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Radicalism, Racism, and Affirmative Action: In Defense of a Historical Approach

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RADICALISM, RACISM AND AFFIRMATIVE ACTION: IN DEFENSE OF A HISTORICAL APPROACH

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"The history of the world is the history, not of individuals, but of groups, not of nations, but of races, and he who ignores or seeks to override the race idea in human history ignores and overrides the central thought of all history."[1]

"No history, no justice; no justice, no peace. What it means to live in history is to recognize that the past has not passed."[2]

Radicalism, in general and as resistance to injustice and power imbalances, has played a noble part in history. In an editorial in support of affirmative action,[3] a local columnist recently commented that he was struck by the irony and ahistoricism of the current virulent resistance to radicalism and embrace of conservatism. He noted that American history has been marked by radical resistance: George Washington was radical in his opposition to the British crown; Abraham Lincoln was radical in his resistance to Southern whites; Dr. Martin Luther King, Jr. was radical in his refusal to accept racism and to respond to violence with more violence; and Malcolm X was radical in his insistence that "Black is Beautiful."

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1 Speech by W.E.B. DuBois to the American Negro Academy (1897), *The Conservation of Races*, *in* THE FUTURE OF THE RACE 123 (Henry Louis Gates, Jr. & Cornel West eds., 1996). A similar sentiment is expressed by Justice Blackmun in his separate opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 407 (1978).

> I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.

Id. (Blackmun, J., concurring in part, dissenting in part).

2 *See* Angela P. Harris, *The End of Reconstruction*, SALT Equalizer, Bringing the Marginalized into the Mainstream, Summer 1995.

3 Affirmative action may consist of any number of race-conscious practices including quotas, preferences, self-studies, outreach and counseling and anti-discrimination. For a more detailed description of affirmative action programs, see David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 926-33 (1996).

An essential part of our democratic tradition, radicalism, rooted in social justice ideals has propelled many progressive, transforming social and legal changes. Effective progressivism, however, cannot be grounded wholly in theory or abstract principles. Realizing equality and justice requires an understanding of the spaces in which oppression and inequality exist in history as well as today. The pervasiveness of racism, in particular, demands an acknowledgment of the historical and contemporary construction of race, racism and oppression, as well as a willingness to use law and legal institutions affirmatively to eradicate racial inequities.[4] Since "[t]he greatest casualty of racism is democracy,"[5] equal protection analysis must necessarily be grounded in America's racial roots and contemporary reality.[6] Yet the simple assertion that law, in measuring social justice, should not divorce itself from history and should acknowledge racial, economic and social inequities has been marginalized as radical.[7]

Race analyses should not be separated from the legacy of slavery and its economic and philosophical causes.[8] Slavery, a symptom of a perceived need for cheap, exploitable labor, was maintained and supported by a belief in white supremacy.[9] Although the institution of slavery was abolished, the

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4 *See* GERTRUDE EZORSKY, RACISM AND JUSTICE, THE CASE FOR AFFIRMATIVE ACTION 1 (1991). An equal protection analysis which recognizes historical and contemporary salience of race is relevant regardless of whether one adopts a group or individual based model of discrimination. For a discussion of a group-based versus an individual-based model of racial discrimination, see Kimberle Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); *see also* Fran Ansley, *Classifying Race, Racializing Class*, 68 U. COLO. L. REV. 1001, 1016 (1997) ("Affirmative action doctrine has for the most part been unable to overcome the strong individualist bent of our legal culture and, therefore, has been unable to provide frank, thoughtful, and enthusiastic support for group remedies to compensate for the infliction of group wrongs."); *see, e.g.*, Patricia J. Williams, *Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*, 104 HARV. L. REV. 525 (1990); Staughton Lynd, *Communal Rights*, 62 TEX. L. REV. 1417 (1984).

5 MANNING MARABLE, W.E.B. DU BOIS: BLACK RADICAL DEMOCRAT 1 (1986).

6 Bryan Fair notes, "American history provides a variety of reasons for repudiating tales of equality, myths of a color-blind tradition, and charges that remedial affirmative action is unfair." BRYAN K. FAIR, NOTES OF A RACIAL CASTE BABY 67 (1997).

7 Cornel West exhorts us to "continue to . . . fight for radical democracy in the face of the frightening abyss – or terrifying inferno – of the twenty-first century, clinging to a 'hope not hopeless but unhopeful.'" THE FUTURE OF THE RACE, *supra* note 1, at 112.

8 *See* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 471 (1997) ("America still pays for the crimes of slavery. We may never stop paying for them. We never ought to, until the day comes when black children have the same opportunities that others have. Affirmative action is no cure-all. It is only a small effort to do some good.") Race analyses should also incorporate the unique stories of other historically oppressed groups.

9 Bell Hooks notes that people remain uncomfortable with the term "white supremacy" (*continued*)

belief in white superiority, as ideology and as support for the subjugation of blacks, continued as evidenced in political, legal and social events throughout history.[10] Equality analysis divorced from this historical and current reality can too easily be co-opted to reinforce systems of privilege and supremacy.[11] As historian Manning Marable asks, "If we don't have a sense of [history] . . . how can we deepen the patterns of social change and continue to create greater vistas of democracy?"[12]

The decision in *Plessy v. Ferguson* is an extreme example of the danger of an ahistorical/decontextualized constitutional analysis of race equality.[13] The case, through a perversion of Jeffersonian individualism, exhibited "historical amnesia," conveniently "forgetting," as W.E.B. DuBois[14]

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and remarks that she frequently receives a strong and critical reaction for using the term. BELL HOOKS, KILLING RAGE, ENDING RACISM 187 (1995).

10 In an essay entitled, *Teaching Resistance*, Bell Hooks challenges Americans to "radicalize" their views and to think critically about the domination of people of color. *See* BELL HOOKS, *Teaching Resistance*, *in* KILLING RAGE 109 (1995). She notes,

> In the beginning black folks were most effectively colonized via a structure of ownership. Once slavery ended, white supremacy could be effectively maintained by the institutionalization of social apartheid and by creating a philosophy of racial inferiority that would be taught to everyone. This strategy of colonialism needed no country, for the space it sought to own and conquer was the minds of whites and blacks.

Id.

11 In *Adarand Constructors, Inc. v. Pena*, Justice Stevens recognized the dangers, writing, "[w]hen a court becomes preoccupied with abstract standards, it risks sacrificing common sense at the altar of formal consistency." 515 U.S. 200, 247 (1995) (Stevens, J., dissenting).

12 MANNING MARABLE, SPEAKING TRUTH TO POWER 88 (1996). According to Alex Johnson, "the condition of people of color, when viewed as a whole, has worsened in the last decade." Alex Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1045-46 (1992).

13 *Plessy v. Ferguson*, 163 U.S. 537, 542-52 (1896). *Plessy* legitimized *de jure* segregation, adopting the doctrine "separate but equal." According to the *Plessy* Court, the object of the 14th amendment

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

Id. Justice John Marshall Harlan was the lone dissenter in *Plessy*. He argued that, "the constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government or the states against any citizen because of his race. All citizens are equal before the law." *Id.* at 556 (Harlan, J., dissenting).

14 W.E.B. Du Bois was a social scientist, educator, critic and political journalist. MARABLE, *supra* note 5.

remarked, that "[t]he Negro . . . had been brought to these shores as forced labor, by definition, as a member of a group; he or she experienced oppression, by definition, as a member of this group; custom, practice, and . . . the law had 'silently but definitely separated men into groups.'"[15] The Supreme Court's "separate but equal" rule and its denial that "the enforced separation of two races stamps the colored race with a badge of inferiority" disregarded the racial realities of the time.[16] The refusal to acknowledge the stigmatization of segregation devalued the African-American experience[17] and ignored the lack of political, economic and social power of blacks at the time.[18] Blacks lived separately, often in substandard housing, with inflated rents.[19] Most black youths attended schools that were extremely impoverished—short-term schools lacking in instructional equipment.[20]

The Court in *Plessy* was willing to serve supremacist ideals by ignoring the historical and contemporary reality of black Americans.[21] As Derrick

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15 THE FUTURE OF THE RACE, *supra* note 1, at 123 (1996). Gates notes that,

> For those of us interested in the relation of white supremacy to modernity. . . . the scholarly and literary works of Du Bois are indispensable. For those of us obsessed with alleviating black social misery, the political texts of Du Bois are insightful and inspiring. In this sense, Du Bois is the brook of fire through which we all must pass in order to gain access to the intellectual and political weaponry needed to sustain the radical democratic tradition in our time.

Id. at 55.

16 *Plessy*, 163 U.S. at 551.

17 *See id.* Justice Harlan's dissent in *Plessy* made clear that the "[c]ourt was on notice as to the real purpose and harm done blacks under the 'separate but equal' doctrine." DERRICK BELL, A RACE, RACISM AND AMERICAN LAW 93 (1980).

18 Around the time of the *Plessy* decision, Du Bois completed the first sociological text on an Afro-American community. The study, "The Philadelphia Negro," was commissioned by the University of Pennsylvania and started August 1, 1896. In the study, Du Bois noted that

> [t]housands of black young adults, denied educational and vocational opportunity, had been unable to develop "fully the feeling of responsibility and personal worth" . . . blacks were "a people receiving a little lower wages than usual for less desirable work, and compelled, in order to do that work, to live in a little less pleasant quarters than most people, and pay for them somewhat higher rents . . . ."

MARABLE, *supra* note 5, at 26 (quoting Du Bois' study).

19 *See id.*

20 *See* MAURICE R. DAVIE, NEGROES IN AMERICAN SOCIETY 150 (1949).

21 In addressing the period immediately preceding the *Plessy* decision, C. Vann Woodward stated, "[b]y narrow and ingenious interpretation [the Supreme Court's] decisions over a period of years had whittled away a great part of the authority presumably given the government for protection of civil rights." C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (3d ed. 1974) (cited in *Bakke*). *See also* RAYFORD W. LOGAN, THE BETRAYAL OF THE NEGRO, 92 (5th ed. 1970) (1954) ("[The *Plessy*] decision conformed to southern customs of

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Bell notes:

> [T]he Court [in *Plessy*] spoke for the majority of whites who, whether pro- or anti-slavery, did not consider, could not envision, blacks as other than inferior people whose labor was exploited, whose cultural contributions were ridiculed and then stolen, and whose very presence provided whites of vastly different positions on the social ladder with a shared sense of superiority.[22]

Affirmative action opponents,[23] like the Court in *Plessy*, seek to

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segregation. . . ."). *See* FAIR, *supra* note 6, at 105 ("[P]ost-*Plessy* America was a cruel paradox:despite the nations written principles of fairness, equality and due process, the reality of white racial privilege continued to prevail. Equal opportunity was a myth.").

22 Derrick Bell, *California's Proposition 209: A Temporary Diversion on the Road to Racial Disaster*, 30 Loyola L.A. L. REV. 1447, 1451 (1997). Frederick Douglas, disturbed by whites' failure to accept blacks on equal terms, commented:

> It is somewhat remarkable, that, at a time when knowledge is so generally diffused, when the geography of the world is so well understood - when time and space, in the intercourse of nations, are almost annihilated - when oceans have become bridges - the earth a magnificent hall - the hollow sky a dome - under which a common humanity can meet in friendly enclave - when nationalities are being swallowed up -and the ends of the earth brought together - I say it is remarkable - nay, it is strange that there should arise a phalanx of learned men - speaking in the name of *science* [law] - to forbid the magnificent reunion of mankind in one brotherhood. A mortifying proof is here given, that the moral growth of a nation, or an age, does not always keep pace with the increase of knowledge, and suggests the necessity of means to increase human love with human learning.

Speech by Fredrick Douglas *in* THE FUTURE OF THE RACE, *supra* note 1, at 122. Frederick Douglas made this speech in 1854 to the scholars at Western Reserve College in which

> he had asserted the fundamental equality of all members of the human species; the underlying unity of black cultures in Africa and the New World; the social construction of difference; the role of environment, as opposed to genetics, in the shaping of human intelligence; and the antiquity of black cultures, traceable to the ancient Egyptians.

Id. at 121-22. Gates asserts that W.E.B. Du Bois "grounded his essay 'The Talented Tenth'" in part in Douglas' speech. *Id.*

23 The term "affirmative action" was first used by President Kennedy in 1961 in strengthening an executive order prohibiting racial discrimination by government contractors in their employment practices. It was later expanded to include goals for increasing women and minorities in the workforce by executive order of President Johnson. TIM WISE, LITTLE WHITE LIES: THE TRUTH ABOUT AFFIRMATIVE ACTION AND "REVERSE DISCRIMINATION" 12 (1995). *See also* Bell, *supra* note 22, at 1453 (Affirmative action was viewed as "a relatively inexpensive response to urban rebellions...."). *See also* Deborah Malamud, *Values, Symbols, and Facts in the Affirmative Action Debate*, 95 Mich. L. Rev. 1668 (1997) (reviewing JOHN

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divorce an analysis about race from history and to dismiss as unimportant contemporary signs of inequities attributable to racism.[24] The debate about affirmative action splits those who recognize that, "in order to get beyond racism, we must first take account of race,"[25] from those who assert that equality means avoiding race consciousness, unless in response to identifiable discrimination. The latter view both dismisses the relevance of our racial legacy and devalues the pervasive and endemic nature of institutional racism.[26] A debate about affirmative action cannot fairly be had without considering the political, economic and social disparities that we have inherited and continue to perpetuate.[27]

Affirmative action, by design, speaks to the "specific grievances and historical claims for material equality and social justice."[28] As President

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DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA (University of Chicago Press 1996) (quoting President Johnson as saying, "[i]f they're working, they won't be throwing bombs in your homes and plants.")). Nixon propelled affirmative action forward, but did so as a means of "woo[ing] the votes of the traditionally Democratic white working class." *Id.* at 1675. Even after the Civil Rights Act was passed in 1964, the EEOC lacked enforcement powers until 1971. *See* WISE, *supra*, at 13.

24 *See* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 458 (1997). Rubenfeld compares the current Court's strict scrutiny analysis with *Plessy*'s "separate but equal holding" stating, "today's colorblindness recapitulates the wrongs of *Plessy*...." *Id.* at 459. Consciousness of the persistence and presence of white supremacy does not dampen my optimism that there is hope for resistance and change. I share Bell Hook's view that "our many cultures can be remade, that this nation can be transformed, that we can resist racism and in the act of resistance recover ourselves and be renewed." HOOKS, *supra* note 10, at 7.

25 *Bakke*, 438 U.S. at 407. (Blackmun, J.). Blackmun, in asserting that a race conscious approach is consistent with the original intended purpose of the 14th amendment continues, "[i]f this conflicts with idealistic equality, that tension is original Fourteenth Amendment tension . . . and it is part of the Amendment's very nature until complete equality is achieved in the area." *Bakke*, 438 U.S. at 405 (Blackmun, J.); *see also* Rubenfeld, *supra* note 24, at 427 (arguing that an "original understanding" analysis of the 14th amendment encompasses race-conscious programs since the same congress which framed the Fourteenth Amendment "repeatedly enacted statutes allocating special benefits to blacks on the express basis of race").

26 Justice Marshall was the premier champion of a contextualized historical discussion of race in affirmative action cases. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 324, 387 (1978); Fullilove v. Klutznick, 448 U.S. 448, 517 (1980) (concurring in judgment); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 295 (1986) (dissenting); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 528 (1989) (dissenting).

27 This essay critiques analyses of affirmative action that do not explicitly include a discussion of historical and contemporary racial inequities. For a critique of the Court's application of its strict scrutiny analysis, see Rubenfeld, *supra* note 24, at 432 ("Recent affirmative action cases have turned heightened equal protection review into a cost-benefit test.").

28 MARABLE, *supra* note 12, at 67.

Johnson stated in 1965, affirmative action is an acknowledgment that

> "[f]reedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, do as you desire, and choose the leaders you please. You do not take a man who for years has been hobbled by chains, liberate him, bring him to the starting line of a race, saying 'you are free to compete with all the others,' and still justly believe you have been completely fair. Thus, it is not enough to open the gates of opportunity."[29]

Yet, the Court in *City of Richmond v. Croson* dismissed historical events which would support affirmative governmental assistance,[30] "clos[ing] its eyes to this constitutional history."[31] It devalued testimony by elected and appointed officials regarding the extent and scope of discrimination,[32] and reduced contemporary statistics of racial disparities to mere "societal discrimination," which, according to the Court, is "an amorphous concept of injury that may be ageless in its reach into the past."[33]

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[29] WISE, *supra* note 23, at 12 (quoting a speech by President Johnson in support of affirmative action, at Howard University in 1965). Wise notes that, while Governor of California, Ronald Reagan, upon signing an order to establish affirmative action in state hiring, noted, "time and experience have shown that laws and edicts of non-discrimination are not enough: justice demands that every citizen consciously adopt and accentuate a real and personal commitment to affirmative action which will make equal opportunity a reality." *Id.* at 13. While President, however, Ronald Reagan was hostile to the concept of affirmative action. During his Presidency, and while Clarence Thomas was EEOC chief, the number of discrimination suits filed by the agency fell 25%, and the number settled fell from 32% of all such cases to just under 15%. *See id.* at 14.

[30] *See Croson*, 488 U.S. at 469. *Croson* involved a minority business utilization set-aside plan adopted by the City of Richmond. The case resulted in six separate opinions with Justice O'Connor announcing the Court's judgment invalidating the Richmond set-aside.

[31] *Id.* at 558. (Marshall, J., dissenting). The Court rejected Marshall's assertion that it viewed "'racial discrimination as largely a phenomenon of the past.'" *Croson*, 488 U.S. at 494. At the same time, it did not engage in any meaningful discussion of the current impact of that history. "While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota . . . ." *Id.* at 499.

[32] *See id.* at 497. According to the Court, statements of a council person and city manager "are of little probative value in establishing identified discrimination in the Richmond construction industry." *Id.* at 500. *See also id.* at 545 (Marshall, J., dissenting).

[33] *Id.* at 497. The O'Connor opinion did not reject all racial classifications but race conscious plans are to be limited to remedying racial discrimination in the local market against the persons to benefit from the set-asides and such plans must pass the strict scrutiny test. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275-77, 279-84 (1986).

Similarly, in *Adarand Constructors, Inc. v. Pena*,[34] the Court took an "equality of oppression" stance and explicitly rejected distinctions between benign and oppressive racial categories.[35] The Court's opinion largely avoided reflection on the historical and contemporary events relevant to deciding the issue. It decontextualized a legal analysis about race from the history of race and evidence of current racial disparities. The *Adarand* Court only briefly noted that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country are an unfortunate reality, and the government is not disqualified from acting in response to it."[36] In addition, recent affirmative action opinions seem to attribute current racial disparities to race-conscious programs and the actions of people of color themselves.[37] The *Adarand* Court was concerned that race consciousness would "exacerbate rather than reduce racial prejudice."[38] Inverting the country's history of racism, the Court contended, "[c]lassifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial

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34 The Court in *Adarand* found that all governmental racial classifications must be analyzed under strict scrutiny. *See Adarand*, 515 U.S. at 227. The Court in *Adarand* overruled *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), to the extent that it was inconsistent with the Court's holding that strict scrutiny applies to all government racial classifications. *See id.* at 235, 227. The *Metro Broadcasting* Court found that "benign" federal racial classifications need only satisfy intermediate scrutiny, even if measures are not remedial. *See* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).

35 *See* Adarand, 515 U.S. at 223. The *Adarand* Court stated that its cases through *Croson* have established three general principles regarding government racial classifications: skepticism, consistency and congruence. *See id.* at 222-23. According to the majority in *Adarand*, that position is supportable because, "the Fifth and Fourteenth Amendment of the Constitution protect persons, not groups." *Id.* at 227. It took a narrow view of affirmative action; affirmative action is legitimate if it is used as a remedy for illegal discrimination. *See id.*

36 *Adarand*, 515 U.S. at 237 (striking down race conscious programs).

37 *See Plessy*, 163 U.S. at 537; MARABLE, *supra* note 12, at 86.

38 *Adarand*, 515 U.S. at 228 (quoting *Fullilove*, 448 U.S. at 545 (Stevens, J., dissenting)).

> So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled."

Id. at 241 (Thomas, J., concurring in part and concurring in the judgment).

hostility."[39] The Court's "color-blind ideology . . . disconnect[s] race from social relations or economic conditions."[40]

American racism and oppression can only fairly be understood and evaluated through a historical lens.[41] It is critical to preserve the unique history of African-Americans in this country.[42] Without a historical understanding of the way in which the law has been used to enslave and subjugate African-Americans for centuries, policies like affirmative action lack the context necessary to support them.[43] As Justice Brennan in *Bakke* noted:[44]

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39 *Croson*, 488 U.S. at 493-94.

40 MARABLE, *supra* note 12, at 65.

41 *See* Johnson, *supra* note 12, at 1073 (supporting a historical and contextual analysis of affirmative action and noting that black oppression is more severe than other forms of oppression because of its unique history).

42 For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.

Bakke, 438 U.S. at 387 (Marshall, J.).

43 Marshall's separate opinion in *Bakke* stated,

[i]n declining to so hold, today's judgment ignores the fact that for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins. It is unnecessary in 20th- century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked inferior by the law. And that mark has endured . . . . It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America.

Bakke, 438 U.S. at 400-01.

44 *See* id. at 320. Allan Bakke was denied admission to the University of California at Davis Medical School in 1973 and 1974. *See id.* Bakke was 32 when he was rejected and he was also denied admission at 10 other medical schools. *See* WISE, *supra* note 23, at 23-24. In addition, the year Bakke was rejected, 84 whites were admitted, 36 of whom had lower M.C.A.T. scores than Bakke. *See id.* At the time, the medical school had a general admissions program and one that considered only minority applicants. That special admissions committee reviewed applicants who were from "economically and/or educationally disadvantaged backgrounds." 438 U.S. at 272-73 n.1. In 1973 and 1974, 16 of the 100 seats in each entering class were reserved for special admissions program candidates. *See id.* at 275. In each of those years, the medical school admitted minority applicants with test scores and grade point

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> [C]andor requires acknowledgment that the Framers of our Constitution, to forge the 13 Colonies into one Nation, openly compromised this principle of equality with its antithesis: slavery. . . . [I]t is well to recount how recent the time has been, if it has yet come, when the promise of our principles has flowered into the actuality of equal opportunity for all regardless of race or color.[45]

Legal analysis regarding race should not, therefore, disregard the explicit protection of slavery in the Constitution,[46] the promulgation of the Slave Codes[47] and Black Codes which limited the rights of free blacks during the

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averages below Bakke's. *See id.* at 277.

45 *Id.* at 326. In a plurality decision, the Supreme Court affirmed in part and reversed in part. *See id.* at 271-72. Despite a decision rejecting the U.C. Davis plan, along with Brennan, White, Marshall and Blackmun, Justice Powell asserted that the attainment of a diverse student body "clearly is a constitutionally permissible goal for an institution of higher education." *Id.* at 311-12. Powell stated that a diverse student body contributes to the "robust exchange of ideas" that are "of paramount importance in the fulfillment of [the school's] mission." *Id.* at 313. Thus, Powell considered an applicant's race or ethnic background a "plus" factor among several other factors in an admissions program aimed at achieving diversity. *See id.* Powell stated, "As I am in agreement with the view that race may be taken into account as a factor in an admissions program, I agree with my Brothers BRENNAN, WHITE, MARSHALL, and BLACKMUN, that the portion of the judgment that would proscribe all consideration of race must be reversed." *Id.* at 296 n.36. Although Brennan, White, Marshall, and Blackmun did not explicitly adopt Powell's diversity theory, they did join Powell in concluding that a "State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Id.* at 317.

46 The Constitution treated a slave as being equivalent to three-fifths of a person for purposes of apportioning representatives and taxes among the States. U.S. CONST. art. 1, § 2. The Constitution also contained a clause ensuring that the "Migration or Importation" of slaves into the existing States would be legal until at least 1808, U.S.CONST. art. 1, § 9, and a fugitive slave clause requiring that, when a slave escaped to another State, he be returned on the claim of the master, U.S. CONST. art. IV, § 2. *Bakke*, 438 U.S. at 389; *see also* JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM 81-83 (1994); HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES, 1492 – PRESENT 176-77 (1995); FAIR, *supra* note 6, at 84-90.

47 *See Bakke*, 438 U.S. at 389; FRANKLIN, *supra* note 46, at 124-26. Slave Codes were designed to reinforce the view that slaves were not people but property. Slaves had no standing in courts. They could not make contracts or own property. A slave could not strike a white person, even in self-defense, and the rape of a female slave was regarded only as trespassing. Slaves could not leave the plantation without authorization, and any white person finding them outside without the permission could capture and return them. They could not possess firearms, hire themselves out, buy or sell goods, could not assemble unless a white person was present and were never to receive, possess or transmit any incendiary literature calculated to incite insurrections. *Id.*; *see also* ZINN, *supra* note 46, at 193-94.

antebellum period and after the Civil War,[48] racially motivated violence,[49] the expansion of Jim Crow,[50] and the segregation of the armed forces in the Civil War, the Spanish American War, World War I and World War II.[51] As Justice Marshall noted in *Bakke*:

> The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment . . . . The relationship between those figures [of inequality] and the history of unequal treatment afforded to the Negro cannot be denied. At every point from birth to death the impact of the past is reflected in the still disfavored position of the Negro[52]

Marshall concluded that "to hold that [the Fourteenth

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48 *See Bakke*, 438 U.S. at 389; FRANKLIN, *supra* note 46, at 225. Black Codes were similar to antebellum Slave Codes and severely restricted Blacks' freedom. Black Codes limited the areas in which blacks could purchase or rent property. Vagrancy laws were designed to force all blacks to work by allowing for the arrest and imprisonment of blacks who quit their jobs. Blacks were not allowed to testify in court except in cases involving other blacks, and fines were imposed for seditious speeches, insulting gestures or acts, absence from work, violating curfew and the possession of firearms. *Id. See also* RAYFORD W. LOGAN, THE BETRAYAL OF THE NEGRO 8 (1997); ZINN, *supra* note 46, at 193-94.

49 The period following Reconstruction, commonly known as the nadir, was marked by violence. "In the last sixteen years of the nineteenth century there had been more than 2,500 lynchings, the great majority of which were of African Americans." FRANKLIN, *supra* note 46, at 312. *See also* PAULA GIDDINGS, WHEN AND WHERE I ENTER 17-31 (1984). "Between 1889 and 1899 the average number of lynchings was 187.5 per year." MARABLE, *supra* note 5, at 30. During the first year after WWI more than 70 blacks were lynched. FRANKLIN, *supra* note 46, at 348. An "epidemic of race riots" led by whites against blacks swept the country early in the century. Riots took place in Statesboro, Georgia in 1904, Atlanta, Georgia in 1906, Philadelphia, Pennsylvania and Springfield, Ohio in 1904, Greensburg, Indiana in 1906, Springfield, Illinois in 1908. *See id.* at 313-16. From June through December 1919 "there were approximately twenty-five race riots." *Id.* at 349. Riots took place in Longview, Texas; Washington, D.C.; Chicago, Illinois; Lake Michigan Beach; Knoxville, Tennessee; Omaha, Nebraska; and Elaine, Arkansas. *Id.*

50 *See Bakke*, 438 U.S. at 393; FRANKLIN, *supra* note 46; ZINN, *supra* note 46.

51 *See Bakke*, 438 U.S. at 394; FRANKLIN, *supra* note 46, at 214-17, 300, 323, et seq.; ZINN, *supra* note 46.

52 *Bakke*, 438 U.S. at 395-96. Justice Marshall cited empirical data supporting this conclusion:

> The infant mortality rate for Negroes is nearly twice that for whites. The median income of the Negro family is only 60% that of the median of a white family, and the percentage of Negroes who live in families with incomes below the poverty line is nearly four times greater than that of whites . . . . For Negro adults, the unemployment rate is twice that of whites, and the unemployment rate for Negro teenagers is nearly three times that of white teenagers.

Id.

> Amendment] barred state action to remedy the effects of that discrimination would pervert the intent of the Framers by substituting abstract equality for the genuine equality the Amendment was intended to achieve."[53]

"Against this background, claims that law must be 'color-blind' or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality."[54] It is only by viewing race from a historical perspective that the importance of separating racial classifications that stigmatize or impose a badge of inferiority from those which benefit a historically oppressed class can be accurately assessed.[55] The danger that results from ignoring the racial reality is, as Brennan warned in *Bakke*, the danger of "let[ting] the Equal Protection Clause perpetuate racial supremacy."[56]

An ahistorical approach renders invisible not only the context in which the 14th amendment was enacted but the aggressive and pervasive use of the law to stigmatize and oppress African-Americans.[57] As noted by Justices Stevens and Ginsburg in their dissenting opinion in *Adarand*, Justice O'Connor's assertion that consistency "means that whenever the government treats any person unequally because of his or her race, that person has suffered an injury" under the Equal Protection Clause ignores the distinction between state action which "perpetuate[s] a caste system and [state action]

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53 *Id.* at 398.

54 *Id.* at 327. Marshall took note of the underrepresentation of African-Americans in medicine, noting that, "[u]ntil at least 1973, the practice of medicine in this country was, in fact, if not in law, largely the prerogative of whites." *Id.* at 362, 369.

> In 1950, for example, while Negroes constituted 10% of the total population, Negro physicians constituted only 2.2% of the total number of physicians. The overwhelming majority of these, moreover, were educated in two predominantly Negro medical schools, Howard and Meharry. By 1970, the gap between the proportion of Negroes in medicine and their proportion in the population had widened . . . .

Id. at 369.

55 *See id.* at 356.

56 *Id.* at 407.

57 "Practically all relevant decisions of the United States Supreme Court during Reconstruction and to the end of the century nullified or curtailed rights of Negroes . . . ." LOGAN, *supra* note 48, at 105; EZORSKY, *supra* note 4, at 74. For example, in the *Slaughter House Cases*, the Court ruled that the Privileges and Immunities clause of the 14th amendment could not be used to redress violations of basic civil rights. 83 U.S. (16 Wall.) 36 (1873). The Court applied the *Slaughter House Cases* to black plaintiffs in *United States v. Cruikshank.* 92 U.S. 542, 548-55 (1876). The *Civil Rights Cases* invalidated the first two sections of the Civil Rights Act of 1875. 109 U.S. 3 (1883).

that seeks to eradicate racial subordination."[58] In other words, the Court currently insists on applying strict scrutiny to all race conscious programs regardless of whether the programs serve benign or invidiously discriminatory goals.[59] "When a court becomes preoccupied with abstract standards, it risks sacrificing common sense at the altar of formal consistency."[60]

The history of segregation and economic disparities based on race is a contemporary reality. Young law students give voice to the claim that separation by race and distinctions based on race continue today.[61] In a class on Race & Gender that I teach at the University of Tennessee College of Law, the class has been struggling to define race. One particularly vocal group defined race as "culture." Taking a very lawyerly approach, the group developed a five factor test for determining whether a person is "culturally black." According to these students, being black meant that you live in a predominately black neighborhood, listen to "black" music, patronize "black clubs," eat black food and attend a black church. The students were defining their "blackness" through their personal experiences of segregation. Each of them—in fact, the majority of the students enrolled in the class— had grown up, gone to school and socialized primarily with people of their own race.

My students' comments reflect the reality that blacks continue to live and work separately in America due to their race.[62] A recent study has revealed that blacks, regardless of economic status, social background or personal characteristics are hypersegregated.[63] According to this study, "Blacks remain the most spatially isolated population in U.S. history."[64] The same study attributes this separateness to racial prejudice and isolates segregation as the key factor responsible for the creation of communities characterized by concentrated poverty.[65] When it comes to where and with whom

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58 *Adarand*, 515 U.S. at 243.

59 *See id.*

60 *See Adarand*, 515 U.S. at 247 (Stevens, J., dissenting).

61 *See Bakke*, 438 U.S. at 327; *see* HOOKS, *supra* note 10, at 187 ("While . . . the nature of racist oppression and exploitation has changed as slavery has ended and the apartheid structure of Jim Crow has legally changed, white supremacy continues to shape perspectives on reality and to inform the social status of black people and all people of color.").

62 *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID, SEGREGATION AND THE MAKING OF THE UNDERCLASS 1 (1993). "[I]t appears that de facto segregation is still endemic in American society and that remedial steps must be taken for its elimination." Johnson, *supra* note 12, at 1046. *See also* David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L. Q. 921 (1996).

63 *See* MASSEY& DENTON, *supra* note 62, at 114.

64 *Id.*

65 *See id.* at 118. Government practices, including FHA redlining practices played a

(*continued*)

Americans live, the dominant organizing principle is race.[66] Thus, discrimination leads to segregation, which restricts economic opportunities for blacks, producing interracial disparities, which incite further discrimination and more segregation.[67]

A recent update to the Kerner Commission report issued in 1968 bolsters that conclusion.[68] Organized by President Johnson, the Kerner Commission warned that the United States was "moving toward two societies, one black, one white separate and unequal."[69] The new report entitled "The Millennium Breach," states, "The Kerner Commission's prophecy has come to pass."[70] "[T]he report . . . says the economic and racial divide in the United States not only has materialized, it's getting wider."[71] Thus, black Americans live separately from whites, in ghettos, quite frequently attend separate schools that lack sufficient resources, and live isolated in poverty in numbers tragically disproportionate to the population.[72] For black Americans, therefore, race means facing institutional and systemic oppression. The pervasiveness of the domination and subjugation of blacks in America stems from a cultural acquiescence in white supremacy.[73]

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direct role in reinforcing housing segregation. *See id.*

66 *See* MASSEY & DENTON, *supra* note 62, at 110. According to the Association of Community Organizations for Reform Now (ACORN), discrimination in home loan lending practices by banks and other financial institutions is nationwide. MARABLE, *supra* note 12, at 105. "ACORN also discovered in its research that African-Americans and Latinos invariably pay much higher rates than whites to insure homes of identical value." *Id.*

67 *See* MASSEY & DENTON, *supra* note 62, at 109. EZORSKY, *supra* note 4, at 17 ("Today widespread segregation continues as an inherited social structure, excluding blacks from white residential areas and neighborhood schools, where they might develop white connections leading to employment."). African American neighborhoods are also disproportionately the site of toxic waste dumps. The United Church of Christ's Commission on Racial Justice report, *Toxic Wastes and Race in the U.S.*, "revealed that three out of five blacks lived in communities with abandoned toxic waste sites and that blacks made up higher percentages of the populations of urban areas with the highest number of toxic waste sites." MARABLE, *supra* note 12, at 120.

68 NAT'L ADVISORY COMM'N ON CIVIL DISORDERS REP. 1 (1968).

69 MASSEY & DENTON, *supra* note 62, at 3-4.

70 Michael A. Fletcher, *Kerner Prophecy on Race Relations Came True, Report Says; Despite Progress Foundation Finds, 'Separate and Unequal' Societies More Deeply Rooted*, THE WASHINGTON POST, Mar. 1, 1998, at §A; Deb Riechmann, *Race, Economy Gaps in U.S. are Widening, Report Claims*, KNOXVILLE NEWS SENTINEL, Mar. 1, 1998, at A1, A11.

71 Riechmann, *supra* note 70.

72 *See* JONATHAN KOZOL, SAVAGE INEQUALITIES 2-6 (1991); EZORSKY, *supra* note 4, at 18-19. (noting continued segregation in schools and the underfunding of black school districts in the "black belt").

73 Bell Hooks, in defining the term white supremacy states,

> to identify the ideology that most determines how white people in this

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Empirical data support the conclusion that discriminatory and degrading attitudes and perceptions of blacks are pervasive in American culture.[74] "[A] 1993 national survey of over 2,200 American adults funded by the National Science Foundation . . . was designed to measure contemporary racial attitudes."[75] "The study's directors . . . stated that, 'the most striking result' of the survey is the sheer frequency with which negative characterizations of blacks are quite openly expressed throughout the white general population."[76] Whites continue to hold and presumably act upon, consciously- and unconsciously- held, degrading views of blacks. According to the National Science Foundation study,

> Fifty-one percent of the white conservatives but also forty-five percent of the white liberals agreed with the statement that 'blacks are aggressive or violent.' Thirty-four percent of the conservatives and nineteen percent of the liberals 'agreed that blacks are lazy.' Twenty-one percent of the conservatives and seventeen percent of the liberals concurred that African-Americans are 'irresponsible.'[77]

A 1985 study of white voters in the blue-collar suburbs of Detroit "concluded that working-class whites 'express a profound distaste for blacks, a sentiment that pervades almost everything they think about government and politics . . . . Blacks constitute the explanation for their vulnerability and for almost everything that has gone wrong in their lives; not being black is what constitutes being middle class . . . .'"[78]

Similarly, "[a]mong whites surveyed in the San Francisco area in 1973 . . . 41% believed that blacks were less likely to take care of their homes than

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> society (irrespective of their political leanings to the right or left) perceive and relate to black people and other people of color. It is the very small but highly visible liberal movement away from the perpetuation of overtly racist discrimination, exploitation, and oppression of black people which often masks how all-pervasive white supremacy is in this society, both as ideology and as behavior. Likewise, 'white supremacy' is a much more useful term for understanding the complicity of people of color in upholding and maintaining racial hierarchies that do not involve force.

HOOKS, *supra* note 9, at 185.

74 *See* MASSEY & DENTON, *supra* note 62. For a more detailed description of the empirical data supporting the need for affirmative action, see Oppenheimer, *supra* note 3, at 926.

75 MARABLE, *supra* note 12, at 116.

76 *Id.* at 117.

77 *Id.*

78 MASSEY & DENTON, *supra* note 62, at 94. Massey and Denton's AMERICAN APARTHEID is widely viewed as perhaps the most important and comprehensive contemporary study of segregation in America's housing markets.

whites; 24% said that blacks were more likely to cheat or steal; and 14% said that blacks were more prone to commit sex crimes."[79] A Detroit area study revealed that fifty percent of whites felt that blacks were not as quiet as whites and nearly half believed that blacks were less moral than whites.[80]

A national survey completed in 1990 revealed that sixty-two percent of non-black respondents thought that blacks were lazier than other groups, fifty-three percent saw blacks as less intelligent, and seventy-eight percent felt that blacks were less self-supporting.[81] More than one in four whites believe in neighborhood segregation and forty-one percent felt as though it is acceptable for white property owners to discriminate against blacks seeking to purchase a home or rent an apartment.[82] Almost one of every four whites believes in laws prohibiting mixed marriage.[83] Nearly half of all whites say they would not send their children to any school where more than half the students were black.[84] Six of ten whites strongly or mildly agree with the statement, "Blacks shouldn't push themselves where they aren't wanted."[85] One in five whites say they wouldn't vote for a black candidate for President, even if the candidate was a member of their own party and espoused views with which they agreed.[86] In a 1988 study of whites, "36 percent stated that blacks have less ambition than whites, 17 percent said they were less intelligent, 21 percent thought they were more likely to commit crimes, and 26 percent felt blacks were unable to get equal work at equal pay because they lacked a work ethic."[87]

One commentator argued, "Imagine if you interviewed for ten jobs, and in six of the sessions [you] were sitting across from a personnel director who thought you were lazy, violent, unambitious, dim-witted, likely to steal, and would rather be at home, collecting welfare, watching TV and making babies. That is essentially what the figures indicate blacks face every day in the labor market."[88] Thus, culturally, blacks are viewed as "problem people."[89]

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79 *Id.*

80 *See id.*

81 *See id.* at 95. The study was conducted by Tom Smith of the University of Chicago's National Opinion Research Center.

82 *See* WISE, *supra* note 23, at 31.

83 *See id.* Wise notes that this statistic is a decline from 39% in 1973. *See id.*

84 *See id.*

85 *Id.*

86 *See id.*

87 MASSEY & DENTON, supra note 62, at 95.

88 WISE, *supra* note 23, at 32; *see* EZORSKY, *supra* note 4, at 15-17. Ezorsky notes the ways in which segregation and negative perceptions of blacks result in racial disparities. For example, she states that large numbers of workers find employment through personal contacts

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> Each black person is interchangeable, indistinguishable . . . . Hence one set of negative stereotypes holds for all . . . no matter how high certain blacks may ascend in the white world . . . . This problematizing of black humanity deprives black people of individuality, diversity and heterogeneity. It reduces black folk to abstractions and objects born of white fantasies and insecurities . . . . [90]

These degrading and discriminatory attitudes and perceptions likely explain the numerous studies which show economic disparities between whites and blacks. A recent study revealed that, "[w]hile the national jobless rate is below 5 percent, unemployment rates for young men in places like south central Los Angeles have topped 30 percent."[91] Blacks generally experience poverty at twice the rate of whites.[92]

> [T]he incarceration rate of black men in the United State is four times higher than the same rate in South Africa under apartheid; and 43 percent of minority children attend urban schools, usually where more than half the students are poor and more than two-thirds fail to reach even basic levels of national tests.[93]

"While the number of black families earning between $35,000 and $75,000 per year doubled between 1970 and 1990 . . . [d]uring the same period, the number of black families earning less than $15,000 also more than doubled . . . ."[94] White men comprise 43 percent of the workforce, have 95 percent of senior management positions, and 80 percent of tenured professorships.[95] The Labor Department recently studied ninety-four of the top 1,000 companies, and found that only sixteen percent of managers were women, while less than 2.6 percent were people of color.[96] A field test conducted in 1991 by the Urban Institute found that blacks were three times more likely to be rejected for jobs than their white counterparts, despite

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and networking in lieu of classified advertisements, therefore blacks who lack contacts with whites because of segregation or who are perceived negatively as a result of stereotyping are less likely to gain employment. *See id.*

89 THE FUTURE OF THE RACE, *supra* note 1, at 84.

90 *Id.* at 84-85.

91 Riechmann, *supra* note 70.

92 *See* MASSEY & DENTON, *supra* note 62, at 127.

93 Riechmann, *supra* note 70.

94 *Id.*

95 *See* WISE, *supra* note 23, at 32 (citing The Glass Ceiling Commission, developed by President Bush and Senator Dole).

96 *See* WISE, *supra* note 23, at 32.

having equal credentials.[97] A 1992 study which examined lending practices of forty-six banks in thirteen cities found that blacks and Latinos were rejected for home loans at two to four times the rate of whites, and that upper-middle-class blacks were three times as likely to be turned down as white loan applicants.[98] Blacks earning over $42,000 annually are rejected for mortgage loans at the same rate as whites earning less than $28,000 per year.[99]

Neither history nor statistics supports a view that anti-discrimination laws are sufficient to erase racial disparities. Racism cannot be defeated one victim at a time. No single man or woman can transcend the impact of racism—it requires collective action.[100] As Cornel West opines in *The Future of the Race*, "In our time—at the end of the twentieth century—the crisis of race in America is still raging."[101] "Thus, our challenge is to reconcile our democratic dreams with our increasingly undemocratic realities."[102]

The extreme and intractable problem of racism and supremacy requires a radical response. It requires that constitutional analyses purporting to advance themes of equality and justice be conducted contextually with acknowledgement and respect for the particular histories and contemporary realities of black Americans. To engage in counter-hegemonic struggle, a contextualized discussion of oppression is required.[103] Discussions about affirmative action which occur on an abstract plane or that focus primarily on individual instances of past and present discrimination can never truly transform a racist society.

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97 *See id.*

98 *See id.*

99 *See id.* at 33. Wise notes that the higher rejection rate is not due to credit worthiness. "Oftentimes the whites with spotty records are given more opportunity to explain their 'blotches.'" *Id.*

100 *See* MARABLE, *supra* note 12, at 133; *see also* Johnson, *supra* note 12 ("The most effective method to eliminate subordination is the focus on the plight of the group and not the individual."); Crenshaw, *supra* note 4.

101 THE FUTURE OF THE RACE, *supra* note 1, at 107. This is reminiscent of Du Bois' statement in 1903 that, "the problem of the twentieth century is the problem of the color-line." W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 54 (1969).

102 MARABLE, *supra* note 12, at 112.

103 *See* HOOKS, *supra* note 9, at 5 (race-talk as counter hegemonic).