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Reformist Myopia and the Imperative of Progress: Lessons for the Post-Brown Era

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Reformist Myopia and the Imperative of Progress: Lessons for the Post-*Brown* Era

Donald E. Lively*

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I. INTRODUCTION

Over the course of two centuries, constitutional law has evolved as both a source¹ and ratification² of moral development. The processes of constructing and interpreting the nation's charter have established a unique window through which it is possible to glimpse the fundamental concerns of bygone and present eras and to observe the competition of values and ordering of priorities that define the society. A survey of the complete record discloses innumerable conflicts of law and morality that have arisen, been resolved, and exist now primarily as historical reference points.³ It also reveals significant business that remains unfin-

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1. Constitutional interpretation that demanded official segregation's undoing, on grounds it was "inherently unequal," exemplifies the development of equal protection as a generating instrument of morality. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (stating that the separate but equal doctrine has no place in public education). The redefinition of cultural premises and preferences, in what was a formally segregated society, became the work of subsequent decisions enforcing the desegregation mandate. See, for example, *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958) (asserting that the Court's interpretation of the Fourteenth Amendment was the supreme law of land and was impregnable to a state law challenging its constitutional viability).

2. Constitutional interpretation that affirmed a challenged social and moral order includes *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896) (deferring to official segregation as a reasonable exercise of police power accounting for "established usages, customs and traditions of the people").

3. Substantive due process review that established economic liberty as a fundamental freedom earlier this century represents a prominent historical reference point. See, for example, *Loch-*

ished. Even as the nation has developed and reinvented itself,⁴ fundamental problems of race have endured as a seemingly immutable and intractable feature of its cultural landscape. Race was a crucial factor when the union was formed,⁵ and later when it ruptured and was reconstructed.⁶ It has persisted as an agent of profound division, confoundment, and nonresolution.

Racial progress in the United States is characterized by an evolutionary process that has yet to work through its final stage. From the abolition of slavery,⁷ the nation has lifted the comprehensive burdens on personal liberty that followed emancipation,⁸ dismantled segregation,⁹ and advanced to the point of at least suspecting and probably prohibiting any racial preference.¹⁰ Fundamental law has developed to

ner v. New York, 198 U.S. 45 (1905) (striking down a state maximum hour law for bakers on grounds that it invaded liberty of contract). In *Lochner*, the Court prioritized the ideologically driven freedom of contract, glossed onto the Fourteenth Amendment, in what some critics describe as an extension of social Darwinist values. See, for example, Laurence H. Tribe, *American Constitutional Law* § 8.4 at 570 (Foundation, 1988). Although economic liberty eventually was repudiated as a fundamental right, modern constitutional law texts allude heavily to *Lochner*, especially in contrasting the Court's resurrection of substantive due process to establish a right of privacy in cases such as *Roe v. Wade*, 410 U.S. 113, 153 (1973) (finding the right of privacy glossed onto the Fourteenth Amendment's Due Process Clause broad enough to house a woman's liberty to elect for an abortion). See, for example, William Lockhart, Yale Kamisar, Jesse Choper, and Steven Shiffrin, *Constitutional Law* 348-50, 414-59 (West, 1991).

4. By constitutional amendment after the Civil War, the nation abolished slavery, U.S. Const., Amend. XIII; established national citizenship for persons born or naturalized in the United States instead of deriving it from state citizenship, and guaranteed privileges and immunities of citizens, due process and equal protection, U.S. Const., Amend. XIV; and secured the right to vote from racial discrimination, U.S. Const., Amend. XV. The reconstruction amendments substantially redirected power and interest from state to national government. Donald E. Lively, *The Constitution and Race* 53 (Praeger, 1992).

5. As James Madison observed, the principal dividing lines at the Constitutional Convention were drawn over "having or not having slaves." Max Farrand, 1 *The Records of The Constitutional Convention of 1787* 486 (Oxford, 1937). The Constitution, as originally framed, accommodated slavery by establishing slave-referenced formulas for taxation and representation, U.S. Const., Art. I, §§ 2, 9; prohibiting congressional regulation of the slave trade until 1808, U.S. Const., Art. I, § 9; and providing for return of fugitive slaves, U.S. Const., Art. IV, § 2.

6. Slavery became the irreconcilable factor dividing North and South, eventually undoing the Union. See Lively, *Constitution and Race* at 23-33. The Fourteenth Amendment in particular was crucial to the establishment of citizenship and the extension of basic civil freedoms to blacks. *Id.* at 44-54. See note 4 for a discussion of the basic purpose and scope of the reconstruction amendments.

7. Slavery was abolished in 1865 by the Thirteenth Amendment. U.S. Const., Amend. XIII.

8. The immediate reaction of former slave states, upon the Thirteenth Amendment's ratification, was to enact the Black Codes, which vitiated new found freedoms and liberties and thus "preserved slavery in fact after it had been abolished in theory." Lively, *Constitution and Race* at 42-43.

9. *Brown*, 347 U.S. at 495 (invalidating racial segregation in public education).

10. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding that racial classifications, even if designed to remedy the nation's legacy of racial discrimination, are suspect and thus subject to strict scrutiny).

preclude formal discrimination, but generally has stopped short of accounting for subtle or unconscious racism.¹¹ Further evolution of law and morality, to the point of a final reckoning with the surviving aspects of racism, necessitates attention not just to the law's letter, interpretation, or even redirection. Formal legal change, as meaningful as it has been and difficult as it was to achieve, has evidenced its limited capacity as a means toward broad spectrum and deep-seated reform.¹² Essential to progress beyond rules that account for formal inequality is the development of standards that are as sophisticated as the modern variants of discrimination they need to discern.¹³ Equally, if not more significant, however, is the need for education and marketing strategies that communicate the reality that the society is not as color-blind as the law assumes¹⁴ and that further accounting for racial discrimination is in order. Crucial as well is a perspective that defines reformist strategy congruent with the full dimensions of the nation's racial legacy and does not misallocate or waste scarce reformist resources for change.

Measured against those imperatives, recent agendas for racial progress have been seriously misconceived and generally disappointing. With the massive challenges of the abolitionist, desegregation, and civil rights movements as a backdrop, and landmark achievements already towering on the constitutional landscape, a comparatively diminished stature may be inevitable for even the grandest modern proposal for racial progress. Reformist initiative and strategy, however, must be measured not merely against the work of the past but against the needs

11. That stopping point exists because of the Court's determination that an equal protection violation requires proof of discriminatory purpose. *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (finding that a system of capital punishment was not constitutionally defective, despite racially disproportionate results, without proof of discriminatory purpose); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977) (holding that a zoning ordinance excluding low income housing does not violate the Equal Protection Clause without proof of discriminatory purpose). Motive-based criteria have been criticized because they require discernment of subjective intent that can be hidden easily. See, for example, *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) (rejecting a purpose requirement in the First Amendment context because motive is elusive). Although the Court has noted that history is relevant for purposes of identifying discriminatory purpose, *Arlington Heights*, 429 U.S. at 265, it nonetheless has been unimpressed in the capital punishment context by historical evidence of a dual criminal justice system or the tendency of defense counsel to give different plea bargaining advice to black and white defendants. *McCleskey*, 481 U.S. at 321, 329 (Brennan dissenting) (noting historical racially significant differences in the operation of the criminal justice system and advice of counsel). Because analysis thus is confined to discerning overt or formal discrimination, modern forms of discrimination that are subtle or unconscious escape constitutional detection. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 319 (1987).

12. See notes 66-78 and accompanying text.

13. See note 11 and accompanying text.

14. In striking down racial preferences as a means of remediating societal discrimination, the Court has insisted on a generally fixed equal protection standard of racial neutrality. *Croson*, 488 U.S. at 493-94 (opinion of Justice O'Connor).

of the present. When assessed against modern imperatives, dominant priorities and strategies for change cast a particularly small shadow.

Contemporary agendas for further racial progress, at least those assuming an interventionist or management role for government, typically have as a premise the redefinition of power or reallocation of privilege. Such a strategy should not be surprising in a society that persistently has stressed group identity and used it to define status and distribute advantage.¹⁵ As a departure point for meaningful progress beyond formalism, and notwithstanding historical support for it,¹⁶ the management of group advantage has elicited significant misgiving with respect to its potential for achievement.¹⁷ What is now the lost constitutional cause of affirmative action¹⁸ consumed nearly a generation's worth of political and intellectual energy.¹⁹ Even if the Court had proved more

15. Owen Fiss has noted the "identity and existence" of black Americans insofar as "they view themselves as a group; their identity is in large part determined by membership in the group; their social status is linked to the status of the group; and much of our action, institutional and personal, is based on those perspectives." Owen Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107, 148 (1976).

16. The Civil War Amendments, although cast in terms of general personhood like original provisions accounting for slavery, generally are understood as accounting for basic civil and political rights traditionally denied blacks. See Lively, *Constitution and Race* at 39-56 (cited in note 4). Land distribution schemes to provide slaves with a means toward self-support were an early reconstruction concept. See John Hope Franklin, *Reconstruction After the Civil War* 114 (Chicago, 1961).

17. See, for example, *Croson*, 488 U.S. at 493-94 (opinion of Justice O'Connor) (finding that racially preferential policies stigmatize and thus victimize intended beneficiaries); Stephen L. Carter, *Reflections of an Affirmative Action Baby* 71-72 (Basic Books, 1991) (stating that racially preferential policies are low-cost and low-impact methodologies); Shelly Steele, *The Content of Our Character* 118-19 (St. Martin, 1990) (stating that racially preferential policies indulge trading in victimization).

18. See *Croson*, 488 U.S. at 493-94 (opinion of Justice O'Connor) (holding that remedial classifications must be strictly scrutinized and may not account for societal discrimination); *id.* at 520 (Scalia concurring) (arguing for the application of strict scrutiny to all racial classifications, which generally are not allowable except under extreme circumstances). Although minority preferences established by Congress in the broadcast licensing process have since been upheld, they represent a discrete avenue for promoting what was identified as an important federal interest in promoting diversity under the First Amendment. See *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3010 (1990) (upholding minority preferences in the broadcast licensing process). Critical to the Court's validation was not only the important government interest, but also a degree of deference to congressional findings that would not characterize the review of other governmental action. *Id.* at 3008-09. The 5-4 decision was authored by Justice Brennan and was supported by Justice Marshall, both of whom no longer are on the Court. Justice Marshall was replaced by Justice Thomas who, as a court of appeals judge, helped strike down gender preferences in the broadcast licensing process. See *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992).

19. The Court's first exposure to racially preferential policies occurred in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), in which it dismissed the claim as moot. Its first substantive decision on racial preferences upheld attention to race as a factor that, along with other diversifying considerations, a medical school could use in its admissions policy. See *Regents of the University of California v. Bakke*, 438 U.S. 265, 320 (1978) (opinion of Justice Powell). Initial groundwork for modern affirmative action as a means of remediating the nation's legacy of racial discrimination

receptive to remedial racial preferences, affirmative action strategy required heavy investment of reformist capital for what would have been relatively limited returns.²⁰ A significant lesson of affirmative action's constitutional failure is not just that it may stigmatize in its own way or facilitate bouts of racial politics that minorities are destined to lose.²¹ The Court itself has instructed that the management of group advantage by redistributing burdens and benefits is inconsonant with the equal protection guarantee.²² For many architects of racially significant reformist strategy, the Court's message has been lost or ignored.²³ Even as preferential proposals and policies were undone by the Court's insistence upon a color-blind Fourteenth Amendment,²⁴ reformist energy renewed itself in similar group-restrictive terms. Like the agenda for racial preferences, the case for special protection from racist speech has proposed a special allocation of constitutional interests.²⁵

The philosophy of racist speech management denotes a relatively insular, underdeveloped, and perilous effort to account for the harms it identifies and progress it envisions. Such a criticism does not undervalue the harm that may be attributed to racially stigmatizing expression. It may be conceded that the injury is as real and profound as proponents of regulation maintain,²⁶ and that the First Amendment has

and disadvantage was performed by President Lyndon Johnson, who observed that "[y]ou do not take a man, who for years has been hobbled by chains, liberate him, bring him to the starting line of the race, saying 'you are free to compete with all the others,' and still justly believe you have been completely fair. Thus, it is not enough to open the gates of opportunity. All our citizens must have the ability to walk through those gates. This is the next and more profound stage of the battle of civil rights." II Public Papers of the Presidents, Lyndon B. Johnson 635-40 (U.S. G.P.O., 1965) (quoted in Derrick Bell, *Race, Racism and American Law* § 9.13 at 894 (Little, Brown, 3d ed., 1992)).

20. Affirmative action, as framed over the past two decades, has been criticized for diverting attention and benefits from the more profoundly disadvantaged to a comparatively well-qualified subgroup likely to succeed without special attention. See William J. Wilson, *The Declining Significance of Race* 110 (Chicago, 1978) (criticizing attention to a relatively elite subgroup); Carter, *Affirmative Action Baby* at 71-72 (criticizing "racial justice on the cheap").

21. See *Croson*, 488 U.S. at 493-94 (opinion of Justice O'Connor) (noting the consequences of stigmatization and racial politics).

22. *Id.* (emphasizing the Equal Protection Clause guarantee's imperative of racial neutrality).

23. Initiatives to regulate racist hate speech share a similar philosophy of managing relative group advantage. The denouncement of racially preferential policies in *Croson*, however, has not deterred interest in racist speech management.

24. *Croson*, 488 U.S. at 493-94 (opinion of Justice O'Connor) (stating that the equal protection guarantee demands strict racial neutrality).

25. A primary exponent of racist speech regulation, Charles Lawrence, favors use of expressive control and sanctions when the victim is a minority but not when the victim is white. See Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L. J. 431, 450 n.82 (1990) (exempting from protection "persons who were vilified on the basis of their membership in dominant majority groups").

26. See notes 35-38 and accompanying text.

been qualified for less trenchant reasons.²⁷ Even factoring a discount for the charge that it is easier to oppose regulation in the abstract, when one has not borne the brunt of assaultive racist speech, the case for racist speech control is ultimately unpersuasive because it lacks general historical perspective, is underinclusive, and suffers from disproportionality. It ignores the limited returns and indulgence of imagery that ensue when legal change is uncoupled with coextensive moral development. The strategy for hate speech control overlooks the record of like methods over the course of this century that were either unsuccessful or counterproductive.²⁸ Bypassed also is the fact that in a functionally segregated society, the points of interracial contact are relatively scarce and the beneficiaries of regulation constitute a relatively discrete subgroup. A particularly awkward reality is that abasing intraracial expression represents a more extensive and profound source of harm.²⁹ Given the broad contours and consequences of racism that await reckoning, attention to a relatively narrow slice of racist injury betrays a poor distribution of reformist resources.

As presented so far, the racist speech agenda seems framed largely from tenured faculty positions and academic halls where intellectual output may be more the grist for publishing mills than an engaged concern with real world disadvantage. Given its limited objectives and tortuous theory, the strategy seems better structured to impress and provoke colleagues than to effect real change.³⁰ While scholarly exercise

27. Obscene expression is entirely unprotected under the First Amendment, for instance, so no constitutional demand exists for establishing harm from such expression as a condition for regulating it. *Paris Adult Theatre I v. Slaton*, 413 U.S. 60-62 (1973). Racially stigmatizing harm would seem a more consistently serious injury, moreover, than say the dubious economic harm of commercial appropriation when a broadcaster airs footage of an entertainer's performance that arguably may enhance economic value. See *Zablocki v. Scripps Howard Broadcasting Co.*, 433 U.S. 562, 575 (1977); *id.* at 580 n.2 (Powell dissenting).

28. See notes 85-96 and accompanying text.

29. See notes 117-23 and accompanying text.

30. Speech codes, like words themselves, do not speak as loudly as actions and depending upon circumstances may reveal more than they intended. The University of Louisville law faculty, for instance, recently adopted a resolution "unanimously urg[ing] all members of the law school community to take special care to avoid offensive statements or behavior which reasonably can be perceived as negative stereotyping or as racial, religious, sexual or other harassment" and describing such expression or conduct as "unprofessional and inconsistent with the fundamental values of our law school." Ben Hershberg, *Louisville Courier-Journal* 3 (Mar. 12, 1993). Despite some laudable ideals, the exercise seems relatively unambitious and even misleading. The claim to unanimity plays loose with facts insofar as some faculty members opposed the resolution. See Memorandum to Donald L. Burnett, Jr., Dean, from Russell L. Weaver, Professor of Law (Feb. 23, 1992). Such manipulation of reality undermines confidence in both motivation and achievement. The formalized value statement was generated at an institution that presently has one full-time black faculty member. *Id.* Despite belated progress toward enhancing faculty diversity pursuant to hiring decisions this year, see *id.*, respect for diversity extends to a student body that is only 5% black, see *id.*, in a community that is 30% black, see 38 Statistical Abstract of the United States 36 (1992),

is valuable in its own right, and need not be hostage to any imperative of pragmatism, proposals for social progress must expect serious and critical examination of their merit, utility, motive, and even harm. With its lack of vision and breadth, and considered against what should be more pressing reformist priorities, racist speech management risks being dismissed as a mere exercise in political correctness.³¹ While such a reading and result may not be disastrous to specific circumstances, it would be unfortunate if the imperative of racial progress was trivialized by the pursuit of more marginal and debatable concerns. This Article will examine how modern racist speech management strategy (1) seriously misreads or disregards history; (2) is grossly underinclusive and perhaps misleading with respect to the main sources of stigmatizing speech; and (3) represents a serious misallocation of scarce reformist resources.

II. RACIST SPEECH MANAGEMENT AND THE LESSONS OF HISTORY

The case for regulating racist speech has been presented in terms that implicate a broad spectrum of law and its sources. Racist speech management has been supported by reference to the law of torts,³² of the constitution,³³ and of nations.³⁴ A common premise of regulatory

and in contrast with a starting line-up for a school basketball team that is 100% black. Institutional resolutions under such circumstances suggest a classic accounting for appearance and a relatively inexpansive stand that comforts the souls of those who avoid the cost of real engagement and change. Such trade in the imagery of progress presents a legitimate source of concern that judgment is the function of professionals whose certified intellectual status blinds them to their perceptual limitations. The temptation to assume visionary superiority, bred by formally recognized intellectual prowess, is not always bridled with meaningful exposure to an engagement with truly disadvantaged persons or groups. When succumbed to, that temptation generates overconfidence in fair-mindedness and a sense that formal education has precluded the possibility of narrow-mindedness or even prejudice. Without recognition that academic development is no substitute for self-reflection and broad spectrum involvement, advocacy of change may be reducible to a lust for power that if gratified will generate results that are no less indulgent or insular than the output of the established order.

31. In concurring with the invalidation of a municipal anti-hate speech ordinance, Justice Blackmun expressed a "fear that the Court has been distracted from its proper mission by the temptation to decide the issue over 'politically correct speech' and 'cultural diversity.'" *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2561 (1992) (Blackmun concurring). Blackmun's suspicions were aroused by the majority's extreme intellectual gymnastics that protected an otherwise unprotected form of expression—fighting words—from viewpoint discrimination. *Id.* at 2545. The net result is that regulation may not protect the sensitivities of select groups from verbal assault. *Id.* In less contorted fashion, concurring justices found the ordinance invalid on grounds that it was overbroad. *Id.* at 2550 (White concurring); *id.* at 2561, (Stevens concurring).

32. See, for example, Richard Delgado, *Words That Wound: A Tort Action For Racial Insults, Epithets, and Name-Calling*, 17 Harv. CR-CL L. Rev. 133 (1982).

33. See, for example, Charles Lawrence, 1990 Duke L. J. at 438-49 (cited in note 25).

34. See, for example, Mari T. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2341-48 (1989) (stressing international legal consensus against racist speech).

exponents is that racist expression constitutes a verbal assault that profoundly injures its victims.³⁵ As Charles Lawrence has described it, such speech represents an "instantaneous . . . slap in the face that generates injury rather than dialogue."³⁶ Mari Matsuda characterizes hate speech as one of several "implements" of racism that "work in coordination, reinforcing existing conditions of domination."³⁷ From the stigmatizing consequences of racist speech, Lawrence has deduced a harm that implicates Fourteenth Amendment interests and necessitates a formal sanction.³⁸

Much criticism of racist speech management has been clothed in the First Amendment.³⁹ Commentators have devoted substantial attention to demonstrating why such control is generally vague,⁴⁰ overbroad,⁴¹ and inimical to constitutional and regulatory objectives.⁴² If the harm attributed to racist expression is as profound and real as regulatory advocates maintain, however, a facially sound case for speech control might be constructed. Relevant case law establishes that freedom of speech is not an absolute.⁴³ The Court has allowed states to abridge the First Amendment to the extent that either a compelling reason is established for regulation⁴⁴ or the speech at issue is classified as unprotected.⁴⁵

Insofar as assaultive racist speech causes identifiable harm, it is possible and even principled to maintain that it is without "significant social value" and, like obscenity or fighting words, should not be pro-

35. See, for example, Lawrence, 1990 Duke L. J. at 452.

36. *Id.*

37. Matsuda, 87 Mich. L. Rev. at 2335.

38. Lawrence, 1990 Duke L. J. at 439-40.

39. See, for example, Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 Duke L. J. 484 (generally resisting racist speech management as contrary to the First Amendment).

40. See, for example, Strossen, 1990 Duke L. J. at 526-30.

41. See, for example, *id.* at 524-25.

42. See, for example, *id.* at 507-23, 549-61; Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 Wm. & Mary L. Rev. 267, 305-11 (1991) (noting that speech management is at odds with constitutional and regulatory interests).

43. The idea that freedom of speech is an absolute was touted most notably by Justice Black. See, for example, *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 60-61 (1961) (Black dissenting) (stating that First Amendment is an "unequivocal command"). The Court, however, has rejected such absolutism. *Id.* at 49-51 (noting that some speech is outside the scope of the First Amendment or must be balanced against the state's regulatory interest).

44. *Id.* at 51 (finding speech freedom defeasible by "subordinating valid governmental interests"). See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that a state may not regulate advocacy of force or lawlessness minus showing of intent to incite and likelihood of imminent and illegal action).

45. See, for example, *Roth v. United States*, 354 U.S. 476, 484 (1957) (finding obscenity outside the protective scope of the First Amendment); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (finding fighting words outside the protective scope of the First Amendment).

tected.⁴⁶ Alternatively, it may be argued that regulatory interests at least should be balanced against First Amendment demands.⁴⁷ Even assuming that concerns with overbreadth and precision could be satisfied,⁴⁸ the regulatory agenda represents a dubious exercise that misreads history at various levels. Recent Fourteenth Amendment history discloses a profound animus toward group-referenced policy that establishes special status or immunity.⁴⁹ First Amendment history indicates a tendency to transform minority protective rules into methodologies that consolidate the dominant group's advantage.⁵⁰ The history of constitutional law, even when profound minority concerns are at stake, evidences a pattern of resistance and underachievement in accounting for them.⁵¹ Against that confluence of historical tendencies, the risk is not just that asking so little will result in achieving so little, but that apparent gain will be transformed into real loss.⁵²

Forceful repudiation of the case for group preferences, to remediate the nation's legacy of racial discrimination,⁵³ put reformists on notice that special accounting for the interests of a particular group is not a wise investment. In drastically narrowing the allowable circumstances for race-dependent remedial action,⁵⁴ the Court acknowledged the nation's "sorry history of both private and public discrimination."⁵⁵ At the same time, it refused to prioritize affirmative action over "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past

46. See, for example, Lawrence, 1990 Duke L. J. at 450-51 (cited in note 25).

47. See, for example, *id.* at 458.

48. An anti-hate speech ordinance, to pass constitutional scrutiny, may not protect select groups even if they may be the most obvious targets of verbal attack. See *R.A.V.*, 112 S. Ct. at 2545 (holding that a group-referenced anti-hate speech law was a function of unconstitutional viewpoint discrimination). As Justice White stressed, regulation that protects against "hurt feelings, offense, or resentment" or other "generalized reactions" is overbroad. *Id.* at 2559 (White concurring).

49. See notes 17-18, 21-22, 53-67 and accompanying text.

50. See notes 88-103 and accompanying text.

51. See notes 96-110 and accompanying text.

52. The peril is evidenced especially by speech management schemes designed to protect minorities but converted into instrumentalities of persecution. See notes 88-93 and accompanying text.

53. *Crason*, 488 U.S. at 493-94 (opinion of Justice O'Connor) (stressing the suspect nature of remedial classifications and the equal protection guarantee's demand of racial neutrality); *id.* at 735 (Scalia concurring) (stating that racial classifications must be strictly scrutinized in all but the most exigent circumstances).

54. The Court concluded that remedial racial preferences were allowable only to fix proven instances of discrimination. *Id.* at 509. Militating against even that limited possibility for preferential methods is the vexing requirement of first proving intentional discrimination. See note 11 and accompanying text.

55. *Id.* at 499.

wrongs.”⁵⁶ It may be maintained that the “dream” not only has been elusive, but that the Court’s decision confounds the possibility of realizing it in the future. The argument may be made too that the “ideal” of racial “irrelevance” under law, to the extent actualized now, consolidates accumulated racial advantage. The strategic interest in preferential methodology also may have waxed logically, as constitutional standards hardened to the point that they virtually defied proof of discrimination.⁵⁷ With dated criteria unable to detect and reckon with the sophisticated variants of discrimination characterizing the post-*Brown* era,⁵⁸ an attempted redirection of attention to wholesale remediation was not illogical.

The Court’s own resistance to affirmative action, moreover, is not especially persuasive insofar as it expresses concern with stigmatization⁵⁹ and the risks of racial politics.⁶⁰ Analysis seems disingenuous when it blames preferential policy for racial perceptions that predate it and casually rejects methodology that attempts to alter them.⁶¹ Notwithstanding the quality of reasoning, both the Court and the political process have confirmed that group-referenced benefits are a disfavored means of accounting for past injustice.⁶² The message is reinforced by enactment of the Civil Rights Act of 1991,⁶³ which although undoing a series of decisions that narrowly interpreted federal civil rights laws, left intact the Court’s rejection of group preferences as a remedial strategy.⁶⁴ A constitutional perspective unable to discern the legitimate and

56. *Id.* at 505-06.

57. See note 11 and accompanying text.

58. See *id.*

59. *Croson*, 488 U.S. at 493 (opinion of Justice O’Connor) (stating that racially preferential policies “carry a danger of stigmatic harm . . . [that may] promote notions of racial inferiority”).

60. *Id.* (noting the danger that racially preferential policies may promote “politics of racial hostility”).

61. Racial politics have permeated governance since the nation accommodated slavery at its founding, redistributed civil and political rights during reconstruction, and segregated on the basis of race. Lively, *Constitution and Race* at 159 (cited in note 4). Racial antagonism, fueled by politicians whose references to affirmative action are a subtle race-baiting method, has been a prominent aspect of recent elections. See, for example, Howard Fineman, et al., *The New Politics of Race*, *Newsweek* 22 (May 6, 1991). Even now, race has significant influence upon voting patterns. *Id.* Racial stereotypes thus reflect cultural perceptions already rooted in the nation’s history, which diversification may help overcome.

62. The Court has invalidated racial preferences and insisted that they be strictly scrutinized. *Croson*, 488 U.S. at 493-94. See also *id.* at 520 (Scalia concurring).

63. 42 U.S.C. § 1981 (1988).

64. The Civil Rights Act, among other things, curtails tardy challenges to affirmative action plans negotiated in a consent decree, overturning *Martin v. Wilks*, 490 U.S. 755 (1989); imposes on employers the burden of showing practices having a racially disparate impact are justified by business necessity, overturning *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989); and extends protection against racial discrimination in employment contracts to post-formation harassment, overturning *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

compelling nature of a state's interest in remedying the nation's compounding legacy of racial disadvantage, or to allow the same methodology that benefits seniority and military veterans, would seem to have little capacity for recognizing racially stigmatizing injury as a harm sufficient to justify deviation from First Amendment norms. Categorical resistance to management of group interest is difficult to understand, given a legacy of group-referenced disability schemes, except as a function of maintaining established distributions of power and advantage.⁶⁵ Insistence upon wholesale color-blind standards for a color-conscious society suggests an interest in avoiding even compelling logic and signals that development of more creative or sophisticated legal theory is a largely futile preoccupation. Modern patterns of review indicate that the constitutional deck is stacked against progress, reflecting the phenomenon described by Catharine MacKinnon that "changing an unequal status quo is discrimination, but allowing it to exist is not."⁶⁶ Instead of assuming responsibility for the harder task of inspiring moral redirection, racist speech management effectively conspires with the established order by demanding cosmetic change rather than a reshuffling of the cards of power. For wishful thinkers unwilling to draw the inference of a dead-end methodology from the affirmative action decisions or from recent political output, the Court's invalidation of a municipal hate speech ordinance should be convincing enough.⁶⁷ To make its point—that hate speech regulation referencing the interests of selected groups was unconstitutional—the Court turned settled First Amendment doctrine on its ear.⁶⁸

Resistance to redistributive or selective justice, although fixed and even overstated, has not deterred theoretical creativity in support of racist speech management. A serious effort exists, as noted previously, to establish racist speech control as a logical extension of the *Brown* legacy.⁶⁹ Apart from any problems that may exist in establishing that

65. For all of the court's efforts toward establishing that all racial classifications are equally invidious, the simple and undisputable reality is that they are not the same. It is patently evident that historically pernicious classifications are those that have been used by the dominant race to burden minorities. Since minorities have had little or no power to establish or enforce burdens on the majority race, and remedial classifications are not calculated to burden, reasoning that regards all racial classifications as equally suspect suggests a symmetry driven by analytical slickness.

66. Catharine MacKinnon, *Feminism Unmodified* 42 (Harvard, 1987).

67. See *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (striking down an anti-hate speech law as an unconstitutional exercise in viewpoint discrimination).

68. The Court essentially determined that unprotected expression could not be the subject of viewpoint discrimination. *Id.* at 2545. Justice White criticized the Court for ignoring the plain meaning of case law to the effect that certain categories of speech are unprotected entirely. *Id.* at 2552 (White concurring).

69. See note 38 and accompanying text.

connection,⁷⁰ a strategy that ties into *Brown* may assume too much about its imagery and too little about its achievements. The meaning and significance of *Brown* rest not just with the decision, which speech control advocates reference, but with its fate over the course of four decades. What began in 1954 as an epochal exercise in redefining the Constitution, and recrafting the society it governs, has yielded results that at best are uncertain and debatable and at worst are delusionary and damaging. A generation of public school students experienced little if any benefit from desegregation, which primarily begot widespread evasion, delay, and resistance.⁷¹ When the Court finally demanded real compliance and achievement,⁷² the perception of actual change on a national scale precipitated opposition and backlash—first in the political process and then in constitutional principle.⁷³ Thereafter, the potential for social engineering through the Fourteenth Amendment was curtailed by interpretations that limited the conditions for,⁷⁴ scope of,⁷⁵

70. See Strossen, 1990 Duke L. J. at 541-47 (cited in note 39) (stressing that segregation was a function of officially prescribed racism rather than of private speech).

71. Disregard of the *Brown* mandate was facilitated by legal interpretations that desegregation did not require integration, *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955) (responding to the Supreme Court's order to desegregate "with all deliberate speed"), and by the limited resources available to challenge noncompliance. Not until the mid-1960s, when the Justice Department was authorized to bring desegregation actions and federal educational funds were conditioned upon compliance with *Brown*, did meaningful progress toward compliance manifest itself. See Derrick Bell, *Race, Racism and American Law* § 7.3.2 at 550-51 (1991). As one judge had predicted in the course of desegregation litigation leading to *Brown*, tactical evasiveness promised that "these very infant plaintiffs . . . will probably be bringing suits for their children and grandchildren decades . . . hence." *Briggs v. Elliot*, 98 F. Supp. 529, 540 (E.D.S.C. 1951) (Waring dissenting). Desegregation efforts in fact have been disputed into the 1990s, when standards of review have become much more relaxed. See notes 68-72 and accompanying text.

72. See, for example, *Green v. County School Bd.*, 391 U.S. 430, 439 (1968) (insisting upon a desegregation "plan that promises realistically to work, and promises realistically to work now") (emphasis in original).

73. Richard Nixon was elected President in 1968 in part upon his criticism of and opposition to forceful application or extension of the desegregation mandate through means such as busing. See Lively, *Constitution and Race* at 118 (cited in note 4). Nixon won the election with a plurality of the total votes cast. Id. Critical to his triumph was the ardent segregationist campaign of George Wallace, who attracted enough votes to seal Nixon's victory. Id. Among other things, Nixon promised during his campaign to select Supreme Court nominees with a restrained vision of the Fourteenth Amendment. Id.

74. The duty to desegregate was conditioned upon proof of segregative intent. *Keyes v. School District No. 1*, 413 U.S. 189, 208 (1973). The resultant distinction between de jure and de facto segregation has been criticized as a false dichotomy, given the connection of modern functional segregation to official segregation. See, for example, id. at 216 (Douglas concurring); Paul Jacobs, *Prelude to Riot: A View of Urban America from the Bottom* 140 (Random House, 1967). As the precursor of the discriminatory intent requirement for proving an equal protection violation, insistence on proof of a de jure violation has proved a vexing demand. See note 11 and accompanying text.

75. Without proof of formal contributions to urban segregation by suburban communities, the Court has determined that metropolitan desegregation plans are unallowable. *Milliken v. Bradley*, 418 U.S. 717, 746-47 (1974). The decision created a ventilation opportunity for white

and duration of⁷⁶ relief. By the 1990s, *Brown's* insistence upon elimination of segregation "root and branch"⁷⁷ had been reduced to a demand for eradication of segregation "to the extent practicable."⁷⁸

For all the powerful imagery that the *Brown* decision and its early progeny project,⁷⁹ a final record of performance that includes an educational system "as separate and inherently unequal . . . in the future . . . as . . . in the past"⁸⁰ represents a model of significant underachievement. Striking down official segregation was an apt and belated exercise in interpreting the Constitution. Beyond that accounting for formalism, and given its ultimate unwinding by constitutional limiting principles,⁸¹ the legacy of *Brown* is important for the insight it provides into the relative value society has put on racial appearance and reality. The desegregation decision generally is one of the most revered in the Court's history, causing even conservative interpretivists awkwardness in squaring their theories of review with its result.⁸² The imagery it projects, however, enables society to hide from the underlying reality left untouched. Like the touting of color-blindness, in an era of pervasive group-consciousness,⁸³ the largely cosmetic and formal achievements of

flight and, as Justice Marshall observed, ensured "the same separate and inherently unequal education in the future as . . . in the past." *Id.* at 782 (Marshall dissenting).

76. Once desegregation is achieved (even if only in a fleeting sense) and a community resegregated as a function of population resettlement, no constitutional responsibility exists for integration maintenance. *Freeman v. Pitts*, 112 S. Ct. 1430, 1439, 1447-48 (1992) (finding no enduring duty to desegregate even though there was a quick reversion to segregated status). See note 72 and accompanying text.

77. *Green*, 391 U.S. at 438.

78. *Freeman*, 112 S. Ct. at 1446 (quoting *Bd. of Educ. v. Dowell*, 111 S. Ct. 630, 638 (1991)). The changed tone denoted a prioritization over permanent results and accommodation of racial preferences.

79. The case law contains forceful assertions to the effect, for instance, that "separate educational facilities are inherently unequal," *Brown*, 347 U.S. at 495, "constitutional rights . . . are not to be sacrificed or yielded to . . . violence and disorder," *Cooper*, 358 U.S. at 16, desegregation plans must work "realistically" and "now," *Green*, 391 U.S. at 439, and vestiges of racial discrimination must "be eliminated root and branch," *id.* at 438.

80. *Milliken v. Bradley*, 418 U.S. 717, 782 (1974) (Marshall dissenting).

81. See notes 74-78 and accompanying text.

82. Robert Bork, for instance, has urged fidelity to original intent and neutrality in application of constitutional principles. Robert H. Bork, *The Tempting of America* 144-51 (Free Press, 1990). The history of the Fourteenth Amendment suggests, however, that the framers contemplated segregation as a method not inconsistent with equality. See Lively, *Constitution and Race* at 110 (cited in note 4). The *Brown* Court sidestepped the problem with the observation that it could not turn the clock back to 1868 when the Amendment was adopted. *Brown*, 347 U.S. at 492. Bork, attempting to reconcile the result with his theory, suggests that the framer's intent had to give way if it meant vitiating the Fourteenth Amendment altogether. Bork, *The Tempting of America* at 82-83. The "either-or" choice Bork posits is false, however, as the separate but equal doctrine represented not a total negation of, but a limited understanding of, equality.

83. See *Croson*, 488 U.S. at 493-94 (stating that racially preferential policies must give way to the equal protection demand of race neutrality).

the *Brown* era suggest a real peril to reformism that may expect too much from innovation or redirection of the law. Regulation of racial wrong has proved vexingly different from the sanctioning of almost any other civil or criminal activity, given well-established habits of and easily identified opportunities for circumventing legal demands.⁸⁴ The *Brown* experience itself evidenced those tendencies and thus presents a dubious model for attempted reform of speech habits. Mere enactment of a law prohibiting offensive expression does not alter the predictability of subsequent equivocation toward and accommodation of the identified evil.⁸⁵ By attempting to imitate the perceived success of *Brown*, racist speech management assumes the danger of achievement that is more illusory than real.

While Fourteenth Amendment history has been unresponsive to group claims and concerns,⁸⁶ for the most part,⁸⁷ First Amendment history evidences that speech management strategy actually may be inimical to minority interests. In dissenting from a decision upholding group libel laws in *Beauharnais v. Illinois*,⁸⁸ Justice Black warned: "Another such victory and I am undone."⁸⁹ As Justice Black saw it, prohibition of expression that degraded, slurred, or offended minorities was more likely to imperil than protect them.⁹⁰ The record of speech management over the past half century generally bears out his concern. Libel law, a decade after *Beauharnais*, was invoked in an effort to put the civil rights movement out of business in the South,⁹¹ much like abolitionists were shut down there more than a century earlier.⁹² The fighting words

84. The history of resistance to racial progress is referred to in notes 71-78 and accompanying text and in notes 104-10 and accompanying text. As one critic has noted, no one can be expected to acknowledge wrongful purpose, and policy results are unlikely to be "so striking . . . as to permit only one inference—discrimination on the basis of a suspect criterion." Owen Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107, 142 (1976).

85. See notes 71-78, 104-10 and accompanying text.

86. See notes 49-52, 105-10 and accompanying text.

87. But see *Metro Broadcasting*, 110 S. Ct. 2997 (1990) (upholding racial preferences in the discrete circumstances of the broadcast licensing process).

88. 343 U.S. 250 (1952).

89. *Id.* at 275.

90. *Id.* at 274-75.

91. An Alabama jury thus awarded a \$500,000 damage award in a libel action based upon a newspaper advertisement by civil rights organizers that made minor mischaracterizations about the actions of police during a protest. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964). The verdict was overturned by the Supreme Court, which determined that a public official could not recover for defamation absent proof that a falsehood was disseminated with actual malice. *Id.* at 279-80.

92. Southern states, for instance, barred the distribution of abolitionist literature or the making of abolitionist speeches. See Lively, *Constitution and Race* at 11-34 (cited in note 4). Because the First Amendment was not incorporated through the Fourteenth Amendment until the twentieth century, see *Near v. Minnesota*, 283 U.S. 697, 707 (1931), such incidents did not present a freedom of expression problem under the Constitution.

doctrine, although conceived as a means of deterring expression that provokes retaliation or breach of the peace, likewise has a history of being turned against minorities.⁹³

Evidence suggests that the resurrection of hate speech regulation will not reverse those historical trends.⁹⁴ To guard against such misdirection, and the transformation of protective into oppressive methodology, it has been suggested that racist speech regulation should cut only one way. As so conceived, anti-hate speech laws would be enforced only when the victim of degrading speech is a minority.⁹⁵ The very urging of such a double standard, contemporaneous with clear constitutional trends against race-dependent attention or protection, suggests an exercise that not only is unattuned to recent trumpeting of constitutional color-blindness but is insular and disinterested in the lessons of history or considerations of practicality. The limited aims of group-referenced speech control arise at a time when, "after several hundred years of class-based discrimination, . . . the Court is unwilling to hold that a class-based remedy for that discrimination is permissible."⁹⁶ They are a focal point of forums and conferences,⁹⁷ even as individuals are saddled with the near impossible burden of proving they are specific "victims of discrimination" in a society where "racism . . . has been so pervasive that none . . . has managed to escape its impact."⁹⁸ From constitutional principle that "ignores the fact that for several hundred years Negroes have been discriminated against, not as individuals, but rather solely

93. See, for example, *Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Street v. New York*, 394 U.S. 576 (1969); *Edwards v. South Carolina*, 372 U.S. 229 (1963). Commentators have noted that, although the Court consistently has struck down fighting words convictions on grounds that the regulations were overbroad, the Court has left many cases unreviewed. See Stephen W. Gard, *Fighting Words as Free Speech*, 58 Wash. U. L. Q. 531, 564 (1980).

94. A University of Michigan speech code, before being struck down as vague and overbroad, was used to punish racist speech in two instances—including a black student's usage of the term "white trash" in a conversation with a white student. See Strossen, 1990 Duke L. J. at 5557 n.377 (cited in note 39).

95. Lawrence, 1990 Duke L. J. at 450 n.82 (cited in note 25) (proposing that regulation not cover "persons who were vilified on the basis of their membership in dominant majority groups").

96. *Regents of the University of California v. Bakke*, 438 U.S. 265, 400 (1978) (Marshall dissenting).

97. Evidencing the vast amount of intellectual resources tied up by the controversy over hate speech management are the numerous conferences and forums on the subject in recent years. See, for example, Symposium, *The State of Civil Liberties: Where Do We Go From Here?*, 27 Harv. CR-CL L. Rev. 339-406 (1992); Symposium, *Campus Hate Speech and the Constitution in the Aftermath of Doe v. University of Michigan*, 37 Wayne L. Rev. 1309-1525 (1991); Symposium, *Frontiers of Legal Thought II: The New First Amendment*, 1990 Duke L. J. 375-586 (1990). A three-day program on "Speech, Equality & Harm" was held at the University of Chicago Law School in March of 1993.

98. *Bakke*, 438 U.S. at 400 (Marshall dissenting).

because of the color of their skins,"⁹⁹ a message exists that meaningful progress requires a significantly grander moral and legal vision than the relatively discrete concern with and attack on racist speech. Stubborn touting of it as part of a reformist methodology suggests the possibility of a commitment toward maintaining life-support for a pet academic theory instead of contributing to the cause of meaningful progress.

Given the pertinent lessons of previous speech control experiments, and fresh evidence from their revival, it is mystifying that arguments for group protection still draw upon discredited or repudiated concepts. Like fighting words, racist expression has been characterized as speech that has no social value and that constitutes a verbal assault preempting reasoned dialogue toward truth.¹⁰⁰ The choice of fighting words doctrine as a role model is especially problematic. Since inventing the notion, the Court consistently has found regulation of such speech to be vague and overbroad.¹⁰¹ Not surprisingly, when challenged under the First Amendment, adaptation of the fighting words doctrine to the management of racist speech proved similarly defective.¹⁰² For a formula that offers little meaningful protection, but presents a high risk of harsh turnaround, racist speech management has commanded a degree of attention and even success¹⁰³ that seems vastly disproportionate to its real utility. First and Fourteenth Amendment interests alike will be fortunate if the concept remains essentially a matter for academic warfare. Reformist needs and broad spectrum progress will be worse off, however, to the extent that intellectual resources are tied up in relatively marginal pursuits.

Given the general failure of the racist speech control movement to factor in the most directly relevant aspects of history, it is not a shock to find obliviousness to long-term patterns of racially significant legal and moral development. Two centuries of racial reckoning disclose a national consistency in ordering priorities and underachieving through the law. Abolition of slavery, like subsequent racially significant reforms, accomplished a change in form as racist energy was redirected toward creation of an equivalent system in fact.¹⁰⁴ Despite the Four-

99. *Id.*

100. See notes 35-38 and accompanying text.

101. See note 95 and accompanying text.

102. See *Doe v. University of Mich.*, 721 F. Supp. 852, 867 (E.D. Mich. 1989) (striking down a hate speech policy prohibiting stigmatizing or victimizing verbal or physical behavior on grounds it was vague).

103. Those speech codes that have been struck down or abandoned nonetheless represent a degree of success insofar as they were adopted.

104. The Black Codes, as discussed in note 8, imposed comprehensive legal disabilities that denied real civil freedom and equality despite slavery's abolition. See Harold Hyman and William

teenth Amendment's subsequent eradication of the Black Codes,¹⁰⁵ a system of peonage survived into the early part of this century.¹⁰⁶ Official segregation was established as a methodology not only for maintaining racial separation but also for consolidating group advantage.¹⁰⁷ The eventual determination that "separate is inherently unequal,"¹⁰⁸ as noted previously,¹⁰⁹ eliminated overtly racist policy but was qualified in a way that enabled discrimination to operate subtly or unconsciously without constitutional significance.¹¹⁰ Historical patterns of legal reform and consequent rerouting of racist impulses indicate an established model of limited change that is more eager to account for appearance than to compel real progress. Successful enactment of hate speech laws promises a hollow victory to the extent it redirects racism into more secretive and insidious enterprises.¹¹¹ Methods that yield such results and taunt history denote poor strategy and undermine confidence in the wisdom of those responsible for it. At risk in the debate over racist speech regulation is not only the efficacy of policy but the credibility of those reformists whose priorities evidence practical disengagement, lack of perspective, and inept allocation of resources.

III. MANIPULATING REALITY TO FIT THE CAUSE

The case for racist speech management is troubling not only for its deficient historical perspective but for its lack of perspective or honesty in describing the problem. For all of the attention that racist hate speech has elicited in current law and literature,¹¹² it is a relatively

Wiecek, *Equal Justice Under the Law: Constitutional Development 1835-1875* at 319 (Harper, 1982).

105. The Civil Rights Act of 1866, accounting for basic rights to contract, own and transfer property, sue, travel, and be secure under the law, was an initial attempt to acquire the freedom that did not follow the Thirteenth Amendment. Given concern that civil rights legislation might be at risk of repeal when the South returned to the Union's fold, the Fourteenth Amendment, among other things, constitutionalized the 1866 Act. In the words of one supporter, it fixed the guarantees of citizenship "beyond [politics] . . . in the eternal firmament of the Constitution." Cong. Globe, 39 Cong., 1st Sess. 2462 (1866) (statement of Rep. Garfield).

106. *Butler v. Perry*, 240 U.S. 328 (1916).

107. Dissenting from the Court's validation of official segregation, Justice Harlan objected to an exclusionary method that connoted a "superior, dominant, ruling class of citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan dissenting), overruled by *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

108. *Brown*, 347 U.S. at 495.

109. See notes 9, 71-78 and accompanying text.

110. See note 11 and accompanying text.

111. Such a result would follow the pattern of discrimination, which when outlawed in its formal or visible sense, became a subtle presence. See Lawrence, 39 Stan. L. Rev. at 344-50 (cited in note 11).

112. A small but representative sampling of articles on the subject includes Robert Post, *Racist Speech, Democracy, and the First Amendment*, 43 Wm. & Mary L. Rev. 267 (1991); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 Nw. U. L. Rev.

marginal source of stigmatization and subordination. Reformist fixation upon expression suggests that anger, even though legitimate, has consumed judgment, clouded vision, and displaced interest in inspiring meaningful change. In a society that remains functionally segregated, many traditionally disadvantaged minorities have limited if any contact across racial lines. The imagery and conditioning effects of television, in contrast, are absorbed in virtually every household in the nation.¹¹³ Contemporary prime-time programming contains more series and shows featuring blacks than ever.¹¹⁴ The phenomenon is a function in part of the fact that black households watch considerably more television than white households.¹¹⁵ The images communicated by television, according to various researchers, tend "to reinforce social dominance and control with respect to preferred social relations between the races."¹¹⁶ The institutionalization of demeaning stereotypes as a mainstream source of profit generates and indulges caricatures and misperceptions that are communicated and digested in a voluntary but largely non-interactive process. Without an effective defense mechanism or competing source of definition, trade in stigmatization is compounded and is largely validated by programming strategy and viewer choice.

The nation's heritage of racism includes the awkward reality that most verbal racial blows are incidental to intragroup rather than intergroup experience. Missing from modern concern with stigmatizing speech, however, is any attention to the subcultural usage of class-conscious terminology referenced to racial physiognomy. Traditionally, the acceptability of trading in certain race-sensitive terms has depended upon the racial identity of their source.¹¹⁷ The distinction does not determine necessarily the risk of injury. Investment in the notion that harm is determined by the speaker's identity, moreover, subscribes to

343 (1991); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 Duke L. J. 484 (1990); Charles Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L. J. 484 (1990); Kenneth Karst, *Boundaries and Reason: Freedom of Expression and the Subordinating of Groups*, 1990 U. Ill. L. Rev. 95 (1990); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harv. CR-CL L. Rev. 133 (1982).

113. Television penetrates 98.2% of the nation's households. U.S. Bureau of Census, *Statistical Abstract of the United States: 1991* at 556 (11th ed.).

114. See Joshua Hammer, *Must Blacks Be Buffoons?*, Newsweek 70 (Oct. 26, 1992).

115. *Id.* (citing 1990 A.C. Nielsen Survey showing black households average nearly 70 hours of television viewing per week compared to 47 hours per week for nonblack households).

116. The emphasis tends to be on comedic roles with limited dimensions that indicate "fewer life opportunities, fewer resources, lower status, and a greater likelihood of victimization." Janette L. Dates and William Barlow, *Split-Image: African Americans in the Mass Media* 261 (Howard, 1991).

117. *FCC v. Pacifica Found.*, 438 U.S. 726, 775-76 (1978) (Brennan dissenting).

and perpetuates more racial, if not racist, mythology. Racially demeaning speech within a group may be especially effective in stigmatizing and reinforcing pernicious stereotypes. The childhood experience of Justice Clarence Thomas has been offered as a classic example in support of that point. Raised in a formally segregated society, Justice Thomas as a child regularly was taunted and belittled by other blacks because of his thick lips, kinky hair, and dark skin.¹¹⁸

Such intragroup differentiation, calculated to fortify an internal class and status hierarchy, discloses an especially perverse aspect of racism. The fact that the victimizers themselves are victimized by an especially perverse twist of racism's legacy makes the injury no less serious.¹¹⁹ To the extent stigmatizing speech is an evil that must be controlled, moreover, constitutional principle affords no support for distinguishing on the basis of source.¹²⁰ Whether a provable linkage between intragroup verbal degradation and injury exists in Justice Thomas's case, the perils of internal verbal warfare are bypassed largely by legal literature that focuses on interracial damage.¹²¹ Regulatory attention that is incremental and limited to cross-cultural incidents responds to deeply etched and easily recognized aspects and consequences of racism. It also may result from group sensitivity, poor perception, or dishonesty. Even if merely reflecting a historical conditioning process that induces recognition of and response to bright racial lines, narrowly framed speech management theories conveniently respect rather than challenge those divisions. The oversight, if not a function of unawareness, seems to represent a theory concerned more with posturing than achievement.

In fortifying his argument for regulating stigmatizing interracial expression, Professor Lawrence adverts to an incident of such victimizing speech that affected his own family. Lawrence mentions the work of some white students who painted racist slogans and pictures on a large board erected on a high school playing field. The drawing included various racist symbols and messages, singled out one particular African American student, and depicted "Ku Klux Klansmen . . . one of whom was saying that the student 'dies.' Next to the gun was a drawing of a

118. Frontline, *Public Hearing, Private Pain* (Public Broadcasting Service, Oct. 13, 1992).

119. See generally Kathy Russell, Midge Wilson, and Ronald Hall, *The Color Complex* 2-3, 95-99 (Harcourt Brace Jovanovich, 1992).

120. It would follow that if a particular group cannot be singled out for protection, *R.A.V.*, 112 S. Ct. at 2545, a distinction drawn on the basis of source represents an even more obvious case of viewpoint discrimination.

121. See, for example, Lawrence, 1990 Duke L. J. at 431 (cited in note 25); Matsuda, 87 Mich. L. Rev. at 2320 (cited in note 34). By contrast, a motion picture such as Spike Lee's *School Daze* focuses directly on the perils of and the need to confront intragroup verbal and behavioral brutalization.

burning cross under which was written 'Kill the Tarbaby.'¹²² Compounding the injury of the message was the lamentable but predictable response of many white parents who regarded the incident as a racially insignificant childish prank and dismissed or discounted its gravity and impact.¹²³

While it is easy, or should be easy, to empathize and share the outrage generated by such an incident, the call for a regulatory response indicates a lead that may be false. Especially given the reflexive and probably race-conditioned instincts of denial and minimization typified by reaction to the incident, the anticipation of meaningful enforcement seems wishful to the point that any enactment would be largely precautionary. Reliance upon a community to enact and enforce protective regulation, when the dominant culture itself has evidenced insensitivity toward the harm for which sanction is sought, seems neither well-conceived nor well-placed. A mentality that trivializes incidents such as those that Lawrence relates is likely also to house the attitudes that historically have inspired the turning of racially significant regulation against minorities, especially because the dominant cultural group is less likely to temporize, discount offensive actions, or underuse power when its own interests are implicated.

An exclusive concern with regulating such incidents also discloses a miscalibrated focus factoring in only a relatively small slice of racially harmful expression. The reality is, in a society that largely remains functionally if not formally segregated, direct interracial contacts for members of any group are a limited or nonexistent phenomenon. Objectionable and even injurious as cross-racial verbal stigmatization may be, the frequency of interracial contacts and mathematical possibilities for any communication—harmful or otherwise—pale in comparison to incidents of intraracial contacts. Given the gross disparity of interaction, the quantitative potential for injurious expression is profoundly higher in an intraracial than in an interracial context. Actualizing the potential for racially significant expressive harm within the same group, moreover, is the not uncommon usage of racially degrading terminology in intraracial contexts.

Traditionally, the acceptability of racially referenced expression and the understanding of whether it demeans or not has been a function of source. Much expression considered stigmatizing or objectionable, if uttered across racial lines, historically has been traded in, indulged, and ratified to the extent it circulates within the same racial

122. Lawrence, 1990 Duke L. J. at 460 (quoting Letter from Dulany Bennett to parents, alumni, and friends of the Wilmington Friends School).

123. *Id.*

group. Awareness of that racial dividing line even has evidenced itself in constitutional jurisprudence, as Justice Brennan noted that “[w]ords generally considered obscene . . . are considered neither obscene nor derogatory in the [black] vernacular except in particular contextual situations and when used with certain intonations.”¹²⁴ Critical to determining the reaction of being called a “bubble lip,” for instance, would be not only the tone and demeanor but the racial identity of the name-caller.

Because much racial terminology is enmeshed deeply in a racist history and circulates as part of a racist legacy (and to the extent such language reflects values that have been absorbed even if not consciously recognized), the racially identified line between acceptability and unacceptability is treacherous and dubious. The damage potential of harmful intraracial versus interracial expression can be measured in part by the relative frequency of any speech contact within and between groups. The results of any such comparison support an especially powerful concern with intragroup speech and its effects. An initiative for offsetting the consequences of racially harmful speech, that overlooks or factors out such a high volume dimension of the problem, is at least seriously underinclusive.

To the extent that personal and anecdotal evidence has been adduced to support regulation of intergroup racist speech, it seems fair to consider like data on the other side. The evidentiary supplement to the victimization that Lawrence described as occurring at the high school is the experience of many black Americans who, when encountering intraracial verbal degradation, sense confusion, uneasiness, shame, and a challenge to self-esteem. It is an experience that, contrasted with interracial disparagement or insult, is more subtle and may be more confounding and perhaps even more dangerous. My wife, while accustomed to the subtle or unconscious variants of cross-racial putdowns, recalls no overtly degrading or stigmatizing interracial expression directed to her or family members. By contrast, she cannot begin to count the numerous times that she has been a victim of or bystander to demeaning intraracial speech. For her, being called a “skinny black bitch nigger,” or a comparable name, has been a function of intragroup rather than intergroup dynamics. The experience at least comports with a premise that verbal victimization is more common as an intragroup phenomenon. Unlike academic theories focused upon and determined by concepts of relative power, reaction without the luxury of relatively

124. *Pacifica Found.*, 438 U.S. at 776 (Brennan dissenting) (quoting C. Bins, *Toward Ethnography of Contemporary African American Oral Poetry*, Language and Linguistics Working Papers No.5, at 82 (Georgetown, 1972)).

detached intellectualization seems unlikely to draw such precious doctrinal distinctions. A more likely response would be the sense of pain and confusion, experienced by my wife and others, over whether to risk feeling further betrayed if an effort to reeducate the offending person fails or to dismiss the individual as an "ignorant fool." If she were to sue anyone for racially stigmatizing speech, it undoubtedly would be the lighter-skinned school teacher who instead of encouraging her when she stumbled in class one day told her "you [darker-skinned] people are pitiful."

Even the casual reference of "nigger, please," as a statement of disbelief articulated in an intragroup context, is weighted with mixed baggage that includes a racist dimension capable of evoking a sense of diminishment and humiliation. Such reaction cuts negatively in two ways insofar as the listener first must reckon with the value judgment that society has built into or glossed onto the terminology. The risk in even reaching the point of reckoning, however, is that unlike cross-racial slurs that provoke anger and resistance, intragroup putdowns may escape meaningful challenge and reinforce the negative imagery attached to them. Pointing out the objectionable and shame-inducing aspects of such expression is not unlikely to elicit a reaction that denies any harm or discounts any offense taken. Such a response, as the functional equivalent of the minimization and rationalization of racism characterizing white parental reaction to the victimization of Lawrence's nephew, is no less discouraging.

Especially in a society that has not entirely jettisoned its racist legacy, and notwithstanding how cultural differences and nuances merit respect, the imperatives of perspective and efficacy ordinarily favor maximum attention to the greatest harm. Advocacy of racist speech control, however, seems to push for utmost leverage against sources of harm that are not necessarily the most profound or pervasive. The reason for that distribution of attention or underinclusiveness, as supplied by its advocates, relates to differing power relationships. It is not convincing enough to argue, however, that the context of power relationships makes certain intergroup expression more destructive or insidious than intraracial expression that wounds. Established power is fortified and racial advantage is hardened when the dominant group's victims become its agents, or if an otherwise suspect agenda is ratified by the participation of the injured group.

What Professor Lawrence refers to as “the double-consciousness” of racial minorities in America¹²⁵ actually functions to some degree as a defense mechanism against adverse interracial experiences. A history of societal exclusion and degradation provides a constant reminder for traditionally oppressed minorities to be on alert and keep ready whatever protective psychological clothing may be worn against racism’s manifestations. Such a response wars consistently against the incidents of pervasive racist reality and imagery that, as Lawrence borrowing from Catharine MacKinnon puts it, is “necessary for . . . constructing social reality.”¹²⁶ If indeed words wound, it seems likely that their potential to do psychic harm increases in relationship to the possibility of acceptability or credibility. It seems an especially high-risk experience, therefore, when wounding words originate from a unsuspected medium and do not trip otherwise reflexive defense mechanisms.

Even acknowledging racial differences in source, the racial identity of victims in either circumstance is the same. If mistrust of or discomfort with the dominant culture’s involvement in punishing intragroup injury militates against regulating internal dialogue, it is grounds too for defeating any initiative to regulate cross-racial expression. In either event, the dominant culture will have a significant role in enactment and enforcement. Insofar as interracial speech may be implicated, the majority may have a vested group interest in the outcome that may make it even less responsive to injury than in the intraracial setting. If racially degrading speech is the enemy, a principled response should neither respect the stereotyped lines that society has etched nor trade on those divisions to misrepresent the scope of the problem.

IV. OVERBLOWN INTERESTS AND MISALLOCATED RESOURCES

Racial unfairness has been an immutable aspect of American society. Although its contours and manifestations have varied over the course of time, racism has established a legacy that still awaits a final reckoning. For the most part, the dimensions of racism have elicited responses commensurate with the scope of the burdens they impose and challenges they present. Movements for African resettlement and gradual abolition during the early eighteenth century, for instance, were discrete strategies and fostered by a sense that slavery was a limited and

125. “[D]ouble consciousness” refers to the “sense of always looking at one’s self through the eyes of others.” Lawrence, 1990 Duke L. J. at 435 (quoting W.E.B. DuBois, *The Souls of Black Folk* 16-17 (1953)).

126. *Id.* at 443 (quoting Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 204 (Harvard, 1989)) (arguing that to the extent pornography succeeds in constructing a social reality, it becomes invisible as harm).

terminal institution.¹²⁷ Such initiatives anticipated that slavery's awkward relationship to founding values could be resolved by pressure for gradual reform that eventually would result in slavery's disappearance.¹²⁸ Although myopic, early abolition and colonization efforts at least responded coextensively with perceived dimensions of society's racial problem. So too did later abolitionist efforts, which reflected an awakening to the truth that slavery was not a dying institution but a phenomenon with an expansive capacity and demands that implicated the entire nation.¹²⁹ The twentieth century challenge to segregation likewise factored in broad spectrum group interest. Although the desegregation agenda and its objectives were debated vigorously among black Americans,¹³⁰ no question existed that the legal challenge to the separate but equal doctrine attended to group-wide interests.¹³¹

Measured against the backdrop of past challenges to racial disadvantage and injustice, not to mention the dimensions of modern problems, recent initiatives to reckon with the nation's legacy of racism fall short both with respect to vision and breadth. The push for racial preferences during the past few decades was vulnerable to objection that it was too narrow in both its conception and its potential for achievement.¹³² The case for affirmative action, however, at least attempted to reference itself to group-wide interests.¹³³ Even acknowledg-

127. See Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* 117-19 (Oxford, 1978). The idea that slavery would wither on its own had been critical for compromises at the Constitutional Convention that accommodated slavery. See William Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* at 65 (Cornell, 1977).

128. See Fehrenbacher, *Dred Scott* at 117-19; Wiecek, *Antislavery Constitutionalism* at 84-89.

129. By the early 1830s, as the slave population totaled two million, more aggressive strains of abolitionism evolved. The abolitionist movement eventually split into radicals, who regarded the Constitution as pro-slavery and demanded the nation's disunion, and moderates, who favored development of constitutional provisions such as the Due Process and Privileges and Immunities Clauses to eliminate slavery. See Fehrenbacher, *Dred Scott* at 119-21; Wiecek, *Antislavery Constitutionalism* at 16-19. The first half of the nineteenth century was characterized by increasing sectional friction over slavery's expansion into new territories and the North's duties under fugitive slave legislation. See Fehrenbacher, *Dred Scott* at 44-46; Wiecek, *Antislavery Constitutionalism* at 97-104.

130. The desegregation concept and strategy competed against a rival sense that "Sympathy, Knowledge, and the Truth, outweigh all that the mixed school can offer." W.E.B. DuBois, *Does the Negro Need Separate Schools?*, 4 *J. Negro Educ.* 328, 335 (1935).

131. The desegregation strategy thus was conceived as a means toward undoing "a caste system which is based on race and color." Richard Kluger, *Simple Justice* 259 (Knopf, 1976) (quoting Brief for Appellant, *Sipuel v. Oklahoma State Bd. of Regents*, 332 U.S. 631 (1948)).

132. See notes 17-22, 53-64 and accompanying text.

133. In the educational process, a preferential policy for hiring minority faculty was touted unsuccessfully as a means of establishing necessary "role models." *Wygant v. Jackson Bd. of Educ.*, 467 U.S. 267, 275-76 (1986) (finding that the role model theory does not necessarily reckon with harm caused by past discrimination). Also rejected was the argument that a preferential admissions program at a state medical school would improve the quality of health care in disadvan-

ing the possibility that the benefits of racially preferential policies may accrue primarily to a discrete subgroup,¹³⁴ one commentator has offered the defense that a single policy choice should not exclude broader reformist responses and thus should not be condemned simply for limited focus or achievement.¹³⁵ The argument of nonexclusivity might be satisfactory if the resources for change were unlimited. Fending off the underinclusiveness charge is more difficult, however, when higher group-wide priorities exist and reformist resources are limited. Unlike the concept of racial preferences as a means of ensuring economic opportunity, which has the relative luxury of defending itself against claims that it is a tactic for subgroup advantage,¹³⁶ the case for racist speech regulation has not managed effectively to reference itself to a clear group-wide interest.¹³⁷ It is a strategy that misallocates reformist resources without even a claim to group-wide service.

It is conceivable that the inverted priorities, denoted by the limited aims and benefits of the racist speech regulation movement, may be understood as a function of factors beyond the control of reformists who otherwise would pursue broader change. In response to such a contention, one must acknowledge that constitutional standards in recent years have limited substantially the capacity of the equal protection guarantee as an agent of change.¹³⁸ Modern law and society reflect real animus toward official management of racial disadvantage, whether effected through desegregation processes¹³⁹ or through racially preferential policies.¹⁴⁰ Constitutional case law, in addition to rejecting the group accounting methodologies of racial preferences¹⁴¹ and racist speech regulation,¹⁴² has established motive requirements that function as seemingly infeasible impediments to further constitutional chal-

tagued communities. *Bakke*, 438 U.S. at 310-11. More successful, but probably unique in its analysis and result, see note 18 and accompanying text, was the affirmation of minority preferences in the broadcast licensing process on grounds they promote the goal of content diversity. *Metro Broadcasting*, 110 S. Ct. at 3008-10.

134. See notes 17-18 and accompanying text.

135. See Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 Harv. L. Rev. 1327, 1333-34 (1986) (stressing that affirmative action does not operate to the exclusion of broader policies for remediating racial injustice and noting that the reaction is disproportionately vehement to relatively small impact).

136. See notes 135-36 and accompanying text.

137. See notes 112-26, 152 and accompanying text.

138. See notes 11, 53-85 and accompanying text.

139. See notes 71-78 and accompanying text.

140. See notes 53-66 and accompanying text.

141. *Croson*, 488 U.S. at 493-94 (opinion of Justice O'Connor) (noting that such preferences generally are inimical to the equal protection guarantee of race neutrality); *id.* at 520, (Scalia concurring) (stating that no racial classification is allowable except in most exigent circumstances).

142. See notes 67-68.

lenges of discrimination.¹⁴³ Social critics also have identified a sense of "race fatigue"¹⁴⁴ which, as experienced by other generations that effected limited change but found race a still intractable problem,¹⁴⁵ has established an inertia of disinterest, resignation, or indifference. Even acknowledging that circumstances are not perfect for racial vision and change (that more comprehensively account for group interests), the reality is that conditions for racial progress never have been ideal. If reformist energy historically had been harbored pending a welcoming signal or nonresistant environment, official segregation might be absent from the record only because slavery never was defeated.

Despite all of the legal, moral, and social barriers to progress beyond the present law's accounting for formalism, significant responsibility for underachievement must be assigned to the quality of contemporary reformist ideas and strategy. A legitimate argument exists that traditionally disadvantaged minorities carry a heavy and unfair burden of unremedied racism and discrimination. Even if discrimination is explained away as a phenomenon of the past, the abiding consequences of its legacy are undeniable. As Paul Brest has noted, "the injuries inflicted by [it] can place its victims at a disadvantage in a variety of future endeavors, and discrimination can also perpetuate itself by altering the social environment to harm new generations of victims."¹⁴⁶ Real and enduring harm notwithstanding, history has demonstrated that appeals for racial change cast basically in terms of victimization are not easy to market. Despite the raised consciousness of the Reconstruction period, and the poignant case that ex-

143. See note 11 and accompanying text.

144. Steele, *Content of Our Character* at 23 (cited in note 17) (describing "race fatigue" as a "deep weariness with things racial").

145. Following ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments and enactment of legislation intended to secure civil and political rights, see, for example, Enforcement Act of 1870, 16 Stat. 433 (1870) (making interference with the right to vote a criminal act); Ku Klux Klan Act of 1871, 17 Stat. 13 (1871) (prohibiting state interference with civil rights and private action denying equal protection), Reconstruction peaked out with passage of the Civil Rights Act of 1875. The law prohibited discrimination in public transportation and various public venues. It was struck down on grounds it exceeded Congress's power to enforce the Thirteenth and Fourteenth Amendments. *Civil Rights Cases*, 100 U.S. 3, 25 (1883). Evidencing the nation's weariness with race was the Court's observation that "[w]hen a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected." *Id.* at 25. As Reconstruction interest wound down, the Fourteenth Amendment evolved over the next several decades as a source of doctrine that favored established advantage through economic liberty concepts, see note 3, and resisted arguments for a changed racial order. See, for example, *Plessy v. Ferguson*, 163 U.S. at 550-51.

146. Paul Brest, *In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1, 31 (1976).

isted on behalf of former slaves, the nation's remedial interest and attention abated swiftly.¹⁴⁷ Progress was limited and actually undone, even when the gross injustice of slavery was fresh in the nation's mind.¹⁴⁸ More than a century later, when the achievements of *Brown* have been hyperinflated to the point that imagery is indulged more than reality is understood,¹⁴⁹ and even legal educators have lost touch with the abiding relevance of *Dred Scott v. Sandford*,¹⁵⁰ it should be evident that the touting of victim status by itself is a dead-end strategy for further progress. The argument, that stigmatization by private expression is the functional equivalent of permanent damage caused by official segregation,¹⁵¹ simply does not have the marketing potential or moral appeal that ultimately established a consensus against formal racial division.

Broad achievement under the law is dependent not just upon identifying the racially disadvantaged status of a group (as affirmative action strategy did) or the victimized circumstance of a subgroup (as racist speech management initiatives do). If further progress is to be attained at a level that seriously reckons with the nation's unfinished racial business, it must be generated with a grander vision and the identifiable potential for a wider impact. A useful starting point for legal reformists would be to swear off narrowly targeted strategies that primarily stress victimization, offer limited possibilities of return, and do not have broad spectrum relevance. It also is essential to understand that limited intellectual and material resources exist for pursuing racially significant change. The unwise and potentially counterproductive strategy for regulating racist speech, although impressive in its academic polish and sophistication, might not have been pressed so seriously if tested against some real world sense and perspective. Had they performed a reality check first, the architects and exponents of racist speech management theory might have pondered the preference of disadvantaged groups with respect to whether reformist energies should be

147. See notes 145, 148 and accompanying text.

148. The Civil Rights Act of 1875, prohibiting racial discrimination in a variety of public venues, was invalidated in the Civil Rights Cases, 109 U.S. 3 (1883) (holding that the enactment exceeded Congress's power under the Thirteenth and Fourteenth Amendments). Congress itself, by the end of the nineteenth century, repealed reconstruction laws that criminalized conspiracies to interfere with voting rights. See Lively, *Constitution and Race* at 64 (cited in note 4).

149. Although *Brown* is revered as a sea change in the nation's law and social order, see for example, Anthony Lewis, *Portrait of a Decade: The Second American Revolution* 1-11 (Random House, 1964), the net meaning and consequences of its limiting principles tend to be understated. See notes 65-76 and accompanying text.

150. 60 U.S. (19 How.) 393 (1857). Only one of the leading modern constitutional law casebooks provides an edited version of the racially significant aspects of *Dred Scott*. See William Seidman, et al., *Constitutional Law* 477-80 (Little, Brown, 1991).

151. See notes 34 and 63 and accompanying text.

dedicated toward primary impediments to development and opportunity or to the relatively marginal phenomenon of interracial dialogue or monologue.¹⁵² Assuming that the choice is as simple as it would seem, and that overwhelming support would exist for the broader vision, the challenge for legal reformists is to rise above the discouraging trends of recent constitutional jurisprudence, not be consumed by anger or lesser priorities, and avoid battles that by their relatively incidental nature indicate that the greater war has been lost.

Instead of picking relatively small fights of their own convenience, or defined largely by their own experience, reformists must confront stubbornly the obstacles that truly impede the evolution of further racial progress under the law. The most crippling constitutional blow of the post-*Brown* era, largely foreclosing interpretive progress beyond an accounting for formalism, has been the installment of discriminatory intent requirements as a condition for establishing an equal protection violation.¹⁵³ Motive-based criteria are to modern reckoning with racial disadvantage and discrimination what the separate but equal doctrine was to constitutional progress from the late nineteenth through the middle twentieth century.¹⁵⁴ Although history discloses confirmed habits of resistance to progress, as noted previously,¹⁵⁵ it also provides inspiration for contesting and even undoing unjust social orders.

152. Reformist failure to priorities in a sensible and thoughtful way is not unlike the established order's emphasis upon constitutionally permissible aims, such as high test scores as the primary criterion for admission to professional schools, at the expense of considerations that might factor in the interests of disadvantaged groups. Although such goals are allowable, "there is a chance—a most substantial one—that they would not be chosen as *the* goals (without any modification) if . . . the goal-choosers paid sufficient attention to the special needs, desires, and views of this powerless group." Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107, 154 (1976).

153. See note 11 and accompanying text.

154. The Court's determination that legal distinctions on the basis of race did not translate into constitutional inequality or imprint a badge of inferiority precluded any reckoning with official segregation. See *Plessy v. Ferguson*, 163 U.S. at 543. Similarly, insistence on proof of discriminatory purpose defeats efforts to account for subtle or unconscious racism. See Lawrence, 39 Stan. L. Rev. at 319, 344-47 (cited in note 11).

Recent indications that the legal order has fortified itself against equal protection challenge, at least when remediation of discrimination is not at issue, include the rejection of compelling evidence that environmental quality and policymaking are determined in significant part by racial considerations. See, for example, Marianne Lavelle and Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, Nat'l L.J. 51-58 (Sept. 21, 1992). Repudiation of constitutional claims asserting environmental racism, contrasted with progress on other fronts in broadening the bases of environmental policy input and formulation and diffusing its impact, underscore that real reform is not merely a function of doctrinal innovation or creativity. See *id.* at S1. Rather, progress is achieved by interdisciplinary effort that includes not only attention to legal theory and development but to "community education" and broad spectrum participation. See *id.*

155. See notes 71-87, 104-10.

The legal challenge to desegregation was a prolonged exercise that eventually succeeded because of its unwavering focus, tireless effort, and effective marketing of its ideals.¹⁵⁶ As the primary barrier to reckoning with modern incarnations of discrimination,¹⁵⁷ motive-referenced standards are the progeny of past legal methods for securing racial advantage.¹⁵⁸ Like segregation before them, motive-based criteria are an apt and ripe target for a massive legal challenge. It took nearly four decades, in a more intimidating social environment, for the challenge to official segregation to express itself in a tactical fashion.¹⁵⁹ In half that amount of time, since the Court invested in motive-based inquiry,¹⁶⁰ legal reformists have responded to the overarching equal protection challenge of the time in a generally underwhelming fashion. Rather than conceiving strategies of litigation and education targeted toward the defeat of principles that indulge subtle and unconscious discrimination, reformist energy is being diverted into and dissipated by causes that generally are lost and would have limited significance even if successful.¹⁶¹ It may be an ominous sign for the future that as the process of framing strategic goals and development has progressed from circumstances of real human peril to the relative comfort of academic tenure, policy vision and strategy have become correspondingly uninspired and insular. The phenomenon of parochialism and interest stratification is reminiscent of John Hart Ely's concern, expressed as a critique of fundamental rights development, with "a bias in constitutional reason in favor of the values of the upper middle, professional class from which

156. The nature, aims and strategies of the NAACP's campaign to defeat prescriptive segregation are documented in Kluger, *Simple Justice* at 155-656 (cited in note 131).

157. As mentioned in note 11, contemporary variants of subtle and unconscious racist behavior have superseded overt discrimination.

158. Insofar as such criteria maintain or consolidate racial advantage, or accommodate racism, their ancestry includes segregation, the Black Codes, and slavery.

159. The NAACP began to implement anti-segregation strategy in the 1930s. Its first triumph was in a state court, where Maryland was ordered to provide a separate legal education or admit a black student to its university law school. *Pearson v. Murray*, 182 A. 590, 594 (Md. 1936). Litigation against segregation in the South presented a high peril to the personal safety of NAACP attorneys. See Carl Rowan, *Dream Makers, Dream Breakers: The World of Justice Thurgood Marshall* 248 (Little, Brown, 1993).

160. The Court's investment in motive-based standards has been an analytical phenomenon of the past two decades. See *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977) (finding failure to establish that exclusionary effect of zoning ordinance was racially motivated); *Washington v. Davis*, 426 U.S. 229, 246 (1976) (finding failure to establish that exclusionary effect of employment test was racially motivated). Such criteria were previewed by the de jure-de facto distinction in the desegregation cases. See *Keyes*, 413 U.S. at 208.

161. See notes 16-25, 52-66 and accompanying text.

most lawyers . . . and for that matter most moral philosophers are drawn."¹⁶²

Focusing attention and energy upon the real impediments to further progress, and thereby adapting the model for defeating segregation to modern needs, responds to Charles Lawrence's plea "to think creatively as lawyers."¹⁶³ It represents such thinking, however, with a sense of proportionality. Creative thought by itself, as recent reformist efforts demonstrate, does not ensure wise policy or useful results.¹⁶⁴ Racist speech management in particular, although creative, also is distinguished by a lack of vision and failed sense of marketability that risks tainting the historically profound movement for racial justice with the debatable and perhaps trendy agenda of political correctness.¹⁶⁵ Unlike abolitionism, which managed to insinuate itself into mainstream politics,¹⁶⁶ and the anti-segregation movement, which diligently cultivated legal and moral support, speech management theory has succeeded primarily in dividing traditional reformist allies.¹⁶⁷

Especially crucial to thinking that is both creative and productive may be a reacquisition of the capacity for not thinking like a lawyer. At least one set of first-year law students were advised of the risks that a legal education presents to their thought processes and cognitive powers. The advice given them was that the law school experience hones unique and exceptional skills of analysis and dissection.¹⁶⁸ It was coupled with fair warning, however, that the cost of indoctrination may be a loss of previously possessed vision, powers of empathy, and perceptual qualities.¹⁶⁹ It is tempting to regard modern advocacy of racist speech classification as the artfully crafted work of individuals who thrived in the professional education process but, in so doing, sacrificed the perspective, understanding, and other aspects of intelligence and emotion

162. John Hart Ely, *The Supreme Court 1977 Term—Foreword: On Discovering Fundamental Values*, 92 Harv. L. Rev. 5, 54 (1978).

163. Lawrence, 1990 Duke L. J. at 480 (cited in note 25).

164. See notes 16-25, 52-66, 69-87 and accompanying text.

165. See note 31 and accompanying text.

166. Abolitionist sentiment was eclipsed largely prior to the Civil War by free soil principles and respect for slavery as a local institution— notions absorbed by the Republican Party which captured the presidency in 1860. Lively, *Constitution and Race* at 31-32 (cited in note 4). Abolitionist goals were vindicated, however, by the Thirteenth Amendment's redefinition of the Constitution to prohibit slavery. U.S. Const., Amend. XIII. The dynamics of change that led from a policy of containment to abolition of slavery are discussed in Harold Hyman and William Wiecek, *Equal Justice Under the Law* 115-278 (Harper & Row, 1982).

167. The issue of racist speech, for instance, has caused profound division in the American Civil Liberties Union. See Strossen, 1990 Duke L. J. at 487, 496 (cited in note 39) (noting that conflict over racist speech regulation splits civil libertarians).

168. Such disclosure of risks was offered to the author and other students in Professor Kenneth Graham's civil procedure class at U.C.L.A. School of Law.

169. *Id.*

that would make their talents especially useful in reckoning with society's compounding legacy of racial disadvantage. A revitalized sense of context and proportion at least might improve the chances for shrewder allocation of reformist resources in the future.

Creative thought, if it is to be bridled with real achievement, must factor in considerations other than legal theory and analytical prowess. Crucial to the ends of progress is an effective marketing strategy for selling change. Consistent with the advice given many law students—that a significant market exists for their skills beyond the legal profession—a need exists outside the legal system for the perspective, public sensitization, and moral development that legal reformists can supply. Regardless of how aptly a strategy for legal change is conceived and developed, it may be largely for naught if sufficient attention also is not devoted to elevating levels of social awareness. Teaching a constitutional law class affords quick insight into the reality that the vast majority of law students, until exposed to modern equal protection doctrine, have no idea that a daunting barrier exists to proving discrimination.¹⁷⁰ A safe inference would be that if a relatively well-educated class of prospective professionals is largely oblivious to that reality, the society at large has little if any clue that modern discrimination is mostly above the law. Like the evils of segregation before, the unfairness of modern legal standards now is a tale that needs to be told well. Effective narration may require some armchair advocates to enhance their exposure to and engagement in real world diversity, however, rather than define their pluralistic credentials on the basis of the relatively limited differences among professionals. Real appreciation of, and accounting for, cultural pluralism in the end is denoted not just by filling faculty positions with persons of like professional training but by a broader mix of actions, decisions and involvement that more meaningfully confirm a person's or institution's life.

The recognition that society has reached a point at which it is capable of acknowledging "the sorry history of . . . discrimination,"¹⁷¹ while still maintaining standards which shelter that legacy,¹⁷² should prompt more than cynicism, frustration, or self-absorption. Relevant toward that end is the desegregation strategy, which provided a lesson not just in constitutional litigation but also in how to market an ideal. Ra-

170. This characterization reflects the author's experience in teaching constitutional law for seven years and comments directed to him by other instructors. The virtual disappearance of the *Dred Scott* case from modern constitutional law casebooks and courses, see note 147 and accompanying text, suggests that not only law students but the experts who educate them labor with a deficient perspective.

171. *Crosby*, 488 U.S. at 499.

172. See notes 11, 74-78, 83 and accompanying text.

cial reformists then, as now, faced the task of educating society on the need for change. Like the reckoning that ultimately must occur with subtle racism, the challenge to official segregation was vexed by much indifference toward and unawareness of how the law was responsible for disadvantage.¹⁷³ In its generation-long challenge to segregation, the NAACP pitched its case to the courts, politicians, academics, and the general public.¹⁷⁴ Such multi-dimensional groundwork erected a legal and societal environment in which real change eventually became possible.

The model is especially apt for consideration at a time when strategy has become so insular. While modern reformists may run a lesser risk of violence and peril than their predecessors, they face a daunting educational task insofar as much conventional wisdom assumes racial justice under the law has been achieved. Because it is necessary to have a marketable idea, as a precondition for inspiring change, advocates of speech management should not be disappointed if their notions generate little popular interest or enthusiasm. The interest of broad spectrum progress would be enhanced significantly, however, if the energies of a Professor Lawrence were redirected from promoting racist speech management to expanding access to his arresting insights into subtle and unconscious racism and how to move beyond motive-based equal protection standards.¹⁷⁵ Unlike the desegregation movement that succeeded against real intimidation and peril, modern reformists interested in wholesale change have the advantage of a broad media universe for disseminating their ideas and secure professional positions from which to frame and espouse them.

For any cause, selling change is a crucial prerequisite of change itself. History illustrates why social awakening is essential for any racially

173. See Mark V. Tushnet, *The NAACP's Legal Strategy Against Segregated Education, 1925-1950* at 34, 43-44 (North Carolina, 1987); Kluger, *Simple Justice* at 165-72, 203-05 (cited in note 131).

174. See *id.*

175. Lawrence, 39 Stan. L. Rev. at 317 (cited in note 11). The Court's investment in motive-based criteria relates in large part to fear that a focus on effect would jeopardize or disrupt "a whole range of tax, welfare, public service, regulatory, and licensing statutes." *Washington v. Davis*, 426 U.S. 229, 248 (1976). Choosing between purpose and effect is not necessarily an either-or choice. As Lawrence points out, equal protection analysis can focus upon effects that have racially stigmatic consequences. Lawrence, 39 Stan. L. Rev. at 355-58. Attention to stigmatic harm is what Lawrence also urges in the racist speech context. See Lawrence, 1990 Duke L. J. at 454 (cited in note 25). Although appealing to a dissenting faction of the Court in a recent school desegregation decision that found no further de jure violation, the standard did not capture enough support to broaden the focus of equal protection analysis. See *Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 111 S. Ct. 630, 642-44 (1991) (Marshall dissenting). Such resistance reinforces the need discussed in notes 160-75 and accompanying text that future progress depends not just on better honed legal standards but also on better education and marketing efforts.

pertinent change that may be achieved by law. The latter half of this century has included two racially significant demands by the legal system for social and moral change. In *Brown*, the Court required dismantlement of formal segregation.¹⁷⁶ Later, it prohibited racial preferences even for remedial purposes.¹⁷⁷ Both decisions, despite their constitutional demands, have legacies demonstrating that the challenge of moral reform is at least as daunting as the task of legal change. A review of post-*Brown* litigation discloses the pervasiveness of resistance to the redefined imperatives of equal protection.¹⁷⁸ Notwithstanding the recent demand for constitutional color-blindness,¹⁷⁹ one need go no further than a faculty hiring meeting at countless American law schools to witness an exercise in group prioritization¹⁸⁰ and effective repetition of *Brown's* aftermath guided only by a different moral compass.

Creative thinking in its broadest sense also requires identifying and seizing advantage when opportunity presents itself. Trying to rework the magic of *Brown*, by making its theory relevant to modern problems, is an odd enterprise when the past two decades of relevant jurisprudence essentially have gutted it. In retrospect, *Brown* and its progeny represent a classic exercise in the treatment of symptoms rather than causation. Racist speech management likewise inclines toward results that account more for the appearance than the actuality of social change. Peculiar too is the willingness to reinvest in a premise that indulges the imagery of achievement and reinforces habits of reliance on what history suggests will be unkept promises or inadequate resolve. Further appeals for special attention or protection miss a key lesson of the nation's racial legacy that the desegregation experience has reinforced. If the purpose of speech regulation is to safeguard against further victimization, it seems as one observer has put it, "somewhat self-defeating to appeal to the sense of the majority" as a strategy of accounting for minority rights.¹⁸¹ Indications are that neither the present nor future of a society that rewards individual achievement and advan-

176. *Brown*, 349 U.S. at 301 (requiring elimination of segregative policies "with all deliberate speed").

177. See *Croson*, 488 U.S. at 493-94 (mandating that the general policy must be racially neutral); *id.* at 520 (Scalia concurring) (stating that no racial classification is permissible absent highest exigency).

178. See notes 11, 71-78 and accompanying text.

179. *Croson*, 488 U.S. at 493-94; *id.* at 520 (Scalia concurring).

180. The author acknowledges having refused to vote in favor of any candidate who was not a minority, and in faculty recruiting has joined in various group-weighted selection processes. Such preference has not been uncommon based on conversations with colleagues at other law schools seeking to diversify their faculty. Such procedures at the same time establish race not just as a factor but *the* factor in recruiting and hiring.

181. Thomas Mayo, *Constitutionalizing the "Right to Die,"* 49 Md. L. Rev. 103, 130 (1990) (citing John Hart Ely, *Democracy and Distrust* 69 (Harvard, 1980)).

tage will differ much from the past, at least with respect to anyone's or any group's willingness to qualify or restrain self-interest as a condition for redistributing power, status, and justice.¹⁸² The case for managing group interests, apart from reflecting on incompetent strategy, trades both in the imagery of patronization and the reality of false hope. What is missed by legal intellectuals, seduced by the allure of formalistic manipulation and discovery, is effectively articulated by grass-roots social critics who—having witnessed the underachievement of desegregation and broken promises of urban redevelopment—“don't expect whites to do anything for blacks.”¹⁸³ Appeals for official management of group interest are viewed skeptically from such a perspective that sees “[t]he only reason we could ever have to be a supplicant before another group [as being] our own lack of self-respect and belief in ourselves.”¹⁸⁴ Even in a system burdened by the legacy of discrimination, a group or individual strategy that prepares for emerging opportunities may prove more useful in the long run than trading in victimization or attempting to squeeze progress from *Brown* ever could be. More useful than pleas for special attention or protection may be strategies that trade in group identity for purposes of pooling resources and investing them in group benefiting ways.¹⁸⁵ The lifetime training of minorities in multiculturalism, and the dominant race's tendency toward maintaining its insularity,¹⁸⁶ presents at least one foreseeable possibility for inverting traditional group advantage. In an increasingly globalized existence that rewards cultural adaptability, not to mention a nation itself that is becoming increasingly diversified, minorities possess an advantage that the market should reward if modern incarnations of discrimination are effectively discerned and uprooted.

Inventorying group strength and identifying group advantage represents a strategy for progress that draws upon the brokering and leveraging methodologies that an opportunity society touts by emphasizing

182. As Paul Brest has noted, “[i]f a society can be said to have an underlying political theory, ours has not been a theory of organic groups but of liberalism, focusing on the rights of individuals, including rights of distributive justice.” Paul Brest, *Foreward: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1, 49 (1976). Although contradicted by a history of racism that systematically has *derogated* on the basis of group status, it is difficult to envision the individualist premise giving way especially when challenged only by a relatively narrow and unambitious reformist agenda.

183. Tony Brown, *Affirmative Action—With a Twist*, *The Toledo Journal* 35 (Feb. 3-9).

184. *Id.*

185. One suggestion for self-investment is that black organizations whose spending on conventions each year amounts to one percent of the gross domestic product, cancel such events for one year, deposit the amount that would have been spent into a capital formation fund, purchase hotels in major American markets and “put blacks to work running them.” *Id.*

186. Residential segregation is a classic example of such preference, which is maintained by post-*Brown* decisions.

self-responsibility, it seriously tests the society's professed commitment to comprehensive color blinding. Acceptance of the spoken rules for individual or group development, thus, must be met by the legal system's commitment to recontour its standards so that those who invest in the system and its credibility still are not denied their rewards as a result of vestigial prejudice or discrimination.¹⁸⁷ Legal change even if achieved, moreover, represents an essentially technical accomplishment of the craft, unless responsibility also is assumed for the educational groundwork that makes real social reform possible. Time and energy spent trying to control the way people speak is time and energy lost from the grander challenge to how they think.¹⁸⁸ Even armed with the best of vision and strategy, efforts to redefine the future may not preclude a further extension of history that perpetuates race as its most intractable problem. Although society's development to date might not encourage betting against such a future, an agenda of narrow or insular goals and underdeveloped strategy makes the prospect a bankable certainty.

V. CONCLUSION

Critical to any racially significant achievement in the future is the preconditional recognition that the post-segregation era has created a safe harbor for racism that will not be undone by relatively marginal reformist tinkering with the legal structure or by demands that are perceived as illiberal nuisances. Accommodation of racist behavior, by criteria responsive only to intentional manifestations of it, should indicate two significant realities for proponents of speech management or other low-return reforms. First, a legal system that creates ventilation opportunities for racism in general is unlikely to afford the necessary environment for meaningful enforcement much less enactment of laws governing its verbal manifestations. Second, having reached the point of diminishing returns in racially significant legal change, advocates of further progress need to reexamine their priorities and revitalize their

187. The legal impediments to reckoning with modern discrimination are discussed in note 11. One suggestion for undoing them is discussed in note 175. Other proposals for analytical reform include better accounting for the compound effects of remote or past discrimination, see Brest, 90 Harv. L. Rev. at 35-36, establishing the presumptive invalidity of official practices that aggravate subordinate group status, see Fiss, 5 Phil. & Pub. Aff. at 157-60 (cited in note 152), and fortifying inquiries into the existence of substantive prejudice to determine if any group's agenda or interest was "peremptorily brush[ed] aside." Bruce Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 739 (1985).

188. Revamping curricula so that it provides broad exposure to and appreciation of multiculturalism would seem a better investment of academic energy than attention to prohibitive methodologies that encourage repression and stealth rather than development. See generally Strossen, 1990 Duke L. J. at 558 (cited in note 39).

strategies. The case for a broader vision of change exaggerates too much if it does not disclose the limits of legal reform. It thus is important to recognize that the most intractable problems of racial injustice will not be altered by the recalibration of standards to an optimum level for discerning discrimination. Elimination of the barriers to proving discrimination, however, may facilitate the task of reckoning with the imperatives of attitudinal change, moral development, and opportunity identification that are the keys to escaping the morass of racism's social legacy.

Four decades after *Brown*, at the termination point of the desegregation era, it is time to begin framing and communicating the broader vision of future racial progress. With all deference to the *Brown* era, it is essentially over and further achievement rests not with revisiting its real or presumed glories but learning from the multi-faceted strategy that begot it. Legalistic creativity that trumpets the connection of a peripheral concern to a bygone principle and era is a poor substitute for any vision of wholesale progress. Fundamental to any achievement in a morally competitive context is an intelligent and informed understanding of the market. A strategy that lacks perspective, ignores history, risks counterproductivity, and affects a relative few is a difficult commodity to sell. A more worthy successor to past struggle and achievement is an agenda framed as broadly as the problem it confronts and seeking change that makes a real difference.