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Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law

Kimberlé W. Crenshaw
Columbia Law School, crenshaw@law.columbia.edu

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RACE, REFORM, AND RETRENCHMENT: TRANSFORMATION AND LEGITIMATION IN ANTIDISCRIMINATION LAW

*Kimberlé Williams Crenshaw**

Recent works by neoconservatives and by Critical legal scholars have suggested that civil rights reforms have been an unsuccessful means of achieving racial equality in America. In this Article, Professor Crenshaw considers these critiques and analyzes the continuing role of racism in the subordination of Black Americans. The neoconservative emphasis on formal color-blindness, she argues, fails to recognize the indeterminacy of civil rights laws and the force of lingering racial disparities. The Critical scholars, who emphasize the legitimating role of legal ideology and legal rights rhetoric, are substantially correct, according to Professor Crenshaw, but they fail to appreciate the choices and possibilities available to an oppressed group such as Blacks. The Critics, she suggests, ignore the singular power of racism as a hegemonic force in American society. Blacks have been created as a subordinated "other," and formal reform has merely repackaged racism. Antidiscrimination law, she argues, has largely succeeded in eliminating the symbolic manifestations of racial oppression, but has allowed the perpetuation of material subordination of Blacks. Professor Crenshaw concludes by demonstrating the importance of exposing the racist nature of ostensibly neutral norms, and of devising strategies for change that include the pragmatic use of legal rights.

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* Acting Professor of Law, University of California at Los Angeles. B.A., Cornell University, 1981; J.D., Harvard Law School, 1984; LL.M., University of Wisconsin, 1985.

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I. INTRODUCTION

IN 1984, President Reagan signed a bill that created the Martin Luther King, Jr. Federal Holiday Commission.[1] The Commission was charged with the responsibility of issuing guidelines for states and localities to follow in preparing their observances of Martin Luther King's birthday. The Commission's task would not be easy. Although King's birthday had come to symbolize the massive social movement that grew out of efforts of African-Americans[2] to end the long history of racial oppression in America, the first official observance of the holiday would take place in the face of at least two disturbing obstacles: first, a constant, if not increasing, socioeconomic disparity between the races,[3] and second, a hostile administration devoted to

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[1] Act of Aug. 27, 1984, Pub. L. No. 98-399, 98 Stat. 1473. President Reagan's signing is reported at 20 WEEKLY COMP. PRES. DOC. 1192 (Sept. 3, 1984).

[2] I must make several comments at the outset. I shall use "African-American" and "Black" interchangeably. When using "Black," I shall use an upper-case "B" to reflect my view that Blacks, like *A*sians, *L*atinos, and other "minorities," constitute a specific cultural group and, as such, require denotation as a proper noun. *See* MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS: J. WOMEN IN CULTURE & SOC'Y 515, 516 (1982) (noting that "Black" should not be regarded "as merely a color of skin pigmentation, but as a heritage, an experience, a cultural and personal identity, the meaning of which becomes specifically stigmatic and/or glorious and/or ordinary under specific social conditions"). The naming of Americans of African descent has had political overtones throughout history. *See* W.E.B. DUBOIS, 2 THE SEVENTH SON 12–13 (1971) (arguing that the "N" in Negro was always capitalized until, in defense of slavery, the use of the lower case "n" became the custom in "recognition" of Blacks' status as property; that the usage was defended as a "description of the color of a people;" and that the capitalization of other ethnic and national origin designations made the failure to capitalize "Negro" an insult). "African-American" is now preferred by some because it is both culturally more specific and historically more expansive than the traditional terms that narrowly categorize us as America's "other." *See infra* p. 1385.

A final prefatory remark regards the author's relationship to her subject. One of the conventions of dominant scholarship is the use of "they" or "them" to denote Blacks as a subject group. Implicit in such references is a silent "we" which carries the appearance of objectivity but actually presumes a dominant group perspective. This creates a dilemma for some Black scholars who must either risk self-exclusion by referring to our own cultural group as "they" or adopt a seemingly unscholarly approach to the subject by assuming a "we" identity. I have sometimes succumbed to convention; however, I acknowledge the dilemma in hopes that doing so may somehow bridge the distance created by my occasional use of "them" or "they."

[3] Continuing disparities exist between African-Americans and whites in virtually every measurable category. In 1986, the African-American poverty rate stood at 31%, compared with 11% for whites. *See* Williams, *Urban League Says Blacks Suffered Loss over Decade*, N.Y. Times, Jan. 15, 1988, at A10, col. 1. "[B]lack median income is 57 percent that of whites, a decline of about four percentage points since the early 1970's." Bernstein, *20 Years After the Kerner Report: Three Societies, All Separate*, N.Y. Times, Feb. 29, 1988, at B8, col. 2. Between 1981 and 1985, Black unemployment averaged 17%, compared to 7.3% for whites. *See* NATIONAL URBAN LEAGUE, THE STATE OF BLACK AMERICA 1986, at 15 (1986). In 1986, approximately 44% of all Black children lived in poverty. *See* Lauter & May, *A Saga of Triumph, a Return to Poverty: Black Middle Class Has Grown but Poor Multiply*, L.A. Times, April 2,

changing the path of civil rights reforms that some believe responsible for most of the movement's progress.[4] A focus on the continuing disparities between Blacks and whites might call, not for celebration, but for strident criticism of America's failure to make good on its promise of racial equality. Yet such criticism would overlook the progress that has been made, progress which the holiday itself represents. The Commission apparently resolved this dilemma by calling for a celebration of progress toward racial equality while urging continued commitment to this ideal. This effort to reconcile the celebration of an ideal with conditions that bespeak its continuing denial was given the ironic, but altogether appropriate title "Living the Dream."[5] The "Living the Dream" directive aptly illustrates Professor Derrick

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1988, § 1, at 16, col. 1. Blacks comprise sixty percent of the urban underclass in the United States. *Id.* at 16, col. 3.

The African-American socioeconomic position in American society has actually declined in the last two decades. Average annual family income for African-Americans dropped 9% from the 1970's to the 1980's. *See* Williams, *supra*, at A10, col. 1. Since 1969, the proportion of Black men between 25 and 55 earning less than $5000 a year rose from 8% to 20%. *See* Lauter & May, *supra*. African-American enrollment in universities and colleges is also on the decline. *See* Williams, *supra*, at A10, col. 2.

The decline in the African-American socioeconomic position has been paralleled by an increase in overt racial hostility. *See generally* U.S. COMM'N ON CIVIL RIGHTS, INTIMIDATION AND VIOLENCE: RACIAL AND RELIGIOUS BIGOTRY IN AMERICA (1983). In addition to well-publicized incidents of racial violence like the Howard Beach attack, *see* Note, *Combatting Racial Violence: A Legislative Proposal*, 101 HARV. L. REV. 1270, 1270 & n.1 (1988); *infra* note 32, and the lynching of Michael Donald, *see Follow-Up on the News: Paying Damages for Lynching*, N.Y. Times, Feb. 21, 1988, § 1, at 45, col. 1, racial unrest has risen dramatically on university campuses. *See* Wilkerson, *Campus Blacks Feel Racism's Nuances*, N.Y. Times, April 17, 1988, § 1, at 1, col. 3.

For a comprehensive analysis of the conditions afflicting the Black urban underclass, see W. WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1987).

[4] The principal civil rights reforms are the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 243 (codified as amended at 42 U.S.C. §§ 2000(e)–2000(h)(6) (1982)); the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971–1974 (1982)); U.S. CONST. amends. XIII–XV; 42 U.S.C. §§ 1981, 1983, 1985 (1982); Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965 comp.); and the Equal Employment Opportunity Commission regulations, 29 C.F.R. §§ 1600–1691 (1987).

See ACLU, IN CONTEMPT OF CONGRESS AND THE COURTS — THE REAGAN CIVIL RIGHTS RECORD (1984); Chambers, *Racial Justice in the 1980's*, 8 CAMPBELL L. REV. 29, 31–34 (1985); Devins, *Closing the Classroom Door to Civil Rights*, 11 HUM. RTS. 26 (1984); Selig, *The Reagan Justice Department and Civil Rights: What Went Wrong*, 1985 U. ILL. L. REV. 785; Wolvovitz & Lobel, *The Enforcement of Civil Rights Statutes: The Reagan Administration's Record*, 9 BLACK L.J. 252 (1986); *see also* Hernandez, Weiss, & Smith, *How Different Is the World of 1984 from the World of 1964?*, 37 RUTGERS L. REV. 755, 757–60 (1985).

Some scholars have been critical of the overall development of civil rights law over the past decade, positing that we have reached the end of the "Second Reconstruction." *See generally* D. BELL, AND WE ARE NOT SAVED (1987); Bell, *The Supreme Court, 1984 Term — Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985).

[5] MARTIN LUTHER KING, JR. FEDERAL HOLIDAY COMM'N, LIVING THE DREAM (1986).

Bell's observation that "[m]ost Americans, black and white, view the civil rights crusade as a long, slow, but always upward pull that must, given the basic precepts of the country and the commitment of its people to equality and liberty, eventually end in the full enjoyment by blacks of all rights and privileges of citizenship enjoyed by whites."[6]

Commentators on both the Right and the Left,[7] however, have begun to cast doubt upon the continuing vitality of this shopworn theme. The position of the New Right, articulated by members of the Reagan Administration[8] and by neoconservative scholars such as Thomas Sowell,[9] is that the goal of the civil rights movement — the extension of formal equality to all Americans regardless of color — has already been achieved. Therefore, the vision of a continuing struggle under the banner of civil rights is inappropriate.[10] The position of the New Left, presented in the work of scholars associated with the Conference on Critical Legal Studies ("CLS"), also challenges the perception that the civil rights struggle represents a long, steady march toward social transformation.[11] CLS scholars do not significantly disagree with the goal of racial equality, but assert only the basic counterproductivity of seeking that objective through the use of legal rights. Indeed, CLS scholars claim that even engaging in rights discourse is incompatible with a broader strategy of social change. They view the extension of rights, although perhaps energizing political struggle or producing apparent victories in the short run, as ultimately legitimating the very racial inequality and oppression that such extension purports to remedy.[12]

This Article challenges both the New Left and New Right critiques of the civil rights movement. Part II develops the critical indictment of the neoconservative critique. The Right argues that the civil rights community[13] reduces civil rights to mere special-interest

[6] D. BELL, RACE, RACISM, AND AMERICAN LAW, § 1.2, at 7 (2d ed. 1981).

[7] I use the terms "Right" and "Left" to contrast opposing views and to offer some idea of the ideological moorings of various critiques of civil rights. I have also followed the lead of others in designating various groups as the "New" Right or the "New" Left. My understanding is that the designation "New" is appropriate given the social and political upheavals of the last two decades which have altered the rhetoric, and indeed the very composition, of traditional political groupings.

[8] *See, e.g.*, Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312 (1986); *infra* note 23.

[9] *See infra* pp. 1339–41.

[10] *See generally* Abram, *supra* note 8.

[11] *See infra* pp. 1349–69.

[12] *See* Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); *infra* pp. 1349–69.

[13] Throughout this Article, I shall use the terms "civil rights community" and "civil rights constituency." The former refers to those who actively engage in political and legal struggle to improve the conditions of racial minorities historically burdened by racism in America. The term "civil rights constituency" refers to those who support the broad objectives of the civil

politics.[14] Because the Right views law and politics as essentially distinct, it presumes that demonstrating that the civil rights vision is essentially political renders it illegitimate. Yet, as is argued below, the neoconservative interpretation of antidiscrimination law reveals assumptions about racism and society that can no more transcend politics than can the civil rights vision. Thus, the neoconservative critique collapses under its own criticism.

The civil rights community, however, must come to terms with the fact that antidiscrimination discourse is fundamentally ambiguous and can accommodate conservative as well as liberal views of race and equality. This dilemma suggests that the civil rights constituency cannot afford to view antidiscrimination doctrine as a permanent pronouncement of society's commitment to ending racial subordination. Rather, antidiscrimination law represents an ongoing ideological struggle in which the occasional winners harness the moral, coercive, consensual power of law. Nonetheless, the victories it offers can be ephemeral and the risks of engagement substantial.

Part III criticizes the CLS attack on civil rights. Critical scholarship clarifies the crisis of antidiscrimination law, identifying the potential costs of engaging in liberal reform discourse. The key flaw in CLS writing on legal ideology and hegemony, however, is that it overlooks the relationship of racism to hegemony. Critical literature focuses primarily on legal consciousness and on consensual domination,[15] leaving coercion and popular consciousness unexamined. Because racism is intimately connected to both coercion and popular consciousness, the Critics' failure to examine them undermines the utility of their critique in analyzing the oppression of Black people and in explaining domination and legitimation in society as a whole.

Part IV expands the CLS perspective to address the role of racism, presenting a somewhat altered vision of society, legitimacy, and racial reform. This expanded critique presents race consciousness as a central ideological and political pillar upholding existing social conditions; race consciousness, I contend, must be taken into account in efforts to understand hegemony and the politics of racial reform. The civil rights movement is recast as a radical challenge to the dominant order even though cooptation has been and remains an ever-present threat to the movement. Finally, a realistic examination of the limited alternatives available to Blacks makes it clear that legal reform was a viable pragmatic strategy for Blacks confronted with the threat of unbridled racism on one hand and co-optation on the other.[16]

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rights community. Although my analysis focuses on the situation of Black Americans, I leave open the possibility that it may warrant a broader application.

[14] *See infra* pp. 1339–40.

[15] *See infra* pp. 1358–60.

[16] *See infra* pp. 1384–87.

In the course of my analysis, I wish to stress three crucial aspects of the consideration of race in the American legal context. First, racism is a central ideological underpinning of American society. Critical scholars who focus on legal consciousness alone thus fail to address one of the most crucial ideological components of the dominant order. The CLS practice of delegitimating false and constraining ideas[17] must include race consciousness if the accepted objective is to transcend oppressive belief systems. Second, the definitional tension in antidiscrimination law, which attempts to distinguish equality as process from equality as result,[18] is more productively characterized as a conflict between the stated *goals* of antidiscrimination law. Is the goal limited to the mere rejection of white supremacy as a normative vision,[19] or may the goal be expanded to include a societal commitment to the eradication of the substantive conditions of Black subordination?[20] Finally, the Black community must develop and maintain a distinct political consciousness in order to prevail against the co-opting force of legal reform. History has shown that the most valuable political asset of the Black community has been its ability to assert a collective identity and to name its collective political reality. Liberal reform discourse must not be allowed to undermine the Black collective identity.

II. THE NEW RIGHT ATTACK: CIVIL RIGHTS AS "POLITICS"

A. The Neoconservative Offensive

The Reagan Administration arrived in Washington in 1981 with an agenda that was profoundly hostile to the civil rights policies of

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[17] This practice of deconstruction, or, more irreverently, "trashing," is a principal tactic of Critical scholars. *See, e.g.*, Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984); *infra* pp. 1354–56.

[18] *See, e.g.*, Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C.L. REV. 531, 539–41 (1981) (characterizing the tension as between means and ends); Freeman, *supra* note 12, at 1052–53 (characterizing the tension as a conflict between "victim" and "perpetrator" perspectives); Fallon & Weiler, Firefighters v. Stotts: *Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1 (characterizing the tension as between a model of group justice and a model of individual justice).

[19] When discussed as a normative vision, white supremacy is used to refer to a formal system of racial domination based on the explicit belief that Blacks are inferior and should be subordinated. *See infra* pp. 1372–74.

[20] This characterization is premised on the notion that a society once expressly organized around white supremacist principles does not cease to be a white supremacist society simply by formally rejecting those principles. The society remains white supremacist in its maintenance of the actual distribution of goods and resources, status, and prestige in which whites establish norms which are ideologically self-reflective. The phenomenon is ideological because it is a fantasy, because it is not real. *See infra* pp. 1372–74.

the previous two decades. The principal basis of its hostility was a formalistic, color-blind view of civil rights that had developed in the neoconservative "think tanks" during the 1970's.[21] Neoconservative doctrine singles out race-specific civil rights policies as one of the most significant threats to the democratic political system.[22] Emphasizing the need for strictly color-blind policies, this view calls for the repeal of affirmative action and other race-specific remedial policies, urges an end to class-based remedies, and calls for the Administration to limit remedies to what it calls "actual victims" of discrimination.[23]

A number of early episodes sent a clear message that the Reagan Administration would be inhospitable to the civil rights policies adopted by earlier administrations.[24] For example, the Civil Rights Division of the Justice Department, under Deputy Attorney General William Bradford Reynolds,[25] abruptly changed sides in several cases.[26] Other serious attacks on the civil rights constituency included

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[21] Prominent among these was the Heritage Foundation. *See, e.g.*, S. BUTLER, M. SANERA & W. WEINROD, MANDATE FOR LEADERSHIP II: CONTINUING THE CONSERVATIVE REVOLUTION (Heritage Foundation) (1984); HERITAGE FOUNDATION, MANDATE FOR LEADERSHIP: POLICY MANAGEMENT IN A CONSERVATIVE ADMINISTRATION (C. Heatherly ed. 1981) (hereinafter HERITAGE FOUNDATION REPORT); HERITAGE FOUNDATION, A MANDATE FOR LEADERSHIP REPORT: THE FIRST YEAR (R. Holwill ed. 1982).

[22] *See* HERITAGE FOUNDATION REPORT, *supra* note 21, at 447–48.

[23] For scholarship generally supportive of this restrictive view, see generally Abram, cited in note 8 above; Cooper, *The Coercive Remedies Paradox*, 9 HARV. J.L. & PUB. POL'Y 77 (1986), which argues for color-blindness in equal protection remedial action and against "victim-blind" remedies; Graglia, *Race-Conscious Remedies*, 9 HARV. J.L. & PUB. POL'Y 83 (1986), which argues that the term "race-conscious remedies" is merely a euphemism for race discrimination; Kristol, *Equal Protection Doctrine: Foundations in Mud*, 9 HARV. J.L. & PUB. POL'Y 35 (1986), which argues that once narrow interpretation is abandoned, there is no principled stopping point; and Schiff, *Reverse Discrimination Re-Defined as Equal Protection: The Orwellian Nightmare in the Enforcement of Civil Rights Laws*, 8 HARV. J. L. & PUB. POL'Y 627 (1985), which argues that Congress intended title VII to mean "equal protection" and not "reverse discrimination." For a critical analysis of affirmative action and the neoconservative view, see Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986).

[24] *See, e.g.*, Exec. Order No. 11,478, 3 C.F.R. 803 (1966–1970) (establishing the policy of equal opportunity in federal government); Exec. Order No. 11,246, 3 C.F.R. 339 (1964–65 comp.) (establishing nondiscrimination in government employment).

[25] For the views of Deputy Attorney General Reynolds, who directed the implementation of the Reagan civil rights agenda, see Reynolds, *Individualism vs. Group Rights: The Legacy of* Brown, 93 YALE L.J. 995 (1984) [hereinafter Reynolds, *Individualism vs. Group Rights*]; Reynolds, *The Reagan Administration and Civil Rights: Winning the War Against Discrimination*, 1986 U. ILL. L. REV. 1001 [hereinafter Reynolds, *The Reagan Administration and Civil Rights*].

[26] The most notorious was Bob Jones University v. United States, 461 U.S. 574 (1983), in which the Reagan Administration refused to argue a case, initiated by the Justice Department during the previous Administration, that sought to maintain the Internal Revenue Service policy of denying tax-exempt status to schools that discriminated on the basis of race. The Supreme Court denied the Justice Department's request for a dismissal, and appointed a private attorney to argue the case. For a critical analysis of the Administration's conduct in *Bob Jones*, see

Reagan's attempt to fire members of the United States Commission on Civil Rights,[27] the Administration's opposition to the 1982 amendment of the Voting Rights Act,[28] and Reagan's veto of the Civil Rights Restoration Act.[29]

These fervent attempts to change the direction of civil rights law generated speculation that the Reagan Administration was anti-Black[30] and ideologically opposed to civil rights.[31] Yet the Adminis-

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Selig, cited in note 4 above, at 817–21. A response to the Selig critique of *Bob Jones* appears in Reynolds, *The Reagan Administration and Civil Rights*, cited in note 25 above, at 1011–14.

In Washington v. Seattle School District No. 1, 458 U.S. 457, 471–72 (1982), the Justice Department switched sides to support the constitutionality of an anti-busing initiative. In Plyler v. Doe, 457 U.S. 202 (1982), the Carter Administration had filed a brief as amicus curiae in a suit alleging that Texas had unconstitutionally denied public education to the children of undocumented workers. Although the government had argued this position successfully in the Fifth Circuit, the Reagan Justice Department refused to express any view on the constitutionality of Texas' policy, which the Court subsequently invalidated.

[27] Although the Commission was originally chartered as an independent watchdog agency, Reagan successfully replaced most of its members with persons whose political views reflected his own more restrictive view of civil rights. For a discussion of Reagan's "commission-packing" set against the historical background of the Commission, see Comment, *The Rise and Fall of the United States Commission on Civil Rights*, 22 HARV. C.R.-C.L. L. REV. 449, 476–80 (1987).

[28] Pub. L. No. 97-205, 96 Stat. 131 (1982) (codified at 42 U.S.C. § 1973(b)). The Administration favored a straight extension of the Voting Rights Act of 1965 over the 1982 Amendments' incorporation of a results test in the new section 2(b). The 1982 Amendments provided in part:

> A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

96 Stat. at 134. For a discussion of the Reagan Administration's role in the passage of the 1982 Amendments, see Boyd & Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1384–88, 1393–1410 (1983). For a sense of conservative reservations regarding the 1982 Amendments, see the minority views of Senator East as expressed in the Senate Judiciary Committee Reports on the Amendments. *See* S. Rep. No. 417, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS, vol. 2, at 370–410.

[29] *See* Johnson, *Reagan Vetoes Bill That Would Widen Federal Rights Law*, N.Y. Times, March 17, 1988, at A1, col. 6.

[30] Associate Justice Thurgood Marshall recently characterized Reagan as among the Presidents most hostile to the civil rights of Blacks. *See* N.Y. Times, Sept. 9, 1987, at A1, col. 1. Polls show that the vast majority of Black Americans share Marshall's assessment of the Reagan Administration's hostility toward civil rights. *See, e.g.*, *JCPS Survey of Political Attitudes*, FOCUS, Sept. 1984, at 9.

[31] *See* Days, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309 (1984); *cf.* Selig, *supra* note 4, at 796 (arguing that "[t]he fundamental difference between the Nixon and Reagan administrations in the school desegregation area is that the Nixon administration recognized its responsibility to the rule of law").

tration denied that any racial animus motivated its campaign.[32] Far from viewing themselves as opponents of civil rights, Reagan, Reynolds, and others in the Administration apparently saw themselves as "true" civil rights advocates seeking to restore the original meaning of civil rights.

Neoconservative scholar Thomas Sowell[33] perhaps best articulates the philosophy underlying the New Right policies on race and law. Sowell presents the neoconservative struggle against prevailing civil rights policies as nothing less than an attempt to restore law to its rightful place and to prevent the descent of American society into fascism.[34] Sowell suggests that the growing popularity of white hate groups is evidence of the instability wrought by improvident civil rights policies.[35] To Sowell, the growth of anti-Black sentiment is an understandable reaction to a vision that has threatened to undermine democratic institutions, delegitimize the court system, and demoralize the American people.

The culprit in this epic struggle is a political view which Sowell has dubbed "the civil rights vision."[36] According to Sowell, this view developed as the leaders of the civil rights movement shifted the movement's original focus on equal treatment under the law to a demand for equal results notwithstanding genuine differences in ability, delegitimizing the movement's claim in a democratic society.[37] The civil rights vision has nothing to do with the achievement of civil rights today, according to Sowell, because in reality "the battle for civil rights was fought and won — at great cost — many years ago."[38] Sowell's central criticism is that the visionaries have attempted to infuse the law with their own political interpretation, which Sowell characterizes as separate from and alien to the true meaning of civil rights.[39] He argues that, although these visionaries have struggled

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[32] *See, e.g.*, Williams, *Rights Leaders See U.S. Pattern in Queens Attack*, N.Y. Times, Dec. 25, 1986, at 36, col. 3.

[33] Sowell is a Senior Fellow at the Hoover Institution, Stanford University.

[34] *See* T. SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 116 (1984).

[35] *See id.* at 90. Sowell observes that "[e]armarked benefits for blacks provide some of these hate groups' strongest appeals to whites." *Id.* Moreover, such appeals are spreading "not only among ignorant southern rednecks but also in more middle class and educated classes across the nation — in short, in places where they never had a foothold before." *Id*; *see also* Williams, *Discrimination and Public Policy*, in 1 SELECTED AFFIRMATIVE ACTION TOPICS IN EMPLOYMENT AND BUSINESS SET-ASIDES: A CONSULTATION/HEARING OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 9, 18 (March 6–7, 1985) (arguing that affirmative action is "immoral" and builds support for Nazis and the Ku Klux Klan). The Ku Klux Klan, however, has always counted among its members those from middle class and upper class backgrounds. Indeed, some Supreme Court Justices were former Klan members, including Edward Douglas White and Hugo Black.

[36] *See* T. SOWELL, *supra* note 34, at 13–35.

[37] *See id.* at 37–48.

[38] *Id.* at 109.

[39] *See id.* at 109–10 (contrasting Sowell's view of "civil rights" with those of civil rights

and sacrificed in the name of civil rights, they nonetheless merit censure for undermining the stability of American society through their politicization of the law.[40]

Sowell singles out the judiciary for especially harsh criticism.[41] Judges, according to Sowell, have ignored the original understanding of title VII and imposed their own political views instead. "The perversions of the law by federal judges . . . have been especially brazen," Sowell charges.[42] According to Sowell, judges have participated in a process by which "law, plain honesty and democracy itself [have been] sacrificed on the altar of missionary self-righteousness."[43] Sowell cautions that when judges allow law to be overridden by politics, the threat of fascism looms ever large:

> When judges reduce the law to a question of who has the power and whose ox is gored, they can hardly disclaim responsibility, or be

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advocates). For other examples of this view, see T. EASTLAND & W. BENNETT, COUNTING BY RACE 143–49 (1979), which characterizes the dichotomy between the true and false visions of civil rights as embodying contrasting commitments to "moral" and "numerical" equality, and argues against the "false" commitment to numerical equality on both historical and philosophical grounds; and Williams, cited in note 35 above, at 10, which characterizes this "false" vision of civil rights as the "new civil rights vision."

[40] According to Sowell, "[s]incerity of purpose is not the same as honesty of procedure. Too often they are opposites. Lies and deceptions 'in a good cause' are all too common, and nowhere more so than in political and legal doctrines that falsely sail under the flag of 'civil rights.'" T. SOWELL, *supra* note 34, at 120; *see also* Williams, *supra* note 35, at 10 ("The evolution of the new civil rights movement is an effort by some to impose greater government control as a means to acquire more personal political power and wealth. But another important thrust to the new civil rights results from honest, but incorrect, views of how the world operates.").

[41] Although Sowell is apparently convinced that law is fundamentally separate from politics, he believes that it can be captured by politics. Sowell's position appears to ignore both the critique of law as politics and ethics developed by the Legal Realists, *see, e.g.*, Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Cook, *The Logic and Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924), and the work of European structuralist and post-structuralist philosophical schools showing the general indeterminate "meaning" of texts, *see, e.g.*, J. DERRIDA, OF GRAMMATOLOGY (G. Spivak trans. 1976); V. LEITCH, DECONSTRUCTIVE CRITICISM: AN ADVANCED INTRODUCTION (1983). Both of these approaches have been extended as specific critiques of American legal ideology by Critical legal scholars. For a discussion of the relationship between critical theory, structuralist theory, early post-structuralist theory, and critical legal theory, see Kennedy, *Critical Theory, Structuralism and Contemporary Legal Scholarship*, 21 NEW ENG. L. REV. 209 (1985–86). For a general review of these critiques of legal texts as having a meaning apart from the politics of the interpretive act, see Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195 (1987), and Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 18 (D. Kairys ed. 1982).

[42] *See* T. SOWELL, *supra* note 34, at 120. This I also take to be the import of Walter Williams' misleading reference to Thurgood Marshall's remark, "You guys have been practicing discrimination for years. Now it is our turn." Williams, *supra* note 35, at 10 (quoting W. DOUGLAS, THE COURT YEARS 1939–1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 149 (1980)).

[43] T. SOWELL, *supra* note 34, at 119.

morally superior, when others respond in kind. We can only hope that the response will not someday undermine our whole concept of law and freedom. Fascism has historically arisen from the utter disillusionment of the people with democratic institutions.[44]

B. A Critique of the Critique: The Indeterminacy of Civil Rights Discourse

Given the seriousness of his accusations, particularly those against the judiciary, one would expect Sowell's proof of subversion to be substantial. His repeated accusations that the true law has been subverted raise expectations that he will eventually identify some determinate, clearly discernible version of that law. Sowell's true law would presumably stand apart from the politics of race, yet control it, without being influenced by inappropriate political factors.[45] Sowell's only "proof" that the law has been subverted, however, rests on his assumption that such subversion is self-evident. In the context of voting, for example, Sowell declares simply: "The right to vote is a civil right. The right to win is not. Equal treatment does not mean equal results."[46]

Sowell fails to substantiate his accusations because he cannot tell us *what* the real law is, or whether it ever existed as he claims. He simply embraces language from antidiscrimination texts, imports his own meaning of its purpose, and ignores contradictory purposes and interpretations. Here Sowell, apparently without realizing it, merely embraces one aspect of a tension that runs throughout antidiscrimination law — the tension between equality as a process and equality as a result.[47]

This basic conflict has given rise to two distinct rhetorical visions in the body of antidiscrimination law — one of which I have termed the expansive view, the other the restrictive view. The expansive view stresses equality as a result, and looks to real consequences for African-Americans. It interprets the objective of antidiscrimination law as the eradication of the substantive conditions of Black subordination and attempts to enlist the institutional power of the courts to further the national goal of eradicating the effects of racial oppression.[48]

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[44] *Id.*

[45] Sowell relies on neat statements of his formalistic theories, *see, e.g.*, *id.* at 38 ("'Equal opportunity' laws and policies require that individuals be judged on their qualifications as individuals, *without regard* to race, sex, age, etc.") (emphasis in original), but declarations of this kind are decidedly indeterminate in practice. *See infra* note 52.

[46] *Id.* at 109.

[47] *See supra* note 18.

[48] Accordingly, the Supreme Court declared that district courts hold "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects

The restrictive vision, which exists side by side with this expansive view, treats equality as a process, downplaying the significance of actual outcomes. The primary objective of antidiscrimination law, according to this vision, is to prevent future wrongdoing rather than to redress present manifestations of past injustice. "Wrongdoing," moreover, is seen primarily as isolated actions against individuals rather than as a societal policy against an entire group. Nor does the restrictive view contemplate the courts playing a role in redressing harms from America's racist past,[49] as opposed to merely policing society to eliminate a narrow set of proscribed discriminatory practices. Moreover, even when injustice is found, efforts to redress it must be balanced against, and limited by, competing interests of white workers — even when those interests were actually created by the subordination of Blacks. The innocence of whites weighs more heavily than do the past wrongs committed upon Blacks and the benefits that whites derived from those wrongs.[50] In sum, the restrictive view seeks to proscribe only certain kinds of subordinating acts, and then only when other interests are not overly burdened.[51]

Although the tension between the expansive and restrictive vision is present throughout antidiscrimination law,[52] Sowell dismisses the

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of the past as well as bar like discrimination in the future." Louisiana v. United States, 380 U.S. 145, 154 (1965).

[49] The Supreme Court stated this viewpoint with stark clarity in United Air Lines v. Evans, 431 U.S. 553, 558 (1977): "A discriminatory act . . . which occurred before the [Civil Rights Act of 1964] was passed . . . may constitute relevant background evidence [regarding present conduct] . . . but separately considered . . . is merely an unfortunate event in history which has no present legal consequences."

[50] This concern has gained special solicitude from the Supreme Court in the context of layoffs. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280–84 (1986) (plurality opinion).

[51] Derrick Bell describes this tendency through the following equation: "White Racism v. Justice = White Racism; White Racism v. White Self-Interest = Justice." *See* D. BELL, *supra* note 6, § 1.12, at 41.

[52] The problem of remedying race-neutral practices that perpetuate the effects of past racial subordination policies provides an acute demonstration of how legal reform has failed to resolve conflicts between restrictive and expansive views of discrimination. For example, in opposition to the Civil Rights Act's declared purpose — restoring victims of discrimination "to a position where they would have been were it not for the unlawful discrimination" — § 703(h) provides protection to "bona fide" seniority systems, thereby introducing opposing status quo interests within the very statute committed to bringing about the end of racial subordination. *Compare* Conference Report of the Equal Employment Opportunity Act of 1972, 118 Cong. Rec. 7166, 7168 (March 6, 1972) (stating that the Act would "represent a vital step toward the realization of equal opportunity for millions of Americans") *with* 42 U.S.C. § 2000e-2(h) (1982) ("Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system."). Protection of bona fide seniority systems was inserted to win labor support for the bill, *see* Chambers & Goldstein, *Title VII at Twenty: The Continuing Challenge*, 1 LAB. LAW. 235, 248 n.66 (1985); W. MURPHY, DISCRIMINATION IN EMPLOYMENT 168 (4th ed. 1979); the definition of bona fide was left unclear and was the subject of repeated litigation. Nevertheless, it was clear from the beginning that this

full complexity of the problem by simply declaring that equal process is completely unrelated to equal results. Yet it is not nearly as clear as Sowell suggests that the right to vote, for instance, has nothing to do with winning; no measure of a process' effectiveness can be wholly

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protection for seniority systems provided a barrier against the complete remedying of racial inequality. The Supreme Court has resisted efforts to overcome the last hired, first fired problem. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984).

In many cases where § 703(h) was at issue, the question was raised whether facially neutral seniority systems that perpetuated the effects of past discrimination were *bona fide*. This issue arose in situations where employers had completely segregated and subordinated Black workers in company job lines so that the lowest white job paid more than even the highest-ranking Black job. Competitive seniority for all jobs was based on departmental seniority rather than on plant-wide seniority. After 1964, many companies merged their two job progressions; however, the departmental seniority rule still stood. Consequently, the most senior Black workers could not successfully bid for jobs in the previously all-white job progression. Plaintiffs in these cases argued that the seniority systems perpetuated past discrimination against Blacks.

Prior to 1977, at least six circuit courts of appeals held that courts could remedy the effects of past discrimination by requiring that jobs be filled on the basis of plant-wide rather than departmental seniority, and that seniority systems which perpetuated the effects of past discrimination could not be considered "bona fide." *See* United States v. Navajo Freight Lines, 525 F.2d 1318 (9th Cir. 1975); Bowe v. Colgate, Palmolive Co., 489 F.2d 896 (7th Cir. 1973); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973); Bailey v. American Tobacco Co., 462 F.2d 160 (6th Cir. 1972); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970), *rev'd on other grounds*, 401 U.S. 424 (1971); Local 189, United Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). An overwhelming number of commentators agreed. *See, e.g.*, Blumrosen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope*, 23 RUTGERS L. REV. 268 (1969); Fine, *Plant Seniority and Minority Employees: Title VII's Effect on Layoffs*, 47 U. COLO. L. REV. 73 (1975); Gould, *Seniority and the Black Worker: Reflections on* Quarles *and Its Implications*, 47 TEX. L. REV. 1039 (1969); Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967).

This view diverged sharply from the approach suggested by unions and employers, who argued that because the Act was intended to apply prospectively, neutral practices that perpetuated the effects of past discrimination were acceptable under § 703(h). Courts, however, failed to extend the logic of their holdings, rejecting as unfair to white workers the theory that restoring Blacks to their rightful places would require employers to grant Blacks the jobs denied them. *See, e.g.*, Quarles v. Philip Morris Inc., 279 F. Supp. 505 (E.D. Va. 1968). Rather than bump whites who had received their jobs because of discrimination, courts merely allowed senior Blacks to compete for the next available vacancies. *See id.* at 520–21.

In 1977, however, the Supreme Court upset even this dubious compromise, holding in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), that Congress intended to protect all facially neutral seniority rights regardless of the discriminatory effect on Black workers. In so holding, the Court rejected the government's contention that no seniority system that perpetuated pre-Act discrimination could be bona fide under § 703(h). *See id.* at 353. *Teamsters* represents a move toward a more restrictive view of discrimination in which the objective of eradicating racial subordination is limited by competing interests. As the various opinions concerning seniority suggest, interpretation of § 703(h) boils down to a choice of which interest will take priority: the achievement of racial equality, or the protection of interests founded in the policies of white supremacy. Simply put, the issue was whether Black hopes of overcoming racial subordination would prevail over, or be defeated by, the status quo.

separated from the purpose for which it was initiated. Sowell implicitly acknowledges that voting is related to some notion of actual representation.[53] Having done so, he cannot completely sever that process from its admitted purpose. Depending on how one views society, democracy, and the historic significance of racial disenfranchisement, the "appropriate" relationship between voting and representation can be defined to require anything from at-large representation to full proportional representation. Sowell's attempt to sever voting from winning merely *raises* the question of process and results; it does not answer it.

As the expansive and restrictive views of antidiscrimination law reveal, there simply is no self-evident interpretation of civil rights inherent in the terms themselves. Instead, specific interpretations proceed largely from the world view of the interpreter.[54] For example, to believe, as Sowell does, that color-blind policies represent the only legitimate and effective means of ensuring a racially equitable society, one would have to assume not only that there is only one "proper role" for law, but also that such a racially equitable society already exists. In this world, once law had performed its "proper" function of assuring equality of process, differences in outcomes between groups would not reflect past discrimination but rather real differences between groups competing for societal rewards.[55] Unimpeded by irrational prejudices against identifiable groups and unfettered by government-imposed preferences, competition would ensure that any group stratification would reflect only the cumulative effects of employers'

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[53] Sowell spends a great deal of time defending economic, "racially neutral" reasons for statistical inequities in representation. *See* T. SOWELL, *supra* note 34, at 73–90. It is apparent that he does so because one might expect equality of process to lead to equality of result.

[54] There has been a recent explosion of literature on legal texts and their interpretation. *See, e.g.*, *Interpretation Symposium*, 58 S. CAL. L. REV. 1 (1985); *Law and Literature: Symposium*, 60 TEX. L. REV. 373 (1982).

[55] *See* T. SOWELL, *supra* note 34, at 42–48. John Bunzel, then a Senior Research Fellow at the neoconservative Hoover Institution, took exactly this position in his testimony before the U.S. Commission on Civil Rights:

> [T]he most general difficulty with the argument that underutilization/disproportionality equals discrimination is that it conveniently overlooks the fact that there have always been differences of values, orientation, taste, expectation, and the like among the varied groups that compose this or any other country . . . [M]any of the differences of group outlook — differences that have influenced a disproportionate number of Italians to become opera singers, a disproportionate number of Armenians to become truck farmers, and a disproportionate number of Jews to become doctors, college professors, and novelists . . . express prima facie evidence not of discrimination, but, rather, of the vitality of democracy.

2 U.S. COMM'N ON CIVIL RTS., CONSULTATIONS ON THE AFFIRMATIVE ACTION STATEMENT OF THE U.S. COMMISSION ON CIVIL RIGHTS, at 37 (1981). Consider also the statement of Commissioner Horn: "I think one would have to say that underlying much of the discriminatory aspects is a problem . . . — poverty, socioeconomic class, etc. — that *conditions* the response of various individuals and *their inability or ability to take advantages of the opportunities offered.*" *Id.* at 54 (emphasis added).

rational decisions to hire the best workers for the least cost.[56] The deprivations and oppression of the past would somehow be expunged from the present. Only in such a society, where all other societal functions operate in a nondiscriminatory way, would equality of process constitute equality of opportunity.

This belief in color-blindness and equal process, however, would make no sense at all in a society in which identifiable groups had actually been treated differently historically and in which the effects of this difference in treatment continued into the present. If employers were thought to have been influenced by factors other than the actual performance of each job applicant, it would be absurd to rely on their decisions as evidence of true market valuations. Arguments that differences in economic status cannot be redressed, or are legitimate because they reflect cultural rather than racial inferiority, would have to be rejected; cultural disadvantages themselves would be seen as the consequence of historical discrimination.[57] One could not look at outcomes as a fair measure of merit since one would recognize that everyone had not been given an equal start. Because it would be apparent that institutions had embraced discriminatory policies in order to produce disparate results, it would be necessary to rely on results to indicate whether these discriminatory policies have been successfully dismantled.

These two visions of society correspond closely to those held by Sowell and the civil rights visionaries. In each vision, all arguments about what the law *is* are premised upon what the law *should be*, given a particular world view.[58] The conflict is not, as Sowell has suggested, between the true meaning of the law and a bastardized

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[56] *See* T. SOWELL, *supra* note 34, at 37–60. Walter Williams argues that the real solutions to racial inequalities lie in ending government intervention in the market, such as the imposition of minimum wage laws.

> We overlook the fact that not every discriminatory action reflects dislike of Negroes. For example: certain discrimination may come from the rational behavior of individuals minimizing information costs or confronting real differences in the market, whether that market is free or institutionally constrained. And we often overlook the fact that in a free market economically irrational preferences will impose costs on whoever indulges them. Institutional restraints may render that indulgence costless to the indulger. If they do, the answer is to lift the restraints and reimpose the costs. In other words, to free the market.
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> When we are formulating policy, we must be careful to distinguish among the three sources of "discrimination" — preference, prejudice, and real differences.

W. WILLIAMS, THE STATE AGAINST BLACKS 27 (1982).

[57] Discrimination based on race would be revealed as a social construct — a fiction — which was nevertheless operative in defining and shaping historically both the distinct culture of the dominated and the ideological constructs devaluing that culture. Recognizing the interrelated historical contingency of culture and race renders any distinction between them meaningless.

[58] For a cogent discussion of this confusion between descriptive and normative claims, see Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1371–1382 (1984) (presenting the indeterminacy critique of rights).

version, but between two different interpretations of society. Thus, though they attempt to lay claim to an apolitical perch from which to accuse civil rights visionaries of subverting the law to politics, the neoconservatives as well rely on their own political interpretations to give meaning to their respective concepts of rights and oppression. The crucial point that Sowell overlooks is that law itself does not dictate which of various visions will be adopted as an interpretive base. The choice between various visions and the values that lie within them is not guided by any determinate organizing principle. Consequently, Sowell has no basis from which to argue that color-conscious, result-oriented remedies are political perversions of the law, but that his preference, color-blind, process-oriented remedies are not.

C. The Constituency's Dilemma

The passage of civil rights legislation nurtured the impression that the United States had moved decisively to end the oppression of Blacks. The fanfare surrounding the passage of these Acts,[59] however, created an expectation that the legislation would not and could not fulfill. The law accommodated and obscured contradictions that led to conflict, countervision, and the current vacuousness of antidiscrimination law.

Because antidiscrimination law contains both the expansive and the restrictive view, equality of opportunity can refer to either. This uncertainty means that the societal adoption of racial equality rhetoric does not itself entail a commitment to end racial inequality. Indeed, to the extent that antidiscrimination law is believed to embrace color-blindness, equal opportunity rhetoric constitutes a formidable obstacle to efforts to alleviate conditions of white supremacy. As Alfred Blumrosen observes, "it [is] clear that a 'color-blind' society built upon the subordination of persons of one color [is] a society which [cannot]

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[59] President Johnson's address to the nation at the signing ceremony was representative of the fanfare that surrounded the passage of the Act:

> I am about to sign into law the Civil Rights Act of 1964. I want to take this occasion to talk to you about what the law means to every American. We believe that all men are created equal. Yet many are denied equal treatment. We believe that all men have certain unalienable rights. Yet many Americans do not enjoy these rights. We believe that all men are entitled to the blessings of liberty. Yet millions are being deprived of those blessings — not because of their own failures, but because of the color of their skin. . . . But it cannot continue. Our Constitution, the foundation of our Republic, forbids it. Morality forbids it. And the law I will sign tonight forbids it. Its purpose is not to punish. Its purpose is not to divide, but to end divisions — divisions which have lasted too long. Its purpose is national, not regional. Its purpose is to promote a more abiding commitment to freedom, a more constant pursuit of justice, and a deeper respect for human dignity. We will achieve these goals because most Americans are law-abiding citizens who want to do what is right.

Address of President Lyndon Johnson, Washington, D.C. (July 2, 1964), *quoted in* C. WHALEN & B. WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 227–28 (1985).

correct that subordination because it [can] never recognize it."[60] In sum, the very terms used to proclaim victory contain within them the seeds of defeat. To demand "equality of opportunity" is to demand nothing specific because "equality of opportunity" has assimilated both the demand and the object against which the demand is made; it is to participate in an abstracted discourse which carries the moral force of the movement as well as the stability of the institutions and interests which the movement opposed.

Society's adoption of the ambivalent rhetoric of equal opportunity law has made it that much more difficult for Black people to name their reality. There is no longer a perpetrator, a clearly identifiable discriminator. Company X can be an equal opportunity employer even though Company X has no Blacks or any other minorities in its employ. Practically speaking, all companies can now be equal opportunity employers by proclamation alone. Society has embraced the rhetoric of equal opportunity without fulfilling its promise; creating a break with the past has formed the basis for the neoconservative claim that present inequities cannot be the result of discriminatory practices because this society no longer discriminates against Blacks.

Equal opportunity law may have also undermined the fragile consensus against white supremacy.[61] To the extent that the objective of racial equality was seen as lifting formal barriers imposed against participation by Blacks, the reforms appear to have succeeded. Today, the claim that equal opportunity does not yet exist for Black America may fall upon deaf ears — ears deafened by repeated declarations that equal opportunity exists.[62] Even Alfred Blumrosen — himself a civil rights visionary — demonstrates how the rhetoric of formal racial equality, by bringing about the collapse of overt obstacles, convinced people that things have changed significantly:

> The public sympathy for the plight of black Americans circa 1965 cannot be recreated, because the condition of black American[s] in

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[60] A. Blumrosen, Twenty Years of Title VII Law: An Overview 26 (April 18, 1985) (unpublished manuscript on file in the Harvard Law Library).

[61] The decline of the civil rights consensus reflects serious differences about whether the commitment to reject racial discrimination should be extended to include race-conscious affirmative relief. In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), for example, the American Jewish Committee and the Anti-Defamation League of B'nai B'rith — both traditional supporters of civil rights — filed amicus briefs opposing the Davis medical school's affirmative action program.

[62] Polls show that most Americans have adopted the rhetoric of formal racial equality. *See, e.g.*, I. KATZ, STIGMA: A SOCIAL PSYCHOLOGICAL ANALYSIS 14–16 (1981); H. SCHUMAN, C. STEEH & L. BOBO, RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 71–138 (1985); Pettigrew, *The Mental Health Impact*, in IMPACTS OF RACISM ON WHITE AMERICANS 97, 114–15 (B. Bowser & R. Hunt eds. 1981). The same respondents, however, expressed anti-Black opinions and attitudes when questions were directed towards specific issues such as housing integration and miscegenation. For a review of literature discussing current racial attitudes, see Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 RUTGERS L. REV. 673, 686–93 (1985).

> 1985 is so much improved, as a result of the 1964 legislation. The success of the Civil Rights Act contained the seeds of its loss of public support. *Racism alone simply will no longer do as an explanation for the current condition of depressed minorities.* The rhetoric of the sixties sounds hollow to Americans of the eighties because it is hollow.[63]

Blumrosen and others may be correct in pointing out that many things have changed under the political, legal, and moral force of the civil rights movement. Formal barriers have constituted a major aspect of the historic subordination of African-Americans and, as I discuss below,[64] the elimination of those barriers was meaningful. Indeed, equal opportunity rhetoric gains its power from the fact that people can point to real changes that accompanied its advent. As the indeterminacy of doctrine reveals,[65] however, what at first appears an unambiguous commitment to antidiscrimination conceals within it many conflicting and contradictory interests. In antidiscrimination law, the conflicting interests actually reinforce existing social arrangements, moderated to the extent necessary to balance the civil rights challenge with the many interests still privileged over it.

The recognition on the part of civil rights advocates that deeper institutional changes are required has come just as the formal changes have begun to convince people that enough has been done.[66] Indeed, recent cases illustrate that the judiciary's commitment to racial equality has waned considerably.[67] These doctrinal and procedural devel-

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[63] A. Blumrosen, *supra* note 60, at 13 (emphasis added).

[64] *See infra* pp. 1377–79.

[65] *See supra* note 52.

[66] *See* Reeves, *America's Choice: What It Means*, N.Y. Times, Nov. 4, 1984, § 6 (Magazine), at 36, cols. 4–5 (quoting John Seigenthaler, editor of *The Tennessean*: "I think white Americans have reached a consensus on black America. Look, we've done enough for them. If they can make it, fine. If they can't, that's their problem."). Reviewing the results of several opinion surveys, one author has concluded that most white Americans believe that racism can no longer explain the socioeconomic disparity between Blacks and whites and that socioeconomic disparities were largely a result of Blacks' lacking either effort, skills, or the "right values." *See* Kluegel, *"If There Isn't a Problem, You Don't Need a Solution": The Bases of Contemporary Affirmative Action Attitudes*, 28 AM. BEHAV. SCIENTIST 761, 766 (1985). Kluegel further points out that, to the extent whites in this study did acknowledge "some" discrimination in the 1980's, they tended to believe it occurred in roughly equal proportions to preferential treatment. This, combined with other responses, led Kluegel to conclude that the American public believes that Blacks enjoy opportunities that are equal to or greater than those of the average American. *See id.* at 769.

[67] Recent Supreme Court decisions have placed severe limitations on civil rights suits. *See, e.g.*, Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) (precluding race-conscious remedies in layoff cases); Ford Motor Co. v. EEOC, 458 U.S. 219 (1982) (permitting company to toll accrual of backpay by offering the victim only the position previously denied, and not without lost seniority); General Tel. Co. v. Falcon, 457 U.S. 147 (1982) (imposing strict certification requirements in title VII class actions); Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982) (holding that rejection of a discrimination claim by a state agency may bar plaintiff from pursuing the claim in federal court).

opments, taken along with the overall political climate,[68] indicate that the policy of redressing discrimination no longer has the high priority it once had. As Derrick Bell argues, "At heart, many of the cases seem to reflect an unwillingness that has been evident since *Washington v. Davis* to further expand remedies for discrimination."[69] In discussing what he views as the waning of the commitment to achieve a non-racist society, Bell observes, "Discrimination claims, when they are dramatic enough, and do not greatly threaten majority concerns, are given a sympathetic hearing, but there is a pervasive sense that definite limits have been set on the weight that minority claims receive when balanced against majority interests."[70]

The flagging commitment of the courts and of many whites to fighting discrimination may not be the only deleterious effect of the civil rights reforms. The lasting harm must be measured by the extent to which limited gains hamper efforts of African-Americans to name their reality and to remain capable of engaging in collective action in the future. The danger of adopting equal opportunity rhetoric on its face is that the constituency incorporates legal and philosophical concepts that have an uneven history and an unpredictable trajectory. If the civil rights constituency allows its own political consciousness to be completely replaced by the ambiguous discourse of antidiscrimination law, it will be difficult for it to defend its genuine interests against those whose interests are supported by opposing visions that also lie within the same discourse. The struggle, it seems, is to maintain a contextualized, specified world view that reflects the experience of Blacks.[71] The question remains whether engaging in legal reform precludes this possibility.

III. THE NEW LEFT ATTACK: THE HEGEMONIC FUNCTION OF LEGAL RIGHTS DISCOURSE

Various scholars connected with the Critical Legal Studies movement[72] have offered critical analyses of law and legal reform

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[68] *See infra* p. 1376.

[69] D. BELL, *supra* note 6, § 9.11.3, at 117 (2d ed. Supp. 1984) (citing Washington v. Davis, 426 U.S. 229 (1976)).

[70] *Id.*

[71] This is essentially Professor Matsuda's "bottom up" argument — that viewing the world through the lives of subordinated minorities provides a distinct perspective on reality. *See* Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); *see also* B. HOOKS, FEMINIST THEORY FROM MARGIN TO CENTER (1984) (arguing that viewing society and life from the "margin" provides important insights not available to those viewing society from the "center").

[72] This brief summary does not begin to represent a full description of Critical literature. For an introduction to Critical Legal Studies, see, for example, M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); THE POLITICS OF LAW, cited in note 41 above; *Critical Legal*

which provide a broad framework for explaining how legal reforms help mask and legitimate continuing racial inequality. The Critics present law as a series of ideological constructs that operate to support existing social arrangements by convincing people that things are both inevitable and basically fair. Legal reform, therefore, cannot serve as a means for fundamentally restructuring society. This theory, however, is a general one, the utility of which is limited in the context of civil rights by its insufficient attention to racial domination. Removed from the reality of oppression and its overwhelming constraints, the Critics cannot fairly understand the choices the civil rights movement confronted or, still less, recommend solutions to its current problems.

A. The Critical Vision

In broadest terms, Critical scholars have attempted to analyze legal ideology and discourse as a social artifact which operates to recreate and legitimate American society. In order to discover the contingent character of the law, CLS scholars unpack legal doctrine to reveal both its internal inconsistencies (generally by exposing the incoherence of legal arguments) and its external inconsistencies (often by laying bare the inherently paradoxical and political world views imbedded within legal doctrine). Having thus exposed the inadequacies of legal doctrine, CLS scholars go on to examine the political character of the choices that were made in the doctrine's name. This inquiry exposes the ways in which legal ideology has helped create, support, and legitimate America's present class structure.

1. The Role of Legal Ideology. — Critical scholars derive their vision of legal ideology in part from the work of Antonio Gramsci, an Italian neo-Marxist theorist who developed an approach to understanding domination that transcends some of the limitations of traditional Marxist accounts.[73] In examining domination as a combination

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Studies Symposium, 36 STAN. L. REV. 1 (1984); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983); Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669 (1982); and Dalton, Book Review, 6 HARV. WOMEN'S L.J. 229 (1983). For a bibliography of Critical scholarship, see Kennedy & Klare, *Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984). Although the scholarship of the conference's members has occasionally been arbitrarily grouped together for collective criticism, *see, e.g.*, Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413 (1984), the thinking in the movement is far from monolithic. For two insightful discussions of significant tensions in the movement, see Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985), and Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984). For a discussion of the current state of the project, see Gordon, cited in note 41 above.

[73] Traditional Marxist accounts present law as a tool of oppression serving to pacify the working class. *See generally* H. COLLINS, MARXISM AND LAW (1982). The Critics argue that this instrumental view is inadequate because it fails to account for the considerable support that the state and the legal system enjoy from the dominated classes. *See, e.g.*, Gordon, *New*

of both physical coercion and ideological control, Gramsci developed the concept of hegemony, the means by which a system of attitudes and beliefs, permeating both popular consciousness and the ideology of elites, reinforces existing social arrangements and convinces the dominated classes that the existing order is inevitable.[74] After observing the ability of the Italian system to withstand aggressive challenges in the years preceding the ascent of fascism, Gramsci concluded that "when the State trembled a sturdy structure of civil society was at once revealed. The State was only an outer ditch, behind which there stood a powerful system of fortresses and earthworks . . . ."[75]

Some Critical scholars place great emphasis on understanding the "fortifying earthworks" of American society. The concept of hegemony allows Critical scholars to explain the continued legitimacy of American society by revealing how legal consciousness induces people to accept or consent to their own oppression. Legal historian Robert Gordon, for example, declares that one should look not

> only at the undeniably numerous, specific ways in which the legal system functions to screw poor people . . . but rather at all the ways in which the system seems at first glance basically uncontroversial, neutral, acceptable. This is Antonio Gramsci's notion of "hegemony," *i.e.*, that the most effective kind of domination takes place when both the dominant and dominated classes believe that the existing order, with perhaps some marginal changes, is satisfactory, or at least represents the most that anyone could expect, because things pretty much have to be the way they are.[76]

According to Gordon, Gramsci directs our attention to the many thoughts and beliefs that people have adopted that limit their ability "even to *imagine* that life could be different and better."[77]

Although society's structures of thought have been constructed by elites out of a universe of possibilities, people reify these structures and clothe them with the illusion of necessity.[78] Law is an essential

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Developments in Legal Theory, in THE POLITICS OF LAW, *supra* note 41, at 284–86; Greer, *Antonio Gramsci and "Legal Hegemony,"* in *id.* at 305.

[74] *See generally* A. GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS (Q. Hoare & G. Smith trans. 1971). Gramsci developed his theory after becoming intrigued by the ability of the dominant ideology to contain and dissipate even serious conflicts. Gramsci became convinced that "no regime, regardless of how authoritarian it was, could sustain itself primarily through organized state power; in the long run, its scope of popular support or 'legitimacy' was always bound to contribute to its stability . . . ." C. BOGGS, GRAMSCI'S MARXISM 38 (1976).

[75] A. GRAMSCI, *supra* note 74, at 238.

[76] Gordon, *supra* note 73, at 286 (footnote omitted).

[77] *Id.* at 287 (emphasis in original).

[78] Gordon explains the interlocking social phenomena of reification and legitimation as follows: "Though the structures are built, piece by interlocking piece, with human intentions, people come to 'externalize' them, to attribute to them existence and control over and above human choice [reification]; and, moreover, to believe that these structures must be the way they are [legitimation]." *Id.* at 288.

feature in the illusion of necessity because it embodies and reinforces ideological assumptions about human relations that people accept as natural or even immutable. People act out their lives, mediate conflicts, and even perceive themselves with reference to the law. By accepting the bounds of law and ordering their lives according to its categories and relations, people think that they are confirming reality — the way things must be. Yet by accepting the view of the world implicit in the law, people are also bound by its conceptual limitations. Thus conflict and antagonism are contained: the legitimacy of the entire order is never seriously questioned.

Relating this idea to the limitations of antidiscrimination law, Alan Freeman argues that the legal reforms that grew out of the civil rights movement were severely limited by the ideological constraints embedded within the law[79] and dictated by "needs basic to the preservation of the class structure."[80] These ideological pillars supporting the class structure were simultaneously repositories of racial domination and obstacles to the fundamental reordering of society. For example, Freeman argues that formal equality, combined with the fact that American law does not formally recognize any difference based on wealth, precluded most remedies which would have required the redistribution of wealth.[81] Yet economic exploitation and poverty have been central features of racial domination — poverty is its long-term result. A legal strategy that does not include redistribution of wealth cannot remedy one of the most significant aspects of racial domination. Similarly, the myths of "vested rights" and "equality of opportunity" were necessary to protect the legitimacy of the dominant order and thus constituted insuperable barriers to the quest for significant redistributive reform.[82] Freeman's central argument is that the severe limitations of legal reform were dictated by the legitimating role of legal discourse. If law functions to reinforce a world view that things should be the way they are, then law cannot provide an effective means to challenge the present order.

Some Critics see the destructive role of rights rhetoric as another symptom of the law's legitimating function. Mark Tushnet has offered a four-tiered critique of rights:

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[79] *See* Freeman, *Antidiscrimination Law: A Critical Review*, in THE POLITICS OF LAW, *supra* note 41, at 96.

[80] *Id.* at 111.

[81] "[F]ormal equality . . . leads easily to evasion of remedial burdens by the rich, since American law sees no formal differences based on wealth . . . . [A] regime of formal equality will ensure that the dislocative impact [of remedying the economic costs of historical discrimination] is disproportionately borne by lower-class whites (not to mention blacks, who are burdened either way)." *Id.* *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973); Lindsey v. Normet, 405 U.S. 56, 74 (1972) ("[T]he Constitution does not provide judicial remedies for every social and economic ill."); Dandridge v. Williams, 397 U.S. 471 (1970).

[82] *See* Freeman, *supra* note 12, at 111–13.

> (1) Once one identifies what counts as a right in a specific setting, it invariably turns out that the right is unstable; significant but relatively small changes in the social setting can make it difficult to sustain the claim that a right remains implicated. (2) The claim that a right is implicated in some settings produces no determinate consequences. (3) The concept of rights falsely converts into an empty abstraction (reifies) real experiences that we ought to value for their own sake. (4) The use of rights in contemporary discourse impedes advances by progressive social forces . . . .[83]

Tushnet's first and second arguments crystallize the doctrinal dilemmas faced by the civil rights community.[84] Antidiscrimination doctrine does not itself provide determinate results. To give rights meaning, people must specify the world; they must create a picture of "what is" that grounds their normative interpretation.

Tushnet's third and fourth arguments spell out pragmatic reasons to approach rights with caution. According to Tushnet, the language of rights undermines efforts to change things by absorbing real demands, experiences, and concerns into a vacuous and indeterminate discourse.[85] The discourse abstracts real experiences and clouds the ability of those who invoke rights rhetoric to think concretely about real confrontations and real circumstances.[86]

According to Tushnet, the danger that arises from being swept into legal rights discourse is that people lose sight of their real objectives. Their visions and thoughts of the possible become trapped within the ideological limitations of the law. Tushnet suggests that, "[i]f we treated experiences of solidarity and individuality as directly relevant to our political discussions, instead of passing them through the filter of the language of rights, we would be in a better position to address the political issues on the appropriate level."[87]

Peter Gabel suggests that the belief in rights and in the state serves a hegemonic function through willed delusion:[88]

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[83] Tushnet, *supra* note 58, at 1363–64 (footnotes omitted). For a different rendition of the critique of rights which is centered in psychoanalytic theory, see Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984).

[84] *See supra* pp. 1346–49.

[85] *See* Tushnet, *supra* note 58, at 1382–84. Tushnet describes the danger as follows:

> When I march to oppose United States intervention in Central America, I am "exercising a right" to be sure, but I am also, and more importantly, being together with friends, affiliating myself with strangers, with some of whom I disagree profoundly, getting cold, feeling alone in a crowd, and so on. It is a form of alienation or reification to characterize this as an instance of "exercising my rights." The experiences become desiccated when described in that way.

Id. at 1382.

[86] *See id.* at 1384.

[87] *Id.*

[88] This is not to suggest that the scholars discussed in this or any other section view the connections between their work and that of colleagues in the movement in the way that I

> [B]elief in the state is a flight from the immediate alienation of concrete existence into a split-off sphere of people's minds in which they imagine themselves to be a part of an imaginary political community — "citizens of the United States of America." *And it's this collective projection and internalization of an imaginary political authority that is the basis of the legitimation of hierarchy.* It's the mass-psychological foundation of democratic consent.[89]

Hegemony is reinforced through this "state abstraction" because people believe in and react passively to a mere illusion of political consensus.

Gordon, Freeman, Tushnet, and Gabel all assert that these abstractions blind people to the contingent nature of human existence. When people act as if these illusions are real, they actually recreate their own oppressive world moment by moment.

2. Transformation in the Critical Vision. — The vision of change that Critical scholars express flows directly from their focus on ideology as the major obstacle that separates the actual from the possible. Because it is ideology that prevents people from conceiving of — and hence from implementing — a freer social condition, the Critics propose the exposure of ideology as the logical first step toward social transformation. Emphasizing how ideology obscures the contingency of human relations, Gordon proposes unearthing conventional thought in order to excavate the potential for change. "[The] point is to unfreeze the world as it appears to common sense as a bunch of more or less objectively determined social relations and to make it appear as . . . it really is: people acting, imagining, rationalizing, justifying."[90] Gabel, too, argues that it is necessary to reveal the ways in which "law is actually constitutive of our social existence."[91] He believes that this can best be achieved by experiencing the character of living through legal ideas, while at the same time critiquing the ways in which these phenomena "appear in our unreflective consciousness."[92] Reflecting his concern that rights discourse misdirects and abstracts our struggle for a better society, Tushnet also advocates ongoing critique, proposing that popular aspirations for change be

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present them. Categorizing ideas is always tricky business and this is no less true of Critical scholarship than of other varieties of scholarship.

[89] Gabel & Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 29 (1984) (emphasis added). In this piece, the authors acknowledge that the critique of rights is itself in danger of becoming reified. *See id.* at 36–37. Elsewhere, Professor Kennedy has advocated "working at the slow transformation of rights rhetoric, at dereifying it, rather than simply junking it." Kennedy, *Critical Labor Law Theory: A Comment*, 4 INDUS. REL. L.J. 503, 506 (1981). "Embedded in the rights notion," Kennedy observes, "is a liberating accomplishment of our culture: the affirmation of free human subjectivity against the constraints of group life, along with the paradoxical countervision of a group life that creates and nurtures individuals capable of freedom." *Id.*

[90] Gordon, *supra* note 73, at 289.

[91] Gabel, *supra* note 83, at 1564.

[92] *See id.*

recast in the language of "solidarity and individuality," rather than in the language of "rights."[93]

Although Alan Freeman does not offer a transformative strategy in his work on antidiscrimination law, he has advocated delegitimation, or "trashing," elsewhere. Explaining the Critical commitment to trashing,[94] Freeman states that:

> The point of delegitimation is to expose possibilities more truly expressing reality, possibilities of fashioning a future that might at least partially realize a substantive notion of justice instead of the abstract, rightsy, traditional, bourgeois notions of justice that generate so much of the contradictory scholarship. One must start by knowing what is going on, by freeing oneself from the mystified delusions embedded in our consciousness by the liberal legal worldview. I am not defending a form of scholarship that simply offers another affirmative presentation; rather, *I am advocating negative, critical activity as the only path* that might lead to a liberated future.[95]

Although the focus of their critiques may differ, the Critics all premise their views of transformative possibility on the necessity of critically engaging dominant ideology. Viewing the structures of legal

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[93] Tushnet believes that "[t]he language of rights should be abandoned to the very great extent that it takes as a goal the realization of the reified abstraction, 'rights,' rather than the experiences of solidarity and individuality." Tushnet, *supra* note 58, at 1382–83 (footnote omitted); *see also id.* at 1394 (arguing that engaging in rights discourse is politically less useful than demanding that immediate, concrete needs be met now). For an insightful critique of the utility of "needs rhetoric" versus "rights rhetoric," see Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 412–13 (1987). Professor Williams argues that Tushnet's advocacy of needs rhetoric ignores the fact that "blacks have been describing their needs for generations. [He] overlook[s] a long history of legislation *against* the self-described needs of black people . . . . For blacks, describing needs has been a dismal failure as political activity." *Id.* at 412 (emphasis in original). Indeed, she goes on to argue that the "country's worst historical moments have not been attributable to rights-*assertion*, but to a failure of rights-*commitment*." *Id.* at 424 (emphasis in original).

[94] For other discussions of the merits of "trashing," see Kelman, cited in note 17 above, which alternately defends and advocates trashing and, occasionally, whimsically muses that it would be nice if there were something better to do, and Kennedy, *Cost-Reduction Theory as Legitimation*, 90 YALE L.J. 1275, 1282–83 (1981), which argues that smashing "defense mechanisms" may be an necessary first step in liberating energy that is necessary to utopian speculation. Finally, for a critique of trashing from the perspective of the needs of racial minorities, see Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435, 436 n.4 (1987). Professor Dalton suggests that there are risks of "moving ahead with a positive program before the critique has adequately altered our consciousness." *Id.* He argues, however, that negative critique is not the only path, and that positive programs must be developed simultaneously with the critique. *See id; see also* Matsuda, *supra* note 71, at 362–97 (arguing for reparations as the kind of positive program that might arise out of Critical scholarship, if that scholarship were adequately informed by the experiences and history of people of color).

[95] Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229, 1230–31 (1981) (emphasis added) (footnote omitted). In fairness to Freeman, it should be noted that he took this position in discussing the correct "path" for legal scholars, and not for some larger audience which might include the civil rights community.

thought as central to the perception of the world as necessary and the status quo as legitimate, they believe it is crucial to demonstrate the contingency of legal ideology. Once false necessity or contingency is revealed, the Critics suggest, people will be able to remake their world in a different way.

B. A Critique of the Critique: The Problem of Context

The Critics offer an analysis that is useful in understanding the limited transformative potential of antidiscrimination rhetoric. There are difficulties, however, in attempting to use Critical themes and ideas to understand the civil rights movement and to describe what alternatives the civil rights constituency could have pursued, or might now pursue. While Critical scholars claim that their project is concerned with domination, few have made more than a token effort to address racial domination specifically, and their work does not seem grounded in the reality of the racially oppressed.

This deficiency is especially apparent in critiques that relate to racial issues. Critical scholars have criticized mainstream legal ideology for its tendency to portray American society as basically fair, and thereby to legitimate the oppressive policies that have been directed toward racial minorities. Yet Critical scholars do not sufficiently account for the effects or the causes of the oppression that they routinely acknowledge. The result is that Critical literature exhibits the same proclivities of mainstream scholarship — it seldom speaks to or about Black people.

The failure of the Critics to incorporate racism into their analysis also renders their critique of rights and their overall analysis of law in America incomplete. Specifically, this failure leads to an inability to appreciate fully the transformative significance of the civil rights movement in mobilizing Black Americans and generating new demands. Further, the failure to consider the reality of those most oppressed by American institutions means that the Critical account of the hegemonic nature of legal thought overlooks a crucial dimension of American life — the ideological role of racism itself. Gordon, Freeman, Tushnet, and Gabel fail to analyze racism as an ideological pillar upholding American society, or as the principal basis for Black oppression.

The Critics' failure to analyze the hegemonic role of racism also renders their prescriptive analysis unrealistic. In the spirit of Alan Freeman's declaration, Critics often appear to view the trashing of legal ideology "as the only path that might lead to a liberated future."[96]

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[96] *Id.* at 1231 (footnote omitted).

Yet if trashing is the only path that might lead to a liberated future, Black people are unlikely to make it to the Critics' promised land.[97]

The Critics' commitment to trashing is premised on a notion that people are mystified by liberal legal ideology and consequently cannot remake their world until they see how contingent such ideology is. The Critics' principal error is that their version of domination by consent does not present a realistic picture of racial domination. Coercion explains much more about racial domination than does ideologically induced consent.[98] Black people do not create their oppressive worlds moment to moment but rather are coerced into living in worlds created and maintained by others. Moreover, the ideological source of this coercion is not liberal legal consciousness, but racism. If racism is just as important as, if not more important than, liberal legal ideology in explaining the persistence of white supremacy, then the Critics' single-minded effort to deconstruct liberal legal ideology will be futile.

Finally, in addition to exaggerating the role of liberal legal consciousness and underestimating that of coercion, Critics also disregard the transformative potential that liberalism offers. Although liberal legal ideology may indeed function to mystify, it remains receptive to some aspirations that are central to Black demands, and may also perform an important function in combating the experience of being excluded and oppressed.[99] This receptivity to Black aspirations is crucial given the hostile social world that racism creates. The most troubling aspect of the Critical program, therefore, is that "trashing" rights consciousness may have the unintended consequence of disempowering the racially oppressed while leaving white supremacy basi-

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[97] As Richard Delgado notes, "CLS scholars' idealism has a familiar ring to minority ears. We cannot help but be reminded of those fundamentalist preachers who have assured us that our lot will only improve once we 'see the light' and are 'saved.'" Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 309 (1987).

[98] The term "coercion" is used here to describe all non-consensual forms of domination — that is, all forces external to the individual or group that maintain that individual or group's position in society's hierarchy. As such, it refers to everything from baton-wielding police officers to court injunctions to "White Only" signs. More importantly, it also refers to more subtle forms of exterior domination, such as the institutionalized oppositional dynamic — the vision of "normative whiteness" that pervades current forms of race consciousness. *See infra* Part IV.

[99] The degree to which rights consciousness has been receptive to Black aspirations is probably the most overlooked aspect in the Critique of rights. This may be attributed to Critics' limited understanding of nonmaterial manifestations of racial domination. *See infra* pp. 1360–64. Although Critics argue that rights consciousness only creates an illusion of community that produces alienation, *see, e.g.*, Gabel, *supra* note 83, at 1576–78, this analysis tends to underestimate the extent to which Blacks' exclusion from the illusion creates its own experience of alienation. Thus, although Critics have acknowledged the pragmatic value of rights rhetoric, *see, e.g., id.* at 1597, they have not recognized the legitimacy of Black demands for inclusion in the social illusion and the consequent utility of rights discourse in articulating such demands.

cally untouched. These difficulties are discussed below as they relate to the critiques of Gordon, Freeman, and Tushnet.

1. Gordon: The Underemphasis on Coercion. — Robert Gordon's explanation of ideological domination illustrates how an exclusive focus on consent leaves gaping holes in his reader's understanding of hegemony. Gordon writes that beliefs are "the main constraints upon making social life more bearable."[100] Yet how can others understand the fact that Black people, although unable to bring about a world in which they fully participate, *can* imagine such a world? Clearly, something other than their own structure of thought prevents Blacks from changing their world. This fact suggests that a more complete explanation of domination requires that coercion and consent be considered together.

The coercive power of the state operates to suppress some groups, particularly when there is consensus among others that such coercion is warranted. Racism serves to single out Blacks as one of these groups "worthy" of suppression.[101] Gordon, however, does not offer any way to understand this. If his exclusive focus on ideological domination is to be taken literally, one is left believing that Black Americans are unable to change their world because they accept the dominant ideology and thus cannot imagine an alternative existence. Yet to say that the beliefs of Black Americans have boxed them into a subordinate existence because of what they believe is to ignore the history of coercive racial subordination. Indeed, it would be difficult for Blacks, given the contradiction between American fiction and Black American reality, to believe as much of the American mythology as whites do.[102]

The most significant aspect of Black oppression seems to be what is believed *about* Black Americans, not what Black Americans believe. Black people are boxed in largely because there is a consensus among many whites that the oppression of Blacks is legitimate. This is where consensus and coercion can be understood together: ideology convinces one group that the coercive domination of another is legitimate. It matters little whether the coerced group rejects the dominant ideology

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[100] Gordon, *supra* note 73, at 291.

[101] Another obvious example of suppression is the extermination campaign waged against Native Americans. The consensus that this suppression was "worthy" is commemorated daily as children and adults alike engage in "cowboy-Indian" imagery with little sensitivity to the genocide that those images represent.

[102] When I say it is difficult for Blacks to believe as much as whites, I do not mean to imply that Black Americans do not accept the ideals of the American fiction. Rather, I am suggesting that Black Americans, more than others, know that the ideals do not describe the present world. As the "contradiction" between ideals and reality diminishes for some classes of oppressed people, however, it becomes easier to accede to the dominant myths. One of the legitimating aspects of reform is that the contradictions, once laid bare, became clothed in the illusion of fairness. The extent that the unique consciousness of some Black people has been undermined by these reforms indicates one of the losses of engaging in reformist rhetoric.

and can offer a competing conception of the world; if they have been labeled "other" by the dominant ideology, they are not heard.[103]

Blacks seem to carry the stigma of "otherness," which effectively precludes their potentially radicalizing influence from penetrating the dominant consciousness.[104] If this is the case, then Blacks will gain little through simply transcending their own belief structures. The challenge for Blacks may be to pursue strategies that confront the beliefs held *about* them by whites. For Blacks, such strategies may take the form of reinforcing some aspects of the dominant ideology in attempts to become participants in the dominant discourse rather than outsiders defined, objectified, and reified by that discourse. In this sense, the civil rights movement might be considered as an attempt to deconstruct the image of "the Negro" in the white mind. By forcing the political system to respond to Black demands, Blacks rejected images of complacency and docility that had been invoked by some whites to dismiss Black demands.[105]

Although Gordon sets out to analyze hegemonic domination, he ends up revealing little about the oppression of those most dominated.[106] This "oversight" probably results from his effort to absorb the *coercive* elements of class rule into the *consensual* elements of ideological hegemony. This, however, is not consistent with Gramsci's view of hegemony.[107] Gramsci explicitly recognized that the two

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[103] *See infra* pp. 1370–74.

[104] The 1984 Jesse Jackson presidential campaign may serve as a case in point. Most whites dismissed Jackson's positions as simply "special interest" or, more accurately, "pro-Black." To many whites, "pro-Black" translates to "anti-white," even though Jackson's policies might have benefited most whites much more than the policies of the white candidates whom most whites supported. For example, Jackson supported using funds from a reduced military budget to provide employment to the growing number of displaced industrial workers.

For an analysis of the destructive role of racism in contemporary American politics, see the text accompanying notes 169–176.

[105] One of the common complaints of the South's segregationists was that the civil disruptions were caused by "outside agitators." *See, e.g.*, W. WORKMAN, THE CASE FOR THE SOUTH 190–210 (1960). The implication, of course, was that southern Blacks were content before various outsiders stirred them into action.

[106] One must acknowledge that the shortcomings in Gordon's arguments reflect real gaps in the Gramscian thought upon which much of the discussion of hegemony has been based. Gramsci was preoccupied with developing a better approach to understanding domination by consent — a fact which leads many scholars who use his concepts to focus on consent to the virtual exclusion of coercion. Also, Gordon's discussion of the law must be considered in light of the fact that Gramsci himself wrote very little on the law; exactly two pages in the *Prison Notebooks* address law directly. Finally, and most importantly, Gramsci was not concerned with the impact of race and slavery in America, and consequently wrote nothing about it. At least one Gramscian scholar cautions that his narrow understanding of race and slavery undermines some attempts to utilize fully his concepts in the American context. *See* C. BOGGS, *supra* note 74, at 132 n.20.

[107] As Quentin Hoare and Geoffrey Smith, translators and editors of the *Prison Notebooks*, observe:

> The fact that, more than any other great revolutionary Marxist thinker, he concerned himself with the sphere of "civil society" and of "hegemony", in his prison writings,

fundamental types of political control — coercion and hegemonic consensus — were dialectically linked and thus had to be understood together. In Gramsci's view, hegemony consists of "1. the 'spontaneous' consent given by the great masses of the population [and] 2. *The apparatus of state coercive power which 'legally' enforces discipline on those groups who do not 'consent' either actively or passively.*"[108]

An alternative approach more consistent with the dual nature of control would be to discuss, or perhaps suggest, how the coercion of nonconsenting groups may provide an important reinforcement to the creation of consensus among classes that do accept the legitimacy of the dominant order. I have alluded to the possibility that the coercion of Blacks may provide a basis for others to consent to the dominant order. An analysis of hegemony that includes racial subordination suggests that the creation of a clearly visible "other," whose interests are seen as being opposed in every way to the interests of those who identify — by virtue of color and culture — with the dominant class, is a hegemonic tool used to maintain legitimacy. In Part IV, I will discuss this "otherness" as one way of understanding how racism plays a hegemonic role and how legal reform has both transformed and legitimated this dynamic.[109]

2. Freeman: Failure to Analyze Racism as Hegemonic. — Alan Freeman's discussion of antidiscrimination law suffers from a failure to ground the critique in the historical and ideological conditions that brought about antidiscrimination law. This is puzzling, both because Freeman has written more than any other Critical scholar on antidiscrimination law[110] and because he clearly recognizes the uniqueness of racism as a system of domination.[111] Freeman's work pays too little attention to racism's role in legitimating American society and isolating Blacks. He also overlooks one of the consequences of this history of racism: Blacks have succeeded in diminishing this isolation by relying on and deploying the very ideological "presuppositions" that Freeman attempts to delegitimize.

As I have discussed above, Freeman argues that "needs basic to the preservation of the class structure . . . compel[led] rejection" of a developing perspective that would have required an America in which

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cannot be taken to indicate a neglect of the moment of political society, of force, of domination. On the contrary, his entire record shows that this was not the case, and that his constant preoccupation was to avoid any undialectical separation of "the ethical-political aspect of politics or theory of hegemony and consent" from "the aspect of force and economics."

A. GRAMSCI, *supra* note 74, at 207.

[108] *Id.* at 12 (emphasis added).

[109] *See infra* pp. 1370–74.

[110] *See* Freeman, *supra* note 12; Freeman, *supra* note 79; Freeman, Book Review, *Race & Class: The Dilemma of Liberal Reform*, 90 YALE L.J. 1880 (1980).

[111] *See* Freeman, *supra* note 79, at 97.

Blacks were substantively better off, not simply the recipients of formally equal treatment.[112] Oddly, in his account none of the needs that forced this retrenchment is connected to racism, that is, white supremacy and racial stratification.[113] In Freeman's account of the sociopolitical and ideological necessities that underlay the Supreme Court's *Brown* decision,[114] the need to respond to racism and race issues, not the need to deal with class issues, gave birth to antidiscrimination law.[115] Freeman's discussion of the forces that led to retrenchment, however, is couched only in terms of preserving class structure. This failure to discuss the retrenchment in racial terms undermines the force of his analysis, especially in light of the racial character of the subsequent political retrenchment.[116]

Freeman argues that affirmative action and other remedial programs conflicted with beliefs in formal equality, vested rights, and equal opportunity. Thus the preservation of these myths compelled the rejection of these remedies, lest whites and people of color discover that these myths were contingent ideas and thus undermine their beliefs in the legitimacy of American class structure. Indeed, he notes that "[t]he more that civil rights law threatened the 'system' of equality [of] opportunity, which threat was essential to the production of victim-perspective results, the more it threatened to expose and delegitimize the relative situation of lower-class whites."[117]

Freeman implies that the concern that forced the curtailment of affirmative action was the fear that whites would question the legitimacy of the class structure once it was revealed that equal opportunity and vestedness were contingent.[118] Yet a different interpretation suggests that whites were unlikely to question the legitimacy of these conceptions, but rather would question the legitimacy of racial remedies that relied upon a suspension of these myths. Indeed, the fact that these promises had been suspended seemed to make whites believe in and cling to them all the more. Freeman fails to analyze the ways in which 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. The most prevalent threat

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[112] *See id.* at 111. Freeman notes that what he means by the class structure is "not 'American society' but the particular class relationships characteristic of contemporary American society." *Id.*

[113] *See id.* at 111–14.

[114] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[115] *See* Freeman, *supra* note 79, at 100–02; *see also* Freeman, *supra* note 12, at 1065–76 (critiquing various explanations of the *Brown* decision).

[116] *See infra* p. 1376.

[117] Freeman, *supra* note 12, at 113.

[118] *See id.* at 111–13; *see also* Freeman, *supra* note 110, at 1894 ("From my perspective, the goal of civil rights law is to offer a credible measure of tangible progress without in any way disturbing class structure generally.").

was not that the ideology would be exposed as fraudulent and that whites would attack the ideology, but that there would be a white backlash against Blacks and against institutions perceived as sympathetic to Black interests.[119] This problem could be rectified — as it has been — by narrowing the focus of antidiscrimination law, thereby sacrificing the interests of Blacks in order to appease the majority.[120]

There was something significant about affirmative action and other civil rights policies that gave rise to a crisis in a way that other more devastating or more common ideological disruptions have not. This suggests that the relatively subordinate status of Blacks serves a stabilizing function in this society. At least one consequence of this "stabilizing" function is that special attention is directed toward the status of Blacks so that ideological deviations arising out of racial issues do not evade popular detection.

The tremendous controversy surrounding the *Bakke* case[121] provides an excellent illustration. Freeman would describe the controversy as arising largely from whites' reaction to suspension of the equal opportunity myth in relation to school admissions. There were other deviations from equal opportunity, however, in the U.C. Davis medical school admissions program that Bakke and other affirmative action opponents could have attacked.[122] Yet advantages granted to others — such as the wealthy — did not appear as presumptively illegitimate as did those granted to minority candidates. The outcry over the specter of "unqualified" minorities being granted privileges over "qualified" whites was not simply a reaction to the suspension of competition per se. Nor was it merely a reaction — as white affirmative action opponents, in particular, would argue — to a fundamental hostility to racial preferences. Racial preferences for whites have existed for years with the tacit and often explicit support of these very opponents. Thus, we must assume either that the adamant disbelievers in racial equality suddenly converted and became racial

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[119] Some commentators both inside and outside the Democratic Party believe that the crushing defeat suffered by the party in the 1984 presidential election reflects a perception among whites that the party is too sympathetic to Black interests. Whether or not this perception is accurate, it does illustrate the centrality of race in American political analysis. *See infra* p. 1376.

[120] Derrick Bell sees this sacrifice as representing a historical pattern which he calls "The Principle of Involuntary Sacrifice." *See infra* note 176.

[121] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[122] *See* G. DREYFUSS & C. LAWRENCE, THE BAKKE CASE 232 (1979) ("For the time being, medical schools would continue to favor the children of the wealthy and exclude thousands of well-qualified applicants of all races. Just a few months before the decision, the *New York Times* had reported on a growing pattern of abuses of the admissions process by wealthy parents attempting to avoid the stiff competition for places. A study by Grace Ziem at Harvard University of the composition of medical students at U.S. universities shows that the percentage of students below the national median income has remained at 12 since 1920.").

equality's high priests, or, more likely, that what really outraged whites about affirmative action was merely that minorities were now getting something at their expense.[123] This race-specific explanation of affirmative action retrenchment is exactly what Freeman's legitimation explanation fails to analyze adequately.

Although we can only speculate why Freeman does not discuss the forced withdrawal of expansive race-reform policies in more racial terms, such an omission is consistent with the assumption that racism is not a central ideological construct of the system. Rejecting what he considers to be the Marxist instrumental view of racism, Freeman declares: "[G]iven the presence of other powerful ideologies that serve to arrest the development of class consciousness, racism seems only marginally necessary, and perhaps superfluous, if regarded from a functional point of view."[124]

This view is further evidenced in Freeman's critique of those who argue that progress in civil rights has advanced class struggle:[125]

> [T]he assault on racism under such circumstances will come to a halt, lest it unleash too much white rage or expose the reality of class relationships. *There is nothing particularly radical about the goal of ending racial discrimination.* The goal would be achieved if non-

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[123] The irony in the argument that race policies designed to remedy unjust oppression constitute illegitimate "special treatment" has a striking parallel in history. Perhaps this backward argument will eventually be seen in the same light as Justice Bradley's comments in the Civil Rights Cases, 109 U.S. 3 (1883). Even though Blacks at that time were isolated and denied most privileges offered to whites, Bradley argued that it was time for Blacks to stop expecting special treatment and to become ordinary citizens:

> When a man has emerged from slavery, and by the aid of a beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws . . . .

Id. at 25.

Civil rights advocates argued then and argue now that this is exactly the objective of race reform — to end the special treatment that Blacks receive and to create the conditions that would allow their expectations to approach those of white citizens. Obviously, the issue was not then, and is not now, simply whether Blacks receive "special" treatment — they did in Bradley's day, and they do now. The conflict lies beneath the special treatment tag; the question is what kind of treatment is deemed special and whether that special treatment is legitimate.

[124] Freeman, *supra* note 79, at 108. Lest my comments be misunderstood, I am not arguing that the oppression of Black people can be discussed solely in race terms. Rather, I believe that viewing Black oppression in terms of caste combines an understanding of racism with a class analysis. This Article reflects my concern that class analysis — and now, "hegemony-centered analysis" — overlooks the element of racial oppression that is non-consensual and, to a degree, non-class based. There are significant distinctions between race oppression and class oppression that I think are important in understanding domination. Part IV illustrates the connection between racial oppression and hegemony.

[125] *See id.* at 107–110 (critiquing traditional Marxist treatments of race); *id.* at 110–14 (exploring the ways in which antidiscrimination law may bring about token improvements by "bourgeoisifying" a small number of Blacks who will legitimate and therefore protect the underlying class structure).

> whites were stratified across American society in percentages similar to whites. *The class structure would remain intact.*[126]

What is particularly disconcerting about this analysis is that it appears simply to collapse issues of race into issues of class[127] in only a slightly more sophisticated fashion than do the traditional Marxist accounts of racism that Freeman criticizes so cogently.[128] Freeman's failure to see the attack on white supremacy as radical typifies his failure to critique the ways in which racism operates together with, but differently from, class ideologies central to the maintenance of hegemony. Without such an analysis of racism's role in maintaining hegemony, his explanation simply does not convincingly capture the political realities of racism and the inevitability of white backlash against any serious attempts to dismantle the machinery of white supremacy.

3. Tushnet: The Problem of Pragmatism Without Context. — The problem with Tushnet's critique of rights is perhaps most evident when he rhetorically queries: "Can anyone really think that it helps either in changing society or in understanding how society changes to discuss whether [protestors] were exercising rights protected by the first amendment?"[129] The answer to Tushnet's rhetorical question, given the thrust of his critique is, of course, no. What really matters, says Tushnet, is not whether people are exercising rights, but whether their action is politically effective.[130] If, however, the inquiry is squarely placed within a historical context, the implied disparity between thinking about change in terms of rights and thinking about politically effective action might be diminished. Perhaps the action of the civil rights community was effective, for example, because it raised the novel idea of Blacks exercising rights. Indeed, thinking in terms of rights may have been a radical and liberating activity for Blacks. Tushnet suggests that thinking in terms of rights is incompatible with feelings of solidarity and is not helpful in determining how to be politically effective.[131] The expression of rights, however,

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[126] Freeman, *supra* note 110, at 1895 (emphasis added).

[127] This "collapse" is revealed if one considers rephrasing Freeman's statement conversely: "There is nothing particularly radical about ending class discrimination. *Incomes* could be equalized, and *racial hierarchy* would remain intact." Racial heirarchy is characterized by the ghettoization of Blacks on the bottom rung of society, but it encompasses much more than class oppression. Consequently, even though relative economic parity might be seen as a radical step toward ending class domination, and would indeed be a tremendous step toward ameliorating conditions in the Black community, equalization alone would not end racial subordination.

[128] *See id.* at 1891–93.

[129] Tushnet, *supra* note 58, at 1370–71.

[130] *See id.* at 1371.

[131] *See id.* ("If . . . action was politically effective, we ought to establish the conditions for its effectiveness, not because these conditions are 'rights' but because politically effective action is important"); *id.* at 1382–83 ("I could not sensibly deny the importance of experiences of

was a central organizing feature of the civil rights movement. Because rights that other Americans took for granted were routinely denied to Black Americans, Blacks' assertion of their "rights" constituted a serious ideological challenge to white supremacy.[132] Their demand was not just for a place in the front of a bus, but for inclusion in the American political imagination. In asserting rights, Blacks defied a system which had long determined that Blacks were not and should not have been included. Whether or not the extension of these rights has ultimately legitimated the subordinate status of Blacks, the use of rights rhetoric was a radical, movement-building act.

Because Tushnet's critique of rights is not sufficiently related to racism, his prescriptive comments are unpersuasive. Tushnet argues that the only circumstance in which rights should be used is when, on pragmatic consideration, they appear useful; he then argues that rights may not be pragmatically useful but instead may actually impede the progress of the "party of humanity":[133]

> [T]here do seem to be substantial pragmatic reasons to think that abandoning the rhetoric of rights would be the better course to pursue for now. People need food and shelter right now, and demanding that those needs be satisfied — whether or not satisfying them can today persuasively be characterized as enforcing a right — strikes me as more likely to succeed than claiming that existing rights to food and shelter must be enforced.[134]

One wonders, however, whether a demand for shelter that does not employ rights rhetoric is likely to succeed in America today. The underlying problem, especially for African-Americans, is the question of how to extract from others that which others are not predisposed to give. As Tushnet has said himself, rights are a way of saying that

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independence and solidarity. They are central parts of our humanity. But the reification critique claims that treating those experiences as instances of abstract rights mischaracterizes them . . . . The experiences become desiccated . . . . We must insist on preserving real experiences rather than abstracting general rights from those experiences. The language of rights should be abandoned *to the very great extent* that it takes as a goal the realization of the reified abstraction 'rights' rather than the experiences of solidarity and individuality.") (emphasis added).

Tushnet's second comment is actually one of his most intriguing, given the thesis of this Article. Taken in isolation, the passage seems both to recognize the positive process of individuation possible in utilizing rights discourse and to hold open the possibility that rights discourse to some extent might be worth deploying if one were careful to aim such rhetoric at achieving the "real human experiences" of "individuality" and "solidarity." As this Article demonstrates, however, it is precisely these roads which lie largely unexplored by the bulk of Critical literature.

[132] Indeed, Tushnet displayed such an awareness in a history of the civil rights litigation strategy. *See* M. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950 (1987).

[133] *See* Tushnet, *supra* note 58, at 1386–94.

[134] *Id.* at 1394. It is worth noting that "needs" terminology is no less open to both the indeterminacy and reification critiques than is rights terminology.

a society is what it is, or that it ought to live up to its deepest commitments.[135] This is essentially what all groups of dispossessed people say when they use rights rhetoric. As demonstrated in the civil rights movement, engaging in rights rhetoric can be an attempt to turn society's "institutional logic"[136] against itself — to redeem some of the rhetorical promises and the self-congratulations that seem to thrive in American political discourse.

C. Questioning the Transformative View: Some Doubts About Trashing

The Critics' product is of limited utility to Blacks in its present form. The implications for Blacks of trashing liberal legal ideology are troubling, even though it may be proper to assail belief structures that obscure liberating possibilities. Trashing legal ideology seems to tell us repeatedly what has already been established — that legal discourse is unstable and relatively indeterminate. Furthermore, trashing offers no idea of how to avoid the negative consequences of engaging in reformist discourse or how to work around such consequences. Even if we imagine the wrong world when we think in terms of legal discourse, we must nevertheless exist in a present world where legal protection has at times been a blessing — albeit a mixed one. The fundamental problem is that, although Critics criticize law because it functions to legitimate existing institutional arrangements, it is precisely this legitimating function that has made law receptive to certain demands in this area.

The Critical emphasis on deconstruction as *the* vehicle for liberation leads to the conclusion that engaging in legal discourse should be avoided because it reinforces not only the discourse itself but also the society and the world that it embodies. Yet Critics offer little beyond this observation. Their focus on delegitimating rights rhetoric seems to suggest that, once rights rhetoric has been discarded, there exists a more productive strategy for change, one which does not reinforce existing patterns of domination.

Unfortunately, no such strategy has yet been articulated, and it is difficult to imagine that racial minorities will ever be able to discover one. As Frances Fox Piven and Richard Cloward point out in their

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[135] Tushnet observes:

> The conditions of the society define exactly what kind of rights-talk makes sense, and *the sort of rights-talk that makes sense in turn defines what the society is.* When someone objects to an act as a violation of a right, the ensuing dialogue either involves a claim that the challenged act is inconsistent with some "deeper" commitments that the actor has . . . or deals with what kind of society we ought to have.

Id. at 1370 (emphasis added).

[136] *Cf.* F. PIVEN & R. CLOWARD, POOR PEOPLE'S MOVEMENTS 22–23 (1977) (noting that "the opportunities for defiance are structured by features of institutional life").

excellent account of the civil rights movement, popular struggles are a reflection of institutionally determined logic and a challenge to that logic.[137] People can only demand change in ways that reflect the logic of the institutions that they are challenging.[138] Demands for change that do not reflect the institutional logic — that is, demands that do not engage and subsequently reinforce the dominant ideology — will probably be ineffective.[139]

The possibility for ideological change is created through the very process of legitimation, which is triggered by crisis. Powerless people can sometimes trigger such a crisis by challenging an institution internally, that is, by using its own logic against it.[140] Such crisis occurs when powerless people force open and politicize a contradiction between the dominant ideology and their reality. The political conse-

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[137] *See id.* at 22–25. The observation concerning the inability to bring about change in some non-legitimating fashion does not, of course, rule out the possibility of armed revolution. For most oppressed peoples, however, the costs of such a revolt are often too great. That is, the oppressed cannot realistically hope to overcome the "coercive" components of hegemony. More importantly, it is not clear that such a struggle, although superficially a clear radical challenge to the coercive force of the status quo, would be a lesser reinforcement of the ideology of American society (i.e., the consensual components of hegemony).

[138] Strikes, for example, are a reflection of the logic of the work institution. It only makes sense for employed workers to use strikes as a tactic. Unemployed workers, of course, cannot use the strike to press their grievances.

[139] Reforms necessarily come from an existing repertoire of options. As Piven and Cloward note, "if impoverished southern blacks had demanded land reform, they would probably have still gotten the vote." *Id.* at 33.

[140] Conversely, groups that do not engage the institutional logic are unlikely to create such a crisis; indeed, they are routinely infiltrated, isolated, and destroyed. Compare, for example, the history of the NAACP with that of the Black Panthers. One should not infer from the fact that the Panthers have ceased to exist whereas the NAACP has not that insurgent groups are not essential to reform. Indeed, it is their insurgency that ultimately benefits more moderate groups. Both moderate and radical groups, however, face similar limitations. Although they can create a crisis which forces an institutional response, no oppressed group can control the response. Institutions can respond with either repression or conciliation; often they respond with both. Thus, even enlisting the dominant, legitimating ideology in struggle does not guarantee protection against violent repression.

Indeed, the degree of violence and repression that an oppressed group must endure to wrest even moderate reforms from the dominant class is a measure of its subordinate status in society. Consider, for example, how much real suffering people had to endure during the civil rights movement before even moderate concessions were made. The injustice of racial oppression is succinctly characterized by the fact that thousands of lives were risked, and some lost, to secure for Blacks the most basic rights that whites were routinely granted. *See* H. RAINES, MY SOUL IS RESTED 190–93 (1977) (quoting Willie Bolden, a participant in the struggle for voting rights, as he describes police beatings of marchers occurring inside and around a church in Marion County, resulting in more than twenty hospitalizations and the death of Jimmy Jackson); *id.* at 197–226 (describing "Bloody Sunday," on which mounted Alabama state troopers attempted to thwart a march on Selma, by riding into the crowd, and beating and teargassing the marchers, many of whom were kneeling); J. WILLIAMS, EYES ON THE PRIZE 230–35 (1987) (describing the discovery of the bodies of James Chaney, Andrew Goodman, and Michael Schwerner, civil rights workers executed by Klansmen in June 1964).

quences of maintaining the contradictions may sometimes force an adjustment — an attempt to close the gap or to make things appear fair.[141] Yet, because the adjustment is triggered by the political consequences of the contradiction, circumstances will be adjusted only to the extent necessary to close the apparent contradiction.

This approach to understanding legitimation and change is applicable to the civil rights movement. Because Blacks were challenging their exclusion from political society, the only claims that were likely to achieve recognition were those that reflected American society's institutional logic: legal rights ideology. Articulating their formal demands through legal rights ideology, civil rights protestors exposed a series of contradictions — the most important being the promised privileges of American citizenship and the practice of absolute racial subordination. Rather than using the contradictions to suggest that American citizenship was itself illegitimate or false, civil rights protestors proceeded as if American citizenship were real, and demanded to exercise the "rights" that citizenship entailed. By seeking to restructure reality to reflect American mythology, Blacks relied upon and ultimately benefited from politically inspired efforts to resolve the contradictions by granting formal rights. Although it is the need to maintain legitimacy that presents powerless groups with the opportunity to wrest concessions from the dominant order, it is the very accomplishment of legitimacy that forecloses greater possibilities. In sum, the potential for change is both created and limited by legitimation.

The central issue that the Critics fail to address, then, is how to avoid the "legitimating" effects of reform if engaging in reformist discourse is the only effective way to challenge the legitimacy of the social order. Perhaps the only situation in which powerless people may receive any favorable response is where there is a political or ideological need to restore an image of fairness that has somehow been tarnished. Most efforts to change an oppressive situation are bound to adopt the dominant discourse to some degree.[142] On the other hand, Peter Gabel may well be right in observing that the reforms which come from such demands are likely to transform a given situation only to the extent necessary to legitimate those elements of the situation that "must" remain unchanged.[143] Thus, it might just be

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[141] As Piven and Cloward observe, these adjustments often take the form of "new programs that appear to meet the moral demands of the movement, and thus rob it of support without actually yielding much by way of tangible gains." F. PIVEN & R. CLOWARD, *supra* note 136, at 30–31; *see* Gabel, *supra* note 83, at 1591–97. Moreover, governments gain additional leeway for repression once they have achieved the appearance of fairness. *See* F. PIVEN & R. CLOWARD, *supra* note 136, at 31.

[142] This engagement is apparently required of successful efforts at change. *See* F. PIVEN & R. CLOWARD, *supra* note 136, at 1–32.

[143] *See* Gabel, *supra* note 83, at 1591–97 (discussing the means by which state officials

the case that oppression means "being between a rock and a hard place" — that there are risks and dangers involved both in engaging in the dominant discourse *and* in failing to do so. What subordinated people need is an analysis which can inform them how the risks can be minimized, and how the rocks and the very hard places can be negotiated.

IV. THE CONTEXT DEFINED: RACIST IDEOLOGY AND HEGEMONY

The failure of the Critics to consider race in their account of law and legitimacy is not a minor oversight: race consciousness is central not only to the domination of Blacks, but also to whites' acceptance of the legitimacy of hierarchy and to their identity with elite interest. Exposing the centrality of race consciousness is crucial to identifying and delegitimating beliefs that present hierarchy as inevitable and fair. Moreover, exposing the centrality of race consciousness shows how the options of Blacks in American society have been limited, and how the use of rights rhetoric has emancipated Blacks from some manifestations of racial domination.

A realignment of the Critical project to incorporate race consciousness must begin with beliefs about Blacks in American society, and how these beliefs legitimize racial coercion.[144] Thus, this Part examines the deep-rooted problem of racist ideology — or white race consciousness — and suggests how this form of consciousness legitimates prevailing injustices and constrains the development of new solutions that benefit Black Americans.

Racist ideology provides a series of rationalizations that suppress the contradiction between American political ideals and Black existence under white supremacy. Not only does racism legitimate the

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contain the radicalizing possibilities of social movements via eventual "recognition" of some of the movement's claims).

[144] *See* Lawrence, Book Review, *"Justice" or "Just Us": Racism and the Role of Ideology*, 35 STAN. L. REV. 831 (1983). Professor Lawrence suggests that

> Individuals tend to identify with the socioeconomic order in which they hold privileged positions while at the same time feeling the tension between the harsh realities of that order and their ideal images of themselves within that order. . . . The natural response of the privileged individual confronted with this tension between the real and the ideal is to resolve it by legitimizing the existing structure to himself. This self-mystification manifests itself in his legal arguments, judicial opinions, or theoretical discussions, which in turn become part of a defense mechanism that extends beyond the individual.

Id. at 842–43 (footnote omitted). Lawrence has since applied this approach in the equal protection context, examining the evidence and implications of unconscious racism to critique constitutional theories underlying the intent requirement in equal protection analysis. *See* Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). Lawrence proposes a "cultural meaning" test to trigger heightened judicial scrutiny of race-based actions, arguing that principles of due process and antidiscrimination both justify judicial intervention in cases of identified unconscious racial motivation. *See id.* at 355–87.

oppression of Blacks, it also helps to define and privilege membership in the white community, creating a basis for identification with dominant interests. Racism serves a consensus-building hegemonic role by designating Black people as separate, visible "others" to be contrasted in every way with all other social groups.[145] Although not consenting to domination, Black people are seen as legitimate objects of antipathy and coercion by whites. In the first section of this Part, I examine the political and ideological dynamic of white supremacy, which I term the "Politics of Otherness."

In this Part's second section, I sketch the contours of an analysis which suggests that race consciousness legitimates racial oppression.[146] Within this framework, one can better comprehend how the assertion of rights in the context of a formal, legally sanctioned subordination created a radical challenge to the dominant order. In response to this assertion of rights, legal reforms were promulgated that transformed the Black experience by lifting formal barriers that had subordinated all Black people and produced their formal and political designation as "other."

The Critics are correct in observing that, despite these gains, engaging in rights discourse has helped to deradicalize and co-opt the challenge in the current period, in which racial oppression continues to flourish behind the screen of racial equality. Yet only after race ideology itself and the real differences that formal equality made in transforming race ideology are understood can the paradoxical relationship of transformation and legitimation be fully appreciated. Blacks are ultimately presented with a dilemma: liberal reform both transforms and legitimates. Even though legal ideology absorbs, redefines, and limits the language of protest, African-Americans cannot ignore the power of legal ideology to counter some of the most repressive aspects of racial domination.

A. The Hegemonic Role of Racism: Establishing the "Other" in American Ideology

Throughout American history, the subordination of Blacks was rationalized by a series of stereotypes and beliefs that made their conditions appear logical and natural.[147] Historically, white suprem-

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[145] *See infra* pp. 1370–74.

[146] *See infra* pp. 1377–81.

[147] *See generally* D. DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770–1823 (1975); G. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND, 1817 TO 1914 (1971) [hereinafter G. FREDRICKSON, THE BLACK IMAGE]; G. FREDRICKSON, WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY (1981) [hereinafter G. FREDRICKSON, WHITE SUPREMACY]; W. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812 (1968); I. NEWBY, JIM CROW'S DEFENSE: ANTI-NEGRO THOUGHT IN AMERICA 1900–1930 (1968); J. WILLIAMSON, THE CRUCIBLE OF RACE: BLACK/

acy has been premised upon various political,[148] scientific,[149] and religious[150] theories, each of which relies on racial characterizations and stereotypes about Blacks that have coalesced into an extensive legitimating ideology.[151] Today, it is probably not controversial to say that these stereotypes were developed primarily to rationalize the oppression of Blacks. What *is* overlooked, however, is the extent to which these stereotypes serve a hegemonic function by perpetuating a mythology about both Blacks *and* whites even today, reinforcing an illusion of a white community that cuts across ethnic, gender, and class lines.

As presented by Critical scholars, hegemonic rule succeeds to the extent that the ruling class world view establishes the appearance of a unity of interests between the dominant class and the dominated.[152]

WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION (1984); C. WOODWARD, THE STRANGE CAREER OF JIM CROW (1958).

[148] *See* R. HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM 298–303 (1981) (analyzing Americans' abandonment of the idea of "liberating" various peoples by spreading the American brand of democracy, and subsequent captivation by the notion of Anglo-Saxon superiority and the right to expand limitlessly); *id.* at 158–86 (analyzing the development of "romantic racial nationalism"); *see also* M. CASSITY, LEGACY OF FEAR: AMERICAN RACE RELATIONS TO 1900, at 68 (1985) (critiquing the paternalist arguments for slavery based on beliefs that it improved and civilized Africans).

[149] *See* R. HORSMAN, *supra* note 148, at 43–61, 116–57 (tracing the development and mass dissemination of scientific proof of white superiority); W. JORDAN, *supra* note 147, at 216–65, 482–511 (analyzing the scientific theories prevalent from 1700 to 1755 and from 1783 to 1812). Even Thomas Jefferson, who eloquently proclaimed the inherent equality of mankind, harbored doubts about the equality of the races. Jefferson offered

> as a suspicion only, that the blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites in the endowments both of body and mind. It is not against experience to suppose, that different species of the same genus, or varieties of the same species, may possess different qualifications.

T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 143 (W. Peden ed. 1787, reprinted 1954). For the "modern" Jeffersonian view, see A. JENSEN, EDUCABILITY AND GROUP DIFFERENCES (1973). *But see* F. MORRIS, THE JENSEN HYPOTHESIS: SOCIAL SCIENCE RESEARCH OR SOCIAL SCIENCE RACISM? (1971) (demonstrating the white racist ideology implicit in Jensen's method).

[150] *See, e.g.*, G. FREDRICKSON, THE BLACK IMAGE, *supra* note 147, at 88–89; C. LINCOLN, RACE, RELIGION, AND THE CONTINUING AMERICAN DILEMMA 23–59 (1984).

[151] *See, e.g.*, S. DRAKE, 1 BLACK FOLK: HERE AND THERE 28–30 (1987) (discussing both the content and the context of the development of a negative Black stereotype); J. TURNER, R. SINGLETON & D. MUSICK, OPPRESSION: A SOCIO-HISTORY OF BLACK-WHITE RELATIONS IN AMERICA 11–23, 26–28, 35–38 (1984) (tracing the development of a Black stereotype from the antebellum period to the present day). For a discussion of the historical development of the image of Blacks as "beasts," see G. FREDRICKSON, THE BLACK IMAGE, cited in note 147 above, at 53–58, 275–82. *See generally* G. ALLPORT, THE NATURE OF PREJUDICE 196–99 (1954); J. KOVEL, WHITE RACISM: A PSYCHOHISTORY 51–92 (1970). For a taste of different contexts in which the stereotype grew, see M. CASSITY, cited in note 148 above, at 32–33, 53–54, 62–63 (sexually promiscuous); 48–49 (lazy); 50–52 (morally corrupt and intellectually inferior); 68 ("stupid, immoral, lazy, heathen, docile, sexual and rhythmic creatures").

[152] *See* Gordon, *supra* note 73, at 288 (describing "legal belief structures" as one of the systems of meaning "built by elites who have thought they had some stake in rationalizing their

Throughout American history, racism has identified the interests of subordinated whites with those of society's white elite. Racism does not support the dominant order simply because all whites want to maintain their privilege at the expense of Blacks, or because Blacks sometimes serve as convenient political scapegoats. Instead, the very existence of a clearly subordinated "other" group is contrasted with the norm in a way that reinforces identification with the dominant group. Racism helps create an illusion of unity through the oppositional force of a symbolic "other."[153] The establishment of an "other" creates a bond, a burgeoning common identity of all non-stigmatized parties — whose identity and interests are defined in opposition to the other.[154]

According to the philosophy of Jacques Derrida, a structure of polarized categories is characteristic of Western thought:

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dominant power positions," which have "the effect of making the social world as it is come to seem natural and inevitable").

[153] The notion of Blacks as a subordinated "other" in Western culture has been a major theme in scholarship exploring the cultural and sociological structure of racism. *See* Trost, *Western Metaphysical Dualism as an Element in Racism*, in CULTURAL BASES OF RACISM AND GROUP OPPRESSION 49 (J. Hodge, D. Struckmann & L. Trost eds. 1975) (arguing that Black and white are seen as paired antinomies, and that there is a hierarchy within the antinomies, with Caucasians and Western culture constituting the preferred or higher antinomy). Frantz Fanon has summarized the attitude of the West toward Blackness as a projection of Western anxiety concerning the "other" in terms of skin color:

> *In Europe, the black man is the symbol of Evil* . . . . The torturer is the black man, Satan is black, one talks of shadow, when one is dirty one is black — whether one is thinking of physical dirtiness or moral dirtiness. It would be astonishing, if the trouble were taken to bring them all together, to see the vast number of expressions that make the black man the equivalent of sin. In Europe, whether concretely or symbolically, the black man stands for the bad side of the character. As long as one cannot understand this fact one is doomed to talk in circles about the "black problem." Blackness, darkness, shadow, shades, night, the labyrinths of the earth, abysmal depths, blacken someone's reputation; and on the other side, the bright look of innocence, the white dove of peace, magical, heavenly light.

F. FANON, BLACK SKINS, WHITE MASKS 188–89 (1967) (emphasis in original); *see* S. GILMAN, DIFFERENCE AND PATHOLOGY: STEREOTYPES OF SEXUALITY, RACE, AND MADNESS 30 (1985) (arguing that the notion that "blacks are the antithesis of the mirage of whiteness, the ideal of European aesthetic values, strikes the reader as an extension of some 'real,' perceived difference to which the qualities of 'good' and 'bad' have been erroneously applied. But the very concept of color is a quality of Otherness, not of reality."); Isaacs, *Blackness and Whiteness*, ENCOUNTER, Aug. 1963, at 8; *see also* W. JORDAN, *supra* note 147 (discussing how 16th and 17th century English writers used the concept that Blacks were the Europeans' polar opposites to establish an elaborate hierarchy to classify other colored people in the world). Others who have used the concept of "otherness" as a framework for examining Black/white relations include C. DEGLER, NEITHER BLACK NOR WHITE: SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES (1971), and Copeland, *The Negro as a Contrast Conception*, in RACE RELATIONS AND THE RACE PROBLEM: A DEFINITION AND AN ANALYSIS 152–79 (E. Thompson ed. 1939). For a general overview of scholarship that further develops and critiques the racial dualism in Western culture, see S. DRAKE, cited in note 151 above, at 75–85.

[154] *See generally* J. KOVEL, *supra* note 151, at 93–105.

> Western thought . . . has always been structured in terms of dichotomies or polarities: good vs. evil, being vs. nothingness, presence vs. absence, truth vs. error, identity vs. difference, mind vs. matter, man vs. woman, soul vs. body, life vs. death, nature vs. culture, speech vs. writing. These polar opposites do not, however, stand as independent and equal entities. The second term in each pair is considered the negative, corrupt, undesirable version of the first, a fall away from it. . . . In other words, the two terms are not simply opposed in their meanings, but are arranged in a hierarchical order which gives the first term *priority* . . . .[155]

Racist ideology replicates this pattern of arranging oppositional categories in a hierarchical order; historically, whites represented the dominant antinomy while Blacks came to be seen as separate and subordinate. This hierarchy is reflected in the chart below. Note how each traditional negative image of Blacks correlates with a counter-image of whites:

Historical Oppositional Dualities

WHITE IMAGES	BLACK IMAGES
Industrious	Lazy
Intelligent	Unintelligent
Moral	Immoral
Knowledgeable	Ignorant
Enabling Culture	Disabling Culture
Law-Abiding	Criminal
Responsible	Shiftless
Virtuous/Pious	Lascivious

The oppositional dynamic symbolized by this chart was created and maintained through an elaborate and systematic process.[156] Laws and customs helped create "races" out of a broad range of human traits. In the process of creating races, the categories came to be filled with meaning — Blacks were characterized one way, whites another. Whites became associated with normatively positive characteristics; Blacks became associated with the subordinate, even aberrational

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[155] J. DERRIDA, DISSEMINATION viii (B. Johnson trans. 1981) (emphasis in original). Otherness is a corollary to the bipolar conceptualizations that characterize structuralist analysis of Western thought. Some Critical legal scholars have seized these bipolar conceptualizations and used them to explain how doctrine attempts to mediate opposing tendencies in the law. *See, e.g.*, Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

[156] *See generally* N. Gotanda, Origins of Racial Categorization in Colonial Virginia, 1619–1705 (1980) (unpublished LL.M. thesis, Harvard Law School) (available in the Harvard Law School library) (analyzing the development of racial categories and racist ideology in colonial Virginia).

characteristics. The operation of this dynamic, along with the important political role of racial oppositionalism, can be illustrated through a few brief historical references.

Edmund Morgan provides vivid illustration of how slaveholders from the seventeenth century onward created and politicized racial categories to maintain the support of non-slaveholding whites.[157] Morgan recounts how the planters "lump[ed] Indians, mulattoes, and Negroes in a single slave class," and how these categories became "an essential, if unacknowledged, ingredient of the republican ideology that enabled Virginians to lead the nation."[158] Having accepted a common interest with slaveholders in keeping Blacks subordinated, even whites who had material reasons to object to the dominance over the slaveholding class could challenge the regime only so far. The power of race consciousness convinced whites to support a system that was opposed to their own economic interests. As George Fredrickson put it, "racial privilege could and did serve as a compensation for class disadvantage."[159]

Domination through race consciousness continued throughout the post-Reconstruction period. Historian C. Vann Woodward has argued that the ruling plantocracy was able to undermine the progressive accomplishments of the Populist movement by stirring up anti-Black sentiment among poor white farmers.[160] Racism was articulated as the "broader ground for a new democracy."[161] As racism formed the new base for a broader notion of democracy, class differences were mediated through reference to a racial community of equality.[162] A tragic example of the success of such race-conscious political manipulation is the career of Tom Watson, leader of the progressive Populist movement of the 1890's. Watson, in his attempts to educate the masses of poor farmers about the destructive role of race-based poli-

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[157] *See* E. MORGAN, AMERICAN SLAVERY — AMERICAN FREEDOM (1975).

[158] *Id.* at 386.

[159] G. FREDRICKSON, WHITE SUPREMACY, *supra* note 147, at 87.

[160] *See* C. WOODWARD, *supra* note 147, at 68–77.

[161] *Id.* at 76. In the words of Southern Progressive Thomas P. Bailey:

> [The] *disenfranchisement of the negroes has been concomitant with the growth of political and social solidarity among the whites.* The more white men recognize sharply their kinship with their fellow whites, and the more democracy in every sense of the term spreads among them, the more the negro is compelled to "keep his place" — a place that is gradually narrowing in the North as well as in the South.

Id. (emphasis in original).

[162] One might argue that the fact that many poor whites were simultaneously disenfranchised cuts against the idea that racist ideology was the glue that organized and held whites together across class lines. In reality, the ability to exclude lower-class whites was achieved politically via racist rhetoric. The need to engage in such rhetoric in order to achieve white political unity led to Populist leader Tom Watson's conversion to white supremacy, which was motivated by his growing belief that true democracy for whites could only be achieved if Blacks were excluded from the political equation.

tics, repeatedly told Black and white audiences, "You are made to hate each other because upon that hatred is rested the keystone of the arch of financial despotism which enslaves you both. You are deceived and blinded that you may not see how this race antagonism perpetuates a monetary system which beggars you both."[163] Yet, by 1906, Watson had joined the movement to disenfranchise Blacks.[164] According to Woodward, Watson had "persuaded himself that only after the Negro was eliminated from politics could Populist principles gain a hearing. In other words, the white men would have to unite before they could divide."[165]

White race consciousness also played a role in the nascent labor movement in the North.[166] Labor historian Herbert Hill has demonstrated that unions of virtually all trades excluded Black workers from their ranks,[167] often entirely barring Black employment in certain fields. Immigrant labor unions were particularly adamant about keeping out Black workers; indeed, it was for the precise purpose of assimilating into the American mainstream that immigrant laborers adopted these exclusionary policies.[168]

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[163] *See id.* at 44–45.

[164] Woodward traces the cycle of enfranchisement and disenfranchisement of Southern Blacks during and immediately following Reconstruction. He explains that the Black vote increasingly became the swing vote, leading various factions of whites into bitter, even corrupt and violent, competition for it. He particularly argues that white politicians alternately used Blacks as allies and as scapegoats to gain power over other whites. Following the defeat of the Populists, whites from all camps agreed that disenfranchisement of the Blacks was necessary to prevent whites from vying against each other for the Black vote. Thus, white supremacy became the salve that healed the wounds of the bitter conflict, and heralded the new age of democracy in the South. *See id.* at 56–95; *see also* J. FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 251–67 (5th ed. 1980) (describing the politics of race in the South after Reconstruction).

[165] C. WOODWARD, *supra* note 147, at 73–74.

[166] *See* P. FONER, ORGANIZED LABOR AND THE BLACK WORKER, 1619–1973, at 94–102 (1974); Karson & Radosh, *The American Federation of Labor and the Negro Worker, 1894–1949*, in THE NEGRO AND THE AMERICAN LABOR MOVEMENT 155–87 (J. Jacobson ed. 1968); Hill, *Race and Ethnicity in Organized Labor: The Historical Sources of Resistance to Affirmative Action*, J. INTERGROUP REL., Winter 1984, at 5.

[167] According to Hill,

> Racist ideas and practices in a multitude of forms became a basic characteristic of the most important institution of the working class; labor unions. From the 1880s to the contemporary period, as workers became more union conscious, they also became more race conscious, and as labor organizations became more successful they also intensified their racist practices.

Hill, *supra* note 166, at 5.

[168] "The historical record reveals that the embrace of white supremacy as ideology and as practice was a strategy for assimilation by European working class immigrants, the white ethnics who were to constitute a major part of the membership and leadership of organized labor in the United States." *Id.* at 6.

Even today, unions that are supposed to represent the "consciousness of the working class" often still fail to represent the interests of the Black American worker. For an account of the

The political and ideological role that race consciousness continues to play is suggested by racial polarization in contemporary presidential politics. Several political commentators have suggested that many whites supported Ronald Reagan in the belief that he would correct a perceived policy imbalance that unjustly benefited Blacks,[169] and some argue further that Reagan made a direct racist appeal to white voters.[170] Manning Marable notes, for example, that "[a]ppeals to the 'race consciousness' of white workers were the decisive factor in Reagan's 1984 victory, especially in the South."[171] Reagan received nearly 70% of the white vote whereas 90% of Black voters cast their ballots for Mondale.[172] Similarly, the vast majority of Blacks — 82% — disapproved of Reagan's performance, whereas only 32% of whites did.[173]

Even the Democratic Party, which has traditionally relied on Blacks as its most loyal constituency, has responded to this apparent racial polarization by seeking to distance itself from Black interests.[174] Although it has been argued that the racial polarization demonstrated in the 1984 election does not represent a trend of white defections from the Democratic Party,[175] it is significant that, whatever the cause of the Party's inability to attract white votes, Democratic leaders have expressed a willingness to moderate the Party's stand on key racial issues in attempts to recapture the white vote.[176]

B. The Role of Race Consciousness in a System of Formal Equality

The previous section emphasizes the continuity of white race consciousness over the course of American history. This section, by

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racist history of the AFL-CIO, see Hill, *The AFL-CIO and the Black Worker: Twenty-Five Years After the Merger*, J. INTERGROUP REL., Sept. 1982, at 5.

[169] *See, e.g.*, M. Marable, Race and Realignment in American Politics (1985) (unpublished manuscript available in Harvard Law School library).

[170] *See, e.g.*, Howell, *Electoral Politics and Racial Polarization*, 101 CHRISTIAN CENTURY 1117 (1984); Wilkins, *Smiling Racism*, 23 THE NATION 437 (Nov. 3, 1984).

[171] M. Marable, *supra* note 169, at 34.

[172] *See Portrait of the Electorate*, N.Y. Times, Nov. 8, 1984, at A19, cols. 8–9.

[173] *See* M. Marable, *supra* note 169, at 17.

[174] *See, e.g.*, *Democrats Sift '84 Rubble, Assess Rebuilding in South*, Wash. Post, Jan. 20, 1985, at A31, cols. 3–4; *Party Looks Inward for Ways to Regain Majority*, N.Y. Times, Nov. 8, 1984, at A24, col. 8; Wicker, *A Party of Access?*, N.Y. Times, Nov. 25, 1984, at E17, col. 1. The party's first response to the 1984 loss was a proposal "to reduce democratic access of Blacks, feminists, and other insurgent social forces inside the party's governing apparatus." M. Marable, *supra* note 169, at 31.

[175] *See, e.g.*, T. FERGUSON & J. ROGERS, RIGHT TURN (1986) (arguing that the "right turn" in 1980 and 1984 was caused not by voter realignment but by a realignment of major investors in the political system).

[176] This effort to minimize Black influence reflects what Derrick Bell has called the principle of "involuntary sacrifice." *See* D. BELL, *supra* note 6, § 1.9, at 29–30. Bell asserts that throughout American history, Black interests have been sacrificed when necessary to reestablish the bonds of the white community, "so that identifiably different groups of whites may settle a dispute and establish or reestablish their relationship." *Id.* at 30.

contrast, focuses on the partial transformation of the functioning of race consciousness that occurred with the transition from Jim Crow to formal equality in race law.

Prior to the civil rights reforms, Blacks were formally subordinated by the state. Blacks experienced being the "other" in two aspects of oppression, which I shall designate as symbolic and material.[177] Symbolic subordination refers to the formal denial of social and political equality to all Blacks, regardless of their accomplishments. Segregation and other forms of social exclusion — separate restrooms, drinking fountains, entrances, parks, cemeteries, and dining facilities — reinforced a racist ideology that Blacks were simply inferior to whites and were therefore not included in the vision of America as a community of equals.

Material subordination, on the other hand, refers to the ways that discrimination and exclusion economically subordinated Blacks to whites and subordinated the life chances of Blacks to those of whites on almost every level. This subordination occurs when Blacks are paid less for the same work, when segregation limits access to decent housing, and where poverty, anxiety, poor health care, and crime create a life expectancy for Blacks that is five to six years shorter than for whites.[178]

Symbolic subordination often created material disadvantage by reinforcing race consciousness in everything from employment to education. In fact, the two are generally not thought of separately: separate facilities were usually inferior facilities, and limited job categorization virtually always brought lower pay and harder work. Despite the pervasiveness of racism, however, there existed even before the civil rights movement a class of Blacks who were educationally, economically, and professionally equal — if not superior — to many whites, and yet these Blacks suffered social and political exclusion as well.[179]

It is also significant that not all separation resulted in inferior institutions. School segregation — although often presented as the epitome of symbolic and material subordination[180] — did not always

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[177] These two manifestations of racial subordination are not mutually exclusive. In fact, it only makes sense to separate various aspects of racial oppression in this post-civil rights era in order to understand how the movement changed some social norms and reinforced others. Most Blacks probably did not experience or perceive their oppression as reflecting two separate structures.

[178] *See* BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 69–71 (107th ed. 1987); *supra* note 3.

[179] *See* J. FRANKLIN, *supra* note 164, at 163–66.

[180] This characterization was the clear motivation of the NAACP's school desegregation strategy. *See generally* R. KLUGER, SIMPLE JUSTICE (1976) (detailing the NAACP's strategy). For an excellent critique of this strategy that discusses some of the paradoxes that attend the simultaneous pursuit of integration and quality education, see Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470

result in inferior education.[181] It is not separation *per se* that made segregation subordinating, but the fact that it was enforced and supported by state power, and accompanied by the explicit belief in African-American inferiority.[182]

The response to the civil rights movement was the removal of most formal barriers and symbolic manifestations of subordination. Thus, "White Only" notices and other obvious indicators of the societal policy of racial subordination disappeared — at least in the public sphere. The disappearance of these symbols of subordination reflected the acceptance of the rhetoric of formal equality and signaled the demise of the rhetoric of white supremacy as expressing America's normative vision. In other words, it could no longer be said that Blacks were not included as equals in the American political vision.

Removal of these public manifestations of subordination was a significant gain for all Blacks, although some benefited more than others. The eradication of formal barriers meant more to those whose oppression was primarily symbolic than to those who suffered lasting material disadvantage. Yet despite these disparate results, it would be absurd to suggest that no benefits came from these formal reforms, especially in regard to racial policies, such as segregation, that were partly material but largely symbolic. Thus, to say that the reforms were "merely symbolic" is to say a great deal. These legal reforms and the formal extension of "citizenship" were large achievements precisely because much of what characterized Black oppression was symbolic and formal.

Yet the attainment of formal equality is not the end of the story. Racial hierarchy cannot be cured by the move to facial race-neutrality in the laws that structure the economic, political, and social lives of Black people. White race consciousness, in a new form but still virulent, plays an important, perhaps crucial, role in the new regime

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(1976). For one historical example of the view that the real issue should be education, and not integration, see DuBois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328 (1935), which is reprinted in W. DUBOIS, cited in note 2 above, at 408.

[181] That there were Black professionals indicates that Black educational achievement was not always inferior. Howard University Law School, for example, is legendary for producing the brilliant Black attorneys who shaped the legal campaign for racial equality, and for producing the first Black Supreme Court Justice. *See* R. KLUGER, *supra* note 180, at 126–31. Thomas Sowell makes much of the fact that students from Washington's Dunbar High excelled in a number of fields. *See* T. SOWELL, BLACK EDUCATION: MYTHS AND TRAGEDIES 282–86 (1972).

[182] Socially, many Blacks lived in a society that was comparable in many ways to that of the white elites. Hardly strangers to debutante balls, country clubs, and vacations abroad, these Blacks lived lives of which many whites only dreamed. Nevertheless, despite their material wealth, upper-middle class Blacks were still members of a subordinated group. Where rights and privileges were distributed on the basis of race, even a distinguished African-American had to take a back seat to each white — no matter how poor, ignorant, or uneducated the white might be. *See generally* E. FRAZIER, BLACK BOURGEOISIE: THE RISE OF A NEW MIDDLE CLASS IN THE UNITED STATES (1957).

that has legitimated the deteriorating day-to-day material conditions of the majority of Blacks.[183]

The end of Jim Crow has been accompanied by the demise of an explicit ideology of white supremacy. The white norm, however, has not disappeared; it has only been submerged in popular consciousness. It continues in an unspoken form as a statement of the positive social norm, legitimating the continuing domination of those who do not meet it. Nor have the negative stereotypes associated with Blacks been eradicated. The rationalizations once used to legitimate Black subordination based on a belief in racial inferiority have now been reemployed to legitimate the domination of Blacks through reference to an assumed cultural inferiority.

Thomas Sowell, for example, suggests that underclass Blacks are economically depressed because they have not adopted the values of hard work and discipline.[184] He further implies that Blacks have not pursued the need to attain skills and marketable education, and have not learned to make the sacrifices necessary for success.[185] Instead, Sowell charges that Blacks view demands for special treatment as a means for achieving what other groups have achieved through hard work and the abandonment of racial politics.[186]

Sowell applies the same stereotypes to the mass of Blacks that white supremacists had applied in the past, but bases these modern stereotypes on notions of "culture" rather than genetics. Sowell characterizes underclass Blacks as victims of self-imposed ignorance, lack of direction, and poor work attitudes. Culture, not race, now accounts for this "otherness." Except for vestigial pockets of historical racism, any possible connection between past racial subordination and the present situation has been severed by the formal repudiation of the old race-conscious policies. The same dualities historically used to legitimate racial subordination in the name of genetic inferiority have now been adopted by Sowell as a means for explaining the subordinated status of Blacks today in terms of cultural inferiority.[187]

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[183] For examples of this deterioration, see note 3 above.

[184] I take this to be implied by Sowell's opposition to the "civil rights vision," which he shows by challenging the significance of statistical disparities, and by his statements concerning the "way people work." *See* T. SOWELL, *supra* note 34, at 46–47.

[185] *See id.* at 42–46 (illustrating the low levels of educational attainment by Blacks relative to other ethnic and racial groups and arguing that demographic, cultural, and geographic differences among groups strongly affect incomes and occupations).

[186] Sowell recites a predictable and stereotypical litany of ethnic groups that have abandoned political struggle for hard work and achieved success. *See id.* at 29–35. Sowell reduces these complex racial histories into another variant of "otherness."

[187] Sowell exemplifies what may be the worst development of the civil rights movement — that some Blacks who have benefited the most from the formal gestures of equality now identify with those who attempt to affirm the legitimacy of oppressing other Blacks. Clearly, this legitimation and desertion by some Blacks has been politically damaging and may undermine future efforts to organize.

Moreover, Sowell's explanation of the subordinate status of Blacks also illustrates the treatment of the now-unspoken white stereotypes as the positive social norm. His assertion that the *absence* of certain attributes accounts for the continued subordination of Blacks implies that it is the *presence* of these attributes that explains the continued advantage of whites. The only difference between this argument and the older oppositional dynamic is that, whereas the latter explained Black subordination through reference to the ideology of white supremacy, the former explains Black subordination through reference to an unspoken social norm. That norm — although no longer explicitly white supremacist — remains, nonetheless, a white norm. As Martha Minow has pointed out, "[t]he unstated point of comparison is not neutral, but particular, and not inevitable, but only seemingly so when left unstated."[188]

White race consciousness, which includes the modern belief in cultural inferiority, acts to further Black subordination by justifying all the forms of unofficial racial discrimination, injury, and neglect that flourish in a society that is only formally dedicated to equality. In more subtle ways, moreover, white race consciousness reinforces and is reinforced by the myth of equal opportunity that explains and justifies broader class hierarchies.

Race consciousness also reinforces whites' sense that American society is really meritocratic and thus helps prevent them from questioning the basic legitimacy of the free market. Believing both that Blacks are inferior and that the economy impartially rewards the superior over the inferior, whites see that most Blacks are indeed worse off than whites are, which reinforces their sense that the market is operating "fairly and impartially"; those who should logically be on the bottom are on the bottom.[189] This strengthening of whites' belief in the system in turn reinforces their beliefs that Blacks are *indeed* inferior. After all, equal opportunity *is* the rule, and the market *is* an impartial judge; if Blacks are on the bottom, it must reflect their relative inferiority. Racist ideology thus operates in conjunction with the class components of legal ideology to reinforce the status quo, both in terms of class and race.

To bring a fundamental challenge to the way things are, whites would have to question not just their own subordinate status, but also both the economic and the racial myths that justify the status quo. Racism, combined with equal opportunity mythology, provides a rationalization for racial oppression, making it difficult for whites to see the Black situation as illegitimate or unnecessary. If whites believe

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[188] Minow, *The Supreme Court, 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 32 (1987).

[189] *See* Kluegel, *supra* note 66, at 774.

that Blacks, because they are unambitious or inferior, get what they deserve, it becomes that much harder to convince whites that something is wrong with the entire system.[190] Similarly, a challenge to the legitimacy of continued racial inequality would force whites to confront myths about equality of opportunity that justify for them whatever measure of economic success they may have attained.

Thus, although Critics have suggested that legal consciousness plays a central role in legitimating hierarchy in America, the otherness dynamic enthroned within the maintenance and perpetuation of white race consciousness seems to be at least as important as legal consciousness in supporting the dominant order. Like legal consciousness, race consciousness makes it difficult — at least for whites — to imagine the world differently. It also creates the desire for identification with privileged elites. By focusing on a distinct, subordinate "other," whites include themselves in the dominant circle — an arena in which most hold no real power, but only their privileged racial identity. Consider the case of a dirt-poor, southern white, shown participating in a Ku Klux Klan rally in the movie *Resurgence*, who declared: "Every morning, I wake up and thank God I'm white."[191] For this person, and for others like him, race consciousness — manifested by his refusal even to associate with Blacks — provides a powerful explanation of why he fails to challenge the current social order.

C. Rights Discourse as a Challenge to the Oppositional Dynamic

The oppositional dynamic, premised upon maintaining Blacks as an excluded and subordinated "other," initially created an ideological and political structure of formal inequality against which rights rhetoric proved to be the most effective weapon. Although rights rhetoric may ultimately have absorbed the civil rights challenge and legitimated continued subordination, the otherness dynamic provides a fuller understanding of how the very transformation afforded by legal reform itself has contributed to the ideological and political legitimation of continuing Black subordination.

Rights discourse provided the ideological mechanisms through which the conflicts of federalism, the power of the Presidency, and the legitimacy of the courts could be orchestrated against Jim Crow. Movement leaders used these tactics to force open a conflict between whites that eventually benefited Black people. Casting racial issues in the moral and legal rights rhetoric of the prevailing ideology helped create the political controversy without which the state's coercive function would not have been enlisted to aid Blacks.

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[190] *See* Kluegel & Smith, *Whites' Beliefs About Blacks' Opportunity*, 47 AM. SOC. REV. 518 (1983).

[191] *Resurgence* (Skylight Pictures–Emancipation Arts Sept. 1981).

Simply critiquing the ideology from without or making demands in language outside the rights discourse would have accomplished little. Rather, Blacks gained by using a powerful combination of direct action, mass protest, and individual acts of resistance, along with appeals to public opinion and the courts couched in the language of the prevailing legal consciousness. The result was a series of ideological and political crises. In these crises, civil rights activists and lawyers induced the federal government to aid Blacks and triggered efforts to legitimate and reinforce the authority of the law in ways that benefited Blacks. Simply insisting that Blacks be integrated or speaking in the language of "needs" would have endangered the lives of those who were already taking risks — and with no reasonable chance of success. President Eisenhower, for example, would not have sent federal troops to Little Rock simply at the behest of protesters demanding that Black schoolchildren receive an equal education. Instead, the successful manipulation of legal rhetoric led to a crisis of federal power that ultimately benefited Blacks.[192]

Some critics of legal reform movements seem to overlook the fact that state power has made a significant difference — sometimes between life and death — in the efforts of Black people to transform their world. Attempts to harness the power of the state through the appropriate rhetorical/legal incantations should be appreciated as intensely powerful and calculated political acts. In the context of white supremacy, engaging in rights discourse should be seen as an act of self-defense. This was particularly true because the state could not assume a position of neutrality regarding Black people once the movement had mobilized people to challenge the system of oppression: either the coercive mechanism of the state had to be used to support white supremacy, or it had to be used to dismantle it. We know now, with hindsight, that it did both.[193]

Blacks did use rights rhetoric to mobilize state power to their benefit against symbolic oppression through formal inequality and, to some extent, against material deprivation in the form of private, informal exclusion of the middle class from jobs and housing. Yet today the same legal reforms play a role in providing an ideological

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[192] For a detailed account of the crisis that preceded Eisenhower's decision to deploy the 101st Airborne Division in Little Rock, see J. WILLIAMS, cited in note 140 above, at 92–119.

[193] Consider, for example, the possible police responses to students who violated local ordinances by sitting in at segregated lunch counters and demanding service. Government officials could have ordered the students arrested, thereby upholding the segregation policy, or they could have ignored them, which would have incidentally supported the students' efforts. Both tactics were followed throughout the course of the movement. Because officials sometimes had a degree of choice in the matter, and courts had the ultimate power to review the legitimacy of the laws and the officials' actions, Black protesters' use of rights rhetoric can be seen as an effort to defend themselves against arrest or conviction for violating the norms of white supremacy.

framework that makes the present conditions facing underclass Blacks appear fair and reasonable. The eradication of barriers has created a new dilemma for those victims of racial oppression who are not in a position to benefit from the move to formal equality. The race neutrality of the legal system creates the illusion that racism is no longer the primary factor responsible for the condition of the Black underclass; instead, as we have seen, class disparities appear to be the consequence of individual and group merit within a supposed system of equal opportunity. Moreover, the fact that there are Blacks who are economically successful gives credence both to the assertion that opportunities exist,[194] and to the backlash attitude that Blacks have "gotten too far."[195] Psychologically, for Blacks who have not made it, the lack of an explanation for their underclass status may result in self-blame and other self-destructive attitudes.[196]

Another consequence of the formal reforms may be the loss of collectivity among Blacks.[197] The removal of formal barriers created new opportunities for some Blacks that were not shared by various other classes of African-Americans. As Blacks moved into different spheres, the experience of being Black in America became fragmented

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[194] This is essentially the process described in Freeman, cited in note 79 above, at 110–14.

[195] This phenomenon is undoubtedly exacerbated by periods of economic hardship. It was in this context that the U.S. Commission on Civil Rights commented that some whites "believe that their hard times result from 'reverse discrimination' in employment and a tax burden imposed upon them to support government programs that in their view provide undeserved advantages to minorities." U.S. COMM'N ON CIVIL RIGHTS, *supra* note 3, at 11.

[196] Kristin Bumiller argues that victims of discrimination ultimately fail to "achieve successful resolutions of their problems" for three reasons:

> First, the bonds between the perpetrator and the discrimination victim drive the conflict to self-destructive or explosive reactions. Second, these individuals are guided by an ethic of survival that encourages self-sacrifice rather than action. And third, the potential for legal remedies is diminished by a view of the law that engenders fear of legal intervention. Injured persons reluctantly employ the label of discrimination because they shun the role of the victim, and they fear legal intervention will disrupt the delicate balance of power between themselves and their opponents.

Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 SIGNS: J. WOMEN IN CULTURE AND SOC'Y 421, 438 (1987). Note that the last sentence attempts to analyze both the consensual and the coercive components of hegemony.

[197] By "collectivity," I refer to the recognition of common interests and the benefits derived by Blacks of all classes in sharing the burdens of social struggle. The potential for collective struggle is maximized where the grievance is shared by all. It was clear that racial segregation, for example, affected all Blacks. The creation of opportunity for some Blacks — however small the number may be — can obscure the degree to which Blacks have common interests that warrant continual collective struggle. One of the unfortunate consequences of viewing racism solely in terms of economic class is that it may create the impression that there are few common interests that Blacks share across class lines. Although the emergence of a new and outspoken class of Black neoconservatives may confirm this consequence, political opinion surveys indicate that Black political opinions are not so tightly bounded by class lines as those of whites. *See* Gilliam, *Black America: Divided by Class?*, PUBLIC OPINION, Feb.–Mar. 1986, at 53–57.

and multifaceted, and the different contexts presented opportunities to experience racism in different ways.[198] The social, economic, and even residential distance between the various classes may complicate efforts to unite behind issues as a racial group. Although "White Only" signs may have been crude and debilitating, they at least presented a readily discernible target around which to organize. Now, the targets are obscure and diffuse, and this difference may create doubt among some Blacks whether there is enough similarity between their life experiences and those of other Blacks to warrant collective political action.

Formal equality significantly transformed the Black experience in America. With society's embrace of formal equality came the eradication of symbolic domination and the suppression of white supremacy as the norm of society. Future generations of Black Americans would no longer be explicitly regarded as America's second-class citizens. Yet the transformation of the oppositional dynamic — achieved through the suppression of racial norms and stereotypes, and the recasting of racial inferiority into assumptions of cultural inferiority — creates several difficulties for the civil rights constituency. The removal of formal barriers, although symbolically significant to all and materially significant to some, will do little to alter the hierarchical relationship between Blacks and whites until the way in which white race consciousness perpetuates norms that legitimate Black subordination is revealed. This is not to say that white norms alone account for the conditions of the Black underclass. It is instead an acknowledgment that, until the distinct racial nature of class ideology is itself revealed and debunked, nothing can be done about the underlying structural problems that account for the disparities.[199] The narrow focus of racial exclusion — that is, the belief that racial exclusion is illegitimate only where the "White Only" signs are explicit — coupled with strong assumptions about equal opportunity, makes it difficult to move the discussion of racism beyond the societal self-satisfaction engendered by the appearance of neutral norms and formal inclusion.

D. Self-Conscious Ideological Struggle

Rights have been important. They may have legitimated racial inequality, but they have also been the means by which oppressed

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[198] *See* W. WILSON, *supra* note 3, at 7–8.

[199] The racial character of the rationalizations that legitimate poverty is exemplified by advocates who seek to educate the American public about the severity of the homelessness problem by revealing that many of the new homeless are white. This does not necessarily indicate that advocates prefer whites over Blacks; instead, it is an acknowledgment that such a problem can easily be disregarded as the result of personal failure if its victims are Black. The vast number of white homeless, however, raises the inescapable inference that something is amiss within America's economic structure.

groups have secured both entry as formal equals into the dominant order and the survival of their movement in the face of private and state repression. The dual role of legal change creates a dilemma for Black reformers. As long as race consciousness thrives, Blacks will often have to rely on rights rhetoric when it is necessary to protect Black interests. The very reforms brought about by appeals to legal ideology, however, seem to undermine the ability to move forward toward a broader vision of racial equality. In the quest for racial justice, winning and losing have been part of the same experience.

The Critics are correct in observing that engaging in rights discourse has helped to deradicalize and co-opt the challenge. Yet they fail to acknowledge the limited range of options presented to Blacks in a context where they were deemed "other," and the unlikelihood that specific demands for inclusion and equality would be heard if articulated in other terms. This abbreviated list of options is itself contingent upon the ideological power of white race consciousness and the continuing role of Black Americans as "other." Future efforts to address racial domination, as well as class hierarchy, must consider the continuing ideology of white race consciousness by uncovering the oppositional dynamic and by chipping away at its premises. Central to this task is revealing the contingency of race and exploring the connection between white race consciousness and the other myths that legitimate both class and race hierarchies. Critics and others whose agendas include challenging hierarchy and legitimation must not overlook the importance of revealing the contingency of race.

Optimally, the deconstruction of white race consciousness might lead to a liberated future for both Blacks and whites. Yet, until whites recognize the hegemonic function of racism and turn their efforts toward neutralizing it, African-American people must develop pragmatic political strategies — self-conscious ideological struggle — to minimize the costs of liberal reform while maximizing its utility. A primary step in engaging in self-conscious ideological struggle must be to transcend the oppositional dynamic in which Blacks are cast simply and solely as whites' subordinate "other."[200]

The dual role that rights have played makes strategizing a difficult task. Black people can afford neither to resign themselves to, nor to attack frontally, the legitimacy and incoherence of the dominant ideology. The subordinate position of Blacks in this society makes it unlikely that African-Americans will realize gains through the kind of direct challenge to the legitimacy of American liberal ideology that is now being waged by Critical scholars. On the other hand, delegiti-

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[200] The embrace of the self-definition "African-American" can symbolize the ongoing effort to break free of the subordinate self-identity brought about by exclusive reference to a white norm.

mating race consciousness would be directly relevant to Black needs, and this strategy will sometimes require the pragmatic use of liberal ideology.

This vision is consistent with the views forwarded by theoreticians such as Frances Fox Piven and Richard Cloward, Antonio Gramsci, and Roberto Unger. Piven and Cloward observe that oppressed people sometimes advance by creating ideological and political crisis, but that the form of the crisis-producing challenge must reflect the institutional logic of the system.[201] The use of rights rhetoric during the civil rights movement created such a crisis by presenting and manipulating the dominant ideology in a new and transformative way. Challenges and demands made from outside the institutional logic would have accomplished little because Blacks, as the subordinate "other," were already perceived as being outside the mainstream. The struggle of Blacks, like that of all subordinated groups, is a struggle for inclusion, an attempt to manipulate elements of the dominant ideology to transform the experience of domination. It is a struggle to create a new status quo through the ideological and political tools that are available.

Gramsci called this struggle a "War of Position" and he regarded it as the most appropriate strategy for change in Western societies. According to Gramsci, direct challenges to the dominant class accomplish little if ideology plays such a central role in establishing authority that the legitimacy of the dominant regime is not challenged. Joseph Femia, interpreting Gramsci, states that "the dominant ideology in modern capitalist societies is highly institutionalized and widely internalized. It follows that a concentration on frontal attack, on direct assault against the bourgeois state ('war of movement' or 'war of manoeuvre') can result only in disappointment and defeat."[202] Consequently, the challenge in such societies is to create a counter-hegemony by maneuvering within and expanding the dominant ideology to embrace the potential for change.

Gramsci's vision of ideological struggle is echoed in part by Roberto Unger in his vision of deviationist doctrine. Unger, who represents another strand of the Critical approach, argues that, rather than discarding liberal legal ideology, we should focus and develop its visionary undercurrents:

> [T]he struggle over the form of social life, through deviationist doctrine, creates opportunities for experimental revisions of social life in the direction of the ideals we defend. An implication of our ideas is

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[201] *See* F. PIVEN & R. CLOWARD, *supra* note 136, at 23.

[202] J. FEMIA, GRAMSCI'S POLITICAL THOUGHT: HEGEMONY, CONSCIOUSNESS, AND THE REVOLUTIONARY PROCESS 51 (1981).

> that the elements of a formative institutional or imaginative structure may be replaced piecemeal rather than only all at once.[203]

Liberal ideology embraces communal and liberating visions along with the legitimating hegemonic visions. Unger, like Gramsci and Piven and Cloward, seems to suggest that the strategy toward meaningful change depends on skillful use of the liberating potential of dominant ideology.

V. CONCLUSION

For Blacks, the task at hand is to devise ways to wage ideological and political struggle while minimizing the costs of engaging in an inherently legitimating discourse. A clearer understanding of the space we occupy in the American political consciousness is a necessary prerequisite to the development of pragmatic strategies for political and economic survival. In this regard, the most serious challenge for Blacks is to minimize the political and cultural cost of engaging in an inevitably co-optive process in order to secure material benefits. Because our present predicament gives us few options, we must create conditions for the maintenance of a distinct political thought that is informed by the actual conditions of Black people. Unlike the civil rights vision, this new approach should not be defined and thereby limited by the possibilities of dominant political discourse, but should maintain a distinctly progressive outlook that focuses on the needs of the African-American community.

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[203] Unger, *supra* note 72, at 666.