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WHITENESS AS PROPERTY

Cheryl I. Harris

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WHITENESS AS PROPERTY

*Cheryl I. Harris**

Issues regarding race and racial identity as well as questions pertaining to property rights and ownership have been prominent in much public discourse in the United States. In this article, Professor Harris contributes to this discussion by positing that racial identity and property are deeply interrelated concepts. Professor Harris examines how whiteness, initially constructed as a form of racial identity, evolved into a form of property, historically and presently acknowledged and protected in American law. Professor Harris traces the origins of whiteness as property in the parallel systems of domination of Black and Native American peoples out of which were created racially contingent forms of property and property rights. Following the period of slavery and conquest, whiteness became the basis of racialized privilege — a type of status in which white racial identity provided the basis for allocating societal benefits both private and public in character. These arrangements were ratified and legitimated in law as a type of status property. Even as legal segregation was overturned, whiteness as property continued to serve as a barrier to effective change as the system of racial classification operated to protect entrenched power.

Next, Professor Harris examines how the concept of whiteness as property persists in current perceptions of racial identity, in the law's misperception of group identity and in the Court's reasoning and decisions in the arena of affirmative action. Professor Harris concludes by arguing that distortions in affirmative action doctrine can only be addressed by confronting and exposing the property interest in whiteness and by acknowledging the distributive justification and function of affirmative action as central to that task.

she walked into forbidden worlds
impaled on the weapon of her own pale skin
she was a sentinel
at impromptu planning sessions
of her own destruction . . . .

Cheryl I. Harris, *poem for alma*[1]

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[1] Cheryl I. Harris, *poem for alma* (1990) (unpublished poem, on file at the Harvard Law School Library).

> [P]etitioner was a citizen of the United States and a resident of the state of Louisiana of mixed descent, in the proportion of seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every recognition, right, privilege and immunity secured to the citizens of the United States of the white race by its Constitution and laws . . . and thereupon entered a passenger train and took possession of a vacant seat in a coach where passengers of the white race were accommodated.
>
> *Plessy v. Ferguson*[2]

I. INTRODUCTION

In the 1930s, some years after my mother's family became part of the great river of Black[3] migration that flowed north,[4] my Mississippi-born grandmother was confronted with the harsh matter of economic survival for herself and her two daughters. Having separated from my grandfather, who himself was trapped on the fringes of economic marginality, she took one long hard look at her choices and presented herself for employment at a major retail store in Chicago's central business district. This decision would have been unremarkable for a white woman in similar circumstances, but for my grandmother, it was an act of both great daring and self-denial, for in so doing she was presenting herself as a white woman. In the parlance of racist America, she was "passing."

Her fair skin, straight hair, and aquiline features had not spared her from the life of sharecropping into which she had been born in

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[2] 163 U.S. 537, 538 (1896).

[3] I use the term "Black" throughout the paper for the reasons articulated by Professor Kimberlé Crenshaw. I share her view that "Blacks, like Asians, Latinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988). According to W.E.B. DuBois, "[t]he word 'Negro' was used for the first time in the world's history to tie color to race and blackness to slavery and degradation." W.E. BURGHARDT DU BOIS, THE WORLD AND AFRICA 20 (1965). The usage of the lower case "N" in "negro" was part of the construction of an inferior image of Blacks that provided justification for and a defense of slavery. *See* W.E.B. DU BOIS, *That Capital "N," in* 2 THE SEVENTH SON 12, 13 (Julius Lester ed., 1971). Thus, the use of the upper case and lower case in reference to racial identity has a particular political history. Although "white" and "Black" have been defined oppositionally, they are not functional opposites. "White" has incorporated Black subordination; "Black" is not based on domination. *See* discussion *infra* p. 1785. "Black" is naming that is part of counterhegemonic practice.

[4] The Great Migration of Blacks from the rural South to urban centers between 1910 and 1940 doubled the percentage of Blacks living in the North and West. *See* 1 GUNNAR MYRDAL, AN AMERICAN DILEMMA 183 (1944). The second major wave of Black migration, during the 1940s, increased the Black population in Northern cities. For example, in Chicago, it increased by over 70 percent. *See* NICHOLAS LEMANN, THE PROMISED LAND 70 (1991).

anywhere/nowhere, Mississippi — the outskirts of Yazoo City. But in the burgeoning landscape of urban America, anonymity was possible for a Black person with "white" features. She was transgressing boundaries, crossing borders, spinning on margins, traveling between dualities of Manichean space, rigidly bifurcated into light/dark, good/bad, white/Black. No longer immediately identifiable as "Lula's daughter," she could thus enter the white world, albeit on a false passport, not merely passing, but *tres*passing.

Every day my grandmother rose from her bed in her house in a Black enclave on the south side of Chicago, sent her children off to a Black school, boarded a bus full of Black passengers, and rode to work. No one at her job ever asked if she was Black; the question was unthinkable. By virtue of the employment practices of the "fine establishment" in which she worked, she could not have been. Catering to the upper-middle class, understated tastes required that Blacks not be allowed.

She quietly went about her clerical tasks, not once revealing her true identity. She listened to the women with whom she worked discuss their worries — their children's illnesses, their husbands' disappointments, their boyfriends' infidelities — all of the mundane yet critical things that made up their lives. She came to know them but they did not know her, for my grandmother occupied a completely different place. That place — where white supremacy and economic domination meet — was unknown turf to her white co-workers. They remained oblivious to the worlds within worlds that existed just beyond the edge of their awareness and yet were present in their very midst.

Each evening, my grandmother, tired and worn, retraced her steps home, laid aside her mask, and reentered herself. Day in and day out, she made herself invisible, then visible again, for a price too inconsequential to do more than barely sustain her family and at a cost too precious to conceive. She left the job some years later, finding the strain too much to bear.

From time to time, as I later sat with her, she would recollect that period, and the cloud of some painful memory would pass across her face. Her voice would remain subdued, as if to contain the still remembered tension. On rare occasions she would wince, recalling some particularly racist comment made in her presence because of her presumed, shared group affiliation. Whatever retort might have been called for had been suppressed long before it reached her lips, for the price of her family's well-being was her silence. Accepting the risk of self-annihilation was the only way to survive.

Although she never would have stated it this way, the clear and ringing denunciations of racism she delivered from her chair when advanced arthritis had rendered her unable to work were informed by those experiences. The fact that self-denial had been a logical

choice and had made her complicit in her own oppression at times fed the fire in her eyes when she confronted some daily outrage inflicted on Black people. Later, these painful memories forged her total identification with the civil rights movement. Learning about the world at her knee as I did, these experiences also came to inform my outlook and my understanding of the world.

My grandmother's story is far from unique. Indeed, there are many who crossed the color line never to return. Passing is well-known among Black people in the United States[5] and is a feature of race subordination in all societies structured on white supremacy.[6] Notwithstanding the purported benefits of Black heritage in an era of

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[5] When I began to relate the subject matter of my research to Black friends and colleagues, in nearly every instance I was told, "I had an uncle . . . . I had a great aunt . . . . My grandfather's brother left Alabama to go North as a white man and we never saw or heard from him again" or other similar stories. *See also* PATRICIA J. WILLIAMS, *On Being the Object of Property*, *in* THE ALCHEMY OF RACE AND RIGHTS 216, 223 (1991) (recounting the story of Marjorie, Williams's godmother, who was given away by her mother at the age of six in order that her mother could "pass" and marry a white man); Gregory H. Williams, Neither Black Nor White: A Childhood on the Color Line 8 (1991) (unpublished manuscript, on file at the Harvard Law School Library) (describing the childhood of a law professor whose father passed for white, a fact unknown to his son until the age of ten).

Gunnar Myrdal's discussion of the phenomenon of "passing" in his 1944 study of race illuminates the social context of my grandmother's story and the stories of many like her.

> "[P]assing" means that a Negro becomes a white man, that is, moves from the lower to the higher caste. In the American caste order, this can be accomplished only by the deception of the white people with whom the passer comes to associate and by a conspiracy of silence on the part of other Negroes who might know about it. . . . In the Northern and Border states it seems to be relatively common for light-skinned Negroes to "pass professionally" but preserve a Negro social life. Negro girls have practically no chance of getting employment as stenographers or secretaries, salesclerks in department stores, telephone operators, outside the establishments run by Negroes for Negroes. In most communities their chances are slight even to become regular teachers, social workers, or the like, if they do not conceal their Negro ancestry. . . . Not only in these female middle class occupations but in all male and female trades where Negroes are excluded, there must be a similar incentive to attempt to "pass professionally.". . . In view of the advantages to be had by passing, it is not difficult to explain why Negroes pass, professionally or completely. It is more difficult, however, to explain why Negroes do not pass over to the white race more often than they actually do.

MYRDAL, *supra* note 4, at 683–86 (1944).

[6] Because of the relative privileges of whites, the principal incentive is for Blacks to pass as whites, not vice versa. *See* Marvin Harris, *Referential Ambiguity in the Calculus of Brazilian Racial Identity*, *in* AFRO-AMERICAN ANTHROPOLOGY: CONTEMPORARY PERSPECTIVES 75, 75–76 (Norman E. Whitten, Jr. & John F. Szwed eds., 1970) (describing the more fluid racial classification systems of the Caribbean, Brazil, and other parts of Latin America that, unlike the U.S. model that denotes as Black anyone with any known Black heritage, admits of intermediate categories of mixed blood, but still holds that "money whitens," thereby equating "white" with higher class position and reflecting that white is preferred and dominant). *See generally* MARVIN HARRIS, PATTERNS OF RACE IN THE AMERICAS 39–40, 56–59 (1964) (describing the phenomena of Indians "passing" in Mexico, and the complex racial system of Brazil). However, there have been recent accounts of "reverse passing," that is, whites attempting to be reclassified as Black or Hispanic for purposes of affirmative action programs. *See infra* note 319.

affirmative action, passing is not an obsolete phenomenon that has slipped into history.[7]

The persistence of passing is related to the historical and continuing pattern of white racial domination and economic exploitation that has given passing a certain economic logic.[8] It was a given to my grandmother that being white automatically ensured higher economic returns in the short term, as well as greater economic, political, and social security in the long run. Becoming white meant gaining access to a whole set of public and private privileges that materially and permanently guaranteed basic subsistence needs and, therefore, survival. Becoming white increased the possibility of controlling critical aspects of one's life rather than being the object of others' domination.

My grandmother's story illustrates the valorization of whiteness as treasured property in a society structured on racial caste. In ways so embedded that it is rarely apparent, the set of assumptions, privileges, and benefits that accompany the status of being white have become a valuable asset that whites sought to protect and that those who passed sought to attain — by fraud if necessary. Whites have come to expect and rely on these benefits, and over time these expectations have been affirmed, legitimated, and protected by the law. Even though the law is neither uniform nor explicit in all instances, in protecting settled expectations based on white privilege, American law has recognized a property interest in whiteness[9] that, although unack-

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[7] *See, e.g.*, Doe v. State of Louisiana, 479 So.2d 369, 371 (La. Ct. App. 1985) (rejecting the attempt by a family whose parents had been classified as "colored" to be reclassified as white).

[8] *See* WILLIAMS, *supra* note 5, at 8 (theorizing that the author's father's masquerade as a white man was motivated by the belief that passing brought "greater job opportunities").

One recurrent image of Blacks in cinema was the "tragic mulatto" who assassinated her Black origins in order to attain a better life in the white world. Although many of the cinematic versions of this tale have been cautionary morality plays illustrative of the tragic consequences of self-denial, the underlying economic rationale for the hero(ine) to pass was so self-evident as never to be challenged nor even explicitly stated. *See generally* DONALD BOGLE, TOMS, COONS, MULATTOES, MAMMIES, AND BUCKS: AN INTERPRETIVE HISTORY OF BLACKS IN AMERICAN FILMS 9 (1989) (discussing film images of the "tragic mulatto").

[9] My exploration of this concept began in March, 1991, when I participated in a conference on "Constitution Making in a New South Africa," held at the University of the Western Cape in South Africa. (The conference was jointly sponsored by the National Conference of Black Lawyers, the National Lawyers Guild and the National Association of Democratic Lawyers in South Africa.) My paper argued that American law had implicitly recognized a property interest in whiteness. The concept resonated in the South African context because of the similar and even more extreme patterns of white domination evident there.

As I later discovered, the concept of a "property interest in whiteness" is one that has been recognized in modern legal theory. Professor Bell in his chronicle, "Xerces and the Affirmative Action Myth," noted the argument advanced in Plessy v. Ferguson, 163 U.S. 537 (1896), regarding the property interest in whiteness and the extent to which affirmative action policies are seen as a threat to "property interests of identifiable whites." Derrick Bell, *Xerces and the Affirmative Action Myth*, 57 GEO. WASH. L. REV. 1595, 1602, 1608 (1989). Finding that Professor Bell, to whom I am deeply indebted intellectually, had identified this concept before me only served to confirm my belief that further exploration of this idea is a worthwhile project.

nowledged, now forms the background against which legal disputes are framed, argued, and adjudicated.

My Article investigates the relationships between concepts of race and property and reflects on how rights in property are contingent on, intertwined with, and conflated with race. Through this entangled relationship between race and property, historical forms of domination have evolved to reproduce subordination in the present. In Part II, I examine the emergence of whiteness as property and trace the evolution of whiteness from color to race to status to property as a progression historically rooted in white supremacy[10] and economic hegemony over Black and Native American peoples. The origins of whiteness as property lie in the parallel systems of domination of Black and Native American peoples out of which were created racially contingent forms of property and property rights. I further argue that whiteness shares the critical characteristics of property even as the meaning of property has changed over time. In particular, whiteness and property share a common premise — a conceptual nucleus — of a right to exclude. This conceptual nucleus has proven to be a powerful center around which whiteness as property has taken shape. Following the period of slavery and conquest, white identity became the basis of racialized privilege that was ratified and legitimated in law as a type of status property. After legalized segregation was overturned, whiteness as property evolved into a more modern form through the law's ratification of the settled expectations of relative white privilege as a legitimate and natural baseline.

Part III examines the two forms of whiteness as property — status property and modern property — that are the submerged text of two paradigmatic cases on the race question in American law, *Plessy v. Ferguson*[11] and *Brown v. Board of Education*.[12] As legal history, they illustrate an important transition from old to new forms of whiteness as property. Although these cases take opposite interpretive stances regarding the constitutional legitimacy of legalized racial segregation, the property interest in whiteness was transformed, but not discarded, in the Court's new equal protection jurisprudence.

Part IV considers the persistence of whiteness as property. I first examine how subordination is reinstituted through modern conceptions

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[10] I adopt here the definition of white supremacy utilized by Frances Lee Ansley:

> By "white supremacy" I do not mean to allude only to the self-conscious racism of white supremacist hate groups. I refer instead to a political, economic, and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings.

Frances L. Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 n.129 (1989).

[11] 163 U.S. 537 (1896).

[12] 347 U.S. 483 (1954).

of race and identity embraced in law. Whiteness as property has taken on more subtle forms, but retains its core characteristic — the legal legitimation of expectations of power and control that enshrine the status quo as a neutral baseline, while masking the maintenance of white privilege and domination. I further identify the property interest in whiteness as the unspoken center of current polarities around the issue of affirmative action. As a legacy of slavery and de jure and de facto race segregation, the concept of a protectable property interest in whiteness permeates affirmative action doctrine in a manner illustrated by the reasoning of three important affirmative action cases — *Regents of the University of California v. Bakke*,[13] *City of Richmond v. J.A. Croson & Co.*,[14] and *Wygant v. Jackson Board of Education*.[15]

Finally, in Part V, I offer preliminary thoughts on a way out of the conundrum created by protecting whiteness as a property interest. I suggest that affirmative action, properly conceived and reconstructed, would de-legitimate the property interest in whiteness. I do not offer here a complete reformulation of affirmative action, but suggest that focusing on the distortions created by the property interest in whiteness would provoke different questions and open alternative perspectives on the affirmative action debate. The inability to see affirmative action as more than a search for the "blameworthy" among "innocent" individuals is tied to the inability to see the property interest in whiteness. Thus reconstructed, affirmative action would challenge the characterization of the unfettered right to exclude as a legitimate aspect of identity and property.

II. THE CONSTRUCTION OF RACE AND THE EMERGENCE OF WHITENESS AS PROPERTY

The racialization of identity and the racial subordination of Blacks and Native Americans provided the ideological basis for slavery and conquest.[16] Although the systems of oppression of Blacks and Native Americans differed in form — the former involving the seizure and appropriation of labor, the latter entailing the seizure and appropriation of land — undergirding both was a racialized conception of property implemented by force and ratified by law.

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[13] 438 U.S. 265 (1978).

[14] 488 U.S. 469 (1989).

[15] 476 U.S. 267 (1986).

[16] *See* RONALD TAKAKI, IRON CAGES: RACE AND CULTURE IN 19TH-CENTURY AMERICA 11 (1990) (describing how English definitions of Blacks and Native Americans as "savage" and "instinctual" "encouraged English immigrants to appropriate Indian land and black labor as they settled and set up production in the New World, and enabled white colonists to justify the actions they had committed against both peoples").

The origins of property rights in the United States are rooted in racial domination.[17] Even in the early years of the country, it was not the concept of race alone that operated to oppress Blacks and Indians; rather, it was the *interaction* between conceptions of race and property that played a critical role in establishing and maintaining racial and economic subordination.

The hyper-exploitation of Black labor was accomplished by treating Black people themselves as objects of property. Race and property were thus conflated by establishing a form of property contingent on race — only Blacks were subjugated as slaves and treated as property. Similarly, the conquest, removal, and extermination of Native American life and culture were ratified by conferring and acknowledging the property rights of whites in Native American land. Only white possession and occupation of land was validated and therefore privileged as a basis for property rights. These distinct forms of exploitation each contributed in varying ways to the construction of whiteness as property.

A. Forms of Racialized Property: Relationships Between Slavery, Race, and Property

1. The Convergence of Racial and Legal Status. — Although the early colonists were cognizant of race,[18] racial lines were neither consistently nor sharply delineated among or within all social groups.[19] Captured Africans sold in the Americas were distinguished from the population of indentured or bond servants — "unfree" white labor — but it was not an irrebuttable presumption that all Africans were

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[17] In reviewing ROBERT WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSE OF CONQUEST (1990), an eloquent and meticulous work on the American Indian in Western legal doctrine, Joseph William Singer draws out the organic connections between property rights and race as the pattern of conquest of native lands exemplified:

> [P]roperty and sovereignty in the United States have a racial basis. The land was taken by force by white people from peoples of color thought by the conquerors to be racially inferior. The close relation of native peoples to the land was held to be no relation at all. To the conquerors, the land was "vacant." Yet it required trickery and force to wrest it from its occupants. This means that the title of every single parcel of property in the United States can be traced to a system of racial violence.

Joseph W. Singer, *The Continuing Conquest: American Indian Nations, Property Law, and Gunsmoke*, 1 RECONSTRUCTION 97, 102 (1991); *see* Frances L. Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511, 1523 (1991) (citing the history of discovery and conquest of American Indian land to be illustrative of the fact that "race is at the heart of American property law").

[18] *See* WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812, at 3–43 (1968) (describing early colonial racism).

[19] Indeed, between 1607 and 1800, racial lines among the lower classes were quite blurred; not only were social activities between Blacks and lower class whites sometimes racially integrated, but also political resistance in the form of urban slave revolts sometimes included whites. *See* DAVID ROEDIGER, THE WAGES OF WHITENESS 24 (1991).

"slaves" or that slavery was the only appropriate status for them.[20] The distinction between African and white indentured labor grew, however, as decreasing terms of service were introduced for white bond servants.[21] Simultaneously, the demand for labor intensified, resulting in a greater reliance on African labor and a rapid increase in the number of Africans imported into the colonies.[22]

The construction of white identity and the ideology of racial hierarchy also were intimately tied to the evolution and expansion of the system of chattel slavery. The further entrenchment of plantation slavery was in part an answer to a social crisis produced by the eroding capacity of the landed class to control the white labor population.[23] The dominant paradigm of social relations, however, was that, although not all Africans were slaves, virtually all slaves were not white. It was their racial otherness that came to justify the subordinated status of Blacks.[24] The result was a classification system that "key[ed] official rules of descent to national origin" so that "[m]embership in the new social category of 'Negro' became itself sufficient justification for enslaveability."[25] Although the cause of the increasing gap between the status of African and white labor is contested by historians,[26] it is clear that "[t]he economic and political

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[20] According to John Hope Franklin, "there is no doubt that the earliest Negroes in Virginia occupied a position similar to that of the white servants in the colony." JOHN H. FRANKLIN, U.S. COMM'N ON CIVIL RIGHTS, FREEDOM TO THE FREE 71 (1963), *cited in* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS 21 (1978). The legal disabilities imposed on Blacks were not dissimilar to those imposed on non-English servants of European descent, as the principal line of demarcation was between Christian and non-Christian servants. *See* Raymond T. Diamond & Robert J. Cottrol, *Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment*, 29 LOY. L. REV. 255, 259 n.19 (1983). Indeed, "the word *slave* had no meaning in English law." THOMAS F. GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA 29 (1963). Later statutory provisions prohibited Blacks who were slaves from attaining their freedom by converting to Christianity. *See, e.g.*, HIGGINBOTHAM, *supra*, at 200 (citing a South Carolina statute of 1690 that declared "no slave shall be free by becoming a christian").

[21] *See* GOSSETT, *supra* note 20, at 30.

[22] *See id.*

[23] *See* EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 295–300 (1975).

[24] *See* Neil Gotanda, *A Critique of "Our Constitution is Colorblind,"* 44 STAN. L. REV 1, 34 (1991).

[25] *Id.*; *see also* Christopher Lasch, THE WORLD OF NATIONS 17 (1974) (asserting that the concept of "Negro" emerged from "related . . . concepts of African, heathen and savage — at the very point in time when large numbers of men and women were beginning to question the moral legitimacy of slavery"). The implications are that, as the system of chattel slavery came under fire, it was rationalized by an ideology of race that further differentiated between white and Black.

[26] *Compare* GOSSETT, *supra* note 20, at 29–30 (arguing that the terms of service for white workers were decreased in order to attract white labor in the colonies) *with* HIGGINBOTHAM, *supra* note 20, at 26 (citing masters' fears of a potential alliance between white indentured servants and the rapidly expanding African population). *See generally* DAVID W. GALENSON,

interests defending Black slavery were far more powerful than those defending indentured servitude."[27]

By the 1660s, the especially degraded status of Blacks as chattel slaves was recognized by law.[28] Between 1680 and 1682, the first slave codes appeared, codifying the extreme deprivations of liberty already existing in social practice. Many laws parceled out differential treatment based on racial categories: Blacks were not permitted to travel without permits, to own property, to assemble publicly, or to own weapons; nor were they to be educated.[29] Racial identity was further merged with stratified social and legal status: "Black" racial identity marked who was subject to enslavement; "white" racial identity marked who was "free" or, at minimum, not a slave.[30] The ideological and rhetorical move from "slave" and "free" to "Black" and "white" as polar constructs marked an important step in the social construction of race.

2. Implications for Property. — The social relations that produced racial identity as a justification for slavery also had implications for the conceptualization of property. This result was predictable, as the institution of slavery, lying at the very core of economic relations, was bound up with the idea of property. Through slavery, race and economic domination were fused.[31]

Slavery produced a peculiar, mixed category of property and humanity — a hybrid possessing inherent instabilities that were reflected in its treatment and ratification by the law. The dual and contradictory character of slaves as property and persons was exemplified in the Representation Clause of the Constitution. Representation in the

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WHITE SERVITUDE IN COLONIAL AMERICA: AN ECONOMIC ANALYSIS 159–60 (1981) (arguing that the increased demand for skilled labor, a limited pool of low-cost, skilled white labor, and the decline in the cost of training for the slave population that was increasingly born in the Americas, combined to make slave labor more economically attractive); Diamond & Cottrol, *supra* note 20, at 260 (advancing an argument in accord with Higginbotham).

[27] ROEDIGER, *supra* note 19, at 32.

[28] In 1661, the Maryland legislature enacted a bill providing that "'All Negroes and other slaves shall serve Durante Vita [for life].'" GOSSETT, *supra* note 20, at 30.

[29] *See* HIGGINBOTHAM, *supra* note 20, at 39–40.

[30] For a catalogue of pre-Civil War cases articulating the general rule that a Black person was presumed to be a slave, see CHARLES S. MANGUM, JR., THE LEGAL STATUS OF THE NEGRO 2 n.2 (1940).

[31] The system of racial oppression grounded in slavery was driven in large measure (although by no means exclusively) by economic concerns. *See* MORGAN, *supra* note 23, at 295–315; LESLIE H. OWENS, THIS SPECIES OF PROPERTY *passim* (1976). Whether from the perspective of Southern slave owners or early Northern capitalists, the slave trade, slave labor, and the direct and indirect profits that flowed from it were central to an economic structure that benefited the nation. Thus, the tension over the issue of slavery ultimately resulted in the now well-documented set of constitutional compromises that subordinated the humanity of Black people to the economic and political interests of the white, propertied class. *See* DERRICK BELL, AND WE ARE NOT SAVED 34 (1987).

House of Representatives was apportioned on the basis of population computed by counting all persons and "three-fifths of all other persons" — slaves.[32] Gouveneur Morris's remarks before the Constitutional Convention posed the essential question: "Upon what principle is it that slaves shall be computed in the representation? Are they men? Then make them Citizens & let them vote? Are they property? Why then is no other property included?"[33]

The cruel tension between property and humanity was also reflected in the law's legitimation of the use of Blackwomen's[34] bodies as a means of increasing property.[35] In 1662, the Virginia colonial assembly provided that "[c]hildren got by an Englishman upon a Negro woman shall be bond or free according to the condition of the mother . . . ."[36] In reversing the usual common law presumption that the status of the child was determined by the father, the rule facilitated the reproduction of one's own labor force.[37] Because the children of Blackwomen assumed the status of their mother, slaves were bred through Blackwomen's bodies. The economic significance of this form of exploitation of female slaves should not be underestimated. Despite Thomas Jefferson's belief that slavery should be abol-

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[32] U.S. CONST. art. I, § 2, cl. 3.

[33] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 222 (Max Farrand ed., 1911).

[34] My use of the term "Blackwomen" is an effort to use language that more clearly reflects the unity of identity as "Black" and "woman," with neither aspect primary or subordinate to the other. It is an attempt to realize in practice what has been identified in theory — that, as Kimberlé Crenshaw notes, Blackwomen exist "at the crossroads of gender and race hierarchies." Kimberlé Crenshaw, *Whose Story Is It, Anyway? Feminist and Antiracist Appropriations of Anita Hill*, *in* RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 402, 403 (Toni Morrison ed., 1992). Indeed, this essay projects a powerful and complex vision of blackwomen that forms the foundation of my construction of this term:

> The particular experience of black women in the dominant cultural ideology of American society can be conceptualized as intersectional. Intersectionality captures the way in which the particular location of black women in dominant American social relations is unique and in some senses unassimilable into the discursive paradigms of gender and race domination.

Id. at 404.

[35] This use of slave women made them a type of sexual property, and particularly subject to the control of white males. *See* Margaret Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW & INEQ. J. 187, 197–99 (1987).

[36] HIGGINBOTHAM, *supra* note 20, at 43. By the late 1600s and early 1700s, the legislatures of various colonies adopted similar rules of classification. *See, e.g.*, *id.* at 128 (citing a 1706 New York statute); *id.* at 252 (citing a 1755 Georgia law).

[37] *See id.* at 44. According to Paula Giddings, the Virginia statute completed "[t]he circle of denigration . . . [in] combin[ing] racism, sexism, greed, and piety" in that it "laid women open to the most vicious exploitation." She noted that "a master could save the cost of buying new slaves by impregnating his own slave, or for that matter having anyone impregnate her." PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 37 (1984).

ished, like other slaveholders, he viewed slaves as economic assets, noting that their value could be realized more efficiently from breeding than from labor. A letter he wrote in 1805 stated: "I consider the labor of a breeding woman as no object, and that a child raised every 2 years is of more profit than the crop of the best laboring man."[38]

Even though there was some unease in slave law, reflective of the mixed status of slaves as humans and property, the critical nature of social relations under slavery was the commodification of human beings. Productive relations in early American society included varying forms of sale of labor capacity, many of which were highly oppressive; but slavery was distinguished from other forms of labor servitude by its permanency and the total commodification attendant to the status of the slave. Slavery as a legal institution treated slaves as property that could be transferred, assigned, inherited, or posted as collateral.[39] For example, in *Johnson v. Butler*,[40] the plaintiff sued the defendant for failing to pay a debt of $496 on a specified date. Because the covenant had called for payment of the debt in "money or negroes," the plaintiff contended that the defendant's tender of one negro only, although valued by the parties at an amount equivalent to the debt, could not discharge the debt. The court agreed with the plaintiff.[41] This use of Africans as a stand-in for actual currency highlights the degree to which slavery "propertized" human life.

Because the "presumption of freedom [arose] from color [white]" and the "black color of the race [raised] the presumption of slavery,"[42] whiteness became a shield from slavery, a highly volatile and unstable form of property. In the form adopted in the United States, slavery made human beings market-alienable and in so doing, subjected human life and personhood — that which is most valuable — to the ultimate devaluation. Because whites could not be enslaved or held as slaves,[43] the racial line between white and Black was extremely

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[38] Letter from Thomas Jefferson to John Jordan (Dec. 21, 1805), *cited in* TAKAKI, *supra* note 16, at 44.

[39] By 1705, Virginia had classified slaves as real property. *See* HIGGINBOTHAM, *supra* note 20, at 52. In Massachusetts and South Carolina, slaves were identified as chattel. *See id.* at 78, 211.

[40] 4 Ky. (1 Bibb) 97 (1815).

[41] *Id.* at 98. The court held that the defendant was not entitled to judgment on the demurrer for three reasons, including the following:

> The defendant, under the terms of the covenant, no doubt had his election to pay either in money or negroes; but in case of his choosing the latter alternative, as the covenant requires the payment to be made in *negroes*, in the plural number, the plaintiff could not be compelled to receive *one* only. The tender therefore, of a single negro, though of value equal to the amount to be paid, could not discharge the covenant.

Id.

[42] 1 THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES §§ 68–69, at 66–67 (1858).

[43] *See id.* § 68, at 66.

critical; it became a line of protection and demarcation from the potential threat of commodification, and it determined the allocation of the benefits and burdens of this form of property. White identity and whiteness were sources of privilege and protection; their absence meant being the object of property.

Slavery as a system of property facilitated the merger of white identity and property. Because the system of slavery was contingent on and conflated with racial identity, it became crucial to be "white," to be identified as white, to have the property of being white.[44] Whiteness was the characteristic, the attribute, the property of free human beings.

B. Forms of Racialized Property: Relationships Between Native American Land Seizure, Race, and Property

Slavery linked the privilege of whites to the subordination of Blacks through a legal regime that attempted the conversion of Blacks into objects of property. Similarly, the settlement and seizure of Native American land supported white privilege through a system of property rights in land in which the "race" of the Native Americans rendered their first possession rights invisible and justified conquest. This racist formulation embedded the fact of white privilege into the very definition of property, marking another stage in the evolution of the property interest in whiteness. Possession — the act necessary to lay the basis for rights in property — was defined to include only the cultural practices of whites. This definition laid the foundation for the idea that whiteness — that which whites alone possess — is valuable and is property.

Although the Indians were the first occupants and possessors of the land of the New World, their racial and cultural otherness[45] allowed this fact to be reinterpreted and ultimately erased as a basis for asserting rights in land. Because the land had been left in its natural state, untilled and unmarked by human hands, it was "waste"

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[44] Kenneth Minogue states that property performs the critical function of identification: "[P]roperty is the concept by which we find order in things. The world is a bundle of things, and things are recognized in terms of their attributes or properties." Kenneth R. Minogue, *The Concept of Property and Its Contemporary Significance*, *in* NOMOS XXII: PROPERTY 3, 11 (J. Roland Pennock & John W. Chapman eds., 1980). Indeed, he suggests that it is impossible to identify anyone or anything except by reference to their properties. *See id.* at 12.

[45] Takaki describes the construction of Native Americans as savages through political doctrine and cultural imagery — what Herman Melville called the "metaphysics of Indian hating" — as an ideology that facilitated the removal and extermination of Native Americans. *See* TAKAKI, *supra* note 16, at 81 (citation omitted). The "savage Indian" also served as the referential opposite by which whites defined themselves to be civilized. *See generally id.* at 56 (stating that Jefferson's efforts to civilize the Indians affirmed a definition of civilization and progress measured by distance from the savagery of the Indian); *id.* at 176–80 (describing George Custer's view of the "heathen and savage" Indians as "counterpoint[s] to civilization").

and, therefore, the appropriate object of settlement and appropriation.[46] Thus, the possession maintained by the Indians was not "true" possession and could safely be ignored.[47] This interpretation of the rule of first possession effectively rendered the rights of first possessors contingent on the race of the possessor.[48] Only particular forms of possession — those that were characteristic of white settlement — would be recognized and legitimated.[49] Indian forms of possession were perceived to be too ambiguous and unclear.

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[46] Thus, the Indians' claim as first possessors was said to rest on a "questionable foundation," according to John Quincy Adams, because the right of the hunter could not preempt and provide the basis for an exclusive claim for a "few hundreds" against the needs of "millions." His argument reflected a widely held consensus. GOSSETT, *supra* note 20, at 230 (citations omitted). The land that lay in the common, left "wholly to nature," was the proper subject of appropriation by one's labor because these "great tracts of ground . . . [that] lie waste . . . are more than the people who dwell on it do, or can make use of." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 137, 139 (photo. reprint 1990) (W.S. Carpenter ed., 1924) (3d ed. 1698). The forms of land use typical of Native American peoples were fluid and communal in nature. The American courts have held that governmental seizures of Indian property held under original Indian title do not offend the Takings Clause of the Fifth Amendment. Courts have reasoned that Indian property rights were not protected by the constitutional prohibition against taking private property without just compensation because the property rights of Native Americans were communal and inhered in the tribe rather than an individual. Secondly, courts have contended that Native American people had not established possession of the lands they claimed for. Although they had hunted and fished on the land, they had never enclosed it and allotted the land to individuals. *See* Joseph W. Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 17–18 (1991).

[47] According to Carol Rose, the common law made a "choice among audiences" in refusing to dismiss legal claims to Indian land based on the assertion that "the Indians . . . had never done acts on the land sufficient to establish property in it . . . . [T]he Indians had never really undertaken those acts of possession that give rise to a property right." Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 85–86 (1985). She states:

> "[I]n defining the acts of possession that make up a claim to property, the law not only rewards the author of the 'text'; it also puts an imprimatur on a particular symbolic system and on the audience that uses this system. Audiences that do not understand or accept the symbols are out of luck."

Id. at 85.

[48] *See* Joseph W. Singer, *Re-reading Property*, 27 NEW ENG. L. REV. 711, 720 (1992).

[49] This redefinition of possession and occupancy at the theoretical level was accompanied at the practical level by massive land dispossession that restricted Indians to reservations and designated hunting areas, established lines of demarcation by treaty that were later violated, effected land "sales" through fraud, trickery, or coercion, and led ultimately to campaigns of forced removals. *See* GOSSETT, *supra* note 20, at 228. Jefferson's Indian policy, for example, had the stated goal of "civilizing" the Indians, which resulted in their land being taken by whites for development. The objective of making the Indians "willing to sell" was achieved by the threat of force and encouraging the exchange of lands for goods pushed on them through trading houses. *See* TAKAKI, *supra* note 16, at 60–62. Andrew Jackson's campaign to dissolve the tribes, through both the forced removal of entire tribes and the land allotment program, was an attempt to make the Indians "citizens" and to coerce them to get rid of their lands. Under the land allotment program, Indians, as a condition of remaining on the land, were required to accept individual land grants that later were seized by land speculators through fraud or by creditors for debts. *See id.* at 92–107; *see also* ROBERT A. WILLIAMS, JR., THE AMERICAN

The conquest and occupation of Indian land was wrapped in the rule of law.[50] The law provided not only a defense of conquest and colonization, but also a naturalized regime of rights and disabilities, power and disadvantage that flowed from it, so that no further justifications or rationalizations were required.[51] A key decision defending the right of conquest was *Johnson and Graham's Lessee v. M'Intosh*,[52] in which both parties to the action claimed the same land through title descendant from different Indian tribes. The issue specifically presented was not merely whether Indians had the power to convey title, but to whom the conveyance could be made — to individuals or to the government that "discovered" land.[53] In holding that Indians could only convey to the latter, the Court reasoned that Indian title was subordinate to the absolute title of the sovereign that was achieved by conquest because "[c]onquest gives a title which the Courts of the conqueror cannot deny . . . ."[54] If property is under-

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INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 274 (1990) (describing the "time-honored" policy of "waging war on the Indians in order to force a land cession").

[50] In Alexis de Tocqueville's words, "the United States ha[s] accomplished this twofold purpose [of extermination of Indians and deprivation of rights] . . . legally, philanthropically, . . . and without violating a single great principle of morality in the eyes of the world. It is impossible to destroy men with more respect for the laws of humanity." 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 355 (Phillips Bradley ed. & Henry Reeve trans., 1945) (1835). As Rennard Strickland argues, these acts by the United States constituted genocide-at-law. *See* Rennard Strickland, *Genocide-at-law: An Historic and Contemporary View of the Native American Experience*, 34 KAN. L. REV. 713, 714–15 (1986).

[51] *See* WILLIAMS, *supra* note 49, at 8.

[52] 21 U.S. (8 Wheat.) 543 (1823).

[53] *See id.* at 563. Milner Ball's reinterpretation of *Johnson* rejects the traditional reading that all rights held by American Indian nations were lost in conquest. Instead, he argues that the case held only that, by conquest, Indians lost the right to convey title to any country other than the United States. *See* Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 29.

[54] *Johnson*, 21 U.S. (8 Wheat.) at 588–89. According to Robert Williams, in rendering this decision, the Court "merely formalized the outcome of a political contest that the Founders had fought and resolved among themselves some forty years earlier." WILLIAMS, *supra* note 49, at 231. Before Independence, radical colonists of the "landless" states — those without Crown charters specifying the territory available for settlement under the authority of the Crown — asserted the Indians' natural law right to alienate their land to whomever they chose, without regard to approval of the sovereign. *See id.* at 229–30. On the other hand, colonists of the "landed" states, those who held original Crown charters, argued that the colonial charters, as expressions of the will of the sovereign, granted them rights to the land specified and, under the frequently broad language of the grant, rights to control the land extending to the frontier. *See id.* at 230.

However, the coherence of the views between the settlers was far more significant than their differences. Ultimately, the conflict was resolved through a political compromise reached by the Founders that allowed for frontier claims held by the landed states to be ceded to a federal sovereign that could then assert exclusive rights to eradicate Indian occupancy claims by conquest or purchase and to undertake reallocation. *See Johnson*, 21 U.S. (8 Wheat.) at 585–88. Notwithstanding the differences between the opposing settler groups, their shared assumptions were

stood as a delegation of sovereign power — the product of the power of the state[55] — then a fair reading of history reveals the racial oppression of Indians inherent in the American regime of property.[56]

In *Johnson* and similar cases, courts established whiteness as a prerequisite to the exercise of enforceable property rights. Not all first possession or labor gave rise to property rights; rather, the rules of first possession and labor as a basis for property rights were qualified by race.[57] This fact infused whiteness with significance and value because it was solely through being white that property could be acquired and secured under law. Only whites possessed whiteness, a highly valued and exclusive form of property.

C. Critical Characteristics of Property and Whiteness

The legal legacy of slavery and of the seizure of land from Native American peoples is not merely a regime of property law that is (mis)informed by racist and ethnocentric themes. Rather, the law has established and protected an actual property interest in whiteness itself, which shares the critical characteristics of property and accords with the many and varied theoretical descriptions of property.

Although by popular usage property describes "things" owned by persons, or the rights of persons with respect to a thing,[58] the concept

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that the Indians' rights to land as first possessors were subordinate to European claims, and that therefore conquest and occupation could give rise to a right.

[55] *See* Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 650–52 (1988).

[56] *See generally* Joseph W. Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 1–8 (1991) (exploring the deleterious effects of the Supreme Court's formulation of tribal property rights). Parallel to the colonization of the Americas and the removal of the indigenous peoples from the land was the colonization of Africa and the removal of Africans from the continent. European conquest effected a horrific paradigm: as Europeans took Africans from the land, control of the land was taken from the Africans who remained. The result was that Africans who were removed from the continent became people without a country, and Africans on the continent became people without the legal capacity to control the land they occupied or to reap the benefits of the land they worked. The objective of capturing and enslaving Africans was to convert Africans and their descendants into property, or more accurately, into objects of property. The land dispossession of Africans on the continent, which was a central feature of colonialization, was accompanied by the introduction of regimes of property law that ratified the results of conquest and domination. *See generally* WALTER RODNEY, HOW EUROPE UNDERDEVELOPED AFRICA *passim* (1972) (offering a historical account of the origins and impact of the slave trade and European imperialism on African development). Thus, both here and on the African continent, race domination, imperialist conquest, and property rights were organically linked.

[57] *See* Singer, *supra* note 48, at 713.

[58] *See* C.B. Macpherson, *The Meaning of Property*, *in* PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 1, 3 (C.B. Macpherson ed., 1978) [hereinafter PROPERTY]. Stephen Munzer characterizes the idea of property-as-"thing" as the popular conception and property-as-relations as "the sophisticated version of property." STEPHEN R. MUNZER, A THEORY OF PROPERTY 16 (1990).

of property prevalent among most theorists, even prior to the twentieth century, is that property may "consist[] of rights in 'things' that are intangible, or whose existence is a matter of legal definition."[59] Property is thus said to be a right, not a thing, characterized as metaphysical, not physical.[60] The theoretical bases and conceptual descriptions of property rights are varied, ranging from first possessor rules,[61] to creation of value,[62] to Lockean labor theory, to personality theory, to utilitarian theory.[63] However disparate, these formulations of property clearly illustrate the extent to which property rights and interests embrace much more than land and personalty. Thus, the fact that whiteness is not a "physical" entity does not remove it from the realm of property.

Whiteness is not simply and solely a legally recognized property interest. It is simultaneously an aspect of self-identity and of personhood, and its relation to the law of property is complex. Whiteness has functioned as self-identity in the domain of the intrinsic, personal, and psychological; as reputation in the interstices between internal and external identity; and, as property in the extrinsic, public, and legal realms. According whiteness actual legal status converted an aspect of identity into an external object of property, moving whiteness from privileged identity to a vested interest. The law's construction of whiteness defined and affirmed critical aspects of identity (who is white); of privilege (what benefits accrue to that status); and, of property (what *legal* entitlements arise from that status). Whiteness at various times signifies and is deployed as identity, status, and property, sometimes singularly, sometimes in tandem.

1. Whiteness as a Traditional Form of Property. — Whiteness fits the broad historical concept of property described by classical theo-

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[59] Frederick G. Whelan, *Property as Artifice: Hume and Blackstone*, *in* NOMOS XXII: PROPERTY, *supra* note 44, at 101, 104. Whelan argues that even Blackstone was aware that property rights may pertain to things that may themselves be creations of law. *See id.* at 121–22. Thus, for example, Whelan notes that Blackstone described property in incorporeal hereditaments, which issue out of a "thing" but have "mental existence." *Id.* at 121. The distinction between property as things and property as rights, then, is not so clear.

[60] *See* JEREMY BENTHAM, THE THEORY OF LEGISLATION 111–13 (Richard Hildreth trans., 1931).

[61] *See* Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1221–22 (1979).

[62] *See* Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 178 (1992).

[63] Margaret Radin ascribes these concepts as the principal basis for liberal property theories propounded by John Locke, Georg W. Friedrich Hegel, and Jeremy Bentham respectively. *See* Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 958 n.3 (1982). Munzer describes the multiplicity of definitions of property as inviting the despairing conclusion that "any overarching normative theory of property is impossible." MUNZER, *supra* note 58, at 17; *see* Thomas C. Grey, *The Disintegration of Property*, *in* NOMOS XXII: PROPERTY, *supra* note 44, at 69, 69–82.

rists. In James Madison's view, for example, property "embraces every thing to which a man may attach a value and have a right,"[64] referring to all of a person's legal rights.[65] Property as conceived in the founding era

> included not only external objects and people's relationships to them, but also all of those human rights, liberties, powers, and immunities that are important for human well-being, including: freedom of expression, freedom of conscience, freedom from bodily harm, and free and equal opportunities to use personal faculties.[66]

Whiteness defined the legal status of a person as slave or free. White identity conferred tangible and economically valuable benefits and was jealously guarded as a valued possession, allowed only to those who met a strict standard of proof.[67] Whiteness — the right to white identity as embraced by the law — is property if by property one means all of a person's legal rights.

Other traditional theories of property emphasize that the "natural" character of property is derivative of custom, contrary to the notion that property is the product of a delegation of sovereign power. This "bottom up" theory holds that the law of property merely codifies existing customs and social relations.[68] Under that view, government-

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[64] 6 JAMES MADISON, THE WRITINGS OF JAMES MADISON 101 (Gaillard Hunt ed., 1906) (quoting James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, at 174).

[65] According to Macpherson, the common seventeenth century usage was very broad: "[M]en were said to have a property not only in land and goods and in claims on revenue from leases, mortgages, patents, monopolies and so on, but also a property in their lives and persons." Macpherson, *supra* note 58, at 7; *see* LAWRENCE BECKER, PROPERTY RIGHTS-PHILOSOPHIC FOUNDATIONS 120 n.11 (1977) (describing the use of the word "property" by Blackstone, Hobbes, and Locke to be referring to all of a person's legal rights).

[66] Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 128–29 (1990).

[67] *See infra* pp. 1738–41.

[68] Epstein argues the case as follows:

> In line with the theories of John Austin, law is regarded as a command of the sovereign . . . . In opposition to Austin stands an alternative view that grounds property rights on the traditions and common practices within a given community. On this view, property comes from the bottom up and not from the top down. . . . [The state's] chief function is to discover and reflect accurately what the community has customarily regarded as binding social rules and then to enforce those rules in specific controversies.

Richard A. Epstein, International News Service v. Associated Press: *Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85, 85 (1992) (footnotes omitted) [hereinafter Epstein, *Custom and Law*]. The customary rule recognized in common law was the primary right of first possessors. *See* Richard A. Epstein, *No New Property*, 56 BROOK. L. REV. 747, 750 (1990) [hereinafter Epstein, *No New Property*); Rose, *supra* note 47, at 73–74.

The argument that all American law and property relates to custom rests on assumptions that second possessors were actually first, or that the land that had been "conquested" was vacant. The idea that second possessors were first is apparently Epstein's assumption: "[A]s inheritors of the Lockean tradition, the basic theory [in the United States] was that property rights emerged from first possession, from first occupation, from homesteading, and not from

created rights such as social welfare payments cannot constitute legitimate property interests because they are positivistic in nature.[69] Other theorists have challenged this conception, and argued that even the most basic of "customary" property rights — the rule of first possession, for example — is dependent on its acceptance or rejection in particular instances by the government.[70] Citing custom as a source of property law begs the central question: whose custom?

Rather than remaining within the bipolar confines of custom or command, it is crucial to recognize the dynamic and multifaceted relationship among custom, command, and law, as well as the extent to which positionality[71] determines how each may be experienced and understood. Indian custom was obliterated by force and replaced with the regimes of common law that embodied the customs of the conquerors. The assumption of American law as it related to Native Americans was that conquest *did* give rise to sovereignty. Indians experienced the property laws of the colonizers and the emergent American nation as acts of violence perpetuated by the exercise of power and ratified through the rule of law.[72] At the same time, these laws were perceived as custom and "common sense" by the colonizers.[73] The Founders, for instance, so thoroughly embraced Lockean

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state grant." Epstein, *No New Property*, *supra*, at 750. The notion of vacant land belongs to Locke: the right to acquire property through labor as long as there was some "good left in common for others" applied to the "inland vacant places of America." LOCKE, *supra* note 46, at 130, 134. Neither of these two premises is tenable. *See* Singer, *supra* note 48, at 719 (arguing that, "while Indian land was not built up, virtually all land in America was under tribal sovereignty, so that the land was not vacant, but was taken from the first possessors"). The apparent presumption, therefore, must be that, if the custom was conquest — that is, if the acquisition of land through occupation, settlement, and conquest was customary — then the state's incorporation of customary rules into the common law is merely a ratification of custom — a bottom up, not a top down relation.

[69] *See* Epstein, *No New Property*, *supra* note 68, at 761–62.

[70] *See* Rose, *supra* note 47, at 73 (arguing that the law defines acts of possession that give rise to a claim to property).

[71] I use "positionality" here in the sense employed in feminist legal theory. Positionality is a theory of knowledge, a rejection of objective, neutral truth in favor of a truth "situated and partial[,] . . . emerg[ing] from particular involvements and relationships . . . [that] define the individual's perspective and provide the location for meaning, identity, and political commitment." Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 880 (1990).

[72] This relation between law and power has long been noted: "[B]eneath the veneer of consensus on legal principles, a struggle of interest is going on, and the law is seen as a weapon in the hands of those who possess the power to use it for their own ends." Vilhelm Aubert, *Introduction* to SOCIOLOGY OF LAW 9, 11 (Vilhelm Aubert ed., 1969).

[73] Williams argues that "Locke's discourse . . . legitimated the appropriation of the American wilderness as a right, and even as an imperative, under natural law." WILLIAMS, *supra* note 49, at 248. Locke's ideas were at the root of the Declaration of Independence, a fact readily conceded by Jefferson who indicated that the document was perhaps "a compilation of commonplaces." *Id.* at 246.

labor theory as the basis for a right of acquisition because it affirmed the right of the New World settlers to settle on and acquire the frontier. It confirmed and ratified their experience.[74]

The law's interpretation of those encounters between whites and Native Americans not only inflicted vastly different results on them, but also established a pattern — a *custom* — of valorizing whiteness. As the forms of racialized property were perfected, the value and protection extended to whiteness increased. Regardless of which theory of property one adopts, the concept of whiteness — established by centuries of custom (illegitimate custom, but custom nonetheless) and codified by law — may be understood as a property interest.

2. Modern Views of Property as Defining Social Relations. — Although property in the classical sense refers to everything that is valued and to which a person has a right, the modern concept of property focuses on its function and the social relations reflected therein. In this sense, modern property doctrine emphasizes the more contingent nature of property and has been the basis for the argument that property rights should be expanded.

Modern theories of property reject the assumption that property is "objectively definable or identifiable, apart from social context."[75] Charles Reich's ground-breaking work, *The New Property*,[76] was an early effort to focus on the function of property and note the changing social relations reflected and constructed by new forms of property derived from the government.[77] Property in this broader sense encompassed jobs, entitlements, occupational licenses, contracts, subsidies, and indeed a whole host of intangibles that are the product of labor, time, and creativity, such as intellectual property, business goodwill, and enhanced earning potential from graduate degrees.[78] Notwithstanding the dilution of new property since *Goldberg v. Kelly*[79] and its progeny[80] as well as continued attacks on the concept,[81] the legacy of new property infuses the concept of property with questions

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[74] *See id.* at 247.

[75] Underkuffler, *supra* note 66, at 133.

[76] Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[77] *See id.* at 733.

[78] The analysis derived from Reich's conception of "New Property" formed the basis of the majority opinion in Goldberg v. Kelly, 397 U.S. 254 (1970). *See generally* Singer, *supra* note 48, at 723 (cataloguing the range of intangible interests described as property).

[79] 397 U.S. 254 (1970).

[80] Perry v. Sindermann, 408 U.S. 593 (1972); Morrissey v. Brewer, 408 U.S. 471 (1972); Bell v. Burson, 402 U.S. 535 (1971).

[81] *See* Bishop v. Wood, 426 U.S. 341, 347 (1976) (holding that the plaintiff's discharge from employment with the police department did not constitute a deprivation of a property interest); Board of Regents v. Roth, 408 U.S. 564, 578 (1972) (holding that a non-tenured, one-year university teaching position was not a property right); Epstein, *No New Property*, *supra* note 68, at 760–75; William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process and the Administrative State*, 62 CORNELL L. REV. 445, 457–70 (1977).

of power, selection, and allocation. Reich's argument that property is not a natural right but a construction by society[82] resonates in current theories of property that describe the allocation of property rights as a series of choices. This construction directs attention toward issues of relative power and social relations inherent in any definition of property.

3. Property and Expectations. — "Property is nothing but the basis of expectation," according to Bentham, "consist[ing] in an established expectation, in the persuasion of being able to draw such and such advantage from the thing possessed."[83] The relationship between expectations and property remains highly significant,[84] as the law "has recognized and protected even the expectation of rights as actual legal property."[85] This theory does not suggest that all value[86] or all expectations give rise to property,[87] but those expectations in tangible or intangible things that are valued and protected by the law are property.

In fact, the difficulty lies not in identifying expectations as a part of property, but in distinguishing which expectations are reasonable and therefore merit the protection of the law as property.[88] Although

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[82] *See* Reich, *supra* note 76, at 771. The rejection of "new property" on the ground that it is derived from the government rather than private sources is ultimately not persuasive, because as Reich argues, all property is a creation of law. *See id.* at 778–79.

According to Singer, "the legal system makes constant choices about what interests to define as property." Singer, *supra* note 56, at 47. Moreover, "[s]tate power defines and allocates property rights, and property rights, in turn, allocate power and vulnerability. Seemingly neutral definitions of property rights by the courts distribute power and vulnerability in ways that construct illegitimate hierarchies based on race, sex, class, disability and sexual orientation." *Id.* at 8.

[83] Jeremy Bentham, *Security and Equality in Property*, *in* PROPERTY, *supra* note 58, at 51–52. Curiously, although Bentham argued strongly for the constructed nature of property, he considered the absence of property — poverty — to be natural: "Poverty is not the work of the laws; it is the primitive condition of the human race . . . ." *Id.* at 52–53.

A more modern formulation of the relation between property and expectations is advanced by Macpherson, although from an opposing philosophical view. He argues that property is a right or claim that one anticipates or expects will be enforced. *See* Macpherson, *supra* note 58, at 3 ("What distinguishes property from mere momentary possession is that property is a claim that will be enforced by society or the state, by custom or convention of law."). Munzer also notes that "property, conceived as a legal structure of Hohfeldian normative modalities, makes possible legal expectations with respect to things." MUNZER, *supra* note 58, at 29.

[84] "Expectations are an important part of modern property theory." john a. powell, *New Property Disaggregated: A Model to Address Employment Discrimination*, 24 U.S.F. L. REV. 363, 374 (1990).

[85] *Id.* at 366.

[86] Wendy Gordon persuasively argues that the notion that property arises from value will simply not hold up under examination and thus has little merit. *See* Gordon, *supra* note 62, at 178.

[87] Munzer argues that property cannot be equated with expectations, but that expectations are part of the psychological dimension of property. *See* MUNZER, *supra* note 58, at 30.

[88] Joseph Sax asserts: "The essence of property law is respect for reasonable expectations.

the existence of certain property rights may seem self-evident and the protection of certain expectations may seem essential for social stability,[89] property is a legal construct by which selected private interests are protected and upheld. In creating property "rights," the law draws boundaries and enforces or reorders existing regimes of power.[90] The inequalities that are produced and reproduced are not givens or inevitabilities, but rather are conscious selections regarding the structuring of social relations. In this sense, it is contended that property rights and interests are not "natural," but are "creation[s] of law."[91]

In a society structured on racial subordination, white privilege became an expectation and, to apply Margaret Radin's concept, whiteness became the quintessential property for personhood.[92] The law constructed "whiteness" as an objective fact, although in reality it is an ideological proposition imposed through subordination. This move is the central feature of "reification": "Its basis is that a relation between people takes on the character of a thing and thus acquires a 'phantom objectivity,' an autonomy that seems so strictly rational and all-embracing as to conceal every trace of its fundamental nature: the relation between people."[93] Whiteness was an "object" over which continued control was — and is — expected. The protection of these expectations is central because, as Radin notes: "If an object you now control is bound up in your future plans or in your anticipation of your future self, and it is partly these plans for your own continuity that make you a person, then your personhood depends on the realization of these expectations."[94]

The idea of justice at the root of private property protection calls for identification of those expectations which the legal system ought to recognize." Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 186–87 (1980) (footnote omitted).

[89] *See, e.g.*, Epstein, *supra* note 61, at 1241 ("In essence the first possession rule has been the organizing principle of most social institutions, and the heavy burden of persuasion lies upon those who wish to displace it.").

[90] Singer argues that, in deciding what contract and what property rights to enforce, the state endorses the power of one party over the other or prevents one party from exercising power to the detriment of the other. Thus, the state makes allocative decisions in all transactions, public or private. *See* Singer, *supra* note 55, at 650–52.

[91] Justice Holmes's dissent in *International News Service v. Associated Press* stated that "[p]roperty, a creation of law, does not arise from value . . . ." International News Serv. v. Associated Press, 248 U.S. 215, 246 (1918) (Holmes, J., dissenting).

[92] *See* Radin, *supra* note 63, at 959–61 (examining property as "a class of objects or resources necessary to be a person or whose absence would hinder the autonomy or liberty attributed to a person").

[93] GEORG LUKÁCS, HISTORY AND CLASS CONSCIOUSNESS 83 (Rodney Livingstone trans., 1971).

[94] Radin, *supra* note 63, at 968. In this passage, Radin is not attempting to carry out Bentham's project of providing overall justifications for property; rather, she is only considering the role of expectations in personal property.

Because the law recognized and protected expectations grounded in white privilege (albeit not explicitly in all instances), these expectations became tantamount to property that could not permissibly be intruded upon without consent. As the law explicitly ratified those expectations in continued privilege or extended ongoing protection to those illegitimate expectations by failing to expose or to radically disturb them, the dominant and subordinate positions within the racial hierarchy were reified in law.[95] When the law recognizes, either implicitly or explicitly, the settled expectations of whites built on the privileges and benefits produced by white supremacy, it acknowledges and reinforces a property interest in whiteness that reproduces Black subordination.

4. The Property Functions of Whiteness. — In addition to the theoretical descriptions of property, whiteness also meets the functional criteria of property. Specifically, the law has accorded "holders" of whiteness the same privileges and benefits accorded holders of other types of property. The liberal view of property is that it includes the exclusive rights of possession, use, and disposition.[96] Its attributes are the right to transfer or alienability, the right to use and enjoyment, and the right to exclude others.[97] Even when examined against this limited view, whiteness conforms to the general contours of property. It may be a "bad" form of property, but it is property nonetheless.

(a) Rights of Disposition. — Property rights are traditionally described as fully alienable.[98] Because fundamental personal rights are commonly understood to be inalienable, it is problematic to view them as property interests.[99] However, as Margaret Radin notes, "inalienability" is not a transparent term; it has multiple meanings that refer to interests that are non-salable, non-transferable, or non-market-alienable.[100] The common core of inalienability is the negation of the possibility of separation of an entitlement, right, or attribute from its holder.[101]

Classical theories of property identified alienability as a requisite aspect of property;[102] thus, that which is inalienable cannot be prop-

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[95] *See infra* pp. 1745–57.

[96] *See* J.S. MILL, PRINCIPLES OF POLITICAL ECONOMY bk. II, ch. ii, at 218 (W. Ashley ed., 1909).

[97] *See id.*

[98] *See* Margaret Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1854 n.19 (1987).

[99] *See id.* at 1851.

[100] *See id.* at 1852–53.

[101] *See id.* at 1852.

[102] *See* JOHN S. MILL, PRINCIPLES OF POLITICAL ECONOMY 218 (photo. reprint 1976) (William Ashley ed., 1909) (stating that "[t]he institution of property, when limited to its essential elements" is a person's right to its "exclusive disposal" as well as the producer's right to whatever can be gotten for the goods in a fair market), *quoted in* Radin, *supra* note 98, at 1889. Radin notes that this position differs from one pluralist view, which states that some things can be property without being fully alienable. *See* Radin, *supra* note 98, at 1890.

erty.[103] As the major exponent of this view, Mill argued that public offices, monopoly privileges, and human beings — all of which were or should have been inalienable — should not be considered property at all.[104] Under this account, if inalienability inheres in the concept of property, then whiteness, incapable of being transferred or alienated either inside or outside the market, would fail to meet a criterion of property.[105]

As Radin notes, however, even under the classical view, alienability of certain property was limited. Mill also advocated certain restraints on alienation in connection with property rights in land and probably other natural resources.[106] In fact, the law has recognized various kinds of inalienable property. For example, entitlements of the regulatory and welfare states, such as transfer payments and government licenses, are inalienable; yet they have been conceptualized and treated as property by law.[107] Although this "new property" has been criticized as being improper — that is, not appropriately cast as property — the principal objection has been based on its alleged lack of productive capacity, not its inalienability.[108]

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[103] If property inherently includes the power of alienation, then property that is inalienable is a logical contradiction. *See* Radin, *supra* note 98, at 1889–90. The result is an inexorable pull toward "universal commodification." *Id.* at 1890–91.

[104] *See* MILL, *supra* note 102, at 208, *cited in* Radin, *supra* note 98, at 1889–90.

[105] There is one historical instance in which arguably whiteness was transferred. In Loving v. Virginia, 388 U.S. 1 (1967), the Supreme Court invalidated Virginia's anti-miscegenation statute that prohibited intermarriage between white persons and "colored persons" as violative of the Equal Protection Clause. *See id.* at 12. Significantly, the statute did allow intermarriage between whites and persons of white and American Indian descent. It further defined white persons as those of exclusively Caucasian origin, but granted persons with less than one-sixteenth American Indian blood the status of being white for the purposes of the statute. *See* VA. CODE ANN. § 20-54 (repealed 1968). In conferring the status of honorary white on persons of such heritage, the statute was reflecting the "desire of all to recognize as an integral and honored part of the white race the descendants of John Rolfe and Pocahantas." Bureau of Vital Statistics, *The New Family and Race Improvement*, 17 VA. HEALTH BULL., Extra No. 12, at 18, 19, 26 (New Families Series No. 5, 1925), *cited in* Walter Wadlington, *The* Loving *Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1202 (1966). In one sense, the statute represented a legal conveyance of the property interest in whiteness to those who were technically not white, possibly to ensure the stability of a social order in which many who considered themselves white were not in fact white as defined by law.

[106] *See* MILL, *supra* note 102, at 218, *cited in* Radin, *supra* note 98, at 1889–90. Mill thus argued that property included the power to bequest, but not the right to inherit and that property rights in land carried limitations. *See* John S. Mill, *Of Property*, *in* PROPERTY, *supra* note 58, at 77, 87, 95.

[107] *See* Mathews v. Eldridge, 424 U.S. 319, 332 (1976) (holding that Social Security beneficiaries possessed a qualified property interest); Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (holding that welfare benefits constituted property interests and could not be taken away without a pre-termination hearing); *In re* Ming, 469 F.2d 1352, 1355–56 (7th Cir. 1972) (holding that a law license, as a form of property, may not be suspended without a hearing); Reich, *supra* note 76, at 733.

[108] Epstein acknowledges that "the state can create new forms of property other than the

The law has also acknowledged forms of inalienable property derived from nongovernmental sources. In the context of divorce, courts have held that professional degrees or licenses held by one party and financed by the labor of the other is marital property whose value is subject to allocation by the court.[109] A medical or law degree is not alienable either in the market or by voluntary transfer. Nevertheless, it is included as property when dissolving a legal relationship.

Indeed, Radin argues that, as a deterrent to the dehumanization of universal commodification, market-inalienability may be justified to protect property important to the person and to safeguard human flourishing.[110] She suggests that non-commodification or market-inalienability of personal property[111] or those things essential to human flourishing is necessary to guard against the objectification of human beings.[112] To avoid that danger, "we must cease thinking that market alienability is inherent in the concept of property."[113] Following this

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classic forms that existed at common law . . . so long as it observes the basic conditions associated with its own raison d'etre." Epstein, *No New Property*, *supra* note 68, at 754. Thus, he argues that there is a legitimate basis for treating copyrights and patents, broadcast frequencies, or corporate indentures as property, but no justification exists for treating welfare benefits as property, because the former confer significant financial gain whereas the latter do not. *See id.* at 754–62.

[109] *See, e.g.*, O'Brien v. O'Brien, 489 N.E.2d 712, 713 (N.Y. 1985); Joan M. Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 KAN. L. REV. 379, 410–16 (1980); *see also* Charles Reich, *The New Property After 25 Years*, 24 U.S.F. L. REV. 223, 226 (1990) (arguing that, if a professional degree is a couple's major asset, failure to accord it the status of property may result in substantial injustice to the wife). *But see In re* Marriage of Graham, 574 P.2d 75, 77 (Colo. 1978) (holding that an M.B.A. did not constitute marital property subject to division).

[110] *See* Radin, *supra* note 98, at 1903–09. Universal market rhetoric in fact subjects "everything people need or desire" to commodification and "includes not only those things usually considered goods, but also personal attributes, relationships, and states of affairs." *Id.* at 1860. Radin identifies Richard Posner with this view. *See id.* at 1862 n.49 ("Posner argues that, but for the costs of implementing a property system, value would be maximized if everything scarce and desired were ownable and salable . . . . Thus, [because we ought to maximize value,] everything scarce and desirable ought to be ownable and salable.") (citation omitted); *see also* Elizabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 324 (1978) (arguing for the establishment of a market for babies). This model rejects inalienability — reductively conceptualized as market-inalienability — as being dysfunctional, with the result that everything, including bodily integrity, is objectified and property that is personal collapses into the fungible. *See* Radin, *supra* note 98, at 1880–81.

[111] The distinction between personal and fungible property is described as follows:

> Property is personal in a philosophical sense when it has become identified with a person, with her self-constitution and self-development in the context of her environment. Personal property cannot be taken away and replaced with money or other things without harm to the person — to her identity and existence. In a sense, personal property becomes a personal attribute. On the other hand, property is fungible when there is no such personal attachment.

Radin, *supra* 98, at 1880 n.115; *see* Radin, *supra* note 63, at 959–61.

[112] *See* Radin, supra note 98, at 1903–06.

[113] *Id.* at 1903.

logic, then, the inalienability of whiteness should not preclude the consideration of whiteness as property. Paradoxically, its inalienability may be more indicative of its perceived enhanced value, rather than its disqualification as property.

(b) Right to Use and Enjoyment. — Possession of property includes the rights of use and enjoyment. If these rights are essential aspects of property, it is because "the problem of property in political philosophy dissolves into . . . questions of the will and the way in which we use the things of this world."[114] As whiteness is simultaneously an aspect of identity and a property interest, it is something that can both be experienced and deployed as a resource. Whiteness can move from being a passive characteristic as an aspect of identity to an active entity that — like other types of property — is used to fulfill the will and to exercise power. The state's official recognition of a racial identity that subordinated Blacks and of privileged rights in property based on race elevated whiteness from a passive attribute to an object of law and a resource deployable at the social, political, and institutional level to maintain control. Thus, a white person "used and enjoyed" whiteness whenever she took advantage of the privileges accorded white people simply by virtue of their whiteness — when she exercised any number of rights reserved for the holders of whiteness. Whiteness as the embodiment of white privilege transcended mere belief or preference; it became usable property, the subject of the law's regard and protection. In this respect whiteness, as an active property, has been used and enjoyed.

(c) Reputation and Status Property. — In constructing whiteness as property, the ideological move was to conceptualize white racial identity as an external thing in a constitutive sense — an "object[] or resource[] necessary to be a person."[115] This move was accomplished in large measure by recognizing the reputational interest in being regarded as white as a thing of significant value, which like other reputational interests, was intrinsically bound up with identity and personhood. The reputation of being white was treated as a species of property, or something in which a property interest could be asserted.[116] In this context, whiteness was a form of status property.

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[114] Minogue, *supra* note 44, at 15.

[115] Radin, *supra* note 63, at 960.

[116] There have been longstanding debates on whether one's reputation is more correctly characterized as property or liberty. *Compare* Van Alstyne, *supra* note 81, at 479 n.97 (claiming that interests in reputation, traditionally described as interests in liberty, are at least as well described as property interests) *with* MUNZER, *supra* note 58, at 46 n.9 (noting that reputation in Anglo-American law is more often described as a liberty interest than a property interest). Reputational interests, however, have been treated as interests possessing aspects of both in American law. As Robert Post indicates, the concepts of reputation manifested in the common law of defamation at different points in history include reputation as property, reputation as honor, and reputation as dignity. *See* Robert C. Post, *The Social Foundations of Defamation*

The conception of reputation as property found its origins in early concepts of property that encompassed things (such as land and personalty), income (such as revenues from leases, mortgages, and patent monopolies), and one's life, liberty, and labor.[117] Thus, Locke's famous pronouncement, "every man has a 'property' in his own 'person,'"[118] undergirded the assertion that one's physical self was one's property.[119] From this premise, one's labor, "the work of his hands," combined with those things found in the common to form property over which one could exercise ownership, control, and dominion.[120] The idea of self-ownership, then, was particularly fertile ground for the idea that reputation, as an aspect of identity earned through effort, was similarly property. Moreover, the loss of reputation was capable of being valued in the market.[121]

The direct manifestation of the law's legitimation of whiteness as reputation is revealed in the well-established doctrine that to call a white person "Black" is to defame her.[122] Although many of the cases

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Law: Reputation and the Constitution, 74 CAL. L. REV. 691, 693 (1986). Reputation is a "melange" lending itself to different descriptions over time. *Id.* at 740.

[117] *See* Macpherson, *supra* note 58, at 7.

[118] LOCKE, *supra* note 46, at 130.

[119] Radin surmises that Locke's use of person in this passage probably refers to ownership of one's physical body. *See* Radin, *supra* note 63, at 965. To construe the Lockean precept of holding property in one's person as meaning property in one's body depends on a particular theory of the person that equates persons with human bodies. However, solving the riddle of the meaning of person is not an essential predicate to recognizing whiteness as property because whatever the concept of personhood, whiteness was bound up with identity and liberty in both private and public spheres.

[120] LOCKE, *supra* note 46, at 130.

[121] Reputation as honor is also grounded in historical traditions, but in contrast to the values of the marketplace, embodies the values of society that endow social roles. *See* Post, *supra* note 116, at 699–700. Thus, a king does not work to attain honor; rather, honor is attributed to his position and he is expected to "personify" the role. The underlying presumption is one of social stratification, in which hierarchically determined roles are assigned rather than earned. *See id.* at 700–02. Post notes that the idea of reputation as honor is predicated on the norms of a "deference society" in which "ascribed social roles are pervasive and well established." *Id.* at 701–02. Although American society, which is at least overtly committed to egalitarian principles, might not accurately be characterized as a "deference society," honor defined by hierarchy persists in some institutions. *Id.* at 706–07.

Being regarded as white, or the reputation of whiteness, represents a blending of the concepts of reputation as honor — that which is claimed by virtue of status — and reputation as property — that which has value in the market. Whiteness was honorific in that it was conferred and not earned, based on the inherent unequal status of dominant and subordinate groups. Thus, it might be seen as outside conceptions of reputation as property. In fact, whiteness as reputation seems to evoke Post's description of reputation as honor. *See id.* at 725–26. Nevertheless, because whiteness is something to which market value attaches, I argue that the reputation of whiteness also presents aspects of property. Indeed, being Black — or being de-propertied of whiteness — is something that causes harm capable of pecuniary measurement. *See infra* notes 222–226 and accompanying text.

[122] *See* J.H. Crabb, Annotation, *Libel and Slander: Statements Respecting Race, Color, or Nationality as Actionable*, 46 A.L.R. 2d 1287, 1289 (1956) ("The bulk of the cases have arisen

were decided in an era when the social and legal stratification of whites and Blacks was more absolute, as late as 1957 the principle was reaffirmed, notwithstanding significant changes in the legal and political status of Blacks. As one court noted, "there is still to be considered the social distinction existing between the races," and the allegation was likely to cause injury.[123] A Black person, however, could not sue for defamation if she was called "white." Because the law expressed and reinforced the social hierarchy as it existed, it was presumed that no harm could flow from such a reversal.[124]

Private identity based on racial hierarchy was legitimated as public identity in law, even after the end of slavery and the formal end of legal race segregation. Whiteness as interpersonal hierarchy was recognized externally as race reputation. Thus, whiteness as public reputation and personal property was affirmed.

(d) The Absolute Right to Exclude. — Many theorists have traditionally conceptualized property to include the exclusive rights of use, disposition, and possession, with possession embracing the absolute right to exclude.[125] The right to exclude was the central principle, too, of whiteness as identity, for mainly whiteness has been characterized, not by an inherent unifying characteristic, but by the exclusion of others deemed to be "not white." The possessors of whiteness were granted the legal right to exclude others from the privileges inhering in whiteness; whiteness became an exclusive club whose membership was closely and grudgingly guarded. The courts played an active role in enforcing this right to exclude — determining who was or was not white enough to enjoy the privileges accompanying whiteness.[126] In that sense, the courts protected whiteness as any other form of property.

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from situations in which it was stated erroneously that a white person was a Negro. According to the majority rule, this is libelous per se."); Annotation, *Libel and Slander: Statements Respecting Race, Color, or Nationality as Actionable*, 50 A.L.R. 1413, 1413–14 (1927) ("The great weight of authority in the cases involving charges that the plaintiff is of African origin is that such an imputation is actionable per se."). *But see* Collins v. Oklahoma State Hosp., 184 P. 946, 947–48 (Okla. 1916). *See generally* MANGUM, *supra* note 30, at 18–25 (summarizing cases on this issue from the 1800s to the 1930s).

[123] Bowen v. Independent Publishing Co., 96 S.E.2d 564, 565 (S.C. 1957).

[124] *See* Post, *supra* note 116, at 725–26.

[125] *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 65 (1985) ("The idea of property embraces the absolute right to exclude."). The idea that property means "my right to exclude you from some use or benefit of something" is pervasive in modern theory. *See* Macpherson, *supra* note 58, at 2. Not all theorists agree that the right to exclude embodied in property rights is absolute. *See generally* Margaret J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1669–70 (criticizing as "naive conceptualism" the neoconservative view that the word "property" has a "timeless," "obvious, objective meaning" that is "in" the Constitution).

[126] *See infra* notes 133–140 and accompanying text.

Moreover, as it emerged, the concept of whiteness was premised on white supremacy rather than mere difference. "White" was defined and constructed in ways that increased its value by reinforcing its exclusivity. Indeed, just as whiteness as property embraced the right to exclude, whiteness as a theoretical construct evolved for the very purpose of racial exclusion. Thus, the concept of whiteness is built on both exclusion and racial subjugation. This fact was particularly evident during the period of the most rigid racial exclusion, as whiteness signified racial privilege and took the form of status property.

At the individual level, recognizing oneself as "white" necessarily assumes premises based on white supremacy: It assumes that Black ancestry in any degree, extending to generations far removed, automatically disqualifies claims to white identity, thereby privileging "white" as unadulterated, exclusive, and rare. Inherent in the concept of "being white" was the right to own or hold whiteness to the exclusion and subordination of Blacks. Because "[i]dentity is . . . continuously being constituted through social interactions,"[127] the assigned political, economic, and social inferiority of Blacks necessarily shaped white identity. In the commonly held popular view, the presence of Black "blood" — including the infamous "one-drop"[128] — consigned a person to being "Black" and evoked the "metaphor . . . of purity and contamination" in which Black blood is a contaminant and white racial identity is pure.[129] Recognizing or identifying oneself as white is thus a claim of racial purity,[130] an assertion that one is free of any taint of Black blood. The law has played a critical role in legitimating this claim.

D. White Legal Identity: The Law's Acceptance and Legitimation of Whiteness as Property

The law assumed the crucial task of racial classification, and accepted and embraced the then-current theories of race as biological fact. This core precept of race as a physically defined reality allowed the law to fulfill an essential function — to "parcel out social standing according to race" and to facilitate systematic discrimination by articulating "seemingly precise definitions of racial group membership."[131] This allocation of race and rights continued a century after the abolition of slavery.[132]

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[127] Post, *supra* note 116, at 709.

[128] F. JAMES DAVIS, WHO IS BLACK? 5 (1991) (citations omitted).

[129] Gotanda, *supra* note 24, at 26.

[130] *See id.* at 27.

[131] Robert J. Cottrol, *The Historical Definition of Race Law*, 21 LAW & SOC'Y REV. 865, 865 (1988).

[132] *See id.*

The law relied on bounded, objective, and scientific definitions of race — what Neil Gotanda has called "historical race"[133] — to construct whiteness as not merely race, but race plus privilege. By making race determinant and the product of rationality and science, dominant and subordinate positions within the racial hierarchy were disguised as the product of natural law and biology[134] rather than as naked preferences.[135] Whiteness as racialized privilege was then legitimated by science and was embraced in legal doctrine as "objective fact."

Case law that attempted to define race frequently struggled over the precise fractional amount of Black "blood" — traceable Black ancestry — that would defeat a claim to whiteness.[136] Although the courts applied varying fractional formulas in different jurisdictions to define "Black" or, in the terms of the day, "Negro" or "colored," the law uniformly accepted the rule of hypodescent[137] — racial identity was governed by blood, and white was preferred.[138]

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[133] Gotanda defines "historical race" as socially constructed formal categories predicated on race subordination that included presumed substantive characteristics relating to "ability, disadvantage, or moral culpability." Gotanda, *supra* note 24, at 4.

[134] *See infra* note 139 and accompanying text.

[135] *See* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1693–94 (1989).

[136] See, for example, People v. Dean, 14 Mich. 406 (1866), in which the majority held that those with less than one-quarter Black blood were white within the meaning of the constitutional provision limiting the franchise to "white male citizens," *see id.* at 425. The dissent argued that a preponderance of white blood should be sufficient to accord the status of whiteness. *See id.* at 435, 438 (Martin, C.J., dissenting).

[137] "Hypodescent" is the term used by anthropologist Marvin Harris to describe the American system of racial classification in which the subordinate classification is assigned to the offspring if there is one "superordinate" and one "subordinate" parent. Under this system, the child of a Black parent and a white parent is Black. MARVIN HARRIS, PATTERNS OF RACE IN THE AMERICAS 37, 56 (1964).

[138] According to various court decisions of the nineteenth and early twentieth centuries, the term "negro" was construed to mean a person of mixed blood within three generations, *see* State v. Melton & Byrd, 44 N.C. (Busb.) 49, 51 (1852); a person having one-fourth or more of African blood, *see* Gentry v. McMinnis, 3 Dana (Ky.) 382, 385 (1835); Jones v. Commission, 80 Va. 538, 542 (1885); a person having one-sixteenth or more of African blood, *see* State v. Chavers, 50 N.C. 11, 14–15 (1857); State v. Watters, 25 N.C. (3 Ired.) 455, 457 (1843); a person having one-eighth or more of African blood, *see* Rice v. Gong Lum, 139 Miss. 760, 779 (1925); Marre v. Marre, 184 Mo. App. 198, 211 (1914); anyone with any trace of Negro blood, *see* State v. Montgomery County School Dist. No. 16, 242 S.W. 545, 546 (1922). The term "colored" too had a range of legal meanings. *See* 11 C.J. *Colored* 1224 (1917). For a review of court decisions and statutes of nineteenth and early twentieth centuries delineating who is a "Negro" or who is colored, see MANGUM, *supra* note 30, at 1–17.

An example of the complexity of defining these terms is revealed in State v. Treadaway, 52 So. 500 (La. 1910), in which the Louisiana state supreme court exhaustively reviewed the various meanings of the words "negro" and "colored" in considering whether an "octoroon" — a person of one-eighth Black blood — was a Negro within the meaning of a statute barring cohabitation between a person of the "white" race and a person of the "negro or black" race. *See id.* at 501–10. In examining the definitions propounded in various dictionaries, court

This legal assumption of race as blood-borne was predicated on the pseudo-sciences of eugenics and craniology that saw their major development during the eighteenth and nineteenth centuries.[139] The legal definition of race was the "objective" test propounded by racist theorists of the day who described race to be immutable, scientific, biologically determined — an unsullied fact of the blood rather than a volatile and violently imposed regime of racial hierarchy.

In adjudicating who was "white," courts sometimes noted that, by physical characteristics, the individual whose racial identity was at issue appeared to be white and, in fact, had been regarded as white in the community. Yet if an individual's blood was tainted, she could not claim to be "white" as the law understood, regardless of the fact that phenotypically she may have been completely indistinguishable from a white person, may have lived as a white person, and have descended from a family that lived as whites. Although socially accepted as white, she could not *legally* be white.[140] Blood as "objective

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decisions, and statutory law that used either term, the court concluded that "colored" denoted a person of mixed white and Black blood in any degree, and a "negro" was a "person of the African race, or possessing the black color and other characteristics of the African." *Id.* at 531. Because "there are no negroes who are not persons of color; but there are persons of color who are not negroes," *id.*, the court concluded that the statute did not include octoroons because they were not commonly considered "negroes," although they were persons of color, *see id.* at 537. The response of the Louisiana legislature was to reenact the statute with the identical language, except it substituted the word "colored" for the word "Negro." *See* MANGUM, *supra* note 30, at 5–6.

[139] For example, Samuel Morton, one of the principal architects of these theories, ascribed the basis of Black and non-white racial inferiority to differences in cranial capacity, which purportedly revealed that whites had larger heads. Notwithstanding the gross breaches of scientific method and manipulation of data evident in Morton's theory, *see* GOSSETT, *supra* note 20, at 73–74, his 1839 book, *Crania Americana*, was widely accepted as the scientific explanation of Blacks' inability to mature beyond childhood, *see* GOSSETT, *supra* note 20, at 58–59 (citing the remarks of Oliver Wendell Holmes, Sr., extolling Morton as a "leader" whose "severe and cautious . . . researches" would provide "permanent data for all future students of Ethology"); TAKAKI, *supra* note 16, at 113 (citing the remarks of an Indiana senator in 1850 who spoke of the diminished brain capacity of Blacks). These and other widely disseminated theories of Black inferiority provided the rationale for the political and popular discourse of the time that argued that Black equality and participation in the polity were impossible because Blacks lacked the capacity to develop rational decisionmaking. *See* REGINALD HORSMAN, RACE AND MANIFEST DESTINY 116–57 (describing the permeation of "scientific" bases for racial inferiority into every aspect of American thought).

[140] *See, e.g.*, Sunseri v. Cassagne, 185 So. 1, 4–5 (La. 1938). The case involved a suit by Sunseri to annul his marriage to Cassagne on the grounds that she had a trace of "negro blood." He contended that his wife's great-great-grandmother was a "full-blooded negress," and Cassagne herself asserted that she was Indian. *See id.* at 2. It was not disputed that all of Cassagne's paternal ancestors from her father to her great-great-grandfather were white men. *See id.* Moreover, Cassagne had been regarded as white in the community, as she and her mother had been christened in a white church, had attended white schools, were registered as white voters, were accepted as white in public facilities, and had exclusively associated with whites. *See id.* at 4–5. Nevertheless, because certificates and official records designated Cassagne and some of her relatives as "colored," the court concluded that she was not white and that thus there were

fact" dominated over appearance and social acceptance, which were socially fluid and subjective measures.

But, in fact, "blood" was no more objective than that which the law dismissed as subjective and unreliable. The acceptance of the fiction that the racial ancestry could be determined with the degree of precision called for by the relevant standards or definitions rested on false assumptions that racial categories of prior ancestors had been accurately reported, that those reporting in the past shared the definitions currently in use, and that racial purity actually existed in the United States.[141] Ignoring these considerations, the law established rules that extended equal treatment to those of the "same blood," albeit of different complexions, because it was acknowledged that, "[t]here are white men as dark as mulattoes, and there are pure-blooded albino Africans as white as the whitest Saxons."[142]

The standards were designed to accomplish what mere observation could not: "That even Blacks who did not look Black were kept in their place."[143] Although the line of demarcation between Black and white varied from rules that classified as Black a person containing "any drop of Black blood,"[144] to more liberal rules that defined persons with a preponderance of white blood to be white,[145] the courts universally accepted the notion that white status was something of value

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sufficient grounds to annul the marriage. *See* Sunseri v. Cassagne, 196 So. 7, 10 (La. 1940); *see also* Johnson v. Board of Educ. of Wilson County, 82 S.E. 832, 833–35 (1914) (refusing to allow the children of a "pure white" husband and a wife who was less than "one-eighth negro" to be admitted to white schools because of the presence of "negro blood in some degree," even assuming that the marriage was valid and not violative of the miscegenation statute).

[141] It is not at all clear that even the slaves imported from abroad represented "pure Negro races." As Gunner Myrdal noted, many of the tribes imported from Africa had intermingled with peoples of the Mediterranean, among them Portuguese slave traders. Other slaves brought to the United States came via the West Indies, where some Africans had been brought directly, but still others had been brought via Spain and Portugal, countries in which extensive interracial sexual relations had occurred. By the mid-nineteenth century it was, therefore, a virtual fiction to speak of "pure blood" as it relates to racial identification in the United States. *See* MYRDAL, *supra* note 4, at 123.

[142] People v. Dean, 14 Mich. 406, 422 (1866).

[143] Diamond & Cottrol, *supra* note 20, at 281.

[144] For a history of the "one-drop" rule, see DAVIS, cited above in note 128, at 5. According to Davis:

> The nation's answer to the question "Who is black?" has long been that a black is any person with any known African black ancestry. This definition reflects the long experience with slavery and later with Jim Crow segregation. In the South it became known as the "one-drop rule," meaning that a single drop of "black blood" makes a person black. It is also known as the . . . "traceable amount rule," and anthropologists call it the "hypo-descent rule," meaning that racially mixed persons are assigned the status of the subordinate group. This definition emerged from the American South to become the nation's definition, generally accepted by whites and blacks alike. Blacks had no other choice.

Id. (citations omitted).

[145] *See, e.g.*, Gray v. Ohio, 4 Ohio 353, 355 (1831).

that could be accorded only to those persons whose proofs established their whiteness as defined by the law.[146] Because legal recognition of a person as white carried material benefits, "false" or inadequately supported claims were denied like any other unsubstantiated claim to a property interest. Only those who could lay "legitimate" claims to whiteness could be legally recognized as "white," because allowing physical attributes, social acceptance, or self-identification to determine whiteness would diminish its value and destroy the underlying presumption of exclusivity. In effect, the courts erected legal "No Trespassing" signs.

In the realm of *social* relations, racial recognition in the United States is thus an act of race subordination. In the realm of *legal* relations, judicial definition of racial identity based on white supremacy reproduced that race subordination at the institutional level. In transforming white to whiteness, the law masked the ideological content of racial definition and the exercise of power required to maintain it: "It convert[ed] [an] abstract concept into [an] entity."[147]

1. Whiteness as Racialized Privilege. — The material benefits of racial exclusion and subjugation functioned, in the labor context, to stifle class tensions among whites. White workers perceived that they had more in common with the bourgeoisie than with fellow workers who were Black. Thus, W.E.B. Du Bois's classic historical study of race and class, *Black Reconstruction*,[148] noted that, for the evolving white working class, race identification became crucial to the ways that it thought of itself and conceived its interests. There were, he suggested, obvious material benefits, at least in the short term, to the decision of white workers to define themselves by their whiteness: their wages far exceeded those of Blacks and were high even in comparison with world standards.[149] Moreover, even when the white working class did not collect increased pay as part of white privilege, there were real advantages not paid in direct income: whiteness still yielded what Du Bois termed a "public and psychological wage" vital to white workers.[150] Thus, Du Bois noted:

> They [whites] were given public deference . . . because they were white. They were admitted freely with all classes of white people, to

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[146] The courts adopted this standard even as they critiqued the legitimacy of such rules and definitions. For example, in People v. Dean, 14 Mich. 406 (1886), the court, in interpreting the meaning of the word "white" for the purpose of determining whether the defendant had voted illegally, criticized as "absurd" the notion that "a preponderance of mixed blood, on one side or the other of any given standard, has the remotest bearing upon personal fitness or unfitness to possess political privileges," *id.* at 417, but held that the electorate that had voted for racial exclusion had the right to determine voting privileges, *see id.* at 416.

[147] STEPHEN J. GOULD, THE MISMEASURE OF MAN 24 (1981).

[148] W.E.B. DU BOIS, BLACK RECONSTRUCTION (photo. reprint 1976) (1935).

[149] *See id.* at 634.

[150] *Id.* at 700.

> public functions, to public parks . . . . The police were drawn from their ranks, and the courts, dependent on their votes, treated them with . . . leniency . . . . Their vote selected public officials, and while this had small effect upon the economic situation, it had great effect on their personal treatment . . . . White schoolhouses were the best in the community, and conspicuously placed, and they cost anywhere from twice to ten times as much per capita as the colored schools.[151]

The central feature of the convergence of "white" and "worker" lay in the fact that racial status and privilege could ameliorate and assist in "evad[ing] rather than confront[ing] [class] exploitation."[152] Although not accorded the privileges of the ruling class, in both the North and South, white workers could accept their lower class position in the hierarchy "by fashioning identities as 'not slaves' and as 'not Blacks.'"[153] Whiteness produced — and was reproduced by — the social advantage that accompanied it.

Whiteness was also central to national identity and to the republican project. The amalgamation of various European strains into an American identity was facilitated by an oppositional definition of Black as "other."[154] As Hacker suggests, fundamentally, the question was not so much "who is white," *but* "who may be considered white,"

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[151] *Id.* at 700–01.

[152] ROEDIGER, *supra* note 19, at 13. One of Roediger's principal themes is that whiteness was constructed both from the top down and from the bottom up. *See id.* at 8–11. His vigorous analysis of the role of racism in the construction of working class consciousness leads him to conclude that "the pleasures of whiteness could function as a [wage] for white workers . . . . [S]tatus and privilege conferred by race could be used to make up for alienating and exploitive class relationships." *Id.* at 13. Roediger further argues that the conjunction of "white" and "worker" came about in the nineteenth century at a time when the non-slave labor force came increasingly to depend on wage labor. The independence of this sector was then measured in relation to the dependency of Blacks as a subordinated people and class. *See id.* at 20. The involvement of all sectors, including the white working class, in the construction of whiteness aids in explaining the persistence of whiteness in the modern period. *See* discussion *infra* pp. 1758–77.

[153] ROEDIGER, *supra* note 19, at 13.

[154] "One of the surest ways to confirm an identity, for communities and individuals, is to find some way of measuring what one is *not*." KAI ERICKSON, WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE 64 (1966).

Toni Morrison's study of the Africanist presence in U.S. literature echoes the same theme of the reflexive construction of "American" identity:

> It is no accident and no mistake that immigrant populations (and much immigrant literature) understood their Americaness as an opposition to the resident black population. Race in fact now functions as a metaphor so necessary to the construction of Americaness that it rivals the old pseudo-scientific and class-informed racisms whose dynamics we are more used to deciphering . . . . Deep within the word "American" is its association with race. To identify someone as South African is to say very little; we need the adjective "white" or "black" or "colored" to make our meaning clear. In this country, it is quite the reverse. American means white . . . .

TONI MORRISON, PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION 46–47 (1992).

as the historical pattern was that various immigrant groups of different ethnic origins were accepted into a white identity shaped around Anglo-American norms.[155] Current members then "ponder[ed] whether they want[ed] or need[ed] new members as well as the proper pace of new admissions into this exclusive club."[156] Through minstrel shows in which white actors masquerading in blackface played out racist stereotypes, the popular culture put the Black at "'solo spot centerstage, providing a relational model in contrast to which masses of Americans could establish a positive and superior sense of identity[,]' . . . [an identity] . . . established by an infinitely manipulable negation comparing whites with a construct of a socially defenseless group."[157]

It is important to note the effect of this hypervaluation of whiteness. Owning white identity as property affirmed the self-identity and liberty[158] of whites and, conversely, denied the self-identity and liberty of Blacks.[159] The attempts to lay claim to whiteness through "passing" painfully illustrate the effects of the law's recognition of whiteness. The embrace of a lie, undertaken by my grandmother and the thousands like her, could occur only when oppression makes self-denial and the obliteration of identity rational and, in significant measure, beneficial.[160] The economic coercion of white supremacy on self-definition nullifies any suggestion that passing is a logical exercise of liberty or self-identity. The decision to pass as white was not a choice, if by that word one means voluntariness or lack of compulsion. The fact of race subordination was coercive and circumscribed the liberty

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[155] Andrew Hacker says that white became a "common front" established across ethnic origins, social class, and language. ANDREW HACKER, TWO NATIONS 12 (1992).

[156] *Id.* at 9.

[157] ROEDIGER, *supra* note 19, at 118 (quoting Alan W.C. Green, *"Jim Crow," "Zip Coon": The Northern Origin of Negro Minstrelsy*, 11 MASS. REV. 385, 395 (1970)).

[158] I do not attempt here to review or state a position with regard to the profusion of theories that describe the relationship between liberty and property; that is beyond the scope of this inquiry. Rather, I use liberty in the Hohfeldian sense as a privilege, "a legal liberty or freedom," not involving "a correlative duty but the absence of a right on someone else's part to interfere." MUNZER, *supra* note 58, at 18 (1990).

[159] In this respect, whiteness as property followed a familiar paradigm. Although the state can create new forms of property other than those existing at common law, "in each case that it creates new property rights, the state necessarily limits the common law liberty or property rights of other citizens, for conduct which was once legal now becomes an invasion or an infringement of the new set of rights that are established." Epstein, *No New Property*, *supra* note 68, at 754; *see* HIGGINBOTHAM, *supra* note 20, at 13 (noting that, when the law establishes a right for a person, group, or institution, it simultaneously constrains those whose "preferences impinge on the right established").

[160] This problem is at the center of one of the early classics of Black literature, *The Autobiography of an Ex-Coloured Man*, by James Weldon Johnson, the story of a Black man who "passes" for white, crossing between Black and white racial identities four times. *See* Henry L. Gates, Jr., *Introduction* to JAMES W. JOHNSON, THE AUTOBIOGRAPHY OF AN EX-COLOURED MAN vi (Vintage 1989) (1912).

to self-define. Self-determination of identity was not a right for all people, but a privilege accorded on the basis of race. The effect of protecting whiteness at law was to devalue those who were not white by coercing them to deny their identity in order to survive.[161]

2. Whiteness, Rights, and National Identity. — The concept of whiteness was carefully protected because so much was contingent upon it. Whiteness conferred on its owners aspects of citizenship that were all the more valued because they were denied to others. Indeed, the very fact of citizenship itself was linked to white racial identity. The Naturalization Act of 1790 restricted citizenship to persons who resided in the United States for two years, who could establish their good character in court, and who were "white."[162] Moreover, the trajectory of expanding democratic rights for whites was accompanied by the contraction of the rights of Blacks in an ever deepening cycle of oppression.[163] The franchise, for example, was broadened to extend voting rights to unpropertied white men at the same time that Black voters were specifically disenfranchised, arguably shifting the property required for voting from land to whiteness.[164] This racialized version of republicanism — this Herrenvolk[165] republicanism — constrained

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[161] I am indebted to Lisa Ikemoto for the insight regarding how whiteness as property interacts with liberty and self-identity.

[162] *See* Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103 (1790) (repealed 1795). As Takaki explains, this law "specified a complexion for the members of the new nation" and reflected the explicit merger of white national identity and republicanism. TAKAKI, *supra* note 16, at 15. It was also another arena in which the law promulgated racial definitions as part of its task of allocating rights of citizenship. These decisions further reinforced white hegemony by naturalizing white identity as objective when in fact it was a constructed and moving barrier. As noted in *Corpus Juris*, a white person

> constitutes a very indefinite description of a class of persons, where none can be said to be literally white; and it has been said that a construction of the term to mean Europeans and persons of European descent is ambiguous. "White person" has been held to include an Armenian born in Asiatic Turkey, a person of but one-sixteenth Indian blood, and a Syrian, but not to include Afghans, American Indians, Chinese, Filipinos, Hawaiians, Hindus, Japanese, Koreans, negroes; nor does white person include a person having one fourth of African blood, a person in whom Malay blood predominates, a person whose father was a German and whose mother was a Japanese, a person whose father was a white Canadian and whose mother was an Indian woman, or a person whose mother was a Chinese and whose father was the son of a Portuguese father and a Chinese mother.

68 C.J. *White* 258 (1934) (citations omitted).

[163] *See* Diamond & Cottrol, *supra* note 20, at 262.

[164] For an account of the linkage between expanding white voting rights and increased constraints on rights for Blacks, see ROEDIGER, *supra* note 19, in which he describes the experience in Pennsylvania, *see id.* at 59; *see also* Diamond & Cottrol, *supra* note 20, at 260–61 n.26 (summarizing the fate of free, enfranchised Blacks who were later disenfranchised in the face of rising racism at the same time that property requirements were abolished for white voters).

[165] Pierre van der Berghe uses this term to describe those societies in which dominant groups operate within democratic and egalitarian rules, and subordinate groups are subjected to undemocratic and tyrannical regulation. The classic contemporary example of this model is South

any vision of democracy from addressing the class hierarchies adverse to many who considered themselves white.

The inherent contradiction between the bondage of Blacks and republican rhetoric that championed the freedom of all men was resolved by positing that Blacks were different.[166] The laws did not mandate that Blacks be accorded equality under the law because nature — not man, not power, not violence — had determined their degraded status. Rights were for those who had the capacity to exercise them, a capacity denoted by racial identity. This conception of rights was contingent on race — on whether one could claim whiteness — a form of property. This articulation of rights that were contingent on property ownership was a familiar paradigm, as similar requirements had been imposed on the franchise in the early part of the republic.[167] For the first two hundred years of the country's existence, the system of racialized privilege in both the public and private spheres carried through this linkage of rights and inequality, and rights and property. Whiteness as property was the critical core of a system that affirmed the hierarchical relations between white and Black.

III. BOUND BY LAW: THE PROPERTY INTEREST IN WHITENESS AS LEGAL DOCTRINE IN *PLESSY* AND *BROWN*

Even after the period of conquest and colonization of the New World and the abolition of slavery, whiteness was the predicate for attaining a host of societal privileges, in both public and private spheres. Whiteness determined whether one could vote, travel freely, attend schools, obtain work, and indeed, defined the structure of social relations along the entire spectrum of interactions between the individual and society. Whiteness then became status, a form of racialized privilege ratified in law. Material privileges attendant to being white

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Africa. *See* PIERRE VAN DER BERGHE, RACE AND RACISM: A COMPARATIVE PERSPECTIVE 17–18 (1967).

[166] *See* Diamond & Cottrol, *supra* note 20, at 262.

[167] The organizing principle of the Federalist vision of the republic was that government must protect the rights of persons and the rights of property. *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 17 (1991). But if, as Madison stated, "'the first object of government is the protection of different and unequal faculties of acquiring property,'" *id.* at 17 (citation omitted), then an extension of the rights of suffrage to all would subject those with material property, always a minority, to the control of the propertyless, *see id.* at 18. The solution adopted by Madisonian republicanism limited the franchise and installed a system of freehold suffrage. *See id.* at 19. The result, according to Nedelsky, was a distortion of the republican vision as inequality was presumed and protected. *See id.* at 1. *But see* Book Note, *Private Property, Civic Republicanism and the Madisonian Constitution*, 104 HARV. L. REV. 961, 963–64 (1991) (arguing that Nedelsky mischaracterizes the Madisonian vision of property to be referring only to material property when in fact Madison's concept of property included everything to which one could claim a right).

inhered in the status of being white. After the dismantling of legalized race segregation, whiteness took on the character of property in the modern sense in that relative white privilege was legitimated as the status quo. In *Plessy v. Ferguson*[168] and the case that overturned it, *Brown v. Board of Education*,[169] the law extended protection to whiteness as property, in the former instance, as traditional status-property, in the latter, as modern property.

A. Plessy

Plessy arose at a time of acute crisis for Blacks. The system of legalized race segregation known as Jim Crow[170] and heightened racial violence[171] had reversed the minimal gains attained by Blacks during Reconstruction.[172] Against a background of extreme racial oppression, the Supreme Court's opinion in *Plessy* rejecting thirteenth and fourteenth amendment challenges to state enforced racial segregation was consonant with the overall political climate.

The case arose in 1891, as one of a series of challenges to a Louisiana law that required racial segregation of railway cars, and was brought after Homer A. Plessy attempted to board a coach reserved for whites and was arrested for violating the statute.[173] Because, according to the plea filed on Plessy's behalf, "the mixture of African blood [was] not discernable in him,"[174] it is evident that Plessy's arrest was arranged as part of a strategy that included the

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[168] 163 U.S. 537 (1896).

[169] 347 U.S. 483 (1954).

[170] *See generally* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW *passim* (1974) (describing the American system of legally mandated race segregation).

[171] Lynching, an extreme form of social control designed to contain or obliterate potential economic and political challenges posed by Blacks, rose during the ten-year period between 1890 and 1900. In 1892 alone, over 255 Black men, women, and children were lynched. *See* GIDDINGS, *supra* note 37, at 26.

[172] Some historians have argued that the actual material conditions of Blacks deteriorated in the last two decades of the nineteenth century as they were squeezed out of the core of the labor force. *See* MYRDAL, *supra* note 4, at 222 (arguing that, after Emancipation, "no . . . proprietary interest [of slaveowners] protected negro laborers from the desire of white workers to squeeze them out of skilled employment[,] [t]hey were gradually driven out and pushed down into 'Negro jobs', a category which has been more and more narrowly defined").

[173] *See* CHARLES LOFGREN, THE PLESSY CASE 41 (1987).

[174] *Id.* at 41.

tacit cooperation of railway officials, many of whom were displeased with the separate car law due to the increased expense of operation.[175] The Court dismissed Plessy's claim that legalized racial separation produced racial subordination because

> [T]he underlying fallacy of the plaintiff's argument consists in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act but solely because the colored race chooses to put that construction on it.[176]

Plessy's claim, however, was predicated on more than the Equal Protection Clause of the Fourteenth Amendment. Plessy additionally charged that the refusal to seat him on the white passenger car deprived him of property — "this reputation [of being white] which has an actual pecuniary value" — without the due process of law guaranteed by the amendment.[177] Because phenotypically Plessy appeared to be white,[178] barring him from the railway car reserved for whites severely impaired or deprived him of the reputation of being regarded as white.[179] He might thereafter be regarded as or be suspected of being not white[180] and therefore not entitled to any of the public and private benefits attendant to white status.

The brief filed on Plessy's behalf advanced as its first argument that, because "the reputation of belonging to the dominant race . . . is property, in the same sense that a right of action or inheritance is property," empowering a train employee to arbitrarily take property away from a passenger violated due process guarantees.[181] Because of white supremacy, whiteness was not merely a descriptive or ascrip-

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[175] *See id.* at 32.

[176] Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

[177] Brief for Plaintiff in Error at 8, *Plessy* (No. 210) [hereinafter Brief for Homer Plessy].

[178] *See* LOFGREN, *supra* note 173, at 41.

[179] Albion Tourgée, attorney for Plessy, had specifically sought a fair-skinned plaintiff in order to raise this argument, over vigorous opposition from organized Black leadership. Although Tourgée was seeking a narrower ground for the Court to rule upon, as he was very pessimistic about overturning Jim Crow in the hostile political climate, Black leadership objected that such a strategy, even if successful, would mitigate conditions only for those Blacks who appeared to be white. Legally sanctioning the privilege of fair skin over dark would only serve to reinforce the legitimacy of the race hierarchy that kept white over Black. Nevertheless, Tourgée prevailed in his efforts to pursue this strategy and Homer A. Plessy was chosen because phenotypically he appeared to be white. *See* JACK GREENBERG, LITIGATION FOR SOCIAL CHANGE: METHODS, LIMITS AND ROLE IN DEMOCRACY 13–15 (1974). Greenberg notes that one of the benefits of Tourgée's approach was that, had it been accepted by the Court, it might have, in time, made Jim Crow laws extremely difficult to administer. Thus, states might simply have abandoned them. *See id.* at 14.

[180] *See* Brief for Homer Plessy, *supra* note 177, at 9–10.

[181] *Id.* at 8.

tive characteristic — it was property of overwhelming significance and value. Albion Tourgée, one of Plessy's attorneys, pointedly argued that the property value in being white was self-evident:

> How much would it be *worth* to a young man entering upon the practice of law, to be regarded as a *white* man rather than a colored one? Six-sevenths of the population are white. Nineteen-twentieths of the property of the country is owned by white people. Ninety-nine hundredths of the business opportunities are in the control of white people. . . . Probably most white persons if given a choice, would prefer death to life in the United States *as colored persons*. Under these conditions, is it possible to conclude that *the reputation of being white* is not property? Indeed, is it not the most valuable sort of property, being the master-key that unlocks the golden door of opportunity?[182]

Moreover, Tourgée noted that, in determining who was white, not only were there no national standards, there were also conflicting rules that, by definition, incorporated white domination:

> There is no law of the United States, or of the state of Louisiana defining the limits of race — who are white and who are "colored"? By what rule then shall any tribunal be guided in determining racial character? It may be said that all those should be classed as colored in whom appears a visible admixture of colored blood. By what law? With what justice? Why not count everyone as white in whom is visible any trace of white blood? There is but one reason to wit, the domination of the white race.[183]

The Court ignored Tourgée's argument, and asserted simply that, although the statute obviously conferred power on the train conductor to make assignments by race, no deprivation of due process had resulted because the issue of Plessy's race did not "properly arise on the record."[184] Because there was nothing to indicate that Plessy had

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[182] *Id.* at 9.

[183] *Id.* at 11. Although from a very different perspective and analysis, Tourgée's attack on the arbitrariness of racial categories presaged the full-blown assault on the illusion of colorblindness offered by Neil Gotanda's insight that recognition of race in this society involves race subordination. Gotanda states:

> Under hypodescent [the rule governing race in the United States], Black parentage is recognized through the generations. . . . Black ancestry is a contaminant that overwhelms white ancestry. Thus, under the American system of racial classification, claiming a white racial identity is a declaration of racial purity and an implicit assertion of racial domination. . . .
>
> . . . [T]he moment of racial recognition is the moment in which is *reproduced* the inherent asymmetry of the metaphor of racial contamination and the implicit impossibility of racial equality.

Gotanda, *supra* note 24, at 26–27 (footnotes omitted).

[184] Plessy v. Ferguson, 163 U.S. 537, 549 (1896). The information filed against Plessy had failed to specify his race. *See* LOFGREN, *supra* note 173, at 154. However, Plessy's petition for writs of prohibition and certiorari had alleged that he was seven-eighths white. *See id.* at 55.

been improperly classified under any operative racial definition, no claim for a lack of judicial process in reviewing an improper classification would lie.

The opinion, however, inexplicably proceeded to consider whether Plessy had suffered damage to his property in the form of his reputation, a question dependent on the issue of racial classification that the Court had previously declined to address. The Court simply concluded that, if Plessy were white, any injury to his reputation would be adequately compensated by an action for damages against the company, given that counsel for the state had conceded that the statute's liability exemption for conductors was unconstitutional.[185] The Court stated:

> If he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called property. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.[186]

At one level, the Court's opinion amounted to a wholesale evasion of the argument that, as a matter of federal constitutional law, Plessy's assignment to a railway car for Blacks, in the absence of a clear standard defining who was white, was an arbitrary and unauthorized taking of the valuable asset of being regarded as white. At another level, the Court's decision lent support to the notion of race reputation as a property interest that required the protection of law through actions for damages. It did not specifically consider any particular rule of race definition, but it protected the property interest in whiteness for all whites by subsuming even those like Plessy, who phenotypically appeared to be white, within categories that were predicated on white supremacy and race subordination. Officially, the court declined to consider whether Plessy met any statutory definition of whiteness, but deferred to state law as the legitimate source of racial definitions.[187] Although the opinion rhetorically signaled some qual-

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Attached to the petition was the affidavit of the arresting officer who had identified Plessy as a "passenger of the colored race." *Id.* Notwithstanding the court's demurral, there was thus little doubt that the record contained facts pertaining to Plessy's race.

[185] *See Plessy*, 163 U.S. at 549.

[186] *Id.*

[187] The Court validated, as acceptable norms, state law requirements including, presumably, all common law regarding the proportion of "colored blood necessary to constitute a colored person." The Court stated:

> It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different states . . . . But these are questions to be determined under the laws of each state and are not properly put in issue in this case.

Id. at 552 (citations omitted).

Obviously, state law also would control the federal due process claim. This fact invites speculation that had Plessy been on a train in a different state with different laws defining

ifications about the existence of the property right in whiteness,[188] in fact, the Court protected that right by acknowledging that whites could protect their reputation of being white through suits for damages and by determining that Plessy would be subject to rules that continued white privilege. *Plessy* demonstrated the Court's chronic refusal to dismantle the structure of white supremacy, which is maintained through the institutional protection of relative benefits for whites at the expense of Blacks. In denying that any inferiority existed by reason of de jure segregation, and in denying white status to Plessy, "whiteness" was protected from intrusion and appropriate boundaries around the property were maintained.

B. Brown I

Nearly sixty years later, *Brown I*[189] reversed the Court's prior endorsement of "separate but equal" in *Plessy* and marked the end of the legal recognition of state-enforced racial separation. In no uncertain terms, *Brown I* flatly rejected *Plessy*'s assertion that segregation did not mark Blacks as inferior, and condemned legalized race segregation in public schools as inherently unequal.[190] In *Brown I*, the plaintiffs contended that "segregated public schools are not 'equal' and cannot be made 'equal.'"[191] The Court stated the issue as the constitutional viability of segregation within circumstances of substantive equality, because "with respect to buildings, curricula, qualifications and salaries of teachers, and other tangible factors," Black schools and white schools either had been equalized or were being equalized in the school systems that were the subject of the litigation.[192] *Brown I* held that, parity of resources aside, the evil of state-mandated segregation was the conveyance of a sense of unworthiness and inferiority.[193] To its credit, the Court not only rejected the property right of whites in officially sanctioned inequality, but also refused to protect the old property interest in whiteness by not accepting the argument that the rights of whites to disassociate is a valid counterweight to the rights of Blacks to be free of subordination imposed by segregation. It did not accept the premise that neutral principles guaranteed that white preferences should remain undisturbed.[194]

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whiteness, the case might have gone the other way, although on the narrower basis of the deprivation of due process.

[188] The opinion says that the right asserted by Plessy is "so-called" property and acknowledged the existence of such a property right "for the purposes of this case." *Id.* at 549.

[189] Brown v. Board of Educ. (Brown I), 347 U.S. 483 (1954).

[190] *See id.* at 494–95.

[191] *Id.* at 488.

[192] *Id.* at 492.

[193] *See id.* at 494.

[194] Herbert Wechsler's search for the neutral principles that justify the outcome in *Brown* is

Yet *Brown I* was plagued by ambiguous motives[195] and clouded rhetorical vision.[196] In fact, it is unclear what definition of equality was articulated by *Brown I*, and in this ambiguity, the property interest in whiteness continued to reside. Against the backdrop of real inequality, even as the Court abandoned the highly formalistic view of equality underpinning *Plessy*, it remained unwilling to embrace any form of substantive equality, unwilling to acknowledge any right to equality of resources.[197] The Court refused to extend continued legal protection to white privilege, yet it simultaneously declined to guarantee that white privilege would be dismantled, or even to direct that the continued existence of institutionalized privilege violated the equal protection rights of Blacks.

In its unwillingness to do so, the *Brown I* Court failed to address the full measure of the harm.[198] A very real aspect of injury was

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unsuccessful because he argues that *Brown* really is about the competing associational claims of Blacks whose rights to freely associate were impaired by segregation and the rights of whites to be free from association with Blacks. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959). Defining the problem of segregation in purely associational terms ignores the crucial fact that the system of white supremacy was built not merely to achieve race segregation, but also to construct systematic disadvantage.

[195] Assessing the underlying reasons for *Brown* is beyond the scope of this work, but it is noteworthy that a careful analysis of *Brown* not only reveals the way in which it was analytically and remedially compromised by the protection of the new form of whiteness as property, but also discloses that the impetus for the decision was as much white self-interest as the relentless struggle of Blacks for equal justice. The removal of de jure segregation resulted from the domestic pressure generated by the oppressed Black masses under the banner of equal justice under law as well as from the external dynamic of competition between the United States and the Soviet Union for influence in the Third World. The United States was vulnerable to the charge that its domestic policies toward Black people residing in the United States were a better indication of its view of the emerging nations of Africa and Asia than its rhetoric of democracy. For a thorough and fascinating account of *Brown* in the context of U.S. foreign policy and Cold War initiatives, see Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988). *See also* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 524–25 (1980) (arguing that the decision in *Brown* was also in the interests of white foreign policymakers); Mark Tushnet, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867, 1885 (1991) (citing the briefs filed by the Department of Justice that noted that the system of Jim Crow was a tremendous handicap to U.S. foreign policy in its competition with the Soviet Union for influence in Africa).

[196] Some historians have suggested that this ambiguity may have been deliberate to some extent, part of the necessary price for a unanimous opinion. *See* J. HARVIE WILKINSON III, FROM BROWN TO BAKKE 31 (1979).

[197] According to Alan Freeman:

> [*Brown*] has come to stand for both more and less than equality of educational opportunity — more to the extent it reached out to strike down other discriminatory practices, but much less to the extent there is no recognized right, no ethical claim for equality of resources or a substantively effective education as such.

Alan P. Freeman, *Antidiscrimination Law: A Critical Review*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 96, 101 (David Kairys ed., 1982). This ambiguity infected the remedial phase. *See infra* pp. 1754–56.

[198] This failure may have been due, in part, to the difficulty of attacking the system of racial

that legalized race segregation structured material inequalities into all socioeconomic relations and institutions, including publicly funded schools.[199] All other things, then, most assuredly were *not* equal.[200] The purpose of the law of segregation was to subordinate and disadvantage Blacks. Indeed, legalized segregation could not achieve its purpose without imposing inequality. The purposeful creation and maintenance of inequality, then, was the violation from which the plaintiffs in *Brown I* sought relief. Although the Court partially recognized the claim and acknowledged that "[s]eparate . . . [is] inherently unequal,"[201] it failed to expose the problem of substantive inequality in material terms produced by white domination and race segregation.

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oppression from different fronts. The National Association for the Advancement of Colored People (NAACP) lawyers representing the plaintiffs in the long campaign against state-enforced segregation had long debated the merits of different strategies: (1) pursuing suits that sought equalization of school facilities in systems throughout the country where disparities were obvious; or (2) undertaking a direct attack on *Plessy*. The major issues were not only ideological — that is whether integration was a desired or viable goal — but were strategic as well. That the legal battle was being waged under severe financial constraints made pure equalization suits a less effective and less useful choice, as it was evident early on that equalization suits would have to pursue remedies locality by locality, with each outcome turning on facts highly specific to the case and having little or no precedential value. Unequal conditions were factual questions in essence, and required intensive investigatory resources to make out a case. *See* MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION 107–10 (1987).

Moreover, equality of facilities alone was unacceptable to the plaintiffs, their lawyers, and many of those directly engaged in the struggle. An argument limited to "separate but equal" alone would have served to reinforce the very principle of the system of racial oppression, built to police and reflect race and class privilege. Finally, because the lawyers for the NAACP were fighting for a mandate to desegregate the system from top to bottom, many, such as Thurgood Marshall, believed that the difference between the strategies was more form than substance, because "relief in the form of equalization of facilities was subsumed under the request for an end to discrimination." TUSHNET, *supra*, at 108.

[199] *Cf.* Derrick A. Bell, *School Litigation Strategies for the 1970's: New Phases in the Continuing Quest for Quality Schools*, 1970 WIS. L. REV. 257, 291–92 (noting that separate facilities are likely to be unequal because prejudiced school authorities may be unwilling to provide resources to minority schools).

[200] There is some evidence to suggest that the *Brown I* decision was in part a reaction to the Court's reluctance to involve itself in a seemingly endless inquiry into whether a particular set of circumstances was "equal." The cases that preceded *Brown I*, brought as part of the NAACP's legal offensive against *Plessy*'s endorsement of race segregation, sought to test the limits of *Plessy*'s sanction of "separate but equal." That is, if under *Plessy*, equal protection required separate but equal facilities, then if there were no equal or parallel facilities, the court would be required to order the state to act to rectify the inequality. *See* LOFGREN, *supra* note 173, at 201 (citing the use of *Plessy* "to complicate and make more costly the enforcement of race separation"). Although this approach appeared to be a litigation strategy within the framework of race segregation, in fact, the limits of the meaning of equality were being tested.

[201] Brown v. Board of Educ. (Brown I), 347 U.S. 483, 495 (1954).

Brown I's dialectical contradiction was that it dismantled an old form of whiteness as property while simultaneously permitting its reemergence in a more subtle form. White privilege accorded as a legal right was rejected, but de facto white privilege not mandated by law remained unaddressed. In failing to clearly expose the real inequities produced by segregation, the status quo of substantive disadvantage was ratified as an accepted and acceptable base line — a neutral state operating to the disadvantage of Blacks long after de jure segregation had ceased to do so.[202] In accepting substantial inequality as a neutral base line, a new form of whiteness as property was condoned. Material inequities between Blacks and whites — the product of systematic past and current, formal and informal, mechanisms of racial subordination — became the norm. *Brown* disregarded immediate associational preferences of whites, but sheltered and protected their expectations of continued race-based privilege. Redressing the substantive inequalities in resources, power, and ultimately, educational opportunity that were the product of legislated race segregation was left for another day, as yet not arrived.[203] Although the Court might legitimately retreat from the task of articulating a remedy that might too deeply involve the judiciary in the operation of public schools, it is unacceptable for the Court to ignore the infringement or violation of a constitutionally protected right because of concerns about the proper institutional role of the judiciary. As Laurence Tribe notes, "[t]here is a very real difference between saying 'There is a violation here but institutional considerations prevent us from providing a remedy,' and saying 'There is no violation.'"[204] Similarly, when

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[202] As Professor Bell notes ironically:

> [W]hile we spoke and thought in an atmosphere of 'rights and justice,' our opponents had their eyes on the economic benefits and power relationships all the time. And that difference in priorities meant that the price of black progress was benefits to the other side, benefits that tokenized our gains and sometimes strengthened the relative advantages whites held over us.

BELL, *supra* note 31, at 108.

[203] The underfunding of schools in Black districts continues, although no longer based on explicitly racial criteria. In part, these funding inequities are the result of property tax-based funding schemes for public schools that operate to the disadvantage of all poor students. But because of the convergence of housing and employment discrimination, and the lack of political power of poor school districts, Blacks disproportionately experience "the racist impact of less than equal funding to poor school districts." GERTRUDE EZORSKY, RACISM AND JUSTICE: THE CASE FOR AFFIRMATIVE ACTION 19 n.20 (1991); *see* JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS *passim* (1991) (exposing the two-tier system of educational funding that results in present-day segregated and unequal public school systems).

[204] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1512 (1988). Tribe concludes that the Court's refusal to find a constitutional wrong that arises from regulations that have a racially discriminatory impact in the absence of discriminatory intent is a reservation about the institutional capacity of the Court to articulate a remedy, masquerading as a question about the

Brown declined to acknowledge the problem of substantive and de facto inequities in the education system, it failed to identify clearly the harm, and instead, set the matter of remediation on a defective foundation.

C. Brown II

The Court's remedial approach in *Brown II*[205] also can be seen as an example of judicial weakness and undue deference to white concerns; but more fundamentally, *Brown II* recognized the property interest in whiteness by leaving intact the ability of whites to control, manage, postpone, and if necessary, thwart change. In *Brown II*, which concerned the question of the appropriate relief to be granted, the Court remanded the cases to the lower courts in the various jurisdictions to consider the particular conditions present in each area and to articulate an appropriate approach to achieving desegregation "with all deliberate speed."[206] The Court implicitly assumed that the problem of inequality would be eradicated by desegregation. If all students were assigned to schools on a non-racial basis, no school would be identifiable by race, and therefore neither acute discrimination in resource allocation nor gross disparities in outcomes or results would likely occur, or at least so the theory went.

Integration, however, at least in the way it is currently structured and implemented, has not led to the goal sought by Blacks: a quality education for Black children or, at least, minimum equity.[207] Elimi-

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existence of a constitutional violation. *See id.* at 1502–11 (discussing Washington v. Davis, 426 U.S. 229 (1976), in which the Court rejected an Equal Protection challenge to a screening test brought by unsuccessful Black applicants for police department positions because a discriminatory intent on the part of the department was not shown, *see id.* at 240). Tribe notes:

> The Supreme Court may be forgiven for being taken aback by [the] prospect [of becoming deeply involved in the operation of local government]; the institutional concerns about such a role for the judiciary are serious and legitimate. But the Court may not be forgiven for the way it has elided the problem rather than facing up to it. The proper course would have been to confront the remedial challenge head on: either grit the teeth and get to work fixing the inequality, no matter what it takes, or swallow hard and acknowledge that the constitutional wrong cannot be judicially put right. . . . [When the Court does neither] . . . the actual circumstances of racial disadvantage — unemployment, inadequate education, poverty, and political powerlessness — are to be regarded as mere unfortunate conditions, not as consequences of racial discrimination. Those conditions are then readily rationalized . . . .

Id. at 1512 (footnotes omitted).

[205] Brown v. Board of Educ. (Brown II), 349 U.S. 294 (1955).

[206] *Id.* at 301.

[207] The aftermath of *Brown I* and thirty years of school desegregation litigation demonstrates that *Brown*'s assumption that pupil integration would eliminate racial separation overlooked the critical issue of power and the influence of facially-neutral government policies on the success of desegregation. Desegregated schools are rare, particularly in the urban context, because patterns of residential segregation — fostered by private lending and construction practices and public land use and development policy — gradually became greater determinants of de facto racial segregation in schools than any explicit, racially discriminatory student assignment policies.

nating the subordination of the intended beneficiaries of the *Brown* decision — Black children — would have required more expansive remedies.[208] Selecting desegregation as the sole remedy was the consequence of defining the injury solely as racial separation.

Moreover, *Brown II*'s order to desegregate with all deliberate speed was so open-ended that it engendered increasingly protracted battles with social and political forces that defiantly resisted court-ordered integration.[209] Robert Carter, former General Counsel of the National Association for the Advancement of Colored People, noted that *Brown II* represented a break with a tradition in constitutional law that constitutionally protected rights were regarded as "personal and present," the violation of which required immediate remediation.[210] Thus, when *Brown II* directed the schools to desegregate "with all deliberate speed" rather than immediately, it articulated a new and heretofore unknown approach to rectifying violations of constitutional rights — an approach that invited defiance and delay.[211] It is clear that the

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Integration of public school systems became even less attainable by reason of the physical exodus of white students and their families from school districts that were under a mandate to desegregate. *See* Bell, *supra* note 195, at 518.

[208] In "Chronicle of the Sacrificed Black Schoolchildren," a chapter in Derrick Bell's 1987 book *And We Are Not Saved*, BELL, *supra* note 31, Geneva Crenshaw, the storyteller who illuminates many contradictions in existing doctrine pertaining to race and rights, chides Professor Bell for not advocating a better desegregation policy:

> For example — if we recognize that the real motivation for segregation was white domination of public education — suppose the Court had issued the following orders:
>
> 1. Even though we encourage voluntary desegregation, we will not order racially integrated assignments of students or staff for ten years.
>
> 2. Even though "separate but equal" no longer meets the constitutional equal-protection standard, we will require immediate equalization of all facilities and resources.
>
> 3. Blacks must be represented on school boards and other policy-making bodies in proportions equal to those of black students in each school district.
>
> The third point would have been intended to give Blacks meaningful access to decision-making — a prerequisite to full equality still unattained in many predominately Black school systems.

BELL, *supra* note 31, at 112.

[209] "The Supreme Court endorsed a formula of gradual desegregation that provided the opportunity for massive resistance in the Deep South and for token desegregation elsewhere." Tushnet, *supra* note 195, at 1867. Following *Brown*, from the late 1950s through the mid-1960s, white opposition to school integration was fierce and often violent. Notwithstanding the existence of court orders mandating the admission of Black students and the presence of federal marshals, state governors stood in the doorways of state universities to obstruct school desegregation. Public school systems in the South shut down rather than admit Black students. Students and their families were terrorized and beaten. *See, e.g.*, United States v. Farrar, 414 F.2d 936, 939–42 (5th Cir. 1969); United States v. Crenshaw County Unit of The United Klans of Am., 290 F. Supp. 181, 183 (M.D. Ala. 1968); Bullock v. United States, 265 F.2d 683, 688 (6th Cir.), *cert. denied*, 360 U.S. 909 (1959).

[210] Robert L. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 243 (1968).

[211] As this delay in implementing school desegregation stretched over the years, the Court grew increasingly impatient with the subterfuge and insubordination of school officials. *See*

nature of the injury to Black children was not what defined the scope of the remedy; rather, the level of white resistance dictated the parameters of the remedy.[212] Although the Court was unwilling to give official sanction to legalized race segregation and thus required an end to "separate but equal," it sought to do so in a way that would not radically disturb the settled expectations of whites that their interests — particularly the relative privilege accorded by their whiteness — would not be violated.

D. Brown*'s Mixed Legacy*

Milliken v. Bradley[213] marks the logical consequence of *Brown*'s ambivalence on the question of the state's responsibility to give content to the mandate of equality. Because the *Milliken* Court saw no evidence that suburban school districts had directly caused or substantially contributed to the segregation of Detroit's school system, it rejected, by a five to four vote, an interdistrict, metropolitan desegregation plan, stating that it would exceed the permitted boundaries of judicial action.[214] The majority did not contest the factual determination that the government at all levels had "participate[d] in the maintenance" of racially discriminatory policies in the Detroit school system,[215] nor did it reject the findings of the court below that private sectors such as real estate and lending institutions had engaged in

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e.g., Bradley v. School Bd., 382 U.S. 103, 105 (1965) (per curiam) ("Delays in desegregating school systems are no longer tolerable."); Griffin v. County Sch. Bd., 377 U.S. 218, 234 (1964) (announcing that "the time for mere 'deliberate speed' had run out"). However, by this time, the patterns of official segregation implemented through overt governmental action became less important than patterns of de facto segregation maintained by economics and governmental inaction. Hence, thirty-six years after *Brown I* and *II*, federal court intervention in local school systems has produced decidedly mixed results. There is a consensus among the white polity that, despite the fact that many school systems are as segregated now as they were when *Brown I* and *II* were decided, the federal courts do not have an unlimited license nor indeterminate time to achieve an unattainable goal, given the patterns of residential segregation. Recent Supreme Court decisions suggest that the mandate to desegregate with all deliberate speed is now read to require not only the school boards' implementation of integration, but also a temporal constraint on the federal courts' efforts to ensure integration as well. In Board of Educ. v. Dowell, 111 S. Ct. 630 (1991), the Court considered a challenge brought by the Oklahoma City School Board to the continuation of an injunction imposed in a school desegregation case. The majority opinion criticized the lower court's application of a standard for modifying or dissolving an injunction as too strict because it "would condemn a school district, once governed by a board which intentionally discriminated, to judicial tutelage for the indefinite future," a result not required by the Equal Protection Clause. *Id.* at 638.

[212] Although the Court insisted that the purpose of implementing the remedy "with all deliberate speed" was to permit preparation for necessary administrative changes, examination of the historical record clearly indicates that the purpose of the formula was to allow "compliance on terms that the white South could accept." Carter, *supra* note 210, at 243.

[213] 418 U.S. 717 (1974).

[214] *See id.* at 745.

[215] *Id.* at 746.

exclusionary practices that created residential segregation and reinforced school segregation.[216] It reinterpreted all of these facts, however, to be neutral and, therefore, an inadequate predicate for intervention in an unfortunate but unrectifiable inequity.[217] In effect, the protection of the expectations of the local school boards that the de facto segregation resulting from exogenous factors would be left undisturbed was determined to be of greater significance than any constitutional injury caused by the state.[218] Like the substantive inequality of power and resources in *Brown*, the white privilege and Black subordination fostered by systems of interlocking private and public power was left intact by *Milliken*.

Thus, we are left with *Brown*'s mixed legacy: *Brown* held that the Constitution would not countenance legalized racial separation, but *Brown* did not address the government's responsibility to eradicate inequalities in resource allocation either in public education or other public services, let alone to intervene in inequities in the private domain, all of which are, in significant measure, the result of white domination. In attempting to remedy state-mandated racial separation by the simple prescription of desegregation, the *Brown* decisions finessed the question of what to do about the inequality produced by state and private policy and practice. *Brown* modified *Plessy*'s interpretation of the Equal Protection Clause and accommodated both Blacks' claims for "equality under law" and the global interests of white ruling elites.[219] What remained consistent was the perpetuation of institutional privilege under a standard of legal equality. In the foreground was the change of formal societal rules; in the background was the "natural" fact of white privilege that dictated the pace and course of any moderating change. What remained in revised and reconstituted form was whiteness as property.

IV. The Persistence of Whiteness As Property

In the modern period, neither the problems attendant to assigning racial identities nor those accompanying the recognition of whiteness have disappeared.[220] Nor has whiteness as property. Whiteness as

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[216] *See id.* at 724.

[217] *See id.* at 746–47. As Justice Douglas's dissent notes, the "decision . . . means that there is no violation of the Equal Protection Clause though the schools are segregated by race and though the black schools are not only 'separate' but 'inferior.'" *Id.* at 761 (Douglas, J., dissenting).

[218] *See id.* at 746–47.

[219] *See* Bell, *supra* note 195, at 524–25.

[220] Doe v. State, 479 So.2d 369 (La. App. 4th Cir. 1985), is a prime example. Before this decision, the *Doe* plaintiffs had sued to change the racial classification of their parents on their birth certificate from "colored" to white. *See id.* at 371. Although by upbringing, experience, and appearance they were white, the court noted that, if the plaintiffs had standing, relief

property continues to perpetuate racial subordination through the courts' definitions of group identity and through the courts' discourse and doctrine on affirmative action. The exclusion of subordinated "others" was and remains a central part of the property interest in whiteness and, indeed, is part of the protection that the court extends to whites' settled expectations of continued privilege.

The essential character of whiteness as property remains manifest in two critical areas of the law and, as in the past, operates to oppress Native Americans and Blacks in similar ways, although in different arenas. This Part first examines the persistence of whiteness as valued social identity; then exposes whiteness as property in the law's treatment of the question of group identity, as the case of the Mashpee Indians illustrates; and finally, exposes the presence of whiteness as property in affirmative action doctrine.

A. The Persistence of Whiteness as Valued Social Identity

Even as the capacity of whiteness to deliver is arguably diminished by the elimination of rigid racial stratifications, whiteness continues to be perceived as materially significant. Because real power and wealth never have been accessible to more than a narrowly defined ruling elite, for many whites the benefits of whiteness as property, in the absence of legislated privilege, may have been reduced to a claim of relative privilege only in comparison to people of color.[221] Nevertheless, whiteness retains its value as a "consolation prize": it does not mean that all whites will win, but simply that they will not lose,[222]

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would be denied because of the plaintiffs' failure to establish that their grandparents had been incorrectly classified. A subsequent Fourteenth Amendment challenge to the 1970 Louisiana racial classification law was rejected by both the trial and appellate courts on the ground that the statute had been held constitutional in a prior decision of the Louisiana Supreme Court. *See* State *ex. rel.* Plaia v. Louisiana State Bd. of Health, 296 So.2d 809, 810 (La. 1974). The statute was repealed in 1983, and the *Doe* plaintiffs again brought a mandamus action that was again rejected by the trial court. *See Doe*, 479 So.2d at 371. On appeal, the state appellate court concluded that "the very concept of the racial classification of individuals, as opposed to that of a group, is scientifically insupportable . . . [because] [i]ndividual racial designations are purely social and cultural perceptions." *Id.* Louisiana's racial classification system was vigorously critiqued on constitutional grounds. *See* Diamond & Cottrol, *supra* note 20, at 278–85.

[221] *See* Letter from Leland Ware, Professor of Law, St. Louis University School of Law, to Cheryl I. Harris, Assistant Professor of Law, Chicago-Kent College of Law 4 (Mar. 23, 1992) (on file at the Harvard Law School Library) [hereinafter Ware, Letter].

[222] HACKER, *supra* note 155, at 29. Andrew Hacker says that given the fierceness of competition in American society, white America

> cannot guarantee full security to every member of its own race. Still, while some of its members may fail, there is a limit to how far they can fall. . . . [N]o matter to what depths one descends, no white person can ever become black. As James Baldwin has pointed out, white people need the presence of black people as a reminder of what providence has spared them from becoming.

Id. at 29–30.

if losing is defined as being on the bottom of the social and economic hierarchy — the position to which Blacks have been consigned.

Andrew Hacker, in his 1992 book *Two Nations*,[223] recounts the results of a recent exercise that probed the value of whiteness according to the perceptions of whites. The study asked a group of white students how much money they would seek if they were changed from white to Black. "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."[224] Whether this figure represents an accurate amortization of the societal cost of being Black in the United States, it is clear that whiteness is still perceived to be valuable. The wages of whiteness are available to all whites regardless of class position, even to those whites who are without power, money, or influence. Whiteness, the characteristic that distinguishes them from Blacks, serves as compensation even to those who lack material wealth. It is the relative political advantages extended to whites, rather than actual economic gains, that are crucial to white workers. Thus, as Kimberlé Crenshaw points out, whites have an actual stake in racism.[225] Because Blacks are held to be inferior, although no longer on the basis of science as antecedent determinant, but by virtue of their position at the bottom,

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[223] HACKER, *supra* note 155.

[224] *Id.* at 32. Hacker reports these results from white students who were presented with the following parable:

> *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 every happens.
>
> According to their records . . . 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? . . . [The] records show you are scheduled to live another fifty years — as a black man or woman in America.
>
> How much financial recompense would you request?

Id. at 31–32. Hacker further argues that evidence of the continued value of whiteness is manifested in the fact that no white person would be willing to trade places with an even more successful black person:

> All white Americans realize that their skin comprises an inestimable asset. . . . Its value persists not because a white appearance automatically brings success and status . . . . What it does ensure is that you will not be regarded as *black*, a security which is worth so much that no one who has it has ever given it away.

Id. at 60.

[225] *See* Crenshaw, *supra* note 3, at 1381.

it allows whites — all whites — to "include themselves in the dominant circle. [Although most whites] hold no real power, [all can claim] their privileged racial identity."[226]

White workers often identify primarily as white rather than as workers because it is through their whiteness that they are afforded access to a host of public, private, and psychological benefits.[227] It is through the concept of whiteness that class consciousness among white workers is subordinated and attention is diverted from class oppression.[228]

Although dominant societal norms have embraced the idea of fairness and nondiscrimination, removal of privilege and antisubordina-

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[226] *Id.*; *see* ROEDIGER, *supra* note 19, at 5 (describing the significance of whiteness to white workers).

This argument is not to suggest that poverty does not exist among whites. It is evident, however, that poverty is not proportionately represented across all racial groups. Blacks are and have been disproportionately affected by poverty and all its attendant social ills, such as inadequate housing, health care, and education. The relative advantage accorded to whites because of white supremacy is what I am identifying as a core component of "whiteness." This advantage does not mean that no whites will be poor, but that the poor will be disproportionately Black. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-60, NO. 181, POVERTY IN THE UNITED STATES: 1991, at x (1992) [hereinafter CENSUS] (reporting that the poverty rate of whites, Blacks, Asians, and Hispanics is 11.3%, 32.7%, 13.8%, and 28.7%, respectively).

[227] These benefits may be difficult to discern, yet they often remain crucial. Albert Memmi's classic indictment of French colonialism in pre-independence Algeria offers invaluable insight into the benefits of racism to the working or lower class, notwithstanding the nearly equivalent positions of need of lower class whites and Blacks. He suggests that the problem is not merely gullibility or illusion:

> If the small colonizer defends the colonial system so vigorously, it is because he benefits from it to some extent. His gullibility lies in the fact that to protect his very limited interests, he protects other infinitely more important ones, of which he is, incidentally, the victim. But, though dupe and victim, he also gets his share.
>
> [P]rivilege is something relative. To different degrees every colonizer is privileged, at least comparatively so, ultimately to the detriment of the colonized. If the privileges of the masters of colonization are striking, the lesser privileges of the small colonizer, even the smallest, are very numerous. Every act of his daily life places him in a relationship with the colonized, and with each act his fundamental advantage is demonstrated.
>
> . . . From the time of his birth, he possesses a qualification independent of his personal merits or his actual class.

ALBERT MEMMI, THE COLONIZER AND THE COLONIZED 11–12 (Howard Greenfield trans., 1965).

[228] Social scientists have noted this phenomenon as part of the social dynamic of the white working class for some time:

> It is through differential access to social institutions and political power that the bourgeoisie binds white workers to it in "whiteness."
>
> . . . .
>
> . . . [T]o the extent that white workers identify with "whiteness," "a central component of *Anglo-American bourgeois consciousness* . . . ," and not with their proletarian status as workers, they will remain supporters and defenders of relative privileges for whites as extended by capital.

Hermon George, Jr., *Black America, the "Underclass" and the Subordination Process*, BLACK SCHOLAR, May/June 1988, at 44, 49–50 (quoting ROXANNE MITCHELL & FRANK WEISS, A HOUSE DIVIDED: LABOR AND WHITE SUPREMACY 84 (1981)).

tion principles are actively rejected or at best ambiguously received because expectations of white privilege are bound up with what is considered essential for self-realization. Among whites, the idea persists that their whiteness is meaningful.[229] Whiteness is an aspect of racial identity[230] surely, but it is much more; it remains a concept based on relations of power, a social construct predicated on white dominance and Black subordination.

B. Subordination Through Denial of Group Identity

Whiteness as property is also constituted through the reification of expectations in the continued right of white-dominated institutions to control the legal meaning of group identity. This reification manifests itself in the law's dialectical misuse of the concept of group identity as it pertains to racially subordinated peoples. The law has recognized and codified racial group identity as an instrumentality of exclusion and exploitation; however, it has refused to recognize group identity when asserted by racially oppressed groups as a basis for affirming or claiming rights.[231] The law's approach to group identity reproduces subordination, in the past through "race-ing" a group — that is, by assigning a racial identity that equated with inferior status, and in the present by erasing racial group identity.

In part, the law's denial of the existence of racial groups is predicated not only on the rejection of the ongoing presence of the past,[232] but is also grounded on a basic tenet of liberalism — that constitutional protections inhere in individuals, not groups.[233] As informed by the Lockean notion of the social contract, the autonomous, free-will of the individual is central. Indeed, it is the individual who, in

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[229] Roediger describes this phenomenon as the "white problem." ROEDIGER, *supra* note 19, at 6.

[230] "Racial identities are not only black, Latino, Asian, Native American, and so on; they are also white. To ignore white ethnicity is to redouble its hegemony by naturalizing it." bell hooks, *Representing Whiteness: Seeing* Wings of Desire, ZETA, Mar. 1989, at 39 (citation omitted).

[231] "Notably in the context of the affirmative action debate, some philosophers and policy-makers even refuse to acknowledge the reality of social groups, a denial that often reinforces group oppressions." IRIS M. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 9 (1990).

[232] According to Aviam Soifer, in many ways, particularly as it pertains to racial subordination, the Supreme Court has decided that history has stopped. *See* Aviam Soifer, *On Being Overly Discrete and Insular: Involuntary Groups and the Anglo-American Judicial Tradition*, 48 WASH. & LEE L. REV. 381, *passim* (1991).

[233] *See* William B. Reynolds, *Individualism vs. Group Rights: The Legacy of* Brown, 93 YALE L.J. 983, 984 (1984) (citing the remarks of Professor Chester Finn that civil rights "inhere in individuals, not in groups"). As Fiss notes, the strong appeal of the antidiscrimination principle as the mediating principle that informs the Equal Protection Clause is grounded in its tie to individualism, "yield[ing] a highly individualized conception of rights." Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 127 (1976). Thus, it is the individual who lays claim to constitutionally protected rights. *See id.*

concert with other individuals, elects to enter into political society[234] and to form a state of limited powers. This philosophical view of society is closely aligned with the antidiscrimination principle — the idea being that equality mandates only the equal treatment of individuals under the law.[235] Within this framework, the idea of the social group has no place.[236]

Although the law's determination of any "fact," including that of group identity, is not infinitely flexible, its studied ignorance of the issue of racial group identity insures wrong results by assuming a pseudo-objective posture that does not permit it to hear the complex dialogue concerning the identity question, particularly as it pertains to historically dominated groups.

Instead, the law holds to the basic premise that definition from above can be fair to those below, that beneficiaries of racially conferred privilege have the right to establish norms for those who have historically been oppressed pursuant to those norms, and that race is not historically contingent. Although the substance of race definitions has changed, what persists is the expectation of white-controlled institutions in the continued right to determine meaning — the reified privilege of power — that reconstitutes the property interest in whiteness in contemporary form.

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[234] *See* LOCKE, *supra* note 46, at 154–64; *see also* Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 514 (1991) (noting that Locke based the right of protection "on the consent of free individuals to enter society and establish government for the preservation of their natural rights").

[235] *See* Fiss, *supra* note 233, at 123 (1976) (noting that "the antidiscrimination principle would seem individualistic in a negative sense — it is not in any way dependent on a recognition of social classes or groups," although he argues that "the recognition and protection of social groups may be required to determine which state purposes are legitimate . . .").

[236] "Political philosophy typically has no place for a specific concept of the social group." YOUNG, *supra* note 231, at 43. Many scholars have vigorously opposed this notion. *See, e.g.*, TRIBE, *supra* note 204, at 1514–21 (arguing that the appropriate view of constitutional guarantees of equal protection is that they are animated by an antisubjugation principle that requires that actions be evaluated not by the intent of the actors, but by the impact on members of protected groups); Burke Marshall, *A Comment on the Non-discrimination Principle in a "Nation of Minorities,"* 93 YALE L.J. 1006, 1006 (1984) (arguing that discrimination and subordination were imposed not against individuals, but against a people, so that the remedy "has to correct and cure and compensate for the discrimination against the people and not just the discrimination against the identifiable persons").

Although the existence and definition of a social group is complex, it is possible to articulate a coherent concept of a social group. For example, Iris Marion Young defines a social group as

> a collective of persons differentiated from at least one other group by cultural forms, practices, or way of life. . . . Groups are an expression of social relations; a group exists only in relation to at least one other group. Group identification arises . . . in the encounter and interaction between social collectivities that experience some differences in their way of life and forms of association, even if they also regard themselves as belonging to the same society.

YOUNG, *supra* note 231, at 43. However, groups do not have "substantive essence." *Id.* at 47. Rather, they are "cross-cutting, fluid, and shifting." *Id.* at 48.

In undertaking any definition of race as group identity, there are implicit and explicit normative underpinnings that must be taken into account. The "riddle of identity" is not answered by a "search for essences" or essential discoverable truth, nor by a search for mere "descriptions and re-descriptions."[237] Instead, when handling the complex issue of group identity, we should look to "purposes and effects, consequences and functions."[238] The questions pertaining to definitions of race then are not principally biological or genetic, but social and political: what must be addressed is who is defining, how is the definition constructed, and why is the definition being propounded.[239] Because definition is so often a central part of domination, critical thinking about these issues must precede and adjoin any definition. The law has not attended to these questions. Instead,

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[237] Martha Minow, *Identities*, 3 YALE J.L. & HUMAN. 97, 97, 128 (1991).

[238] *Id.* at 97.

[239] In the modern South African context, evolution of the terms "Black" and "African" illustrate the possible interplay between definitions of identity and liberation. A central feature of apartheid law was the Population Registration Act that empowered the Ministry of the Interior to register the entire South African population, to classify each individual as a "white," "coloured," or "Black." Population Registration Act No. 30 of 1950, § 1(1) (as amended by Population Registration Act No. 106 of 1969, § 1(a) (S. Afr.)). The definition, based on criteria such as appearance, social acceptance, and descent, produced predictably freakish and contradictory results, with siblings and parents being classified differently. *See* STUDY COMM'N ON U.S. POLICY TOWARD SOUTHERN AFRICA, SOUTH AFRICA: TIME RUNNING OUT 48–49 (1981) [hereinafter TIME RUNNING OUT].

In opposition to the categories propounded by the regime, during the 1970s different definitions of race emerged in the context of the struggle against the apartheid regime. "Black" was defined by the Black Consciousness Movement, led by Steven Biko, to mean "[a]ll those people who by law or tradition have been politically, socially or economically exploited against [sic] as a group in South African Society and who identify themselves as a unit in the struggle for liberation." Ziyad Motala, The Re-definition of "Black" in the South African Liberation Struggle 6 (unpublished manuscript, on file at the Harvard Law School Library); *see* TIME RUNNING OUT, *supra*, at 177.

Sometime, too, in the 1960s or 1970s, the African National Congress, the oldest and largest organized manifestation of the liberation movement, began using the term "African" for all those persons not of European origin. The word "African" thus subsumed the official categories of Bantu, Coloureds, and Indians. Subsequent references to Coloureds often appeared as "so-called 'Coloureds.'" *See* IMMANUEL WALLERSTEIN, *The Construction of Peoplehood*, *in* RACE NATION AND CLASS: AMBIGUOUS IDENTITIES 71, 72–73 (Etienne Balibar & Immanuel Wallerstein eds., 1991).

This comparison reveals the rich, complex, and ultimately organic nature of group self-identity. Both the alternative usage of "Black" and "African" are fed by the impulse of oppressed people to deny legitimacy to categories propounded by their oppressors. It is the rejection of the right to control definitions of self and group identity. Thus, neither of these redefinitions situate around the axis of biological referents inherent in apartheid legislation. Instead, they implicitly or explicitly substitute the experience of oppression as the principal criterion and confront the problem of domination and subordination. In contrast to government-imposed classifications, these definitions are propounded by people exploited by apartheid, are arrived at through struggle, and are put forward to actively resist the source of their oppression, thus addressing the critical definitional issues of who, how, and why.

identity of "the other" is still objectified, the complex, negotiated quality of identity is ignored, and the impact of inequitable power on identity is masked.[240] These problems are illustrated in the land claim suit brought by the Mashpee, a Massachusetts Indian tribe.[241]

In *Mashpee Tribe v. Town of Mashpee*,[242] the Mashpee sued to recover land that several Indians had conveyed to non-Indians in violation of a statute that barred alienation of tribal land to non-Indians without the approval of the federal government.[243] In order to recover possession of the land, the Mashpee were required to prove that they were a tribe at the time of the conveyance.[244] Although the trial judge admitted to some preliminary confusion about the appropriate definition of "tribe,"[245] he ultimately accepted the standard articulated in prior case law that defined tribe as "a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."[246] The Mashpee were held not to be a tribe at the time the suit was filed, so that their claim to land rights based on group identity were rejected.[247]

The Mashpee's experience was filtered, sifted, and ultimately rendered incoherent through this externally constituted definition of tribe that incorporated outside criteria regarding race, leadership, territory, and community.[248] The fact that the Mashpee had intermingled with Europeans, runaway slaves, and other Indian tribes signified to the jury and to the court that they had lost their tribal identity.[249]

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[240] As Martha Minow notes:

> If lawyers and judges treat identity as something discoverable rather than forged or invented, they hide the latitude for choice and struggle over identity. At the same time they exercise their own power to make those choices . . . . The use of a specific notion of identity to resolve a legal dispute can obscure the complexity of lived experiences while imposing the force of the state behind the selected notion of identity.

Minow, *supra* note 237, at 111.

[241] Gerald Torres and Kathryn Milun offer a sensitive interpretation of the case as an exploration of the problems of meaning, telling, and legal translation within a context of white domination and Native American subordination. *See* Gerald Torres & Kathryn Milun, *Translating* Yonnondio *by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, *passim*.

[242] 447 F. Supp. 940 (D. Mass. 1978).

[243] *See id.* at 946.

[244] *See id.* at 943.

[245] *See id.* at 949.

[246] Montoya v. United States, 180 U.S. 261, 266 (1901); *accord* Mashpee v. New Seabury Corp., 427 F. Supp. 899, 902 (Mass. 1977).

[247] *See Mashpee*, 447 F. Supp. at 950.

[248] *See* Torres & Milun, *supra* note 241, at 634–35 & n.31.

[249] *See id.* at 638–39. It was not the facts but the meaning of the facts that was contested. *See id.* at 641. A meaning was constructed in which the Mashpees had no voice. Torres and Milun say: "The tragedy of power was manifest in the legally mute and invisible culture of

But for the Mashpee, blood was not the measure of identity: their identity as a group was manifested for centuries by their continued relationship to the land of the Mashpee; their consciousness and embrace of difference, even when it was against their interest; and, their awareness and preservation of cultural traditions.[250] Nevertheless, under the court's standard, the tribe was "incapable of *legal* self-definition."[251] Fundamentally, then, the external imposition of definition maintained the social equilibrium that was severely challenged by the Mashpee land claims.

The Mashpee case presents new variations on old themes of race and property. Previous reified definitions of race compelled abandonment of racial identity in exchange for economic and social privilege.[252] Under the operative racial hierarchy, passing is the ultimate assimilationist move — the submergence of a subordinate cultural identity in favor of dominant identity, assumed to achieve better societal fit within prevailing norms.[253] The modern definition of "tribe" achieved similar results by misinterpreting the Mashpee's adaptation to be assimilation. The Mashpee absorbed and managed, rather than rejected and suppressed, outsiders; yet the court erased their identity, assuming that, by virtue of intermingling with other races, the Mashpee's identity as a people had been subsumed. The Mashpee were not "passing," but were legally determined to have "passed" — no longer to have distinct identity. This erasure was predicated on the assumption that what is done from necessity under conditions of established hierarchies of domination and subordination is a voluntary surrender for gain.[254]

Beyond the immediate outcome of the case lies the deeper problem posed by the hierarchy of the rules themselves and the continued

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those Mashpee Indians who stood before the court trying to prove that they existed." *Id.* at 649.

[250] *See* Minow, *supra* note 237, at 114.

[251] Torres & Milun, *supra* note 241, at 655.

[252] These privileges were the motivating forces behind my grandmother's decision to "pass." *See supra* pp. 1710–12.

[253] Here again Memmi describes one of the possible responses of an oppressed people — the "colonized" in Memmi's context — that is strikingly similar to what has been described in the U.S. context as passing:

> The first attempt of the colonized is to change his condition by changing his skin. There is a tempting model very close at hand — the colonizer. The latter suffers from none of his deficiencies, has all rights, enjoys every possession and benefits from every prestige. . . . The first ambition of the colonized is to become equal to that splendid model and to resemble him to the point of disappearing into him.

MEMMI, *supra* note 227, at 120. The American edition of this book is dedicated to "the American Negro, also colonized." *Id.* at v.

[254] As Torres and Milun note, "[t]hat interpretation [of adaptation as surrender of identity] incorporates a dominant motif in the theory and practice of modern American pluralism. Ethnic distinctiveness often must be sacrificed in exchange for social and economic security." Torres & Milun, *supra* note 241, at 651 (footnote omitted).

retention by white-controlled institutions of exclusive control over definitions as they pertain to the identity and history of dominated peoples. Although the law will always represent the exercise of state power in enforcing its choices, the violence done to the Mashpee and other oppressed groups results from the law's refusal to acknowledge the negotiated quality of identity. Whiteness as property assumes the form of the exclusive right to determine rules; it asserts that, against a framework of racial dominance and unequal power, fairness can result from a property rule, or indeed any other rule, that imposes an entirely externally constituted definition of group identity.[255] Reality belies this presumption. In *Plessy*, the Court affirmed the right of the state to define who was white,[256] obliterating aspects of social acceptance and self-identification as sources of validation and identity. The Mashpee were similarly divested of their identity through the state's exclusive retention of control over meaning in ways that reinforced group oppression. When group identity is a predicate for exclusion or disadvantage, the law has acknowledged it; when it is a predicate for resistance or a claim of right to be free from subordination, the law determines it to be illusory. This determinist approach to group identity reproduces racial subordination and reaffirms whiteness as property.

C. Subjugation Through Affirmative Action Doctrine

The assumption that whiteness is a property interest entitled to protection is an idea born of systematic white supremacy and nurtured over the years, not only by the law of slavery and "Jim Crow," but also by the more recent decisions and rationales of the Supreme Court concerning affirmative action. In examining both the nature of the affirmative action debate and the legal analysis applied in three Supreme Court cases involving affirmative action — *Regents of University of California v. Bakke*,[257] *City of Richmond v. J.A. Croson Co.*,[258] and *Wygant v. Jackson Board of Education*,[259] it is evident that the protection of the property interest in whiteness still lies at the core of judicial and popular reasoning.

Affirmative action remains a wellspring of contention.[260] If anything, the tone of the debate has sharpened since affirmative action

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[255] *See* Plessy v. Ferguson, 163 U.S. 537, 552 (1896).

[256] *See id.* at 552.

[257] 438 U.S. 265 (1978).

[258] 488 U.S. 469 (1989).

[259] 467 U.S. 267 (1986).

[260] Hacker says that affirmative action has become "an epithet for our time." HACKER, *supra* note 155, at 118. The debate in the legal arena has been active. *Compare* Richard A. Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 25 (arguing that all racial preferences should be held invalid per se) *and*

programs were first introduced. The universal battle cry of the political right is that affirmative action means "quotas" for Blacks, and is an economic threat to whites.[261] This equation, although advanced most stridently by the right, has deep resonance among many whites across the political spectrum. In according "preferences" for Blacks and other oppressed groups, affirmative action is said to be "reverse discrimination" against whites, depriving them of their right to equal protection of the laws. Lawsuits brought by white males claiming constitutional injury allegedly produced by affirmative action programs have proliferated and have garnered support in many quarters.[262] Whites concede that Blacks were oppressed by slavery and by legalized race segregation and its aftermath, but protest that, notwithstanding this legacy of deprivation and subjugation, it is unfair to allocate the burden to innocent whites who were not involved in acts of discrimination.[263]

The Supreme Court's rejection of affirmative action programs on the grounds that race-conscious remedial measures are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment — the very constitutional measure designed to guarantee equality for Blacks — is based on the Court's chronic refusal to dismantle the institutional protection of benefits for whites that have been based on white supremacy and maintained at the expense of Blacks. As a

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Antonin Scalia, *The Disease as Cure*, 1979 WASH. U. L.Q. 147, 153–54 (1979) ("[Affirmative action] is based upon concepts of racial indebtedness and racial entitlement rather than individual worth and individual need[; thus it] is racist.") *with* WILLIAMS, *The Obliging Shell*, *in* ALCHEMY OF RACE AND RIGHTS, *supra* note 5, at 121 ("[A]ffirmative action is an affirmation; the affirmative act of hiring — or hearing — blacks is a recognition of individuality that includes blacks as a social presence. . . . It is an act of verification and vision, an act of social as well as professional responsibility.") *and* Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 705, 707 (arguing for affirmative action in law schools in order to respect the "democratic principle that people should be represented in institutions that have power over their lives," and for the inclusion of minority scholars in order to "improve the quality and increase the social value of legal scholarship").

[261] Hacker cites the campaign of Jesse Helms of North Carolina as another instance of the deployment of political rhetoric to "remind white people how much they have invested in maintaining the status of their race." HACKER, *supra* note 155, at 203. The Helms campaign commercial displayed a white working class man tearing up a rejection letter while the voice-over said, "You needed that job, and you were the best qualified. . . . But it had to go to a minority because of a racial quota." *Id.* at 202. *See generally* THOMAS B. EDSALL & MARY D. EDSALL, CHAIN REACTION 172–97 (1991) (describing how the Republican Party refocused the anger of the white working classes away from their declining economic position by indicting the Democratic Party's pandering to "black" concerns at the expense of the rights of whites).

[262] *See, e.g.*, Billish v. City of Chicago, 962 F.2d 1269, 1272–73 (7th Cir. 1992); Baker v. Elmwood Distrib. Inc., 940 F.2d 1013, 1015 (7th Cir. 1991); United States v. City of Chicago, 870 F.2d 1256, 1257–58 (7th Cir. 1989).

[263] The "innocent persons" argument is at the heart of the legal and social dispute over affirmative action. *See* RONALD J. FISCUS, THE CONSTITUTIONAL LOGIC OF AFFIRMATIVE ACTION 7 (Stephen L. Wasby ed., 1992). This argument is considered in greater depth below in Part IV at pages 1779–84.

result, the parameters of appropriate remedies are not dictated by the scope of the injury to the subjugated, but by the extent of the infringement on settled expectations of whites. These limits to remediation are grounded in the perception that the existing order based on white privilege is not only just "there,"[264] but also is a property interest worthy of protection. Thus, under this assumption, it is not only the interests of individual whites who challenge affirmative action that are protected; the interests of whites as whites are enshrined and institutionalized as a property interest that accords them a higher status than any individual claim to relief.

This protection of the property interest in whiteness is achieved by embracing the norm of colorblindness. Current legal definitions interpret race as a factor disconnected from social identity and compel abandonment of race-consciousness. Thus, at the very historical moment that race is infused with a perspective that reshapes it, through race-conscious remediation, into a potential weapon *against* subordination, official rules articulated in law deny that race matters. Simultaneously, the law upholds race as immutable and biological.[265] The assertion that race is color and color does not matter is, of course, essential to the norm of colorblindness.[266] To define race reductively as simply color, and therefore meaningless, however, is as subordinating as defining race to be scientifically determinative of inherent deficiency. The old definition creates a false linkage between race and inferiority; the new definition denies the real linkage between race and oppression under systematic white supremacy. Distorting and denying reality, both definitions support race subordination. As Neil Gotanda has argued, colorblindness is a form of race subordination in that it denies the historical context of white domination and Black subordination.[267] This idea of race recasts privileges attendant

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[264] *See* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 895 (1987). The *Brown* decision was criticized for not being "neutral" because the existing distribution of power and resources between Blacks and whites was taken by the courts as simply "there" — the base line from which all actions should be measured. All subsequent departures from the status quo were then "preferences," or violations of neutrality. Sunstein argues that the status quo's distribution of wealth and power is in fact a product of state action and law through the assignment of entitlements and the creation of property rules. *See id.*

[265] Modern formulations of race have shed notions of inherited inferiority linked to race and have substituted a conception of race that Gotanda describes as "formal-race" — in which "Black and white are seen as neutral apolitical descriptions reflecting merely 'skin color' or country of ancestral origin . . . unrelated to ability, disadvantage, or moral culpability . . . [and] unconnected to social attributes such as culture, education, wealth or language." Gotanda, *supra* note 24, at 4.

[266] Gotanda notes that the current discourse of colorblindness assumes that nonrecognition of race is possible and desirable. He argues, however, that nonrecognition "fosters systematic denial of racial subordination and the psychological repression of an individual's recognition of that subordination, thereby allowing such subordination to continue." *Id.* at 16.

[267] *See id.* at 1–2. Gotanda provides an extended discussion of the modern application of

to whiteness as legitimate race identity under "neutral" colorblind principles.

The use of colorblindness as the doctrinal mode of protecting the property interest in whiteness is exemplified in three major affirmative action cases decided by the Supreme Court: *Bakke*, *Croson*, and *Wygant*. The underlying, although unstated, premise in each of these cases is that the expectation of white privilege is valid, and that the legal protection of that expectation is warranted. This premise legitimates prior assumptions of the right to ongoing racialized privilege and is another manifestation of whiteness as property.

1. Bakke. — The Supreme Court's first full-blown review of an affirmative action program considered the claim of Alan Bakke, a white male applicant to a state medical school, that he had been the victim of "reverse discrimination."[268] Bakke claimed an Equal Protection violation because he had been denied admission, despite the fact that his undergraduate grades and Medical College Admissions Test (MCAT) scores were higher than those of the Black, Latino, and Asian students admitted through a special admissions program. The program reserved sixteen out of one hundred spaces for disadvantaged and minority students. Bakke reasoned that he had not been admitted because of his race — white — in violation of the Fourteenth Amendment's equal protection guarantee.[269]

In a deeply divided four-one-four decision, the Court invalidated the special admissions plan and ordered that Bakke be admitted.[270] Justice Powell, who offered the only opinion in support of Bakke's position on constitutional grounds, was most concerned and perplexed by the lack of any basis that he could find to justify this "extraordinary" remedial action that displaced Bakke's expectation of admittance and placed the burden of rectifying discrimination, which Justice Powell said was not proven here, on the shoulders of an "innocent" white.[271] Justice Powell could find no right to substantive equality justifying an affirmative action program that trumped Bakke's settled expectations that, because of his grades and test scores, he should be admitted.[272] Moreover, a majority of the Court invalidated the special admissions plan employed by the University because it denied future white applicants the opportunity to compete for all one hundred seats in the class.[273]

"formal race" through the doctrine of colorblindness and illustrates the severe deficiencies of color-blind analysis. *See id.* at 40–52.

[268] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 277–78 (1978).

[269] *See id.* at 276–78.

[270] *See id.* at 271.

[271] *See id.* at 290–98.

[272] *See id.* at 310.

[273] *See id.* at 319–20.

This analysis incorrectly assumes, first, that Bakke's expectation of admission was valid and entitled to protection, and second, that the special admissions program impermissibly infringed the equal protection rights of future white applicants. These presumptions in fact mask settled expectations of continued white privilege. By extending legal protection to these expectations and legitimating them as valid, the property interest in whiteness was given another form and further hegemony.

The first presumption — that Bakke's expectation was valid because he was better qualified — is severely flawed. The judgment of "who is better qualified" is fraught with complex and subjective assessments. Test scores and grade point averages are undoubtedly important factors in determining qualifications for admission, but work experience, difficulty of course of study, and even such intangibles as "motivation" and "potential for professional contribution" are also considered. Any combination of these factors can be used to determine that one applicant is "better qualified" or more meritorious than another. Bakke was nevertheless presumptively "better qualified" because (and these are the only facts the Court cited) he had higher MCAT scores and GPAs than students admitted through the special admissions program.[274] Bakke, according to Justice Powell, was therefore an "innocent victim" and implicitly deserving because he ranked higher in the selected criteria. Even assuming that Bakke could establish that his rejection constituted an abridgement of the Equal Protection Clause,[275] Bakke's expectation of admission was neither reasonable nor supported by the evidence because he may not

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[274] *See id.* at 277 & n.7.

[275] In order to establish a violation of the Equal Protection Clause, Bakke should have had to demonstrate that he would have been admitted but for the special admissions program. The only facts in the record upon which Justice Powell seems to have relied upon were that Bakke was rejected in two successive years, although on each occasion students who ranked significantly lower, according to the criteria used to evaluate candidates, were admitted through the special admissions program. *See id.* at 276–77 & n.7. Although this analysis compared Bakke's credentials with those of the students admitted through the special admissions program, equally probative is a comparison of Bakke's test scores and GPA with those of all other students admitted and rejected. If white applicants with lower scores than Bakke's were admitted, it could not fairly be said that Bakke was denied admission because of his race. In fact, both white and Black applicants with credentials lower than Bakke's were admitted. *See* JOEL DREYFUSS & CHARLES LAWRENCE III, THE BAKKE CASE: THE POLITICS OF INEQUALITY 112–13 (1979). This fact illustrates the inherently discretionary nature of all admissions processes, which are rarely, if ever, tied to purely mathematical formulae. Although race was undeniably a factor in favor of the minority applicants, that does not demonstrate that race was the reason why Bakke was rejected. Instead, the Court held that Bakke should be admitted because the school conceded that it could not carry its burden of proving that "but for the existence of its unlawful special admissions program, [Bakke] still would not have been admitted." *Bakke*, 438 U.S. at 320. This concession by the university was only one of many and was part of a pattern of serious omissions in its defense of the case. *See* DREYFUSS & LAWRENCE, *supra*, at 32.

have been "better qualified" if the entire range of admissions criteria had been considered.

The majority of the Court was willing to validate Bakke's expectation because the special admissions plan violated neutrality, when "neutrality" was a colorblind decision process based on "objective merit." In fact, however, the Court's discussion about relative performance, measured by "neutral" merit criteria, masks its assumptions about the definition of merit. The Court assumed that merit in this context meant superior GPAs and MCAT scores and that these were objective, neutral measures beyond serious challenge. However, Ronald Dworkin has argued that Bakke's claim that his rejection violated merit-based standards was unsubstantiated because merit could not be assumed to mean only undergraduate GPA and MCAT performance. Merit could in fact mean something quite different, such as the probability that the individual would make a contribution to the profession.[276] Bakke's presumptions about "merit" were also the Court's presumptions and formed an essential part of the idea that Bakke had a specific right to be admitted to medical school based on a "universal" definition of merit. This reductive assessment of merit obscures the reality that merit is a constructed idea, not an objective fact. There are few, if any, self-evident, universally agreed upon, objective criteria that comprise merit because merit itself is a fluid, ever-changing objective. Merit criteria are in fact selected in relation to certain "merit" objectives, and those choices are heavily influenced by subjective factors. The idea of merit embodied in the opinions of the plurality have the character of property; the law ratified the settled expectations in a particular definition of merit as MCAT scores and GPAs, even though in fact merit is not only shifting, but also is imperfectly measured by the chosen standard.

Nor is it certain that this standard was neutral or colorblind; commentators have claimed that the MCAT and other standardized tests are biased against racial minorities, and that the tests were deployed to ensure white dominance and privilege.[277] The idea, that

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[276] *See* Ronald Dworkin, *Why Bakke Has No Case*, N.Y. REV. BOOKS, Nov. 10, 1977, at 11, 13–14.

[277] Although MCATs and other standardized tests are not objective measures of ability, they may be the "best we can do." DERRICK BELL, TEACHER'S HANDBOOK TO RACE, RACISM AND AMERICAN LAW 61 (2d ed. 1980). In fact, prior surveys of the Scholastic Aptitude Test, a test also constructed and administered by the Educational Testing Service as an objective measure of potential performance in college, show a striking correlation between performance and family income level. *See id.*

The deployment of standardized tests as a basis for graduate admissions and employment correlates with demands by Blacks for equal opportunity. Professor Ware has observed:

> [S]tandardized tests were not generally used until the late 1940s and early 1950s. This, coincidentally, was the time when the NAACP's pre-Brown equalization strategy began to force institutions of higher education to admit black students or to build separate and truly equal facilities for them. Prior to that time, students who successfully completed

potential performance as a physician or even as a medical student can be quantified as a single number on a test that can then be rank ordered, embraces two central fallacies of biological determinism: the reification of the abstract concept of intelligence — a "complex and multifaceted set of human capabilities" — into a unitary thing (the performance on a test), and the ranking of "complex variation [as] a gradual ascending scale."[278]

Second, Bakke argued, and the Court agreed, that the minority admissions plan abridged Fourteenth Amendment guarantees for whites, who although not historically oppressed, were nevertheless "persons" within the meaning of the Equal Protection Clause. However, the special admissions program violated equal protection standards only if whites as a group can claim a vested and continuing right to compete for one hundred percent of the seats at the medical school, notwithstanding their undue advantage over minority candidates. This advantage results from illegal oppression and race seg-

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their undergraduate studies could simply enroll in graduate schools. The sort of competitive examinations that exist today were not part of the process.

Ware, Letter, *supra* note 221, at 2; *see also* Moses v. Washington Parish Sch. Bd., 330 F. Supp. 1340, 1342 (E.D. La. 1971) (noting that "testing was first imposed on blacks at the time of full integration"), *aff'd*, 456 F.2d 1285 (5th Cir. 1972), *cert. denied*, 409 U.S. 1013; DERRICK BELL, RACE, RACISM AND AMERICAN LAW 601 (3d ed. 1992) (noting that, with regard to the use of testing in primary and secondary education, "[i]t is no coincidence that the interest in grouping students by ability resurfaced only in the mid-1950s, at the same time that desegregation was gaining momentum"). Indeed, Griggs v. Duke Power Co., 401 U.S. 424 (1971), demonstrates the correlation between increased reliance on testing and increased demands for integration. In *Griggs*, the employer's policy of requiring a high school diploma as a condition of transfer to higher ranked positions in the operating departments coincided with the company's abandonment of its policy of excluding Blacks from those departments. *See id.* at 427. On the date that Title VII's antidiscrimination provisions became effective, the company imposed the additional requirement of successful performance on two aptitude tests, *see id.*, neither of which was designed "to measure the ability to learn to perform a particular job or category of jobs," *id.* at 428. Rejecting the employer's claim that the use of the tests was not prohibited by Title VII because the employer lacked the intent to discriminate, *see id.* at 432, the Court held that, if an employment practice in fact has discriminatory impact, it can be justified only by business necessity — a showing of a relationship between the requirement and the job in question, *see id.* at 431; *see also* Stamps v. Detroit Edison, 365 F. Supp. 87, 115 (E.D. Mich. 1973) (holding that "[i]t is indisputable that Detroit Edison had used its written examinations to 'freeze the status quo' of past discrimination and that such has resulted in a differential impact upon the races").

For a history of the LSAT as a tool developed to respond to the high attrition rates of law students during the period of open admissions, when competence to perform in law school was measured by actual performance, not as a device to determine who should gain admission, see THE MEXICAN AMERICAN LEGAL DEFENSE FUND (MALDEF) LAW SCHOOL ADMISSIONS STUDY 16–24 (1980), *cited in* Portia Y.T. Hamlar, *Minority Tokenism in American Law Schools*, 26 HOW. L. J. 443, 495–97 (1983). *See also* David M. White, *An Investigation into the Validity and Cultural Bias of the Law School Admissions Test*, *in* TOWARDS A DIVERSIFIED LEGAL PROFESSION 66, 81–93 (David M. White ed., 1981) (reviewing the accuracy of the LSAT as a predictor of law school grades).

[278] GOULD, *supra* note 147, at 23–25.

regation in all arenas that operate as an effective and lasting bar to the participation of people of color. The University's remedial choice did in fact interfere with the expectations of Bakke and other whites that they had a property interest in a space in the class. Expectations of privilege based on past and present wrongs, however, are illegitimate and are therefore not immune from interference.

Bakke expected that he would never be disfavored when competing with minority candidates, although he might be disfavored with respect to other more privileged whites. The relevance of class privilege is not a matter of conjecture; the special admissions program and the regular admissions process were not the only paths to admission to the medical school. Five seats in the class were reserved for the Dean to exercise his discretion in favor of children of prominent alumnae/i or donors.[279] Indeed, there was clear evidence that Bakke was rejected from twelve other medical schools, with some citing age as a factor.[280] The well-established bias against older applicants to medical schools was not challenged by Bakke; nor did the preference for children of wealthy donors and prominent alumnae/i trigger equal protection claims, despite the fact that such procedures clearly created classifications that worked against Bakke, who was neither young nor the son of a wealthy or prominent alumna or alumnus. Bakke was, however, white, and the special admissions program endangered his property interest in whiteness. The Court demonstrated its sympathetic concern for his interest in this circumstance by deferring to his vested property interest in whiteness and intervening to reorder the situation to his benefit and in accordance with his expectations.

2. Croson. — By the time the Court considered the City of Richmond's set-aside program for minority-owned businesses and contractors in *Croson*, the unease that it had displayed in *Bakke* over inappropriate burden shifting had matured into full-blown hostility toward any infringement of white interest. In a suit brought by a disappointed white contractor, Richmond's minority business enterprise program was challenged as an impermissible racial preference violating

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[279] *See* EZORSKY, *supra* note 203, at 91. Although this program was later abandoned, *see id.* at 91 n.26, present data suggests that children of more affluent families continue to have a better chance of being accepted at elite institutions, *see Graduates of Elite Schools Increasingly Getting Top Jobs*, CHI. TRIB., Aug. 19, 1992, § 3, at 1 (citing economists' report on patterns of acceptance at elite institutions and high-paying employment that indicate that, in contrast to children of affluent families, "'middle-class students of equal ability are relegated to an education with significantly lower value'"). Harvard University continues to favor children of alumnae as forty percent of alumnae children were admitted compared with fourteen percent of those who did not have such connections. The difference is not justified by higher qualifications of "legacy" candidates over non-legacy candidates. *See* John Larew, *Why Are Droves of Unqualified, Unprepared Kids Getting in Our Top Colleges? Because Their Dads Are Alumni*, WASH. MONTHLY, June 1991, at 10.

[280] *See* DREYFUSS & LAWRENCE, *supra* note 275, at 16.

the Fourteenth Amendment.[281] For the first time, a majority of the Court embraced a strict scrutiny standard to evaluate an affirmative action program under the Equal Protection Clause.[282] Despite the fact that the City of Richmond had managed to spend only .67% of its contracting dollars with minority-owned businesses in a city that was over 50% Black, and that this and other testimony was presented to the City Council,[283] the Court held that there was an insufficient factual predicate upon which to base an affirmative action program for city contracts that required 30% minority participation.[284] Existing societal discrimination was insufficient in the view of the majority of the Court to justify an affirmative action program — a program that it seemed to find was in derogation of the norm of nondiscrimination. Only a compelling state interest, such as rectifying the city's own proven discriminatory practices, would justify the imposition on "innocent whites" of this burden of lost expected profit from the contract that was not awarded because of the minority participation requirement.[285]

In the majority's view, whites cannot be burdened with rectifying inequities that are the product of history. But even if one accepts this questionable normative premise,[286] it is still difficult to see how the injury claimed by Croson — the loss of anticipated profit — warranted the application of strict scrutiny review. The gravamen of Croson's charge was that the state had no right under the Fourteenth Amendment to interfere with any de facto privilege accruing to him because he was white, and that therefore the status quo, in which over 99%

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[281] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 485 (1989).

[282] *See id.* at 494.

[283] *See id.* at 479–80.

[284] *See id.* at 477–78, 498–500. Another interesting feature of the *Croson* decision was the Court's hostility to the affirmative action set-aside program enacted by the Richmond City Council precisely because the City Council was predominantly Black. In the majority's view, the set-aside program was no more than a political spoils system in which Blacks were using their political power to appropriate economic resources. Blacks' actions to benefit themselves were deemed inappropriate and as illegitimate as similar action undertaken by whites. *See id.* at 495–96. The Court conveniently ignored the fact that history demonstrates that whites did implement such systems and that their current position of dominance is such a direct and successful product of it that "neutrality" is all that is now required for them to maintain control.

[285] *See id.* at 488–506.

[286] There is little to commend the notion that beneficiaries of historical wrongs are holders of inviolable rights or interests. The underlying premises of much of the law disputes such an assumption. For example, the family of an embezzler who occupies a house or possesses goods purchased with stolen funds is not considered to have a normatively secure claim to the goods merely because they did not actively perpetuate the wrong. *See* FISCUS, *supra* note 263, at 45 ("[P]ersonal guilt or innocence is irrelevant to the claim of right, as when a party innocently comes into possession of stolen goods; the claim on those goods by the rightful owner is not forfeited because of the innocence of the current possessor."); WILLIAMS, *The Obliging Shell*, *in* ALCHEMY OF RACE AND RIGHTS, *supra* note 5, at 101 ("If a thief steals so that his children may live in luxury and the law returns his ill-gotten gain to its rightful owner, the children cannot complain that they have been deprived of what they did not own.").

of the government contracting business had gone to whites, could not be disturbed absent the most compelling justification. Essentially, Croson's claim was an assertion of the property interest in whiteness.[287]

It is not that white individuals like Croson do not or should not have a right to seek constitutional protection under the Equal Protection Clause; that is a right guaranteed to all persons. The problem lies in extending the protection of the law *in the form of strict scrutiny review*[288] to whites as whites. Treating whiteness as the basis for a valid claim to special constitutional protection is a further legitimation of whiteness as identity, status, and property. Treating white identity as no different from any other group identity when, at its core, whiteness is based on racial subordination ratifies existing white privilege by making it the referential base line. Differential treatment of whites is not beyond constitutional concern; but differential treatment of whites does not signify the same meaning as differential treatment of Blacks. To assert that whites have an equivalent right to a level of review designed to protect groups and peoples subordinated by white supremacy is to seek to legitimate a usurpation. After all, race oppression has meaning in this country not because of what has been done to whites because of their racial identity, but what has been done to those who are not white in the name of protecting whiteness.[289]

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[287] Linda Greene has described judicial solicitation for the "rights of whites," which is evident throughout American law and appears as a common theme in the Supreme Court's civil rights decisions during the 1988 Term. *See* Linda S. Greene, *Race in the 21st Century: Equality Through Law?*, 64 TUL. L. REV. 1515, 1533–38 (1990). Greene maintains that *Croson* protects the rights of whites "against both the economic aspirations of black contractors and the political effectiveness of black leaders and constituents." *Id.* at 1533. The case is thus situated in the modern trend of protecting white rights, not through explicit guarantees, but through counterbalancing Blacks' claims for equality against the "vested interest of white[s] . . . in maintaining the status quo." *Id.* at 1537.

[288] The origin of the strict scrutiny standard is Korematsu v. United States, 323 U.S. 214 (1944), in which the Court reviewed the exclusion orders that shipped Japanese-Americans out of the western United States and interned them in camps, *see id.* at 216.

[289] As noted by one author, there is tremendous irony in ascribing the same meaning to the differential treatment of whites and the discriminatory treatment of Blacks:

> Why does racial discrimination excite us when so many other kinds of discrimination do not? It is because of the way we interpret history, associating racial discrimination with practices that now appear self-evidently evil: forcing blacks from their homeland, enslaving blacks, lynching blacks for actions that among whites would not be criminal, intimidating blacks who sought to exercise their rights — in sum, systematically disadvantaging a people in almost every way that mattered. . . .
>
> A claim made by a white person as a member of the dominant majority draws its moral force largely from our collective horror at centuries of oppressing black people. It would be ironic indeed if evils visited on blacks had lent enough force to the moral claims of whites to prevent what appears to many at this point to be the most effective means of eliminating the legacy of those evils.

Richard Lempert, *The Force of Irony: On the Morality of Affirmative Action and* United Steelworkers v. Weber, 95 ETHICS 86, 88–89 (1984).

3. Wygant. — In *Wygant*, more senior white teachers who were laid-off before more junior Black teachers who had been hired to remedy prior discrimination by the Jackson, Michigan school board challenged the union-approved layoff plan as reverse discrimination barred by the Equal Protection Clause.[290] Because the loss of existing jobs was at issue in *Wygant*, it has been considered a more difficult case. Certainly, there was loss: the question, as Justice Marshall noted in dissent, is whether there was constitutional injury.[291] When the Jackson, Michigan School Board negotiated an agreement with the union that sought to protect the jobs of more recently hired Black teachers in the event of a layoff, it disturbed long-standing assumptions about seniority as the basis of distributing loss. White teachers who had lost their jobs asserted that their seniority was a vested right — a property right — on which they were entitled to rely, and of which they were being deprived because of their race. The Court, disturbed by the loss of employment to innocent whites, overrode the provision in the union agreement that modified seniority rules in the interest of remediating past racial discrimination, and ordered reinstatement of the more senior white employees.[292] It in fact restructured the bargain and set aside a portion of the contract negotiated by the union so that whites were protected from the layoff despite the contract.

The majority's analysis ignores what positions many of the white teachers would have held but for the privilege inherent in being white. Absent the history of overt and covert racial exclusion, many white employees would not have been hired in the first place and would therefore have no basis to claim seniority preferences. Thus, a claim of right predicated on seniority is an assertion of preference based on that racially discriminatory history. Asserting the property interest in seniority rights against the background of structured privilege for whites and inequities for Blacks "is to claim a property right in the benefits of being white."[293] To illustrate the point, one could consider the extent to which the Court would extend protections to these workers if they were losing their jobs because of a corporate takeover, a plant closing, or any other reason.[294]

Together, these cases establish the Court's major doctrinal view of affirmative action as abnormal and against the norm of nondiscrimi-

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[290] *See* Wygant v. Jackson Bd. of Educ., 467 U.S. 267, 272–73 (1986).

[291] *See id.* at 296 (Marshall, J., dissenting).

[292] *See id.* at 283–84.

[293] Singer, *supra* note 17, at 103.

[294] Indeed, Frances Ansley suggests that, when one compares general worker protections with "white skin protection," it is evident that the courts are not in fact protecting workers but their whiteness. *See* Ansley, *supra* note 10, at 1068–69.

nation. They speak the formal language of equality, but subordinate equality by vesting the expectations of whites that what is unequal in fact will be regarded as equal in law. Thus, they enshrine whiteness as property.

V. DE-LEGITIMATING THE PROPERTY INTEREST IN WHITENESS THROUGH AFFIRMATIVE ACTION

Within the worlds of de jure and de facto segregation, whiteness has value, whiteness is valued, and whiteness is expected to be valued in law. The legal affirmation of whiteness and white privilege allowed expectations that originated in injustice to be naturalized and legitimated. The relative economic, political, and social advantages dispensed to whites under systematic white supremacy in the United States were reinforced through patterns of oppression of Blacks and Native Americans. Materially, these advantages became institutionalized privileges, and ideologically, they became part of the settled expectations of whites[295] — a product of the unalterable original bargain. The law masks what is chosen as natural; it obscures the consequences of social selection as inevitable.[296] The result is that the distortions in social relations are immunized from truly effective intervention, because the existing inequities are obscured and rendered nearly invisible. The existing state of affairs is considered neutral[297]

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[295] Frances Ansley identifies the origins of these expectations in segregation:

> [I]n the days of Jim Crow, white people who lived in that system had emotional, cultural and financial stakes in the continuation of a segregated way of life. Segregation had become a settled expectation that, for most whites, represented their "chosen" preference . . . . From the point of view of blacks, these arrangements may have looked unjust and bizarre. Of course, the arrangements *were* unjust and bizarre. But they nevertheless clearly represented settled expectations, and to many ordinary white people these arrangements seemed natural and essential to their fundamental rights to private property and personal liberty.

Id. at 1011 (citation omitted). She further describes the pattern of antidiscrimination cases beginning with Shelley v. Kraemer, 334 U.S. 1 (1948), and continuing through *Brown II* and the cases following the Civil Rights Act of 1964, to be embracing the rule that these expectations could not supersede the mandate of equality. *See id.* at 1011–13.

[296] *See* Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 334–50 (1979).

[297] Neutrality, conceptualized as the "preservation of the existing distribution of wealth and entitlements," is required and maintained through means adjudged to be fair. Sunstein, *supra* note 264, at 875. It is Sunstein's argument that this notion of neutrality is so deeply embedded in the framework of American constitutionalism that, despite the fact that Lochner v. New York, 198 U.S. 45 (1905) — one of the major cases enshrining this particular definition of neutrality — has been overruled and severely criticized, the legacy of *Lochner*'s assumptions about neutrality remain. *See id.* at 874–75. Neutrality also has its negative implications for Black self-definition that parallel the self-denial inherent in the phenomenon of passing. Patricia Williams describes several incidents in which Blacks shunned public identification as Blacks

and fair, however unequal and unjust it is in substance. Although the existing state of inequitable distribution is the product of institutionalized white supremacy and economic exploitation, it is seen by whites as part of the natural order of things that cannot legitimately be disturbed. Through legal doctrine, expectation of continued privilege based on white domination was reified; whiteness as property was reaffirmed.

The property interest in whiteness has proven to be resilient and adaptive to new conditions. Over time it has changed in form, but it has retained its essential exclusionary character and continued to distort outcomes of legal disputes by favoring and protecting settled expectations of white privilege. The law expresses the dominant conception of "rights," "equality," "property," "neutrality," and "power": rights mean shields from interference; equality means formal equality; property means the settled expectations that are to be protected; neutrality means the existing distribution, which is natural; and, power is the mechanism for guarding all of this.

One reason then for the court's hostility toward affirmative action is that it seeks to de-legitimate the assumptions surrounding existing inequality. It exposes the illusion that the original or current distribution of power, property, and resources is the result of "right" and "merit." It places in tension the settled expectations of whites, based on both the ideology of white supremacy and the structure of the U.S. economy, that have operated to subordinate and hyper-exploit groups identified as the "other." It opens to critique the idea that individualized and discrete claims to remedy identified discrimination will achieve the promise of equality contained in the Fourteenth Amendment. It conceives of equality in transgenerational terms, and demands a new and different sense of social responsibility in a society that defines individualism as the highest good, and the "market value" of the individual as the just and true assessment.[298] It unmasks the

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because of the perceived negative consequences. This phenomenon, Williams argues, is a product of a "tabooed sense of self" linked to requirements of neutrality. Thus, she states:

> Neutrality is from this perspective a suppression, an institutionalization of psychic taboos as much as segregation was the institutionalization of physical boundaries. What the middle-class, propertied, upwardly mobile black striver must do, to accommodate a race-neutral world view, is to become an invisible black, a phantom black, by avoiding the label "black" . . . .

WILLIAMS, *The Obliging Shell*, *in* THE ALCHEMY OF RACE AND RIGHTS, *supra* note 5, at 98, 119.

The de facto lack of neutrality and equality occurs as part of a partial integration in which "white" is still good, but some blacks "who are like whites" can be considered good. This is a form of neo-racism under which "equality and neutrality have become . . . constant and necessary companions, two sides of the same coin: 'equal . . .' has as its unspoken referent '. . . to whites'; 'neutral . . .' has as it [sic] hidden subtext '. . . to concerns of color.'" *Id.* at 116.

[298] According to Macpherson, this is the underlying assumption of a full market economy as "there is no measure of a man's merit other than what the market will award him." C.B.

limited character of rights granted by those who dominate. In a word, it is destabilizing.[299]

Affirmative action begins the essential work of rethinking rights, power, equality, race, and property from the perspective of those whose access to each of these has been limited by their oppression. This approach follows Mari Matsuda's suggestion of "looking to the bottom" for a more humane and liberating view.[300] From this perspective, affirmative action is required on both moral and legal grounds to de-legitimate the property interest in whiteness — to dismantle the actual and expected privilege that has attended "white" skin since the founding of the country. Like "passing," affirmative action undermines the property interest in whiteness. Unlike passing, which seeks the shelter of an assumed whiteness as a means of extending protection at the margins of racial boundaries, affirmative action de-privileges whiteness and seeks to remove the legal protections of the existing hierarchy spawned by race oppression. What passing attempts to circumvent, affirmative action moves to challenge.

Rereading affirmative action to de-legitimate the property interest in whiteness suggests that if, historically, the law has legitimated and protected the settled expectations of whites in white privilege, de-

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MACPHERSON, THE RISE AND FALL OF ECONOMIC JUSTICE AND OTHER PAPERS 9 (1985). Under these conditions, market value equals just value. *See id.*

[299] Some critical scholars have argued that the goals of equal protection have never been fully implemented because allowing the claims of Blacks would disrupt the system. All people might then lay claim to equal conditions rather than equal opportunity, which is measured by definitions of merit that perpetuate class preferences. *See, e.g.*, Freeman, *supra* note 197, at 112–14 (arguing that the retreat in antidiscrimination law is due to the fact that overturning Black subordination would lay siege to hallowed concepts central to the functioning of the existing order).

However, Kimberlé Crenshaw cautions that we should not overlook the embedded nature of white supremacy that causes whites to be "unlikely to question the legitimacy" of the class structure, and instead more likely "to question the legitimacy of racial remedies that relied upon a suspension of these myths" of equal opportunity. Crenshaw writes that "whites were on the defensive, not because the promise of vestedness had proven unstable, but because Blacks had been granted some privileges at their expense." Crenshaw, *supra* note 3, at 1361. The retrenchment in antidiscrimination law then was the result of white backlash "against Blacks and against institutions perceived as sympathetic to Black interests." *Id.* at 1362.

In characterizing affirmative action to be destabilizing, I do not ascribe to affirmative action any magical capacity to create cross-racial solidarity with the white working class against class exploitation. Instead, I intend to evoke the counterhegemonic possibilities of another vision of rights and remedies, as well as equality, property, neutrality, and power, around which to mobilize resistance.

[300] Matsuda suggests something beyond imagining the experience of oppression. Rather, she says that "[l]ooking to the bottom [involves] adopting the perspective of those who have seen and felt the falsity of the liberal promise." Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324. This shift of perspective requires studying the actual experience of those groups that have suffered oppression and heeding the voice of that experience rather than considering this viewpoint in the abstract. *See id.* at 325.

legitimation should be accomplished not merely by implementing equal treatment, but by *equalizing* treatment among the groups that have been illegitimately privileged or unfairly subordinated by racial stratification. Obviously, the meaning of equalizing treatment would vary, because the extent of privilege and subordination is not constant with reference to all societal goods. In some instances, the advantage of race privilege to poorer whites may be materially insignificant when compared to their class disadvantage against more privileged whites.[301] But exposing the critical core of whiteness as property as the unconstrained right to exclude directs attention toward questions of redistribution and property that are crucial under both race and class analysis. The conceptions of rights, race, property, and affirmative action as currently understood are unsatisfactory and insufficient to facilitate the self-realization of oppressed people.

Here I consider some of the preliminary issues that arise from thinking about affirmative action as a method of attacking whiteness as property. First, I examine how the property interest in whiteness has skewed the concept of affirmative action by focusing on the sin or innocence of individual white claimants with vested rights as competitors of Blacks whose rights are provisional and contingent, rather than on the broader questions of distribution of benefits and burdens. This focus improperly narrows the affirmative action debate to corrective/compensatory issues, to the exclusion of distributive issues. Asking distributive questions about affirmative action is not only conceptually warranted, but is an effective beginning to disentangling whiteness from property through refocusing on the extent to which the existing, distorted distribution results directly from racial subordination. Second, I consider and reject the argument that affirmative action amounts to the illegitimate establishment of a property interest in Blackness. Affirmative action does not embody a conception of Blackness that is the functional opposite of whiteness, because Black identity, unlike whiteness, is not derived from racial subordination. Affirmative action does not reify expectations of continued race-based privilege, for it does not implement a permanent system of unfair advantage that is then naturalized and held outside the boundaries of

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[301] History reveals that the racial oppression of Blacks has been both beneficial and harmful to white workers. Racial stratifications have often operated to weaken the capacity of organized labor to exert leverage in bargaining. Marginalized Black workers have worked in substandard conditions and for inadequate wages rejected by white laborers. Their work allows employers to resist demands for improved wages and conditions for all workers. *See* EZORSKY, *supra* note 203, at 83–84. However, the white working class has also benefited from Black subordination:

> [White workers] have been first in line for hiring, training, promotion, and desirable job assignments, but last in line for seniority-based layoffs. As white, they have also benefited from housing discrimination in areas where jobs could be had and from the racist impact of selection based on personal connections, seniority, and qualifications.

Id. at 83.

continued scrutiny. Finally, I argue that, unlike the property interest in whiteness that rests on the distorted notions of identity and property that afford whites the right to exclude "the other," affirmative action implies broader and more highly developed concepts of identity and property.

A. Corrective Justice, Sin, and Whiteness as Property

The distorting prism of whiteness as property further reinforces an exclusively corrective view of affirmative action claims when, in fact, affirmative action embodies aspects of both corrective and distributive justice. Ronald Fiscus has described the corrective (or compensatory) argument in affirmative action as "the claim to compensation for discrete and 'finished' harm done to minority group members or their ancestors"; distributive justice "is the claim an individual or group has to the positions or advantages or benefits they would have been awarded under fair conditions."[302] These arguments are frequently conflated because, as Fiscus notes, the case for affirmative action often is premised on the need to compensate minorities for harms done to them in the past — a discussion that admits of interpretations consistent with both compensatory and distributive justice claims.[303]

There are in fact different logical consequences flowing from the two perspectives. Whether one completely accepts the conceptual framework outlined by Fiscus,[304] the crucial point is that, in failing to consider the distributive aspects of affirmative action, its validity has been measured solely against a corrective justice framework that works to undermine the very core of affirmative action objectives — addressing the harm to Blacks caused by racial oppression. If the paradigm is one of corrective justice, then the governing principles are that "compensation should be paid to the one harmed and that it should be paid by the one who caused the harm."[305] Affirmative action then would appear to contravene both traditional guidelines

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[302] FISCUS, *supra* note 263, at 8.

[303] *See id.* Thus, according to Fiscus, if "the argument refers to past harms so great that their victims (or, more likely, their victims' descendants) deserve to be compensated," it is a compensatory justice claim. Alternatively, if it refers "to past harms that have continuing, disabling effects," then, Fiscus argues, it really is a distributive justice claim. *Id.* at 8–9. In contrast to remedies imposed for rectifying a retroactive compensatory justice claim, affirmative action applies when a past injustice has continuing effects and the distributive claim, situated in the present, has "subsumed or incorporated the compensation claim." *Id.* at 9.

[304] For the contrasting view, rejecting distributive justice as a basis for affirmative action, see Thomas Nagel, *Equal Protection and Compensatory Discrimination*, 2 PHIL. & PUB. AFF. 348, 359 (1973). Nagel argues that preferential policies for minorities can be justified only on the basis of social utility, not on the basis of distributive justice, because distributive justice arguments are difficult to construct without the aid of premises on the source of unequal qualifications between different groups. *See id.* at 350–51.

[305] FISCUS, *supra* note 263, at 9.

because there is a lack of identity between the recipient of compensation and the one suffering a substantial share of the original harm (even allowing for the continued effects of past discrimination), and because the current generation of whites is being required to compensate for harms caused by prior generations.[306] Even when the Court has upheld affirmative action plans, it implicitly has accepted the notion that affirmative action burdens — that is, extracts compensation from — innocent whites.[307] Proponents of affirmative action justify requiring the sons to pay for the sins of the fathers by pointing to the compelling interest in eliminating the disadvantage of the present built on the oppression of the past. Even this argument, however, accepts the notion that harm was being done.[308] Significantly, this argument has great moral suasion in popular discourse and is the source of heated debate.[309] The focus on innocent whites changes the affirmative action inquiry from one of rectifying the harm to Blacks to invoking legal protection for the rights of whites who are innocent of discriminatory acts, although they have benefited from prior discrimination.[310]

Mischaracterizing affirmative action as a claim of bipolar corrective justice between individual Black and white competitors renders invisible parties essential to the proper adjudication of the claims at issue. In some instances, when the claim is between competing Black and white applicants for limited resources, the role of the employer, state agency, or other distributor of the resources is minimized although, as decisionmakers and holders of power, they are obviously

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[306] *See id.* at 9–10.

[307] *See id.* at 5.

[308] *See id.* at 4–5.

[309] *See* Ansley, *supra* note 10, at 1005 (describing the "innocent victim" as "the most harrowing and publicly-debated issue in affirmative action").

[310] *See generally* Kathleen M. Sullivan, *The Supreme Court, 1985 Term — Comment: Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 80 (1986) (arguing that the Supreme Court's approach of only approving affirmative action plans when designed to rectify past "sins of racism" has "invited claims . . . [that] white workers 'innocent' of their bosses' or union leadership's past discrimination . . . should not pay for 'the sins of others of their own race'"). Thus, when the Court invokes legal protections for the interests of innocent whites, affirmative action claims are conceptualized as problems of corrective justice, inevitably to the detriment of the claim of any Black aspirant. If affirmative action is cast as a bipolar corrective justice claim between a Black aspirant and a white applicant or incumbent, then denying relief to the Black aspirant logically follows. Although the claim for compensation for unjust loss may be valid, the white applicant or incumbent is innocent of the historical wrong for which the Black aspirant seeks relief and therefore should not be forced to yield position. Alternatively, when a white aspirant or incumbent lays a claim of reverse discrimination, he is asserting another type of corrective justice argument. He argues that he has been caused unjust harm by the affirmative action program that has displaced white expectations of a secured position in favor of the Black applicant. In this scenario, it is the white aspirant or incumbent who has suffered unjust loss and, under a corrective justice model, is the central focus of the rights debate and rectification question.

major players.[311] In other scenarios, when a white applicant charges that he has been unfairly passed over, Blacks are at the core of the dispute but are not parties to the litigation.[312] By disavowing the essential jurisprudential nature of affirmative action to be both corrective and distributive, conflict that is both private and public in nature becomes wholly privatized and the parties misaligned.[313]

If affirmative action is viewed through the prism of distributive justice, the claim of white innocence no longer seems so compelling, because a distributive justice framework does not focus primarily on guilt and innocence, but rather on entitlement and fairness. Thus, distributive justice as a matter of equal protection requires that individuals receive that share of the benefits they would have secured in the absence of racism.[314] Conversely, and most significantly, Fiscus rejects white innocence for the following reasons:

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[311] This tendency for the employer to fade into the background is exemplified by Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986). The discriminatory hiring practices of the Jackson, Michigan School Board that had led to gross racial imbalance among teachers were not the central concerns of the *Wygant* plurality opinions. Indeed, Justice Marshall's dissent notes that the decision in the case was impaired by a record that was "informal[,] incomplete," and "inadequate to inform the Court's decision," leading to a failure to appreciate the factual basis for the imposition of affirmative action in the first instance. *Id.* at 295–96 (Marshall, J., dissenting). Instead, the discourse focused on whether it was fair to override the seniority interests of innocent white employees in apportioning loss between Black and white workers. According to Justice Powell, "'the rights and expectations surrounding seniority make up what is probably the most valuable capital asset that the worker "owns," worth even more than the current equity in his home.'" *Wygant*, 476 U.S. at 283 (plurality opinion) (quoting Richard H. Fallon, Jr. & Paul C. Weiler, Firefighters v. Stotts: *Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1, 58 (1985)).

[312] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 276 (1978). The fact that minority students were not actual parties to the *Bakke* litigation was crucial to the way in which the case was litigated, the strategies were developed, and indeed, even what facts ultimately became part of the record that went before the Supreme Court. *Cf.* DREYFUSS & LAWRENCE, *supra* note 275, at 40–42 (documenting the omission of critical facts from the record, such as (1) the Dean's special admissions policy for children of wealthy donors and alumnae; (2) the university's mistaken concessions that the admissions program for disadvantaged students admitted 16 students each year that Bakke applied, when in fact it did not; and, (3) the fact that whites were considered for admission through the Task Force Program).

[313] This observation is Frances Ansley's insight regarding the shift in both legal discourse and popular conception regarding remediation of race discrimination. *See* Ansley, *supra* note 10, at 1021–22. She notes the "picture is of an embattled white, male worker in need of protection from an overbearing and intrusive government or employer." *Id.* at 1022. This vision tends to exclude Black aspirants from consideration. *See id.* at 1022 n.126.

[314] If one assumes relative equality of abilities among the races at birth, then it is only racial subordination that can explain the fact that Blacks have not secured the proportion of society's benefits that they would be expected to have based on their numbers in society. *But see* Posner, *supra* note 260, at 17 ("Many groups are underrepresented in various occupations for reasons of taste, opportunity, or aptitude unrelated to discrimination. There is no basis for a presumption that but for past discrimination . . . minorities . . . would supply [a proportional] percent of the nation's lawyers."). Fiscus argues that, if one accepts relative group equality in ability at birth, then race-correlated differences must be due to societal factors that differentiate along

> Distributive justice also holds that individuals or groups may *not* claim positions, advantages, or benefits that they would *not* have been awarded under fair conditions. . . .
>
> This means that white individuals who would not have won for themselves a benefit in a racially fair world . . . are not entitled to claim those benefits by using putatively more objective measures of merit. If, in a fair world, white males would have achieved *N* percent of a given set of benefits, then white males who claim benefits beyond that percentage are claiming benefits they are not entitled to, whether or not they appear to have "earned" the benefit according to accepted criteria. The criteria are likely to be right for measuring immediate merit . . . . They are wrong for measuring distributive justice. The merit claimed by these individuals is in fact a false merit because it is based on unfair competition . . . . [T]his means that white males who are disadvantaged by affirmative action programs, and who are ostensibly being discriminated against because of their race and/or gender, are in most cases not being treated unfairly at all — not, that is, being discriminated against at all.[315]

The distributive justice lens, then, would refocus the question of affirmative action on what would have been the proper allocation in the absence of the distortion of racial oppression.[316] By not descending into the warp of sin and innocence, doctrine and legal discourse would be redirected toward just distributions and rights rather than punishment or absolution and wrongs.[317]

B. Affirmative Action: A New Form of Status Property?

If whiteness as property is the reification, in law, of expectations of white privilege, then according privilege to Blacks through systems of affirmative action might be challenged as performing the same

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racial lines — racism. *See* FISCUS, *supra* note 263, at 24. He rejects the racial ethnicity argument "because any racially correlated variation in taste, opportunity, or aptitude can *only* be explained by either innate racial differences or pervasive societal recognition of race and differential behavior based on it — *i.e., de facto* discrimination." *Id.* at 27.

[315] FISCUS, *supra* note 263, at 13–14.

[316] As Fiscus argues, "the question is not Who is to blame for racism? but What would [Blacks] have naturally attained? . . . [W]hat . . . would [whites] be entitled to in a nonracist society." *Id.* at 45.

[317] It is not my belief that changing the rationale and discourse around affirmative action will magically dispel objections or dissipate the very real tensions that have accumulated around these issues. In the real world, these questions are not merely discursive. Rather, I suggest that the proper reformulations of these issues would avoid exacerbating the very difficult issues of allocation by excluding essential parties or minimizing the role of those holding power and control. For example, Ansley argues that alternatives to the issue of laying off Black versus white workers include job sharing, increased unemployment compensation, greater worker control over the workplace, and other remedial measures that require greater employer concessions. *See* Ansley, *supra* note 10, at 1069–70. Moreover, correctly identifying the locus of power in the affirmative action debate would serve to better expose class privilege and domination. *See id.* at 1021–23.

ideological function, only on the other side of the racial line.[318] As evidence of a property interest in Blackness, some might point out that, recently, some whites have sought to characterize themselves as belonging to a racial minority.[319] Equating affirmative action with whiteness as property, however, is false and can only be maintained if history is ignored or inverted and the premises inherent in the existing racial hierarchy are retained. Whiteness as property is derived from the deep historical roots of systematic white supremacy that has given rise to definitions of group identity predicated on the racial subordination of the "other,"[320] and that has reified expectations of continued white privilege.[321] This reification differs in crucial ways from the premises, intent, and objectives of affirmative action.

Fundamentally, affirmative action does not reestablish a property interest in Blackness because Black identity is not the functional opposite of whiteness. Even today, whiteness is still intertwined with the degradation of Blacks and is still valued because "the artifact of 'whiteness' . . . sets a floor on how far [whites] can fall."[322] Acknowledging Black identity does not involve the systematic subordination of whites, nor does it even set up a danger of doing so.[323] Affirmative action is based on principles of antisubordination, not principles of Black superiority.

The removal of white privilege pursuant to a program of affirmative action would not be implemented under an ideology of subordination, nor would it be situated in the context of historical or present exploitation of whites. It is thus not a matter of implementing systematic disadvantage to whites or installing mechanisms of group

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[318] Interestingly, when I describe my project of exposing the property interest in whiteness, it is principally whites who make this suggestion. Although this may signal nothing more than coincidence, I fear there is an undercurrent to the question that is grounded in what Hacker describes as the fear of retribution — that Blacks will do to whites what whites did to them. Hacker attributes this observation to Louis Farrakhan. *See* HACKER, *supra* note 155, at 206 (discussing white fears of having Black elected officials).

[319] *See, e.g.*, Susan Diesenhouse, *In Affirmative Action, A Question of Truth in Labeling*, N.Y. TIMES, Dec. 11, 1988, at E26 (relating the account of Philip J. and Paul J. Malone, two brothers on the Boston Fire Department who were dismissed for falsely stating on their job applications that they were Black, a status they claimed by virtue of a Black great-grandmother). The definition of race deployed by the Malones is based on old fractional formulas that measure race by bloodlines and consider race to be biologically determined.

[320] *See supra* notes 128–131 and accompanying text.

[321] *See supra* pp. 1724–46.

[322] HACKER, *supra* note 155, at 217.

[323] The assertion of Black identity in the face of the concerted and relentless efforts to degrade and eradicate it is indeed essential to the recovery of Blacks in particular and of the society as a whole. *Cf.* MEMMI, *supra* note 227, at 128 ("The more oppression increases, the more the colonizer needs justification. The more he must debase the colonized, the more guilty he feels . . . . How can he emerge from this increasingly explosive circle except by rupture, explosion?").

exploitation. Whites are not an oppressed people and are not at risk of becoming so. Those whites that are disadvantaged in society suffer not because of their race, but in spite of it. Refusing to implement affirmative action as a remedy for racial subordination will not alleviate the class oppression of poor whites.[324] Indeed, failing to do so will reinforce the existing regime of race and class domination that leaves lower class whites more vulnerable to class exploitation. Affirmative action does not institute a regime of racialized hierarchy in which all whites, because they are white, are deprived of economic, social, and political benefits. It does not reverse the hierarchy, but levels the racial privilege.

Even if one rejects the notion that, properly constructed, affirmative action policies cause whites no injustice, affirmative action does not implement a set of permanent, never-ending privileges for Blacks. Affirmative action does not distort Black expectations because it does not naturalize these expectations. Because affirmative action can only be implemented through conscious intervention and requires constant monitoring and reevaluation, it does not function behind a mask of neutrality in the realm beyond scrutiny. Affirmative action for Blacks does not reify existing patterns of privilege, nor does it produce subordination of whites as a group. If anything, it might fairly be said that affirmative action creates a property interest in *true* equal opportunity[325] — opportunity and means that are equalized.

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[324] As Fiscus argues, "unfairness to poor whites is a serious matter in its own right . . . . [I]t is [however] a *different* injustice, and the net unfairness of the society is not improved by giving to poor whites what Blacks would have won under racially fair conditions. . . . The only proper remedy for . . . class-based unfairness is one that addresses class *per se* . . . ." FISCUS, *supra* note 263, at 50.

[325] *See* powell, *supra* note 84, at 379–80. The issue of equal opportunity was examined in United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979). Weber, a white employee who had been denied a spot in his employer's training program, alleged that the program, open to selected workers on the basis of seniority with the proviso that at least 50% were Black, violated Title VII of the Civil Rights Act of 1964 because the program resulted in Black workers receiving training in preference to more senior whites. The training program had been designed, pursuant to a collective bargaining agreement, to rectify the craft unions' past exclusion of Blacks. Because the company, in the past, had hired only experienced craftworkers, few Blacks had been able to rise through the craft ranks. *See id.* at 197–200. The Court upheld the constitutionality of the training program, and instructed that the language of Title VII was to be interpreted in light of its affirmative action goals. *See id.* at 202–04. john powell discusses *Weber* as a case in which both the majority and minority workers have a personal property interest in promotions on the job. powell surmises that the expectation of equal opportunity is a property interest that both groups have, although "neither group has a vested interest in the job itself." powell, *supra* note 84, at 379. I contend that expectations in the status quo are not legitimately considered as property, but have, nevertheless, been treated as property. Thus, disposing or interfering with these expectations is not impermissible. Indeed, to validate the status quo against the backdrop of disadvantage would interfere with what powell calls the property interest in equal opportunity — a legitimate form of property. Thus, Weber's claim to equal opportunity is not insignificant, but the gravamen of his complaint was that he was

C. *What Affirmative Action Has Been; What Affirmative Action Might Become*

The truncated application of affirmative action as a policy has obscured affirmative action as a concept. The ferocious and unending debate on affirmative action cannot be understood unless the concept of affirmative action is considered and conceptually disengaged from its application in the United States.

As policy, affirmative action does not have a clearly identifiable pedigree[326] but was one of the limited concessions offered in official response to demands for justice pressed by Black constituencies.[327] Despite uneven implementation in the areas of public employment, higher education, and government contracts, it translated into the attainment by Blacks of jobs, admissions to universities, and contractual opportunities. Affirmative action programs did not, however, stem the tide of growing structural unemployment and underemployment among Black workers, nor did it prevent the decline in material conditions for Blacks as a whole.[328] Such programs did not change

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more senior and therefore would have been selected for the training program first. This claim rested on expectations borne of a racialized stratification and was not valid. As powell points out, "[t]o protect this expectation would be abusive power." *Id.* at 380.

[326] Affirmative action as a matter of U.S. policy surfaced in a remark attributed to President Lyndon B. Johnson in a 1965 speech at Howard University. "You do not take a person who for years has been hobbled by chains, and liberate him, bring him up to the starting line and then say 'you are free to compete with all the others.'" Lyndon B. Johnson, Commencement Speech at Howard University (June 4, 1965), *in* N.Y. TIMES, June 5, 1965, at A14. In fact, Martin Luther King, Jr. had previously been quoted to the effect that equality could not be achieved by telling people who do not have boots to pull themselves up by their own bootstraps. *See* HACKER, *supra* note 155, at 119. Hacker traces the idea to an even earlier history of presidential initiatives beginning with Franklin Delano Roosevelt's 1941 Executive Order regarding employment in defense industries and the creation of the Fair Employment Practices Commission. *See id.* at 118–19. He attributes the phrase "affirmative action" to the Kennedy administration orders that firms with federal contracts take "positive steps" toward a racially integrated work force. *See id.* at 119; Exec. Order No. 10,925, 3 C.F.R. 448, 449 (1959–1963).

[327] *See* EZORSKY, *supra* note 203, at 31–32.

[328] Although the numbers of Blacks who have attained professional status and middle-class income have increased, so too have the numbers of Black poor. *See* A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 275 (Gerald D. Jaynes & Robin M. Williams, Jr., eds., 1989) [hereinafter COMMON DESTINY]. Over 45 percent of all Black children in 1991 lived below the official poverty line as defined by government income standards, *see* CENSUS, *supra* note 226, at x, and the Black infant mortality rate has been twice that of whites for most of the century, although the rates of all groups have improved in this category, *see* COMMON DESTINY, *supra*, at 398. The mortality of Black people from treatable diseases as well as from a host of socioeconomically related ills, such as homicide, *see id.* at 397, 419, AIDS, *see id.* at 420–21, and substance abuse, *see id.* at 421–22, continues to be disproportionately high in comparison with the rest of U.S. society. Further, the gap in per capita income between Blacks and whites also remains in existence, *see id.* at 16–18, 323. On every plane, along every indicator of socioeconomic conditions from employment rates, *see id.* at 18, the percentage of persons living below the poverty line, *see id.* at 17, and median family wealth, *see id.* at 282, to health care

the subordinated status of Blacks, in part because of structural changes in the economy, and in part because the programs were not designed to do so.[329]

However, affirmative action is more than a program: it is a principle, internationally recognized,[330] based on a theory of rights and equality. Formal equality overlooks structural disadvantage and requires mere nondiscrimination or "equal treatment"; by contrast, affirmative action calls for *equalizing treatment* by redistributing power and resources in order to rectify inequities and to achieve real equality. The current polarized debate on affirmative action and the intense political and judicial opposition to the concept is thus grounded in the fact that, in its requirement of equalizing treatment, affirmative action implicitly challenges the sanctity of the original and derivative

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standards, *see id.* at 435, the picture is one of continued, relatively poor material living conditions for Blacks.

[329] One of the more prominent critiques made by writers such as William Julius Wilson is that affirmative action has failed because it has not changed conditions for the "truly disadvantaged." *See* WILLIAM J. WILSON, THE TRULY DISADVANTAGED *passim* (1987). Although it is true that Black poverty and unemployment has persisted, *see supra* note 328, it is also true that Blacks at *all* income and educational levels have benefited from affirmative action. *See* EZORSKY, *supra* note 203, at 63–65 (disputing the claim that affirmative action has aided only advantaged Blacks and citing studies indicating increased and better employment among Blacks at the lower end of the economic scale as a result of affirmative action); *see also* William L. Taylor, Brown, *Equal Protection, and the Isolation of the Poor*, 95 YALE L.J. 1700, 1713–14 (1986) (citing evidence of increased job opportunities for Blacks in blue-collar work as well as significant increases in minority enrollment in professional schools, which reflect the matriculation of children from families of low income and job status).

[330] The Charter of the United Nations requires that all members promote human rights "without distinction as to race, sex, language, or religion." U.N. CHARTER art. 1, ¶ 3. This mandate does not mean that one may never differentiate (because this would disallow bilingual classes for students in a language that they speak), but that one may never discriminate. *See* VERNON VAN DYKE, HUMAN RIGHTS, ETHNICITY, AND DISCRIMINATION 4 (1985). The International Convention on the Elimination of All Forms of Race Discrimination defines racial discrimination as:

> [A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

U.N. GAOR, 3d Comm. 20th Sess., Annex 2, Agenda Item 58, at 42, U.N. Doc. A/RES/2106 (1967). Significantly, the Convention also states that, "when the circumstances so warrant," parties shall take "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights." *Id.* This provision has been construed by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities to mean that the implementation of special measures does not violate the mandate of equality. Thus, affirmative action or "special measures" are not merely permitted, but are required to attain factual (substantive) equality. *See* VAN DYKE, *supra*, at 9–11. American judicial confusion notwithstanding, affirmative action is perceived under international law to be entirely consistent with equality.

present distribution of property, resources, and entitlements and directly confronts the notion that there is a protectable property interest in "whiteness." If affirmative action doctrine were freed from the constraint of protecting the property interest in whiteness, if indeed it were conceptualized from the perspective of those on the bottom, it might assist in moving away from a vision of affirmative action as an uncompensated taking and inspire a new perspective on identity as well. The fundamental precept of whiteness — the core of its value — is its exclusivity. But exclusivity is predicated not on any intrinsic characteristic, but on the existence of the symbolic "other," which functions to "create an illusion of unity" among whites.[331] Affirmative action might challenge the notion of property and identity as the unrestricted right to exclude.[332] In challenging the property interest in whiteness, affirmative action could facilitate the destruction of the false premises of legitimacy and exclusivity inherent in whiteness and break the distorting link between white identity and property.

Affirmative action in the South African context offers a point of comparison. It has emerged as one of the democratic movement's[333] central demands, appearing in both the constitutional guidelines and draft Bill of Rights issued by the African National Congress. These documents simultaneously denounce all forms of discrimination and

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[331] Crenshaw, *supra* note 3, at 1372.

[332] Macpherson suggests that the central problem of liberal democracy has been the failure to reconcile the contradiction between the "liberal property right" enshrined in law as the individual right to exclusive use and disposition and the "ethical goal of free and independent individual development." C.B. Macpherson, *Liberal Democracy and Property*, *in* PROPERTY, *supra* note 58, at 199, 199–200. Because there is no legitimate norm for constraining the exclusive property right conferred by liberal theory, it leads to the excessive concentration of ownership that invariably forecloses "the equal possibility of individual human fulfilment." *Id.* at 200. "It led to denial of property as a right to what is needed to be human." *Id.* at 205. The crux of the problem lies in an excessively narrow view of the nature of the property right as the right to exclude others from the benefit or use of something when, in fact, property legitimately embraces "the right not to be excluded from the use or benefit of . . . the achievements of the whole society." *Id.* at 206. A conception of affirmative action that would dismantle whiteness as property raises similar implications about the meaning of property for it is dissonant with notions of property, such as the absolute right to exclude.

[333] As Albie Sachs, one of the leading lawyers for the African National Congress, writes:

> Without a constitutionally structured programme of deep and extensive affirmative action, a Bill of Rights in South Africa is meaningless. Affirmative action by its nature involves the disturbance of inherited rights. It is redistributory rather than conservative in character. It is not a brake on change but rather a regulator of change, designated on the one hand to guarantee that change takes place, and on the other hand that it proceeds in an orderly way according to established criteria. . . .
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> In the historical conditions of South Africa, affirmative action is not merely the corrector of certain perceived structural injustices. It becomes the major instrument in the transitional period after a democratic government has been installed, for converting a racist oppressive society into a democratic and just one.

Albie Sachs, *Towards a Bill of Rights for a Democratic South Africa*, 35 J. AFR. L. 21, 29 (1991).

embrace affirmative action as a mechanism for rectifying the gross inequities in South African society.[334]

The South African conception of affirmative action expands the application of affirmative action to a much broader domain than has typically been envisioned in the United States. That is, South Africans consider affirmative action a strategic measure to address directly the distribution of property and power, with particular regard to the maldistribution of land and the need for housing.[335] This policy has not yet been clearly defined, but what is implied by this conception of affirmative action is that existing distributions of property will be modified by rectifying unjust loss and inequality. Property rights will then be respected, but they will not be absolute and will be considered against a societal requirement of affirmative action. In essence, this

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[334] The Draft Constitutional Principles for the ANC instruct that:

> Provision will be made for discrimination to be eliminated in substance as well as in form. At all levels of government the state will be empowered to pursue policies of affirmative action for the advancement of persons who have been socially, economically or educationally disadvantaged by past discriminatory laws and practices and in order to redress social, economic and educational imbalances in South Africa resulting from such discrimination with special regard to the maldistribution of land and the need for housing. Special provision will also be made to redress the added discrimination which has been suffered by women and the victims of forced removals.

AFRICAN NAT'L CONGRESS, CONSTITUTIONAL COMM., DISCUSSION DOCUMENT: CONSTITUTIONAL PRINCIPLES AND STRUCTURES FOR A DEMOCRATIC SOUTH AFRICA 30 (Centre for Development Studies, Univ. of the Western Cape, South Africa, Apr. 1991). The Draft Bill of Rights similarly authorizes the implementation of affirmative action and states that:

> Nothing in the Constitution shall prevent the enactment of legislation, or the adoption by any public or private body of special measures of a positive kind designed to procure the advancement and the opening up of opportunities, including access to education, skills, employment and land, . . . of men and women who in the past have been disadvantaged by discrimination.

ANC CONSTITUTIONAL COMM., ANC DRAFT BILL OF RIGHTS, PRELIMINARY REVISED VERSION 1.1, Art. 14, at 14 (Centre for Development Studies, Univ. of the Western Cape, South Africa, May 1992) [hereinafter ANC DRAFT BILL OF RIGHTS].

[335] To deal with the grossly skewed property relations produced by apartheid under which whites, who number less than 13% of the population, own 87% of the land and 95% of productive capital, a new democratic government could pursue a number of alternatives ranging from completely precluding public intervention in the existing patterns of ownership to authorizing total nationalization. The ANC's proposal on the land issue seems to embody a third option — permitting intervention through taking property in the public interest and providing compensation to the owner, but defining compensation to include affirmative action principles. Sachs suggests that under the formulation:

> [M]arket valuation would not be the sole determinant [of compensation]. Affirmative action principles could enter the picture, so that under broad equal protection principles, historical, social, and family factors could be taken into account, as well as the need to ensure continuity of productive use; there could be flexibility in terms of the modalities of payment, and a wide variety of transitional arrangements and forms of mixed interests could be permitted.

ALBIE SACHS, PROTECTING HUMAN RIGHTS IN A NEW SOUTH AFRICA 166 (1990); *see* ANC DRAFT BILL OF RIGHTS, *supra* note 334, at 11–12 (describing the objectives and principles of land redistribution that would consider an "equitable balance" between private and public interests).

conception of affirmative action is moving toward the reallocation of power and the right to have a say. This conception is in fact consistent with the fundamental principle of affirmative action and effectively removes the constraint imposed in the American model that strangulates affirmative action principles by protecting the property interest in whiteness.

VI. Conclusion

Whiteness as property has carried and produced a heavy legacy. It is a ghost that has haunted the political and legal domains in which claims for justice have been inadequately addressed for far too long. Only rarely declaring its presence, it has warped efforts to remediate racial exploitation. It has blinded society to the systems of domination that work against so many by retaining an unvarying focus on vestiges of systemic racialized privilege that subordinates those perceived as a particularized few — the "others." It has thwarted not only conceptions of racial justice but also conceptions of property that embrace more equitable possibilities. In protecting the property interest in whiteness, property is assumed to be no more than the right to prohibit infringement on settled expectations, ignoring countervailing equitable claims that are predicated on a right to inclusion. It is long past time to put the property interest in whiteness to rest. Affirmative action can assist in that task. Affirmative action, if properly conceived and implemented, is not only consistent with norms of equality, but is essential to shedding the legacy of oppression.