UNMASKING WHITE PRIVILEGE TO EXPOSE THE FALLACY OF WHITE INNOCENCE: USING A THEORY OF MORAL CORRELATIVITY TO MAKE THE CASE FOR AFFIRMATIVE ACTION PROGRAMS IN EDUCATION

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> Education...beyond all other devices of human origin, is the great equalizer of the conditions of men—the balance-wheel of the social machinery.... It gives each man the independence and the means...by which he can resist the selfishness of other men. It does more...than to disarm the poor of their hostility towards the rich; it prevents being poor.... And, if this education should be universal and complete, it would do more than all things else to obliterate factitious distinctions in society.[1]

Despite the great strides made during the civil rights era, particularly with regards to desegregation in the classroom and with the later creation and implementation of affirmative action policies in education, equality still has not been achieved. This Note undertakes an explanation of the typical obstacles to the implementation of affirmative action programs in education and proposes a solution.

Part I of this Note illustrates the continued existence of racial discrimination and its attendant effects. This section includes a brief synopsis of the Fifth Circuit's opinion in *Hopwood v. Texas*[2] to show the great impact the decision is projected to have on affirmative action programs in education across the country. Part I also catalogues the most common and forceful criticisms regarding affirmative action and shows how a number of these criticisms trace their roots to

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1. Roscoe C. Howard, Jr., *Getting it Wrong:* Hopwood v. Texas *and its Implications for Racial Diversity in Legal Education and Practice*, 31 NEW ENG. L. REV. 831, 831 (1997) (quoting HORACE MANN, TWELFTH ANNUAL REPORT OF THE MASSACHUSETTS BOARD OF EDUCATION, 59–60 (1848)).

2. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

traditional liberal political theory and, more specifically, to the doctrine of utilitarianism.

Part II details the evolution of the system of racial classification within the United States and the subsequent development of white privilege. This section illustrates how claims of white "innocence," the most common form of denouncement, are faulty. Part III discusses the ways in which utilitarianism proves problematic in its assertion of rights, particularly with respect to those that affirmative action seeks to secure, principally the opportunity and ability to achieve. This section delves into the construct of moral versus legal rights and discusses Alison Renteln's theory of moral correlativity. The functionalist critique of the utilitarian concept of rights is addressed as a potential solution to the utilitarian's rejection of moral rights. Ronald Dworkin's advocacy of individual rights acting in a trump capacity is central to this discussion and is also detailed. Finally, this Note advocates employing a strong conception of rights to unmask the invisible operation of white privilege, thereby strengthening the case for affirmative action in education.

I. THE PERSISTENCE OF RACIAL DISCRIMINATION IN THE FACE OF WHOLESALE DISASSEMBLY OF AFFIRMATIVE ACTION

A. The Hopwood *Decision and Its Implications for the Future Use of Affirmative Action Policies in Education*

In recent years, our society has seen many of the affirmative action programs civil rights activists fought hard to ensure come under fire.[3] This has been especially true in the area of education.[4] The *Hopwood v. Texas* decision, handed down in 1996, stands out as a benchmark in the overall process of dismantling that is currently taking place.[5]

At issue in *Hopwood* was the University of Texas Law School admission procedure. This procedure essentially provided for two separate paths of applicant assessment, with race determining the path taken. One was for blacks and Mexican-Americans, the other for whites and all other "non-preferred" minorities.[6] The two groups had disparate applicable standards that were used to determine

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3. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (holding unconstitutional a city law requiring at least thirty percent of construction subcontracts be awarded to minority owned businesses); *see also* Adarand Const., Inc. v. Peña, 515 U.S. 200 (1995) (questioning the use of race-based preferences in the awarding of general contracts for government projects).

4. *See* Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994) (striking down the use of race-based scholarships at the University of Maryland at College Park); *see also Hopwood*, 78 F.3d 932; Mark Hansen, *The Great Admissions Debate*, A.B.A. J., June 1997, at 28, 28 ("[L]awsuits challenging affirmative action in college admissions are pending in at least two states [besides Texas], Washington and Georgia.").

5. *Hopwood*, 78 F.3d 932.

6. *See id.* at 934.

admissibility.[7] Of particular concern was the fact that the scores used for the preferred group, that of black and Mexican-American candidates, were lower, overall, than were those used to assess the candidates of the second group.[8] At no time were the applications of the preferred group compared to, or combined with, those in the other group.[9] In short, "race was always an overt part of the review of any applicant's file."[10]

The *Hopwood* suit was instituted by four white plaintiffs who had applied to the law school for admission to the class of 1992.[11] All were rejected.[12] The suit was predicated on the Equal Protection Clause of the Fourteenth Amendment.[13] Specifically, the applicants alleged that they had been the victims of racial discrimination perpetrated by the law school's admission process.[14]

The *Hopwood* decision makes any future use of affirmative action programs in university admissions a dubious possibility.[15] The reason for this is two-fold. First, and perhaps most strikingly, the Fifth Circuit's decision eliminates the use of the diversity rationale[16] as a justification for the use of racial classification in admissions decision-making.[17] Prior to the *Hopwood* decision, university officials could argue that their programs were geared towards ensuring a racially, ethnically, and religiously diverse entering class. This claim arguably constituted, at that time, a compelling state interest.[18]

Second, in its *Hopwood* decision, the Fifth Circuit severely limited the scope of applicability of the other primary argument proffered by affirmative action proponents: the remedial argument.[19] This argument essentially justifies the

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7. *See id.* at 936.
8. *See id.* at 935–37.
9. *See id.* at 937.
10. *See id.*
11. *See id.* at 938.
12. *See id.*
13. *See* U.S. CONST. amend. XIV.
14. *See Hopwood*, 78 F.3d at 938.
15. *See* Henry J. Reske, *Law School Affirmative Action in Doubt*, A.B.A. J., May 1996, at 36, *passim* (suggesting that the ruling in *Hopwood* may "jeopardize affirmative action programs at universities across the country").
16. The development of the diversity rationale for affirmative action programs in higher education is attributed to Justice Powell. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–13 (1978) (Powell, J., opinion).
17. *See Hopwood*, 78 F.3d at 944. The Fifth Circuit indicated that "any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment." *Id.* The court went on to indicate that "the caselaw sufficiently establish[es] that the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional." *Id.* at 945–46.
18. *See Bakke*, 438 U.S. at 311–12 (Powell argued that attaining a diverse student body "clearly is a constitutionally permissible goal for an institution of higher education."); *see also* Reske, *supra* note 15, at 36 ("Powell's opinion recognized diversity in higher education as a sufficient state interest.").
19. The essence of the remedial argument for affirmative action is that

use of affirmative action programs on the ground that these programs act as a remedial response to the current effects of past discrimination.[20] Before *Hopwood*, the type of discrimination that justified a remedial program was more broadly defined.[21] However, the Fifth Circuit sharply narrowed the scope of what would be considered a showing of past discrimination sufficient to justify a remedy in the form of a preference in admissions.[22] The Fifth Circuit soundly rejected the idea that a showing of past societal discrimination suffices to legitimate the use of race as a factor in admissions decisions, claiming that such an expansive reading of discrimination would engender "no viable limiting principle."[23] Furthermore, the Court sought to narrow the spectrum regarding the kinds of proof that would constitute a sufficient showing of discrimination's present effect to justify the employment of racial classifications.[24] Strikingly, the showing by the University of Texas Law School that discrimination had occurred within the Texas state school system as a whole, including the University of Texas undergraduate programs, was insufficient to justify the Law School's use of race in its admissions process.[25] Thus, the Fifth Circuit implied that the only discrimination that could generate a compelling state interest meriting remediation would have been specific discrimination within the law school *itself*.[26]

One sociologist has remarked that the lessons to be drawn from the *Hopwood* decision are "unmistakable."[27] Many have read *Hopwood* as sounding

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affirmative action is merited to the extent that it remediates the current effects of past discrimination. *See* Podberesky v. Kirwin, 956 F.2d 52, 57 (4th Cir. 1992) (stating that to justify affirmative action programs, the state must show present effects of past discrimination).

20. *See* MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 146–47, 151 (1964). King urged society to develop mechanisms for compensating blacks for the handicaps that resulted from slavery.

21. *See Bakke*, 438 U.S. 265.

22. *See Hopwood*, 78 F.3d at 952 ("To have a present effect of past discrimination sufficient to justify the program, the party seeking to implement the program must, at a minimum, prove that the effect it proffers is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program." (quoting *Podberesky*, 38 F.3d at 153)).

23. *Id.* at 950.

24. *See id.* at 950–55.

25. *See id.* at 954 ("[P]ast discrimination in education, *other than at the law school*, cannot justify the present consideration of race in law school admissions." (emphasis added)).

26. This was true despite the fact that there had been fairly significant discrimination within the law school. *See* Sweatt v. Painter, 339 U.S. 629 (1950). In *Hopwood v. Texas*, the court concluded that official discrimination persisted into the 1960s. Hopwood v. Texas, 861 F. Supp. 551, 555 (W.D. Tex. 1994). In fact, the discrimination that had occurred within the University of Texas Law School was considered so egregious that the Office of Civil Rights worked with the school to bring it into compliance with Title VI until 1994. *See id.* at 555–57.

27. Lincoln Caplan, *The* Hopwood *Effect Kicks in on Campus*, U.S. NEWS & WORLD REP., Dec. 23, 1996, at 26, 28.

the death knell for affirmative action programs in education.[28] The elimination of race as part of the admissions calculus has had stunning consequences, particularly for law school admissions. Commentators have indicated that were law schools to base admissions decisions on LSAT scores and grades alone, the percentage of blacks in law schools would drop by 50%.[29] This projection is exceedingly dire. The result would be a drop in black students to one half of 1% at the top twenty to twenty-five schools.[30] Those schools ranked between forty and fifty would see their enrollment of black students wither to 1% or below.[31]

Real numbers became available when the University of Texas Law School eradicated race from admissions considerations, proving that the forecasts were not over-exaggerated. In years past, the University of Texas Law School has produced more of the country's minority lawyers than any other law school.[32] However, after changing the admissions policy, the number of minority admits dropped from the typical 30-40 students to 11, none of whom had enrolled as of June 2, 1997.[33] In California, black admissions at UCLA and Berkley dropped eighty percent,[34] while Latino admissions fell thirty-two percent and fifty percent, respectively.[35] The overarching implications of these astonishing drops are readily apparent. According to Linda Wightman, a Law School Admission Council Official, colorblind admissions will have a "'devastating impact' on minorities."[36] There were 90,000 law school applicants in 1991.[37] Whereas 26% of black admits gained admissions with the help of race-conscious admissions policies, that number would plummet to 3% in a colorblind admissions setting.[38]

The visible effects of the evisceration of race-conscious admission embody an element of foreboding for undergraduate admissions as well.[39] An

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28. *See* Paul Burka, *Fight* Bakke, TEX. MONTHLY, May 1996, at 228, 228 ("[U]nless the Supreme Court reviews the majority opinion [in *Hopwood*], affirmative action is dead."); *see also* Michael S. Greve, Hopwood *and Its Consequences*, 17 PACE L. REV. 1, 1 (1996) ("Elsewhere in the country, political pressures and threats of future litigation will prompt...universities to revise transparently discriminatory policies."); Caplan, *supra* note 27, at 26 ("[T]he *Hopwood* effect [has] begun killing off...affirmative action at one institution of higher education after another."); David Gergen, *Becoming "Race Savvy"—The End of Affirmative Action Brings Unexpectedly Dramatic Results*, U.S. NEWS & WORLD REP., June 2, 1997, at 78, 78 ("First results are in from efforts to abolish affirmative action, and the news is sobering, even startling."); S.C. Gwynne, *Back to the Future—Forced to Scuttle Affirmative Action, Law Schools See Minority Enrollment Plummet to 1963 Levels*, TIME, June 2, 1997, at 48, 49.

29. *See* Derek Bok & William G. Bowen, *Access to Success*, A.B.A. J., Feb. 1999, at 62, 63.

30. *See id.* at 63.

31. *See id.*

32. *See* Gwynne, *supra* note 28, at 48.

33. *See id.*

34. *See id.*; *see also* Gergen, *supra* note 28, at 78.

35. *See* Gwynne, *supra* note 28, at 48.

36. Caplan, *supra* note 27, at 28.

37. *See id.*

38. *See id.*

39. *See id.* at 27 ("[M]any leaders in higher education treat *Hopwood* as an

example of the consequences of eliminating race from admissions was provided by the University of California at Berkley. In 1989, when the University of California at Berkeley switched from a race-based system to one that considered both class and race, the changes were dramatic. "From '89 to '94, the share of admitted Hispanics dropped (from 21 percent to 17), as did the share of blacks (from 11 percent to 7)."[40]

Scholars have also argued that *Hopwood* can be read as standing for the proposition that there are no true lasting vestiges of discrimination, at least not vestiges rising to a level of seriousness that would merit racial preference measures.[41] The obvious conclusion, opponents say, is that affirmative action programs should be done away with altogether.[42] These commentators argue that preference programs, to the extent that they were merited in the first place (and there is widespread disagreement with respect to this question), have served their purpose and the time has come for their disintegration.[43] Those opposed to the continuation of affirmative action say that such programs were instituted in an attempt to get us to a place where we could achieve the ideal embodied in the Fourteenth Amendment.[44] Critics argue the Fourteenth's vision is one of a colorblind society in which one's race is irrelevant.[45] The claim is that the central purpose of the Equal Protection Clause is "to prevent the States from purposefully discriminating between individuals on the basis of race,"[46] and nothing more.

A new justification developed to contend with the criticisms which attacked affirmative action in its remedial cast. This new rationale relies on the claim that racial preferences facilitate needed, and otherwise unattainable,

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indication of where the future may lie....")

40. *Id.* at 28.

41. *See* Greve, *supra* note 28, at 6 ("[A]s the history of segregation recedes further into the distant past, it becomes progressively harder to document its present effects."); *see also* Orlando Patterson, *Why Can't We Find Consensus on Affirmative Action?*, *in* THE MORAL FOUNDATIONS OF CIVIL RIGHTS 77, 81 (Robert K. Fullenwider & Claudia Mills eds., 1986) (discussing how the perception that racism no longer exists erects a major obstacle to the implementation of affirmative action programs).

42. *See* Lino A. Graglia, Hopwood: *A Plea to End the "Affirmative Action" Fraud*, 2 TEX. F. ON CIV. L. & CIV. RTS. 105, 107 (1996) ("The receding of the era of segregation into the ever more distant past...makes the remedy justification for racial preferences ever more obviously untenable."); *see also* STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 25–26 (1991) (arguing that the current backlash against affirmative action may be a signal that the programs have run their course).

43. *See generally* Graglia, *supra* note 44, at 105–07.

44. *See* U.S. CONST. amend. XIV.

45. Those who oppose affirmative action argue that race-conscious decision-making works at cross-purposes to the achievement of a colorblind society, encouraging identification along racial lines rather than working towards an atmosphere of equality in which race does not figure prominently, if at all. *See, e.g.*, STEPHEN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBILE 539 (1997) ("Race-conscious policies make for more race-consciousness; they carry American society backward.").

46. Shaw v. Reno, 509 U.S. 630, 642 (1993).

diversity.[47] Critics, however, maintain that, in practice, the diversity rationale becomes synonymous with reverse racial discrimination through preferences.[48]

An essential criticism argues that affirmative action programs go against many liberal traditions that form the bedrock of our society, including the concepts of individualism, meritocracy, and the preference for legal rights.[49] The idea of preferences is particularly odious to society as a whole because it seems to rob one group of rights so as to secure them for another. In short, "[r]acial preferences appear to 'even the score'...only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white."[50] To its adversaries, affirmative action operates as a form of reverse discrimination in no way compatible with the colorblind vision and, therefore, should be eliminated entirely.

B. The Resilience of Racism as an Indication of the Continuing Need for Affirmative Action Policies

In evaluating affirmative action opposition, a critical question that must be posed is whether affirmative action has accomplished the goal that it was designed to accomplish.[51] Those who oppose the continuation of affirmative action policies suggest that affirmative action policies have contributed as much as they can to the pursuit of colorblindness; therefore, their continued operation only hurts society.[52] However, statistics provide a brief, yet striking illustration that discrimination persists and that, to the extent affirmative action can provide a solution, its continued operation is merited. Currently, black unemployment is nearly double that of white unemployment;[53] while one in every seven white children lives in poverty, one out of every two black children does.[54] Futhermore, while less than 3% of college graduates were unemployed according to 1993 statistics, whites were almost twice as likely to have gone to college as were their black counterparts.[55] Not only do these statistics indicate the persistence of present effects of discrimination, they also highlight the covert nature of racist practices.

Christopher Edley presents two anecdotes in his book *Not All Black and White: Affirmative Action, Race and American Values* that are clearly illustrative of the persistence of racism. Edley first tells of a "black tester [who] applied for an

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47. *See* Graglia, *supra* note 44, at 107.

48. *See id.* at 108.

49. *See* discussion *infra* Part II.

50. Hopwood v. Texas, 78 F.3d 932, 934–35 (5th Cir. 1996) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 528 (1989) (Scalia, J., concurring in the judgment)).

51. *See infra* text accompanying notes 156–65.

52. *See generally* RICHARD D. KAHLENBERG, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION ix–x (1996).

53. CHRISTOPHER EDLEY JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES 42 (1996).

54. *See id.* at 43.

55. *See id.*

advertised position as typist/receptionist."[56] The applicant was interviewed and heard nothing further.[57] "An identically qualified white tester was [subsequently] interviewed, offered a better position [than the one that had been advertised] that paid more than the receptionist job, and given tuition assistance."[58] Edley goes on to detail the experiences of another African-American who, upon asking about an advertised position in sales, was told that the job was an entry-level position washing cars, in contrast to what had been advertised.[59] Meanwhile, "the white applicant with identical credentials was immediately interviewed for the sales job."[60] It is true that these instances of discrimination do not point to instances of discriminatory practices within a particular educational system. Still, "[u]nequal education is a key variable in creating and sustaining these disparities."[61] Equal education, as augmented by the use of affirmative action programs, plays a prominent role in eliminating such glaring disparities.[62]

None of the foregoing is intended to suggest that the educational system is without its own documented instances of discriminatory practices.[63] For instance, the University of Texas' Law School was sued in 1946 by Mr. Sweatt who sought and was denied admission.[64] The state court hearing the case ordered the University of Texas to provide a law school for blacks.[65] Up until the time of Sweatt's suit, the Prairie View State Normal and Industrial College for Colored Teachers was the "only state-supported institution of higher learning open to black students in Texas, no [other] type of professional training was available to blacks."[66] Texas required the maintenance of "separate schools...for the white and colored children," both by state constitution and statute.[67] In response to the mandate of the state court, the law school created a separate "makeshift law school" for blacks.[68] The separate facility was without permanent staff, facilities or a library.[69]

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56. *Id.* at 48.
57. *See id.*
58. *Id.*
59. *See Id.*
60. *Id.*
61. *Id.* at 43 (discussing disparities in regards to affluence and achievement).
62. For instance, the number of doctoral degrees awarded to blacks rose 34% between 1988 and 1993, a time when affirmative action policies were aggressively employed. *See* Gilda R. Williams, *Key Words for Equality*, A.B.A. J., Feb. 1999, at 64, 65.
63. There are, however, statistics that are seemingly indicative of some discrimination within the educational system. In the 1960s, only one percent of all lawyers in the United States were black, while one percent of all doctors were. At that time, only a "handful" of minority students were admitted and enrolled in the nation's prominent schools. *See* Bok & Bowen, *supra* note 29, at 62.
64. Sweatt v. Painter, 339 U.S. 629 (1950).
65. Sweatt v. Painter, 210 S.W.2d 442 (Tex. Civ. App. 1948).
66. Hopwood v. Texas, 861 F. Supp. 551, 555 n.4 (W.D. Tex. 1994).
67. *Id.* at 554 (quoting TEX. CONST. art. VII, § 7 (1925, repealed 1969)).
68. *Id.* at 555.
69. *See id.*

Upon hearing Sweatt's appeal, the Supreme Court overturned the lower court's decision, opining that the provision of the makeshift law school was not equal.[70] The Court required that Sweatt be admitted to what, until that time, had been an all-white law school.[71] Despite receiving some scrutiny from the Supreme Court, The University of Texas continued to promulgate racially discriminatory practices well into the 1960s.[72]

The discriminatory practices of the 1950s and 1960s would not be easily eradicated, though, even with the backing of the Supreme Court. In the 1970s, Texas' discrimination came under fire when a court ordered the Department of Health, Education and Welfare ("HEW"), Office for Civil Rights ("OCR") to conduct an investigation of Texas' higher education system.[73] This investigation was the result of a lawsuit initiated in an attempt to get HEW to enforce certain provisions of Title VI.[74] Between 1978 and 1980, the OCR conducted a thorough inquiry into the higher education system of Texas.[75] The OCR mandated that Texas develop a plan to bring itself into compliance with Title VI.[76] The submitted plan enumerated a commitment to equal educational opportunity for blacks and Latinos.[77] However, in 1982, the Assistant Secretary of Education informed Texas officials that its plan was deficient[78] because the numbers the plan set as targets for black and Latino enrollees, as well as for graduate and professional programs, were too low.[79]

The situation continued to deteriorate and eventually lead to the OCR itself proposing 37 changes to the plan to bring about compliance.[80] The Texas plan, accepted in 1983, was subject to monitoring, which continued up until 1988.[81] This history is evidence of a persistent problem. Indeed, as of 1994, the

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70. Sweatt v. Painter, 339 U.S. 629, 635 (1950). The Supreme Court did not consider overturning *Plessy v. Ferguson*, 163 U.S. 537 (1896), that established the notion of separate but equal. *See id.* at 635–36. Instead, the Court took a very limited view of Sweatt's case, indicating that the State had to provide Sweatt with a legal education just as it did for applicants of any other group. *See id.* at 635. Since the makeshift school was not equal to the University's law school, the Court ordered the University of Texas to admit Sweatt. *See id.* at 636.

71. *See id.*

72. *See Hopwood*, 861 F. Supp. at 555 ("[T]he record reflects that during the 1950s, and into the 1960s, the University of Texas continued to implement discriminatory policies against both black and Mexican American students. Mexican American students were segregated in on-campus housing and assigned to a dormitory know as the 'barracks'.... Additionally, until the mid-1960s, the Board of Regents policy prohibited blacks from *living in or visiting* white dormitories." (emphasis added) (citations omitted)).

73. *See id.*

74. *See id.* at 555–56.

75. *See id.* at 556.

76. *See id.*

77. *See id.*

78. *See id.* (citing as one of the major factors the complete lack of a projected completion date).

79. *See id.*

80. *See id.*

81. *See id.*

DOE informed the Governor of Texas that the OCR would continue its oversight of Texas' operation of the educational system.[82] Specifically, this monitoring was necessitated to ensure the "elimin[ation] [of all] vestiges of its former de jure segregation."[83] Yet, despite clear evidence of an established and ongoing pattern of discrimination at work within higher education in the state, the Fifth Circuit refused to find in *Hopwood* that there was sufficient showing of past discrimination to legitimate the law school's remedial steps.[84]

Other universities likely were also guilty of discriminatory policies during this time.[85] Assuming that even a few institutions of higher learning have employed such practices, societal apathy towards remedying discriminatory practices in education is puzzling. Existing hostility towards affirmative action does not derive from resistance to the idea of equality in the abstract.[86] Instead, vehement resistance to race-conscious policies stems from something much deeper, and consequently, more dangerous. Indeed, "white Americans increasingly reject racial injustice in principle, but are reluctant to accept the measures necessary to eliminate the injustice."[87]

C. The History and Evolution of Affirmative Action

1. Original Affirmative Action Theory—The Compensatory Model

In order to fully understand the basis for the widespread opposition to affirmative action policies it is necessary to first understand the evolution of affirmative action as a policy along with shifting attendant goals and rationales. The original goal of affirmative action, as a policy, was to equalize the starting point for all persons to allow for equal competition when it came to capitalizing on

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82. *See id.* at 557.

83. *Id.*

84. *See* Hopwood v. Texas, 78 F.3d 932, 951 (5th Cir. 1996). The Fifth Circuit held that scrutinization of the entire University of Texas system was "too expansive." *Id.* The court said that in order for the law school's admission policy to pass muster

> the State of Texas, through its legislature, would have to find that past segregation has present effects...it would have to determine the magnitude of those present effects; and it would need to limit carefully the "plus" given to applicants to remedy that harm.... Obviously, none of those predicates has been satisfied here.

Id.

85. *See, e.g.*, R. Richard Banks, Editorial, *Affirmative Action—The Black's Burden*, S.F. CHRON., July 26, 1990, at A19 ("For most of this country's history, the nation's top universities practiced the most effective form of affirmative action ever; the quota was for 100 percent white males.").

86. As Martin Luther King, Jr. remarked: "Whenever the issue of compensatory or preferential treatment for the Negro is raised, some of our friends recoil in horror. The Negro should be granted equality, they agree, but he should ask for nothing more." KING, *supra* note 20, at 147.

87. Thomas F. Pettigrew, *Race and Class in the 1980s: An Interactive View*, DAEDALUS, Spring 1981, at 252, 252.

already existing opportunity.[88] One of the first to address the need for affirmative action was Martin Luther King, Jr. In his book, *Why We Can't Wait*,[89] King argued for the creation of "some sort of compensatory consideration for the handicaps [the black man] has inherited from the past."[90] It was clear to King, and others who advocated the inception of affirmative action programs, that the starting point had to be equalized, the idea being to eliminate the enormous head start that whites enjoyed at that time.[91] King expressed this notion with keen insight: "It is obvious that if a man is entered at the starting line in a race three hundred years after another man, the first would have to perform some impossible feat in order to catch up with his fellow runner."[92] Original proponents of affirmative action, who included Presidents Kennedy and Johnson, saw clearly that the legacy of slavery coupled with segregation and Jim Crowism had made it impossible for blacks to compete with whites in a meaningful way.[93] Blacks had been denied opportunities for development all along.[94] At the time when contemplation of affirmative action policies began, blacks did not "qualify in anything like the way they would have had they developed under conditions of freedom and racial equality."[95]

President Johnson recognized the need to offset these handicaps, tracing their roots to discrimination, and began to design programs to alleviate the problem.[96] The way to do this was to compensate those who had suffered discrimination, making them whole again, thereby enabling them to compete equally in society.[97] Neither President Johnson nor Dr. King favored the usage of racial preferences in furtherance of this goal.[98] Instead, the idea was to compensate

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88. *See, e.g.*, KAHLENBERG, *supra* note 52, at 4, 8–9 (Kahlenberg argues that affirmative action was originally intended to ensure that race would cease to be a factor in decision-making); *see also* KING, *supra* note 20, at 147.

89. KING, *supra* note 20.

90. *Id.* at 146.

91. *See* KAHLENBERG, *supra* note 52, at 12 (noting that the "fundamental aim" of Johnson and other early affirmative action advocates was to "address unequal starting places").

92. KING, *supra* note 20, at 147.

93. As one commentator has put it, "The history of segregation in this country has provided a life of denial of basic needs for blacks." Roscoe C. Howard, Jr., *Getting It Wrong:* Hopwood v. Texas *and its Implications for Racial Diversity in Legal Education and Practice*, 31 NEW ENG. L. REV. 831, 849 (1997).

94. Slavery required that the slave be kept in a state of ignorance. Ignorance was the justification for, and the means of perpetuating, slavery as an institution. Attempts to keep blacks in a state of ignorance impacted history and the capacity of blacks to develop intellectually and compete. *See* KAHLENBERG, *supra* note 52, at 4–5. *See also* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 395 (1978) (noting that blacks had four times the chance of living in poverty that whites had); Howard, *supra* note 93, at 849 ("The effects of racism are prevalent in today's society.").

95. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY, 51–52 (1983).

96. *See* KAHLENBERG, *supra* note 52, at 6, 12.

97. *See id.* at 18–19.

98. *See id.* at 7, 11, 13–15. Both Johnson and King argued for increased social programming rather than institution of preferences. *See id.* Specifically, both men saw class-

for past wrongs and move forward once all members of society were on comparable footing. Therefore, affirmative action at its inception was justified solely on the basis of compensation.[99] Compensation, in turn, was viewed as a temporary measure that would act as a bridge, equipped with an inherent self-destruct mechanism that would be triggered once society could be trusted to disregard race altogether as a factor in all decision-making.[100]

However, the notion of compensation began to dwindle as the primary justification under which affirmative action was promulgated.[101] The uncoupling of affirmative action and compensation is the primary reason for the entrenched opposition which subsequently developed.[102] Abandoning compensation as the rationale for affirmative action led to expansive, at-large preferences.[103] Because the goal of preferences has been to put blacks on the societal rung where policy makers speculated they would have been "but for" discrimination, such policies violate many societal notions regarding the way things should be. While compensation involved a "negative" move, in that it did not mean the granting of special treatment to certain people to achieve colorblindness, diversity was "affirmative" in its goals. Compensation based affirmative action policies sought to strip away the effects of a historically entrenched system of discrimination. These policies did not necessarily entail a special allocation of rights to any particular group and were, therefore, less societally objectionable than diversity policies. Indeed, "Americans have supported compensation for past racial wrongs when...the victims benefit, wrongdoers pay, and the reparations are proportionate to the crime."[104]

In contrast, preferences instituted in accordance with the diversity rationale, did raise societal concern, precisely because they accorded differential treatment along racial lines. When the justification for affirmative action shifted to diversity and claimed that "even the most advantaged blacks deserve compensation, because if not for the accumulated sins of three hundred years they...[would be] more advantaged," acceptance became "very hard to swallow."[105] In short, those offended by preference systems argued that such systems favor situations wherein even the wealthiest minority applicant should be preferred over the poorest white.[106] As Kahlenberg points out, "[w]here the first notion was that poor kids have unequal opportunities and, because of past

based solutions as preferable to those involving race alone. *See id.* Kennedy, meanwhile, advocated programs aimed at seeking already existing eligible blacks, as opposed to altering the eligibility standards themselves. *See id.* at 11–12.

99. *See id.* at 28 ("[A]ffirmative action was initially justified as compensation for past discrimination....").

100. *See id.* at 16, 26.

101. *See id.* at 28.

102. *See id.* at 17.

103. *See id.* Preferences developed in response to the race riots of the 1960s. When Dr. King's Poor People's Campaign was rejected due to cost, preferences were implemented as a band-aid alternative policy. *See id.* at 16–17.

104. *Id.* at 18.

105. *Id.*

106. *See id.* at 17.

discrimination, an extraordinary number of poor kids are black, the new notion was that *every* individual black needs a break against *every* individual white, no matter the class status of either."[107]

The "leap" from a compensatorily-oriented system to one of preferences, "was never accepted by the American public,"[108] most likely because the shift was viewed as unjust and as lending entitlement where there was no corresponding merit.[109] Particularly problematic was the loss of any temporal restraint upon the operation of affirmative action programs. The inclusion of a temporal restraint on affirmative action policies under the compensatory model was critical to their acceptance. It was clear that "if colorblindness was [sic] the ultimate goal, any race-based program would...place the means in tension with the ends."[110] Society was far more receptive to affirmative action moves when they were predicated upon the compensatory model because both the ultimate goal—colorblindness—and the mechanism for attaining it—temporary compensation—were more palatable.

2. The New Affirmative Action—The Diversity Rationale and Beyond

The development of the diversity rationale coincided with the shift to the use of preferences.[111] The essence of the diversity rationale lies in the notion that certain race-conscious decisions by states are constitutionally permissible where they are made to achieve optimum diversity.[112] The idea of diversity as a sufficient state interest in the context of education was most fully developed in Justice Powell's decision in *Regents of the University of California v. Bakke*.[113]

At issue in *Bakke* was a University of California plan proscribing a certain number of set-aside seats for minority applicants.[114] The Court's decision consisted of two four-justice blocks, with Justice Powell commanding the swing vote. The block in favor of upholding the policy in *Bakke* opined that the use of racial preferences was acceptable as a means of remedying the effects of past discrimination.[115] The reasoning of this coalition was clearly compensatory based, as evidenced by its claim that an undeniable "legitimate and substantial interest [exists] in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination."[116] The Court illustrated its subscription to a compensation based model by tying the interest in redress to "the wrongs worked

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107. *Id.* (emphasis in original).
108. *Id.* at 18.
109. *See id.* at 18–19.
110. *Id.* at 13.
111. *See id.* at 16–18.
112. *See id.* at 40. Kahlenberg points out that the main goal of affirmative action policies rooted in diversity theory is to ensure that as many viewpoints as possible are represented. *Id.*
113. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
114. *See id.* at 275.
115. *See id.* at 307.
116. *Id.*

by specific instances of racial discrimination."[117] According to this portion of the Court, broad-based societal discrimination was not sufficient to justify the burdens to a class of individuals who lacked responsibility for the wrongs being redressed.[118]

Justice Powell's opinion in *Bakke*, on the other hand, seemed to signal a new conception of the role of affirmative action in society. Justice Powell's opinion diverged from that of the plurality upholding the University's plan in that it recognized the potential influence race might have on an individual's perspective. A portion of Powell's decision argued that seeking the educational benefits that would flow from a diverse student body, via the use of preferences, was a sufficiently compelling interest to allow the University of California's admissions plan to pass constitutional muster.[119] Powell argued, "[i]t is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation."[120] To a certain extent, Powell's advocacy of diversity was grounded in his notion that education occupies a particular place in the democratic system and that this special status lent particular credence to the diversity rationale.[121] In short, because the educational system was intended to develop the citizenry of the future, preparing students for a world full of varying cultures and perspectives meant including as many different viewpoints in educational as possible. For Justice Powell, the pursuit of diversity via affirmative action constituted a state interest entirely consistent with the aims of the Fourteenth Amendment.[122]

Learning in an environment infused with diverse elements would facilitate student learning in light of cultural difference.[123] More importantly, Powell believed diversity in education encouraged students, through interaction, to "reexamine even their most deeply held assumptions about themselves and their world."[124] In fact, race *does* matter, particularly in the formation of individual opinion and outlook.[125] The promotion of diversity as an interest was adopted by proponents of affirmative action and was viewed as lending strength to the evolving ideas regarding the potential for affirmative action programs. School administrators and lawyers alike latched onto Powell's diversity rationale as providing a "moderate and reasonable approach to affirmative action."[126]

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117. *Id.*

118. *See id.* at 310.

119. *See id.* at 313. *See, e.g.*, Richard H. Seaton, *Affirmative Action at the Crossroads*, 36 WASHBURN L.J. 248, 251 (1997).

120. *Bakke*, 438 U.S. at 312. (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result)).

121. *See id.*

122. *See id.* at 311–12.

123. *See id.* at 311–13.

124. *Id.* at 313 n.48 (quoting President Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WKLY., Sept. 26, 1977, at 7).

125. *See, e.g.*, Howard, *supra* note 93, at 849.

126. Seaton, *supra* note 119, at 249. In fact, the diversity rationale advocated and adhered to by a single justice, came to be viewed as established law where educational

It is important to note that Powell's decision in no way advocated the use of race as the sole criterion in admissions decisions. Instead, according to Powell, a university was authorized to consider race as one in a number of factors utilized to attain the "goal of a heterogeneous student body."[127] Despite his position that race could be used as a factor in admissions, Powell was careful to point out that any admissions program that set aside seats in the incoming class solely for disadvantaged minorities would not survive strict scrutiny.[128]

Powell's primary claim was that viewpoints are shaped according to race, gender, and other cultural factors. Diversity in the classroom would contribute to a "robust exchange of ideas."[129] An affirmative action model organized according to this perspective seeks to create racial harmony, justice, and understanding amongst different groups by bringing them together so as to ensure exposure to a cornucopia of differing voices and experiences. Exposure, according to Justice Powell, had a substantial impact on learning.[130]

This supposition was consistent with the key feature of the new theories of affirmative action that view race as a critical factor in the formation of one's identity. According to these newer theories, societal goods and benefits are allocated along racial lines.[131] The new affirmative action rationales seek to make evident the inextricable link between race and the distribution of societal benefits and burdens.[132] Theories of affirmative action that seek to redistribute benefits, posit the acknowledgment of the foregoing tie as indispensable.

In short, new affirmative action theories claim that "[r]ace does matter, and it always will, because race is not just skin color but a substantive cultural characteristic of such great importance that it ought to be a significant factor in the distribution of benefits and burdens."[133] Under this new framework, failure to take account of race is tantamount to racism.[134] Part and parcel of the diversity claim is that minorities bring to the discussion the perspectives of those who have experienced discrimination directly and that inclusion of these voices is a desirable end for affirmative action policies to pursue.[135]

D. Typical Criticisms of Modern Theories of Affirmative Action

Virulent opposition to affirmative action polices began to crystallize around the same time that the diversity rational emerged as the preferred defense

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affirmative action was concerned. *See id.* at 249–50.

127. *Bakke*, 438 U.S. at 314.

128. *See id.* at 274–75, 319–20. *See also* Seaton, *supra* note 119, at 249.

129. *Bakke*, 438 U.S. at 313.

130. *See id.*

131. *See* KAHLENBERG, *supra* note 52, at 28.

132. *See* discussion *infra* Part II.

133. KAHLENBERG, supra note 52, at 28.

134. *See* Barbara Applebaum, *Moral Paralysis and the Ethnocentric Fallacy*, 25 J. MORAL EDUC. 185, 187 (1996) (The new racist is "[s]omeone who does not actively acknowledge his/her dominance or...passive role in the perpetuation of the status quo....").

135. *See* KAHLENBERG, *supra* note 52, at 34.

for affirmative action. Some argue that the biggest flaw in the diversity model is found in the notion that race is meaningful as a substantive cultural characteristic determinative of the overall allocation of societal goods.[136] Richard Kahlenberg, in his book, *The Remedy: Class, Race and Affirmative Action*, asserts that the cause of divisiveness lies not in the foregoing assertion but, instead, over whether relevant aggregate differences between the races constitute a sufficient basis for individual preference.[137] According to Kahlenberg, the loss of correlation between the individuals harmed and those benefited is most offensive and egregious to critics. "'Societal discrimination' does not justify a classification that imposes disadvantages upon persons...who bear no responsibility for whatever harm the beneficiaries [a] special admissions program are thought to have suffered."[138]

Kahlenberg's objective is to identify the three primary faults that he claims are attributable to theories of affirmative action that are not couched in compensation. First, and most importantly, diversity-based, race-conscious policies eviscerate the burden placed on the courts by compensatory considerations—no longer is an individual required to make a specified showing of past discrimination for race-conscious treatment to be deemed legitimate.[139] Second, diversity circumvents the temporality inherent to the compensatory model.[140] New affirmative action theories do not require direct findings of historic or specific wrongs and, therefore, lack the temporal restraint that inherently exists in compensatorily based remedies.[141] Whereas any program developed in accordance with the compensation model intrinsically contains a self-destruct mechanism, theories aimed at redistribution seem devoid of any limiting principle.[142] Since diversity is not tethered to historic wrongs, Kahlenberg claims that its goal—promoting diversity—is valid so long as the "slightest imbalance exists."[143] A major problem, then, is that race-conscious programs couched in diversity have an infinite lifespan.[144] The identification of lasting vestiges of discrimination becomes irrelevant under diversity theory and therefore affirmative action ceases to be tethered to rectifying the current effects of prior discriminatory practices.[145]

Finally, Kahlenberg claims that diversity based, race sensitive programs are prone to a particularly forceful morality argument. The diversity rationale

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136. *See id.* at 28. Note, however, that Kahlenberg sets up the diversity rationale so as to leave it open to a common attack offered by both whites and blacks, namely that not all people of a certain culture can be posited as having a singular viewpoint. Specifically, Kahlenberg points out the obvious litany of problems attendant with the essentialization on the basis of race. However, Kahlenberg fails to address the intricacies that may make investigation of the relationship between race and its influence on the dissemination of societal goods worthwhile.

137. *See id.*

138. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 310 (1978).

139. *See* KAHLENBERG, *supra* note 52, at 39.

140. *See id.*

141. *See id.* at 39–40.

142. *See id.*

143. *Id.* at 40.

144. *See, e.g., id.*

145. *See id.* at 28.

involves an implicit devaluation of the claim that innocent whites are hurt while non-deserving minorities are helped by affirmative action.[146] Diversity theory can jettison the biggest philosophical objection to affirmative action, namely that affirmative action sometimes burdens innocent whites while doling out benefits to undeserving minorities,[147] by countering that the minority student deserves the benefit because he or she is capable of delivering a benefit to the university community that the white student cannot.[148] More specifically, diversity theory claims that the minority student contributes a diverse perspective, and since "diversity is part of [a] quality"[149] education, the preference is completely legitimate. Under the purview of affirmative action policies steeped in diversity, merit is sacrificed as a criteria, says Kahlenberg.[150] This trivialization of the "innocent white" objection plays a major part in offending the mainstream societal conscience.

The compensatory model's built in way of dealing with the innocence claim lies in the requirement for specified showings of past discrimination. There is a real fear of "forcing innocent persons...to bear the burdens of redressing grievances not of their making."[151] Compensation's requirement of a specific showing of discrimination ameliorates these concerns.[152] Not only does compensation ensure that affirmative action programs will meet a certain and finite end, it also guarantees that those receiving benefits are "worthy" of receiving them.[153] Non-compensatory theories, according to Kahlenberg, lack the critical conjunction between those to be helped and those who were specifically injured by the discriminatory practices.[154]

The displacement of remedial compensatory affirmative action by themes of redistribution has the potential to deeply offend the Anglo-American liberal political tradition as well. Critics argue the feebleness of theories which embrace race lies in the corollary that all members of an identified group should be included in remedial efforts, regardless of whether past instances of discrimination were suffered by each and every individual member of that group.[155] The suggestion that remedies address groups, rather than identifiably injured individuals, flies directly in the face of the American political tradition. This liberal tradition purportedly dictates that equal protection means that all people should be treated equally, not

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146. *See id.* at 40.

147. *See id.*

148. *See id.*

149. Townsend Davis, *Letter to the Editor*, N.Y. TIMES, May 19, 1989, at A34.

150. *See* KAHLENBERG, *supra* note 52, at 40.

151. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978).

152. *See* KAHLENBERG, *supra* note 52, at 40.

153. Opponents argue that preference based programs "may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth." *Bakke*, 438 U.S. at 298.

154. *See* KAHLENBERG, *supra* note 52, at 16–20, 39–40.

155. *See id.* at 33 ("The new vision emphasizes these differences between people, calling attention to aggregate differences and asserting that group differences are so important that they justify differential treatment.").

that some persons should be treated more equally than others.[156] The argument is that the rights engendered in the Fourteenth Amendment are rights guaranteed to the individual—that is, that they are "personal rights."[157] Rather than fostering a sense of unity, this line of arguments says, the use of affirmative action generally engenders group-obsession.[158] Affirmative action justifications which focus on the prominent way in which race factors into the distribution of societal goods allegedly violates the tenet of individualism which lies at the heart of the liberal political doctrine.[159] The claim is that race-conscious affirmative action encourages group identification by doling out benefits according to group membership and that this is antithetical to our political organization.[160] As one author has put it, "[t]he current preference system, based upon group entitlement, is wholly antithetical to the liberal constitutional traditions of the United States, based upon individual rights."[161]

Thus, opponents claim that instead of attaining the purported goal of the colorblind society envisioned by the compensatory model, race-conscious affirmative action programs have created a society in which identity politics play a central role.[162] The Fifth Circuit honed in on this issue in *Hopwood*, stating that "[d]iversity fosters, rather than minimizes, the use of race."[163] A preferential system that identifies a group, versus an identifiably injured individual, as the recipient of benefits flowing from a given remedy, goes against the grain of society's liberal tradition, especially that part of liberalism that dictates that individual rights are the apex of our political system.[164] The problem with race-consciousness is thus summarized: "[i]t treats minorities as a group, rather than as individuals. It may further remedial purposes but...may promote improper racial stereotypes, thus fueling racial hostility."[165]

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156. *See* Robert J. Corry, *Affirmative Action: An Innocent Generation's Equality Sacrificed*, 22 OHIO N.U. L. REV. 1177 (1996).

> [G]overnment obsession with race occurs in a nation unlike any other in its formal constitutional guarantees of equal protection of individuals under the same laws. The Constitution of the United States is anchored firmly in the principle of individual rights. There is no place for a group based system here.... The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection...to other individuals.

Id. at 1180, 1183.

157. *Id.* at 1182. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Id.* at 1183.

158. *See id.* at 1178.

159. *See, e.g.*, PIERRE MANENT, AN INTELLECTUAL HISTORY OF LIBERALISM xvi (1994) ("One of the principle 'ideas' of liberalism...is that of the 'individual.'").

160. *See* Corry, *supra* note 156, at 1183.

161. *Id.*

162. *See id.* at 1177–78; *see also* Graglia, *supra* note 42, at 106.

163. Hopwood v. Texas, 78 F.3d 932, 945 (5th Cir. 1996).

164. *See* Corry, *supra* note 156, at 1183; *see also* MANENT, *supra* note 159, at xvi.

165. *Hopwood*, 78 F.3d 932, 945.

As alluded to previously, many opponents believe that affirmative action has run its course.[166] Since the official impediments to achievement have been destroyed, the demand for affirmative action has become obsolete. The question becomes one of when previously disadvantaged minorities will be required to achieve on their own accord, without special help in the form of preferences. The basic assertion is that many other minorities have achieved, why haven't blacks?[167] Out of this same vein emanates the oft heard cry, "pull yourself up by your bootstraps." The success of other minorities within the United States, such as Asian Americans, seems to obviate the argument regarding the need to equalize educational access and performance. "[T]he embarrassing academic success of members of other once-disadvantaged racial groups makes the...justification for racial preferences ever more obviously untenable."[168] Bound up in this reproach is the belief that affirmative action creates double standards, and therefore, is responsible for an increase in racial tensions and hostilities.[169] The extension of this belief is that those let in under preference programs are underqualified, or simply inferior.[170] The employment of race-based programs, it is argued, "may in fact promote notions of racial inferiority and lead to politics of racial hostility."[171]

A final, and most problematic, strain of criticism boldly asserts that there are no lasting vestiges of discrimination. The pernicious nature of this notion is made readily apparent in the perception that "[o]ur generation is innocent of the sins of the past."[172] This criticism not only fails to see the operation of the past effects of discrimination in today's world but also arrogantly asserts that contemporary white society has no duty to rectify any current manifestations of the racism of old.[173] At its worst, this type of criticism reasons that the paucity of

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166. *See supra* text accompanying notes 106–29.

167. *See* Graglia, *supra* note 42, at 107.

168. *Id.*

169. *See, e.g.*, Corry, *supra* note 156, at 1181–85. *See also* Greve, *supra* note 28, at 6–8.

170. *See* Graglia, *supra* note 42, at 108 (arguing that the only reason affirmative action exists at all is because blacks, and other minorities, are not equiped to compete with whites); *see also* Greve, *supra* note 28, at 5 (asserting that there is a "paucity" of qualified minority applicants and that their admission under race-conscious policies contributes to increased and "recurrent racial tensions"). Some critics, such as Stephen L. Carter, have remarked on the negative impact of race-conscious preferences on the psyche of recipients themselves. *See generally* CARTER, *supra* note 42. Carter argues that affirmative action programs increase the propensity of blacks to identify themselves as victims. *See id.* at 210. Indeed, Carter says that under diversity theory, race becomes a proxy for the "ability to tell the story of the oppressed...." *Id.* This focus on victimization debilitates blacks according to Carter, preventing them from capitalizing on opportunities that exist independent of affirmative action. *See id.* Others have argued that the existence of preference programs may inculcate a sense of entitlement in the recipient. *See* Corry, *supra* note 156, at 1185. This sense of entitlement may encourage the recipient to rely on the existence of such programs, rather than on individual ability.

171. Hopwood v. Texas, 78 F.3d 932, 945 (5th Cir. 1996) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 476–77 (1989)).

172. Corry, *supra* note 156, at 1180.

173. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978).

qualified blacks, whether in jobs or education, is the result of inferiority. As Lino Graglia, a professor at the University of Texas Law School claims that, "[t]he only reason we have 'affirmative action' is that blacks...are not academically competitive, or close to competitive, with whites."[174] Graglia fails to account for the reason why blacks are not, in his opinion, competitive with whites.

Two factors collude to produce the dominant critiques of affirmative action. The first of these is societal ignorance regarding the value of whiteness and the rights and privileges that derive therefrom.[175] Disregard, or utter ignorance, of the role of white identity in society has lead to ease the assertion of white innocence for the sins of history. Specifically, the indignation created by the perception that innocent parties bear the cost of affirmative action programs can be attributed to societal refusal to recognize the operation of white privilege. This strain of criticism came to the forefront with the loss of compensation as the primary justification for affirmative action. The second factor at work is the liberal political regime, which is steeped in the doctrine of utilitarianism. In sum, the allocation of group rights without a specified showing of wrongs suffered violates many of liberalism's central tenets.[176] Part II of this Note contains a detailed investigation of the development of the correlation between racial identity and status, which illustrates the fallacy endemic to the claim of white innocence. Part III moves to a description of the primary tenets of liberal utilitarianism which, in collusion with the invisibility of white privilege, enables a majority of society to maintain that affirmative action is patently unfair.

II. DEBUNKING THE CONSTRUCT OF WHITE INNOCENCE—THE CONTINUED OPERATION OF WHITE PRIVILEGE

Unmasking the operation of white privilege is essential to the goal of reaching equality under modern theories of affirmative action. Currently there is a lack of cognizance regarding the value of whiteness that leads to the complete misfocus of affirmative action criticism. Today, compensatory-based models "search for the 'blameworthy' among 'innocent' individuals,"[177] while diversity models seek to confer benefits on one racial group, but fail to make the indispensable move of unmasking those bestowed on another. While dominant society has embraced theoretical notions of equality, the need to divest whites of the overprivilege they currently enjoy and secure rights to the underprivileged has been soundly rejected.[178] To dominant white society, equality simply mandates equal treatment of individuals under the law,[179] it does not require affirmative guarantees to be allocated along group lines.[180] Dominant society's failure to recognize the privilege inherent in white identity facilitates these feelings. Unless and until whiteness is

174. Graglia, *supra* note 42, at 108.
175. *See* discussion *infra* Part II.
176. *See* KAHLENBERG, *supra* note 52, at 34.
177. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1715 (1993).
178. *See id.* at 1760–61.
179. *See id.* at 1762.
180. *See id.*

viewed in light of its connection with the benefits it confers, affirmative action can only continue to be an empty promise. Society, without viewing the privilege associated with white identity in a group context, ostensibly never will be convinced that benefits to equalize conditions must be considered in a group, rather than an individual, context. To begin to convince the mainstream and opponents of affirmative action alike that the distribution of rights along racial lines is not so offensive as they may think, it is first necessary to uncover how it was that whiteness, as an identity, came to have a status.

A. How White Identity Came to Be Imbued with Worth

The construction of a racial hierarchy commenced around the same time that the practice of slavery began to be called into question.[181] Proponents of slavery desperately needed to develop a rationale legitimating slavery as an institution. According to Cheryl Harris, it was "their racial otherness that came to justify the subordinated status of Blacks."[182] The creation of a racial classification system, seeded in rules regarding national origin and descent, resulted in the creation of a social category of "negro."[183] Indeed, the entire concept of "negro" was related to "concepts of African, heathen and savage...."[184] From the start, the classification ascribed to black persons within the United States was one which encompassed a notion of inherent inferiority. The category, in and of itself, became sufficient to justify enslavement, thus serving the ultimate purpose of perpetuating slavery.[185] Thus, the very institution of slavery became hinged on racial identity.[186]

The degraded status of blacks did not end with slavery. Instead, the newly created racial hierarchy became an integral part of the slave codes and insinuated itself into laws up to, and including, Jim Crow policies. The embracing of this classification system in law codified the social stratification between the races. Racial identity, by virtue of this process, came to be "further merged with stratified social and legal status...."[187]

The drawing of the line between white and black, and the association engendered in each of free and slave, respectively, was a critical move. Because the presumption associated with whiteness as an identity was freedom, "whiteness

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181. *See id.* at 1717–21.

182. *Id.* at 1717.

183. *See id.*

184. CHRISTOPHER LASCH, THE WORLD OF NATIONS 17 (1974).

185. *See* Harris, *supra* note 177, at 1720 ("[T]he 'presumption of freedom [arose] from color [white]' and the 'black color or the race [raised] the presumption of slavery....'" (quoting THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES §§ 68–69, at 66–67 (1858)).

186. *See id.* at 1721.

187. *Id.* at 1717. Harris notes that the enveloping of racial classification in the cloak of law involved a key ideological step towards the new construction of race. Specifically, this ideological move involved creating the association of "Black" racial identity with enslavement, while "White" identity was merged with the concept of freedom. *See id.* at 1718.

became a shield from slavery, a highly volatile and unstable form of property."[188] A white identity was protection from the human commodification that was slavery. Through the evolution of this process, white identity became a well of privilege and protection. Without such an identity, one became the object, rather than the owner, of property.[189] Through the operation of the hierarchy, racial identity attached to something akin to a sort of property interest.[190] The interest in being white, while not a tangible item, was indeed property, in the sense that a right, itself, is property.[191]

In the modern world, racial identity operates on three levels. At its most base level, race acts on the development of self-identity and concepts of personhood.[192] Second, racial identity becomes intertwined with reputation at the point where internal and external identities intersect.[193] Finally, whiteness operates as property with respect to the extrinsic realm of the public and the law.[194] In other words, the legal status accorded to whiteness facilitates the metamorphosis of race. Where once race existed as a piece of one's identity, it has become tantamount to an object like property. As such, racial identity now operates in and upon the external world. Because a particular value has come to be attached to whiteness, maintenance of one's racial identity has become a vested interest.[195]

It is imperative to comprehend the operation of the status of whiteness because it lends perspective to the expectations endemic thereto. The law protects property and the expectations of rights associated with the ownership of property. Sometimes the law allows the expectations themselves to be treated as a form of property.[196] A property right in racial identity subsequently engenders an expectation regarding the availability of certain advantages to be drawn from the property possessed (in this instance whiteness).[197] Viewed in this light, property is a legal construct which values particular venerable expectations. Through its system of valuation, the law reinforces the distribution of power and the ordering of social relations that were produced by the racial hierarchy. However, it is of critical significance to note that the "inequalities that are produced and reproduced

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188. *Id.* at 1720.

189. *See id.* at 1721.

190. *See id.* at 1724.

191. The notion of a right as property has been widely recognized under the ambit of liberal political theory. As noted by James Madison, the concept of property encompasses all things to which "man may attach value and have a right." *See* 6 JAMES MADISON, THE WRITINGS OF JAMES MADISON 101 (Galliard Hunt ed., 1906) (quoting James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, at 175).

192. *See* Harris, *supra* note 177, at 1725.

193. *See id.*

194. *See id.*

195. *See id.*

196. Jeremy Bentham, *Security and Equality*, *in* PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 41, 51–52 (C.B. Macpherson ed., 1978). Bentham remarked that "[p]roperty is nothing but a basis of expectation [which consists of an] established expectation, in the persuasion of being able to draw such or such an advantage from the thing possessed...." *Id.*

197. *See id.* at 51–52; *see also* Harris, *supra* note 177, at 1729.

are not givens or inevitabilities, but rather are conscious selections regarding the structuring of social relations."[198] As the law has explicitly ratified white expectations to continued enjoyment of the privileges associated with their color and approved the false legitimacy of these inherently illegitimate expectations vis-à-vis its failure to expose their true nature, so has the racial hierarchy's conceptions of dominance and subordination been solidified and codified.[199]

Most menacing of all to the pursuit of real equality through redistribution of societal goods is the process of "reification" of race through law. The process of reification involves the creation of a "phantom objectivity."[200] This objectivity is attained by removal of the underlying relationship between people, that which really formulates the backdrop of racial identity, and substitution of a "thing." By making racial identity an objective "thing," the reification process enables racial identity to become detached from its moorings in the relationships between people and be viewed as an autonomously operating factor.[201] The "thing," in this case racial identity, takes on an autonomy "that seems so strictly rational and all embracing" that it veils the underlying nature of that 'thing,' again, the relationship between people.[202] Reification of whiteness renders it an objective thing, detaching it from its true foundation in the racial hierarchy. By making racial identity objective, reification makes the operation of white privilege invisible and, seemingly, natural.[203] The result is a ratification of the illegitimate expectations which whiteness creates and, by implication, a sanctioning of the positions of dominance and subordination that exist within the hierarchy of race.

B. The Most Dangerous Privilege—The Right to Exclude

The wholesale adoption by dominant society of the racial hierarchy, and the corollary ascription of dominant and subservient roles, has had dramatic implications for the potential of successful affirmative action policies. One of the biggest "achievements" of the racial classification system was the galvanization of an entire national identity. This was done via the creation of a relational model in which "masses of Americans could establish a positive and superior sense of identity" by contrasting their social status with that of blacks.[204] This model is indicative of the worst consequence of white privilege, chiefly, the right to exclude. The ability to exclude is the single most important right attached to whiteness,

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198. Harris, *supra* note 177, at 1730.

199. *See id.* at 1731.

200. *Id.* at 1730.

201. *See id.*

202. *Id. See also* GEORG LUKACS, HISTORY AND CLASS CONSCIOUSNESS 83 (Rodney Livingstone trans., 1971).

203. *See* J.J. Scheurich, *Toward a White Discourse on White Racism, and a Difficult, Confusing, Painful Problem that Requires Many Voices, Many Perspectives*, EDUC. RESEARCHER, Nov. 1993, at 4, 7 (noting that the consequence of dominance is that "styles of thinking, acting, speaking, and behaving of the dominant group have become the socially correct or privileged way of thinking, acting, speaking, and behaving").

204. Harris, *supra* note 177, at 1743 (quoting Alan W.C. Green, *"Jim Crow," "Zip Coon": The Northern Origin of Negro Minstrelsy*, 11 MASS. REV. 385, 395 (1970)).

particularly when viewed in lieu of its portent for opposition to affirmative action. Just as ownership of real property entitles the owner to exclude others from land, so too does whiteness involve the privilege of excluding others from the benefits associated with a white identity. Harris remarks that "[t]he possessors of whiteness were granted the legal right to exclude others from the privileges inhering in whiteness; whiteness [is] an exclusive club whose membership [is] closely and grudgingly guarded."[205] "Ownership" of these privileges includes not only the right to exclude, but also the right to subordinate others where the fulfillment of rights in accordance with societally-esteemed expectations requires. This benefit, which coexists with racial identity, is that which proves to be most problematic for affirmative action programs seeking redistribution.

Though the association of privilege with white identity coincided with the construction of a racial hierarchy aimed at justifying the institution of slavery, that in no way should lead to the conclusion that the operation of white privilege died with slavery. In fact, the valuable status of a white identity is alive and well.[206] Though racial classification is seemingly more benign than it used to be, its consequences are still both dramatic and serious.[207] Today, a person's race "shapes how they are treated, where they are accepted" and, most importantly, "what doors are open to them."[208] Whites are taught to conceive of racism as putting others at a disadvantage, yet are encouraged to remain oblivious to the correlation between their own race and the overprivilege accorded therewith.[209] The failure to acknowledge, the acquiescence in, and the reliance upon, the hierarchical status quo enables whites to argue against affirmative action without appearing inconsistent. "[W]hites are taught to think of their lives as morally neutral [and] normative...."[210]

Further complicating the so-called white innocence claim is liberalism's focus on the individual. According to liberal political theory, "[t]he individual...is naturally entitled to 'rights' that...are attributed to him independently of his function or place in society."[211] So long as dominance, and the benefits flowing therefrom, remain invisible to whites, white society can continue to enjoy the rights and privileges that are conferred by their racial identity while staunchly opposing the allocation of rights to blacks under redistributive affirmative action theories. And all of this can be achieved while whites maintain the cloak of meritocracy and strict equality.[212]

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205. *Id.* at 1736.

206. *See* Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, INDEP. SCH., Winter 1990, at 31, 31.

207. As one author has noted, "[b]lacks suffer, in one form or another, at one time or another, racism—prejudging, not the individual as an individual, but the individual as a member of his or her race." Howard, *supra* note 93, at 858.

208. *Id.* at 849.

209. *See* McIntosh, *supra* note 206, at 31.

210. *Id.* at 31–33.

211. MANENT, *supra* note 159, at xvi.

212. "The perception that racism no longer exists and the refusal to recognize the realities of historically derived and structurally reinforced patters of exclusion together

This cycle is perpetuated and encouraged by the utilitarian underpinnings of American-style democracy. As will be demonstrated in the next section, this leads to a perpetuation of the invisibility of white privilege. Without clear recognition of the operation of white identity as a status, affirmative action will continue to inappropriately focus on the most narrow scope of identifying those injured by discrimination and the burden of remediation required.

III. THE POLITICS OF UTILITARIANISM—WHY THE UTILITARIAN CLASSIFICATION OF RIGHTS PROVES PROBLEMATIC FOR AFFIRMATIVE ACTION

Utilitarianism, both as a doctrine regarding the definition of rights and as a political framework, is merited here because it continues to be one of the primary foundations of American politics.[213] Additionally, many tenets of utilitarianism, as previously discussed, underlie many of the criticisms of affirmative action in its diversity cast.[214] This section illustrates how the concepts of utilitarianism that prevail in political discourse act as a limitation upon the potential operation of affirmative action. In order to explain how best to ameliorate such difficulties, it is imperative to first flesh out the problems that utilitarianism poses for affirmative action.

A. A Brief History of the Development of Utilitarianism

John Stuart Mill was one of the primary architects of utilitarianism, a doctrine that was developed in an attempt to furnish a normative theory of morality.[215] Mill claimed that any principles which were to act as the underpinnings of morality needed to be self-evident.[216] Underlying all conceptions of morality, Mill said, is the defining characteristic of 'utility.'[217] According to Mill, utility is the extent to which individual actions serve the ends of achieving life's ultimate purpose.[218] Utilitarianism posits happiness as the ultimate goal of life and claims that it is the driving force behind concepts of morality and moral obligation.[219] Conceptually speaking, utility was not intended as a means of distinguishing

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constitute a major obstacle to the achievement [of equality]." Patterson, *supra* note 41, at 81.

213. *See, e.g.*, JAMES MEADOWCRAFT, THE LIBERAL POLITICAL TRADITION 1 (1996) (Liberalism is "an ongoing tradition...which continues to exert a profound influence over political thought and action."); *see also* Ronald Dworkin, *Rights as Trumps*, *in* THEORIES OF RIGHTS 153 (Jeremy Waldron ed., 1984).

214. *See* discussion *supra* Part I.D.

215. *See* John Stuart Mill, *Utilitarianism*, *in* JOHN STUART MILL: A SELECTION OF HIS WORKS 149, 152 (John M. Robson ed., 1966). *See also* David Lyons, *Utility and Rights*, *in* THEORIES OF RIGHTS 110, 110 (Jeremy Waldron ed., 1984) (arguing that utilitarianism is "the only sound, fundamental basis for normative (or moral) appraisal....").

216. *See* MILL, *supra* note 215, at 152–53.

217. *See id.* at 153.

218. *See id.* at 158.

219. *See id.* at 156.

between actions on the basis of usefulness or preferability.[220] Instead, Mill reasoned that the concept of utility included those actions which had as their ends things which were merely agreeable or "ornamental" to the individual.[221]

In defining utility, Mill drew upon the works of Jeremy Bentham, the framer of the "greatest happiness principle." This principle seeks an "existence exempt...from pain, and as rich as possible in enjoyments, both in point of quality and quantity...."[222] Utilitarianism does not, however, define pleasure in singular terms. Rather, it is inclusive of all individual conceptions of what is required to attain personal happiness. Because of this inclusiveness, a system operating under utilitarian principles is bound to encounter situations in which there are competing concepts of pleasure. Thus, a key question becomes how to value the worth of competing notions of pleasure. Because utility is seen as a source of moral obligation,[223] the claim is that utility should be invoked to decide between incompatible obligations.[224]

Mill's argument is that preferences must be weighed on the basis of quality of pleasure to be derived therefrom, rather than quantity.

> Of two pleasures, if there be one to which all or almost all who have experience of both give a decided preference, irrespective of any feeling of moral obligation to prefer it, that is the more desirable pleasure. If one of the two is, by those who are competently acquainted with both, placed so far above the other that they prefer it, even though knowing it to be attended with a greater amount of discontent, and would not resign it for any quantity of the other pleasure which their nature is capable of, we are justified in ascribing to the preferred enjoyment a superiority in quality so far outweighing quantity as to render it, in comparison, of small account.[225]

Mill envisions a system of valuation in which those who have been privy to the experience of a variety of pleasurable situations will be relied upon for the construction of the hierarchy of worth.[226] This notion can be seen operating in relation to the racial hierarchy as a way to reinforce the system wherein one group (whites) has been entitled to experiences that have historically been denied to another group (blacks).

A further problem for affirmative action arises with respect to the utilitarian valuation of the individual pursuit of pleasure. Specifically, utilitarianism focuses on the attainment of individual happiness and, in so doing, seems to disregard the effects such pursuits may have on other individual members of society. Clearly this kind of focus can be quite problematic for affirmative action.

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220. *See id.*
221. *See id.*
222. *Id.* at 163.
223. *See id.* at 181.
224. *See id.*
225. *Id.* at 159.
226. *See id.* at 160, 163.

Although Mill disavowed the pursuit of individual happiness as being the apex utilitarianism was aimed at achieving,[227] he incongruously insisted that any feelings of duty towards others neither is, nor should be, what compels individual action.[228] Indeed, Mill notes that "[t]he great majority of good actions are intended not for the benefit of the world, but for that of individuals, of which the good of the world is made up...."[229]

The problematic nature of utilitarianism's disregard for the effect of individual actions on others is illustrated in Mill's remarks regarding virtuosity. Mill claims that "the thoughts of the most virtuous man need not...travel beyond the particular persons concerned, except so far as is necessary to assure himself that...he is not violating the rights—that is, the legitimate and authorized expectations—of anyone else."[230] This statement proves dually precarious for the possibilities of affirmative action in a political system grounded in utilitarianism. First, Mill's argument suggests that individuals need not be concerned, generally speaking, with the consequences of acting according to their particularized notions of pleasure. This argument constitutes yet another tool for whites to employ in denying and maintaining the privilege associated with their racial identity. More importantly, Mill's argument sets up the equation for the competition of rights, requiring that competing expectations be "authorized" and "legitimate." As will be discussed, this is a key problem with the utilitarian conception of rights.[231]

Utilitarianism "takes, as the goal of politics, the fulfilment of as many of people's goals...as possible."[232] Hence, a political system can be said to be functioning at its best when the highest number of individual citizen preferences are served by laws and policies. Utilitarianism's goal is to seek to discern the common good in society, that which all citizens desire, and strive for its achievement. In such a regime, "a political decision is justified if it promises to make citizens happier, or to fulfill more of their preferences...than any other decision could."[233] Thus, under utilitarian theory, minority[234] wishes and preferences are sacrificed to the pursuit of the common good. Broken down to its most basic formulation, utilitarianism dictates that the goal of a political system is to seek the greatest good for the greatest number of people in society as possible.[235] This conception of the political machinery has dangerous implications with regards to the definition of rights. Furthermore, the utilitarian definition of rights has serious consequences with respect to justifying policies involving affirmative action, particularly those of the redistributive cast.

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227. *See id.* at 170 (The individual must have in mind an "indissoluble association between his own happiness and the good of the whole.").

228. *See id.* at 172–73.

229. *Id.*

230. *See id.* at 172.

231. *See* discussion *infra* Part III.B.

232. Dworkin, *supra* note 213, at 153.

233. *Id.*

234. The term minority here is being used not in reference to a racial or cultural minority but, instead, with respect to a political minority in a society.

235. *See* Dworkin, *supra* note 213, at 153.

B. Rejecting Moral Rights—The Utilitarian's Myopic View of Rights

Utilitarianism conceives of rights as being cognizable only when they are legally recognized.[236] To the utilitarian, there is no such thing as a moral right because it is not socially recognized.[237] The utilitarian rejection of moral rights can be fatal to affirmative action. Rights in utilitarian rhetoric are synonymous with the idea of a valid claim to act.[238] Put differently, one can be said to hold a valid claim when, and only when, that claim is grounded in a legally or socially recognized right. This normative theory of rights further posits that the exercise of rights is not dependent upon a duty incumbent upon others to acknowledge or respect that right.[239] This is clearly problematic when applied to calls for affirmative action. Instead of conceiving of rights as corresponding with a duty, the utilitarian thinks of rights in terms of "immunity rights," which have a corresponding concept of a "disability."[240] This too is a foreboding concept because affirmative action programs often involve affirmative guarantees, versus a simple right to be free from discrimination.

An example of an immunity right is the right to free speech. The right to free speech exists independently of an obligation upon others not to interfere with an individual's right to exercise free speech.[241] The corresponding disability operates upon Congress. The disability prohibits Congress from enacting certain laws abridging the individual's right to free speech, but does not extend so far as to require the passage of legislation which would affirmatively protect or guarantee the immunity right.[242] The immunity right, then, is one that merely involves a freedom from outside interference, a sort of negative right, as opposed to being a right that is *affirmatively* protected through the imposition of an obligation upon others to honor the right.

The distinction made between moral and legal rights, encompassing the distinction between a disability and a duty, is central to the utilitarian argument. Utilitarianism squarely rejects the recognition of moral rights because moral rights must be understood in terms of a corresponding beneficial obligation.[243] A moral conception of rights dictates that a right is held by an individual "*if and only if* one is supposed to benefit from another person's compliance with a coercive...rule."[244] Utilitarianism must necessarily reject a conception of rights grounded in morality because the utilitarian doctrine is diametrically opposed to the notion that rights correspond with duties.

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236. ALISON DUNDES RENTELN, INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM 40 (1990).

237. *See* Lyons, *supra* note 215, at 111 (Moral rights are those rights that "exist independently of social recognition and enforcement.").

238. *See* RENTELN, *supra* note 236, at 40.

239. *Id.* at 41.

240. *See id.* at 40.

241. *See id.* at 41–42.

242. *See id.*

243. *See* Lyons, *supra* note 215, at 114; *see also* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 208 (1980).

244. Lyons, *supra* note 215, at 114 (emphasis added).

Furthermore, utilitarianism renounces moral rights precisely because they exist independent of social recognition or enforcement.[245] Moral rights "are independent of particular circumstances and do not depend on any special conditions,"[246] like legal affirmation. Thus, moral rights cannot be accepted by the utilitarian because they lack the normative grounding fundamental to utilitarian theory. Utilitarians, therefore, assume that there is a clear delineation between moral rights and the pursuit for overall human welfare, the central tenet of utilitarian doctrine.

Moral rights are objectionable not only because they lack social recognition but also because they necessarily imply a correlation between rights and duties. Again, utilitarianism's specific rejection of the tie between rights and duties renders recognition of white privilege nearly impossible. Without this recognition, there can be no meaningful solution.[247] If accepted, moral rights would provide the grounds for the appraisal of law and other social institutions, a system of appraisal antithetical to utilitarianism's rubric of assessment. Moral rights carry with them the expectation that institutions will be erected with an eye towards respect and furtherance of such rights.[248] Such a proposition would certainly require more than just striving towards color-blindness were it applied to affirmative action. Utilitarianism, however, requires that institutions and rights be evaluated solely with respect to the promotion of human welfare, welfare being the satisfaction of overall citizen desires.[249] The assumption, implicit in the foregoing argument, is that moral rights neither fit perfectly nor converge with legal rights.[250] This may not necessarily be the case.

David Lyons' "theory of moral rights exclusion" discusses the way in which utilitarians conceive of moral rights working at odds with the utilitarian goal.[251] Lyons' theory describes the way in which a moral right, at some point, gains enough currency to warrant individual exercise of that right. According to Lyons, when a moral right has reached this point, it has achieved the "argumentative threshold" and gains normative force.[252] The potential for this occurrence is precisely what leads to the utilitarian rejection of moral rights. Rejection is predicated on the fact that once the argumentative threshold is reached, a presumption is created against interference upon the individual exercise

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245. *See id.* at 111.

246. *Id.* at 112.

247. As Terry Carter has pointed out, in light of the fact that black and white lawyers have vastly different opinions of the justice system, "The starting point has long been and remains simple: recognizing that there is a problem. But that sometimes seems as difficult to achieve as the solutions themselves." Terry Carter, *Divided Justice*, A.B.A. J., Feb. 1999, at 42, 42.

248. *See* Lyons, *supra* note 215, at 114.

249. *See id.* (arguing that the utilitarian is only concerned with the evaluation of institutions based on their furtherance of human welfare). Lyons points out the problem with this argument lies in the assumption that consideration of moral rights would diverge substantially from consideration of welfare, that the two are mutually exclusive. *Id.*

250. *See id.* at 114.

251. *See id.* at 112–15.

252. *Id.* at 115.

of the right.[253] Under a system which recognized moral rights, but still organized itself according to the utilitarian goal of achieving human welfare (which is happiness), individual rights would purportedly run headlong into the pursuit of welfare.[254] Though the pursuit of welfare would be deemed morally relevant and would justify a course of action on welfare's behalf, in a scenario where that course of action constituted a mere "minimal increment of utility," it would be incapable of overcoming the argumentative threshold of rights.[255] Thus, the argument is that the recognition of moral rights is diametrically opposed to utilitarianism because in a moral rights regime, rights act as a limitation upon the utilitarian goal of fulfilling as many individual desires as possible.

Lyons' "inclusion thesis" refutes the idea that legal rights should, and do, exist independent of moral force, as posited by exclusion theory.[256] Inclusion theory suggests that institutions are responsible for the conferral of rights and that an unavoidable and integral result of this process is the granting of certain rights which ought not to be granted.[257] Another result of this process is that certain other rights are violated that should not be.[258] What is critical is the notion that this legal conferral, which is legal because society has established institutions consistent with legal rights rather than moral rights, is neutral.[259] Applying this misconception to affirmative action, one can see how white privilege becomes cloaked in neutrality, facilitating both its continued operation and invisibility. Hence, the utilitarian is convinced that there is no moral presumption involved in the requirement that these legal rights be respected. Mere legal rights, then, lack any moral force by which there might be compulsion for an individual to act in a certain way and, correspondingly, be free from interference by others. Therefore, from the legal conferral, it does not necessarily follow, as exclusion theory claims, that there is a mandate regarding how an individual should act in accordance with rights or with respect to the interference with those rights.[260] It is clear, Lyons maintains, that many legal rights do, in fact, carry moral weight, because without this weight there would be no "disability" prohibiting outside interference with the exercise of a right. Therefore, the dichotomy the utilitarian maintains between moral and legal rights may, in fact, be illusory. Employing Lyons' inclusion theory would perhaps persuade strict utilitarians to consider recognition of moral rights, as well as the indissoluble link between rights and duties.

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253. *See id.* at 114–15.

254. This, again, relies on the assumption that the goals underlying welfare and moral rights never coalesce. Thus, any incremental gain in welfare would be overborne by stronger individual moral rights.

255. *See* Lyons, *supra* note 215, at 120.

256. *See id.* at 112.

257. *See id.* at 116.

258. *See id.*

259. *See id.*

260. *See id.* at 112.

C. The Theory of Moral Correlativity and the Deceiving Nature of the Moral/Legal Dichotomy

Not only is the aforementioned distinction between moral and legal semantic in nature, but, so too, is the distinction between a "disability" and a duty. The reluctance of utilitarianism to recognize the validity of moral rights is predicated upon the fear that such a recognition will simultaneously require the recognition of corresponding duties. Should we recognize that blacks have a moral right to true equality, then whites may be said to have a corresponding duty to divest themselves of the ill-gotten gain received as a virtue of their privileged racial identity. Again, the utilitarian claims that rights exist only if enforceable,[261] which implies that the only rights are those existing by virtue of legislative enactment, those that are legally cognizable.

Alison Renteln argues, however, that rights and duties are actually "flip sides of the same coin."[262] Renteln maintains that one must not be persuaded by the utilitarian refusal to perceive the correlativity existing between rights and duties.[263] Indeed, the recognition of the relationship between the two is a fundamental predicate to the existence and operation of a right. Renteln proposes the doctrine of moral correlativity which dictates that in order to "hold rights one must be capable of and *willing* to perform duties...."[264] Rather than viewing the existence of a duty as eliminating or circumscribing a right, as normative utilitarianism does, moral correlativity encourages a new conceptualization of the relationship between duties and rights.[265] "The recognition of an obligation," according to the doctrine, "may well signify the presence of an implicit right," rather than being indicative of a limitation upon an already existing right.[266]

Moral correlativity also envisions a new way of conceiving of rights. The doctrine regards rights under the rubric of "due."[267] Instead, a view utilizing the concept of due requires that the individual look both forward and backward with respect to the exercise of rights.[268] An individual conscious of due, then, must look both ways at the rights/duty crossroads. Such a view would require whites to take account of the rights and privileges they have been accorded because of race and then consider what compensatory duty they may have to others who have suffered because they are not of a privileged race. When the individual considers what is "due" to others with respect to the privilege he or she enjoys in exercising a given right, rather than limiting the view to the appropriate scope of exercise of the right itself, he or she is acting according to moral correlativity. In sum, moral

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261. *See* Lyons, *supra* note 215, at 114.

262. RENTELN, *supra* note 236, at 43.

263. *Id.* at 44.

264. *Id.* (emphasis added).

265. *See id.* "Correlativity is crucial because it means that the framing of moral claims in terms other than rights is not necessarily problematic." *Id.* Renteln claims that recognizing correlativity does not, as critics suggest, "cheapen" rights. *See id.* at 43.

266. *Id.* at 44.

267. *See, e.g.*, FINNIS, *supra* note 243, at 208–09 (Finnis suggests that "where nobody has any duty..., *no one has any rights*." (emphasis in original)).

268. *See, e.g., id.* at 209. ("[D]ue looks both ways along a judicial relationship.").

correlativity takes into account not only "what is due to one,"[269] but also "what one is due to do."[270] Therefore, the theory of moral correlativity would be most useful in the affirmative action context as a tool by which white privilege could be exposed. This exposure might compel a recognition of the duties bound up in the exercise of rights.

D. Using a Functionalist Critique of Utilitarianism to Make Rights Stronger and Incorporate Moral Rights

A functionalist critique of utilitarianism could also be employed in this context to advocate the acceptance of moral rights and the theory of correlativity. Functionalism points up the problems with the alleged egalitarian underpinnings of utilitarianism by making clear the fallacy of alleged neutrality in the calculation of individual preferences.[271] By employing a functionalist critique of utilitarianism, affirmative action proponents can advocate the adoption of Ronald Dworkin's "model two" conception of rights.[272] Dworkin claims that all rights inherently carry moral force.[273] Recognition of the moral element of rights enables them to trump certain societal decisions regarding utility, which, in turn, strengthens the overall worth of rights.[274] Thus, adoption of a functionalist critique of utilitarianism may facilitate a wider acceptance of those affirmative action policies currently deemed offensive to our political regime.

The belief of many is that utilitarianism "can...provide a conception of how government treats people as equals, or...[at least] how government respects the fundamental requirement that it must treat people as equals."[275] This notion dovetails perfectly with the utilitarian rejection of those affirmative action policies that go beyond the colorblind vision because such policies would violate the deeply held conviction that all people are to be treated as equals. Allowing for preferences or redistribution would be a clear violation of this principle. "Utilitarianism claims that people are treated as equals when the preferences of each, weighted only for intensity, are balanced in the same scales, with no distinctions for persons or merit."[276] However, this egalitarian justification of utilitarianism is self-undermining because of the critical significance utilitarianism delegates to the views of those who hold profoundly non-neutral positions.[277] The undermining impact becomes particularly apparent when viewed in light of the notion that the preferences of some should count for more than those of others.[278]

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269. FINNIS, *supra* note 243, at 209.
270. *Id.*
271. *See supra* text accompanying notes 246–47.
272. *See infra* text accompanying notes 303–05.
273. *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 186–87 (1977).
274. *See* Dworkin, *supra* note 213, at 154.
275. *Id.*
276. *Id.* at 154 (arguing that utilitarianism views all desires as equally valid and worthy of fulfillment).
277. *See id.* at 155.
278. *See id.*

A proposed solution to the problem of specious neutrality is elucidated in Ronald Dworkin's concept of individual rights as trumps.[279] Dworkin argues that "[r]ights are best understood as trumps over...political decisions that state[] a goal for the community as a whole."[280] In other words, individual rights are at their strongest when they act as a trump on societal notions of utility. Under the trump theory, individual rights are only strong enough to act as trumps on the societal will when they carry moral force.[281] Without the trump capacity, the commitment to individual rights that the liberal tradition professes is imperfect. A political system organized according to utilitarianism sets up a situation primed for the political majority to capture the means of process. Allowing for the trump capacity of individual rights to exist ensures that the political minority will be protected from the preferences of the majority, who often completely disregard equality or egalitarianism.[282] This is precisely what is behind the current drive to dismantle existing affirmative action policies. As Dworkin points out, when society allows the utilitarian predilection for majority will to go unchecked, individual rights get trampled in the process.

The capture problem is particularly egregious when the preference involved deals with the behavior of others.[283] The reasons for this are two-fold. First, it can be said that preferences regarding the behavior of others generally involve moral preferences.[284] When moral preferences regarding how others should behave are counted in the political process, the so-called neutrality of utilitarianism is called into serious question.[285] Utilitarianism's purported egalitarianism is challenged even when the preference operating is one which deals with the kind of experience which the individual wishes to personally experience. The problem endemic to this kind of preference is that it necessarily devalues the motives and preferences of others, while simultaneously recognizing and affirming certain other types of individual preferences.[286] In the United States, white society's preferences are affirmed while those of societal minorities are disregarded. Utilitarianism becomes "unnecessarily inhospitable to the special and important ambitions of those who then lose control of a crucial aspect of their own self development."[287] This loss is the direct result of the inability of certain members of society to value and respect motives, other than their own, regarding proper means of self-development.

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279. *See id.* at 157.

280. *Id.* at 153.

281. *See id.* at 154.

282. *Id.* at 158. Dworkin says that establishing, for example, the right to political independence enables that right to later act as a trump. Thus, in a situation in which the majority seeks to exclude an individual in the distribution of goods or opportunities on the basis that a majority of people think that individual should have less because of who that individual is, or is not, would be prevented by the trumping.

283. *Id.* at 158–59.

284. *See id.*

285. *See id.*

286. *See id.*

287. *Id.*

One way to ameliorate these concerns is found in a strong conception of rights. If rights cannot act as trumps on utility, then the guarantee of any one individual right becomes an empty set.[288] Such a conception requires that where rights exist, they not be abridged simply in the name of utilitarian good. The functionalist conception of rights rejects the idea that "government is entitled to act on no more than a judgment that its act is likely to produce, overall, a benefit to the community. That admission would make [the] claim of a right pointless...."[289]

Dworkin argues that individual rights carry no weight when they can be overriden solely for the sake of utility.[290] The worse case scenario is the instance in which individual rights are abridged because their maintenance has become "inconvenient."[291] This is precisely what has happened in the instance of affirmative action. While initially, there was societal support for equality in the abstract, when affirmative action advocates started to argue for the redistribution of societal goods and the use of preferences, support dwindled.[292]

In a regime honoring the capacity of rights to act as trumps, a viable claim for the violation of individual rights in the name of societal utility can legitimately be made only when there is a stronger competing interest.[293] What commonly occurs under a utilitarian government is that the societal interest in the maintenance of order and security is seen as a valid competing interest in the weighing of individual rights, the outcome generally being that the societal interest wins out.[294] Maintenance of status quo power relationships is made easy precisely because societal interests are treated as valid competitors with individual interests. Dworkin claims it is necessary to "distinguish the 'rights' of the majority as such, which cannot count as a justification for overruling individual rights, and the personal rights of members of the majority, which might well count."[295] When society has a right to pursue any goal so long as it is in furtherance of the general good, it renders impossible a sincere valuation of any minority-held preferences. It is clear that when individual rights are put in direct competition with societal goals, individual rights will be annihilated every time.[296]

There are two potential models for society to follow with regards to the treatment of individual rights. The first model is the one which operates currently, wherein individual rights are treated as a competitor to the demands of the society at large.[297] The job of the government is to strike a balance between these two validly competitive interests.[298] Model one treats infringement and inflation of

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288. *See* DWORKIN, *supra* note 273, at 192.
289. *Id.*
290. *Id.* at 193.
291. *Id.*
292. *See supra* text accompanying footnotes 101–04; *supra* text accompanying footnotes 108–09; *supra* text accompanying footnote 133.
293. *See* DWORKIN, *supra* note 273, at 194.
294. *See id.*
295. *Id.* at 194.
296. *See id.*
297. *See id.* at 198.
298. *See id.*

rights as equally iniquitous.[299] Infringement is unjust because it works an individual wrong by denying the unencumbered exercise of a right.[300] On the other hand, inflation is considered unacceptable because society is cheated of a societal benefit as a result of the over-extension of an individual right.[301] This model takes social costs into serious consideration.[302] Model one shuns the implementation of government policies with high social costs, particularly those that provide little in the way of utility. In the cost-benefit analysis required under model one, affirmative rights are seriously contemplated, for they are more costly to society as a whole than are negative rights. This constitutes yet another reason for the rejection of moral rights.

In contrast, the second model finds abridgment of a right to be the more serious of the two potential transgressions.[303] Model two says that once rights are recognized, the government should act to cut off their exercise only when there is a compelling interest for doing so.[304] Adoption of model two's notion of rights necessarily requires the recognition of the inherent moral element of rights, without which there is no way to quantify the worth of competing rights. Model two requires that societal interests not be weighed in the scales used for legitimate, competing individual rights.[305] According to model two, competing rights exist only in situations where there are two equally worthy, *individually* held rights.

Widespread acceptance of the model two concept of rights would enable society to abandon some of its hostility towards moral rights. Dworkin points out that where rights exist, they do so regardless of whether they are legally recognized.[306] This being the case, it makes little sense to speak of the duty one has to obey the law, yet to shun the duty that moral correlativity insists is the companion to a right. Therefore, to embrace model two is to simultaneously recognize that rights have moral force and that, congruently, a legitimate government must recognize and respect this.

IV. CONCLUSION

Utilitarianism, because it focuses on the achievement of individual happiness, without regard to its affect on others, perpetuates the concealment of the operation of white privilege. By sustaining the dichotomy between moral and legal rights, utilitarianism further inhibits recognition of white privilege. According to utilitarianism, rights and duties share no interdependence. However, white privilege has, and does, come at the expense of others.

Viewing affirmative action through the lens of utilitarian theory, then, it is easy to see why a large number of people feel that the guarantee to be free from

299. *See id.* at 198.
300. *See id.* at 200.
301. *See id.*
302. *See id.*
303. *See id.*
304. *See id.*
305. *See supra* text accompanying notes 140–42.
306. *See* DWORKIN, *supra* note 273, at 193.

discrimination and to give equal opportunity to all members of society does not necessarily correlate with any duty to present anything in the way of affirmative guarantees for the provision of these opportunities. Utilitarianism leads individuals to view their exercise of rights as being entirely distinct and unrelated to any duties that may stem from the exercise of those rights. Society is willing to say that there should be equal access, but does not go so far as to ensure that the actualization of opportunity takes place. Doing so would clearly detract from the ability of the society as a whole to capitalize on the same educational opportunity and, therefore, is seen as not in fulfillment of the common good. If we accept the correlativity that Renteln urges, however, whites perhaps would be urged to begin thinking of a right in the sense of a due.

The solution is to view rights under the rubric of moral correlativity. The exercise of rights should be viewed in relation to their corresponding duties. Our society, because it is predicated upon utilitarian doctrine, views the identification of a duty as a circumscription of a right. Instead of taking this narrow view, the theory of moral correlativity would encourage society to see that the identification of an obligation may well imply the presence, rather than the absence, of rights.

Under the conception of due, not only do we seek to discern the rights that we hold as individuals, we also look to what is "due" with respect to others for allowing the privilege of enjoying those rights. Thus, with attention to affirmative action, whites could be persuaded that the promises of equal opportunity for all are empty without a corresponding affirmative educational guarantee furthering the ability to succeed. Such a guarantee would strengthen their own enjoyment of equal opportunity as well.

Employing Renteln's idea of due, white society would begin to recognize that they, in fact, exercise privileges simply by virtue of the fact that they are white. Currently, however, whites exercise the rights conferred by such privileges, yet are loathe to accept or recognize the existence of the latter. Indeed, whites are taught not to recognize their privilege.[307] Thus, the "[d]ominance [of the majority, here whites] when related to different groups in a society,...is best understood not only in the sense of power but as having certain privileges—invisible privileges."[308] The existence of these advantages are seen as unearned assets by those who recognize them.

The continued operation of a system of white privilege can be demonstrated by the fact that more people than not agree with the following statements.

> I can turn on television or open the front page of the paper and see people of my race widely represented...
>
> I can be sure my children will be given curricular materials that testify to the existence of their race.
>
> Whether I use checks, credit cards, or cash, I can count on my skin color not to work against the appearance of financial reliability.

307. *See* Applebaum, *supra* note 134, at 189–90.
308. *Id.* at 189.

> I can do well in a challenging situations without being called a credit to my race.[309]

It is the last of these which proves an especially poignant illustration of both the desperate need for and the primary objection to affirmative action. The fact that most whites, as members of the dominant society, can (and do) rely on the above enumerated rights on a daily basis and without a second thought, while minorities cannot, illustrates the clear presence of what has been referred to as white privilege.

The problem with these privileges is that they exist without the acknowledgment of those who hold them. Whites prefer to see the dividends which they garner from their racial identity as being the consequence of their own particular merit. The white individual is taught to think as follows:

> All of the rewards are offered in terms of the idea that I am receiving them because of my special, individual talents, abilities, and efforts. It is very easy, then, to convince myself that this individual specialness is true and to become deeply committed to a kind of personal egotism or arrogance.[310]

The objectification[311] which has been leant to white privilege has rendered its operation imperceptible to its beneficiaries. The arrogance of claims of innocence becomes particularly dangerous when coupled with liberal political thought. Whites focus in on individualism and reverence for meritocratic ideals. When affirmative action is viewed from this myopic standpoint, whites are prone to see affirmative action as violative of the political doctrine which they hold dear. Worse still, whites are likely to view affirmative action policies that impose a burden on whites as a personal affront. In short, "whites cannot be burdened with rectifying inequities that are the product of history."[312]

At the same time, whites, and even blacks, view those who benefit from affirmative action as being inferior and unable to make the cut. A whole group is seen as receiving benefits predicated on past discrimination when many members of that group did not suffer from that discrimination. Again, critics see affirmative action as the doling out of benefits to an overly broad group of people based on the construction of aggregate difference.[313] Thus, when taking the long view of affirmative action, it is the psychological toll taken on both whites and blacks which seems most troublesome.

In short, if we, as a society, decide that colorblindness is where we want to go, we are choosing to ignore the present effects of discrimination. Such oblivion would constitute, in and of itself, a nasty form of racism. We must instead, allow the view of race with respect to the effects which it has on one's ability and

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309. *Id.*

310. *Id.*

311. Here I am referring to the process of reification. *See supra* text accompanying footnotes 200–03.

312. Harris, *supra* note 177, at 1774.

313. *See* KAHLENBERG, *supra* note 52, at 17–18.

opportunity (for both blacks and whites) until that time when discrimination based on race has been eliminated.

In terms of "mending" affirmative action, whites must be forced into cognizance of the privilege conveyed by our skin color. The fight for survival of affirmative action gains credence through an application of Ronald Dworkin's call for a strong conception of rights. Under Dworkin's framework, white privilege and the rights of excluded and injured minority members which seek to be availed of that privilege can be seen as competing interests. As such, we cannot allow the maintenance of the status quo to trump the competing rights of minorities. According to Dworkin's analysis, this would be the model one conception of rights and would constitute a denigration of the rights of all of society's members since societal rights would be allowed to compete with important individual rights.

Instead, we must view affirmative action as an indispensable predicate to the guarantees of freedom from discrimination and equality of opportunity which dominant society has promised to the dominated for so long. "Without affirmative action, nondiscrimination can be a hollow formality that results in little actual change in people's lives."[314] Thinking of rights in terms of due will facilitate the realization that rights are correlated with duties. Whites, through exercise of their privilege, accumulate a duty to guarantee the same ability to capitalize on societal opportunity to those who have suffered because they have been without the privilege of the 'right' skin color.

Under Dworkin's functionalist notions, the right to affirmative action should be seen as inseparable from the right to acquire adequate skills to compete for an equal education. The guarantee of negative rights, which the liberal tradition is usually limited to, is not sufficient to make this promise see fruition. Those who advocate negative rights in society, and oppose the promise of affirmative moves, are the "haves," who are entitled to be concerned only with the protection of what they already have obtained.[315] Their basic needs have been met. We must not fall into this trap. Dominant society must supplant affirmative action attempts with other affirmative guarantees which help to shore up the success of educational affirmative action programs. If we do not make good on our promises to end discrimination and make real the pledge of equal opportunity, then not only are we fueling the fire of racial hatred, we are also deprecating the rights of all people, not just those injured by discrimination.

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314. EDLEY, *supra* note 53, at 52.

315. "Whites still get the best, high-paying jobs and blacks still get the mid- and lower-level jobs. But they say we don't need affirmative action." Carter, *supra* note 247, at 42 (quoting Fred D. Gray, Sr.).