist

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53. *Id.*

54. *Id.*

55. *Id.* at 85.

56. *Id.* at 84. *See also* Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1662 (1995). (describing how " 'the way things are' ... tends to make prevailing patterns of race, ethnicity, power, and the distribution of privilege appear as features of the natural world.").

57. *See* Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. U. J.L. & POL'Y 245, 255 (2005) (quoting Mahoney, *supra* note 56, at 1662) (describing the White lived experience as "just normal—'the way things are.' ").

58. Wildman, *supra* note 57, at 251. *See also* John O. Calmore, *Racialized Space and the Culture of Segregation: Hewing a Stone of Hope from a Mountain of Despair*, 143 U. PA. L. REV. 1233, 1234 (1995); Mahoney, *supra* note 56, at 1662 (noting how 'the way things are' erases individual White's sense of personal participation in maintaining White supremacy.).

59. Rebecca Aanerud, *Fictions of Whiteness: Speaking the Names of Whiteness in U.S. Literature*, *in* DISPLACING WHITENESS: ESSAYS IN SOCIAL AND CULTURAL CRITICISM 49 (Ruth Frankenberg ed., 1997).

60. DYER, *supra* note 26, at 12.

61. *See* BROWN ET AL., *supra* note 6, at 35.

62. DYER, *supra* note 26, at 1.

regime"[63] and a "white dominated society,"[64] founded on principles of White supremacy,[65] the dominant and, thus, default perspective in both public and private space[66] could accurately be described as White-centered. Moreover, against this historical backdrop, in all matters bearing on racial perception, the White-centered or White framed perspective presumes not only the "power to name" but also the power to "determine perception, and ultimately, prescription."[67] In this way, the White-centered perspective has come to occupy a "privileged strategic location in a racialized social system."[68]

It is not surprising that race has such a profound effect on the perception of racial reality because, as the nation was starkly reminded by the two contrasting pictures of the New Orleans flood survivors,[69] "Blacks continue to inhabit a very different America than do Whites."[70] As a result, "People's perspectives on race reflect their experience on one side of the color line or the other."[71]

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63. GEORGE M. FREDRICKSON, RACISM: A SHORT HISTORY 100–101 (2002) (describing the American Jim Crow South, South Africa, and Nazi Germany as the only "overtly racist regimes" because "[n]owhere else were the political and legal potentialities of racism so fully realized."). *See also* FREDRICKSON, *supra* note 10, at xi (noting that "[t]he phrase 'white supremacy' applies with particular force to the historical experience of two nations—South Africa and the United States.").

64. BROWN ET AL., *supra* note 6, at 34.

65. *See* FREDRICKSON, *supra* note 10, at xi (noting that "[t]he phrase 'white supremacy' .... refers to the attitudes, ideologies, and policies associated with the rise of blatant forms of white or European dominance over 'non-white' populations ... based primarily, if not exclusively, on physical characteristics and ancestry.").

66. *See* DAVID DELANEY, RACE, PLACE, & THE LAW 24 (1998) (describing the influence of race on "the *spatiality* of [social] power.").

67. BROWN ET AL., *supra* note 6, at 35.

68. EDUARDO BONILLA-SILVA, WHITE SUPREMACY AND RACISM IN THE POST-CIVIL RIGHTS ERA 62 (2001) (citing NICOS POULANTZAS, POLITICAL POWER AND SOCIAL CLASS (1982)). *See id.* at 83, n.16 (noting that the "ideological ensemble of a society" consists of "racial, class, and other forms of hierarchical structurations").

69. *See* Page, *supra* note 28, at 9 ("As the misery mounted, more TV broadcasters mentioned what viewers could plainly see, that the vast majority of "refugees," were black and poor."). *See also* Mulrine, *supra* note 25, at 22 ("Katrina's lethal one-two punch of 145 mile-per-hour winds and 25-foot storm surge left 90,000 square miles of heartbreak, devastation, and unhinged lives ... [it] uprooted more Americans than the Civil War, the Dust Bowl storms of the 1930's or the San Francisco earthquake of 1906 ... '[t]his is our tsunami.' ").

70. Barbara J. Flagg, *Was Blind, But Now I See: White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 987 (1992).

71. BROWN ET AL., *supra* note 6, at 35.

B. *The White-Centered Perspective and Judicial Discourse*

The presumptive power of the White-centered perspective to determine racial reality is especially important in the language and decisions of America's judiciary, particularly so in the decisions of the Supreme Court, because of the critical role of the Court in what David Delaney has described as "world-making."[72] While it is certainly true that "the politics of world-making ... is inherent in any performance of legal discourse," it is particularly critical to keep in mind that "these issues are sharper in those situations in which the maintenance or transformation of inherited social hierarchies is precisely the point of contention."[73]

These are critically important concerns because, as Richard Delgado has intelligently observed, "traditional legal writing purports to be neutral and dispassionately analytical, but ... all too often it is not."[74] Delgado argues that part of the reason for this counterfeit neutrality in traditional legal writing is the fact that "legal writers rarely focus on their own mindsets, the received wisdoms that serve as their starting points."[75] The "starting points" that Delgado identifies consist of the unstated and unexamined racialized vantage points from which legal writers see, interpret, and make sense of racial reality, directly reflecting the racing characteristics of the society at large which privileges the White way of seeing.

In this way, judicial proceedings at all levels, but especially at the ultimate height of the Supreme Court, can be understood as a "struggle in which differing, indeed[,] antagonistic world-views confront each other."[76] Analyzing juridical decisionmaking and discourse from this perspective helps to reveal the hidden political dimensions and the racial starting point from which the Court takes its bearings and perceives racial reality. As a consequence, this level of inquiry tends to expose the Court's critical and unstated assumptions where "contingency is portrayed as necessity, the created is portrayed as the found, the constructed as the natural or the political as the nonpolitical, and so on."[77] For example, the Court's current obsession to define racism so narrowly as to primarily include only "purposeful individual bigotry ... is highly advantageous for whites" and thus

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72. DELANEY, *supra* note 66, at 23

73. *Id.*

74. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2440–41 (1989).

75. *Id.*

76. P. Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 830, 837 (1987).

77. DELANEY, *supra* note 66, at 23–24. *See also* Bourdieu, *supra* note 76, at 838–39 (noting that "[l]aw is the quintessential form of symbolic power of naming that creates the things named, and creates social groups in particular .... It would not be excessive to say that [legal discourse] creates the social world, but only if we remember that it is the world that first creates law.").

reflects a strong and completely arbitrary preference of the White-centered perspective over all others. The emphasis on intentional or purposeful discrimination by a guilty perpetrator tends to "locate racism in America's past. It labels black anger and white guilt as equally inappropriate. . . . [and therefore]renders most whites innocent."[78]

Unfortunately, the distinction between White-centered and Non-White-centered perspectives on racial reality has rarely been recognized in the Court's consideration of racial difference. Instead, the Court's "legal treatment of difference . . . tends to treat as unproblematic the point of view from which difference is seen, assigned, or ignored, rather than acknowledge that the problem of difference can be described and understood from multiple points of view."[79] More importantly, as Martha Minnow reminds us, the very existence of "multiple viewpoints challenges the assumption of objectivity and shows how claims to knowledge bear the imprint of those making the claims."[80] Therefore, it is important to pay careful attention to the way in which the courts generally—and the United States Supreme Court in particular—treat the issues of racial difference and perspective in the process of resolving racialized claims of constitutional rights.

It is critical that the law begin to expressly recognize and confront the virtual monopoly that the White-centered perspective exerts on the Supreme Court's view of racial reality in racially-inflected cases bearing on fundamental constitutional rights. Moreover, such honest and realistic recognition is essential because, in the final analysis, it is "only by acknowledging [the] profound differences in [racialized] perspectives [that one] can . . . begin to address the durable racial inequality of American society."[81]

As Malcolm Gladwell has observed, when "reduced to its simplest elements, even the most complicated of relationships and problems . . . have an identifiable underlying pattern."[82] One of the most important and central "identifiable underlying pattern[s]"[83] of racial conflict and inequality in America is due to a fundamental "contradiction of perspectives"[84]

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78. BROWN ET AL., *supra* note 6, at 64. *See also id.* at 64–65 (describing how viewing "racism as simply the collection of intentionally bigoted individual attitudes is fundamentally flawed, both theoretically and empirically. It uses assumptions that are not supported by empirical evidence, it ignores the collective dimension of racism, and its conclusions are dictated by its vantage point.").

79. Minow, *supra* note 1, at 14.

80. *Id.* (citing H. PUTNAM, REASON, TRUTH AND HISTORY 50 (1981)). *See also* T. NAGEL, THE VIEW FROM NOWHERE 7 (1986).

81. BROWN ET AL., *supra* note 6, at 64.

82. MALCOLM GLADWELL, BLINK 141 (Little Brown Publishers 2005).

83. *Id.*

84. Frances V. Rains, *Is the Benign Really Harmless? Deconstructing Some "Benign" Manifestations of Operational White Privilege* (citing J.J. Scheurich, *Toward a White Discourse on*

on the nature and experience of racial reality in America. It would be a gross oversimplification to conclude that this fundamental conflict is between Whites and Non-Whites. Instead, the logic of this argument leads to the conclusion that the contradiction is based not on the color of one's skin, but on the color of one's perspectival centeredness or assumptive racial vantage point.[85]

It has been noted that the central racial paradox of the law in the twenty-first century consists of reconciling the rival White-centered and Non-White-centered perspectives regarding the nature of racial reality. However, at the threshold of this paradox is a candid recognition of the very existence of a distinction between a White-centered and a Non-White-centered perspective on racial reality—that there are in fact opposing perspectives on racial reality that must be reconciled. Dismantling the monopoly that the White-centered perspective currently enjoys as the presumptive and sole arbiter of racial reality will not be a simple process.[86] However, it is an essential threshold requirement to achieving meaningful racial equality because, in a truly pluralistic society, a mere recognition of the rights of those categorized as "different" is simply not enough. In addition to such mere recognition, there must also be at least a minimal degree of respect and dignity afforded to the differences in perspective that this presumptive position has created and perpetuated.[87]

The principal argument of this Article is that in resolving competing racially-inflected claims to constitutional shelter, the Supreme Court's racial perspective "is unreflectively locked inside its own ... limited ... experience"[88]; and, as a consequence, it has consistently chosen to view racial reality through a "totally white prism," thereby adopting a distinctly

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White Racism, Educational Researcher 22, no. 8, 5–10 (1993)), *in* WHITE REIGN: DEPLOYING WHITENESS IN AMERICA 80, 80 (Joe L. Kincheloe et al. eds., St. Martin's Griffin 1991).

85. *See* LIPSITZ, supra note 18, at 20 (noting that "the stark contrast between the nonwhite experiences and white opinions during the past two decades cannot be attributed solely to individual ignorance or intolerance, but stems instead from liberal individualism's inability to describe adequately the collective dimensions of our experience.").

86. *See id.* (noting the existence of a "broadly shared narrative about the victimization of 'innocent' whites by irrational and ungrateful minorities.").

87. The logic of the argument advanced in this Article is premised on the understanding that the White-centered perspective is not only raced, but also gendered, classed, physically-abled, and sexually oriented. Thus, it is a perspective that primarily reflects the experience of those who are White, male, middle class, fully-abled, and heterosexual. For purposes of this discussion, I will focus primarily on the raced aspects of this perspective, but it is important to keep in mind that this analysis could apply with equal force to any of the other aforementioned categories as well.

88. *See* BROWN ET AL., *supra* note 6, at 35 ("any perspective that is unreflectively locked inside its own experience is limited, and this is particularly so when that perspective reflects the dominant culture.").

White-centered perspective as the "master framework"[89] or dominant judicial gaze[90] through which it evaluates racial reality in America.[91] Moreover, the Court's consistent choice of a White-centered perspective as the exclusive lens through which to resolve race-based constitutional claims "cannot be defended as principled, coherent or neutral,"[92] but instead is a social construction which represents little more than the arbitrary imposition of the judiciary's own personal racial perspective—a judicial choice, whether conscious our unconscious, but a choice nonetheless.

The choice[93] by America's highest legal tribunal to adopt a White-centered perspective as its presumptive and default lens for evaluating and resolving racially-inflected constitutional claims is deeply troubling and problematic on a number of critical levels. In choosing the White-centered perspective, the Court has completely erased the Non-White-centered perspective and not only allowed the White-centered perspective to dominate its thinking, but also to present this perspective as the sole objective, unraced, and neutral evaluator of the real and the natural.[94]

This White-centered judicial gaze on America's racial reality is also problematic for both constitutional and policy reasons. At a minimum, from a constitutional perspective, whether the result of conscious or unconscious motivations,[95] the Court's consistent choice of a White-

89. *See* BONILLA-SILVA, *supra* note 68, at 63 ("Although all the races in a racialized social system have the capacity to develop these frameworks, the frameworks of the dominant race become the master frameworks against which all racial actors compare (positively or negatively) their ideological positions.").

90. *See* CORNEL WEST, PROPHESY DELIVERANCE! AN AFRO-AMERICAN REVOLUTIONARY CHRISTIANITY 55 (Westminster John Knox Press 2002)(1982) (describing the "normative gaze" as an artifact of White supremacy). *But see* David Theo Goldberg, *The Social Formation of Racist Discourse*, *in* ANATOMY OF RACISM 295, 299 (David Theo Goldberg ed., Univ. of Minn. Press 1990)(noting that "the metaphors of racist discourse are not reducible to a single form.").

91. As a result, this unreflective judicial attitude has led the Court to consistently deny or ignore competing Non-White-centered viewpoints as legitimate bases for either interpreting or articulating the nature and meaning of racial reality in America.

92. Geoffrey R. Stone, *Rehnquist's Legacy Doesn't Measure Up*, CHI. TRIB., Sept. 6, 2005, § 1, at 17 (summarizing the late Chief Justice Rehnquist's views on First Amendment cases before the Court during his tenure).

93. The *choice* of the White perspective is masked in the myth of the absence of choice. However, whether it is made consciously or unconsciously, a choice is still certainly being made. *See* Minow, *supra* note 1, at 70. *See also* discussion, *infra* Section II, regarding the distinction between conscious and unconscious choices by the Court.

94. *See* JACOBSON, *supra* note 40, at 10 (noting that "[t]he awesome power of race as an ideology resides precisely in its ability to pass as a feature of the natural landscape.").

95. *See* Charles Lawrence, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) ("We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.").

centered perspective as the presumptive lens through which to understand and resolve constitutional race-based claims gives a constitutionally impermissible racial preference in favor of Whiteness.[96] This impermissible racial preference represents a one-sided,[97] arbitrary, unprincipled, irrational, capricious, and unexplained judicial choice in stark violation of both the equal protection and due process guarantees of the Constitution. The Court's presumptive choice of the White-centered perspective from which to consider and resolve race-based constitutional claims, whether conscious and deliberate or unconscious and unintentional, is constitutionally indefensible and must be expressly and unambiguously rejected as little more than a measure "designed to maintain White Supremacy."[98]

More broadly, the Court's choice of the White-centered perspective is also deeply distressing because, as Martha Minnow reminds us, in a pluristic society, "Litigation in the Supreme Court should be an opportunity to endow rival vantage points with the reality that power enables, to redescribe and remake the meanings of difference in a world that has treated only some vantage points on difference as legitimate."[99] Instead of providing a forum where rival racial vantage points can be evaluated and measured so as to compete for state recognition and support, the Court's adoption of the White-centered perspective erases all rival vantage points[100] and crowns itself as the sole and undisputed interpreter of the nature and meaning of racial difference that amounts to "a compulsory gospel which admits of no dissent and no disobedience."[101]

When the dominant ideology represented by the White-centered perspective succeeds in controlling the Court's interpretation and understanding of reality, this perspective then controls the production of what passes for knowledge in a manner that "may even shape the terms of access for other points of view, so that exclusions appear natural, based on merit or on other standards endorsed even by those who remain

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96. The central problem with the White-centered perspective is that the Court mistakes this perspective for the real. The Court forgets that with respect to racial reality, the White-centered perspective is in dialectical and antinomic opposition to the Non-White perspective, in that both are in themselves quite reasonable given their respective starting points.

97. *See* RICHARD POSNER, OVERCOMING LAW 373–80 (1995) (accusing Patricia Williams, in writing *The Alchemy of Race and Rights*, of "suppress[ing] every perspective other than that of the suffering, oppressed black" and noting that "one-sidedness is an endemic risk of the literary depiction of reality, rather than a particular characteristic of Patricia Williams").

98. Loving v. Virginia, 388 U.S. 1, 11 (1967).

99. Minow, *supra* note 1, at 16 (1988).

100. *See id.* at 53 (noting that "a judicial stance that treats its own perspective as unproblematic makes other perspectives invisible and puts them beyond discussion.").

101. ERIC STOKES, THE ENGLISH UTILITARIANS AND INDIA 302 (1959) (quoting J. Fitzjames Stephen, *Legislation under Lord Mayo*, *in* LIFE OF THE EARL OF MAYO 169 (W.W. Hunter ed., 1876)).

excluded."[102] As deployed by the Court, the White-centered perspective constitutes a rhetorical narrative that is more than a mere neutral descriptor; rather, it is "determined within a social-cognitive matrix that is raced,"[103] and therefore constitutes a rhetorical tool in the classic sense[104] that is meant to construct a persuasive and particularized vision of racial reality. The Court also "wrongly impl[ies] a natural fit with the world"[105] and attempts to persuade both the victims and the beneficiaries that the presumptive perspective lacks any perspectival particularity at all.[106]

I. WHITE INNOCENCE AND THE IDEOLOGY OF WHITENESS

A central analytical support beam in the Court's unacknowledged reliance on the White-centered perspective in race cases is its use of the rhetoric of White innocence within the larger context of the ideology of Whiteness itself.[107] For this reason, interrogating the meaning, significance, and implications of the Court's adoption of the White-centered perspective as its presumptive measure of racial difference requires a careful examination of the relationship between the ideology of White innocence within the larger framework of Whiteness.[108]

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102. *See* Minow, *supra* note 1, at 67. Minow elaborates by observing that:

> Ideological success is achieved when only dissenting views are regarded as ideologies; the prevailing view is the truth. Those who win a given struggle for control have the best access to the means of producing knowledge, such as the mass media and schools .... Historians have described how a conception of reality, when it triumphs, convinces even those injured by it of its actuality. Accordingly, political and cultural success itself submerges the fact that conceptions of reality represent a perspective of some groups, not a picture of reality free from any perspective.

Id. (internal citations omitted)

103. GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 73 (2002).

104. *See* ARISTOTLE, THE ART OF RHETORIC 70 (H.C. Lawson-Tancred trans., 1991).

105. Minow, *supra* note 1, at 13.

106. *Id.* at 67.

107. *See id.* Another writer suggests:

> The concept of "ideology" reflects the one discovery which emerged from political conflict, namely, that ruling groups can in their thinking become so intensively interest-bound to a situation that they are simply no longer able to see certain facts which would undermine their sense of domination. There is implicit in the word "ideology" the insight that in certain situations the collective unconscious of certain groups obscures the real condition of society both to itself and to others and thereby stabilizes it.

KARL MANNHEIM, IDEOLOGY AND UTOPIA 36 (L. Wirth & E. Shils trans., 1936).

108. *See* Amanda E. Lewis, *Some Are More Equal than Others: Lessons on Whiteness from School*, *in* WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM 159, 161 (Ashley W. Doane & Eduardo Bonilla-Silva eds., Routledge 2003) (noting that "it is particularly important to understand the parameters and functions of whiteness, [and] of what it means to say someone is white.").

In any analysis which critiques an important facet of Whiteness, it is important to keep in mind the critical admonition articulated by historian David Roediger that Whiteness is not merely a skin color; it is also an "*ideology*" that was "developed out of desires to rule and the exigencies of ruling."[109] Critical to these demands of ruling was the need to justify, both to the ruled and the rulers, the hegemonic grip of exclusively White rule in terms that appeared to be more than the mere naked imposition of raw military and technological power. Inherent in notions of Whiteness are also notions of "innocence" that suggests that White rule is not merely the result of outside imposition by force; rather, it is a natural consequence of racial, moral, and biological superiority of Whiteness itself. White rule was a natural function of nature and not the brute consequences of unbridled political power. In this way, the ideologies of Whiteness and White innocence were born together as mutually-dependant concepts.[110] Thus, the ideology of White innocence is not only derivative from the ideology of Whiteness, but also, like Whiteness itself, it is "a peculiar institution"[111] that is a deeply schizophrenic and inconsistent mix of both colorblind and color-conscious values, understandings, and perspectives.[112]

From this central position in society, the essential principles of the ideology of White innocence strongly correlate with what has variously been described as a "new racism,"[113] a "neo-con"[114] or

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109. DAVID R. ROEDIGER, COLORED WHITE: TRANSCENDING THE RACIAL PAST 23 (2002) ("Perhaps the overarching theme in scholarship on whiteness is the argument that white identity is decisively shaped by the exercise of power and the expectation of advantages in acquiring property."). *See also*, LIPSITZ, *supra* note 18, at viii (offering the admonition that "I hope it is clear that opposing whiteness is not the same as opposing white people. White supremacy is an equal opportunity employer; nonwhite people can become active agents of white supremacy as well as passive participants in its hierarchies and rewards.").

110. *See* BONILLA-SILVA, *supra* note 68, at 63 (noting that "a more fruitful approach for examining individual racial views is the notion of *racial ideology*, or the racially based frameworks used by actors to explain and justify (the dominant race) or challenge (subordinate race or races to) the racial status quo."). *See also* Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 314 (1988) ("Central to my new array of insights was that law and rights might be better understood not [merely] as functional, responsive and autonomous expressions of shared values or emerging egalitarian norms, but instead as *ideology*.").

111. BONILLA-SILVA, *supra* note 68, at 137. *See also* THEODORE ALLEN, THE INVENTION OF THE WHITE RACE, VOL. I (1994).

112. *See* JACOBSON, *supra* note 40, at 5 (noting that "The contest over whiteness—its definition, its internal hierarchies, its proper boundaries, and its rightful claimants—has been critical to American culture throughout the nation's history, and it has been a fairly untidy affair.").

113. Paul Finkelman, *The Rise of the New Racism*, 15 YALE L. & POL'Y REV. 245, 247 (1996) (describing the new racism as "a way of thinking that has become fashionable and acceptable in some quarters [that] (1) denies the history of racial oppression in America; (2) rejects biological racism in favor of an attack on black culture; and (3) supports formal, de jure equality . . . .").

114. This is a reference to the neo-conservative view of the far right of the political divide.

neo-confederate[115] racism, or a new "conservative . . . racial realism."[116] For this reason, the ideology of White innocence may either be deployed innocently out of ignorance or strategically out of political calculation.[117]

A. *Defining White Innocence*

The essential principles of White innocence also strongly correlate with the various major dictionary definitions of the term "innocence" generally. First, the term innocence is primarily defined "in a narrow, even technical way"[118] as simply being "not guilty of a crime or offense."[119] This is the primary, narrowest, and most technical definition of the term innocence, and connotes a legalized sense of having been wrongly accused or adjudicated as guilty of some specifically charged crime or offense. Second, " '[I]nnocence' can also take on a larger meaning that extends beyond technicality into morality: 'freedom from sin, guilt, or moral wrong in general; the state of being untainted with, or unacquainted with, evil; moral purity,' "[120] or of being " 'free of responsibility' " or moral blameworthiness for

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115. *See generally* PETER APPLEBOME, DIXIE RISING: HOW THE SOUTH IS SHAPING AMERICAN VALUES, POLITICS, AND CULTURE 136 (1996).

116. BROWN ET AL., *supra* note 6, at 9. Brown describes the central organizing claims of "racial realists" as consisting of:

> three related claims. First, . . . America has made great progress in rectifying racial injustice [and that] . . . . the economic divide between whites and blacks . . . is exaggerated, and white Americans have been receptive to demands for racial equality . . . . [Their] second claim is that persistent racial inequalities . . . cannot be explained by white racism . . . . As they see it, the problem is the lethargic, incorrigible, and often pathological behavior of people who fail to take responsibility for their own lives [and are] . . . . attributable to the moral and cultural failure of African Americans, not to discrimination . . . . [Third], the civil rights movement's political failures are caused by the manipulative, expedient behavior of black nationalists and the civil rights establishment.

Id. at 6–7.

117. *See* Finkelman, *supra* note 113.

118. Seth D. Harris, *Innocence and the Sopranos*, 49 N.Y.L. SCH. L. REV. 577, 577 (2005)(quoting OXFORD ENGLISH DICTIONARY 995 (2d ed. 1989)) ("freedom from specific guilt; the fact of not being guilty of that which one is charged; guiltlessness.").

119. THE NEW OXFORD AMERICAN DICTIONARY 875 (Elizabeth J. Jewell & Frank Abate eds., 2001). The sense of innocence as being not guilty or wrongfully accused is poignantly illustrated in the recent popularity of "innocence projects" which have evolved all over the country, whereby defendants on death row have been freed (some, after long years of confinement) based on DNA technology that was not available at the time of their original trial and conviction.

120. Harris, *supra* note 118, at 577 (quoting THE OXFORD ENGLISH DICTIONARY 995 (2d ed. 1989)). *See id.* at 578 ("It bestows no special legal status. Yet, it is a positive attribute with normative consequences.").

something, yet nonetheless "suffering [the] consequences,"[121] of guilt despite being not guilty of the offence. The third definition of innocence is understood to describe those who are naïve, unaware, uninitiated, weak or vulnerable.[122]

As one scholar has observed, there is a fourth alternative definition of innocence that "conveys a larger idea that is more powerful than the former's narrow literalism."[123] In this more expansive view, innocence "evokes the sleeping infant, wholly dependant and pure of thought and deed. No avoidable harm can be justifiably inflicted on this type of 'innocent.'"[124] In fact, this type of innocence imposes demands on others to "receive care and protection from harm."[125] Thus, this expansive moral dimension of innocence "is not a passive state" but, rather, "includes the power to command others to action—that is, to require the care and protection of those deemed innocent."[126]

Under the ideology of White innocence as conceived by this Article, there are four principal ways in which Whiteness reflects and reinscribes notions of innocence. First, Whiteness is regarded as innocent of race itself. Second, Whiteness is considered to be innocent of racial perspective. Third, Whiteness insists that it is innocent of racism. Fourth, Whiteness argues that it is innocent of racial benefit from the legacy of American racism.

1. Innocent of Race

Despite the overwhelming rejection by the scientific and academic community of the notion of biological racial essentialism[127] and the widespread acceptance of race as nothing more than a social construct,[128] it is important to note that Whiteness is not accurately regarded as a "singular

121. THE NEW OXFORD AMERICAN DICTIONARY, *supra* note 119.

122. *Id.*

123. Harris, *supra* note 118, at 577.

124. *Id.* at 578.

125. *Id.*

126. *Id.* at 580.

127. *See* ABBY L. FERBER, WHITE MAN FALLING: RACE, GENDER, AND WHITE SUPREMACY 19 (1998) (quoting Ken Clatterbaugh, *Mythopoetic Foundations and New Age Patriarchy*, *in* THE POLITICS OF MANHOOD (Michael S. Kimmel ed., 1995)) (defining racial essentialism "as the assumption that 'social differences such as those between men and women, people of different races, or social classes are due to intrinsic biological or psychic differences' . . . [that] are believed to be innate and unchanging.").

128. *See* Ruth Frankenberg, *The Mirage of an Unmarked Whiteness*, *in* THE MAKING AND UNMAKING OF WHITENESS 72 (Rasmussen et al. eds., 2001)(citing Becky Thompson and Sangeeta Tyagi, *Storytelling as Social Conscience: The Power of Autobiography*, *in* NAMES WE CALL HOME: AUTOBIOGRAPHY ON RACIAL IDENTITY 11–18 (Thompson & Tyagi eds., 1996)). *See also* Aanerud, *supra* note 59, at 36–37 (defining Whiteness as a "socially and historically constructed category of racial identity.").

entity, existing prior to or apart from other categories of identities. [Instead,] [i]ts formation depends on the changing relations of gender, class, sexuality, and nationality."[129] As a consequence, Whiteness should be regarded more like a historical process[130] that "signals the production and reproduction of dominance rather than subordination, normativity rather than marginality, and privilege rather than disadvantage."[131] From a White-centered perspective, the ideology of White innocence reflects a continuing sense of real, socially meaningful, essential, biological differences between different racial groups. As one scholar has noted, the White-centered perspective tends

> to think of race as being indisputable, *real*. It frames our notions of kinship and descent and influences our movements in the social world; we see it plainly on one another's faces. It seems a product not of the social imagination but of biology.[132]

From the Non-White-centered perspective, "While the history of the scientific concept of race argues that race is an inherent essence, it reveals, on the contrary, that race is a social construct."[133] The deep-seated White-centered notion of racial essentialism "cannot be supported" because "while our commonsense assumptions may tell us that race is rooted in biology, biologists today reject such notions."[134] The claim of Whiteness as a form of personal identity[135] is a relatively recent historical phenomenon[136]

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129. Aanerud, *supra* note 59, at 37.

130. *See* Frankenberg, *supra* note 18, at 193.

131. *Id.* at 236–37.

132. JACOBSON, *supra* note 40, at 1.

133. FERBER, *supra* note 127, at 33.

134. *Id.* at 19 (citing Jonathan Marks, *Black, White, Other*, 103 NATURAL HISTORY 32, 32–35 (Dec. 1994)). *See also* FERBER, *supra* note 127, at 19 ("Racial categories lack any scientific foundation; there is greater genetic variety within racial groups than between them, and racial classifications vary both cross-culturally and historically.").

135. *See* AMY GUTMANN, IDENTITY IN DEMOCRACY 2 (2003) (arguing that "mutual identification . . . [in] identity groups . . . . is basic to human existence . . . . "). Cornel West describes personal identity:

> Identity has to do with protection, association and recognition. People identify themselves in certain ways in order to protect their bodies, their labor, their communities, their way of life; in order to be associated with people who ascribe value to them, who take them seriously, who respect them; and for purposes of recognition, to be acknowledged, to feel as if one actually belongs to a group . . . .

See CORNEL WEST, THE CORNEL WEST READER 501 (1999).

136. *See* Ruth Frankenberg, *Local Whitenesses, Localizing Whiteness*, *in* DISPLACING WHITENESS: ESSAYS IN SOCIAL AND CULTURAL CRITICISM 9 (Ruth Frankenberg ed., 1997) (noting that " 'Race' is, in fact, a rather recent phenomenon; the hierarchal ranking of 'peoples' is a much older measuring instrument in the Western lexicon of supremacism.").

and is heavily "veiled in value."[137] The notion of a personal White identity is also a uniquely Western[138] conflation of diverse European national ethnicities into a relatively recent and socially-constructed race-based claim of group identity.[139] Additionally, this is not a positive claim about what one is, but rather a negative claim grounded on what one is *not*.[140] To be White necessarily implies a claim of racial purity.[141] It is effectively a

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137. *See* Goldberg, *supra* note 90, at 301.

138. One scholar observes:

> "West" and "Western" are relational terms constructed out of opposition to non-Western Others or "Orientals." Westerness implies a particular, dominative relationship to power, colonial expansion, a belonging to center rather than margin in a global capitalist system, and a privileged relationship to institutions . . . for the production of knowledge.

See FRANKENBERG, *supra* note 18, at 265 n.2 (1993).

139. *See* FERBER, *supra* note 127, at 33 ("While the history of the scientific concept of race argues that race is an inherent essence, it reveals, on the contrary, that race is a social construct."). *See also* Frankenberg, *supra* note 136, at 9.

On "Black—Brown Relations" Professor Klor de Alva observes, in a conversation with Cornel West, that:

> We have, in the United States, two mechanisms at play in the construction of collective identities. One is to identify folks from a cultural perspective. The other is to identify them from a racial perspective. Now, with the exception of black-white relations, the racial perspective is not the critical one for most folks. The cultural perspective was, at one time, very sharply drawn . . . . But in the twentieth century, we have seen in the United States a phenomenon that we do not see anyplace else in the world—the capacity to blur the differences between these cultural groups, to construct them in such a way that they become insignificant and to fuse them into a new group called Whites, which didn't exist before.

See CORNEL WEST, *supra* note 135, at 503. Professor West responds to Klor de Alva's observation, stating that

> part of the tragedy of American civilization is precisely the degree to which the stability and continuity of American democracy has been predicated on a construct of whiteness that includes the subordination of black people, so that European cultural diversity could disappear into American whiteness while black folk remain subordinated.

Id. See also FRANKENBERG, *supra* note 136, at 9 (noting that "whiteness is a construct or identity almost impossible to separate from racial dominance.").

140. *See* Tayyab Mahmud, *Genealogy of a State-Engineered "Model Minority": "Not Quite/Not White" South Asian Americans*, 78 DENV. U. L. REV. 657, 660–61 (2001) (reviewing VIJAY PRASHAD, THE KARMA OF BROWN FOLK (2000)) (citing Jean-Paul Sartre, in Preface to FRANTZ FANON, THE WRETCHED OF THE EARTH 38 (1963)). *See also* V.G. KIERNAN, THE LORDS OF HUMAN KIND: BLACK MAN, YELLOW MAN, AND WHITE MAN IN AN AGE OF EMPIRE (1969).

141. Ferber writes:

claim[142] of being free from even "one drop" of Black, African or impure non-White blood in one's ancestral chain of racial title.[143] In short, a claim of personal Whiteness is tantamount to a claim of being innocent of Blackness.

> [T]he project of defining races always involves drawing and maintaining boundaries between those races .... From the moment the concept of race was invented, interracial sexuality became a concern .... Historically, the preoccupation with defining who is white and who is black superseded concern with defining other nonwhites. The history of slavery and Jim Crow segregation depended upon firm knowledge of who was white and black for their support.

See FERBER, *supra* note 127, 33–34. *See also id.* at 41 (quoting F. JAMES DAVIS, WHO IS BLACK? ONE NATION'S DEFINITION 17 (1991)) (finding "'the tragedy of miscegenation'[was that] .... [e]very form of political and economic equality for blacks [had been] depicted as a threat to white racial purity, responded to with fears of interracial sexuality, and argued against on this basis.").

142. Such contemporary claims, although common among those who consider themselves to be White, are inherently unprovable beyond more than two or three generations in the vast majority of cases. At best, in many such cases these claims rest on little more than a mere hunch, hope, or prayer based on the perceived White physical characteristics of only a few generations.

143. *See* FERBER, *supra* note 133, at 23 ("[T]he historical construction of the opposition white/black involves defining the limits of whiteness and blackness and defining precisely who qualifies as white and who qualifies as black. In order to produce whiteness as a stable, natural, given identity, the boundaries of whiteness must be specified and secured."). *See also id.* at 35 (asserting that "states moved even further toward the one-drop rule, which defined as black all those with one discernable drop of black blood."); *id.* at 43 (noting that "While a great deal has changed over the past three decades, the one-drop rule is still generally accepted, and interracial unions remain controversial and uncommon."); *id.* at 41–42 (quoting DAVIS, *supra* note 141, at 72–73) (noting that interracial Black/White marriages are still relatively rare and that "such marriages consistently represent only 1 to 2 percent of all marriages."); WEST, *supra* note 135, at 501; THERNSTROM & THERNSTROM, *supra* note 2, at 527 ("It is startling that until 1989 our birth registration rules provided that the child of a white husband and a black wife counted as 'black,' and so, too, did the child of a black husband and a white wife .... It was the 'one drop of blood' ...."). Another scholar describes the federal guidelines outlined by the National Center for Health Statistics used between 1950 and 1989 for birth certificate race-identification records:

> '[I]n cases of mixed parentage where only one parent was white, the child was assigned to the other parent's race. When neither parent was white, the child was assigned to the race of the father ....' One notable characteristic is that any coupling between Whites and non-Whites was deemed to produce non-White children. White racial status could only be removed by intergroup parentage, never gained.

Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1257–58 (1994) (quoting National Ctr. for Health Statistics, U.S. Dep't of Health & Human Servs., *Advance Report of Final Mortality Statistics*, 1989, MONTHLY VITAL STAT. REP., Jan. 7, 1992, at 50).

Because, by definition, claims of personal Whiteness necessarily invoke claims of purity, such claims require constant attention to "policing of the borders [and] maintenance of the boundaries between 'one's own kind' and others."[144] As Iris Marion Young has observed, "Any move to define an identity, a closed totality, always depends on excluding some elements, separating the pure from the impure .... the logic of identity seeks to keep those borders firmly drawn."[145]

Thus, a claim of personal Whiteness is not only paradoxically a claim of being "pure" or uncontaminated by Blackness, but also of actually transcending race or being innocent of race itself. However, this transcendence notwithstanding, most people who regard themselves as White[146] are deeply invested in their Whiteness because it is "an identity that provides them with resources, power, and opportunity."[147] Despite this investment, they are also simultaneously and schizophrenically deeply in denial regarding the racially-contingent basis of their identity. Just as men have difficulty imagining themselves "as having gendered identities,"[148] many Whites have similar difficulty seeing themselves as raced and having racial identities in American society.

Most Whites are conditioned not to view themselves in racial terms; instead, they believe that "race is something that doesn't affect Whites."[149] Under this logic, race is something that affects racial minorities like Blacks, Latinos, Asians, or American Indians, but not Whites.[150] Whiteness and its attendant privileges are something that members of the dominant group are "taught not to recognize."[151] As Richard Dyer has poignantly observed, "As long as race is something only applied to non-white peoples, as long as white people are not racially seen and named, they/we function as a human norm. Other people are raced, we are just people."[152]

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144. FERBER, *supra* note 127, at 23–24.

145. Iris Marion Young, *The Ideal of Community and the Politics of Difference*, *in* FEMINISM/POSTMODERNISM 300, 303 (Linda J. Nicholson ed., 1990).

146. ROEDIGER, *supra* note 109. *See also id.* at 124 (noting that "a substantial African American tradition [exists] that regards terror and complicity in terror as the glue binding together those who think that they are white.").

147. LIPSITZ, *supra* note 18, at vii.

148. Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences through Work in Women's Studies*, *in* CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR, 291, 297 (Richard Delgado and Jean Stefancic eds., 1997).

149. MELANIE E. L. BUSH, BREAKING THE CODE OF GOOD INTENTIONS: EVERYDAY FORMS OF WHITENESS 222 (2004).

150. Lewis, *supra* note 108, at 165 (reflecting on a conversation with a White woman who appeared "not [to] have a coherent or self-conscious identity as a white person. As far as she was concerned, race was about others."); *id.* at 161 ("[M]any whites do not necessarily recognize their own status as racial actors or consciously identify as belonging to a racial group.").

151. McIntosh, *supra* note 148, at 291.

152. DYER, *supra* note 26, at 1.

As a consequence of Whites not seeing themselves as being raced within Western culture, as standing for the "human norm," they are thereby able to "claim to speak for the commonality of humanity."[153] The claim of Whiteness to speak for all of humanity is *sui generis* because "[r]aced people can't do that—they can only speak for their race. But non-raced people can, for they do not represent the interests of a race."[154]

Whiteness is thus thought of as coterminous with being "just human . . . which is not far off from saying that whites are people whereas other colours are something else . . . [an assumption] endemic to white culture."[155] Because most Whites see themselves as just people without a conscious racial identity, this gives rise to a sense of being innocent of race that is uncomfortably disturbed when Whites are reminded that they are White. For example, bell hooks has noted "how amazed and angry white liberals become when attention is drawn to their whiteness, when they are seen by non-white people as white."[156]

2. Innocent of Racial Perspective

Since most Whites do not conceive of themselves in racialized terms, they consider their perspective to be an equally unraced and objective report of reality, especially racial reality. Moreover, since Whites see Whiteness as the norm, Non-Whites "are defined as deviating from that norm."[157] Whites see Whiteness as real and Non-Whites as somehow not real or certainly less real. Under this logic, since Whites are the only "real" people, it follows that their perceptions of racial reality are the only real ones as well.[158]

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153. *Id.* at 2.

154. *Id.*

155. *Id.*

156. *Id.* (summarizing an account from bell hooks, *Madonna or Soul Sister? And Representations of Whiteness in the Black Imagination*, *in* BLACK LOOKS: RACE AND REPRESENTATION 167 (1992)). Dyer subsequently quotes bell hooks:

> Often their rage erupts because they believe that all ways of looking that highlight difference subvert the liberal belief in a universal subjectivity (We are all just people) that they think will make racism disappear. They have a deep emotional investment in the myth of 'sameness', even as their actions reflect the primacy of whiteness as a sign informing who they are and how they think.

Id. (quoting hooks, *supra* note 178)

157. Rains, *supra* note 84, at 80 (Joe L. Kincheloe et al. eds., St. Martin's Griffin 1991) (quoting KATHERINE WEILER, WOMEN TEACHING FOR CHANGE: GENDER, CLASS AND POWER 76–77 (1988)).

158. *See* Wildman, *supra* note 57, at 257 (2005) (quoting STEPHANIE M. WILDMAN WITH CONTRIBUTIONS BY MARGALYNNE ARMSTRONG, ADRIENNE D. DAVIS, & TRINA GRILLO, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 91 (1996)) (not-

This socially-constructed racial identity of being real forms what Peggy McIntosh has described as "a base of unacknowledged . . . unearned . . . skin privilege"[159] which she describes as being "like an invisible weightless knapsack of special provisions, assurances, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear, and blank checks."[160] Because these privileges go unspoken, they are invisible[161] but nonetheless palpably clear, real and indicative of a racially and "arbitrarily conferred dominance."[162] Both Whiteness and the ideology of White innocence are in plain sight while simultaneously totally invisible.

The invisibility of Whiteness allows the Supreme Court to deploy the rhetorical narrative of White innocence as a kind of "semantic code"[163] that supplies a moral armor thorough which the Court can appear to measure constitutionality under what seem to be praiseworthy and ostensibly racially-neutral standards; but which are, in reality, deeply racialized. Not only does the analysis proceed exclusively from the White vantage point, but the standards the Court adopts also serve to protect, perpetuate, and rationalize the existing extreme disequilibrium of power, wealth, and access to the good things in life under the racial status quo.[164]

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ing that "Members of dominant groups assume that their perceptions are the pertinent perceptions, that their problems are the problems that need to be addressed, and that in discourse they should be the speaker rather than the listener."). *See also* McIntosh, *supra* note 148, at 292; DYER, *supra* note 26, at 9.

159. McIntosh, *supra* note 148, at 292.

160. *Id.* at 291.

161. *Id.* (describing how White privilege is invisible only to Whites, but not in any way invisible to Non-Whites). Ruth Frankenberg observes that

> the notion that whiteness [as] unmarked norm is revealed to be a mirage, or at least a phenomenon delimited in time and space .... it is only in those times and places where white supremacism has achieved hegemony that whiteness attains ... unmarkedness .... In times and places when whiteness and white dominance are being built or reconfigured, they are highly visible, and asserted, rather than invisible or simply "normative."

Frankenberg, *supra* note 136, at 5.

162. McIntosh, *supra* note 148, at 296. *See id.* at 296–97 ("some of the power which I originally saw as attendant on being a human being in the U.S. consisted in *unearned advantage* and *conferred dominance*, as well as other kinds of special circumstances not universally taken for granted.").

163. Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77, 78 (2000).

164. *See* DAVID THEO GOLDBERG, RACIST CULTURE 42 (Blackwell 1993) (noting that, "the law, moral discourse, and the social sciences can thus silently incorporate racialized language ... as the preconceptual elements of racialized discourse, while claiming to be *anti*racist."). *See also* Peter Fitzpatrick, *Racism and the Innocence of Law*, *in* CRITICAL LEGAL STUDIES 119, 120 (Peter Fitzpatrick & Alan Hunt eds., Basil Blackwell 1987) ("That is, the form both substitutes for explicit racism and provides a means of asserting that what is involved is not racism but something different."); CASS R. SUNSTEIN, THE PARTIAL

White innocence constitutes a type of magic amulet contained in the "invisible knapsack"[165] of White privilege with which Whites can ward off the dark forces of responsibility for the creation and perpetuation of the many inequalities, burdens, and benefits of the current racial status quo in America.

The rhetorical narrative of White racial innocence constitutes an important and obvious, but also an effectively hidden pillar of the racial status quo that Cass Sunstein calls "the baseline for assessing neutrality."[166] From this perspective, any disturbance in the existing racial prerogatives, preferences, and advantages of so-called innocent Whites as a group, is regarded as a "departure from the status quo" and, thus, "signals partisanship" while "respect for [this] status quo signals neutrality."[167] As a result, the White-centered perspective is able to claim that it does not have a racial vantage point, and in so doing, "perpetuates the mythology of [the] neutral observers."[168]

Similar to Sunstein's observations, Martha Minow observes that the "unstated assumption" of a White racialized standpoint of the status quo can "so entrench one point of view as natural and orderly that any conscious decision to notice or to ignore difference breaks the illusion of a legal world free of perspective."[169] Like Sunstein, Minow also argues that these unstated and deeply racialized assumptions "make it seem that departures from unstated norms violate commitments to neutrality. Yet adhering to the unstated norms undermines commitments to neutrality—and to equality."[170]

Of course, the hard truth is that Whiteness is not a racially neutral lens through which to gaze at the world of racial reality. Instead, Whiteness has a distinct racialized "standpoint [or] location from which to see

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CONSTITUTION 6 (Harvard Univ. Press 1993); GUNNAR MYRDAL, AN AMERICAN DILEMMA 218 (1962).

165. McIntosh, *supra* note 148, at 291.

166. Cass Sunstein notes:

> More Broadly: A decision to use the status quo as the baseline would be entirely acceptable if the status quo could be independently justified. In many contexts, however, the status quo should be highly controversial as a matter of both principal and law. Respect for the existing distributions is neutral only if existing distributions are themselves neutral.
>
> When the status quo—between, say, rich and poor, or blacks and whites, or women and men—is itself a product of law and far from just, a decision to take it as a baseline for assessing neutrality is unjustifiable.

SUNSTEIN, *supra* note 164, at 6.

167. *Id.* at 3.

168. Minow, *supra* note 1, at 47. *See id.* at 48 ("no objective perspective exists free from the particular viewpoint of the observer.").

169. Minow, *supra* note 1, at 57–58.

170. *Id.*

[itself] . . . and national and global others."[171] Failing to acknowledge the "unstated assumption" of this White standpoint, or the White "point in space" that constitutes the source of the White vantage point, has highly negative consequences. As Martha Minow has observed, "Veiling the standpoint of the observer conceals its impact on our perception of the world . . . . [and] leads to the next unstated assumption: that all other perspectives are either presumptively identical to the observer's own or are irrelevant."[172] This is particularly important in the context of the judicial function because, as Minow goes on to explain, "[A] judicial stance that treats its own perspective as unproblematic makes other perspectives invisible and puts them beyond discussion."[173]

3. Innocent of Racism

From the White-centered perspective, racism in America is considered to be such an artifact of America's ancient past that it has moved one commentator speaking from that vantage point to claim that "the blood of slavery does not stain modern mainstream America."[174] Freed from the "stain" of slavery, some scholars have argued that White racial attitudes in America have improved and "transformed" so dramatically that although "[w]hites with a pathological hatred of African Americans can still be found . . . . the haters have become a tiny remnant with no influence in any important sphere of American life."[175] As a result, a significant theme among scholars who speak from a White-centered perspective is the conclusion: "[a]t least when it comes to questions of public policy, [that] few whites are now racists."[176] From this perspective, because most Whites are no longer *guilty* of racism (with the exception of a few fringe outliers); they—and thus Whiteness itself—must be considered *innocent* of racism.

a. *A Discredited View of Racism*

From the "innocent of racism" perspective, the continuing presence of "racial incidents . . . demonstrate" that a few isolated "bigots and institutional failures still exist; however, they do not indicate that racism is a

171. Frankenberg, *supra* note 128, at 76. *See id.* (noting that "Whiteness is a location of structural advantage in societies structured in racial dominance.").

172. Minow, *supra* note 1, at 50. *See also id.* at 51, n.199 ("Feminist theorists have tried to articulate, in theoretical terms, the bases for a 'standpoint,' a perspective grounded in experience that sheds contrasting light on prevailing constructions of reality.").

173. *Id.* at 53.

174. BROWN ET AL., *supra* note 6, at 36.

175. THERNSTROM & THERNSTROM, *supra* note 2, at 500. *See id.* at 533 (noting that "[t]o stress the bad news is to distort the picture, however. Equally important is the story of enormous change . . . . ").

176. *Id.*

systemic problem."[177] Significantly, this view of the innocence of Whiteness is only possible through the filtering of "evidence and . . . judgment through an outdated, discredited understanding of racism."[178] This discredited view is premised on the assumption that racism in contemporary America consists of acts which are "intentional, obvious and individual."[179] The "innocent of race" view is based on "a particular understanding of racism . . . [that] assumes that racism is motivated, crude, explicitly supremacist and typically expressed as individual bias."[180]

This perspective regards racism to be the result of intentional individual behavior that is both conscious and knowing in order to satisfy a personal racial animus and taste for discrimination that is manifested by either formal or explicit barriers to access based on racial categorization. It ignores the fact that "white supremacy is usually less a matter of direct, referential, and snarling contempt than a system for protecting the privileges of whites by denying communities of color opportunities for asset accumulation and upward mobility."[181]

b. *The End of Racism*

Through the White-centered perspective, a great many Whites and Non-Whites have adopted a form of American color blindness that holds: "[e]xcept for vestigial pockets of historical racism, any possible connection between past racial subordination and the present situation has been severed by the formal repudiation of old race-conscious policies."[182] These modern "apostles" in the faith of colorblindness advocate a perspective on race that "insist[s] that racism is primarily a thing of the past."[183]

Central to the ideology of White innocence is the notion that "racism has been eradicated" by the actions of civil rights laws that struck

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177. Adeno Addis, *Recycling in Hell*, 67 TUL. L. REV. 2253, 2255 (1993).

178. BROWN ET AL., *supra* note 6, at 35.

179. Observers note:

> Many White Americans and American institutions, including the current Supreme Court majority, hold parallel views. Because racial conservatives ignore the variability of racial reality in America, they do not recognize that racism is lodged in the structure of society, that it permeates the workings of the economic, political, educational, and legal institutions of the United States.

Id. at 35–36.

180. *Id.* at 37.

181. LIPSITZ, *supra* note 18, at viii. *See generally* Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

182. Crenshaw, *supra* note 15, at 1379.

183. BROWN ET AL., *supra* note 6, at 35.

down "legal segregation and outlaw[ed] discrimination."[184] The elimination of these formal barriers to racial equality has spawned a cult of "color blindness" in which the presumed "race neutrality of the legal system creates the illusion that racism is no longer the primary factor responsible for the condition of the Black underclass . . . ."[185] The continuance of racial inequality is no longer blamed on the biological racial inferiority of Non-Whites but rather on Black cultural inferiority.[186]

Similarly, not only do most Whites consider themselves to be personally innocent of racism, but in national terms, recent surveys reveal that "[a] majority of whites indicate that they do not see U.S. society as fundamentally racist or still pervaded by widespread discrimination."[187] In fact,

> [F]rom this perspective, many whites believe that the 1960s civil rights laws took care of most serious racial discrimination . . . . [and] the majority of whites see the U.S. social system as fair and egalitarian, and some get angry that black Americans do not see the country in the same way.[188]

Not only do most Whites think that racial discrimination against Blacks is largely a thing of the past, "Even more striking, perhaps is the fact that a majority of whites do not see the centuries of slavery and segregation as bringing whites substantial socioeconomic benefits."[189]

This White-centered view of the nature of racism reflects what Alan Freeman has characterized as a move from a "victim perspective" to a "perpetrator perspective."[190] As the labels imply, the victim perspective

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184. *Id.* at 1 (noting that "if vestiges of racial inequality persist, they believe that it is because Blacks have failed to take advantage of opportunities created by the civil rights revolution. In their view, if Blacks are less successful than Whites, it is not because America is still a racist society.").

185. Crenshaw, *supra* note 15, at 1383.

186. *See id.* at 1379 ("The rationalizations once used to legitimate Black subordination based on a belief in racial inferiority have now been reemployed to legitimate the domination of Blacks through reference to an assumed cultural inferiority."). *See also id.* (citing THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? (1984)) ("Culture not race, now accounts for this 'otherness.'"). *See generally* THERNSTROM & THERNSTROM, *supra* note 2.

187. JOE FEAGIN & EILEEN O'BRIEN, WHITE MEN ON RACE: POWER, PRIVILEGE, AND THE SHAPING OF CULTURAL CONSCIOUSNESS 19 (Beacon Press 2003).

188. *Id.* at 14–15. *See also id.* ("one recent *Washington Post*/Kaiser/Harvard survey found that a substantial majority of whites felt that African Americans had societal opportunities that were equal to, or better than, those of whites.").

189. *Id. See also id.* at 15–16 ("Another national survey found that most whites did *not* think that whites as a group had benefited from past or present discrimination against black Americans.").

190. Alan Freeman, *Legitimating Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Decisions,* 62 MINN. L. REV. 1049 (1978).

focuses on the injury or loss suffered by the victims of racial discrimination. The perpetrator perspective, however, "means looking at contested race issues from the vantage point of whites," and the "perpetrator perspective in law, like the conservatives' understanding of racism, is preoccupied with White guilt or innocence."[191] The perpetrator perspective reinforces the notion that racism is primarily a function of individual actors, who can be found and punished, rather than reflecting on the institutional and systemic racial norms of society.

The normative quality of this perpetrator perspective was clearly evidenced in *City of Richmond v. J.A. Croson* when Justice O'Connor argued that there was not " 'a strong basis in evidence for its conclusion that remedial action was necessary,' " because the "the city points to no evidence that qualified minority contractors have been passed over for city contracts or subcontracts, either as a group or in any individual case."[192] On this basis, Justice O'Connor concluded that

> [p]roper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.[193]

Thus, O'Connor reinforces the ideology of the perpetrator perspective by insisting that the "norm" is "equal treatment of all racial groups" absent a "finding" of a specific Non-White contractor that has been discriminated against by the old boys network of White contractors. Under O'Connor's logic, in the absence of finding a bad actor or guilty perpetrator who had discriminated against a non-White contractor, she assumed that the "normal" operation of the system of state contracting was one that respected the "equal treatment of all racial and ethnic groups."[194]

c. *The Continuing Centrality of Racism*

When viewed from a Non-White-centered perspective, racism is neither a thing of the past nor the product of isolated and individual

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191. BROWN ET AL., *supra* note 6, at 37 (noting that this view "largely ignores whether people of color have suffered injury or loss of opportunity because of race.").

192. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 510 (1988) (quoting Wygant v. Jackson Board of Education, 476 U.S. 267, 277 (1986)).

193. *Croson*, 488 U.S. at 510. *See also id.* (noting that "Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotyping or a form of racial politics."); *Grutter*, 539 U.S. at 342 (citing *Croson* on the "norm of equal treatment.").

194. *Croson*, 488 U.S. at 510.

rogue bigots or guilty perpetrators. However, from a Non-White-centered perspective, the central problem of racism in America today is not a function of "intentional individual prejudice"[195] by individually racist White people. Instead, "[R]acism was better understood .... as a sense of group position [by Whites] and as the organized accumulation of racial advantage," in a system that "culturally and economically produce[s] systems of advantage and exclusion that generate privilege for" Whites as a group at the expense of Non-Whites.[196]

From the Non-White centered perspective, racism does not represent an extraordinary malfunction of American culture, but rather reflects one of the fundamental features that are woven into the very structures and institutions of society itself.[197] From this perspective, this sort of institutional racism is not an exceptional occurrence that exists only on the fringes of mainstream American society, but rather lies at the very heart of the system. From this vantage point, racism is seen as a function of systemic forces within societal institutions that operate silently, seamlessly, and incessantly to privilege Whites and burden Non-Whites, without the need for any intentional behavior by individual racist actors. In short, from the Non-White-centered perspective, racism in America is not considered to be an exceptional act of individual, rogue, bad actors, but rather is a normative and endemic feature of the very structure of the status quo, that privileges Whites as a group institutionally, systemically ... and most importantly, automatically.

From the Non-White-centered perspective, racism is a phenomenon that can operate either consciously or unconsciously.[198] In fact, the unconscious operation of racism constitutes its most ubiquitous and common manifestation within personal, institutional, and societal contexts and constitutes a discursive process that operates in the absence of formal and explicit racial restrictions in order to lower the barriers to access for Whites and raise them for Non-Whites. Thus, through its reliance on the White-centered perspective, the ideology of White innocence reflects a set of "shared narratives and ideologies," through which "federal courts have mythically transformed systemic racism into an individualism" that reflects the availability of "choices [that] most people of color do not have."[199]

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195. BROWN ET AL., *supra* note 6, at 37.

196. *Id.* at 43.

197. *See id.* at 34–35 (describing how racism "permeates America's institutions—the very rules of the game ... [that] loads the dice in favor of European Americans while simultaneously restricting African Americans' access to the gaming table.").

198. *See generally* Lawrence, *supra* note 95.

199. Dwight L. Greene, *Justice Scalia and Tonto, Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism in* Bostick v. Florida, 67 TUL. L. REV. 1979, 1982 (1992). *See id.* at 1982 n.7 (noting "[t]his posits a cardinal rule underlying much constitutional jurisprudence: that the Constitution protects individuals but not as members of a racial group.").

From the Non-White-centered perspective, the aftermath of Hurricane Katrina provided compelling evidence of the continuing salience of race in America, tragically illustrated by the fact that over one hundred thousand people—mostly Black and poor—were left behind during the evacuation of New Orleans because their abject poverty deprived them of any ready means to leave before the city was virtually destroyed by the greatest natural disaster in American history.[200] As viewers watched the horror unfolding daily on their television screens, tens of thousands of poor Blacks were left to fend for themselves in the ravaged aftermath of the storm without food, water, medical help, or security.[201]

In the nightmare and human tragedy that an inundated and devastated New Orleans had become after this incredible disaster, we will never know how many poor Blacks died or suffered serious injury waiting for government rescue that either never came or, sadly, came too late.[202] In short, while it may not have been clear to many before the flood, it certainly was clear afterward that, in many ways, "blacks live in a different world from whites."[203]

As starkly summarized by Professor Addis, "[P]ut simply, while most whites see racism as an occasional unfortunate interruption to the institutional and individual commitments to the values of equal opportunity and equal treatment, most blacks see racism as a daily routine by which the lives of black people are systematically and institutionally devalued."[204]

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200. *See* Thomas, *supra* note 27, at 44.

201. *See id.* ("Day after day of images showed exhausted families and their crying children stepping around corpses while they begged: Where is the water? .... [T]he buses?").

202. *See id.* It is indeed hard to imagine that if over 100,000 White middle or upper class people were trapped in a major American city after a devastating natural disaster, that the government would have made them wait for five to six days without food, water or rescue. Instead, the enormity of the suffering coalesced around the intersection of both class and race.

203. JENNIFER L. HOCHSCHILD & MONICA HERK, "YES BUT. . ." : PRINCIPLES AND CAVEATS IN AMERICAN RACIAL ATTITUDES, MAJORITIES AND MINORITIES 319 (John Chapman and Alan Wertheimer eds., 1990). *See also* Addis, *supra* note 177, at 2255 n.7 ("[T]he different worlds blacks and whites occupy are not only metaphorical. They are physical as well."); John Lewis, *Opinion: This is a National Disgrace: A Civil Rights Leader Mourns an African American Population Left Behind*, NEWSWEEK, Sept. 12, 2005, at 52:

> Maybe we will never know the number of people who have been lost .... It's so glaring that the great majority of people crying out for help are poor, they're black. There's a whole segment of society that's being left behind. When you tell people to evacuate, these people didn't have any way to leave. They didn't have any cars, any SUVs ....This reminded me of Somalia. But this is America ....This is an embarrassment. It's a shame. It's a national disgrace.

204. *See* Addis, *supra* note 177, at 2255. Addis defines devaluation:

4. Innocent of Benefiting from or Perpetuating Racism

Most Whites do not think that they have received any benefit either directly or indirectly from the history or the legacy of White supremacy and racial discrimination against Non-Whites. Instead, based on the White-centered perspective, they view the current disproportionate social, economic, and political benefits enjoyed by Whites as the unracialized and normal results of their individual merit and hard work. In this way, Whiteness is regarded as being innocent of either benefiting from or perpetuating historic racism or its contemporary legacy.[205]

a. *White Privilege*

From a Non-White centered perspective, the perpetuation and benefit factor of the ideology[206] of Whiteness expresses a form of innocence that is characterized as "white privilege."[207] In a widely cited description, Peggy McIntosh has defined what she describes as the phenomenon of White privilege "as an invisible package of unearned assets which I can count on cashing in each day, but about which I was 'meant' to remain oblivious."[208] McIntosh then identifies 46 different "daily effects of white privilege . . . which I did not earn but which I have been made to feel are mine by birth, by citizenship, and by virtue of being a conscientious law-abiding 'normal' person of good will .... [that] my Afro-American co-workers, friends, and acquaintances . . . cannot count on . . . ."[209] McIntosh describes these unearned assets as being "denied and protected" functions of her "unearned skin privilege [because] .... whites are taught to think

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> to refer to the situation when the lives and well-being of "African Americans are systematically and institutionally given less weight than those of European Americans, and are consequently deemed dispensable either when they are in some way perceived to be inconsistent with, or to not advance, the interests and well-being of European Americans ....

Id. at 2255 n.8.

205. *See* RONALD J. FISCUS, THE CONSTITUTIONAL LOGIC OF AFFIRMATIVE ACTION: MAKING THE CASE FOR QUOTAS 12–13 (Stephen L. Wasby ed., 1992). *See also* Antonin Scalia, *The Disease as Cure*, 1979 WASH. U. L.Q. 147 (1979); George Sher, *Justifying Reverse Discrimination in Employment*, 4 PHIL. & PUB. AFF. 159, 160–62 (1975).

206. *See* BONILLA-SILVA, *supra* note 68, at 63 (noting that "[i]deologies are about meanings that express 'relations of domination.'") (quoting JOHN B. THOMPSON, STUDIES IN THEORY AND IDEOLOGY 4 (Polity Press 1984)).

207. *See* Wildman, *supra* note 57, at 247; STEPHANIE M. WILDMAN ET AL., PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996); BERGER, *supra* note 42; Flagg, *supra* note 70; FRANKENBERG, *supra* note 18; LIPSITZ, *supra* note 18; Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603 (1999).

208. McIntosh, *supra* note 148, at 291.

209. *Id.* at 293.

of their lives as morally neutral, normative, and average, and also ideal . . . ."[210]

Until recently, the unearned advantages and privileges that came with Whiteness were invisible through this White perspective and experienced by Whites as "the way things are."[211] As a consequence, from the White-centered perspective, Whites were unable to "see how this society produces advantages for them because these benefits seem so natural that they are taken for granted, experienced as wholly legitimate."[212]

Thus, quite literally, Whites were unable to see "how race permeates America's institutions—the very rules of the game—and its distribution of opportunities and wealth."[213] In this way, White's have been able to "convince themselves that life as they experience it on their side of the color line is simply the objective truth about race."[214] This is why Whiteness is not accurately characterized as a thing but, rather, as a social location shared by all those who identify as being racially White; therefore, their failure to "understand that they take [their] racial location for granted leads racial realists to ignore the ways in which race loads the dice in favor of European Americans while simultaneously restricting African Americans' access to the gaming table."[215]

b. *Material Benefits*

White privilege is expensive. The real and material benefits generated by White privilege impose equal and opposite costs on Non-Whites.[216] As George Lipsitz has argued, whether its recipients are willing to acknowledge it or not, the benefits derived from White privilege have actual cash values that Whites actively enjoy, protect, and invest in as an economic asset. Lipsitz argues that Whiteness is a powerful "social fact" that has "cash value . . . . [and was] created and continued with all-too-real consequences for the distribution of wealth, prestige, and opportunity."[217] He also observes that "white Americans are encouraged to invest in . . . [and] to remain true to an identity that provides them with resources [and] power . . . ."[218]

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210. *Id.* at 291–93.
211. Wildman, *supra* note 57, at 255 (quoting Mahoney, *supra* note 56, at 1661–62).
212. BROWN ET AL., *supra* note 6, at 34.
213. *Id.*
214. *Id.* at 35.
215. *Id.*
216. *See id.* at 44.
217. LIPSITZ, *supra* note 18, at vii.
218. *Id.* Lipsitz elaborates that Whiteness

> accounts for advantages that come to individuals through profits made from housing secured in discriminatory markets, through the unequal educations

Lipsitz goes on to argue that, despite the fact that contemporary Whites deny perpetuating racism and benefiting from it and continually "disavow that whiteness means anything at all to [them]," in fact, the evidence shows that they spend so much "time and energy on the creation and re-creation of whiteness . . . that nearly every social choice that white people make about where they live, what schools their children attend, what careers they pursue, and what policies they endorse is shaped by considerations involving race."[219]

Lipsitz concludes that contemporary racism is characterized not by individual acts of racial animus and old-fashioned bigotry, but rather by systemic and institutional processes that contribute to asset accumulation for whites and asset disaccumulation for Blacks. In this way, Lipsitz correctly observes that "Whiteness is invested in, like property, but it is also a means of accumulating property and keeping it from others."[220]

This process of categorically accumulating assets within one racial group while systematically denying them to another racial group has been characterized as "[o]pportunity hoarding,"[221] which has been described not as individual racial animus by consciously bigoted Whites, but as a "group phenomenon . . . by one group to the detriment of another."[222] From this group perspective, it is clear that "the experiences of white and nonwhite Americans are intimately connected. The benefits of being white are related to the costs of being nonwhite"[223] There is a direct link between the advantages that Whites enjoy from an institutionally and racially stratified society and the burdens and limits they impose on Non-Whites.[224]

The institutional White benefits and Non-White burdens run across virtually every aspect of American society. Under these conditions of widespread institutional White advantage at the cost of Non-White—and specifically Black disadvantage—it is little wonder that so many Whites

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> allocated to children of different races, through insider networks that channel employment opportunities to the relatives and friends of those who have profited most from present and past racial discrimination, and especially through intergenerational transfers of inherited wealth that pass on the spoils of discrimination to succeeding generations.

Id.

219. *Id.* at viii.

220. *Id.*

221. BROWN ET AL., *supra* note 6, at 191.

222. *Id.* ("Whites are advantaged in labor markets when they are able to rig the rules of the game and control access to jobs and promotions by defining required credentials, limiting access to training or education, or otherwise closing off access to blacks or other groups.").

223. *Id.* at 51.

224. *See id.* ("As individuals and as a group, [whites] derive advantages from the ways in which race limits the lives of people of color, whether they know it or not.").

are resentful at "having to compete without the hidden benefits of being white."[225] For them, this experience must certainly feel like a "significant hardship," unjustly upsetting their settled expectation of universal White advantage.[226]

David Wellman summarizes this point by noting that "[n]ow white men actually have to *compete* against women and people of color. And sometimes that means they really do come in second, or even third."[227]

c. *Personal Benefit*

Analyzing the White-centered perspective on racial reality can be instructive and illuminating because "[u]nderstanding a person's racial worldview from the perspective of racial identity theory also reveals how a person participates in and understands individual, institutional, and cultural racism."[228] In America, "Every white person ... is socialized with implicit and explicit racial messages about him- or herself and members of visible racial/ethnic groups ... [and] [a]ccepting these messages results in racism becoming an integral component of each white person's ego or personality."[229] As a consequence, "[E]volving a nonracist white identity begins with individuals accepting their 'whiteness' and recognizing the

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225. BROWN ET AL., *supra* note 6, at 51. *See also id.* (citing Jennifer Hochschild, *Race, Class, Power and the American Welfare State*, *in* DEMOCRACY AND THE WELFARE STATE (Amy Gutman ed., 1988)) (noting that "As the number of contestants for a fixed number of prizes increases, the chances of winning decrease. The arithmetic is simple: As blacks gain chances, whites lose certainty.").

226. BROWN ET AL., *supra* note 6, at 51. *See also id.* at 52 (noting that "today's race hierarchy is a powerful force. Thus whites, aware or not, misguided or not, typically resist change because their privileged status comes with (unearned) advantages. White Americans who believe they will lose if blacks gain are prone to oppose policies designed to reduce racial inequalities.").

227. David Wellman, *Minstrel Shows, Affirmative Action Talk, and Angry White Men: Marking Racial Otherness in the 1990's*, *in* FRANKENBERG, *supra* note 136, at 322.

228. James M. Jones & Robert Carter, *Racism and White Racial Identity Merging Realities*, *in* IMPACTS OF RACISM ON WHITE AMERICANS 4 (Benjamin P. Bowser & Raymond G. Hunt eds., 1996). *See also id.* ("Having a knowledge of racial identity can serve to deepen our understanding of the mechanism used to maintain racism in all its forms.").

229. *Id.* at 4–5. Jones and Carter ask:

> Is every White person in the United States racist? Not necessarily. Is every White person exposed to social, institutional, and cultural message[s] that promote racism? Yes. What matters. . .is how he or she interprets the messages received about racial groups. . .[in order to avoid] .... the color-blind status, where the existence of race and racism are denied but the person's behavior and attitudes are guided by racist principles that have never been questioned.

Id. at 4–5.

ways in which they participate in and benefit from individual, institutional, and cultural racism."[230]

From a Non-White-centered perspective, the argument that contemporary Whites derive no benefit from their Whiteness is hopelessly naïve because of the substantial "cash value"[231] that is associated with Whiteness. Moreover, "As long as we define social life as the sum total of conscious and deliberative individual activities, we will be able to discern as racist only *individual* manifestations of personal prejudice and hostility."[232]

II. AFFIRMATIVE ACTION AND WHITE INNOCENCE

As Randall Kennedy reminds us, "The controversy over affirmative action constitutes the most salient current battlefront in the ongoing conflict over the status of blacks in American life,"[233] although the phrase does not easily admit to either a precise or "all-encompassing definition."[234] Its meanings run the gamut from programs focused simply on "the goal of outreach"[235] to a remedy of present or past discrimination,[236] to programs that are focused principally on the goal of achieving a degree of diversity that would be otherwise unobtainable.[237] However, regardless of which definition of affirmative action is embraced, they all have one important characteristic in common—an explicit consciousness of race and some degree of preference based on perceived racial identity.[238]

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230. *Id.* at 4.

231. LIPSITZ, *supra* note 18, at vii. *See also id.* at viii.

232. *Id.* at 20.

233. Randall Kennedy, *Persuasion and Distrust: The Affirmative Action Debate*, *in* DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION 48 (Nicolaus Mills ed., 1994).

234. John David Skrentny, *Introduction* to COLORLINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS OPTIONS FOR AMERICA 4 (John David Skrentny ed., 2001).

235. CARL COHEN & JAMES P. STERBA, AFFIRMATIVE ACTION AND RACIAL PREFERENCE: A DEBATE 202 (2003) (explaining this purpose as consisting of "searching out qualified women and minority candidates who would otherwise not know about or apply for the available positions, and then hiring or accepting only those who are actually the most qualified.").

236. *Id.* (describing remedial programs of two kinds, the first designed to "put an end to an existing discriminatory practice, and to create, possibly for the first time in a particular setting, a truly equal opportunity environment." And the second, designed to "attempt to compensate for past discrimination and the effects of that discrimination.").

237. *Id.* at 203 (describing programs designed to pursue "the goal of diversity, where the pursuit of diversity is, in turn, justified either in terms of its educational benefits or in terms of its ability to create a more effective workforce . . . .").

238. *See id.* at 15 (describing the transformation of affirmative action from an original paradigm of color-blindness to one in which preference is given on the basis of race.). *See also* JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE AND JUSTICE IN AMERICA 6 (1996) (noting the term affirmative action actually "predates

To the extent that affirmative action is generally defined as public and private preferences based on race, most accounts of the history and development of these racialized policies date their origins back only thirty years or so to the Kennedy administration and Executive Order 10925 in the Civil Rights era of the 1960s[239] and the Nixon administration in 1969[240] with the principal recipients being American Blacks.[241] However, that version of the story reflects a distinctly White-centered perspective of the history of government and private sector race-based preferences.

From a Non-White perspective, affirmative action has a much longer historical time line, almost the entire length of which was focused on private and public programs that channeled economic, educational, and employment preferences exclusively to Whites on the basis of race.[242] In fact, the first official use of the phrase "affirmative action" was in 1935 in the context of the National Labor Relations Act and was designed to

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the civil rights movement, stemming from the centuries-old English legal concept of equity, or the administration of justice according to what was fair in a particular situation, as opposed to rigidly following legal rules, which may have a harsh result."); *id.* at 7 (describing how affirmative action evolved from a "color-blind approach .... to mean 'race conscious,' rather than color-blind.").

239. *See* BROWN ET AL., *supra* note 6, at 26 (describing the Kennedy administration's issuance of Executive Order 10925 in the summer of 1963 formally initiating affirmative action programs in an effort to "open doors that had been sealed shut for more than three centuries."). *See also* Skrentny, *supra* note 234, at 4; Nicolaus Mills, *Introduction: To Look Like America*, *in* MILLS, *supra* note 233, at 5; *id.* (noting that President Franklin Roosevelt had also instituted a form of affirmative action in favor of hiring Blacks in the 1940s in a "tepid Executive Order 8802 of 1941, banning discrimination in war industries and the armed services."); *id.* (noting that President Dwight Eisenhower also had initiated a similar and equally tepid form of affirmative action in his "executive orders on federal contract compliance."); *id.* at 7 (noting that President Lyndon Johnson also implemented affirmative action policies in favor of Blacks in "Executive Orders 11246 in 1965 and 11375 in 1967 ... but the key Johnson declaration on affirmative action came in a speech 'To Fulfill These Rights,' delivered at the Howard University commencement in June 1965 .... [insisting on] 'equality as a result' and 'not just legal equity.' "); COHEN & STERBA, *supra* note 235, at 12 (noting that it was the order by President Kennedy "that initiated our national commitment to 'affirmative action'—our determination to take positive steps to *extirpate* all preference by race.").

240. *See* Thomas J. Sugrue, *Breaking Through: The Troubled Origins of Affirmative Action in the Workplace*, *in* SKRENTNY, *supra* note 234, at 31 (describing how the "Kennedy, Johnson, and Nixon administrations all identified the construction industry as the primary target for the evolving policy of affirmative action. Those efforts culminated in 1969 with the Nixon administration's Philadelphia Plan... that became a model for nationwide affirmative action mandates.").

241. Other groups such as White women and a number of other racially identifiable subgroups were eventually added to the list of those eligible to receive benefits under affirmative action polices. *See id.* at 32.

242. *See* IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH CENTURY AMERICA (2005).

protect White union workers who were being harassed or retaliated against because of their union activities.[243]

Affirmative action is particularly relevant ground from which to gain insight into the nature and significance of differences in racial perspectives because affirmative action has been, and promises to continue to be, an especially polarizing, contentious, and socially-combustible topic with opposing camps composed largely, although not exclusively, along racial lines.[244] At the core of the disagreement between these opposing factions is a fundamental miscommunication.[245] This miscommunication is a result of the differences in the racially-distinct starting points that ground and orient each camp's respective racial perspectives. Thus, the argument is not so much over the substantive fairness or effectiveness of affirmative action programs *per se* as it is over the appropriate *perspective* from which to view them.

Those who oppose affirmative action generally see the issue from a White-centered perspective that, among other things, presumes the social, political, economic, and educational status quo is racially neutral and that the social and political debt for slavery was exhausted with the formal dismantling of Jim Crow and the enactment of antidiscrimination legislation. This view is also premised on the assumption that contemporary Whites bear no personal responsibility for existing racial inequality because they had no personal role in the creation of past racism and do not participate in perpetuating or benefiting from its legacy in the form of present-day racial subordination and discrimination.

However, those who support affirmative action as a broad policy matter and see the issue from a Non-White-centered perspective have reached very different conclusions. A Non-White-centered perspective on this issue presumes that the social, political, economic, and educational status quo is *not* neutral, but is in fact heavily skewed in favor of Whites. This view is premised on the presumption that America's social and political debt for its historic racial sins of slavery, Jim Crow and the legacy of

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243. Skrentny observes that the

> phrase *affirmative action* first appeared as part of the 1935 National Labor Relations Act. Here it meant that an employer who was found to be discriminating against union members or union organizers would have to stop discriminating, and also take affirmative action to place those victims where they would have been without the discrimination.

See SKRENTNY, *supra* note 238, at 6. *See also* James E. Jones, Jr., *The Rise and Fall of Affirmative Action*, *in* RACE IN AMERICA: THE STRUGGLE FOR EQUALITY (Herbert Hill & James E. Jones, Jr. eds., 1993).

244. *See* Sugrue, *supra* note 240, at 48 ("Affirmative action remains one of the most fiercely contested legacies of the civil rights era .... In a short period of time ... affirmative action moved from obscurity to prominence ....").

245. *See* Lawrence Bobo, *Race Interests, and Beliefs about Affirmative Action: Unanswered Questions and New Directions*, *in* SKRENTNY, *supra* note 234, at 208–209.

legalized discrimination has not been exhausted by the removal of express and formal barriers of racial discrimination.

Instead, this perspective posits that informal, systemic, institutional, psychological, and unconscious racism continue to shape and benefit the lives of every White person and to burden the lives of every Non-White person, solely on the basis of race.[246] While viewing racial reality from this Non-White perspective does not automatically equate with supporting affirmative action as a policy matter, it does significantly shift the terms of the debate and undercuts one of the principal ideological pillars upon which opposition to affirmative action policies currently depends.

Further, the Non-White-centered perspective also holds that contemporary Whites do in fact bear a considerable personal responsibility for the continuing legacy of racial inequality because, although they are not responsible for the creation of the historical causes of racism, they benefit from the legacy of racism every day in a myriad of ways. As a consequence, they are deeply implicated and invested in maintaining the racial status quo of deep and continuing racial inequality. From this perspective, whether consciously or unconsciously, most Whites engage in personal acts daily to actively reinforce, perpetuate and reinscribe racial distinctions and promote racial discrimination. Thus, from the Non-White-centered perspective, the idea that most contemporary Whites are innocent of active personal participation in promoting, reinscribing, and benefiting from racism is not only naïve but also historically (and profoundly) wrong.

Affirmative action in education and employment has been combustible social tender and the source of continuing, deep, and significant White resentment since it was first introduced.[247] In fact, it has been suggested that the depth of White resentment is so profound that "'a number of whites dislike the idea of affirmative action so much and perceive it to be so unfair that they have come to dislike blacks as a consequence . . . .'"[248]

Thus, it is important to keep in mind that "the ideological *meanings* of a contested racial policy like affirmative action are determined within a

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246. *See* LIPSITZ, *supra* note 18, at 20.

247. *See* Kennedy, *supra* note 233.

248. *See* THERNSTROM & THERNSTROM, *supra* note 2, at 312 (quoting PAUL M. SNIDERMAN & THOMAS PIAZZA, THE SCAR OF RACE 8 (1993)). It is striking, and perhaps illustrative of the difference in racial vantage points, that these otherwise reasonable scholars can actually believe that Whites who were not racists before affirmative action have been driven into the arms of racism, and began to "dislike Blacks" solely as a consequence of the existence of these programs. Of course, they offer neither rational argument nor empirical evidence to support this dramatic rhetoric. Moreover, from a Non-White vantage point, a compelling argument can be made that any Whites who claim to have been so malignantly converted in their racial views solely on the basis of affirmative action are woefully deficient in credibility and are probably engaged in a murky effort to justify preexisting racial antipathy towards Blacks.

social-cognitive matrix that is raced. A similar policy with a different set of beneficiaries might not have the same ideological resonance."[249] These ideological meanings are distinctly racial and are reinforced and reinscribed by the language and images that are employed by the Supreme Court in articulating the bases of their decisions in racially-inflected claims of constitutional violations.[250] Behind these ideological underpinnings are the Court's "unstated assumptions about the nature of difference,"[251] which reveal not a racially-neutral jurisprudence but one which is constitutionally, impermissibly concerned with the welfare of one particular racial group—Whites. Notably, this concern is not based on Whites as individuals but as a racial group.[252]

As George Lipsitz has observed, in resenting and resisting affirmative action, many Whites argue that they are "innocent victims of remedies for a disease that did not even exist."[253] The ideology of White innocence lies at the very heart of this White resentment. Disrupting the ideology may well be the illusive Holy Grail to dismantle such ubiquitous White resentment. The late scholar Ron Fiscus articulated this idea in the early 1990s when he observed that

> the innocent persons argument is more than an important constitutional argument. It is a widely held, racially polarizing

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249. LOURY, *supra* note 103, at 72–73. *See also id.* at 73 ("More generally, if when assessing a policy observers make use of a causal specification that has been 'colored' by racial stigma, then they may perceive that policy as being especially threatening to their ideological positions.").

250. Minow notes that this dynamic gives rise to

> powerful unstated assumptions about whose point of view matters, and about what is given and what is mutable in the world. 'Difference' is only meaningful as a comparison .... Legal treatment of difference tends to take for granted an assumed point of comparison ... [s]uch comparisons work in part through the very structures of our language, which embeds the unstated points of comparison inside categories that bury their perspective and wrongly imply a natural fit with the world.

See Minow, *supra* note 1, at 13.

251. Minow, *supra* note 1, at 31.

252. Thomas Sugrue, for example, writes:

> At the heart of the battle over affirmative action was a debate about the very meaning of liberalism itself. .... The deep-rooted white opposition to affirmative action was at bottom a defense of a racial status quo that marginalized blacks in urban labor markets—a situation solidified by New Deal labor and economic policies that disproportionately benefited white workers. Affirmative action's critics masked their own unacknowledged identity politics in seemingly neutral, universalist rhetoric that they themselves had rejected only a few years earlier.

Sugrue, *supra* note 240, at 49.

253. LIPSITZ, *supra* note 18, at 35.

> social argument. The near-universal belief in it is without doubt the single most powerful source of popular resentment of affirmative action. If the belief could somehow be undercut, the resentment toward affirmative action and the associated racial polarization might be diminished.[254]

Because of its power to engender such profound White resentment, the rhetoric of White innocence in the hands of the Supreme Court is not simply used to resolve affirmative action claims; instead, it amounts to a weapon of White supremacy that is deployed to justify, legitimize, and maintain the existing racial status quo. Under such circumstances, it is hardly surprising that America's debate over affirmative action consists largely of such stridently opposing camps.[255]

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254. FISCUS, *supra* note 205, at 7–8. *See also id.* at 7 ("Until the premise of innocence is effectively refuted, no degree of burdening [of whites by affirmative action] *will* be principled . . . . [and] no defense of affirmative action is going to be wholly persuasive.");

Interestingly, although a supporter of affirmative action as a wise and important public and private policy, Professor Fiscus unconsciously associates the "near universal" belief in White innocence, primarily among *Whites*, as being representative of all Americans. Similarly, in suggesting that affirmative action will not be persuasive without reconciling the innocence argument, the question that immediately presents itself is, persuasive to whom—Whites? This phraseology ignores all the Non-Whites (and Whites) to whom affirmative action is already persuasive despite impassioned claims of White innocence. This typifies the association of Whiteness with humanity or at least with all (real) Americans generally. In this inadvertent phrasing he has effectively erased all Non-White (as well as White) Americans who do not "believe" in the "self evident truth" of White innocence.

In addition, the exclusive focus on White resentment ignores the fact that there is Non-White resentment as well. In fact, much of the Non-White resentment that is ignored by the White gaze is based not simply on the presence and dominance of White supremacy, but also on the fact that so many Whites perceive themselves as racially innocent. Non-White, but especially Black, resentment is rarely ever discussed unless it is characterized as "Black rage," "Black outrage" or "Black anger," but never dignified simply as resentment. See THERNSTROM & THERNSTROM, *supra* note 2, at 496–97 (discussing the public titillation with "racially hostile black anger" and Black "rage" as an organizing principle in work of Black writers.). In contrast, bell hooks describes her own sense of racialized rage as "a constructive healing rage" that leads to a sense of "self-recovery" that is "ultimately about learning to see clearly." hooks, *supra* note 16, at 18.

In short, when Whites react negatively to race, they are being resentful; but when Blacks do the same, they are exhibiting rage. This rhetoric perpetuates the essentialism of Whiteness and the marginality of Non-Whiteness, and paints Whiteness as synonymous with reasonableness and Non-Whiteness with irrationality and bestiality.

255. *See* Bobo, *supra* note 245, at 191 (noting that "[t]he debate over affirmative action often seems to involve two warring camps, each of which stakes a mutually exclusive claim to moral virtue . . . . Opponents see their antagonists as advancing a morally bankrupt claim to victim status and the spoils of racial privilege . . . . ").

A. *Whiteness as Coterminous with Innocence*

Although the Court frequently invokes the rhetoric of innocence and equates it presumptively with Whiteness, it neither provides nor even attempts to provide a definition for the term.[256] This is especially problematic because without some degree of precision in a working definition of White innocence, the Court's invocation of this rhetoric has no substantive content that can be reasonably applied, rejected, or even rationally evaluated by the lower courts.[257]

In the absence of any effort to define the term White innocence, we are left only to conclude the Court does not consider that it requires an independent definition. This approach suggests the Court is taking *judicial notice* of the innocence of Whites. However, under the Federal Rules of Evidence,[258] judicial notice in this context is wholly inappropriate. The Federal Rules of Evidence clearly state that judicial notice is limited to those facts "not subject to reasonable dispute in that [they are] either (1) generally known within the territorial jurisdiction of the trial court or (2) [are] capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[259] As a general matter, both at the trial and appellate level, "judicial notice is limited to facts evidenced by public records and facts of general notoriety."[260]

The observation that Whites generally are racially innocent is clearly not a matter "whose accuracy cannot be reasonably questioned."[261] This

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256. The ideology of innocence does not appear to have a particularly significant influence on the Court in the absence of race. In stark contrast to its receptivity to the concerns of White innocence, the Court appears to be surprisingly resistant and unsympathetic to claims of both "actual innocence," as well as "constitutional innocence." Therefore, it appears that the power of innocence over the courts is not based on innocence alone but rather on the particular power of the ideology of White innocence.

257. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 368 (3d ed. 2000) (arguing that "the ultimate issue is whether it is possible and appropriate to translate the principles underlying the constitutional provision at issue into restrictions on government, or affirmative definitions of individual liberty, which [lower] courts can articulate and apply.").

258. *See* FED. R. EVID. 201(b).

259. 31A C.J.S § 9 (1996). *See also* UNIF. R. EVID. 201(b); Castillo-Villagra v. I.N.S, 972 F.2d 1017 (9th Cir. 1992); Citizens for a Better Environment v. U.S. Environmental Protection Agency, 649 F.2d 522, 526 n.6 (7th Cir. 1981) (noting that judicial notice is limited to facts which are not subject to reasonable dispute).

260. 31A C.J.S. § 9 (1996). *See also id.*

> Most matters which the court may notice fall into one of two classes, those which come to the knowledge of men generally in the course of the ordinary experience of life, and are therefore in the mind of the trier, or those which are generally accepted by mankind as true and are capable of ready demonstration by means commonly recognized as authoritative.

261. *Id.*

entire article constitutes but one in a long line of articles going back to 1986 that have questioned the coherency of this concept.[262] Nor is it a concept that is "generally accepted by mankind as true" unless mankind is synonymous with Whites and excludes all Non-Whites. As the analysis in this Article has demonstrated, from the Non-White perspective, Whites are not considered to be racially innocent at all; rather, they are considered to be guilty in that they are involved with benefiting from and perpetuating racial discrimination in profound and continuing ways both as individuals and as a group, both consciously and unconsciously.

Although it is not always precisely clear *what* the Court means when it invokes the rhetoric of innocence, it is clear to *whom* the Court is referring—Whites. Thus, through the rhetoric of White innocence, and the erroneous application of judicial notice, the Court appears to have constructed a mythologized and racialized concept of constitutionally cognizable innocence that does not just *include* Whites, but is, in fact, *coterminous* with whiteness.[263]

The Court's construction of whiteness with innocence is especially illustrated in Justice O'Connor's majority opinion in *Grutter v. Bollinger*.[264] Applying the strict scrutiny test, she explained that the essence of the "narrowly tailored" requirement is its capacity to ensure that race-conscious remedies are constitutionally sustainable only to the extent that they "work the least harm possible to . . . innocent persons competing for the same benefit."[265] She goes on to state: "[t]o be narrowly tailored, a race-conscious admissions program must not 'unduly burden individuals who are not members of the favored racial . . . groups.'"[266]

According to Justice O'Connor, the proper constitutional measure of narrow tailoring is the extent to which race-conscious remedies avoid harming a group she described as "innocent persons." This group of inno-

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262. *See generally*; John A. Powell, *Whites Will Be Whites: The Failure to Interrogate Racial Privilege*, 34 U.S.F. L. REV. 419 (1999); David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?*, 91 COLUM. L. REV. 791 (1991); Devins, *supra* note 3; Ross (both sources listed), *supra* note 49; Sullivan, *supra* note 49.

263. Although in *Grutter* O'Connor also says that "Narrow tailoring, therefore, requires that a race-conscious admissions program not unduly harm members of any racial group," the overall tenor of her references to the concept of innocence strongly suggests that she, along with the rest of the current Court, does in fact equate innocence with Whiteness. *Grutter*, 539 U.S. at 341.

264. *Grutter*, 539 U.S. 306.

265. *Id.* at 341.

266. *Id.* (quoting Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting)). *See id.* at 333 (quoting Richmond v. J.A. Croson, Co., 488 U.S. 469, 493 (1989) (plurality opinion)) ("[t]he purpose of the narrow tailoring requirement is to ensure that the means chosen fit the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.").

cent persons consists of those who are not included in the so-called "favored racial group." Thus, Justice O'Connor characterizes the beneficiaries of race-conscious programs as members of a "favored racial group" and, by implication, those who do not necessarily benefit are characterized as members of a non-favored racial group. Since the members of the "favored racial groups" in race-conscious programs are clearly Non-White persons, O'Connor's logic suggests that the category of "innocent persons" she has in mind who must be protected from harm by the strict scrutiny "narrow tailoring" requirement consists exclusively of an undifferentiated group of bedfellows who are all White, without regard to their personal histories, views, values or experiences.

Justice O'Connor also suggests that the primary unifying characteristics of the members of the non-favored racial group are their Whiteness, innocence, and victimization from race-conscious affirmative action programs. Any doubt in this regard is resolved by her conclusion in *Grutter*, in which she noted that the Law School affirmative action program had passed constitutional muster because "in the context of its individualized inquiry ... the admissions program does not unduly harm nonminority applicants."[267]

Since O'Connor does not define the term innocence, she does not attempt to establish the innocence of this all-White group she imagines; instead, she simply assumes and asserts their innocent status as a fact without a scintilla of evidence or argument. Thus, from the Court's perspective, the racial innocence of all Whites as a group is not a result of logical argument with which one could take issue because it appears to be a matter of judicial notice beyond debate.

It is indeed problematic that the Court simply presumes the existence of racial innocence, racially equates innocence with Whiteness, and neither engages in analysis nor insists that this position be subject to elements of proof or critical inquiry of any sort. It is especially problematic because, to the extent that innocence becomes constitutionally coterminous with Whiteness, how is Non-Whiteness to be regarded—as not innocent or guilty? What are the implications of a constitutional presumption of White innocence over Non-White guilt?

This grouping of innocent Whites is obviously quite over-inclusive because by definition it must commingle such interesting bedfellows as committed White anti-racists on one extreme and rabid and equally committed White supremacists on the other, making Whites as a group not wholly innocent simply by virtue of their Whiteness.[268] As such, to the

267. *Grutter*, 539 U.S. at 341.

268. Although by logical inference O'Connor assumed that the plaintiff Barbara Grutter was an "innocent White," suppose instead that it was known that the plaintiff was an avowed White supremacist who hated anyone who was not White, actively practiced racial discrimination and advocated violent racial holy war? Under O'Connor's view of White innocence, even this person would be considered racially innocent. Thus, in

extent that the concept of innocence is thought to be coterminous with Whiteness, it is clearly over-inclusive because it would include many who are clearly not innocent, such as the Grand Dragon of the Ku Klux Klan. Therefore, the Court's deployment of the notion of innocence is inherently too imprecise and over-inclusive a concept to be worthy of serious constitutional consideration.

B. *Affirmative Action and the Ideology of White Innocence*

Each of the four elements of the ideology of White innocence identified in Section I have been deployed by the Court, to one extent or another, in resolving racially-inflected claims of constitutional protection. However, when the Court invokes the rhetoric of White innocence, it appears to focus on the third and fourth elements of the ideology involving innocence from racism and racial benefit. Frequently, the Court's invocation of White innocence is deeply embedded in the strict scrutiny analysis: [269] in order to pass constitutional muster, explicitly race-conscious government programs must satisfy a bifurcated test that requires the program to serve a compelling state interest[270] and also be sufficiently narrowly-tailored[271] to achieve that interest.

1. Innocent of Race

Recall that the earlier discussion of the "innocent of race" element emphasized that although from a White-centered-perspective Whiteness is

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O'Connor's view, racial guilt has been defined out of existence because all Whites are by definition racially innocent without regard to their individual views, values, politics, or even their actions. Thus, one could argue that her category of innocent Whites is not only overbroad, but also fatally incoherent because it assumes racial innocence solely on the basis of skin color regardless of the individual facets of assorted White personalities who would strongly contest that description. In fact, she comes dangerously close to suggesting that all Whites as a racial group are presumptively and inherently racially innocent solely on the basis of their Whiteness.

269. *See Croson*, 488 U.S. 469 (holding that strict scrutiny must be applied to all government uses of racial classifications, whether invidious, remedial, or benign).

270. *Id.* at 493.

271. *Id.* The standard of narrow tailoring does not require that such programs be the most narrowly tailored alternative possible. *See Grutter*, 539 U.S. at 339 (finding "[n]arrow tailoring does not require exhaustion of every conceivable race neutral alternative .... [it] does, however, require serious, good faith consideration of workable race-neutral alternatives."). *See also Croson*, 488 U.S. at 493 (noting that any race-conscious remedial program must "'fit' [the] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."); Sheet Metal Workers v. EEOC, 478 U.S. 421, 495 (1986) (noting that the standard of narrow tailoring "require[s] only a good faith effort ... to come within a range demarcated by the goal itself.").

not a race, simultaneously, Whites are acutely aware of their own racialized Whiteness and the Non-Whiteness of racial others. Consequently, Whites consider those differences to be somehow reflective of real and essential biological differences.

This element of the ideology of Whiteness is illustrated by the Court's affirmative action jurisprudence and reflected in the Court's discussion of racial neutrality. In *Grutter*, Justice O'Connor's majority opinion noted in the context of the narrow-tailoring prong of the strict scrutiny test that, although "narrow tailoring does not require exhaustion of every conceivable race-neutral alternative .... [it] does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity that the university seeks."[272] Taking race into account, or not doing so (characterized as racial neutrality), is effectively understood to mean that the Court is only considering the Non-Whiteness of Non-Whites. However, taking race into account should not be limited to the race of Non-Whites; it should also require a consideration of the Whiteness of Whites. There have been precious few calls for the elimination of the Whiteness of Whites being taken into account by affirmative action's opponents. In effect, their position amounts to one in which Whites want to ignore Non-Whiteness—especially Blackness—while simultaneously continuing to take their own Whiteness into account.

Essentially, Justice O'Connor's asking admissions officers to seriously and in good faith consider race-neutral alternatives, is tantamount to asking them to do what no one in America is capable of doing—imagining an entirely raceless person. What would such a person look like? How would he or she function in a society that is so keenly aware and dependant on perceived racial identity? How would his or her racelessness affect his or her treatment, experiences, and opportunities?

Justice O'Connor's proposition constitutes an absurd fantasy in twenty-first century America, because not only are there no unraced people, but there is no model or paradigm to dictate how to imagine one. In America, one is either White or Non-White; race is always present. Thus, if racial neutrality amounts to ignoring Non-Whiteness, the only coherent category left is Whiteness. Consequently, any attempted regime of race neutrality would in effect create a situation where everyone would be presumed to be White—not unraced—because in a highly-racialized nation like America one is, without exception, White or Non-White.[273]

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272. *Grutter*, 539 U.S. at 339.

273. *See* Ross, *supra* note 18 (exploring the effects on the racial identity of Whiteness after September 11, 2001). Professor Ross argues against a scientific racial backdrop in which Arabs and South Asians are racially categorized as Caucasians, especially with regard to brown South Asians and Aryan Caucasians, he observes that "this is surely...also partially a racial war" and "[i]n this war, ...the archenemy is the brown skinned radical

From the White-centered perspective, the Court's idea of race neutrality is a fantasy which would project presumptive Whiteness on every applicant. There is nothing racially-neutral about such a program with or without the express use of racial terms. As a result, those who are in fact White get their files reviewed from a perspective that matches their own, amounting to a racial benefit, not a racially-neutral fact. However, those who are Non-White would be presumed to be White and would not get their applications read by an equally racially-sympathetic and compatible perspective. In fact, since Non-White applicant files would usually be reviewed from a White-centered perspective, their own racial perspectives would be neither recognized nor valued, and their lives and accomplishments would be reviewed from a racial perspective different from their own.

More importantly, admission decisions that purport not to expressly take race into account, and thereby claim to be racially-neutral, are fundamentally hypocritical because they assume that race can be erased as a relevant factor in the development of a person's life up to the point of application. These programs assume that an individual's personal racial history of struggle and success is irrelevant to a rational evaluation of their future prospects of success and contribution to society, reflecting a distinctly White-centered perspective on race.

Because most Whites have the luxury of not having to think of themselves in racial terms, they can easily expect that the same must be true for everyone else. But for most Non-Whites, and especially Blacks, racial identity is not something they can afford to ignore, because ordinary social intercourse in America is filled with constant reminders to Non-Whites that they are not White.[274]

The Court's ideal of racial neutrality is also irrational because, in the context of university admissions, a candidate's past strengths and future potential cannot be reasonably evaluated without all of the candidate's most relevant life experiences. For many Non-White applicants, their racial identities are relevant pieces of the whole package because, for them, such an identity forms an important part in determining who they are, how they got that way, where they want to go, why they want to go there, and the strength of their motivation to accomplish those goals. To arbi-

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Muslim 'terrorist.' This imagery naturally conjures its opposite, the White Christian 'warrior.' " *See id.* at 239.

It is important to note here that those who consider themselves "racially mixed" are still essentially characterized as Non-White. Regardless of racial mixtures, in the American racial lexicon, such individuals are still by definition not "White." Thus, racially-mixed identity is still a subcategory of being Non-White, whether that mixture includes an amalgam of White and other, or some combination of various others.

274. *See* Flagg, *supra* note 70, at 969 (noting that "[i]n fact, whites appear to pursue th[e] option [of not thinking of themselves in racial terms] so habitually that it may be a defining characteristic of whiteness.").

trarily ban this type of highly relevant and probative information from active consideration by admission officials is to be willfully blind to the overall detriment of the applicant's admission prospects and the institution's commitment to evaluate the whole candidate. Viewing higher education admissions from this perspective ensures that no one, whether White or Non-White, is ever admitted to institutions of higher learning without racial considerations playing some role in the evaluation of their worthiness. White applicants are admitted against a racialized backdrop in which their Whiteness is both presumed and privileged[275] as the normative experience of simply being an American.

Similarly, Non-White applicants, whether they present files with superlative traditional credentials that equal or surpass their White counterparts or just marginal ones, are erroneously presumed to be either White or celebrated as a high-achieving Non-White. But given America's historic and continuing obsession with race, racial considerations are inevitably always part of the evaluative process because they are the very measures of merit against which individuals are assessed.[276]

This position does not depend on a universal relevance of racial experience for all Non-Whites, but, rather, a universal allowance for its existence, recognition, and respect.[277] To the extent that race forms an important part of the empirical social reality in the lives of applicants (both White and Non-White), Justice O'Connor's vision of racial neutrality constitutes an arbitrary, irrational, and counterproductive policy that strongly advantages Whites and heavily burdens Non-Whites. Accordingly, so-called racially-neutral policies like those suggested by Justice O'Connor are not racially-neutral at all but instead reflect what Ira Katznelson has incisively described as a pervasive public and judicial "historical amnesia."[278]

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275. *See* Wildman, *supra* note 57, at 245 n.6 (observing that "[t]he term 'privilege' remains problematic, since privilege can connote a reward for an earned achievement. White privilege is not earned. Yet academic discourse has widely adopted the phrase 'White privilege,' and, increasingly, more popular circles recognize it as well."). *See also* STEPHANIE M. WILDMAN ET AL., PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996).

276. *See* Wildman, *supra* note 57, at 247 (noting that the "[c]haracteristics of the privileged group define the societal norm. From 'flesh colored' bandages or crayons and 'nude' hosiery that depict fair skin to standardized testing, individual members of society are judged against characteristics held by the privileged.").

277. *See* LIPSITZ, supra note 18, at 22 (noting that "[g]roup interests are not monolithic .... All whites do not benefit from the possessive investment in whiteness in precisely the same ways; the experiences of members of minority groups are not interchangeable. But the possessive investment in whiteness always affects individual and group life chances and opportunities.").

278. IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 160–61 (2005). *See* discussion, *infra* Section II.A.4 regarding "historical amnesia" of White affirmative action.

The basic premise is that the talents, merits, and abilities of contemporary White applicants to higher education are not the products of their birthright, but instead the result of a multitude of economic and sociological forces that are inextricably tied to the White affirmative action policies that produced the worlds in which these children were reared to maturity.[279] Contemporary affirmative action polices that expressly require the recognition of Non-White identity do not introduce race into an otherwise racially-pristine calculation. Quite the reverse: they merely balance an already racialized calculation that has expressly granted Whites enormous racial preference. In sum, evaluations claiming to be racially-neutral can never actually be so because White applicants are the direct beneficiaries of prior government affirmative action for Whites.

2. Innocent of Racial Perspective

Through a rhetorical narrative grounded in the White-centered perspective, the Supreme Court has deeply embedded into American constitutional affirmative action discourse a powerful and irresistible association between innocence and Whites as a group. This association characterizes Whites as innocent and helpless victims who, metaphorically, have been forcibly strapped to the front of the cannon barrel of affirmative action and have been unjustly punished for the benefit of unharmed and undeserving Non-Whites.

However, as demonstrated in the foregoing analysis, from a Non-White perspective, Whites are not accurately characterized as the innocent victims of Non-White affirmative action; Whites are more accurately viewed as the displaced beneficiaries of decades of express White affirmative action that was imposed and enforced by both federal and state government racial preference, with such intensity for so long a time that contemporary Whites have been deluded into believing that it represented not racial preference and bias but, simply, the normal and unraced state of reality. Because of this historic amnesia, like fish in the water,[280] Whites have ceased to appreciate that their life chances and opportunities have been suffused with racial preference and advantage engineered and protected by the State.

In this way, the Court's "historical amnesia" and its use of the rhetorical narrative of White innocence can be characterized by what David Wellman describes as "anti-affirmative action ... minstrelsy, not serious intellectual ... discourse."[281]

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279. *See* President Lyndon B. Johnson's Commencement Address at Howard University (June 4, 1965), *reprinted in* KATZNELSON, *supra* note 272, at 175.

280. BROWN ET AL., *supra* note 6, at 34.

281. Wellman, *supra* note 227, at 319.

This constitutional minstrel discourse is both powerful and persuasive to Whites because, as Wellman tells us, "[L]ike its earlier incarnation, the new minstrelsy assures white men who they are not: not unqualified recipients of unfair advantage, not responsible for past racial injustices, not beneficiaries of governmental assistance."[282] However, this minstrelsy discourse also raises new questions that are framed in what Pierre Schlag calls "value-talk,"[283] for example: "What is fair? Who is deserving? By what criteria are qualification and merit measured?"[284]

The Court's use of the rhetorical narrative of White innocence has been remarkably successful in framing and fueling the general affirmative action debate. This is partially because innocence constitutes an essential characteristic of White racial identity and the popular presumption of the racial neutrality of the law. However, the Court's choice to champion the cause of White innocence from the White-centered perspective has "fueled rather than dowsed"[285] the racial flames of discord, division, and distrust in American legal discourse and in the popular imagination.

Paradoxically, the Court's approving use of the language of White racial innocence has implicitly put the government's rhetorical imprimatur on this racialized characterization of innocent White victimization; so much so, in fact, that this rhetoric and its various permutations now constitute one of the few areas of common ground and uncritical acceptance among many who fill the ranks of both supporters *and* opponents of affirmative action programs.[286]

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282. *Id.* at 313.

283. PIERRE SCHLAG, LAYING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAN LEGAL MIND 45 (1996). *See also id.* at 43 (noting that "[i]n this kind of rhetoric, values become the self-evident starting points and grounds of legal conversations," however, "values stand as an autonomous realm: values are *severed* from their generative history, and their generative history is *effaced*.").

284. Wellman, *supra* note 227, at 324.

285. *See* Goldberg, *supra* note 90, at 296.

286. For notable examples of affirmative action supporters on the Court expressing acceptance, at some level, of the ideology of White innocence, *see Croson*, 488 U.S. at 548 (Marshall, J., dissenting)(noting that "[l]ike the federal provision, Richmond's [set-aside plan] has a minimal impact on *innocent third parties*.")(emphasis added); *id.* at 561 (Blackmun, J., dissenting) (indicating that "even though one might sympathize with those who—though *possibly innocent themselves*—benefit from the wrongs of past decades.") (emphasis added). *See also* CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES, 158–59 (1996) (arguing that there is a *moral* cost to affirmative action programs *because of the harm to Whites* and suggesting, therefore, that great care be taken to ensure that there is a particularly clear need for such programs and that they be carefully limited in scope and duration to match that need); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 60 (Harvard Univ. Press 1991) (arguing that even if *Whites are innocent victims of affirmative action programs*, it should not be overlooked that *Blacks are innocent too*, therefore, "It does no one much good . . . to make race issues contests for some Holy Grail of innocence.").

Consequently, both sides in the hotly contested affirmative action debate, both wittingly and unwittingly, accept, reproduce, and reinforce a rhetorical narrative of contemporary American racial reality that constructs and perpetuates a normative association between innocence and Whiteness. The congruence of opinion affirming a racialized association between Whiteness and innocence fundamentally undermines any moral case in support of affirmative action programs and strengthens the moral basis of its detractors by allowing them to "don the armor of moral innocence in their war against affirmative action . . . ."[287]

By deploying the rhetorical narrative of White innocence, the Court has been able to effectively "alchemize" these "cases about discrimination against disadvantaged groups into narratives in which African Americans . . . seek to deprive white[s] . . . of their rightful interests."[288] As a result, "Invoking 'innocence' has provided the Court with rhetorical cover for its policy choice[s]"[289] of either approving or disapproving the limited use of race as a legitimate selection criterion while simultaneously advancing the "racial project"[290] of preserving and protecting a status quo of White dominance and White privilege.

When the Court adopts the White perspective as the presumptive lens through which to see and describe American racial reality, it ratifies and emboldens the segment of the public that shares that perspective. Instead of engaging the nation in a dialogue in which it acknowledges that there is more than one appropriate perspective from which to see affirmative action, the Court implicitly endorses the view that there is only one correct factual description—the White perspective. The Court suggests that its view is not White at all but in fact a racially-neutral, objective description of racial reality, rather than the racially White-centered and biased perspective that fails to even acknowledge that there is a contest among perspectives.

3. Innocent of Racism

As indicated earlier, one of the defining features of the "innocent of racism" element of the ideology of White innocence was the notion that racism is largely a thing of the past in contemporary America, with the

287. Bobo, *supra* note 245, at 207.

288. Harris, *supra* note 118, at 580.

289. *Id.* at 582.

290. A racial project

> is simultaneously an interpretation, representation, or explanation of racial dynamics, and an effort to reorganize and redistribute resources along particular racial lines.

MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 56–58 (2d ed., 1994)(emphasis omitted).

exception of rogue individual racists who act out of a taste for discrimination. However, from a Non-White-centered-perspective, the problem of racism is neither solved nor limited solely to individual guilty perpetrators. Instead, Non-Whites perceive systemic racial discrimination that is "the result of the ways that racial inequalities were embedded in urban space and urban institutions."[291]

The primary meaning associated with the Court's use of the rhetoric of White innocence appears to be focused on a definition of innocence as the absence of any White moral blameworthiness for racism. When the Court refers to innocence and equates it with Whiteness, it could be understood to mean that contemporary Whites are not responsible or blameworthy for the history and legacy of racism in American society where "race still matters" so very much in terms of access to the finer things in life.[292]

For example, in *Regents of the University of California v. Bakke*,[293] Justice Powell noted, "[T]here is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making."[294] The *Bakke* Court also described innocent persons as those who "bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered."[295] In his dissent in *Adarand Constructors, Inc. v. Pena*, Justice Souter expressed a similar sense of White innocence when he said, "[T]he result may be that some members of the historically favored race are hurt by that remedial mechanism, however innocent they may be of any personal responsibility for any discriminatory conduct."[296] In this sense, innocence is regarded as the absence of personal responsibility or moral blameworthiness for creating the racial problems that race-conscious programs like affirmative action are designed to remedy.

The ideology of White innocence negates the compelling state interest prong of the strict scrutiny standard because it is ultimately based on a perception of the significance of race as a social problem involving a sense of proportionality. The finding of a compelling state interest will be significantly influenced by the extent to which racism is considered a thing of the past manifested by the rogue individual in isolated and non-systemic ways, or as a deeply insidious systemic and institutional problem. By masking the contemporaneous, systemic and institutional nature of racism in America, the courts can artificially limit the occasions when affirmative action is deemed to be necessary and appropriate.

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291. Sugrue, *supra* note 240, at 44.

292. *See* discussion in Section IA, *supra*.

293. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978)(plurality opinion).

294. *Id.* at 298.

295. *Id.* at 310.

296. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 270 (1995).

The Court's focus on the innocent Whites who could be negatively impacted by race-conscious programs escapes the identification of the systemic and institutional nature of racial bias. The Court's search for racial bogey men in the institution's decisional hierarchy, in its recent historical record, or in an adjudicated finding of actual discrimination, conveniently allows the Court to avoid the core problem of addressing racially-discriminatory practices that are deeply embedded into the machine of racial oppression.

If the Court wants to analyze affirmative action programs against an assumptive social background of racial reality that views racial discrimination from a White-centered perspective as a primarily individualistic dynamic of consciously intentional behavior, then it has the burden of establishing the factual premises and legal support for that position. Instead, the Court simply asserts this view of America's racial reality without any attempt to document, analyze, or acknowledge either its contested nature or its severance from a well-known but denied "generative history."[297] The Court merely asserts this perspective as an unraced and objective report of reality when, in fact, it is little more than a reflection of a distinctly White-centered perspective of hotly contested racial terrain. Rather than recognizing that a competing paradigm of racial experience exists, the Court imposes its own view without support or analysis, suggesting that it is doing nothing more than projecting the personal racial biases of the Justices as representative of racial reality.

For example, in *Croson*, Justice Stevens concluded that the city's set-aside program "stigmatizes the disadvantaged class with the unproven charge of past racial discrimination."[298] In making this argument, Justice Stevens clearly assumed not only that the racial status quo in the city of Richmond was neutral but, also, that the White business men engaged in the construction industry were innocent of racial discrimination. While the class of White contractors "unquestionably includes some white contractors who are guilty of past discrimination against blacks, but it is only habit, rather than evidence or analysis, that makes it seem acceptable to assume that every white contractor covered by the ordinance shares in that guilt."[299] He concluded that this category is clearly overly inclusive because it "presumably includes . . . some [of the white contractors] who have never discriminated against anyone on the basis of race."[300]

How did Justice Stevens reach the presumption that at least some of the White contractors in Richmond had never engaged in racial discrimination against anyone? He specifically refers to the absence of either "fact

297. SCHLAG, *supra* note 283, at 43.

298. *Croson*, 488 U.S. at 516 (1989) (Stevens, J., concurring).

299. *Id.*

300. *Id.* Justice Stevens concludes that "[i]mposing a common burden on such a disparate class merely because each member of the class is of the same race stems from reliance on stereotype rather than fact or reason." *See id.*

or reason"[301] supporting a blanket indictment of the class, yet he provides neither fact nor reason in support of his *own* conclusion of the obviousness of racial innocence among at least some members of this group. His conclusion smacks of a projection of personal racial bias and is comprehensible only from a White-centered perspective.

From a Non-White-centered-perspective, the plaintiff's presentation of the history of racism, repression, resistance, and avoidance in Richmond supplies ample factual evidence from which to conclude that all of the White contractors in the city are presumed to have engaged in racial discrimination absent specific evidence to the contrary.[302] In contrast, Justice Stevens' argument clearly presumes the opposite: all Whites are presumptively non-racist absent evidence to the contrary despite the substantial evidence of the city's deeply racist past. This view can only be justified from a White-centered perspective.

It is important to note that the City Council in *Croson* was not dominated by Blacks bent on revenge against the long years of racist city government. In fact, the City Council was a racially-mixed group that had the full support of the White and Black members as well as the support of the White mayor. When the Court enters into this arena of political compromise over competing racial perspectives, it is wholly inappropriate for it to arbitrarily pick the White perspective as the controlling matrix by which the constitutionality of the program in question is to be judged.

The Court did precisely that, as evidenced by many of its stated conclusions offered in support of its decision. For example, the Court argued that the absence of Blacks from meaningful participation in the construction industry might not be the result of a long history of racialized exclusion by the local contractors, but, rather, Blacks may not have been inclined to participate in the construction industry in the first place. As Justice O'Connor observed:

> [T]here are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction.

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301. *Id.*

302. Justice Marshall dissenting:

> Richmond's leaders had just witnessed decades of publicly sanctioned racial discrimination in virtually all walks of life—discrimination amply documented in the decisions of the federal judiciary. This history of 'purposefully unequal treatment' forced upon minorities, not imposed by them, should raise an inference that minorities in Richmond had much to remedy . . . .

See Croson, 488 U.S. at 554 (Marshall, J., dissenting).

> The mere fact that Black membership in these trade associations is low, standing alone, cannot establish a prima facie case of discrimination.[303]

Just precisely what "other industries" did Justice O'Connor have in mind that Blacks may be "disproportionately attracted" to? This is a very disturbing and ominous reference; whatever she had in mind, the very idea that any racial group would necessarily be inclined to participate or not in any particular industry, simply on the basis of their racial identification, strongly invokes antiquated and rejected notions of racial essentialism and stereotyping that are supposedly relics of America's racist past. In any case, they are inappropriate measures for constitutional principles.

4. Innocent of Benefiting from or Perpetuating Racism

From an even longer historical perspective, it has been persuasively argued that "since the inception of the United States, wealth and institutional support have been invested on the White side of the color line, leading to an accumulation of economic and social advantages among European Americans."[304] This is hardly surprising since, despite its high-sounding rhetoric regarding freedom and equality, America was founded and has lived most of its life as a distinctly White country within which "[r]ace has long been the axis along which full and genuine membership in the polity was established and which set the boundaries for determining what constituted appropriate or inappropriate treatment of individuals."[305]

This observation is particularly important because the racial preferences of contemporary affirmative action in favor of Non-Whites has so frequently been harshly criticized as "a profound break with an American tradition of resisting government recognition of [racial] groups that the real historical record is easily misunderstood."[306] As Randall Kennedy reminds us, discourse regarding America's heralded past of color-blind reverence for individual merit above all else "is little more than disappointed nostalgia for a golden age that never really existed"[307] and is

303. *Croson*, 488 U.S. at 503.

304. BROWN ET AL., *supra* note 6, at 26 (noting "[o]n the black side, economic and institutional *dis*investment has been the practice, resulting in a process of disaccumulation.").

305. Bobo, *supra* note 245, at 207 (noting that "[r]ace has been so profoundly implicated in American politics that it played the central role in reshaping partisan identities and party alignments in the post-World War II period.").

306. *Id.* at 207.

307. Kennedy, *supra* note 233, at 53.

simply "the opening wedge of a broader effort to recapture territory 'lost' in the Civil Rights Revolution . . . ."[308]

Such nostalgic rhetoric for a mythical American golden age embracing the tradition of individuality and merit-based opportunities both denies and obscures the fact that "[e]xplicitly race-based policies, usually actively antiminority in design, have characterized major social policies in the United States almost from the very founding of the nation."[309] In fact, race-based preferences are so characteristic of the entire sweep of American history that "the logic of affirmative action policies, rather than contradicting the American historical pattern, is actually entirely consistent with it."[310]

The most important shift in focus (among others) that scholars recommend involves changing our "historical attention span."[311] This historical shift results in focusing not on the affirmative action policies begun forty years ago during the Civil Rights era, but, rather, going back seventy years to the policies instituted in Roosevelt's New Deal and the impact their legacies have had on contemporary economic and political racial reality.[312] Katznelson perceptively argues that such a shift in our historical perspective on affirmative action will reveal a largely erased and "mainly neglected earlier history of race and public policy" that will "allow us to see, think, and act about affirmative action in fresh ways."[313]

This fresh new historical perspective reveals a recent, profound, and massive system of government mandated preferences and privileges to Whites at the expense of Blacks that had almost nothing to do with merit and almost everything to do with race. However, because of a profound sense of "historical amnesia," we have forgotten about how recently "all the major tools [of] the federal government [were] deployed during the New Deal and the Fair Deal [to] create a powerful, if unstated, program of affirmative action for white[s] . . . . [that formulated a] recent record of profound and pervasive racial bias" in favor of whites at the expense of

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308. *Id.* 59–60.

309. Bobo, *supra* note 245, at 207 (citing Ronald T. Takaki, *Reflections on Racial Patterns in America*, *in* FROM DIFFERENT SHORES: PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA (Ronald T. Takaki ed., 1994)).

310. *Id.* (citing SKRENTNY, *supra* note 238.

311. KATZNELSON, *supra* note 278, at xi.

312. *Id.* at 160–61 (noting how the "powerful negative effects" of these policies "have compounded in the past two generations . . . . "); BROWN ET AL., *supra* note 6, at 26 (observing that "Franklin D. Roosevelt's policies were instrumental to both the cause of racial equality and the perpetuation of racial inequality.").

313. *Id.* at xi. *See also id.* at 21 (noting that "As the great agent of social policy change in the New Deal and postwar periods, [the] Democratic Party partnership of 'strange bedfellows' produced a series of 'strange deals' that, together, constituted a program of affirmative action granting white Americans privileged access to state-sponsored economic mobility.").

Blacks."[314] Katznelson urges Americans to remember that, beginning with Roosevelt's New Deal programs that have had enormous implications for the present day,

> [a]ffirmative action then was white. New national policies enacted in the pre-civil rights, last-gasp era of Jim Crow constituted a massive transfer of quite specific privileges to white Americans. New programs produced economic and social opportunity for favored constituencies and thus widened the gap between white and black Americans in the aftermath of the Second World War. And the effects . . . did not stop even after discriminatory codes were swept aside by the civil rights movement and the legislation it inspired.[315]

This is a critically important historical and analytical perspective to be kept in mind in evaluating contemporary affirmative action policies in favor of Non-Whites. Sniderman and Carmines observe that it is a sense of "racial double standards" that fuels White "anger" and a "sense of betrayal" at Non-White affirmative action.[316]

However, if these same Whites who are so angry and feel so betrayed by what they perceive to be "racial double standards" in favor of Non-White affirmative action were *themselves* the direct beneficiaries of White affirmative action based on precisely the same kind of "racial double standards," then their anger becomes quite problematic. From this perspective, such feelings can only be regarded, at best, as profoundly hypocritical and, at worst, completely disingenuous. It suggests that, at its core, this stripe of White resentment is not based on racial standards at all, but on racial double standards that do not benefit Whites. At the very least, it renders this White opposition completely unprincipled and based on "sour grapes" that the very same state-sponsored racial double standards providing them entry into the middle class, thereby securing their economic and social success, should now be used for other racial groups.

As Katznelson rightly suggests, this fresh new historical perspective on affirmative action, which is not focused on ancestors long dead but, instead, on the living generation here and now, completely alters the affirmative action debate. It deprives contemporary Whites of any principled basis upon which to object to so-called racial double standards *per se*, and reveals that such objections are reduced to nothing more than saying that racial double standards of government preference are completely unobjectionable so long as they are primarily targeted to and benefit Whites, but are completely objectionable when they benefit Non-Whites, in general, and Blacks in particular.

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314. *Id.* at 161.

315. *Id.* at 23.

316. SNIDERMAN & CARMINES, *supra* note 5, at 102–103.

Cast in this light, it is difficult to avoid characterizing such objections as not only nakedly hypocritical, but also as anything other than profoundly racist. When regarded from this perspective, it is not surprising that the current generation of Whites has engaged in a form of willful amnesia about the very policies and government racial preferences which created the modern White middle class.

To be sure, the New Deal is not all a one-sided picture of White benefits and Non-White burdens. Blacks and other Non-Whites benefited from the New Deal's sweeping social legislation, too. As it has been observed, it is beyond question that "African Americans benefited from New Deal policies. They gained from the growth of public employment and governmental transfers like social security and welfare."[317] However, there is equally no question that "[t]he New Deal's class-based, or race-neutral, social policies did not affect blacks and whites in identical ways."[318] Most importantly, because of the deliberately racialized way in which these programs were administered and targeted to Whites[319] and "riddled with discrimination,"[320] they "contributed disproportionately to the prosperity of the white middle class from the 1940s on."[321]

A detailed exposition of the myriad ways in which many of the New Deal policies amounted to affirmative action for Whites whose "powerful negative effects have compounded in the past two generations,"[322] is beyond the scope of this Article and must wait for another day. However, for purposes of this Article it is important to note that there was one set of New Deal programs that have particular significance to the contemporary debate on affirmative action.

Arguably, the most important New Deal policies that can be accurately characterized as affirmative action for Whites dealt with the federal government's intervention into the home ownership financing market. These programs have a relative primacy among New Deal policies for the purposes of this Article; first, because of the blatant and explicit manner in which it granted massive and transformative government preferences to Whites at the expense of Blacks, and second, because of the enormity of their intergenerational consequences to the present day in creating and exacerbating racial inequality along a number of important matrices.

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317. BROWN ET AL., *supra* note 6, at 27.

318. *Id.* (further noting that "if [New Deal] federal social policy promoted racial equality, it also created and sustained racial hierarchies. Welfare states are as much instruments of stratification as they are of equality.").

319. *See* KATZNELSON, *supra* note 278, at 160–61 (noting that "[t]he history of advantages offered to most whites and denied to many blacks in New Deal and Fair Deal policies is a particular story of targeted official institutional bias and great consequence .... [that was] racially skewed by design ....")

320. BROWN ET AL., *supra* note 6, at 27.

321. *Id.*

322. KATZNELSON, *supra* note 278, at 160–61.

Prior to the federal government's massive intervention into the private home financing market through New Deal programs, the process of financing a home was vastly different than it is today.[323] After the "economic devastation of the Great Depression [which] inflicted crippling damage to both the homeowner and the housing industry,"[324] President Franklin D. Roosevelt created three New Deal Programs that forever transformed the housing purchase and financing market.[325] These programs consisted of the Home Owner's Loan Corporation (HOLC), created in 1933 by the Home Owners' Loan Act,[326] the Federal Housing Administration (FHA), established in 1934,[327] and the Veteran's Administration (VA) in 1944.[328]

The principal contributions of the HOLC and the FHA to the establishment of White affirmative action was their creation, perpetuation, and popularization of the practice of racialized "redlining" in which neighborhoods occupied by Blacks were colored in red on agency maps and assigned the lowest rank of acceptable loan risk.[329] As a direct result, the practice of regarding Black and other Non-White neighborhoods as the most undesirable and hazardous in which to make loans, the federal government institutionalized the redlining mentality in the lending community. As a result, "[M]any avenues of credit for future home buyers [were closed] since private lending institutions adopted the HOLC's discriminatory policies, and the HOLC policies also significantly influenced how the Fair Housing Administration and the Veterans Administration decided to underwrite loans."[330]

More importantly, not only did the FHA adopt the HOLC's redlining practice, but it actually went even further. As Charles Abrams has

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323. *See* Fred Wright, *The Effect of New Deal Real Estate Residential Finance and Foreclosure Policies Made in Response to the Real Estate Conditions of the Great Depression*, 57 ALA. L. REV. 231, 232 (2005) (noting that the "American system of real estate finance that emerged from the New Deal was remarkably different from the system that existed during the Great Depression.").

324. Charles L. Nier, III, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. MARSHALL L. REV. 617, 619 (1999).

325. *See* Wright, *supra* note 323, 232, (noting how the Home Owner's Loan Corporation and the Federal Housing Administration "revolutionized how Americans bought homes.").

326. *See* Kenneth T. Jackson, *Race, Ethnicity, and Real Estate Appraisal: The Home Owners Loan Corporation and the Federal Housing Administration*, 6 URB. HIST. 419, 422 (1980). *See also* Wright, *supra* note 323.

327. *See* KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 203 (1985) (noting that "[n]o agency of the United States government has had a more pervasive and powerful impact on the American people over the past half-century than the Federal Housing Administration.").

328. *Id.* at 204.

329. Wright, *supra* note 323, at 245.

330. *Id.*

persuasively argued, it "adopted a racial policy that could well have been culled from the Nuremberg laws. From its inception FHA .... sent its agents into the field to keep Negroes and other minorities from buying homes in white neighborhoods."[331] As Florence Wagman Roisman has observed, the FHA's "role was crucial: [it] exhorted segregation and enshrined it as public policy; it was the first time in our national history that a federal agency had openly exhorted segregation."[332]

The FHA's policies of protecting White neighborhoods from integration by Blacks and other minorities was so extreme that, as Martha Mahoney has noted, "The agency categorized occupancy by racial minorities with other nuisances to be guarded against for their impact on an area, such as the presence of 'stables' or 'pig pens.' "[333] Moreover, the FHA also "advocated the racially restrictive covenant so energetically that the idea spread throughout the country. Builders everywhere adopted the covenant so their property would be eligible for FHA insurance in the future."[334]

The FHA was remarkably successful in stimulating the development of new housing in the suburbs and stemming the tide of foreclosures. However, because of its intense segregationist requirements, the price of this enormous housing boon to Whites was borne by Blacks who were trapped in the inner city in multifamily and attached housing for which the FHA refused to insure mortgages.[335] The damage caused by the FHA

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331. CHARLES ABRAMS, FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING 229 (1955). *See also* DOUGLAS S. MASSEY & NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDER CLASS 54–55 (1993) (noting the FHA's role in promoting and perpetuating residential segregation after World War II that persists to this day); JACKSON, *supra* note 327, at 213 (noting that the "FHA exhorted segregation and enshrined it as public policy"); MELVIN OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL EQUALITY 17 (1985) (noting the continuing intergenerational significance of the FHA's white racial preferences in the New Deal on the contemporary disparities in wealth between Blacks and Whites today in the form of home ownership).

332. Florence Wagman Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration,* 81 IOWA L. REV. 479, 491 (1995) (citing JACKSON, *supra* note 368, at 213, and ABRAMS, *supra* note 373, at 234).

333. Martha Mahoney, *Law and Racial Geography: Public Housing and the Economy in New Orleans*, 42 STAN. L. REV. 1251, 1258 (1989) (citing ABRAMS, *supra* note 373, at 229).

334. *Id. See also* Nier, *supra* note 324, at 626 (noting that not only did the FHA Underwriting Manual recommended that subdivisions adopt racially restrictive covenants but, remarkably, the agency did not "officially change this policy until February 1950, two years after racial covenants were declared unenforceable and contrary to public policy by the United States Supreme Court."); CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND RESTRICTIVE COVENANT CASES 225–27 (1959) (noting that after the Supreme Court's decision in *Shelley v. Kramer,* 334 U.S. 1 (1948), the FHA waited until February 15, 1950 to refuse to insure properties with new covenants not at all affecting those racially restrictive covenants already in place).

335. *See* Nier, *supra* note 324, at 625.

policies directing federal loan guarantees to Whites residing in the suburbs was not only that it recognized and ratified existing social bias against Blacks and other Non-White peoples, but that it put the government's "seal of approval on ethnic and racial discrimination ... [leading to] the practical abandonment of large sections of older, industrialized cities."[336]

These New Deal home financing policies are critically important today because as Oliver and Shapiro have persuasively observed "[h]ome ownership is without question the single most important means of accumulating assets"[337] and thereby creating wealth. Moreover, as Thomas Shapiro has effectively demonstrated, homeownership is not only the "bedrock of the American Dream," it "also is the way families gain access to the nicest communities, the best public services, and most important ... quality education. Homeownership is the most critical pathway to transformative assets."[338] Shapiro describes these transformative assets as "head-start assets,"[339] that, in light of the prior analysis, are unearned inherited assets from previous generations achieved during explicit New Deal governmental preferences for Whites at the expense of Blacks and other Non-Whites.

The consequences of this recent affirmative action for Whites are staggering. The accumulated wealth represented principally by homes purchased through New Deal White affirmative action and appreciation over the last fifty years has led to a situation where "[t]he baby boom generation, which grew up during a long period of economic prosperity right after World War II, is in the midst of benefiting from the greatest inheritance of wealth in history."[340] It is estimated that "parents will bequeath $9 trillion to their adult children between 1990 and 2030 ... [and] this wealth inheritance will exacerbate already rising inequality."[341]

This New-Deal generated, homeowner-based, baby-boomer bonanza is almost exclusively White. Blacks and other Non-Whites who were left out of the massive government racial preferences during the New Deal and its aftermath did not participate in this wealth transfer. Instead, it is far more typical for today's educated Black and Non-White professional to have to bear the cost of supporting their parents who, in old age, have few, if any, assets upon which to cushion their elder years. Most importantly, when regarded from this wealth perspective,

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336. *Id.* at 627 (citing JACKSON, *supra* note 327, at 217).

337. OLIVER & SHAPIRO, *supra* note 331, at 8.

338. THOMAS M. SHAPIRO, THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY 3 (2004).

339. *Id.*

340. *Id.* at 5.

341. *Id.* at 5 (citing Robert Avery & Robert Rendall, *Estimating the Size and Distribution of Baby Boomer's Prospective Inheritances*, *in* PROCEEDINGS OF THE SOCIAL SCIENCE SECTION OF THE AMERICAN STATISTICAL ASSOCIATION (1993)).

"[H]omeownership [gains] are reversing gains earned in schools and on jobs and making racial inequality worse."[342]

This is a critical observation because "[f]amily inheritance is more encompassing than money passed at death, because for young adults it often includes paying for college, substantial down-payment assistance in buying a first home, and other continuing parental financial assistance."[343] And most distressingly, as a consequence "it is virtually impossible for people of color to earn their way to equal wealth through wages. No matter how much blacks earn, they cannot preserve their occupational status for their children; they cannot outearn the wealth gap."[344] A gap whose seeds were sown in New Deal affirmative action for Whites and whose intergenerational effects are continuing to reverberate into the twenty-first century. Viewed from this perspective, "[T]he crucial role that private family wealth plays in our communities and in our schools to perpetuate inequality from one generation to the next .... which have virtually nothing to do with merit."[345]

C. *The Problem with the Court's White-Centered Regime*

The essence of the Court's error in choosing a particular racial perspective to control its view of racially-inflected claims is not necessarily that it has made the wrong choice. The important point is that is has made a choice at all. The metaphysical truth of the competing racial perspectives is not within the Court's province. The practical realities of efficiently and constitutionally managing the affairs of state are the only duties with which the Court may be legitimately concerned. Where the competing racial perspectives have reached a fair and acceptable compromise in the political process, the Court has no constitutional basis to interfere.[346]

Part of the Court's problem in this regard stems from what many regard as its misunderstanding of the moral imperative of the Equal Protection Clause. Justices Kennedy and Scalia have explicitly endorsed a view that considers "the moral imperative" of the Fourteenth Amendment as nothing more than "racial neutrality."[347] That is a technical and

342. SHAPIRO, *supra* note 338, at 2.

343. *Id.*

344. *Id.*

345. *Id.* at 10.

346. *See* TRIBE, *supra* note 257, at 365 (Which requires courts to "avoid deciding political questions"). *See also* Linda Sandstrom Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?*, 100 DICK. L. REV. 303 (1996). *But see* Earl M. Maltz, *Political Questions and Representational Politics: A Comment on* Shaw v. Reno, 26 RUTGERS L.J. 711 (1995) (calling for the retention and expansion of the political question doctrine); Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976).

347. *Croson*, 488 U.S. at 518.

superficial reading of the Fourteenth Amendment that can withstand neither historical nor rational scrutiny. Although it does not exhaust the Amendment, one of its principal purposes was the elimination of racial caste in America. As Cass Sunstein has persuasively argued in describing the "anticaste principle,"[348] "An important purpose of the Civil War Amendments was the attack on racial caste."[349] The moral imperative of the Fourteenth Amendment, as well as all of the Civil War Amendments, was not to achieve racial neutrality as an end in itself, but, rather, only to use it as one tool among many to achieve the ultimate goal of eliminating the sense of racial caste that had sustained slavery for over 200 years.

The Court's willingness to project its own racial views is apparent in other contexts as well. For example, in *Richmond v. J.A. Croson*, the Court argues that the affirmative action plan endorsed by the city will likely have a negative impact on Black business people who would benefit from it. As Justice Stevens argues in his concurrence, "Although [the plan] stigmatizes the disadvantaged class with the unproven charge of past discrimination, it actually imposes a greater stigma on its supposed beneficiaries."[350] The disadvantage that Justice Stevens had in mind is caused by the fact that, as he observed, "[A] statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race."[351]

Reflecting on Justice Stevens' assertion, a few questions quickly come to mind. First, what is the source of Justice Stevens' knowledge and what is his authority to posit such a proposition? Next, who are the "many" that will perceive affirmative action programs in this way? Moreover, why does their view weigh so heavily with the Court? Justice Stevens' primary legal authority for this proposition is his own opinion in *Fullilove v. Klutznick*, which he quotes at length.[352] Clearly, the "many" that Justice Stevens had in mind consists of those he refers to as the "disfavored group," that is, Whites. Thus, Justice Stevens is explicitly arguing that because the White perspective will view this program negatively and will regard its beneficiaries as "less qualified," somehow that unintended consequence is a constitutionally cognizable consideration of sufficient importance to weigh heavily in favor of overturning the program. As if to emphasize what he apparently believes is a strongly made point, he fol-

348. Cass Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411 (1994) (defining the anticaste principle as "forbid[ing] social and legal practices from translating highly visible and morally irrelevant differences into systematic social disadvantage, unless there is a very good reason for society to do so.").

349. *Id.* at 2435.

350. *Croson*, 488 U.S. at 516–17 (Stevens, J., concurring).

351. *Id.* at 517 (quoting Fullilove v. Klutznick, 448 U.S. 448, 545 (1980)).

352. *See id.*

lows the extensive quoted passage from *Fullilove* by concluding with "accordingly, I concur . . . ."[353]

As Tim Wise has observed, to argue that affirmative action harms its recipients by creating a stigma that damages their self-esteem "completely ignores that racism itself" is the true assault on "the dignity and self-esteem of its targets."[354] Wise also observes that the argument that affirmative action harms the self-esteem of it recipients is fundamentally racist in its orientation. This is because, as Wise has pointed out, given the fact that Blacks, for example, support affirmative action polices by a margin of 6:1, they must be either "too stupid to see when they are being insulted, or . . . . simply do not mind being insulted. To accept the stigma argument requires first believing that the answer to at least one of these fundamentally racist questions is yes."[355]

Interestingly, the Court also fails to compare the potential stigma to the beneficiaries of race-based preferences with the experiences of other groups that also receive preferential consideration for admission to higher education, such as the children of alumni, wealthy donors, athletes and musicians. Of course, because the Court has failed to recognize it, there is also no mention of the potential stigmatizing effects of racial preferences that were given to Whites under the transformative New Deal policies. Thus, it appears that in the Court's unsupported view, preferential treatment is stigmatizing not only just to Non-Whites, but to Non-Whites who also happen not to be children of alumni, wealthy donors, athletes or musicians. Under these auspices, the stigma argument seems not only irrational and unworthy of intelligent argument and constitutional consideration, but is also based on nothing more than the personal biases of those who assert it.

However, having judicially noticed the White-centered perspective as the appropriate lens through which to view race-inflected constitutional claims, and without any evidentiary support whatsoever, the Court does not then measure it against the Non-White perspective and engage in a rational balancing of approaches. In fact, no other perspectives are even acknowledged, much less measured or evaluated leaving the indelible impression that the White perspective not only exhausts the possibilities but also reflects the personal views of the individual Justices on the Court.[356]

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353. *Id.* at 518.

354. TIM WISE, AFFIRMATIVE ACTION: RACIAL PREFERENCE IN BLACK AND WHITE 128 (2005) (also observing that the self-esteem of affirmative action recipients would be more damaged by being denied admission or employment than by being given an opportunity to prove oneself).

355. *Id.* at 126.

356. *See generally* Catherine Pierce Wells, *Improving One's Situation: Some Pragmatic Reflections on the Art of Judging*, 49 WASH. & LEE L. REV. 323 (1992). *See also* Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE

Do Non-Whites generally agree with this view? Do Blacks generally agree? Do past Black beneficiaries agree? The Court does not know, does not ask, and is apparently not interested in knowing. Instead, its rhetorical language clearly suggests that in the Court's mind, there is only one rational perspective on this issue and it is articulated in the White perspective of the "many." Thus, the perspectives, experiences, and opinions of the beneficiaries is not relevant because, in the Court's view, the White-centered perspective can determine the existence of stigma even better than those who allegedly suffer from its burden.

However, even if Justice Stevens' prediction of the White reaction is correct, why is it constitutionally relevant? Unfortunately, he neither raises the question nor provides any answer. In addition, his argument suggests that the degree of resentment and disrespect by the "many" who share the White perspective on this matter will somehow be different than their current view of the beneficiary group if these programs were overturned.

From a Non-White-centered perspective it can be reasonably argued that, in reality, the degree of racism, of racial disrespect, and resentment of Whites toward Non-Whites—especially Blacks, and especially in the South—did not begin with affirmative action and would not end if affirmative action disappeared tomorrow. Such disrespect and low regard for Blacks by Whites already exists, not only in the South but all over America, and to such a high degree that whatever incremental addition may have been caused by Richmond's program would be but a drop in the proverbial bucket of racism. In short, it would make little or no difference at all in the ambient degree of White resentment.

Thus, the Court fails to adequately justify its choice of the White perspective on the issue of resentment and disrespect. Moreover, it also does not explain why White resentment, in any particular manifestation, even if engendered by this program, would make a difference in the racial status quo. Interestingly, Justice Stevens' argument in *Fullilove*, repeated in *Croson*, and cited in *Grutter* by Justice O'Connor, suggests that the mere fact that White resentment exists at all, in whatever degree, is not only automatically constitutionally cognizable, but in some unknown amount constitutionally determinative. This approach also suggests complete disregard of the Equal Protection Clause of the Fourteenth Amendment in that Non-White resentment has not received comparable constitutional consideration. In fact, it has received far less than a comparable amount of consideration—it has received none at all. From a constitutional perspective, it appears that racial resentment is only relevant if it is White. This analysis hardly comports with any reasonable reading of the equal protection guarantees of the Fourteenth Amendment.

L. REV. 405 (2000) (discussing outsider perspectives); Catherine Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1727 (1990) (discussing contextual decisionmaking).

Finally, there is one additional problem with Justice Stevens' argument that again emphasizes its profound racially-influenced quality. His conclusion regarding negative assumptions about the qualifications of the beneficiaries of racial preference programs does not seem to apply outside of racially-targeted programs. For example, there is no discussion of similar assumptions regarding the beneficiaries of veteran's preference programs or legacy preference programs. Either Stevens is wrong about the reaction to preference programs generally or, more likely, the resentment he anticipates would not stem from an inference that the beneficiaries must be deficient in the same way that Whites would project such a label on Non-Whites as beneficiaries of racial-preference programs.[357]

III. DUE PROCESS AND THE WHITE-CENTERED PERSPECTIVE

The rhetoric of White innocence creates and perpetuates a mythology of a generalized racial "innocence of law"[358] which considers the legal landscape to be free of systemic racial biases absent the insertion of race through affirmative action programs. This approach is also problematic because "[t]he Court presumes the institutions and institutional practices it defers to are neutral, natural, and necessary, failing to recognize how those structures are themselves the product of a contingent social context."[359]

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357. Note the absence of any similar criticism of legacy admits to elite colleges and graduate schools, where, given the history of White affirmative action, the schools are likely to be predominantly White.

358. *See* Fitzpatrick, *supra* note 164, at 119 ("In liberal views of the world, law is manifestly incompatible with racism .... [but] racism is compatible with and even integral to law."). Explicit governmental use of racial categories to benefit Non-Whites in the competition for government benefits is presumed to take place in racially-neutral territory and to be devoid of existing racially-determinative influences. Explicit racial remedies are thus presumed to intrude upon a racially-pristine canvass uncontaminated by pre-existing and outcome-determinative elements of highly racialized preference, privilege, and advantage.

359. Adam Winkler, *Sounds of Silence: The Supreme Court and Affirmative Action*, 28 LOY. L.A. L. REV. 923, 925 (1995). Winkler observes that:

> The social environment in which institutions arise impinges upon and shapes those regimes and operations. Yet the Court bases its reasoning on idealized versions of American institutions, decontextualized from the real world of American experience. Consequently, the Court does not notice how the general attitudes of prejudice and racism in society infect and infiltrate the very institutions to which the Court defers. If racism has contaminated the structure and operation of institutions, then there is considerably less reason to accord them deference, at least in their current condition.

See id.

In this way, the constitutional rhetoric of White innocence reinforces White supremacy by legitimating the status quo as the product of racially-neutral social, political and individualistic decisions and discursive dynamics. Rather than being constructed by systemic and institutional racist practices and stereotypes, it posits that racism is only problematic to the extent that it is the product of the blameworthy actions of individual bad actors who are motivated by conscious and intentional racism. In this way, it reinforces the broad discursive innocence of Whites collectively by locating racially discriminatory behavior outside the normative structure of Whiteness, and characterizing it as aberrant and individualistic.

The Due Process Clause, "like its forebear in the Magna Carta ... was 'intended to secure the individual from the arbitrary exercise of the powers of government' .... "[360] Due process, in both procedural and substantive contexts, necessarily presumes rationality, materiality and reasonableness. That is, the essence of the Due Process Clause is a guarantee of a degree of reasonableness that matters—that makes a difference in the outcome.

Thus, in terms of procedural due process, it follows that a process that makes no difference on the outcome is, in fact, no process at all.[361] Thus, if the White-centered perspective always wins, and in so doing achieves a kind of unquestioned hegemony, it cannot be said to have been the result of a reasonable process. Instead, it is evidence of a deeply-flawed and broken process that has in a very real sense made Whiteness the measure of realness. The choice for Non-Whites under this despotic rule of the White perspective has been to either allow it to supplant their own racialized experiences of the world, or to achieve a type of "bi-visuality" whereby they can be visually fluent in both racial perspectives.

Non-Whites in America have always struggled to achieve a degree of mastery over this kind of racial bi-visuality of perspective as a survival mechanism.[362] The need for such fluency began when the first chains of racialized slavery were forged in the English colonies and continues to the present day to impress itself with frightening speed, intensity, and clarity on every Non-White in America.[363] For Non-Whites in America, racial

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360. Daniels v. Williams, 474 U.S. 327, 331 (1986) (quoting Hurtado v. California, 110 U.S. 516, 527 (1884) (quoting Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819)).

361. *See* John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493 (1997). *See also* James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315 (1999).

362. HOOKS, *supra* note 16, at 31("black folks have, from slavery on, shared in conversations with one another 'special' knowledge of whiteness gleaned from close scrutiny of white people.").

363. *See* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 958–59 (2002) (describing the British author's racial initiation with his brother in the United States upon their first contact with American police). *See generally* WINTHROP D. JORDAM, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO (1968); Devon W. Carbado, *Motherhood and Work in Cultural Context: One Woman's Patriarchal Bargain*, 21

bi-visual fluency is an essential survival skill. Some Non-Whites have always absorbed and accepted the White-centered perspective as their own and even preached it to their fellows;[364] however, the vast majority have historically chosen—and continue to choose—bi-visual fluency over total surrender, occupation, and linguistic colonization of perspective by the White-centered perspective.[365]

Through the lens of the White-centered perspective, not only are Whites perceived to be innocent, but the law itself is innocent of racial bias. The ideological underpinnings of this view are a form of judicial self-inflicted colorblindness, whereby the Court and the general public presume the law itself to be free of racial inflection, presumption or bias. From the Non-White-centered perspective, the law constitutes a primary engine in the creation and perpetuation of both race itself and the racialization of society. When the Court adopts one of these perspectives as the controlling lens of a case, it has an obligation, at a minimum, to explain its choice in order to comport with due process.

Instead, the Court chooses the White-centered perspective not as the prevailing party in a contest between combatants, but rather as the naturally or divinely anointed clairvoyant of reality, as if there were never any real choice to make. This choice is supported by neither reason nor logic, and thus, at its core, it represents a fundamentally arbitrary assertion of governmental power that is anathema to a system grounded on due process guarantees. Any process that results in arbitrary decisions cannot possibly lay claim to being either a "due process," or a process consistent with the guarantees of the Equal Protection Clause.[366] In addition, this choice constitutes a clear, unconstitutional racial preference by government without even a colorable claim to advance a compelling state interest that is also narrowly-tailored. Thus, seeing racial reality through the White-centered perspective inclines the Court to make arbitrary racial

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HARV. WOMEN'S L.J. 1 (1998); KENNETH L. KARST, BELONGING TO AMERICA; EQUAL CITIZENSHIP AND THE CONSTITUTION (1989).

364. *See generally* JOHN MCWHORTER, LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA (2000).

365. bell hooks notes:

> One must face written histories that erase and deny, that reinvent the past to make the present vision of racial harmony and pluralism more plausible. To bear the burden of memory one must be willing to journey to places long uninhabited, searching the debris of history for traces of the unforgettable, all knowledge of which has been suppressed.

See HOOKS, *supra* note 16, at 41

366. *See* Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) ("No reason for [the discrimination] is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race [of the beneficiary of affirmative action] . . . which in the eye of the law is not justified.").

preferences in favor of Whiteness that are antipodal, or simultaneously irrational, glaringly obvious, and totally invisible.

IV. RECOMMENDATION

This Article's primary recommendation is for the Court, first, to acknowledge that there are, in fact, competing perspectives of racial reality; and then, to show its analysis and methodology for utilizing whichever perspective it ultimately adopts in jurisprudence dealing with race-based claims. If the Court were to implement the analytical approach that this Article suggests, it could have significant implications for both the results and the constitutional analysis for future race cases. For example, if we were to apply this approach to *Croson*, Justice Scalia could not have simply argued that the Constitution forbids racial categorization *per se* and, thus, cannot accommodate the notion of benign discrimination. He would have been constrained to acknowledge that although this reflects a legitimate construction of the Constitution, it is also based on a distinctly White-centered perspective. Public honesty would have then compelled him to acknowledge that from a Non-White-centered perspective—and especially a Black perspective—the racial prohibitions of the Civil War Amendments are fundamentally anti-subordination in character and were intended to police racial categories only to the extent that they contributed to the creation and perpetuation of a system of subordination and racial caste.[367]

If Scalia had been constrained to choose rhetorical constitutional narratives that recognized multiple legitimate racial perspectives instead of imposing an unexamined judicial notice of the White-centered perspective as the presumptive lens through which to perceive racial reality, he would have taken an important step forward toward meaningful racial equality. Under this logic, he would have had to acknowledge that the Reconstruction Amendments were aptly named, because their aim was to quite literally reconstruct and, indeed, reimagine the principled basis for the American Republic. In this light, it would have been clear that the intent of the framers of these "re-founding documents" was not simply to eliminate race from the governmental lexicon. Rather, it was to solve the great problem that was before them: to disempower race as a powerful and immutable engine of social caste.[368]

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367. *See* Sunstein, *supra* note 348. *See also* Jack M. Balkin and Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, *in* Yale Law School Public Law & Legal Theory Research Paper Series, Research Paper No. 34 SSRN http://papers.ssrn.com/abstract=380800

368. *See generally* W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 328 (First Free Press Edition 1998)(1935) (describing the near national consensus from 1864 to 1868 that the primary purpose of the Reconstruction Amendments was to protect the emancipated slaves).

From this perspective, racial classifications by the state are perfectly legitimate, so long as they do not create or perpetuate a system of subordinate racial caste. Although Justice Stevens argued in *Croson* that the White businesses not favored under the city's plan were stigmatized by the program,[369] there can be no serious argument that affirmative action programs have in any way contributed to incarcerating Whites as a group to a lower and subordinated social class. In other words, from the Non-White perspective, benign discrimination plans by government do not run afoul of the anti-discrimination prohibitions of the Fourteenth Amendment unless and until Whites as a group are realistically threatened with being reduced to a socially-subordinate lower caste. Given the overwhelming concentration of Whites in positions of power, and their vastly disproportionate control of the nation's wealth, it is unlikely in the extreme that such a subordinate status for Whites could occur within foreseeable historical time.

Having distinguished the two competing threshold perspectives and the logical extension of both, one disallowing all racial categories on a *per se* basis and the other condemning such classifications strictly under the anti-subordination principle, how then does the Court justify a choice of one over the other? Neither has an exclusive command of the truth. Each is premised on a distinctly racialized view of reality, and based on that foundation, leads rationally to its conclusion. How, then, should the Court break the tie between competing racialized perspectives in a principled way? Whichever perspective the Justices choose and explain in a more transparent process, their reasoning would expose and reveal a great deal about their thinking with respect to the racial perspectives appropriate for the law to consider in satisfying both the due process and equal protection constitutional mandates.

Although a simple national majoritarian justification might be a seductive option for the adoption of the White-centered perspective, it must be rejected because, at a minimum, it would inexorably lead to difficulty in those jurisdictions where Whites have already become or are fast becoming a numerical minority.[370] Nationally, it has been estimated that somewhere between 2025–2050 America will cease to have a numerically-dominant

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369. Ironically, Justice Stevens refers to the city's set aside program as stigmatizing "the disadvantaged class with the unproven charge of past racial discrimination;" however, he does offers neither evidentiary support nor analytical engagement beyond his own personal and racialized view that this group—White contractors—has in fact been stigmatized at all. *See Croson*, 488 U.S. at 516. Interestingly, Justice Stevens never explains why Whites are stigmatized by being denied benefirts from affirmative action programs, while Non-Whites are stigmatized for being granted those very same benefits. In the Court's tortured logic it appears that the stigmatizing effect of affirmative action can be a function of being both a beneficiary and a non-beneficiary of such benefits.

370. *See* Ross, *supra* note 18, at 224–25 (2005) (describing the increased "browning" of America, particularly in states like California, which is projected to be a majority-minority state by the middle of the century).

majority race.[371] Thus, this would not only be highly problematic from a principled basis perspective; but also, with Whites as a racial group in clear and inexorable decline as a numerical majority, a majoritarian basis would be very thin and shifting ground upon which to base a tie-breaking preference between the competing racial perspectives. Judicial expressions of personal identification, sympathy or bias with either racialized perspective would also be obviously inappropriate bases for distinction as well.

A principled and rationally-articulated, non-race based distinction between the two perspectives would indeed be difficult, if not impossible. And perhaps that is precisely the point. Instead of framing the debate as a stark choice between racialized perspectives, the more principled solution may well be the adoption of a method to accommodate more than a single monopolistic racialized perspective. In this way, the Court would then be forced to consider ways to compromise between perspectives and, unlike the status quo, acknowledge a high degree of respect for multiple perspectives on racial reality. The ultimate result would be a product of policy and practicality rather than one fraudulently alleged to derive from a race-neutral application of pure reason.

As a compromise, considering multiple perspectives would not likely satisfy either side completely, but at least both sides would participate to some degree in the final result. There would be no clear winner but no clear loser either. This solution would envision, a mutual recognition of competing multiple perspectives as being legitimate reports of racial reality, worthy of both judicial respect and consideration. This would not be easy of course. And an important threshold requirement for judging in this fashion would be for judges to be required to pay "attention . . . [and become] more self-conscious about the ways 'personal history, character, and outlook' impact the decisions and interactions with which we engage the world."[372]

This approach is consistent with the finest traditions of participatory democracy and, in fact, precisely reflects the constitutional origins of the American experiment in popular government. In addition, as the epigraph of this Article indicated, once judges acknowledge that they are indeed "situated" and have a racialized "point of view," their primary task

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371. *See id.* at 224 (citing ELIZABETH M. GREICO, U.S. CENSUS BUREAU, THE WHITE POPULATION: 2000 (2002)) (noting the decrease in the White national majority over the last 60 years from 90% to 77%). *See also* Campbell Gibson & Kay Jung, U.S. Census Bureau, Working Paper No. 56, HISTORICAL CENSUS STATISTICS ON POPULATION TOTALS BY RACE, 1790 TO 1990, AND BY HISPANIC ORIGIN, 1970 TO 1990, FOR THE UNITED STATES, REGIONS, DIVISIONS, AND STATES tbl. 1 (2002), *available at* http://www.census.gov/population/documentation/twps0056/twps0056.pdf.

372. Wildman, *supra* note 57, at 264. *See also* Wells, *supra* note 356, at 401 (noting that judging is by its nature a situated activity); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 13 (1921) (noting the inherent situated quality of judging and concluding that "[w]e may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.").

is to "identify vantage points, to learn how to adopt contrasting vantage points, and to decide which vantage points to embrace in given circumstances."[373] At a minimum, this approach requires the abandonment of any notion of a racial default perspective in adjudicating constitutional race cases, whether it be White or Non-White.

In the final analysis, the difficulty of implementing this solution is one of its principle attributes. As Martha Minnow has observed, "struggles over descriptions of reality"[374] is a good thing and not something to be rightly feared. This is a struggle over the value-talk of "racial justice;" and justice, whether racial or otherwise, "is the quality of human engagement with multiple perspectives framed by, but not limited to, the relationships of power in which they are formed."[375] Critics may charge that the approach suggested here poses an inherent danger of putting all of constitutional racial jurisprudence, what Pierre Schlag describes as "our whole normative universe,"[376] into question. In response, I embrace Schlag's eloquent rejoinder to such critics: "[I]t is only a frightened or weary perspective that confuses putting something at risk . . . with its devaluation."[377]

CONCLUSION

The normative deployment of the rhetoric of White innocence in the Supreme Court's affirmative action jurisprudence demonstrate that the Court is unreflectively locked into a White-centered perspective or master framework in terms of its ability to perceive and understand America's racial reality. As a consequence, this racially-limited perspective distorts the Court's appreciation for the full and balanced texture of racial reality in contemporary America, both limiting its analysis and dooming its remedies in combating the nation's real and intractable racial problems.

The answer to this problem is simultaneously deceptively simple and abstractly complex. It begins with a simple act, as captured in the epigraph of this Article, of recognizing that "any point of view, including one's own, *is* a point of view."[378] From this simple act comes an implicit recognition of the existence and validation of opposing points of view. In this way, those who are locked into a White-centered perspective—particularly the Supreme Court—can come to recognize and appreciate that their views

373. Minow, *supra* note 1, at 15.

374. *Id.* at 16.

375. *Id.* at 16.

376. SCHLAG, *supra* note 283, at 58.

377. *Id.* at 59. *See id.* ("That frightened and weary perspective. . .is the one that knows how to question its gods, its values, but dares not do so, for fear of confronting a loss that it knows, on some level, has already occurred.").

378. Minow, *supra* note 1, at 15.

on racial matters reflect only a particular racial experience formed in a racialized culture that neither speaks for nor completely exhausts the metaphysical truth about America's racial reality.

Through its recognition, the Court can come to not only appreciate its own perspective as both racialized and limited, but also simply *as only a perspective*, and thus to respect competing perspectives that may see the world, both literally and figuratively, through a different-colored lens. Without that threshold recognition, the differences in racially-inflected perspectives "admit no common ground," and result in

> black and white Americans ... tak[ing] possession of distinct *paradigms* .... [with] blacks and whites look[ing] upon the social and political world in fundamentally different and mutually unintelligible ways [while] .... speak[ing] across different theoretical [mindsets] ....[379]

As a consequence, "[W]hite and black citizens appear to have a terrible time talking to one another about race."[380] However, despite the size of the gap that separates the White-centered from the Non-White-centered view of racial reality, although it is not impossible to engage in "democratic discussion across the racial divide .... it is hard."[381]

A significant part of the problem in speaking across different racial paradigms is that the White-centered perspective, especially as articulated by the Supreme Court, refuses to acknowledge that it *is* a racial paradigm and that it reflects a particular racial perspective. Therefore, the Court cannot recognize the existence of any legitimate competition. Given the logic of this perspective, since the Court's perspective represents the objective truth, its only competition must be falsity, error or untruth.

From this perspective, any dissenting opinions are dismissed as interest-based ideologies or identity politics, and engaged in for the sole purpose of enlightening them or bringing them up to the point where they can be converted to also see the world through the White-centered perspective. This is essentially missionary work to save the godless and savage souls of the unenlightened rather than legitimate political engagement with ideological opponents who are worthy of respect and dignity. This is not a sound basis for deliberation because, by definition, such a perspective seeks not mutual respect but rather demands absolute surrender, total capitulation and ultimate assimilation.

Finding common ground requires, first, attaining "a language of mutual respect,"[382] and hopefully through that process of mutual respect, also come to see the critical influence that our mutual scars and wounds have

379. KINDER & SANDERS, *supra* note 7, at 288.
380. *Id.*
381. *Id.*
382. *Id.* at 289.

in determining the perspectival line of sight from which we all experience and understand racial reality. This simple act of mutual respect and validation can potentially have deeply transformative and healing effects on America's discordant racial dialogue, which in the end could allow society to talk about race more comfortably, productively, and realistically, as race is actually lived in America rather than merely how it is imagined and perceived thorough a White-centered lens. This is a goal we must achieve if racial inequality is ever to be solved, and although achieving this goal will surely require much hard work, "[T]he stakes are [so] high"[383] that failure cannot be an option.

The rising flood waters of Hurricane Katrina showed America a distinctly racialized world of Blackness, poverty, suffering, and death that it preferred not to see; a world that it had convinced itself was part of America's shameful past and not its triumphant present. Most Whites in America recoiled at what they saw but to this day insist that it had nothing to do with race.[384]

In striking contrast to the predominate White reaction, most Non-Whites generally (and Blacks in particular) in America saw it quite differently;[385] in those heart-wrenching scenes, we saw not alien others, but our own faces, our own loved ones and our own families, suffering, pleading, dying and crying for help that seemed incomprehensively slow in coming, and shockingly indifferent to the appalling specter of human suffering on such a massive scale. From our perspective, we understood that, as the old saying goes, "There but for the grace of God, go I." Such is the power of perspective.

As a consequence, the message seems to be that if America does not heed the warning that Katrina laid so bare in our living rooms day after excruciating day for what seemed like an eternity, and learn, as James Baldwin wrote, to "insist on, or create, the consciousness of the others,"[386] then perhaps the great American experiment in democracy has indeed passed the crest of the arc of history and begun its slow descent into oblivion. If so, then perhaps, as Baldwin so eloquently observed, the "fulfillment of that prophecy, recreated from the Bible in song by a slave, is upon us: 'God gave Noah the rainbow sign, [and said] No more water, the fire next time!' "[387]

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383. *Id.* ("Race, Du Bois chastened us, is 'merely a concrete test of the underlying principles of the great republic.' As it was in the beginning of the twentieth century, so it is now at the end.") (citing W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 14 (Vintage Press 1990)(1903)).

384. Page & Puente, *supra* note 24.

385. *Id.*

386. JAMES BALDWIN, THE FIRE NEXT TIME (1963), *reprinted in* THE PRICE OF THE TICKET 379 (1924).

387. *Id.*