

# “AND GRACE WILL LEAD ME HOME”: THE CASE FOR JUDICIAL RACE ACTIVISM

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## INTRODUCTION

Race inequality persists in the United States. We see it everywhere—in wealth, income, and health disparities; in unequal access to resources such as housing and education; in elevated rates of incarceration for nonwhites; in every dimension of life. Accompanying, underlying, and perhaps contributing to the material and resource inequalities, there also is a racial status hierarchy: it still is better to be white in America than to bear any other ascribed racial identity. “Racism” in this sense—the dignitary significance of race—remains a pervasive fact in our society.

However, our legal culture incorporates a significant degree of resistance to redistribution, including resistance to racial redistribution. At least one strand of legal thought sees it as inappropriate for law to engage, consciously or otherwise, in reconfiguring the extra-legal status quo. As applied to race, this emerges as a view that opposes remediation of racial inequality other than that clearly created by the law itself. From this perspective, racial inequality deemed to originate outside the realm of law is not a problem law is designed to address.

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The underlying premise of this Article is that this anti-race-redistributive view of law is simply wrong. It's wrong because racial inequality is morally wrong. It's wrong to assign to law no role in inequality's remediation because law has been a very significant player in making racial matters what they are today. And even if that were not the case, it would be wrong not to do what can be done about race inequality regardless of its cause or source. Law can and should take responsibility for race remediation, period.

However, this is not a moral treatise; its specific topic is what judges can do to address race inequality. Clearly, one of the most prominent manifestations of law's anti-redistributive aspect is the charge of "judicial activism." It is said that when judges (especially federal judges) interpret the law (especially the U.S. Constitution) in expansive ways (often meaning ones with which the critic does not agree) they are acting inappropriately. "Judicial activism" is a popular, if sometimes poorly articulated, target for politicians, but it also comes in for a good deal of criticism in the legal profession generally. Its contrary, "judicial restraint," situates judges, and through them the law, in a proper, non-redistributive stance.

These terms likely have as many meanings as people who deploy them. For the purposes of this Article, I will adopt the definitions that follow and distinguish two pairs of terms: judicial role activism and restraint, and judicial social activism and restraint. "Judicial role activism" will refer to the "counter-majoritarian difficulty"; it will be used to describe circumstances in which a court invalidates a legislative or executive act on grounds other than a clear command of a superseding legal authority, such as the United States Constitution.<sup>1</sup> Here the problem, if there is one, lies in role violation—the activist judge is said to be "legislating" from the bench. "Judicial social activism" will describe circumstances in which a judicial decision has the effect of altering an existing set of social policies or norms; "judicial social restraint" refers to an approach having consequences that maintain or reinforce existing social norms and practices. When "judicial social activism" is used pejoratively, it denotes a substantive transgression rather than a role-related one. The universes these pairs of terms describe may overlap, but they are not coextensive.

Given these definitions, "judicial race activism and restraint" are subcategories that fall under the headings of judicial social activism and restraint. A race activist judge would be one who issues decisions having the effect of altering the racial status quo in the larger society; a racially re-

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1. The paradigm expression of the problem known as the "counter-majoritarian difficulty" was provided by Alexander Bickel: "[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it." ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-17 (1962).

strained judge issues decisions that do not upset the existing racial distribution of goods, power, or privilege. It is the thesis of this Article that there is no case to be made for judicial racial restraint so defined, and that judges can and ought to be race activist even if, in some instances, their decisions might be regarded as judicially role activist as well.

The Article proceeds as follows. Part I develops the proposition that a dignitary racial hierarchy persists in America, taking as its point of departure Gunnar Myrdal's well-known analysis of white Americans' attitudes regarding race in the 1940s. In Part I.A., I set forth the concepts of white dignitary privilege and color stigmatization as a framework for understanding this dignitary hierarchy. Part I.B. looks to social science as well as to everyday experience as sources of evidence that color stigmatization and white dignitary privilege indeed persist. This Part concludes that whiteness remains the preferred racial identity in America, cultural norms of racial egalitarianism notwithstanding.

Part II turns to an examination of what the law might do to combat dignitary racial hierarchy. Part II.A. describes the ways in which race and the law are intertwined, seeking to rebut the possible contention that the public (legal) and private realms are separate with regard to race. Part II.B. examines the ways existing equal protection law sustains white dignitary privilege and contends that law could avoid doing so. Finally, Part II.C. argues that judges ought to be "activist" on matters of race: there is no case to be made for judicial restraint in this realm.

In many respects, we have come a long way since the era of Jim Crow. It is no longer acceptable in most white circles overtly to express sentiments of white supremacy. But whites remain attached to a subtle and culture-borne sense of superiority vis-à-vis people of color. The law, and the judges who interpret and apply it, have played an important role in the construction of race and its social meanings, and they have an equally important part to play in effectuating racial progress. It is the contention of this Article that no principle of judicial restraint is available to justify hesitation in that regard.

## I. THE PERSISTING "DILEMMA" OF RACE IN AMERICA

*The American Negro problem is a problem in the heart of the American. It is there that the interracial tension has its focus. It is there that the decisive struggle goes on. . . . The "American Dilemma" . . . is the ever-raging conflict between, on the one hand, the valuations preserved on the general plane which we shall call the "American Creed," where the American thinks, talks, and acts under the influence of high national and Christian precepts, and, on the other hand, the valuations on specific planes of individual*

*and group living, where personal and local interests; economic, social, and sexual jealousies; considerations of community prestige and conformity; group prejudice against particular persons or types of people; and all sorts of miscellaneous wants, impulses, and habits dominate his outlook.*<sup>2</sup>

Thus Gunnar Myrdal described a conflict between white America's ideals and its practice in the realm of race in 1944. The practices he described included de jure as well as de facto segregation and a myriad of other forms of race discrimination that for the most part were unrestrained by any type of legal regulation. In many respects those practices have changed, driven to some considerable extent by a sea change in the law, which now renders actionable almost every form of governmental race discrimination and also sanctions many forms of private race discrimination. But what about the "heart of the American"? It is the thesis of this Part that the hearts and minds of white Americans are not deeply changed relative to Myrdal's time, though the precise terms of the Dilemma have shifted slightly. Whites still harbor conflicting impulses regarding blacks and other people of color, simultaneously subscribing to egalitarian principles but retaining a deep attachment to the social status that constitutes the dignitary value of "white" social identity.

This thesis, that the Dilemma has not been resolved, might help explain why we do not see larger gains for people of color than might have been expected once the legal barriers to advancement fell. Myrdal struck a modestly optimistic note regarding the prospects for improvement in the "Negro's" situation. Having described material and social subordination as intertwined, he hypothesized that a diminution in any one aspect of subordination likely would occasion a corresponding diminution in other aspects as well:

Throughout this inquiry, we shall assume a general interdependence between all the factors in the Negro problem. White prejudice and discrimination keep the Negro low in standards of living, health, education, manners, and morals. This, in its turn, gives support to white prejudice. . . . If either of the factors changes, this will cause a change in the other factor, too, and start a process of interaction where the change in one factor will continuously be supported by the reaction of the other factor. The whole system will be moving in the direction of the primary change, but much further. . . .

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2. GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY xliii (1944).

If, for example, we assume that for some reason white prejudice could be decreased and discrimination mitigated, this is likely to cause a rise in Negro standards, which may decrease white prejudice still a little more, which would again allow Negro standards to rise, and so on through mutual interaction.<sup>3</sup>

Looking at the course of subsequent history through Myrdal's lens, we might say that behavioral discrimination has decreased (due in part perhaps to the pressure of legal sanctions), the "Negro's" material situation has improved to some extent, and white prejudice has either decreased or mutated into new forms. However, racial hierarchy clearly persists. I hypothesize here that a principal reason for that is the fact that whites have a continuing and deep investment in the social status that is differentially distributed along lines of race, and concomitantly have a deep and continuing investment in not allowing the "Negro" to advance too far. Today's "American Dilemma" is not so much a contradiction between ideals and practices—though subtly discriminatory practices surely do persist—but between egalitarian ideals and inegalitarian predilections. The process of positive change that Myrdal hoped for appears to have foundered on the inability of whites to disentangle ourselves from the more subtle and seductive consequences of occupying a favored social status.

However, the suggestion that whites' continuing investment in whiteness might explain the persistence of racial subordination is secondary for the moment; the primary focus of this Part is just the project of describing today's version of the Dilemma as it now exists. Though overt discrimination and overt expressions of racial prejudice have decreased significantly, the "heart of the American" is every bit as ambivalent today as it was in Myrdal's time.

#### A. *White Dignitary Privilege and Color Stigmatization*

Even today, being white in America carries with it a wide range of privileges and benefits which have material, normative, and discursive dimensions. Whites own a disproportionate share of material resources in this society, exercise significant control over the allocation of material goods to all—including racial minorities—and in many instances have the power to limit others' access to property, wealth, and material well-being.<sup>4</sup> White people and their social experience also constitute the baseline for many of our culture's normative expectations.<sup>5</sup> Thus white behav-

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3. *Id.* at 75-76.

4. See MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 13-14, 17-18 (2003).

5. BARBARA J. FLAGG, *WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS & THE LAW* 4 (1998).

ior becomes the standard against which all persons' behavior is measured: "[W]hites rely on primarily white referents in formulating the norms and expectations that become the criteria used by white decisionmakers."<sup>6</sup> And whites enjoy ideological authority as well:

Whiteness [is the ability] to define the conceptual terrain on which race is constructed, deployed, and interrogated. Whiteness sets the terms on which racial identity is constructed. Whiteness generates a distinct cultural narrative, controls the racial distribution of opportunities and resources, and frames the ways in which that distribution is interpreted. Finally, Whiteness holds sway over the very terms in which its own ascendancy is understood and might be challenged.<sup>7</sup>

However, many of these racially-distributed powers accrue to white people only in a statistical sense; that is, they belong to whites as a group. Not every white individual is in a position to exercise material, normative, or narrative ownership and authority. Indeed, most are not. But there is one benefit of whiteness that every white person *does* possess on an individual and daily basis: this is the dignitary value of being white.

What is this dignitary benefit of whiteness? It is that socially speaking it's simply better to be white than to be a person of color. This is a matter of social valence: whiteness carries a positive valence that color does not. This is not to say that the dignitary worth of whiteness is monolithic. It is gendered, and is impacted differentially by class, ability status, and religion at least; these aspects of dignitary whiteness will be explored more fully below. But other things being equal, there's always a social advantage in being white.

Like whiteness itself, the positive valence of whiteness tends to be invisible to whites: [W]hite people externalize race. For most whites, most of the time, to think or speak about race is to think or speak about people of color, or perhaps, at times, to reflect on oneself (or other whites) in relation to people of color. But we tend not to think of ourselves or our racial cohort as racially distinctive. Whites' "consciousness" of whiteness is predominantly *unconsciousness* of whiteness. We perceive and interact with other whites as individuals who have no significant racial characteristics. In the same vein, the white person is unlikely to see or describe himself in racial terms, perhaps in part because his white peers do

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6. *Id.*

7. Barbara J. Flagg, *Foreword: Whiteness as Metaprivilege*, 18 WASH. U. J.L. & POL'Y 1, 2 (2005).

not regard him as racially distinctive. Whiteness is a transparent quality when whites interact with whites in the absence of people of color. Whiteness attains opacity, becomes apparent to the white mind, only in relation to, and in contrast with, the “color” of nonwhites.<sup>8</sup>

Because whiteness generally does not figure significantly in the consciousness of white people, the social valence it carries also goes unrecognized. But that is not the whole story. Though transparent in some respects, whiteness’ positive valence occupies a different position in white race consciousness than does recognition of whiteness itself. Though the latter often is absent from whites’ daily consciousness, white identity *is* readily acknowledged when brought to whites’ attention. However, recognizing the dignitary advantage that attaches to whiteness is more problematic. On the one hand, the proposition that it’s better to be white, socially speaking, is accepted by many white people when that question is raised. But on the other hand, strong egalitarian norms militate against acknowledging whiteness’ dignitary value. For the majority of white people, then, conscious recognition of whites’ dignitary advantage is a deeply difficult proposition, and the dignitary privilege associated with whiteness may be more repressed than merely transparent.

“Privilege” is a term that has no simple antonym. “Disadvantage” is the word commonly used, but one looks here for an expression that captures *dignitary* disadvantage and de-emphasizes the material aspects of racial hierarchy. Social psychologists have just such a term: stigmatization. Accordingly, I coin the phrase “color stigmatization” to refer to the obverse of “white dignitary privilege.”<sup>9</sup> Stigmatization is a process in which some socially salient characteristic functions to discredit those who bear it. The stigmatizing “mark” becomes the locus of a devalued social identity. As this process is delineated in the social science literature, the discrediting is both deep and global; Erving Goffman used phrases such as

8. FLAGG, *supra* note 12, at 1-2.

9. I use “color stigmatization” to refer to a general social reality that is independent of context: in this analysis people of color are stigmatized everywhere and all the time. This use differs from a more common sense of “stigma,” in which specific events or situations are seen as (potentially) stigmatizing. See, e.g., R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 823 (2004) (“The upshot is that racial stigma turns in large part upon the context in which the stigmatized individual finds her- or himself.”); Angela Onwuachi-Willig, Emily Houh & Mary Campbell, *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 CALIF. L. REV. 1299 (2008) (looking at the stigmatizing effects of affirmative action). However, Glenn Loury, who is primarily concerned with the effects of stigmatization on black people, does employ the term in a global sense similar to mine. See GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 5 (2002) (defining stigma as “[a]n awareness of the racial ‘otherness’ of blacks”).

“tainted” and “discounted”<sup>10</sup> to describe stigmatized individuals, and said that “we believe the person with a stigma is not quite human.”<sup>11</sup>

In the United States, of course, the racial identities that stigmatize are the identities of “color”; whiteness is the racial characteristic associated with “normals” (to borrow Goffman’s terminology).<sup>12</sup> The literature on stigmatization, whether or not aimed squarely at race, describes a set of social relations that are highly congruent with easily observable, everyday dynamics of race: it identifies the existence of a supporting ideology, attitudes of disrespect toward the stigmatized, avoidance behaviors, and social processes that are intertwined with relations of power as aspects of the process of stigmatization. The stigmatization literature provides one important source, though not the sole source, of evidence supporting the proposition that whites have an ongoing psychological investment in the maintenance of a racial hierarchy.

### *B. The Evidence for Color Stigmatization*

Evidence for the present-day stigmatization of color comes from multiple sources. We can look to the social experience of whites as well as the experience of people of color, and social science provides another avenue of corroboration. In addition to the simple fact that all social scientists who study stigmatization include some racial identities among the characteristics that stigmatize, one specific body of work, known as “high status, high bias” studies, is especially illuminating. I explore these evidentiary sources in turn.

#### *1. Social Experience*

The best evidence for the existence of a culturally-borne dignitary advantage in whiteness is individual experience—the social knowledge held both by whites and by people of color. To many readers, the proposition that whiteness carries a positive social valence will be intuitively obvious. Though I am generally reluctant to comment on the social experience of people of color, I have little doubt on this point: I find it hard to even imagine a person of color who would take issue with the proposition that as a general matter whiteness still is the preferred racial identity in this society (though that may not be the case at all times in every subgroup). As Professor John Powell puts it: “The metamorphic development of racial categories is more than just a curious historical footnote because who is con-

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10. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 3 (1963).

11. *Id.* at 5.

12. Though Goffman does not specifically mention whiteness, he does include “race” among the tribal identities that stigmatize. *Id.* at 4.



sidered White in America has always signified who is entitled to privilege. In this sense, the phrase 'White privilege' is a redundancy . . . Whiteness has always signified worthiness, inclusion and acceptance."<sup>13</sup>

Moreover, there are substantial secondary data pointing in the same direction. For example, in *Two Nations*, Andrew Hacker describes a study of the perceived value of whiteness:

Let us try to find out [the value of being white] by means of a parable: suspend disbelief for a moment, and assume that what follows might actually happen:

#### THE VISIT

You will be visited tonight by an official you have never met. He begins by telling you that he is extremely embarrassed. The organization he represents has made a mistake, something that hardly ever happens.

According to their records, he goes on, you were to have been born black: to another set of parents, far from where you were raised.

However, the rules being what they are, this error must be rectified, and as soon as possible. So at midnight tonight, you will become black. And this will mean not simply a darker skin, but the bodily and facial features associated with African ancestry. However, inside you will be the person you always were. Your knowledge and ideas will remain intact. But outwardly you will not be recognizable to anyone you now know.

Your visitor emphasizes that being born to the wrong parents was in no way your fault. Consequently, his organization is prepared to offer you some reasonable recompense. Would you, he asks, care to name a sum of money you might consider appropriate? He adds that his group is by no means poor. It can be quite generous when the circumstances warrant, as they seem to in your case. He finishes by saying that their records show that you are scheduled to live another fifty years as a black man or woman in America.

How much financial recompense would you request?

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13. john a. powell, *The "Racing" of American Society: Race Functioning as a Verb Before Signifying as a Noun*, 15 LAW & INEQ. 99, 107 (1997).

When this parable has been put to white students, most seemed to feel that it would not be out of place to ask for \$50 million, or \$1 million for each coming black year. And this calculation conveys, as well as anything, the value that white people place on their own skins.<sup>14</sup>

A more recent series of studies found that whites today place a lower value on whiteness; the median compensation requested ranged from \$1000 to \$500,000, depending on the manner and context in which the question was framed.<sup>15</sup> The authors of these studies conclude that most whites seem to be “relatively unaware of . . . ongoing racial disparit[y].”<sup>16</sup> But even at the lower figures, it appears that many white people recognize that whiteness carries a significant value.

However, not all white people experience whiteness as a locus of dignitary privilege; the claim that it is such does not resonate for them. Assuming for the moment that it *is* the case that the culture differentially prizes whiteness and “color,” I believe the disjunction between cultural reality and individual experience can be attributed to two somewhat distinct causes: the experience and interpretation—or misinterpretation—of discrimination, and the existence of other distributional axes of dignitary value.

Anyone, privileged or not, can be the target of discrimination, by which I mean being treated differently (and badly) because of a characteristic that should not have been taken into account under the circumstances. Thus, for example, while it is clearly discriminatory to refuse to hire or train black people as doctors (because being black is not relevant to one’s ability to be a physician), it would be equally discriminatory to refuse to hire or audition white people as musicians at a jazz club (because whiteness is not relevant to one’s skill as a musician). Though a precise identification of “relevant” characteristics can be elusive in some contexts, the basic principle should be clear: discrimination and social privilege are entirely distinct concepts. To the extent they overlap in lived reality, it is because discrimination is more likely to target the least privileged.

Experiencing discrimination can feel like the absence of privilege, but it might better be described as a temporary loss of privilege when its victims are the otherwise socially advantaged. In fact, the pain, frustration, and anger occasioned by being the target of discrimination may be proportionate to the degree of privilege its targets otherwise enjoy. One can see

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14. ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 31-32 (1992).

15. Philip J. Mazzocco et al., *THE COST OF BEING BLACK: WHITE AMERICANS’ PERCEPTIONS AND THE QUESTION OF REPARATIONS*, 3 DU BOIS REV. 261, 280 (2006).

16. *Id.* at 288.

an example of this phenomenon in the *Frontline* documentary “A Class Divided,” in which white corrections workers, participating in Jane Elliott’s “Brown Eyes, Blue Eyes” workshop, express considerable anger and frustration at being subjected to discrimination, even though they are aware all the time that it is only an exercise, and one of relatively short duration.<sup>17</sup> Thus, the experience of discrimination alone, even when accompanied by deep and genuine pain, cannot be considered an indicator of the lack of social privilege; it may well signal just the opposite.

Moreover, the relationship between social privilege and discrimination is rendered even more complex by the fact that dignitary advantage is distributed along multiple axes, of which race is only one. Other socially salient characteristics that differentially affect dignitary valence include gender, class, ability status, religion, and sexual orientation. (Of course, these attributes matter differently in different contexts.) As these characteristics intersect with race (and with one another), dignitary privilege, or the lack thereof, is complex and nuanced. As Tim Wise explains it:

[O]ther forms of privilege mediate, but never fully eradicate, something like white privilege. So I realize that rich whites are more powerful than poor ones, white men are more powerful than white women, able-bodied whites are more powerful than those with disabilities, and straight whites are more powerful than gay, lesbian, bisexual, or transgendered whites.<sup>18</sup>

There is no single social meaning of whiteness; no absolute dignitary advantage conferred by it.

Why, then, speak of white dignitary privilege at all? Because it is an important constituent of social life. Here again, Wise has some helpful commentary:

But despite the fact that white privilege plays out differently for different folks, depending on these other identities, the fact remains that when all other factors are equal, whiteness matters and carries with it great advantage. So, for example, although whites are often poor, their poverty does not alter the fact that relative to poor and working class persons of color, they typically have a leg up. No one privilege system trumps all others every time, but no matter the ways in which individual whites may face obstacles on

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17. See *Frontline: A Class Divided* (PBS television broadcast Mar. 26, 1985), available at <http://www.pbs.org/wgbh/pages/frontline/shows/divided/etc/view.html>. Chapter Five of that presentation features the workers’ reactions.

18. TIM WISE, *WHITE LIKE ME: REFLECTIONS ON RACE FROM A PRIVILEGED SON*, at ix (2005).

the basis of nonracial factors, our race continues to elevate us over similarly situated persons of color.

The notion of privilege is a *relative* concept, as well as an absolute one . . . In relative terms, that is to say compared to persons of color, whites receive certain head starts, and certain advantages, none of which are canceled out because of factors like class or gender or sexual orientation. Likewise, heterosexuals receive privileges relative to GLBT folks, none of which are canceled out by the poverty that many straight people experience; so too, rich folks have certain privileges on the basis of wealth . . . none of which are canceled out just because some wealthy persons happen to be disabled.<sup>19</sup>

We speak of *white* privilege because it is a social reality. I would add that there is some analytic value in disaggregating race and other socially salient characteristics that have dignitary implications, because the dynamics of each, and the underlying cultural mechanisms that support them, are distinct. At the same time, it must be kept in mind that the dignitary consequences of “race” are never assumed to be monolithic; it might be helpful always, in one’s imagination, to draw comparisons between otherwise socially-similar individuals, as does Wise in the passage quoted above.

It’s also worth noting that even on the disaggregated dimension of race, the claim that whites enjoy dignitary advantage does not mean that all nonwhites are situated in precisely the same non-privileged position. Indeed, because dignitary status is culturally-borne, and is supported and transmitted by culturally-inscribed stereotypes, it is only to be expected that nonwhite persons of different races are subject to varying forms of dignitary deprivation.

## 2. *Social Science*

As one leading authority puts it:

Stigma is a powerful phenomenon, inextricably linked to the value placed on varying social identities. It is a social construction that involves at least two fundamental components: (1) the recognition of difference based on some distinguishing characteristic, or “mark”; and (2) a consequent devaluation of the person. Goffman (1963) described stigma as a sign or mark that designates the bearer as “spoiled” and therefore as valued less than “normal” people.

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19. *Id.* at ix-x.

Stigmatized individuals are regarded as flawed, compromised, and somehow less than fully human.<sup>20</sup>

Erving Goffman divided stigmatizing characteristics into three broad categories: some physical conditions (such as physical disabilities and deformities), psychological and/or “character” attributes (such as addiction or radical political behavior), and some “tribal” identities, having to do with race, nationality, or religion.<sup>21</sup> Though there is not a great deal of material directly addressing the stigmatization of “tribal” identities, it does appear that every social psychologist who has touched on the question follows Goffman in recognizing that race is a dimension along which stigmatization takes place.<sup>22</sup> Thus contemporary social science endorses Goffman’s initial insights about the stigmatization of some racial groups. In the United States, persons of color are members of a stigmatized category.

In particular, one can infer the continuing operation of color stigmatization from studies that explore a phenomenon known as “high status, high bias” behavior. A leading example is a study conducted by Kline and Dovidio, in which participants were asked to aid in evaluating the credentials for admission of applicants to their own college.<sup>23</sup> Each was presented with one of three conditions: the file of a poorly qualified applicant, a moderately qualified one, or a highly qualified applicant. Within each category, the race of the applicant was manipulated by appending a photograph to otherwise identical files. As the authors describe the results:

Participants rated the poorly qualified black and white applicants equally low. They showed some bias when they evaluated the moderately qualified white applicant slightly higher than the comparable black candidate. Discrimination against the black applicant was most apparent, however, when the applicants were highly qualified.<sup>24</sup>

Though the authors are careful to state that “[p]oorly qualified black applicants were not rated worse than poorly qualified white applicants,”

20. John F. Dovidio, Brenda Major & Jennifer Crocker, *Stigma: Introduction and Overview*, in *THE SOCIAL PSYCHOLOGY OF STIGMA* 1, 3 (Todd F. Heatherton et al. eds., 2000).

21. See GOFFMAN, *supra* note 10, at 4.

22. The following is illustrative: “This book is about people’s reactions to members of groups that can variously be described as stigmatized, deviant, or of marginal social status. There are many such groups in the United States—blacks; former mental patients; the aged; persons afflicted with physical disabilities, deformities, and chronic diseases; behavioral deviants such as criminals, drug addicts, alcoholics, and prostitutes.” IRWIN KATZ, *STIGMA: A SOCIAL PSYCHOLOGICAL ANALYSIS* 1 (1981).

23. John F. Dovidio & Samuel L. Gaertner, *On the Nature of Contemporary Prejudice: The Causes, Consequences, and Challenges of Aversive Racism*, in *CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE* 3, 17 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998).

24. *Id.* at 18.

the data in fact show slightly higher “admission” rates for poorly qualified black candidates, though the difference is below the level of statistical significance.<sup>25</sup> Thus there is an almost perfect correlation between perceived status and aversive behavior: the highest status blacks posed more of a dignitary threat to the white evaluators, and so were less likely to gain admission than their white counterparts, while the lowest status blacks were less problematic and so actually gained “admission” slightly more frequently than comparably qualified whites. The fact that discriminatory behavior correlates with status supports the proposition that stigmatization, rather than prejudice or stereotyping— each of which would apply equally to all black applicants—is at work here.

One might be tempted to argue that the pattern of admission recommendations was driven by the perceived self-interest of the study’s subjects: they tended to devalue the qualifications, and so oppose the admission, of candidates who posed a relatively greater competitive threat to their own future prospects, and to approve the admission of candidates who were less likely to adversely impact their own life chances. This explanation would be apposite, of course, only if the subjects thought that well-qualified blacks presented greater competitive challenges than well-qualified whites, which would be the case, for example, if they anticipated competing under a regime of “affirmative action.” The study’s authors had a similar concern, and so designed another study aimed directly at the affirmative action hypothesis. Looking at the behavior of white subjects presented with opportunities to help black or white partners, they found that “ability, not status, was instrumental in determining helping toward whites, but status, not ability, was the major factor influencing prosocial behavior toward blacks.”<sup>26</sup> White subjects helped high status blacks less frequently than they helped low status blacks.<sup>27</sup>

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The cumulative evidence perhaps makes more of a case than the central proposition really requires: it remains true that whiteness is a preferred racial identity in America, and that people of color, and especially black people, are a subtly devalued, discredited class. It is also the case that the egalitarian portion of the equation is overt and may be explicitly expressed, while the social message of color stigmatization largely “flies under the radar” of (white) social consciousness. But the latter message persists. Members of the dominant—“normal”/white— racial group are

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25. *Id.*

26. *Id.* at 20.

27. *Id.*

socialized both to regard people of color as social inferiors, and at the same time to regard them as equals.

Accordingly, individual actors can embody a form of racism without deviating at all from cultural norms, simply by reflecting the content of color stigmatization. This culturally competent racism is a racism of social valence; it views people of color as less significant, less valued, and less valuable persons than whites. Acting on the recognition of this social reality is not a matter of individual fault, but a sign of cultural knowledge.

I do not mean to suggest that culturally competent racism is the only sort of racism remaining today. Quite the contrary—we know that ten to fifteen percent of white people harbor conscious race prejudice, because they are willing to say so.<sup>28</sup> And of course, given the culture's disapproval of race prejudice, there almost certainly is a significant additional number who carry conscious prejudice but disclaim it when asked or interviewed. Beyond this, there is unconscious racism, by which I mean either cognitive or affective race bias that is held below the level of the individual's conscious awareness. In the case of race, "cognitive bias" generally refers to racial stereotypes, which can be consciously rejected but nevertheless accepted at a subconscious level. Unconscious prejudice—*affective bias*—can be thought of as a repressed version of the dislike and hostility that constitute the core of conscious racism. Overall, unconscious racism takes many different, if perhaps subtly different, forms, and it is ubiquitous.

In a sense, culturally competent racism—the racism of color stigmatization—is even lower on the racism scale; it is less virulent than either conscious or unconscious racism. At minimum, it is not in conflict with cultural norms taken as a whole, though of course it is inconsistent with strict egalitarianism. Color stigmatization is excruciatingly subtle and pervasive, and so highly intractable. In this way, the Dilemma persists.

## II. THE LAW'S RESPONSE

One might be tempted to argue that the law has done a reasonably good job of dealing with the behavioral aspects of the "Dilemma" Myrdal described: it has outlawed segregation and other forms of *de jure* governmental discrimination, and even has proscribed some forms of private discrimination.<sup>29</sup> Of course, one equally could argue that what has been done has not gone nearly far enough even in those realms: *de facto* segregation is untouched, as are many of the most common forms race discrimination

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28. *Id.* at 4.

29. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding segregated public schooling unconstitutional); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (prohibiting discrimination in voting registration, private places of public accommodation, public facilities, employment, and educational facilities, and by any entity receiving federal funding).

takes today. Moreover, race-specific affirmative action, which might undo some of the consequences of past discrimination, has been held largely impermissible.<sup>30</sup> Even so, it seems entirely impossible to argue that nothing has been accomplished since Myrdal's time. But almost all that has been accomplished has been on the behavioral front; it is equally clear that the law has done little or nothing to combat white dignitary privilege.

Perhaps, one might say, that is because it is not the law's place to address private, individual attitudes, racial or otherwise. I reject that contention as it applies to race, and in this Part, I present an argument that the law not only may, but must, do its part in attempting to dismantle the dignitary elements of racial hierarchy. This is not to say that it is exclusively a legal problem, but law surely performs symbolic as well as regulatory functions and at least on that front ought not to reinforce white supremacy. Moreover, there exists ample latitude for adoption of legal doctrines that might have an actual impact on racial attitudes. At minimum, an institution as significant to the social fabric as is the legal system ought not turn a blind eye to the ongoing existence of the American Dilemma.

The sub-Parts that follow contend that law was and is a very significant ingredient in the creation of "race"; that there is much that could be done by the law—and hence by the judiciary—to combat color stigmatization and white dignitary privilege; and that there is no place for judicial restraint when it comes to racial justice.

#### A. *Race is a Creature of the Law*

One can find an example of an attempt to draw a distinction between the legal realm of race and the private realm in the majority opinion in *Plessy v. Ferguson*:

The argument [that the challenged law should be invalidated] also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the [N]egro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said by the Court of Appeals of New York in *People v. Gallagher*, 93 N. Y. 438, 448, "this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citi-

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



zens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed." Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.<sup>31</sup>

Of course *Plessy* has been repudiated on other grounds, but it would be possible to articulate an analogous position today. Many social scientists observe that humans uniformly, perhaps inevitably, categorize and stereotype others; it is thought to be a necessary technique for managing and retrieving information.<sup>32</sup> These researchers do not necessarily attribute the *development* of race in America to these ubiquitous processes, but it would be possible to do so. Such a theory would have it that the racial categories embedded in the fabric of American culture are nothing more than the products of collective observation of differences—physical, cultural, religious, and so on. I don't mean to construct a straw man here, but just to make clear that it would be possible to set forth an ahistorical, acontextual account of "race" in which neither law or any other social institution played a role. This sub-Part aims to obviate such an analysis.

The story of race in America must begin with the premise that there is no such thing as biological race. The phenomenon we call "race" is entirely socially constructed, lacking any meaningful grounding in biological fact. More precisely, there is no biological foundation for the racial categories we commonly employ. Though this proposition is not yet part of our shared cultural discourse on race, it is well-accepted by geneticists and the scientific community generally:

The genetic data are consistently and strongly informative about human races. Humans show only modest levels of differentiation among populations when compared to other large-bodied mammals, and this level of differentiation is well below the usual threshold used to identify subspecies (races) in nonhuman species. Hence, human races do not exist under the traditional concept of a

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31. *Plessy v. Ferguson*, 163 U.S. 537, 551-52 (1896).

32. See, e.g., Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in DANIEL T. GILBERT, SUSAN T. FISKE & GARDNER LINDZEY, *THE HANDBOOK OF SOCIAL PSYCHOLOGY* VOL. II, 357, 362-63 (4th ed. 1998).

subspecies as being a geographically circumscribed population showing sharp genetic differentiation. A more modern definition of race is that of a distinct evolutionary lineage within a species. The genetic evidence strongly rejects the existence of distinct evolutionary lineages within humans. . . .

Because of the extensive evidence for genetic interchange through population movements and recurrent gene flow going back at least hundreds of thousands of years ago[*sic*], there is only one evolutionary lineage of humanity and there are no subspecies or races under either the traditional or phylogenetic definitions. Human evolution and population structure have been and are characterized by many locally differentiated populations . . . at any given time, but with sufficient genetic contact to make all of humanity a single lineage sharing a common, long-term evolutionary fate.<sup>33</sup>

As this passage indicates, the claim that human races do not exist at the biological level is not a claim that there are no genetic differences among humans at all; clearly there are variations of morphology, largely associated with geographic distribution and distance, and there are other characteristics differentially distributed along the same axes as well. However, there is no gene or set of genes that corresponds to the taxonomy of culturally significant racial categories. In fact, intraracial genetic variation is greater than interracial variation.<sup>34</sup> In this sense, it can be said that biological race does not exist.

Once one accepts the proposition that race is wholly a social construction and turns to the question of why it developed as it did in the United States, the institution of slavery cannot be ignored. However, while it is quite clear that "race" served an important function in the cultural discourse justifying slavery, historians have noted that the practice of slavery predated the development of the concept of biological race. For example, Audrey Smedley explains that though Africans were present in the Colonies as early as 1619, they were not reduced to the status of permanent slaves until the early part of the eighteenth century.<sup>35</sup> But even then, Africans were not understood as members of a biologically distinct race or species:

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33. Alan R. Templeton, *Human Races: A Genetic and Evolutionary Perspective*, 100 AM. ANTHROPOLOGIST 632, 646-47 (1998).

34. Masatoshi Nei and Arun K. Roychoudhury, *Genetic Relationship and Evolution of Human Races*, in 14 EVOLUTIONARY BIOLOGY 1, 40 (Max K. Hecht, Bruce Wallace & Ghilleen T. Prance eds., 1982).

35. See AUDREY SMEDLEY, RACE IN NORTH AMERICA: ORIGIN AND EVOLUTION OF A WORLDVIEW 93, 98-99 (2d ed. 1999) (citing GARY B. NASH, RED, WHITE AND BLACK: THE PEOPLES OF EARLY AMERICA 159 (3d ed. 1992)).

There should be no doubt that the Africans' physical differences facilitated their reduction to the kind of servitude that the English had long wanted and that agricultural circumstances demanded. But this was not the single cause of their reduction to slavery. The visibility of Africans made it possible to structure the demarcation point of permanent slavery solely on the basis of color. . . . Yet it is interesting that the justification for their reduction to slavery did not hinge initially on this physical difference. In fact, English arguments for embarking on the enslavement of Africans rested on the same issues of religion and "savagery" that they had applied to the Irish and the Indians. So the colonists convinced themselves, and others, that the Africans deserved the status of slavery because they had lived in sin and savagery in Africa. Indeed, many colonists of the seventeenth century believed, or vindicated their actions with the belief, that enslavement was a major step toward saving the souls of the Africans.<sup>36</sup>

As Smedley puts it, the "ideology" of race did not "crystallize" until the late eighteenth century, driven by a confluence of forces that included the rise of "science," the egalitarian rhetoric embedded in the Revolutionary movement, and, somewhat ironically, the growing appeal of anti-slavery forces.<sup>37</sup> It is not until the nineteenth century that we see a fully developed racial "worldview" that includes the essential elements of innate and inheritable biological differences, hierarchically arranged.<sup>38</sup> Though it might be argued that today a belief that race is a biological reality is gradually becoming less firmly entrenched, it is the contention of this Article, elaborated in Part I above, that the hierarchical aspect of race is very much alive.

The present question is the role of law in the development of race in America; the above account should make it obvious that race would not be what it has been, and is, if not for its legal dimension. Slavery, of course, is itself a legal status. The American Revolution was about the legal relations between England and its American colonies; the fundamental principles of the Revolution are set forth in this country's founding legal documents. And, at least arguably, the Reconstruction Amendments settled the battle over slavery and its incidents. It is simply impossible to tell the story of race in America without telling the story of race and the law.

That being the case, no meaningful distinction between a private realm of race and a public one can be sustained. Certainly up through the Second Reconstruction, the period in the 1950s and 1960s when segregation was

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36. *Id.* at 107.

37. *See id.* at 150-71.

38. *See id.* at 250.

outlawed (though not necessarily dismantled) and the Civil Rights and Voting Rights Acts were passed, racial categories bore direct legal meaning. More importantly for present purposes, some aspects of the hierarchical significance of race were produced and/or reinforced by its legal meanings. Even today, in addition to the lingering imprint of the segregationist regime, racial categories can bear legal import: for example, race discrimination is outlawed, while other forms of irrational and even invidious discrimination are not. It would strain credibility far beyond the breaking point to suppose that the myriad ways in which race still matters legally have no effect on the private realm. Moreover, the effect is not salutary. For example, the public discourse concerning "affirmative action" is replete with stereotype-reinforcing overtones: it features "innocent victims" and undeserving beneficiaries.<sup>39</sup> Law cannot be disentangled from the continuing story of racial hierarchy in America.

### *B. Law Could Have an Impact on White Dignitary Privilege*

This sub-Part examines the ways in which the law continues to contribute to dignitary racial hierarchy, and explores ways in which it might do better. Currently most of the active equal protection precedents rest on a colorblindness interpretation of that provision, which has its roots in Justice Harlan's *Plessy v. Ferguson* dissent: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."<sup>40</sup> This principle—that the law should make no overt racial distinctions, and that the guarantee of equal protection is largely satisfied whenever it does not—provides the foundation for a number of judicially created doctrines intended to provide guidance regarding the constitutional command. Of these, the rule requiring proof of discriminatory intent in constitutional racial disparate impact cases and the rule that all explicit racial classifications (plus at least some forms of governmental consideration of race) require an exceptionally high level of governmental justification (they trigger an almost-always-fatal "strict scrutiny") will take center stage in this discussion.

The colorblindness principle itself was understood by Justice Harlan to be consistent with the maintenance of white supremacy. In a passage quoted much less frequently than "Our Constitution is color-blind,"<sup>41</sup> he remarked:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in

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39. See Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 299-301 (1990).

40. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

41. *Id.*

wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty.<sup>42</sup>

Perhaps Justice Harlan shared the view of the *Plessy* majority that the law and social attitudes could be neatly separated,<sup>43</sup> or perhaps, as the quoted passage might suggest, he thought white social supremacy a desirable thing. Either way, he was confident—and correct—that were the law to be colorblind, white ascendancy would not thereby be placed at risk.

The rule of *Washington v. Davis*,<sup>44</sup> that in constitutional cases heightened scrutiny requires proof of discriminatory intent where there are racially disparate effects, is one important way in which the colorblindness principle has been implemented. As I have explained elsewhere, this doctrine effectuates colorblindness in that “it views all, and only, decisions that overtly or covertly take race into account as constitutionally impermissible, but rejects the view that unequal outcomes ought to be equally constitutionally suspect.”<sup>45</sup> Viewed from another perspective, the discriminatory intent requirement reflects a quintessentially white way of looking at race discrimination—whites, to a much greater extent than people of color, find racial harm to be relatively unproblematic when it occurs unintentionally.<sup>46</sup> And perhaps most significantly for present purposes, the discriminatory intent rule disables courts from grappling with any of the subtle forms in which race discrimination occurs today.<sup>47</sup>

The rule that all explicit governmental uses of racial classifications trigger strict scrutiny also implements the colorblindness principle and impedes racial justice. Most obviously, the strict scrutiny rule enforces an extreme version of colorblindness: government is put to an almost impossible task of justification whenever it employs racial criteria even for benign purposes, with the consequence that in only two instances thus far has a voluntary race-specific affirmative action program survived Supreme Court review.<sup>48</sup>

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42. *Id.*

43. See *supra* text accompanying note 31.

44. 426 U.S. 229 (1976).

45. Flagg, *supra* note 1, at 958 n.24.

46. See *id.* at 968.

47. The proposition that unconscious bias and discrimination are more common than their conscious counterparts has been recognized in academic legal circles at least since the publication of Professor Lawrence’s pathbreaking essay on the subject. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). The topic has begun to receive greater attention in recent years. See, e.g., Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006) (examining implicit bias); Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection”*, 40 CONN. L. REV. 931 (2008) (retrospective on *The Id, the Ego, and Equal Protection, supra*).

48. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

Both the foundational colorblindness principle and the doctrines it has engendered contribute to the maintenance of the dignitary racial hierarchy described in Part I of this essay. The colorblindness principle does so in a symbolic but direct way. Because it reflects a distinctively white perspective on race—the notion that one may think about and deal with important social issues while being “blind” to race—its enshrinement as the root of equal protection doctrine means that constitutional law is itself normatively white. It must be no small dignitary insult for a person of color to look at a core provision of the Fourteenth Amendment—the guarantee of racial equality—and see it interpreted in a manner antithetical to one’s own lived experience.

The doctrines that require proof of discriminatory intent in racial disparate impact cases and impose strict scrutiny on all explicit racial classifications also operate to reinforce white dignitary privilege, in a more concrete but perhaps less direct manner than does the colorblindness principle itself. The discriminatory intent requirement renders it nearly impossible to mount a successful constitutional challenge to policies that reinforce the existing racial distribution of key social goods such as employment and educational opportunities, and the strict scrutiny doctrine impedes their redistribution by effectively invalidating affirmative action remedies. In turn, the racially unequal distribution of those social goods reinforces white dignitary privilege, in the cycle Myrdal described.<sup>49</sup> Dignitary inequality is deeply intertwined with material inequality in our society.

All of this could be different, and the law could contribute to the dismantling of the ongoing racial hierarchy. First, the colorblindness principle is not the only, or even the most plausible, available interpretation of the Equal Protection Clause. There is no originalist case to be made in its defense.<sup>50</sup> Professor Cass Sunstein and others have argued quite persuasively that an anti-caste or anti-subordination principle provides a better interpretive understanding of the equality guarantee.<sup>51</sup> Such a principle would send a message that the law is not complacent about the racial status quo. Moreover, and more concretely, it would facilitate law’s engagement with the realities of racial hierarchy. An anti-subordination/anti-caste principle would provide a base upon which anti-white-privilege doctrines could be constructed.

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49. See *supra* text accompanying note 3.

50. That is, it does not appear that the framers of the Fourteenth Amendment intended to outlaw all forms of race-specific government action. See, e.g., Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985).

51. See Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2428-36 (1994); David A. Strauss, *Little Rock and the Legacy of Brown*, 52 ST. LOUIS U. L.J. 1065, 1068-75, 1083-86 (2008).

In the case of the requirement of discriminatory intent, several commentators have set forth possible doctrinal schemes that would calibrate concerns about racial hierarchy and yet not run afoul of counter-majoritarian or other valid institutional concerns. Of these, Professor Charles Lawrence's classic article *The Id, the Ego, and Equal Protection*<sup>52</sup> deserves special attention. Building upon the recognition of ubiquitous societal racism, he developed a "cultural meaning" test capable of singling out for judicial scrutiny some but not all facially race-neutral government actions-- those bearing cultural racial significance.<sup>53</sup>

The strict scrutiny rule violates the principle of judicial role restraint, assuming that one recognizes the availability of multiple and conflicting interpretations of the Equal Protection Clause. A more measured approach here would be one that adopted some form of heightened scrutiny, in recognition of the historically subordinating ends to which racial classifications were put, but one more survivable than the current version of strict scrutiny. Professor David Chang has articulated one such framework; he suggests that "localities, states, and the federal government should be free to enact affirmative action programs only if—and whenever—their policies were not adopted because of racial animus, favoritism, or stereotype."<sup>54</sup> By ratifying the proposition that majorities may act to improve the situation of people of color, the courts at least would get out of the way of racial remediation, and might to some extent foster it.

Though this discussion has forefronted the two colorblindness-congruent equal protection doctrines that account for a large plurality of modern equal protection decisions, it's worth noting that the Supreme Court itself has at times adopted an anti-subordinationist interpretation of equality, frequently stepping outside familiar doctrinal bounds when doing so. For example, *Shelley v. Kraemer*<sup>55</sup> and *Reitman v. Mulkey*,<sup>56</sup> both difficult to understand in doctrinal terms, each fairly can be said to reflect an anti-subordinationist vision of race equality. In *Shelley* the Court held on state action grounds that state judicial enforcement of racially restrictive covenants is constitutionally impermissible.<sup>57</sup> Though official judicial action is undeniably "state action," some commentators were hard-pressed to find the equal protection violation, given the state's assertion that it would enforce all restrictive covenants equally, regardless of the race of

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52. Lawrence, *supra* note 56.

53. *Id.* at 355-56. Others who have proposed alternatives include Flagg, *supra* note 1; David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989).

54. David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?*, 91 COLUM. L. REV. 790, 831 (1991). Chang goes on to develop a five-part test for analyzing the constitutionality of race-specific programs. *Id.* at 834-42.

55. 334 U.S. 1 (1948).

56. 387 U.S. 369 (1967).

57. *Shelley*, 334 U.S. at 20-21.

the excluded potential buyer.<sup>58</sup> However, once one takes into account the racial status hierarchy underlying the practice of restrictive covenants, they are obviously impermissible from an anti-subordinationist perspective. In *Reitman v. Mulkey*, the Court struck down a state constitutional amendment, adopted via a popular referendum, which effectively repealed legislatively-enacted fair housing laws.<sup>59</sup> In that case, the dissenting Justices wondered why, if a state is not constitutionally required to enact anti-discrimination laws in the first instance, it may not repeal them once adopted.<sup>60</sup> But if one views the case through an anti-subordinationist lens, the result is much easier to understand—the challenged state constitutional amendment was an expression of white supremacy, pure and simple. And perhaps most significantly, the opinion in *Brown v. Board of Education*<sup>61</sup> is written entirely in the language of non-subordination: “To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>62</sup>

In sum, existing equal protection principles and doctrine reflect and reinforce white dignitary supremacy, but they need not do so. There are available equally respectable doctrines and interpretations that would have the opposite effect on the racial status quo. Law could do better than it does.

### C. *The Judge’s Role—The Case for Judicial Race Activism*

Our legal-judicial culture very strongly favors judicial reasoning in which it appears that the judge’s hands were tied by the law—we want “a government of laws, not men.” However, the reality is that judges have choices to make in the realm of race, and these choices are not fully determined by the text of the Constitution; the colorblindness interpretation of the Equal Protection Clause is not the obvious and inevitable principle that many United States Supreme Court opinions appear to take it to be. I hope it is obvious as a normative matter that the Dilemma ought to be resolved by everyone in favor of our better, egalitarian side; accordingly, white dignitary privilege and color stigmatization ought to be resisted through judicial repudiation of those doctrines and principles that operate to sustain racial hierarchy. But there remains one final consideration: perhaps the colorblindness approach might be justified on the basis of one or another principle of judicial restraint.

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58. See, e.g., Louis Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962).

59. *Reitman*, 387 U.S. at 380-81.

60. *Id.* at 389 (Harlan, J., dissenting).

61. 347 U.S. 483 (1954).

62. *Id.* at 494.



As explained in the introduction to this Article, among the many meanings that might be given to the term “judicial activist,” two are of special significance here. A role activist judge would be one who rendered a decision overturning an otherwise valid legislative or executive act on the basis of something other than a clear constitutional command, such as a personal political predilection or his or her own judgment about good social policy. Of course, few if any federal judges would accept the latter characterization of their decision-making, but it is an available criticism whenever a constitutional provision is not universally afforded one single meaning. That is, one person’s clear constitutional command might be another’s personal value choices. In contrast, a judicial decision can be said to be socially activist when it is inconsistent with existing social norms and values, regardless of the validity or invalidity of the constitutional interpretation upon which it rests.<sup>63</sup> For example, the United States Supreme Court decision in *Washington v. Davis*,<sup>64</sup> which upheld the use of a civil service examination against a race-based equal protection challenge, is both judicially and socially restrained: it declines to invalidate the will of the majority, and it also preserves existing social norms, both with respect to the challenged test itself and with respect to a range of other practices having racially disparate effects.<sup>65</sup>

The case against judicial role activism is relatively easy to make and widely accepted: it is inconsistent with the assigned role of an unelected federal judiciary in our tripartite scheme of government for judges to use the power of judicial review to impose their own conceptions of good social policy at the expense of the will of the majority’s elected representatives. Such behavior constitutes a violation of assigned judicial role that is said to threaten the fabric of our system of government.<sup>66</sup> Thus role re-

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63. As I use the terms, though “social activism” and “social restraint” refer to substantive matters; they are to be distinguished from concepts like “political conservatism” as employed by David Chang, in which a “political conservative judge” would be one whose personal beliefs fall on the conservative side of the political spectrum, see Chang, *supra* note 64, at 794; my terms have more to do with broader social values, norms, and expectations. In fact, my concept of “social restraint” is closer to the Wellingtonian approach termed “conventional morality” and described by Chang in David Chang, *Conflict, Coherence, and Constitutional Intent*, 72 IOWA L. REV. 753, 799-806 (1987).

64. 426 U.S. 229 (1976).

65. See *id.* at 239, 251-52.

66. The story of judicial activism begins with the *Lochner* Era, the period between 1899 and 1937 during which the United States Supreme Court struck down almost 200 federal and state statutes and regulations. The wave of invalidations threatened emerging New Deal policies, and thus was politically quite problematic. But political criticism would not suffice in intellectual circles—even at the time the Court was expected not to be acting on the basis of its own political predilections—and so some other framework of analysis was needed, if one was to contend, or explain, that the Court was out of line. As Professor Morton Horowitz has observed, it is possible to formulate two different objections to the decisions of the *Lochner* Era Court: it could be said to have adopted substantively incorrect assumptions about the nature of the good society, or it could be described as having overstepped its proper institutional role. See Morton J. Horowitz, *History and Theory*, 96 YALE L.J. 1825, 1829 (1987); see also David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373 (2003). Commentators who advanced the former variety of criticisms argued, for example, that unequal distribu-

straint is an important cultural principle that appropriately can govern judicial behavior.

However, the question of judicial social restraint is more complicated. On the one hand, judges routinely *practice* social restraint: their decisions tend to be congruent with the larger society's values. However, social restraint cannot in every instance be elevated to the status of a guiding principle because its legitimacy as an articulable norm depends on the time frame against which a judicial decision is to be measured. One might assess social activism by comparing a decision's normative content with contemporaneous social values, or one might look instead to norms existing at some relevant point in the past. I'll refer to the former as "present-oriented" and to the latter as "past-oriented" social activism and restraint.

Present-oriented social restraint cannot operate as an explicit principle of constitutional interpretation. It is a relatively common practice, in that judges tend to render decisions consonant with society's prevailing norms, perhaps looking subconsciously to those norms in order to flesh out the meaning of applicable regulations, statutes, or constitutional provisions. But though this approach may be appropriate some of the time, such as when interpreting recently-enacted legislation, the principle of role restraint renders the situation different with respect to constitutional law. By definition, one can ascertain whether a particular judicial decision reflects present-oriented social activism or restraint only by comparing the norms and values it embodies or validates with the norms and values widely accepted in the society at large at the time the decision is rendered. For example, a judge who wanted to deliberately pursue a policy of social restraint would have to consider the normative content of his or her ruling and compare it with the existing social consensus on the relevant norms. But that is precisely what judges are not supposed to do under the principle of judicial role restraint: they are expected to follow the law wherever it leads. Of course, whether this is achievable, or whether there even is any meaningful distinction between law and social policy, are highly contested propositions.<sup>67</sup> Thus it appears that seeking to implement a judicial

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tions of wealth and power rendered the Court's often unstated *laissez faire* premises unsatisfactory. The latter institutional analysis, which looked at process rather than substance, had it that the proper role of an unelected federal judiciary in a constitutional democracy was to defer to the judgment of the people's legislative representatives, except where the constitutional values to be vindicated were clear and clearly violated. This understanding came to dominate constitutional theory and doctrine, both among the commentators and among the Justices themselves. It developed into a picture of a contest between the presumably representative legislature and the unelected judiciary, its paradigm expression perhaps provided by Alexander Bickel, who said: "[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it." BICKEL, *supra* note 8, at 16-17.

67. The proposition that law and social policy are not distinct is commonplace among Critical Legal Studies scholars. *See, e.g.,* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 3-4 (David Kairys ed. 1990) ("There is no legal reasoning in the sense of a legal methodology or process for reaching

philosophy of present-oriented social restraint would be inconsistent with a judicial philosophy of role restraint, because pursuing social restraint would involve the judge in considerations of public norms that are placed outside the judicial pale by the principles of role restraint.

On the other hand, past-oriented social restraint *can* function as a constitutional principle—it can be employed by judges when interpreting a constitutional provision whose contours are not entirely clear. One sees an example of this in some substantive due process opinions. For example, Justice Scalia has put it this way:

In an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a “liberty” be “fundamental” (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society. As we have put it, the Due Process Clause affords only those protections “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934) (Cardozo, J.). Our cases reflect “continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society . . .” *Griswold v. Connecticut*, 381 U. S. 479, 501 (1965) (Harlan, J., concurring in judgment).<sup>68</sup>

In this context, social restraint consists in conforming to existing social norms and values, though not necessarily those of the time at which the decision is rendered. It is congruent with judicial role restraint insofar as it seeks not to defeat the present majority’s will except in the service of values and norms set down by a prior and superior majority. It could be said to give a conservative, “restrained” meaning to the “constitutional” in “constitutional democracy.”

As defined earlier, race activism is a species of social activism and racial restraint is a variety of social restraint. As has been discussed in Part II.B., constitutional race discrimination law in fact reflects a pattern of racial restraint; both doctrine and underlying equal protection principles embody dominant—that is, white—norms, values, and expectations.<sup>69</sup> The question to be explored in the remainder of this Article is whether any

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particular, correct results. . . . Social and political judgments about the substance, parties, and context of a case guide [courts’] choices, even when they are not the explicit or conscious basis of decision.”).

68. *Michael H. v. Gerald D.*, 491 U.S. 110, 122-123 (1989) (footnote omitted). Many Justices who adopt this approach might limit it to the substantive facet of the Due Process Clause, regarding that as an especially open-ended constitutional provision, but there is no reason in principle not to employ it whenever the meaning of a constitutional provision is unclear. For helpful commentary on this approach, see Cass R. Sunstein, *Due Process Traditionalism*, 106 MICH. L. REV. 1543 (2008).

69. See *supra* text accompanying notes 49-58.

principled case, based on some concept of judicial restraint, can be made in support of that pattern of outcomes. In the terms set forth here, the candidates for such justifying principles would be judicial role restraint, judicial social restraint in the present-oriented sense, and judicial social restraint in the past-oriented sense. I examine each in turn, and conclude that none provides even minimally adequate justification for a pattern of judicial decisions that preserve white dignitary privilege.

The principle of judicial role restraint cannot be employed to justify the observed pattern of white-status-preserving outcomes unless one believes that the principle of colorblindness upon which they rest is a clear and uncontroversial constitutional command. As described in Part II.B. above, it clearly is not.<sup>70</sup> Moreover, in many instances the colorblindness principle has been employed to invalidate otherwise properly-enacted popular policy choices.<sup>71</sup> Thus, the pattern of existing decisions is not majoritarian in the sense called for by the norm of judicial role restraint, though it is consistent with the present-day racial values of the dominant racial group.

This suggests that the place to look for a justification of white-privilege-sustaining judicial decisions might be one or another version of judicial social restraint. The decided cases are largely consistent with prevailing white racial norms, and so are congruent with the present-oriented version of judicial social restraint.<sup>72</sup> However, as explained above, present-oriented social restraint cannot operate as a principle of constitutional interpretation because it is inconsistent with widely shared judicial role expectations. Judges ought not to be looking to society's present social values in order to resolve constitutional cases. Thus, this variant of the social restraint idea provides no justifying assistance.

The past-oriented version of the principle of judicial social restraint might have some justificatory potential because it exists in relative harmony with the principle of judicial role restraint. The general argument supporting such a principle is that by looking to the norms of society one minimizes the risk that judges will interpret a less-than-perfectly-clear constitutional provision in a role-inappropriate manner. Even if the values thus vindicated are not those of the present majority, they are presumed to be those of an earlier one, whose choices are deemed to be operative.

Were this analysis to be applied to the question of racial restraint, one would have to take the position that judges should look to the racial attitudes and norms prevailing at the time the Equal Protection Clause was

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70. See *supra* text accompanying notes 59-60.

71. The affirmative action cases are the primary examples here; see *supra* notes 56-57 and accompanying text. See also Chang, *supra* note 63, at 844.

72. See *supra* text accompanying notes 57-58.

adopted in order to determine its correct interpretation.<sup>73</sup> But surely one would not want to enshrine the racial attitudes of the 1860s in today's constitutional law.<sup>74</sup> Unsatisfactory as our progress has been, there still has been some improvement even on the dignitary dimension with regard to race. Looking to the history and traditions of a society that practiced slavery does not seem to have much justificatory potential. Even if the past-oriented approach works for some matters such as "unenumerated fundamental rights," it does not offer a similar benefit with respect to race.

I conclude that there is no principle of judicial restraint, role-oriented or substantive, available to provide a supporting justification for the existing pattern of judicial decisions interpreting and applying the constitutional guarantee of equal protection. Our current equal protection law stands solely on the foundation of the principle of colorblindness, which both reflects and is historically rooted in an assumption of white supremacy. It cannot be redeemed by ancillary considerations of framers' intent or by principles of judicial restraint. It is just wrong to perpetuate the legacy of slavery in this way; the colorblindness principle ought to be replaced by, or at least subsumed under, an anti-subordination/anti-caste analysis.

Concomitantly, ostensible judicial activism of the role-transgression variety may sometimes be required. Judges ought to engage in race activism: they ought to render decisions that run counter to whites' suppressed investment in white dignitary privilege, because such whites' attitudes are morally insupportable, the doctrines to which they give rise are not mandated by any framers'-intent-based procedure for constitutional interpretation, and there is no ancillary principle of judicial social restraint that could justify giving effect to them. But precisely because race activist judges by definition would transgress whites' racial expectations, they would run the risk of being seen as role activist to the extent they based their decisions on constitutional principles not widely accepted by whites.

73. This is not to be confused with an originalist approach that would look to the intent of a constitutional provision's framers for interpretive guidance. As has been discussed, see *supra* note 59 and accompanying text, the originalist method yields no definitive outcome in the case of the Equal Protection Clause. The past-oriented social restraint principle turns instead to social attitudes and values, broadly considered, prevailing at or around the time of enactment.

74. According to historian Audrey Smedley:

By the early decades of the nineteenth century, the race concept in North America contained at least five analytically ascertainable ideological ingredients, which, when taken together, may be considered diagnostic of race in the United States. . . . [These are] a universal classification of human groups as exclusive and discrete biological entities. . . . the imposition of an egalitarian ethos that required the ranking of these groups vis-à-vis one another. . . . the belief that the outer physical characteristics of different human populations were but surface manifestations of inner realities. . . . the notion that all of these qualities were inheritable. . . . [and] the belief that each exclusive group (race), so differentiated, was created unique and distinct by nature or by God, so that the imputed differences, believed fixed and unalterable, could never be bridged or transcended.

SMEDLEY, *supra* note 35, at 28. Smedley states that the racial worldview reached its developmental peak in the latter half of the nineteenth century. *Id.* at 250.

Invalidation based on clear constitutional commands is acceptable, but if an underlying command is viewed as less than clear, charges of role activism may arise. In the case of race, decisions based on the colorblindness principle tend not to be seen as role activist even when they set aside the will of the majority. We see this in the case of affirmative action programs, judicial invalidations of which are rarely said by whites to be role activist. Colorblindness, of course, is a white perspective on race. But were the courts to become race activist, which would call for implementation of an anti-subordination or anti-caste principle, one anticipates that accusations of role activism might well begin to fly. Because those principles are not fully embraced by the dominant white culture, they would be controversial, and so judges might be said to be acting out of role when enforcing them. In sum, judicial race activism is much more likely to be seen by whites—and perhaps exclusively by whites—as role activist than is judicial racial restraint, even though neither in fact is inherently role activist or restrained.

#### CONCLUSION

The American Dilemma has not vanished; it has not even changed very much. Certainly there have been incremental improvements in the material circumstances of black people relative to Gunnar Myrdal's time and perhaps incremental improvements in dignitary status as well. But it still is better to be white in America than to be a person of color, as a matter of dignitary status, and thus it still is true that whites harbor deeply conflicted attitudes about race. Racial hierarchy is as much a constituent element of our culture as is racial egalitarianism.

The law, and the way judges interpret and apply it, is one important realm in which the ongoing Dilemma both manifests itself and is sustained. The fundamental guarantee of racial equality, the Fourteenth Amendment's Equal Protection Clause, has become through judicial interpretation a significant vehicle for the maintenance of white dignitary supremacy. But this legal regime is not justified as a matter of substantive law, nor by principles of judicial restraint. Judges ought to become race activists.