

Abstract: The Constitutional Rhetoric of White Innocence

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This article discusses the Supreme Court's use of the rhetoric of white innocence in deciding racially inflected claims of constitutional shelter. It argues that the Court's use of this rhetoric reveals that it has adopted a distinctly white-centered-perspective which reveals only a one-sided view of racial reality and thus distorts its ability to accurately appreciate the true nature of racial reality in contemporary America. This article examines the Court's habit of consistently choosing a white-centered-perspective in constitutional race cases by looking at the Court's use of the rhetoric of white innocence first in the context of the Court's concern with protecting "innocent whites" in affirmative action cases and second in the context of the Court's racialization of the Fourth Amendment's requirements regarding the substantive content of the reasonable person standard in citizen police encounters. This article concludes that the Court's insistence on choosing and imposing only one racialized perspective – the white-centered-perspective—in racially inflected constitutional claims is more than simply bad policy, it also constitutes an unconstitutional violation of the Due Process clause of the Fifth and Fourteenth Amendments. This article thus calls for an appreciation of the dominance and problematic character of the judicial imposition of a single arbitrarily chosen racial perspective in deciding all constitutional race cases. Thus it calls for a modification in judicial decisionmaking in which judges become conscious of the white-centeredness and racial contingency of the white-centered vantage point. In this way it urges a judicial appreciation of multiple levels of racial interpretation in an effort to loosen the hegemonic grip of the white-centered-perspective and dilute its power to both name and punish, and thereby reduce it from its current dominance into just one more option among equally respected racial perspectives competing fairly for judicial recognition and legitimization.

The Constitutional Rhetoric Of White Innocence

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Introduction

- I. The Ideology of White Innocence
 - A. The Innocence of Whiteness
 1. Innocent of Race
 - i. Personal White Identity
 - ii. White is a Color Too
 2. Innocent of Racial Perspective
 3. Innocent of Racism
 - i. A Discredited View of Racism
 - ii. The End of Racism
 - iii. The Continuing Centrality of Racism
 4. Innocent of Perpetuating or Benefiting from Racism
 - i. A Stacked Deck
 - ii. Personal Benefit
 - B. Affirmative Action and the Ideology of White Innocence
 1. Innocent of Race
 2. Innocent of Racial Perspective
 3. Innocent of Racism
 4. Innocent of Racial Benefit
- II. White Innocence and Affirmative Action
 - A. Whiteness as Coterminous with Innocence
 - B. Affirmative Action and the Ideology of White Innocence
 1. Innocent of Race
 2. Innocent of Racial Perspective
 3. Innocent of Racism
 4. Innocent of Racial Benefit
- III. White Innocence and the Fourth Amendment
 - A. White-Centered Reasonableness Standard
 1. Seizure of the Person
 - i. Reasonable Person Test
 - ii. The Irrelevance of Race to the Reasonable Person Test
 - iii. Multiple Interpretations of Reasonableness
 - iv. The Black or Non-White-Centered Reasonable Person Standard

IV. Constitutional Concerns with White Innocence

1. Due Process

2. Arbitrariness

V. Recommendations

VI. Conclusion

Once we see that any point of view, including one's own, is a point of view, we will realize that every difference we see is seen in relation to something already assumed as the starting point. Then we can expose for debate what the starting points should be. The task for judges is to identify vantage points, to learn how to adopt contrasting vantage points, and to decide which vantage points to embrace in given circumstances.¹

During the extensive media coverage of the aftermath of Hurricane Katrina² in the late summer of 2005, two contrasting media images from flood ravaged New Orleans captured the public's imagination and painfully exposed the stark differences between the white-centered and the non-white-centered perspective on racial matters in contemporary America.³ The day after the catastrophic flooding, with much of the Gulf Coast in ruins, thousands dead and dying, hundreds of thousands homeless, and tens of thousands trapped in the flooded city of New Orleans, Yahoo News published two pictures of the flood survivors on its website that immediately sparked a national controversy.⁴ The pictures were strikingly similar in content but were accompanied by starkly different descriptive captions.

In one picture, a young black man is shown wading through chest high water carrying bundles of food in both hands. In the other, two young whites, one a man the

¹ Id at 15 (“A difficulty here, as always, is who is “we.” Writing not just for judges, but for all who judge, I mean to invoke a broad array of people in the exploration of justice. Yet the perspective I advance cannot escape my own critique of the partiality of every perspective.”)id.

² See Anna Mulrine, *To the Rescue: After a Sluggish Response, A Rush to Help and Rebuild*, U.S. News and World Report, September 12, 2005 p.22 (“It didn’t look like America, the exodus of stunned refugees wading through turbid, waist-high water, carrying only what mattered most: sick relatives, bundled babies, storm soaked family Bibles. It looked like another country, the kind of place where armed bandits outnumber police and desperate families search garbage dumpsters for food. A place where the poorest of the poor die in the heat, their corpses ignored on the side of the road.”)

³ See Evan Thomas, *The Lost City*, Newsweek, September 12, 2005 page 44 (“The TV images of hundreds and thousands of people, mostly black and poor, trapped in the shadow of the Superdome. And most horrific: the photographs of dead people floating facedown in the sewage or sitting in wheelchairs where they died, some from lack of water.”) It is indeed hard to imagine that if over 100,000 white middle or upper class people were trapped in a major American city after a devastating natural disaster, that the government would have made them wait for 5-6 without food, water or rescue. Instead, the enormity of the suffering coalesced around the intersection of both class and race.

⁴ See Clarence Page, *When Sluggishness Isn't OK*, Chicago Tribune page 9, September 4, 2005 (“Other e-mailers sent me copies of two news photos that revealed an apparent double standard regarding black and white flood victims in New Orleans.”)

other a woman, are also shown wading through deep water and similarly carrying bundles of food in both hands. However, that is where the similarity ends. The captions describe the young black man judgmentally as a “*looter*,” in sharp contrast the similarly situated whites are benignly described as mere “*finders*.”⁵

The only difference between the two pictures, and thus the only basis for the differences in their respective captions is the apparent racial identity of their subjects. Through this “visual rhetoric”⁶ and racialized narrative, solely by virtue of his blackness, the black man is characterized as a criminal, a predator exploiting a tragedy, and thus clearly morally blameworthy and deserving of condemnation. In contrast, solely on the basis of their whiteness, the whites are characterized as innocent and perhaps even heroic victims, bravely struggling to survive a great natural disaster and thus equally clearly, beyond moral blameworthiness or condemnation.

The difference in these captions reflects a “white-centered” perspective in which blacks are seen as inherently criminally suspect and morally undeserving – even of food in times of natural disaster. In contrast, whites are seen as innocent, heroic, and therefore implicitly deserving victims struggling against nature. However, if one views both photos from a non-white-centered perspective, they both depict commensurate heroism and valor by people struggling in the face of a great national tragedy without the

⁵The actual captions read: “A young man walks through chest deep flood water after *looting* (emphasis added) a grocery store in New Orleans” and “[t]wo residents wade through chest-deep water after *finding* (emphasis added) bread and soda from a local grocery store after Hurricane Katrina came through the area in New Orleans.” <http://news.yahoo.com/photo/050830/480/ladm10208301530/print> and http://news.yahoo.com/photo/050830/photos_ts_afp/050830071810_shxwaoma_p (last visited August 25, 2005); See also, Clarence Page, *supra* (“Apparently...it’s not looting if you are white. Such are the sentiments and suspicions about race and class that churn just beneath the surface of our daily discourse.”)

⁶ See, RICHARD DYER, *WHITE* (Routledge, 1997) at 44 nt. 4 (describing the “visual rhetoric of whiteness.”)

necessity of projecting a racialized and stereotyped judgment regarding their worth, character or values.⁷

These conflicting interpretations of essentially the same pictures represent a vivid and evocative example of the racially inflected difference between viewing reality from a starting point or “white point in space”⁸ that reflects a racialized white-centered perspective as contrasted with one that reflects a non-white-centered vantage point on reality; especially racial reality in America. Part of the difference in these racialized perspectives reflects the fact that “the eye that sees is not a mere physical organ but a means of perception conditioned by the traditions in which its possessor has been reared.”⁹ Thus, because race and color have such a profound influence on the life experiences and life chances of people in America, they also have a profound effect on how whites and non-whites¹⁰ perceive racial reality.

This racial influence on perception is particularly important because, in this way, race itself can be understood as a “mode of perception”¹¹ or as a distortive lens through which reality is perceived that provides the basis for both conscious and unconscious “racial judgments...about people’s capacities and worth.”¹² Therefore, because of America’s unique history as an “overtly racist regime,”¹³ and a “white dominated

⁷ See Clarence Page, *supra* (“Would the storm victims have been rescued with greater urgency had they been mostly white and middle class instead of black and poor? I don’t have all of the answers, but I’m gratified that black people are not the only people who are concerned about the question.”)

⁸ RICHARD DYER, *WHITE* 3 (Routledge, 1997)

⁹ MATTHEW FRY JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRATION AND THE ALCHEMY OF RACE* 10 (Harvard University Press, 1998) [hereinafter Jacobson, *Whiteness of a Different Color*]

¹⁰ See RICHARD DYER, *WHITE* 1 (Routledge, 1997) re: Non-white reference.

¹¹ *Id.* at 11

¹² RICHARD DYER, *WHITE* 1 (Routledge, 1997) (These racial judgments are driven by and are fundamentally “inextricable from racial imagery [which] is central to the organization of the modern world.”)

¹³ GEORGE M. FREDRICKSON, *RACISM: A SHORT HISTORY* 100-101 (Princeton University Press, 2002) [hereinafter Fredrickson, *Racism*] (describing the United States, South Africa, and Nazi Germany as

society”¹⁴ the dominant and thus default perspective in all public and official space could accurately be described as one that is, white-centered, or “white-framed,” and that reflects “white-specific characteristics, attitudes and experiences,” and “unexamined white ways of thinking about race.”¹⁵ Thus the white-centered vantage point presumes the “power to name – determine perception, and ultimately, prescription.”¹⁶

The power of the white-centered perspective to “name and determine perception” especially in the language and decisions of America’s judiciary, is critically important to the future on the nation. This is because the white-centered perspective constitutes a distinctive way of “seeing,”¹⁷ or the “accepted but unexamined white ways of thinking about”¹⁸ and experiencing race in the world. In this way, the white-centered-perspective has come to occupy a “privileged strategic location in a racialized social system...[whose] views, fears, and rationalizations...take a central position in the overall “ideological ensemble” of a society.”¹⁹ The problem is that from this central position, the white-centered-perspective through “sheer force of naked power...[has]

the only “overtly racist regimes” because “[n]owhere else were the political and legal potentialities of racism so fully realized.”) id.

¹⁴ WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 34 (Brown, et. al. eds.) (University of California Press, 2003 [hereinafter Brown, *Whitewashing Race*])

¹⁵ Barbara J. Flagg, *Was Blind, But Now I See: White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 987 (1992-93) [hereinafter Flagg, *Was Blind, But Now I See*]

¹⁶ Brown, *Whitewashing Race* supra at 35

¹⁷ See, DAVID ROEDIGER, *TOWARDS THE ABOLITION OF WHITENESS: ESSAYS ON RACE, POLITICS, AND WORKING CLASS HISTORY* 14 (Verso, 1994) [hereinafter Roediger, *Abolition of Whiteness*] (noting “the way many whites see.”)

¹⁸ Barbara J. Flagg, *Was Blind, But Now I See: White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 987 (1992-93) (also noting the use of “transparently white-specific criteria of decision” and “white-specific characteristics, attitudes, or experiences.”)

¹⁹ EDUARDO BONILLA-SILVA, *WHITE SUPREMACY AND RACISM IN THE POST-CIVIL RIGHTS ERA*, 62 (Lynne Rienner Publishers, 2001) [hereinafter Bonilla-Silva, *White Supremacy*] (noting that the “ideological ensemble of a society” consists of “racial, class, and other forms of hierarchical structurations...[and that] the focus [here is] exclusively on the racial aspects of the ideological ensemble.”) id at 83 nt. 16.

foreclose[d]...the common ground upon which we can listen and learn.”²⁰ Thus, as Cornel West points out, “the challenge is mustering the courage to scrutinize all forms of dogmatic policing of dialogue and to shatter all authoritarian strategies of silencing voices...[because] we must respect the scars and wounds of each one of us – even if we are sometimes wrong (or right).”²¹

The racing process²² in the West generally but in America especially is, “deeply embedded in the symbolic and expressive life of the nation, and the narrative account[s]”²³ that are deployed to describe racial reality. The depth and intensity of this racing process in America is such that, rather than fostering a common national perspective it has instead engendered rival and distinctly racialized perspectives or “vantage points”²⁴ between white-centered and the non-white-centered perspectives. This is a critically important observation because as Malcolm Gladwell has observed, when “reduced to its simplest elements, even the most complicated of relationships and problems...have an identifiable underlying pattern.”²⁵ This article argues that the central “identifiable underlying pattern”²⁶ of racial conflict in America can be described as a fundamental “contradiction of perspectives”²⁷ on the nature and experience of racial

²⁰ CORNEL WEST, *DEMOCRACY MATTERS: WINNING THE FIGHT AGAINST IMPERIALISM* 6 (Penguin Books, 2004) (“The major culprit here is not “political correctness,” a term coined by those who tend to trivialize the scars of others and minimize the suffering of victims while highlighting their own wounds.”)

²¹ *Id.*

²² Cite definition, see Tayyab

²³ GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 88 (Harvard University Press, 2002) [hereinafter Loury, *Anatomy*]

²⁴ Minow, *Justice* supra at 15

²⁵ MALCOLM GLADWELL, *BLINK* 141 (Little Brown Publishers, 2005)

²⁶ *Id.*

²⁷ Frances V. Rains, *Is the Benin Really Harmless? Deconstructing Some “Benign” Manifestations of Operational White Privilege*, in *WHITE REIGN*, supra at 80. (citing J.J. Scheurich, *Toward a White Discourse on White Racism*, *Educational Researcher* 22, no. 8, 5-10 (1993))

reality in America²⁸ based not simply on the color of one's skin, but rather on the color and centeredness of one's personal attitudinal perspective. As one scholar has argued, the stark contrast between the nonwhite experiences and white opinions...stems...from liberal individualism's inability to describe adequately the collective dimensions of our experiences."²⁹

Thus, the logic of this article suggests that the central racial paradox of the law in the twenty-first century consists in reconciling what has been described as "the gap between white perception and minority experience,"³⁰ or the rival white-centered and non-white-centered racialized perspectives regarding the nature of racial reality. However, at the threshold of this paradox is a recognition of the antinomic relationship between the white-centered and the non-white-centered perspectives on racial reality – and thus the fact that there is something that must be reconciled. Achieving this goal will require dislodging the white-centered-perspective from its current presumptive position as the sole arbiter of racial reality.³¹ This is an essential threshold requirement because a truly pluralistic society must not only recognize the rights of those categorized as "different," but it must also reflect a minimally acceptable degree of respect and dignity for the perspectival differences that such status has created and perpetuated.³²

²⁸ Although the non-white perspective consists of multiple racialized subgroups that represent a black, Latino, Asian, American Indian perspectives, what they all have in common is that they are not white. Thus this article will generally refer to this grouping as the non-white perspective. However, particular racial group perspectives will be identified where the context suggests it might be appropriate.

²⁹ GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS*, 20 (Temple University Press, 1998) [hereinafter Lipsitz, *Possessive Investment in Whiteness*]

³⁰ *Id*

³¹ See *id.* (noting the existence of a "broadly shared narrative about the victimization of "innocent" whites by irrational and ungrateful minorities.")

³² The logic of the argument advanced in this article is premised on the presumption that the white-centered-perspective, is not only raced, but also gendered, classed, physically abled, and sexually oriented. Thus it a perspective that reflects the experience of those who are white, male, middle class, fully abled, and heterosexual. However, for purposes of this discussion, this article will focus primarily on the raced

Thus as one group of scholars has concluded “at the center of the debate over race in America is the question of what perspective we will use to define racism and the social policies necessary to end it. From what vantage point will problems be named and solutions found?”³³ These are critically important concerns in contemporary America because as Richard Delgado has presciently observed, “traditional legal writing purports to be neutral and dispassionately analytical, but all too often it is not.”³⁴ As Delgado goes on to point out, part of the reason for this counterfeit neutrality is due to the fact that “legal writers rarely focus on their own mindsets, the received wisdoms that serve as their starting points.”³⁵ This “starting point” that Delgado identifies is the ideological and perspectival vantage point from which one sees, interprets, and makes sense of reality. As this article suggests, these vantage points reflect the racing characteristics of the society at large. It is critical that the law begin to recognize and understand the perspectival monopoly that whiteness exerts on the Supreme Court’s view of racially inflected cases because, “[t]he supposedly objective point of view” advanced by the Court “often mischaracterizes, minimizes, dismisses, or derides without fully understanding opposing viewpoints.”³⁶ Moreover, such broad recognition is essential because it is axiomatic that “only by acknowledging [the] profound differences in [racialized] perspectives can one begin to address the durable racial inequality of American society.”³⁷

aspects of this perspective but it is important to keep in mind that this analysis could apply with equal salience and force to any of the other aforesaid categories as well.

³³ WHITE REIGN, *supra* at 64

³⁴ Richard Delgado, *Storytelling For Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2440-2441 (1989)

³⁵ *Id.*

³⁶ *Id.* (“Implying that objective, correct answers can be given to legal questions also obscures the moral and political value judgments that lie at the heart of any legal inquiry.”)

³⁷ WHITE REIGN, *supra* at 64

It is not surprising that race has such a profound effect on the perception of racial reality because, as the nation was starkly reminded by the two contrasting pictures of the New Orleans flood survivors,³⁸ “Blacks continue to inhabit a very different America than do whites.”³⁹ As a result, “[p]eople’s perspectives on race reflect their experience on one side of the color line or the other.”⁴⁰ Thus, as shown in a revealing new study on white male attitudes on race, “central to the thinking of the majority of whites, in regard to...various racial matters is a constant and enduring approach to the social world that is centered in and framed from a white-American perspective. It is not just that the racial outgroup is viewed as culturally deficient; it is that the viewpoint on this matter is consistently white-framed.”⁴¹

This distinction between white-centered and non-white-centered perspectives on racial reality has rarely been recognized in the Court’s consideration of racial difference. Instead the “legal treatment of difference...tends to treat as unproblematic the point of view from which difference is seen, assigned, or ignored, rather than acknowledge that the problem of difference can be described and understood from multiple points of view.”⁴² More importantly, as Martha Minnow reminds us, the very existence of “multiple viewpoints challenges the assumption of objectivity and shows how claims to

³⁸ See Clarence Page, *supra* (“as the misery mounted, more TV broadcasters mentioned what viewers could plainly see, that the vast majority of “refugees,” were black and poor.”); See also, Anna Mulrine, *supra* (“Katrina’s lethal one-two punch of 145 mile-per-hour winds and 25-foot storm surge left 90,000 square miles of heartbreak, devastation, and unhinged lives...[it] uprooted more Americans than the Civil War, the Dust Bowl storms of the 1930’s or the San Francisco earthquake of 1906...this is our tsumani.”)

³⁹ Flagg, *supra* Was Blind, But Now I See at 987

⁴⁰ WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 35 (Brown, et. al. eds.) (University of California Press, 2003 [hereinafter Brown, *Whitewashing Race*])

⁴¹ JOE FEAGIN & EILEEN O’BRIEN, *WHITE MEN ON RACE: POWER, PRIVILEGE, AND THE SHAPING OF CULTURAL CONSCIOUSNESS*, 17-18 (Beacon Press, 2003) [hereinafter Feagin, *White Men on Race*]

⁴² Minnow, *Justice supra* at 14

knowledge bear the imprint of those making the claims.”⁴³ Therefore it is important to pay careful attention to the way in which the courts generally and the United States Supreme Court in particular, treat the issues of racial difference and racial perspective in the process of resolving racialized claims of constitutional rights.

The principal argument of this article is that in resolving competing racially inflected claims to constitutional shelter, the Supreme Court’s racial perspective “is unreflectively locked inside its own...limited...experience,”⁴⁴ and as a consequence it has consistently chosen to view racial reality through a “totally white prism” and thus has adopted a distinctly white-centered perspective as the “master framework”⁴⁵ or dominant judicial gaze⁴⁶ through which it evaluates racial reality in America.⁴⁷ Moreover, this article argues that the Court’s consistent choice of a white-centered perspective as the

⁴³ Id (“There is no God’s Eye point of view that we can know or usefully imagine; there are only the various points of view of actual persons reflecting various interests and purposes that their descriptions and theories subserve.”) (citing H. PUTNAM, REASON, TRUTH AND HISTORY 50 (1981); See also, T. NAGEL, THE VIEW FROM NOWHERE 7 (1986).

⁴⁴ WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 35 (Brown, et. al. eds.) (University of California Press, 2003 [hereinafter Brown, Whitewashing Race] (“any perspective that is unreflectively locked inside its own experience is limited, and this is particularly so when that perspective reflects the dominant culture.”)

⁴⁵ Bonilla-Silva, White Supremacy supra (Although all the races in a racialized social system have the capacity to develop these frameworks, the frameworks of the dominant race become the master frameworks against which all racial actors compare (positively or negatively) their ideological positions.”)

⁴⁶ See CORNEL WEST, PROPHECY DELIVERANCE! AN AFRO-AMERICAN REVOLUTIONARY CHRISTIANITY, (Westminster John Knox Press, (1982, 2002) [PROPHECY DELIVERANCE] 49, 50, 55

The captivity of natural history to what I have called the “normative gaze” signifies the first stage of the emergence of the idea of white supremacy as an object of modern discourse.” ...the idea of white supremacy emerges partly because of the powers within the structure of modern discourse—powers to produce and prohibit, develop and delimit, forms of rationality, scientificity, and objectivity which set perimeters and draw boundaries for the intelligibility, availability, and legitimacy of certain ideas. ...the controlling metaphors, notions, categories, and norms that shape the predominant conceptions of truth and knowledge in the modern West.

But see, ANATOMY OF RACISM, supra (“the metaphors of racist discourse are not reducible to a single form.”)

⁴⁷ As a result, this unreflective judicial attitude has led the Court to consistently deny or ignore competing non-white-centered viewpoints as legitimate bases for either interpreting or articulating the nature and meaning of racial reality in America.

exclusive lens through which to resolve race based constitutional claims “cannot be defended as principled, coherent or neutral.”⁴⁸

The choice⁴⁹ by America’s highest legal tribunal to adopt a white-centered perspective as its default lens for evaluating and resolving racially inflected constitutional claims is deeply troubling and problematic. In making this choice, the Court has completely erased the non-white-centered perspective and not only allowed the white-centered perspective to dominate its thinking, but also to present itself, not as the superior alternative among competing views of reality, but rather as an objective, unraced, and neutral judge of the real and the natural.⁵⁰

This white-centered judicial gaze on America’s racial reality is problematic for both constitutional and policy reasons. Specifically, this article argues that at minimum, from a constitutional perspective, whether the result of conscious or unconscious motivations,⁵¹ the Court’s consistent choice of a white-framed or white-centered perspective as the presumptive lens through which to understand and resolve constitutional race based claims, constitutes a constitutionally impermissible racial

⁴⁸ Geoffrey R. Stone, *Rehnquist’s Legacy Doesn’t Measure Up*, Chicago Tribune, September 6, 2005. (editorial following the sudden death of the late Chief Justice Rehnquist regarding the Justice’s views on in First Amendment cases that came before the Court during his tenure.)

⁴⁹ The **choice** of the white perspective is masked in the myth of the absence of choice. However, whether it is made consciously or unconsciously, a choice is still certainly being made. See also, Minnow, Justice supra at 70 (“There is no neutrality, no escape from choice. But it is possible to develop better abilities to name and grasp competing perspectives and to make more knowing choices...[which is] central to the challenge of engendering justice.”) See also infra Section _____ regarding the distinction between conscious and unconscious choices.

⁵⁰ MATTHEW FRY JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRATION AND THE ALCHEMY OF RACE* 10 (Harvard University Press, 1998) [hereinafter Jacobson, *Whiteness of a Different Color*] (“[t]he awesome power of race as an ideology resides precisely in its ability to pass as a feature of the natural landscape.”).

⁵¹ See Charles Lawrence, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (“We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which these beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious motivations.”);

preference in favor of whiteness.⁵² Moreover, this article argues that this impermissible racial preference also represents a one-sided,⁵³ arbitrary, unprincipled, irrational, capricious, and unexplained judicial choice in stark violation of the constitutional guarantees of equal protection under the Fourteenth Amendment, and of Due Process under both the Fifth and the Fourteenth Amendments. This article also concludes that the Court's consistent choice of a white-centered perspective to resolve race based constitutional claims is constitutionally indefensible and must be unambiguously rejected as the Court said in *Loving v. Virginia*, "as measures designed to maintain white supremacy."⁵⁴

Moreover, more broadly, the Court's choice of a controlling white-centered perspective is also deeply distressing because as Martha Minnow reminds us, in a pluristic society "[l]itigation in the Supreme Court should be an opportunity to endow rival vantage points with the reality that power enables, to redescribe and remake the meanings of difference in a world that has treated only some vantage points on difference as legitimate."⁵⁵ Instead of providing a forum where rival racial vantage points can be evaluated, measured, and can then compete for state recognition and support, the Court's

⁵² The central problem with white-centered perspective is that the Court mistakes this perspective for the real. It forgets that with respect to racial reality, the white-centered perspective is in dialectical and antinomic opposition to the non-white perspective, in that both are in fact in themselves quite reasonable given their respective starting points.

⁵³ See RICHARD POSNER, *OVERCOMING LAW* 368 (1995) (accusing Patricia Williams in writing *The Alchemy of Race and Rights*, of "suppress[ing] every perspective other than that of the suffering, oppressed black" and noting that "one-sidedness is an endemic risk of the literary depiction of reality, rather than a particular characteristic of Patricia Williams.") (reprinted in EMMA COLEMAN JORDAN, ANGELA P. HARRIS, *ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS, CASES AND MATERIALS* 20-21 (Foundation Press, 2005)

⁵⁴ 388 U.S. 1 (1967)

⁵⁵ Martha Minnow, *The Supreme Court 1986 Term, Forward: Justice Engendered*, 101 HARV. L. REV. 10, 16, (1987-88) [hereinafter Minnow, Justice]

adoption of the white-centered perspective erases all rival vantage points⁵⁶ and crowns itself as the sole and undisputed interpreter of the nature and meaning of racial difference, that amounts to “a compulsory gospel which admits of no dissent and no disobedience.”⁵⁷

When the dominant ideology succeeds in controlling the Court’s interpretation and understanding of reality it is thereby able to control the production of what passes for knowledge. Moreover, it is able to do so in a manner that “may even shape the terms of access for other points of view, so that exclusions appear natural, based on merit or on standards endorsed even by those who remain excluded.”⁵⁸

This article argues that the rhetorical narratives that the Court deploys to describe everything from the parties, circumstances, and operative legal standards, in judging race based claims to constitutional protection are more than mere neutral descriptors. Instead because they are “determined within a social-cognitive matrix that is raced”⁵⁹ they therefore constitute rhetorical tools in the classic sense,⁶⁰ which are meant to construct a persuasive and particularized vision of racial reality. Moreover, they also “wrongly imply a natural fit with the world”⁶¹ and attempt to persuade that they lack particularity of perspective.

⁵⁶ See *Id* at 53, (“a judicial stance that treats its own perspective as unproblematic makes other perspectives invisible and puts them beyond discussion.”)

⁵⁷ ERIC STOKES, *THE ENGLISH UTILITARIANS AND INDIA*, 302 (1959) (quoting Fitzjames Stephen)

⁵⁸ Ideological success is achieved when only dissenting views are regarded as ideologies; the prevailing view is the truth. Those who win a given struggle for control have the best access to the means of producing knowledge, such as the mass media and schools. ...Historians have described how a conception of reality, when it triumphs, convinces even those injured by it of its actuality. Accordingly, political and cultural success itself submerges the fact that conceptions of reality represent a perspective of some groups, not a picture of reality free from any perspective.

Minow, *Justice supra* at 67

⁵⁹ GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 73 (Harvard University Press, 2002) [hereinafter *Loury, Anatomy*]

⁶⁰ *Cornel Rhetoric etc.*

⁶¹ Minow, *Justice supra* at 14

A central analytical support beam in the Court's rationalization of the white-centered-perspective is its use of the rhetoric of white innocence and its underlying ideological scaffolding.⁶² For this reason, interrogating the meaning, significance, and implications of the Court's adoption of the white-centered perspective as its unstated and exclusive measure of racial difference requires an interrogation of the relationship between the ideology of white innocence and the dialectic of whiteness in the formation of white identity.⁶³

This article examines the rhetoric of white innocence through two illustrative examples in the law; first affirmative action, and second the Fourth Amendment. In the case of affirmative action, this article will examine the Supreme Court's use of the rhetoric of white innocence as a substantive counterweight by which the constitutionality of race conscious programs that benefit non-whites is measured. In the context of the Fourth Amendment, this article will examine the Supreme Court's use of the rhetoric of white innocence and thereby racializing the constitutional content of the reasonable person test in citizen police encounters.

This interrogation is divided into six sections. Section one examines the content of the ideology of white innocence. Section two discusses the ideology of white innocence and

⁶² See *Id* (describing ideology as "something at once so thick and so vaporous."); See also, KARL MANNHEIM, *IDEOLOGY AND UTOPIA* 36 (L. Wirth & E. Shils trans. 1936):

The concept of 'ideology' reflects the one discovery which emerged from political conflict, namely, that ruling groups can in their thinking become so intensively interest-bound to a situation that they are simply no longer able to see certain facts which would undermine their sense of domination. There is implicit in the word 'ideology' that insight that in certain situations the collective unconscious of certain groups obscures the real condition of society both to itself and to others and thereby stabilizes it.

⁶³ See, Amanda E. Lewis, *Some Are More Equal than Others: Lessons on Whiteness from School*, in *WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM* 165 (Ashley W. Doane and Eduardo Bonilla-Silva, eds.) (Routledge, 2003) [hereinafter Lewis, *Lessons on Whiteness*] ("it is particularly important to understand the parameters and functions of whiteness, [and] of what it means to say someone is white.")

affirmative action by looking at the Court's deployment of this ideology as a counterbalance with which to measure the constitutionality of race conscious affirmative action programs. Section Three considers the Court's use of the ideology of white innocence in mediating the content of the reasonable person test under the Fourth Amendment. Section Four examines some specific constitutional concerns with white innocence. Section Five offers a number of recommendations to disrupt the hegemonic grip of the Court's rhetorical narrative of white innocence and supplant it with a constitutional racial analytic that appreciates a wider variety of legitimate racial vantage points or perspectives and thus a greater sense of racial reality in America and its relations with the rest of the world community of non-white peoples. Section six offers a few concluding remarks.

I. The Ideology of White Innocence

In any analysis which critiques an important facet of whiteness it is important to keep in mind the critical admonition articulated by historian David Roediger, that whiteness is not merely a color, it is also "an ideology" that was "developed out of desires to rule and the exigencies of ruling."⁶⁴ This article argues that critical to this ideology of whiteness are notions of white innocence that are sufficiently discrete to constitute an independent, but also simultaneously interdependent ideology.⁶⁵ Thus, the ideology of white innocence is derivative from the ideology of whiteness and like whiteness itself, it is "a peculiar institution,"⁶⁶ that is a deeply schizophrenic and

⁶⁴ DAVID R. ROEDIGER, *COLORED WHITE: TRANSCENDING THE RACIAL PAST*, (University of California Press, 2002) 23 ("Perhaps the overarching theme in scholarship on whiteness is the argument that white identity is decisively shaped by the exercise of power and the expectation of advantages in acquiring property."). See also, Lipsitz, *Possessive Investment in Whiteness* at viii ("I hope it is clear that opposing whiteness is not the same as opposing white people. White supremacy is an equal opportunity employer; nonwhite people can become active agents of white supremacy as well as passive participants in its hierarchies and rewards.")

⁶⁵ See, Bonilla-Silva, *White Supremacy* supra:

[i]deology consists of the broad mental and moral frameworks, or grids, that social groups use to make sense of the world, to decide what is right and wrong, true or false, important or unimportant. Although ideologies do not provide individuals, as group members, with an explicit road map of how to act, what to believe and what to say, they furnish the basis principles individuals use to sift through contested and often contradictory information in order to make sense of social reality. ...Ideologies are about meanings that express relations of domination.

See also, Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295 (1988) ("Central to my new array of insights was that law and rights might be better understood not as functional, responsive and autonomous expressions of shared values or emerging egalitarian norms, but instead as ideology."); See also, Bonilla-Silva, *White Supremacy* supra at 63 ("a more fruitful approach for examining individual racial views is the notion of racial ideology, or the racially based frameworks used by actors to explain and justify (dominant race) or challenge (subordinate race) the racial status quo.").

⁶⁶ *Id* at 137; See also, THEODORE ALLEN, *THE INVENTION OF THE WHITE RACE* VOL. I, 1 (19__)

inconsistent mix of both color blind and color conscious values, understandings, and perspectives.⁶⁷

Under the ideology of white innocence as conceived by this article there are four principle ways in which whiteness reflects and reinscribes notions of innocence. First, whiteness is regarded as innocent of race itself. Second, whiteness is considered to be innocent of racial perspective. Third, whiteness insists that it is innocent of racism. Fourth, whiteness argues that it is innocent of racial benefit from the legacy of American racism.

A. The Innocence of Whiteness

As used in this article, whiteness can be understood as a “privileged strategic location in a racialized social system...[whose] views, fears, and rationalizations take a central position in the overall “ideological ensemble” of a society.”⁶⁸ From this central position in society, the essential principles of the ideology of white innocence strongly correlate with what has variously been described as a “new racism,”⁶⁹ or a “neo-con or

⁶⁷ See, MATTHEW FRY JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRATION AND THE ALCHEMY OF RACE*, 5 (Harvard University Press, 1998) [hereinafter Jacobson, *Whiteness of a Different Color*] (“The contest over whiteness – its definition, its internal hierarchies, its proper boundaries, and its rightful claimants—has been critical to American culture throughout the nation’s history, and it has been a fairly untidy affair.”)

⁶⁸ EDUARDO BONILLA-SILVA, *WHITE SUPREMACY AND RACISM IN THE POST-CIVIL RIGHTS ERA*, 62 (Lynne Rienner Publishers, 2001) [hereinafter Bonilla-Silva, *White Supremacy*] (noting that the “ideological ensemble of a society” consists of “racial, class, and other forms of hierarchical structurations...[and that] the focus [here is] exclusively on the racial aspects of the ideological ensemble.”) id at 83 nt. 16.

⁶⁹ Paul Finkelman, *The Rise of the New Racism* 15 *YALE L. & POL’Y REV.* 245 (1996) [hereinafter Finkelman, *the New Racism*] (describing the new racism as “a way of thinking that has become fashionable and acceptable in some quarters [that] (1) denies the history of racial oppression in America; (2) rejects biological racism in favor of an attack on black culture; and (3) supports formal, de jure equality.”) id at 247.

neo-confederate”⁷⁰ racism, or a new “conservative racial realism.”⁷¹ For this reason, the ideology of white innocence may either be deployed innocently out of ignorance or strategically out of political calculation.⁷²

Moreover, the essential principles of white innocence also strongly correlate with the various major dictionary definitions of the term “innocence” generally. As a baseline to interpret the Court’s use of the term “innocence” it is important to note that there are four general definitions of the term innocence from which to choose. First, the term innocence is primarily defined “in a narrow, even technical way”⁷³ as simply the ‘absence of guilt’ in the commission of a crime or offense.⁷⁴ This is the primary, narrowest, and most technical definition of the term innocence.⁷⁵ It connotes a highly legalistic sense of having been wrongly accused or adjudicated as guilty of some specifically charged crime or offense. Second, “innocence can also take on a larger meaning that extends beyond technicality into morality: freedom from sin, guilt, or moral wrong in general; the state of

⁷⁰ PETER APPLEBOME, *DIXIE RISING: HOW THE SOUTH IS SHAPING AMERICAN VALUES, POLITICS, AND CULTURE* 136 (Harcourt Brace and Company, 1996)

⁷¹ *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 1 (Brown, et. al. eds.) (University of California Press, 2003) 6 [hereinafter Brown, *Whitewashing Race*] (describing the new “racial realists” central organizing claims as consisting of:

three related claims: First, ...racism is a thing of the past...the economic divide between whites and blacks...is exaggerated, and white Americans have been receptive to demands for racial equality. [Their] second claim is that persistent racial inequalities...cannot be explained by white racism. As they see it, the problem is the lethargic, incorrigible, and often pathological behavior of people who fail to take responsibility for their own lives, [and are] ...attributable to the moral and cultural failure of African Americans, not to discrimination. [Third], the civil rights movement’s political failures are caused by the manipulative, expedient behavior of black nationalists and the civil rights establishment.

⁷² See Finkelman, *supra* *New Racism*

⁷³ Harris, *Innocence and the Soprano’s*, *supra* at 577 (“freedom from specific guilt; the fact of not being guilty of that which one is charged; guiltless.”)

⁷⁴ *The New Oxford American Dictionary* at 875. [hereinafter, Oxford]The sense of innocence as being not guilty or wrongfully accused is poignantly illustrated in the recent popularity of “innocence projects” which have created all over the country.

⁷⁵ *Id*

being untainted with, or unacquainted with, evil; moral purity,⁷⁶ or of being ‘free of responsibility’ or moral blameworthiness for something, yet nonetheless “suffering its consequences.”⁷⁷ The third alternative definition of innocence is understood to describe those who are naïve, unaware, uninitiated, weak or vulnerable.⁷⁸

As one scholar has observed, there is a fourth alternative definition of innocence that, “conveys a larger idea that is more powerful and evocative than the former’s narrow literalism.”⁷⁹ In this larger and more expansive view, innocence “evokes the sleeping infant, wholly dependant and pure of thought and deed. No avoidable harm can be justifiably inflicted on this type of innocent.”⁸⁰ In fact, this type of innocence imposes “moral...demands” on others to “receive care and protection from harm.”⁸¹ Thus this expansive moral dimension of innocence “is not a passive state” but rather “includes the power to command others to action – that is, to require the care and protection of those deemed innocent.”⁸²

1. Innocent of Race

Despite the overwhelming rejection by the scientific and academic community of the notion of biological racial essentialism⁸³ and the widespread acceptance of race as

⁷⁶ Harris, *Innocence and the Soprano’s*, supra at 577 (citing the Oxford English Dictionary 995 (2d ed. 1989) (“It bestows no special legal status. Yet, it is a positive attribute with normative consequences.”)id.

⁷⁷Oxford, supra.

⁷⁸ Id

⁷⁹ Seth D. Harris, *Innocence and the Sopranos*, 49 N.Y.L. SCH. L. REV. 577, 577 (2004-5)

⁸⁰ Id

⁸¹ Id.

⁸² Id. (noting that this expansive form of innocence leads the Court to “afford...almost parental care and protection appropriate only for the sleeping infant who exemplifies the broader, moral definition of innocence.”) id at 580

⁸³ See, Ferber, *White Man Falling*, supra at 33 (defining racial essentialism “as the assumption that social differences such as those between men and women, people of different races, or social classes are due to intrinsic biological or psychic differences...[that] are believed to be innate and unchanging.”)

nothing more than a social construct,⁸⁴ from a white-centered perspective the ideology of white innocence reflects a continuing sense of real, socially meaningful, essential, and biological differences between differently raced peoples. As one scholar has noted, the white-centered perspective tends “to think of race as being indisputable, real. It frames our notions of kinship and descent and influences our movements in the social world; we see it plainly on one another’s faces. From this perspective race somehow still seems to be a product not of the social imagination but of biology.”⁸⁵

This biological view of race has been advanced and perpetuated in one form or another for the last one hundred and fifty years,⁸⁶ under the banner of scientific racism.⁸⁷ This so-called scientific school of thought argued that “each race had an essence distinguishing it from other races and accounting for its inferiority or superiority,”⁸⁸ and has a tragic and bloody history. This view provided the foundation not only for Jim Crow segregation,⁸⁹ lynching,⁹⁰ and profound white violence in America,⁹¹ but also

⁸⁴ cite

⁸⁵ Jacobson, *Whiteness of a Different Color* supra at 1

⁸⁶ See id, supra (“Since the eighteenth century, racist beliefs have been built upon scientific racial categorizations and the linking of social and cultural traits to supposed genetic racial difference.”)

⁸⁷ See, Ferber, *White Man Falling*, supra at 33 (“The history of racial categorizations is intertwined with the history of racism. Science sought to justify a priori racist assumptions and consequently rationalized and greatly expanded the arsenal of racist ideology.”)

⁸⁸ Ferber, *White Man Falling*, supra at 33 (noting that this view “molded both scientific and popular conceptions of race from Reconstruction until World War I, giving rise to social Darwinism and eugenics...[which] argued, conveniently, that natural selection was at work in the social world and that success was dependant upon one’s fitness.”) id at 32

⁸⁹ See id, supra at 33 (“The entire Jim Crow system of discrimination and strict segregation was supported by widespread, commonly held scientific assumptions about the permanence of racial essences, the extent to which race determines social and cultural behavior, and the danger of miscegenation.”)

⁹⁰ See, GRACE ELIZABETH HALE, *MAKING WHITENESS: THE CULTURE OF SEGREGATION IN THE SOUTH, 1890-1940*, 199 et seq. (Pantheon Books, 1998) [hereinafter Hale, *Making Whiteness*] (describing the rapid rise and enormous and widespread popularity of spectacle lynching in the South) ; See also, LEON F. LITWACK, *TROUBLE IN MIND: BLACK SOUTHERNS IN THE AGE OF JIM CROW* (Knopf, New York, 1999) 280 et. seq. (describing the extreme savagery, barbarity, violence, and popularity of spectacle lynchings. For example, “But the crowd had not finished. Throwing the body into a fire, they watched with astonishing coolness and nonchalance as it burned. Finally, the relic hunters moved in to retrieve portions of the rope and what was left of the charred body.”) (citing Ida B. Wells, *Lynch Law*, in

furnished the intellectual justification for the infamous genocidal “sterilization and extermination policies in the name of racial purification,”⁹² pursued by Nazi Germany that claimed the lives of six million Jews,⁹³ at least as many racially undesirable others, and plunged the globe into its second world war of almost unimaginable carnage. However, despite this infamous pedigree, notions of scientific racism have exhibited a remarkable “staying power [as]... attested to [by] the recent publication of the *Bell Curve*,”⁹⁴ and its widespread popularity. However, from the non-white-centered perspective “[w]hile the history of the scientific concept of race argues that race is an inherent essence, it reveals, on the contrary, that race is a social construct.”⁹⁵ The deep-seated white-centered notion of racial essentialism “cannot be supported” because “while our commonsense assumptions may tell us that race is rooted in biology, biologists today reject such notions.”⁹⁶

i. Personal White Identity

THE REASON WHY THE COLORED AMERICAN IS NOT IN THE WORLDS COLUMBIAN EXPOSITION, AT 30-33)

⁹¹ See, HERBERT SHAPIRO, *WHITE VIOLENCE AND BLACK RESPONSE: FROM RECONSTRUCTION TO MONTGOMERY*, 10 (University of Massachusetts Press, 1988) [hereinafter Shapiro, *White Violence*] (noting the widespread violence, murder and arson committed by whites on blacks during Reconstruction. “Violence and...the threat of violence...blocked access to education, denied entrance to trades, or prevented land ownership undermined black efforts to realize the American Dream...[the] three avenues ...most commonly traveled by other Americans in their quest for self advancement.”)

⁹² Ferber, *White Man Falling*, supra at 33.

⁹³ See DANIEL JONAH GOLDHAGEN, *HITLER’S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (Vintage Books, 1996); See also, GITTA SERENY, *INTO THAT DARKNESS: AN EXAMINATION OF CONSCIENCE*, (Vintage Books, 1974).

⁹⁴ Ferber, *White Man Falling*, supra at 33

⁹⁵ Id

⁹⁶ Id at 19 (“Racial categories lack any scientific foundation; there is greater genetic variety within racial groups than between them, and racial classifications vary both cross-culturally and historically.”)

Moreover, the claim of whiteness as a form of personal identity⁹⁷ is a relatively recent historical phenomenon⁹⁸ and is heavily “veiled in value.”⁹⁹ This notion of a personal white identity is also a uniquely Western¹⁰⁰ conflation of diverse European national ethnicities into a relatively recent, and socially constructed race based claim of group identity.¹⁰¹ Additionally, this is not a positive claim about what one is, but rather a claim grounded in negation based on what one is not.¹⁰² This is because to claim to be

⁹⁷ See West, *supra* West Reader at 501 (“Identity has to do with protection, association and recognition. People identify themselves in certain ways in order to protect their bodies, their labor, their communities, their way of life; in order to be associated with people who ascribe value to them, who take them seriously, who respect them; and for purposes of recognition, to be acknowledged, to feel as if one actually belongs to a group.”)

⁹⁸ Cite

⁹⁹ David Theo Goldberg, *The Social Formation of Racist Discourse*, in ANATOMY OF RACISM, (David Theo Goldberg, ed.) 301 (University of Minnesota Press, 1990) (“The seemingly naked body of pure facts is veiled in value.”)

¹⁰⁰ See RUTH FRANKENBERG, WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS, 265 nt. 2 (University of Minnesota Press, 1993) (“West and Western are relational terms constructed out of opposition to non-Western Others or Orientals. Westernness implies a particular, dominative relationship to power, colonial expansion, a belonging to center rather than margin in a global capitalist system, and a privileged relationship to institutions...for the production of knowledge.”)

¹⁰¹ See Ferber, *White Man Falling*, *supra* at 33 (While the history of the scientific concept of race argues that race is an inherent essence, it reveals, on the contrary, that race is a social construct.”); See also, West, *supra* West Reader at 503. In a chapter entitled “On Black – Brown Relations” in a conversation between Cornel West and Jorge Klor de Alva, Professor de Alva observes that:

We have in the United States, two mechanisms at play in the construction of collective identities. One is to identify folks from a cultural perspective. The other is to identify them from a racial perspective. Now, with the exception of black-white relations, the racial perspective is not the critical one for most folks. The cultural perspective was, at one time, very sharply drawn, including the religious line between Catholics and Protestants, Jews and Protestants, Jews and Catholics, Jews and Christians. But in the twentieth century, we have seen in the United States a phenomenon that we do not see anyplace else in the world – the capacity to blur the differences between these cultural groups, to construct them in such a way that they become insignificant and to fuse them into a new group called whites, which didn’t exist before.

(Cornel West responds by noting that “part of the tragedy of American civilization is precisely the degree to which the stability and continuity of American democracy has been predicated on a construct of whiteness that includes the subordination of black people, so that European cultural diversity could disappear into American whiteness while black folk remain subordinated.”) *id.*

¹⁰² See, Tayyab Mahmud, *Class in LatCrit: Theory and Praxis in a World of Economic Inequality* (LatCrit V Symposium) 78 UNIV. DENVER L.REV. 657, 661 (2001):

modern universality rests upon a conceptual partitioning and corresponding transformation of human populations into a divide between, as Jean-Paul Sartre put it, “men” and “natives.” The canonical dark-skinned savage, constituted as the not-quite-human Other, furnished the grounds to constitute the universal

white necessarily implies a claim of racial purity.¹⁰³ It is effectively a claim¹⁰⁴ of being free from even “one drop” of black or African blood in one’s ancestral chain of racial title.¹⁰⁵ In short, a claim of personal whiteness is tantamount to a claim of being innocent of blackness.

subject of modernity, i.e. the civilized rights-bearing European. In this maneuver, one can see in operation ostensive self-definition by negation, the assumption of identity by reference to what one is not.

(citing Jean-Paul Sartre, Preface to FRANTZ FANON, *THE WRETCHED OF THE EARTH* 38, (Grove Press, 1963). See also, V.G. KIERNANA, *THE LORDS OF HUMAN KIND: BLACK MAN, YELLOW MAN, AND WHITE MAN IN AN AGE OF EMPIRE* (1969)

¹⁰³ See ABBY L. FERBER, *WHITE MAN FALLING: RACE, GENDER, AND WHITE SUPREMACY*, (Rowman & Littlefield Publishers, 1998) 34, 33 (“From the moment the concept of race was invented, interracial sexuality became a concern. Historically, the preoccupation with defining who is white and who is black superseded concern with defining other nonwhites. The history of slavery and Jim Crow segregation depended upon firm knowledge of who was white and black for their support...the project of defining races always involves drawing and maintaining boundaries between the races.”); See also *id* (Regarding the “tragedy of miscegenation...Every form of political and economic equality for blacks was depicted as a threat to white racial purity, responded to with fears of interracial sexuality, and argued against on that basis.”) *id* at 41.

¹⁰⁴ Such contemporary claims, although common among those who consider themselves to be white, are inherently unprovable beyond more than two or three generations in the vast majority of cases. Thus at best, in many such cases these claims rest on little more than a mere hunch, a hope, and a prayer based on the perceived white physical characteristics of only a few generations.

¹⁰⁵ See Ferber, *White Man Falling* *supra* at 23 (“the historical construction of the opposition white/black involves defining the limits of whiteness and blackness and defining precisely who qualifies as white and who qualifies as black. In order to produce whiteness a stable, natural, given identity, the boundaries of whiteness must be specified and secured.”) also at 23, 35 (“In order to racially classify the population...laws label[ed] the fraction of black blood necessary to deem an individual black. ...Increasingly, states moved even further toward the one-drop rule, which defined as black all those with one discernable drop of black blood.”); See also, *id* at 43 (“While a great deal has changed over the past three decades, the one drop rule is still generally accepted, and interracial unions remain controversial and uncommon.”); See also, *id* at 41 (noting that interracial black/white marriages are still relatively rare “While the rate of black-white intermarriage increased 63 percent between 1960-1970, such marriages consistently represent only 1 to 2 percent of all marriages.”) See also West, *supra* West Reader at 501 (“In the United States this unwillingness to challenge what has come to be known as the one-drop rule—wherein anyone who ever had an African ancestor, however remote, is identifiable only as black—has...trap[ped]...so-called people of color, in a social basement with no exit ladders.”). See also, STEPHEN THERNSTROM AND ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* (Simon and Schuster, 1997) (“It is startling that until 1989 our birth registration rules provided that the child of a white husband and a black wife counted as “black,” and so, too, did the child of a black husband and a white wife. It was the “one drop of blood” rule: a trace of black blood and you were black.”); and Christopher A. Ford, *Administering Identity: The Determination of “Race” in Race-Conscious Law*, 82 CAL. L. REV. 1231 (1994) Noting that:

From 1950 to 1989, ...the federal guidelines...used in making birth certificate race-identification records [were] outlined ...by ...the National Center for Health Statistics...included a procedure for determining the race of a child from the self-reported race of the parents. In the case of mixed parentage where only one parent was white, the child was assigned to the other parent’s race. When neither parent was white, the

Because by definition claims of personal whiteness necessarily invoke claims of purity they therefore require constant attention to “policing the borders [and] maintenance of the boundaries between one’s own kind and others.”¹⁰⁶ This is true because, as Iris Marion Young has observed, “any move to define an identity, a closed totality, always depends on excluding some elements, separating the pure from the impure...the logic of identity seeks to keep those borders firmly drawn.”¹⁰⁷ The thrust of this “boundary maintenance”¹⁰⁸ has taken the form of legal and social prohibitions designed to suppress “interracial sexuality and the births of mulattoes” because this “represented boundary crossings that were widely perceived as threatening otherwise stable racial boundaries.”¹⁰⁹

Thus, a claim of personal whiteness is not only paradoxically a claim of being “pure” or uncontaminated by blackness, but also of actually transcending race or being innocent of race itself. However, this transcendence notwithstanding, most people who regard themselves as white,¹¹⁰ are deeply invested in their whiteness, because it is “an identity that provides them with resources, power, and opportunity.”¹¹¹ However,

child was assigned to the race of the father. One notable characteristic is that any coupling between Whites and non-Whites was deemed to produce non-White children. White racial status could only be removed by inter-group parentage, never gained.

¹⁰⁶ Ferber, *White Man Falling*, supra at 23

¹⁰⁷ Iris Marion Young, *The Ideal of Community and the Politics of Difference*, in *FEMINISM/POSTMODERNISM* 303 (Linda J. Nicholson, ed) (Routledge, 1990)

¹⁰⁸ Ferber, *White Man Falling*, supra at 23

¹⁰⁹ Id

¹¹⁰ DAVID R. ROEDIGER, *COLORED WHITE: TRANSCENDING THE RACIAL PAST*, 124 (University of California Press, 2002) (noting that “a substantial African American tradition [exists] that regards terror and complicity in terror as the glue binding together those who think that they are white.”)

¹¹¹ GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS*, 1 (Temple University Press, 1998) [hereinafter Lipsitz, *Possessive Investment in Whiteness*] at vii (“this whiteness is, of course, a delusion, a scientific and cultural fiction that like all racial identities has no valid foundation in biology or anthropology. Whiteness is, however, as social fact, an identity created and continued with all-too-real consequences for the distribution of wealth, prestige, and opportunity.”) id.

despite this investment, they are also simultaneously schizophrenically deeply in denial regarding the racially contingent basis of their identity. This is especially true because, just as men have difficulty imagining themselves “as having gendered identities,”¹¹² many whites have similar difficulty seeing themselves as raced and thus having racial identities in American society.

Thus, most whites are conditioned not to view themselves in racial terms; instead they believe that “race is something that doesn’t affect whites.”¹¹³ Under this logic, race is something that affects racial minorities like blacks, Latinos, Asians, or American Indians, but not whites.¹¹⁴ Thus whiteness and its attendant privileges is something that members of the “dominant group [are] taught not to see.”¹¹⁵ As a result, even though whites “enjoy unearned skin privilege” merely from being identified in society as white,¹¹⁶ they “have been conditioned into oblivion about its existence [and are] unable to see that it puts [them] ahead in any way... overrewarding... and yet also paradoxically damaging [them.]”¹¹⁷ As Richard Dyer has poignantly observed “[a]s long as race is something only applied to non-white peoples, as long as white people are not racially seen and named, they/we function as a human norm. Other people are raced, we are just people.”¹¹⁸

¹¹² McIntosh, *White Privilege* supra at 296

¹¹³ MELANIE E. L. BUSH, *BREAKING THE CODE OF GOOD INTENTIONS: EVERYDAY FORMS OF WHITENESS*, (Rowman & Littlefield Publishers, 2004)

¹¹⁴ Lewis, *Lessons on Whiteness*, supra at 165 (noting that most whites do “not have a coherent or self-conscious identity as a white person. As far as [they are] concerned, race was about others.”); See also, id at 161 (“many whites do not necessarily recognize their own status as a racial actors or consciously identify as belonging to a racial group.”)

¹¹⁵ Id at 292

¹¹⁶ See *Plessy v. Ferguson*, (discussing the value of a reputation for being white)

¹¹⁷ Id at 292; See also Anthony Farley...

¹¹⁸ RICHARD DYER, *WHITE 1* (Routledge, 1997) (“to say that one is interested in race has come to mean that one is interested in any racial imagery other than that of white people. Yet race is not only attributable to people who are not white.”)

As a consequence of whites not seeing themselves as being raced within Western culture, as standing for the “human norm,” they are thereby able to “claim to speak for the commonality of humanity.”¹¹⁹ The claim of whiteness to speak for all of humanity is *sui generis* because “raced people can’t do that – they can only speak for their race. But non-raced people can, for they do not represent the interest of a race.”¹²⁰ Whiteness is thus thought of as coterminous with being “just human...[or] just people...which is not far off saying that whites are people whereas other colours are something else...[and] is endemic to white culture.”¹²¹ Because most whites see themselves as just people without a conscious racial identity, this gives rise to a sense of being innocent of race that is uncomfortably disturbed when they are reminded that they are white. As Dyer points out, “bell hooks, for instance, has noted how amazed and angry white liberals become when attention is drawn to their whiteness, when they are seen by non-white people as white.”¹²²

ii. White is a Color Too

Despite white denials of being an unraced norm, the hard truth is that they are clearly raced within Western culture because “everyone in this social order has been constructed in our political imagination as a racialised subject.”¹²³ Thus in order to

¹¹⁹ Id at 2

¹²⁰ Id

¹²¹ Id

¹²² Id at 2-3 (“often their rage erupts because they believe that all ways of looking that highlight difference subvert the liberal belief in a universal subjectivity (we are all just people) that they think will make racism disappear. They have a deep emotional investment in the myth of ‘sameness’, even as their actions reflect the primacy of whiteness as a sign informing who they are and how they think.”) (citing BELL HOOKS, *Madonna or Soul Sister? And Representations of Whiteness in the Black Imagination*, in *BLACK LOOKS: RACE AND REPRESENTATION* 167 (South End Press, 1992)

¹²³ DYER, *WHITE* *supra* at 3

disrupt the hegemony of whiteness,¹²⁴ it is necessary to “see” it as a racialised socially constructed identity and to “make visible...the invisibility of whiteness as a racial position in white (which is to say dominant) discourse.”¹²⁵ In the absence of such disruption, the “racial position” of whiteness will continue to be “the white point in space from which we tend to identify difference,”¹²⁶ or the “vantage point”¹²⁷ from which all things are judged and measured.

As Richard Dyer reminds us, “indeed, to say that one is interested in race has come to mean that one is interested in any racial imagery other than that of white people. Yet race is not only attributable to people who are not white, nor is imagery of non-white people the only racial imagery.”¹²⁸ Non-whites are not the only people who are raced in American culture. White is a color too, although it has become so ubiquitous that it has become invisible. Thus Dyer argues that, “everyone in this social order has been constructed in our political imagination as a racialized subject and thus...we should consider whiteness as well as blackness,” as racialized colors “in order to make visible what is rendered invisible when viewed as the normative state of existence: the white point in space from which we tend to identify difference.”¹²⁹

The power of “the invisibility of whiteness as a racial position in white (that is to say dominant) discourse is of a piece with its ubiquity” and allows whites to be seen as not as raced peoples, but rather as just as people outside of a socially raced perspective or as “the norm, the ordinary, the standard...[but] precisely because of ...their placing as norm they seem not be represented to themselves *as* whites but as people who are variously gendered, classed,

¹²⁴ See, *Id* at 10 (“the point of looking at whiteness is to dislodge it from its centrality and authority, not restate it.”)

¹²⁵ *Id*

¹²⁶ *Id*

¹²⁷ Minow, *Justice supra* at ____

¹²⁸ *Id*

¹²⁹ *Id* at 3 (citing Hazel Carby, _____) (1992)

sexualized and abled.” Dyer thus concludes that “at the level of racial representation...whites are not of a certain race, they’re just the human race...and speak for humanity”¹³⁰ Moreover, “as long as whiteness is felt to be the human condition, then it alone both defines normality and fully inhabits it.”¹³¹

2. Innocent of Racial Perspective

Since most whites “do not conceive of themselves in racialized terms” they consider their perspective to be an equally unraced and objective report of reality, especially racial reality. Moreover, since whiteness sees itself as the norm, logically non-whites “are defined as deviating from the norm.”¹³² Thus whiteness sees itself as the real and non-whites as somehow not real or certainly less real. Under this logic, since whites are the only “real” people, it follows that their perceptions of racial reality are the only real ones real as well.

Since most whites are paradoxically simultaneously both keenly aware of their whiteness, and deeply oblivious to it, they see their whiteness not as a raced condition but as the norm. As Peggy McIntosh reminds us, “whites are taught to think of themselves as morally neutral; normative, and average, and also ideal.”¹³³ Similarly Richard Dyer concludes that “[f]or those in power in the West, as long as whiteness is felt to be the

¹³⁰ Id at 3 (“in the West, being white is not an issue for most whites people, not a conscious or reflected part of their sense of who they are.”) id at 5.

¹³¹ Id at 9

¹³² WHITE REIGN: DEPLOYING WHITENESS IN AMERICA (Joe L. Kincheloe, et al, eds.,) (St. Martin’s Griffin, 1991) [hereinafter Kincheloe, *White Reign*]

¹³³ McIntosh, *White Privilege* supra at 292

human condition, then it alone both defines normality and fully inhabits it” and in this way “secures a position of power.”¹³⁴

This socially constructed racial identity of being real, forms what Peggy McIntosh has described as “a base of unacknowledged ...unearned...skin privilege” which she describes as being “like an invisible weightless knapsack of special provisions, assurances, tools, maps, guides, codebooks, passports, visa, clothes, compass, emergency gear, and blank checks.”¹³⁵ Because these privileges of whiteness are unspoken they are invisible,¹³⁶ but nonetheless palpably clear and real and constitutive of a racially and “arbitrarily conferred dominance.”¹³⁷ However, both whiteness and the ideology of white innocence are in plain sight while also simultaneously totally invisible. This paradoxical racial phenomenon is not new. As George Lipsitz reminds us, “whiteness is everywhere in U.S. culture, but it is very hard to see.”¹³⁸ This is because, “white power secures its dominance by seeming not to be anything in particular. As the unmarked category against which difference is constructed, whiteness never has to speak its name, never has to acknowledge its role as an organizing principle in social and cultural relations.”¹³⁹

¹³⁴ DYER, WHITE supra at 9 (“ White people have power and believe that they think, feel and act like and for all people; white people unable to see their particularity, cannot take account of other people’s.”)

¹³⁵ Peggy McIntosh, White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences through Work in Women’s Studies, in CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR, 291, 292 (Richard Delgado and Jean Stefancic, eds.) (Temple University Press, 1997) [hereinafter McIntosh, White Privilege]

¹³⁶ See Minow, Justice supra (describing how white privilege is invisible only to whites, but not in any way invisible to non-whites)

¹³⁷ Id at 296 (“some of the power which I originally saw as attendant on being a human being in the U.S. consisted in unearned advantage and conferred dominance, as well as other kinds of special circumstances no universally taken for granted.”) id.

¹³⁸ GEORGE LIPSITZ, THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS, 1 (Temple University Press, 1998) [hereinafter Lipsitz, Possessive Investment in Whiteness]

¹³⁹ Id

This seeming invisibility of whiteness allows the Court to deploy the rhetorical narrative of white innocence as a kind of “semantic code”¹⁴⁰ that supplies a moral armor thorough which the Court can appear to measure constitutionality under what seem to be praiseworthy and ostensibly racially neutral standards, but which are in reality, deeply racialized. This is true because not only does the analysis proceed exclusively from the white vantage point, but the standards the Court adopts also serve to protect, perpetuate, and rationalize the existing extreme disequilibrium of power, wealth, and access to the good things in life under the racial status quo.¹⁴¹ Thus, white innocence constitutes a type of magic amulet contained in McIntosh’s “invisible weightless knapsack”¹⁴² of white privilege, with which whites can ward off the dark forces of responsibility for the creation, and perpetuation, of the many inequalities, burdens, and benefits of the racial status quo in contemporary America.

Thus, through this rhetorical narrative, the presumption of white racial innocence constitutes an important, obvious, but also, an effectively hidden pillar of the racial status quo that Cass Sunstein calls “the baseline for assessing neutrality.”¹⁴³ From this

¹⁴⁰ Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 Cal. L. Rev. 77, 78 (2000)

¹⁴¹ See, RACIST CULTURE, *supra* (noting that, “the law, moral discourse, and the social sciences can thus silently incorporate racialized language... as the preconceptual elements of racialized discourse, while claiming to be anti-racist.”) *id* at 42. See also, RACISM AND THE INNOCENCE OF LAW, *supra* (“That is, the form both substitutes for explicit racism and provides a means of asserting that what is involved is not racism but something different.”) *id* at 120. See also, Cass R. Sunstein, THE PARTIAL CONSTITUTION, (Harvard University Press, 1993) 6 [THE PARTIAL CONSTITUTION]. Gunnar Myrdal, AN AMERICAN DELEMMA, at 218 (which describes this process as one which allows both the individual and the state to “avoid...hard thinking [and] enable...one to stand for the status quo ... without flagrantly exposing oneself even to oneself.”)

¹⁴² McIntosh, *White Privilege*, *supra* at 291

¹⁴³ THE PARTIAL CONSTITUTION, *supra* at 6 (“A decision to use the status quo as the baseline would be entirely acceptable if the status quo could be independently justified. In many contexts, however, the status quo should be highly controversial as a matter of both principal and law. Respect for the existing distributions is neutral only if existing distributions are themselves neutral. When the status quo – between, say, rich and poor, or blacks and whites, or women and men – is itself a product of law, and far from just, a decision to take it as a baseline for assessing neutrality is unjustifiable.”) *Id*.

perspective any disturbance in the existing racial prerogatives, preferences, and advantages of so-called innocent whites as a group, is regarded as a “departure from the status quo” and thus “signals partisanship” while “respect for [this] status quo signals neutrality.”¹⁴⁴ As a result, the white-centered perspective is able to claim that it does not have a racial vantage point, and in so doing continues to “perpetuate the mythology of the neutral observer.”¹⁴⁵

Similar to Sunstein’s observations, Martha Minow observes that the “unstated assumption” of a white racialized standpoint of the status quo can “so entrench one point of view as natural and orderly that any conscious decision to notice or to ignore difference breaks the illusion of a legal world free of perspective.”¹⁴⁶ Like Sunstein, Minow also argues that these unstated and deeply racialized assumptions “make it seem that departures from unstated norms violate commitments to neutrality. Yet adhering to the unstated norms undermines commitments to neutrality – and to equality.”¹⁴⁷

But of course, the hard truth is that whiteness is not a racially neutral lens thorough which to gaze at the world of racial reality. Instead, whiteness has a distinct racialized “standpoint [or] location from which to see [itself] others, and national and global others.”¹⁴⁸ Failing to acknowledge the “unstated assumption” of this white standpoint, or the “white point in space” that constitutes the source of the white vantage point, has highly negative consequences. As Martha Minow has observed, “[v]eiling the standpoint of the observer conceals its impact on our perception of the world...[and]

¹⁴⁴ Id at 3.

¹⁴⁵ Minow, Justice supra at 47 (“no objective perspective exists free from the particular viewpoint of the observer.”) id at 48

¹⁴⁶ Minow, Justice supra at 58,

¹⁴⁷ Id.

¹⁴⁸ Ruth Frankenberg, The Mirage of an Unmarked Woman, in THE MAKING AND UNMAKING OF WHITENESS 76 (Brander, et. al. eds.) (Duke University Press, 2001) (“Whiteness is a location of structural advantage in societies structured in racial domination.”)

leads to the next unstated assumption: that all other perspectives are either presumptively identical to the observer's own or are irrelevant."¹⁴⁹ This is particularly important in the context of the judicial function because, as Minow goes on to explain, "a judicial stance that treats its own perspective as unproblematic makes other perspectives invisible and puts them beyond discussion."¹⁵⁰

3. Innocent of Racism

From the white-centered perspective, racism in America is considered to be such an artifact of America's ancient past that it has moved one commentator, speaking from that vantage point to claim that "the blood of slavery does not stain modern mainstream America."¹⁵¹ Thus freed from the "stain" of slavery, some scholars have argued that white racial attitudes in America have improved and "transformed" so dramatically that although "[w]hites with a pathological hatred of African Americans can still be found...the haters have become a tiny remnant with no influence in any important sphere of American life."¹⁵² As a result, a significant theme among scholars who speak from a white-centered-perspective is the conclusion that, "at least when it comes to questions of

¹⁴⁹ Minow, *Justice* supra at 50 ("Feminist theorists have tried to articulate in theoretical terms, the bases for a "standpoint", a perspective grounded in experience that sheds contrasting light on prevailing constructions of reality.") id at 51 nt. 109. See generally, Hartsock, *The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism*, In *DISCOVERING REALITY: FEMINIST PERSPECTIVES ON EPISTEMOLOGY, METAPHYSICS, METHODOLOGY, AND PHILOSOPHY OF SCIENCE* 283(S. Harding & M. Hintikka eds. 1983). See also, Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *HARV. C.R.-C.L. L. REV.* 323 (1987)

¹⁵⁰ Minow, *Justice* supra at 53.

¹⁵¹ Brown, *Whitewashing Race* supra at 36

¹⁵² Thernstrom, *America in Black and White*, supra at 500 ("In arguing that white racial attitudes have come a long way, we do not claim that racism has entirely disappeared...[only that] white racial attitudes have truly altered...[and] ...been transformed.")

public policy, few whites are now racists.”¹⁵³ From this perspective most whites are no longer *guilty* of racism, thus with the exception of a few fringe outliers they – and thus whiteness itself -- must also logically therefore be considered *innocent* of racism.

i. A Discredited View of Racism

From this perspective the continuing presence of “racial incidents demonstrate” not the presence of societal racism but rather simply confirms that a few isolated “bigots and institutional failures still exist; however, they do not indicate that racism is a systemic problem.”¹⁵⁴ Significantly this view of the innocence of whiteness is only possible through the filtering of “evidence and ... judgment through an outdated, discredited understanding of racism.” This discredited view is premised on the assumption that racism in contemporary America consists of acts which are “intentional, obvious and individual.”¹⁵⁵ This view is based on “a particular understanding of racism...[that] assumes that racism is motivated, crude, explicitly supremacist and typically expressed as individual bias. Moreover, this view regards racism to be the result of intentional individual behavior that is both conscious and knowing in order to satisfy a personal racial animus and taste for discrimination that are manifested by either formal or explicit barriers to access based on racial categorization. This view ignores the fact that “white supremacy is usually less a matter of direct, referential, and snarling

¹⁵³ Id

¹⁵⁴ Adeno Addis, *Recycling in Hell*, 67 TUL. L. REV.2253, 2255 (1993) [hereinafter Addis, *Recycling*]

¹⁵⁵ Id (“Many white Americans and American institutions, including the current Supreme Court majority, hold parallel views. Because racial conservatives ignore the variability of racial reality in America, they do not recognize that racism is lodged in the structure of society, that it permeates the workings of the economic, political, educational, and legal institutions of the United States.”) id at 37

contempt than a system for protecting the privileges of whites by denying communities of color opportunities for asset accumulation and upward mobility.”¹⁵⁶

ii. The End of Racism

Through the white-centered perspective, a great many whites and non-whites have adopted a form of American color blindness that holds that “except for vestigial pockets of historical racism, any possible connection between past racial subordination and the present situation has been severed by the formal repudiation of old race-conscious policies.”¹⁵⁷ These modern “apostles” in the faith of colorblindness thus advocate a perspective on race that “insists that racism is primarily a thing of the past.”¹⁵⁸

Thus, “those who adhere to this color-blind view typically assume that racial discrimination is much less frequent today and what remains is basically a problem of a few bigoted individuals and not of social institutions.”¹⁵⁹ From this white-centered vantage point, white innocence defines racism as primarily consisting of individual acts by rogue whites existing on the fringe of mainstream society.¹⁶⁰ Thus central to the ideology of white innocence is the notion that with the exception of this “tiny minority...of racist hotheads...who occupy political space only on the fringes of

¹⁵⁶ Lipsitz, *Possessive Investment in Whiteness*, supra at viii (“Whiteness is invested in, like property, but it is also a means of accumulating property and keeping it from others.”) See generally, Cheryl Harris, *Whiteness as Property*, __ HARV. L. REV. __ (19__).

¹⁵⁷ Crenshaw, *Race, Reform, and Retrenchment* supra at 1379

¹⁵⁸ *Id* at 35.

¹⁵⁹ Feagin, *White Men on Race* supra at 17 (“It appears that most members of the country’s elite have worked for several decades to foster this color-blind perspective, which in effect helps to camouflage the continuing stereotyping and widespread discrimination directed against Americans of color.”)

¹⁶⁰ See, Thernstrom, *Black and White*, supra 141 (“White racial attitudes have truly altered. Whites with a pathological hatred of African Americans can still be found, of course. But the haters have become a tiny remnant with no influence in any important sphere of American life.”)

mainstream white America...racism has been eradicated” by the actions of civil rights laws that stuck down “legal segregation and outlaw[ed] discrimination.”¹⁶¹

The elimination of these formal barriers to racial equality has spawned a cult of “color blindness” in which the presumed “race neutrality of the legal system creates the illusion that racism is no longer the primary factor responsible for the condition of the Black underclass.”¹⁶² Instead, the continuance of racial equality is no longer blamed on the biological racial inferiority of non-whites but rather on their cultural inferiority.¹⁶³ Although as George Fredrickson reminds us, “culture can be reified and essentialized to the point where it has the same deterministic effect as skin color.”¹⁶⁴

Similarly, not only do most whites consider themselves to be personally innocent of racism, but in national terms recent surveys reveal that “a majority of whites indicate that they do not see U.S. society as fundamentally racist or still pervaded by widespread discrimination.”¹⁶⁵ In fact, “from this perspective, many whites believe that the 1960’s civil rights laws took care of most serious racial discrimination...[and] the majority of whites see the U.S. social system as fair and egalitarian, and some get angry that black Americans do not see the country in the same way.”¹⁶⁶ Thus, “a majority of whites indicate in surveys that they sincerely believe that racial discrimination is no longer a

¹⁶¹ WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 1 (Brown, et. al. eds.) (University of California Press, 2003) [hereinafter Brown, *Whitewashing Race*] (“if vestiges of racial inequality persist, they believe that it is because blacks have failed to take advantage of opportunities created by the civil rights revolution. In their view, if blacks are less successful than whites, it is not because America is still a racist society.”)

¹⁶² *Id.* at 1383

¹⁶³ See *Id.* at 1379 (“The rationalizations once used to legitimate Black subordination based on a belief in racial inferiority have now been reemployed to legitimate the domination of Blacks through reference to an assumed cultural inferiority.”) See also, *id.* (“Culture not race, now accounts for this otherness.”). See generally, STEPHEN THERNSTROM AND ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* (Simon and Schuster, 1997);

¹⁶⁴ GEORGE M. FREDRICKSON, *RACISM: A SHORT HISTORY* 169 (Princeton University Press, 2002) [hereinafter Fredrickson, *Racism*]

¹⁶⁵ Feagin, *White Men on Race* *supra* at 19

¹⁶⁶ *Id.* at 15

serious problem for black Americans.”¹⁶⁷ Not only to most whites think that racial discrimination against blacks is largely a thing of the past, “[e]ven more striking, perhaps is the fact that a majority of whites do not see the centuries of slavery and segregation as bringing whites substantial socioeconomic benefits.”¹⁶⁸

This white-centered view of the nature of racism reflects what Alan Freeman has characterized as a move from a “victim perspective” to a “perpetrator perspective”¹⁶⁹ As the labels imply, the victim perspective was focused on the injury or loss suffered by the victims of racial discrimination. However, he argues that the perpetrator perspective “means looking at contested race issues from the vantage point of whites,” thus the “perpetrator perspective in law, like the conservatives’ understanding of racism, is preoccupied with white guilt or innocence.”¹⁷⁰ The perpetrator perspective of course, reinforces the notion that racism is primarily a function of individual actors, who can be found and punished, rather than reflecting on the institutional and systemic racial norms of society.

The normative quality of this perpetrator perspective was clearly evidenced in *Croson* when O’Connor argued that there was no “strong basis in evidence for its conclusion that remedial action was necessary,” because the “the city points to no evidence that qualified minority contractors have been passed over for city contracts or subcontracts, either as a group or in any individual case.”¹⁷¹ On this basis Justice

¹⁶⁷ Id (“one recent Washington Post/Kaiser/Harvard survey found that a substantial majority of whites felt that African Americans had societal opportunities that were equal to, or better than, those of whites.”)id

¹⁶⁸ Id (“Another national survey found that most whites did not think that whites as a group had benefited from past or present discrimination against black Americans.”)id.

¹⁶⁹ Alan Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Decisions*, 62 MINN. L. REV. 1049 (1978).

¹⁷⁰ *Brown*, *Whitewashing Race*, *supra* at 37 (“It largely ignores whether people of color have suffered injury or loss of opportunity because of race.”)

¹⁷¹ *Croson* *supra* at 510

O'Connor concluded that "[p]roper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings are also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself."¹⁷² Thus O'Connor reinforces the ideology of the perpetrator perspective by insisting that the "norm" is "equal treatment of all racial groups" absent a "finding" of a specific non-white contractor that has been discriminated against by the old boy network of white contractors. Under O'Connor logic, in the absence finding a bad actor or guilty perpetrator who had discriminated against a non-white contractor, she assumed that the "normal" operation of the system of state contracting was one that respected the "equal treatment of all racial and ethnic groups."¹⁷³

iii. The Continuing Centrality of Racism

However, in stark contrast, when viewed from a non-white-centered perspective racism is neither a thing of the past nor the product of isolated and individual rogue bigots or guilty perpetrators. Instead, from a non-white-centered perspective racism is considered to be still "deeply entrenched in this polity and defines the institutions of this country, not so much by being an exception to the general rule of fairness, but rather by being central to the polity's very understanding of fairness, justice, and virtue."¹⁷⁴

Moreover, in further stark contrast to the white-centered perspective, from the non-white centered perspective, equal racial treatment is not the "norm." Instead, it regards racism not as an extraordinary malfunction, but rather as a fundamental feature of

¹⁷² Id (noting that "Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotyping or a form of racial politics.") id. See also, Grutter, *supra* at 31 (citing Croson on the "norm of equal treatment.")

¹⁷³ Id.

¹⁷⁴ Id

society that is reflected not simply in the acts of individual whites but also, and most importantly, in the very structures and institutions of the society itself. From this perspective, this sort of institutional racism is not an exceptional occurrence that exists only on the fringes of mainstream American society, but rather lies at the very heart of the system. This view considers racism to be the function of systemic forces within society and its institutions that operate silently, seamlessly, and incessantly to privilege whites and burden non-whites, without the need for any intentional behavior by specific racist individual actors. In short, from the non-white-centered-perspective, racism is not an exceptional act of individual, rogue, bad actors, but is a normative and endemic feature of the very structure of the status quo.

Moreover, from the non-white-centered-perspective racism is a phenomenon that can operate either, consciously or unconsciously.¹⁷⁵ In fact, from this perspective the unconscious operation of racism constitutes it's most ubiquitous and common manifestation within personal, institutional and societal contexts and constitutes a discursive process that operates in the absence of formal and explicit racial restrictions in order to lower the barriers to access for whites and raise them for non-whites.

Thus through its reliance on the white-centered perspective, the ideology of white innocence reflects a set of “shared narratives and ideologies,” through which “federal courts have mythically transformed systemic racism into an individualism” that reflects the availability of “choices [that] most people of color do not have.”¹⁷⁶ Again, as implicated in the opening lines of this article, from the non-white-centered perspective

¹⁷⁵ See Lawrence *supra*, The Id, the Ego and Equal Protection?

¹⁷⁶ Dwight L. Greene, Justice Scalia and Tonto, Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism in *Bostick v. Florida*, 67 TUL. L. REV. 1979, 1982 (1992) (“[t]his posits a cardinal rule underlying much constitutional jurisprudence: that the Constitution protects individuals but not as members of a racial group.”) *id.* at 1982 nt. 7

the aftermath of Hurricane Katrina in the summer of 2005 provided stark evidence of the continuing salience of race in America. This is poignantly and tragically illustrated by the fact that over one hundred thousand people, mostly black and poor were left behind during the evacuation of New Orleans because their abject poverty deprived them of any ready means to leave before the city was virtually destroyed by the greatest natural disaster in American history.¹⁷⁷

Moreover, as the nation watched the horror unfolding daily on their television screens, day after day tens of thousands of poor blacks were left to fend for themselves in the ravaged aftermath of the storm, without food, water, medical help, or security.¹⁷⁸ In the nightmare and human tragedy that an inundated and devastated New Orleans had become after this incredible disaster, we will never know how many poor blacks died or suffered serious injury waiting for government rescue that either never came, or came too late.¹⁷⁹ In short, while it may not have been clear to many before the flood, it certainly was clear afterward that in many ways “blacks live in a different world from whites.”¹⁸⁰

¹⁷⁷ Evan Thomas, *The Lost City*, Newsweek, September 12, 2005 page 44 (“Left behind were the poor who couldn’t get out, a few defiant gentry and gangs of predators.”)

¹⁷⁸ See Id (“Day after day of images showed exhausted families and their crying children stepping around corpses while they begged: Where is the water...the buses.”)

¹⁷⁹ See id, (“The TV images of hundreds and thousands of people, mostly black and poor, trapped in the shadow of the Superdome. And most horrific: the photographs of dead people floating facedown in the sewage or sitting in wheelchairs where they died, some from lack of water.”) It is indeed hard to imagine that if over 100,000 white middle or upper class people were trapped in a major American city after a devastating natural disaster, that the government would have made them wait for 5-6 without food, water or rescue. Instead, the enormity of the suffering coalesced around the intersection of both class and race. However, according to recent national polls while “six in 10 African Americans say the fact that most hurricane victims were poor and black was one reason the federal government failed to come to the rescue more quickly. Whites reject that idea; nearly 9 in 10 say those weren’t factors.” U.S.A. Today, September 13, 2005 p. 1.

¹⁸⁰ JENNIFER L. HOCHSCHILD & MONICA HERK, “YES BUT...” : PRINCIPLES AND CAVEATS IN AMERICAN RACIAL ATTITUDES, MAJORITIES AND MINORITIES, 319 (John Chapman and Alan Wertheimer eds., 1990); See also, Addis, supra (“the different worlds blacks and whites occupy are not only metaphorical. They are physical as well.”)id at 2255 nt. 7. See also, John Lewis, *Opinion: This is a National Disgrace: A Civil Rights Leader Mourns an African-American Population Left Behind*, Newsweek, September 12, 2005, p. 52 (“maybe we will never know the number of people who have been lost. It’s so glaring that the great majority of people crying out for help are poor, they’re black. There’s a

As starkly summarized by Professor Addis “put simply, while most whites see racism as an occasional unfortunate interruption to the institutional and individual commitments to the values of equal opportunity and equal treatment, most blacks see racism as a daily routine by which the lives of black people are systematically and institutionally devalued.”¹⁸¹ Moreover, he argues that “the very breadth of this devaluation suggests that the institutions of this country are interlinked and that they recycle the process of devaluation.”¹⁸²

4. Innocent of Perpetuating or Benefiting from Racism

From the white-centered perspective, the current disproportionate social, economic, and political benefits enjoyed by whites are direct reflections of individual merit and hard work. This vantage point does not admit any contemporary role or influence for America’s long history of officially sanctioned racial subordination. One group of scholars has pointed out that it is striking “that a majority of whites do not see the centuries of slavery and segregation as bringing whites substantial socioeconomic

whole segment of society that’s being left behind. When you tell people to evacuate, these people didn’t have any way to leave. They didn’t have cars, any SUV’s... [t]his reminded me of Somalia. But this is America. This is an embarrassment. It’s a shame. It’s a national disgrace.”

¹⁸¹ See Addis, *supra* (noting that “the most glaring examples of such devaluation occurs in the criminal justice system.”) See also, *id* (“by devaluation I mean to refer to the situation when the lives and well-being of “African Americans are systematically and institutionally given less weight than those of European Americans, and are consequently deemed dispensable either when they are in some way perceived to be inconsistent with, or to not advance, the interests and well-being of European American.”)*id*. See also, Derrick Bell, INTEREST CONVERGENCE THEORY!!! <CITE>;

¹⁸² Addis, *supra* at 2257

benefits.”¹⁸³ Thus, from this perspective whiteness is thought of as being innocent of having derived any contemporary benefit from racism.

This aspect of the ideology of white innocence is vividly expressed in the early writings of Judge Anton Scalia, prior to joining the High Court and Judge Robert Posner. In their analysis, white innocence appears to have two distinct and inter-related components. First, whites are innocent to the extent that they took “no part in” either the creation or the “perpetuation” of the historic domination and subordination of non-white and especially Black people. Second, white innocence is a function of whites “deriving no profit” or “in any demonstrable sense benefit[ing]” from the existence of discrimination and subordination.

Prior to joining the Supreme Court, Justice Anton Scalia addressed the meaning of innocence in “forcefully articulate[ing] the objections to – and the resentment of – the compensatory justification of affirmative action.”¹⁸⁴ In describing how his own father was racially innocent, he also articulated his sense of a working definition of white innocence that evoked the personal absence of participation in or receipt of benefits from the condemned activity. He wrote that:

“My father came to this country when he was a teenager. Not only had he never profited from the sweat of any black man’s brow, I don’t think he’d ever seen a black man. There are, of course, many white ethnic groups that came to this country in great numbers relatively late in its history – Italians, Jews, Poles – who not only took no part in, derived no profit from, the major historic suppression of the currently acknowledged minority groups, but were in fact themselves the object of discrimination by the dominant Anglo-Saxon majority. To be sure, in relatively recent years some or all of these groups have been the beneficiaries of discrimination against blacks, or have themselves practiced discrimination, but to compare their racial debt...with that of those who plied the slave trade, and who maintained a

¹⁸³ Brown, *Whitewashing Race* supra at 15 (“Another national survey found that most whites did not think that whites as a group had benefited from past or present discrimination against black Americans.”)

¹⁸⁴ Scalia, Commentary—*The Disease as Cure*, 147, 152 (1979). See also, Sher, *Justifying Reverse Discrimination in Employment*, 4 *Philosophy and Public Affairs* 159, 160—62 (1975)

formal caste system for many years thereafter, is confuse a mountain with a molehill.”¹⁸⁵

As Professor Fiscus points out, Richard Posner, “made essentially the same argument...less passionate than Scalia but no less logical,” when he wrote that “the members of minority groups who receive preferential treatment will often be those who have not been the victims of discrimination while the non-minority people excluded because of preferences are unlikely to have perpetrated, or to have been in any demonstrable sense benefited from, the discrimination.”¹⁸⁶ Thus, the Scalian and Posner views of white innocence consist of the absence of participation in or perpetuation of racial discrimination, and the absence of deriving any personal benefit from the existence of that discrimination.

Upon close examination, Justice Scalia’s definition of innocence as the absence of participation and benefit from racism, appears to be incoherent because of a serious internally inconsistency. Although he asserts that he is describing white innocence in the absolute sense, as he writes, they “took no part in, derived no profit from, the major historic suppression of the currently acknowledged minority groups, but were in fact themselves the object of discrimination by the dominant Anglo-Saxon majority.”¹⁸⁷ However, he also asserts that although these late European immigrants had no part in creating the “major historic suppression[s]” of people of color, they later did in fact

¹⁸⁵ Scalia, Commentary—*The Disease as Cure*, 147, 152 (1979). See also, Sher, *Justifying Reverse Discrimination in Employment*, 4 *Philosophy and Public Affairs* 159, 160—62 (1975) (describing “a class of persons, most often white males, who themselves may be innocent of any race-based wrongdoing...who may have enjoyed no personal advantages traceable to past racial injustices.”) *id.*

¹⁸⁶ CONSTITUTIONAL LOGIC, *supra* at 12-13.

¹⁸⁷ See *supra*

participate in that suppression, as he notes that they “have themselves practiced discrimination.”¹⁸⁸

In addition, although Scalia argues that those immigrants, like his father, “derived no profit” or benefit from the historic suppression of people of color, he also admits that “some or all of these groups have been the beneficiaries of discrimination against blacks.” Perhaps mindful of his own internal logical inconsistency, Scalia does not conclude from this analysis that immigrants like his father were innocent in any absolute sense, but rather, merely relatively innocent in comparison to those who personally as he says, “plied the slave trade, and maintained a formal caste system for many years.”¹⁸⁹

It is thus clear that notwithstanding its absolutist billing, Scalia’s logic does not lead to the conclusion that he claims for it. This is evident by his conclusion that “to compare th[e] racial debt” of those immigrants groups who “have been the beneficiaries of discrimination against blacks, or have themselves practiced discrimination...with that of those who plied the slave trade, and who maintained a formal caste system for many years thereafter, is to confuse a mountain with a molehill.”¹⁹⁰ Thus, in Scalia’s terms late European immigrants like his father were not completely free of racial guilt. Instead their own acts of racial discrimination and personal benefit from the racial caste system, renders their degree of culpability a relative “molehill,” in comparison to the “mountain” of culpability of historical others who were far worse and benefited far more.

¹⁸⁸ Id

¹⁸⁹ Id.

¹⁹⁰ Scalia, Commentary—*The Disease as Cure*, 147, 152 (1979). See also, Sher, Justifying Reverse Discrimination in Employment, 4 *Philosophy and Public Affairs* 159, 160—62 (1975) (describing “a class of persons, most often white males, who themselves may be innocent of any race-based wrongdoing...who may have enjoyed no personal advantages traceable to past racial injustices.”) id.

Thus, despite its billing, even Scalia does not assert that late arriving European whites are “innocent” per se, but merely comparatively so, in contrast to those who were actually personally involved in the slave trade, and Jim Crow segregation. It seems an odd turn of logic to base a sense of contemporary innocence on the existence of significantly greater historic culpability. Under this odd Scalian logic, it could be argued that so long as there are greater evil doers in the historic past, even admitted contemporary evil doers are somehow immunized, and rendered innocent, so long as their evilness does not surpass an imaginary quantum of past evil.

Thus, Scalian white innocence seems a perverse form of comparative innocence that no court would accept as exculpating. In essence, to cry that there were once those worse than me, is hardly a reason to conclude that one’s own culpability should be diminished as a consequence. This is a sort of “Attila the Hun” defense; which provides that so long as one can invoke Attila’s past savagery as surpassing one’s own, one can claim a type of relative innocence. It is charitable to characterize this sort of defense of white innocence as fundamentally irrational and it appears to only be intelligible and intellectually coherent through the white-centered-perspective.

i. A Stacked Deck

In their recent study on the “myth of colorblindness” one group of scholars has likened the experience of being white in contemporary America with the “well known philosophical maxim, [that] the last thing a fish notices is the water.”¹⁹¹ In this way they argue that because of this type of immersion phenomenon “things that are unproblematic seem natural and tend to go unnoticed,” thus “fish take the water they swim in for

¹⁹¹ Brown, *surpa Whitewashing Race*, at 34

granted, just as European Americans take their race as a given, as normal.”¹⁹² As a consequence, most whites “cannot see how this society produces advantages for them because these benefits seem so natural that they are taken for granted, experienced as wholly legitimate.”¹⁹³ Because of this total immersion in social and cultural whiteness, most whites quite “literally do not see how race permeates America’s institutions—the very rules of the game—and its distribution of opportunities and wealth.”¹⁹⁴ As a result of failing to appreciate their racially immersed condition in a society awash with whiteness, most whites take their “racial location for granted” which leads them “to ignore the way in which race loads the dice in favor of European Americans while simultaneously restricting African Americans’ access to the gaming table.”¹⁹⁵ Thus ultimately, to most whites “white privilege, like the water that sustains fish, is invisible in their analysis.”¹⁹⁶ However, its invisibility does not lessen the grip of white privilege on access to social benefits and opportunities, nor ameliorate its dampening effect on non-white aspirations and efforts.

ii. Personal Benefit

For these reasons, analyzing the white-centered-perspective analysis on racial reality can be instructive and illuminating because “understanding a person’s racial

¹⁹² Id (“White Americans may face difficulties in life—problems having to do with money, religion, family – but race is not one of them. White Americans can be sanguine about racial matters because their race has not been (until recently) visible to the society in which they live.”)

¹⁹³ Id

¹⁹⁴ Id

¹⁹⁵ Id

¹⁹⁶ Id

If white Americans make no effort to hear the viewpoints and see the experiences of others, their awareness of their own privileged racial status will disappear. They can convince themselves that life as they experience it on their side of the color line is simply the objective truth about race. But while this allows them to take their privileged status for granted, it also distorts their understanding.

id at 35.

worldview from the perspective of racial identity theory also reveals how a person participates in and understands individual, institutional, and cultural racism.”¹⁹⁷ This is true because, in America “every white person...is socialized with implicit and explicit racial messages about him- or herself and members of visible racial/ethnic groups...[and] [a]ccepting these messages results in racism become an integral component of each white person’s ego or personality.”¹⁹⁸ As a consequence, “evolving a nonracist white identity begins with individuals accepting their whiteness and recognizing the ways in which they participate in and benefit from individual, institutional, and cultural racism.”¹⁹⁹

From a non-white-centered-perspective, the argument that contemporary whites derive no benefit from their whiteness, is hopelessly naïve because of the substantial “cash value”²⁰⁰ that is associated with whiteness. As George Lipsitz has pointed out “white Americans are encouraged to invest in whiteness, to remain true to an identity that provides them with resources, power, and opportunity.”²⁰¹ Moreover, “as long as we define social as the sum total of conscious and deliberative individual activities, we will

¹⁹⁷ IMPACTS OF RACISM ON WHITE AMERICANS, SECOND EDITION (Benjamin P. Bowser and Raymond G. Hunt, eds.) 4 (Sage Publications, 1996) [hereinafter Bowser and Hunt, *Impacts of Racism*] (“Having a knowledge of racial identity can serve to deepen our understanding of the mechanism used to maintain racism in all of its forms.”)

¹⁹⁸ Id. (“Is every white person in the United States racist? Not necessarily. Is every white person exposed to social, institutional, and cultural messages that promote racism? Yes. What matters...is how he or she interprets the messages received about racial groups...[in order to avoid]...the color-blind status, where the existence of race and racism are denied but the person’s behavior and attitudes are guided by racist principles that have never been questioned.”) id at 4-5

¹⁹⁹ Id.

²⁰⁰ Lipsitz, *Possessive Investment in Whiteness* supra at vii (“Whiteness is invested in like property, but it is also a means of accumulating property and keeping it from others.”) id at viii.

²⁰¹ Id., pointing out that whiteness:

“accounts for advantages that come to individuals through profits made from housing secured in discriminatory markets, through unequal educations allocated to children of different races, through insider networks that channel employment opportunities to the relatives and friends of those who have profited most from present and past racial discrimination, and especially through intergenerational transfers of inherited wealth that pass on the spoils of discrimination to succeeding generations.”

be able to discern as racist only individual manifestations of personal prejudice and hostility.”²⁰²

II. White Innocence and Affirmative Action

Affirmative action is particularly fertile ground from which to gain insight into the nature and significance of differences in racial perspectives. This is true because affirmative action has been, and promises to continue to be an especially polarizing, contentious, and socially combustible topic with both opposing camps composed largely, although not exclusively, along racial lines.²⁰³ At the core of the disagreement between these opposing factions is a fundamental miscommunication.²⁰⁴ This miscommunication is a result of the differences in the racially distinct starting points that ground and orient each of their respective racial perspectives. Thus, their argument is not so much over the substantive fairness or effectiveness of affirmative action programs per se, as it is over the appropriate perspective from which to view it.

For example, this article argues that those who oppose affirmative action see the issue from a white-centered perspective that, among other things, presumes that the social, political, economic, and educational status quo is racially neutral, and that the

²⁰² Id at 20 (“Systemic, collective, and coordinated group behavior consequently drops out of sight. Collective exercises of power that relentlessly channel rewards, resources, and opportunities from one group to another will not appear “racist” from this perspective, because they rarely announce their intention to discriminate against individuals. Yet they nonetheless give racial identities their sinister social meaning by giving people from different races vastly different life chances.”)

²⁰³ See Skrentny, *Colorlines* supra at 48 (pointing out that “Affirmative action remains one of the most fiercely contested legacies of the civil rights era. ...In a short period of time affirmative action moved from obscurity to prominence...”)

²⁰⁴ See Skrentny, *Colorlines* supra at 208 (“affirmative action is about the place racial groups should occupy in “American society. Despite all the high, abstract, and moralizing rhetoric, affirmative action is about concrete matters of who gets what. A rhetoric centered around a mutual recognition and accommodation of legitimate interests is a far more promising basis for racial progress than are brickbats of moral superiority now wielded so vigorously by those on the Left and the those on the Right.”)

social and political debt for slavery was exhausted with the formal dismantling of Jim Crow and officially enforced racial segregation and subordination, and the enactment of antidiscrimination legislation. Moreover, this view is also premised on the assumption that contemporary whites bear no personal responsibility for existing racial inequality because they had no personal role in the creation of past racism and do not participate in perpetuating or benefiting from its legacy in the form of present-day racial subordination and discrimination.

However, this article also argues that those who support affirmative action as a broad policy matter and see the issue from a non-white-centered perspective have reached very different conclusions. A non-white-centered perspective on this issue, presumes that the social, political, economic, and educational status quo is *not* neutral but is in fact heavily racially skewed in favor of whites and against non-whites. This view is premised on the presumption that America's social and political debt for its historic racial sins of slavery, Jim Crow and the legacy of legalized discrimination has not been exhausted by the removal of express and formal barriers of racial discrimination. Instead, this perspective posits that informal, systemic, institutional, psychological, and unconscious racism continues to shape and benefit the lives of every white person and to burden the lives of every non-white person, solely on the basis of race.²⁰⁵

Moreover, this view also holds that contemporary whites do in fact bear a considerable personal responsibility for the continuing legacy of racial inequality, because although clearly they are not responsible for the creation of the historical causes of racism, nonetheless they feed, nourish, aid, abet, and benefit from the legacy of racism every day in a myriad of ways. As a consequence, they are deeply implicated and

²⁰⁵ See Lipsitz, Possessive Investment in Whiteness supra at 20

invested in maintaining the racial status quo of deep and continuing racial inequality. From this perspective it appears that, whether consciously or unconsciously, most whites engage in personal acts every day that actively reinforce, perpetuate and reinscribe racial distinctions and promote racial discrimination in society. Thus, from the non-white-centered perspective, the idea that most contemporary whites are innocent of active personal participation in promoting, reinscribing, and benefiting from racism is naive.

Affirmative action in education and employment has been combustible social tinder and the source of continuing, deep, and significant white resentment since it was first introduced.²⁰⁶ In fact it has been suggested that the depth of white resentment is so profound that, “a number of whites dislike the idea of affirmative action so much and perceive it to be so unfair that they have come to dislike blacks as a consequence.”²⁰⁷ Thus it is important to keep in mind, as Glen Loury has pointed out that, “the ideological meanings of a contested racial policy like affirmative action are determined within a social-cognitive matrix that is raced. A similar policy with a different set of beneficiaries might not have the same ideological resonance.”²⁰⁸ These ideological meanings are distinctly racial and are reinforced and reinscribed by the language and images that are employed by the Court in articulating the basis of their decisions in racially inflected

²⁰⁶ Cite introduction of Aff/Act

²⁰⁷ See Thernstrom, *Black and White*, supra at 312 (citing SNIDERMAN AND PIAZZA, *THE SCAR OF RACE* 8) It is striking, and perhaps illustrative of the difference in racial vantage points, that these otherwise reasonable scholars can actually believe that whites who were not racists before affirmative action have been driven into the arms of racism, and began to “dislike blacks” solely as a consequence of the existence of these programs. Of course they offer neither rational argument nor empirical evidence to support this dramatic rhetoric. Moreover, from a non-white vantage point a compelling persuasive argument can be made that any whites who claim to have been so malignantly converted in their racial views solely on the basis of affirmative action, are woefully deficient in credibility and are probably engaged in an apparently not so transparent effort to justify preexisting racial antipathy towards blacks.

²⁰⁸ Loury, *Anatomy* supra at 72-73 (“More generally, if when assessing a policy observers make use of a causal specification that has been colored by racial stigma, then they may perceive that policy as being especially threatening to their ideological position.”)

claims of constitutional violations. Behind these ideological meanings are the Court's "unstated assumptions about the nature of difference,"²⁰⁹ which reveal not a racially neutral jurisprudence but one which is decidedly and constitutionally impermissibly overly concerned with the welfare of one particular racial group – whites.²¹⁰

As George Lipsitz has observed, in resenting and resisting affirmative action, whites act like believe that they are "innocent victims of remedies for a disease that did not exist."²¹¹ Notably, the ideology of white innocence lies at the very heart of this white resentment. Thus, disrupting this ideology may well constitute the illusive Holy Grail that can redeem such ubiquitous white resentment. The late scholar, Ron Fiscus presciently made this point in the early 1990's when he observed that:

"the innocent persons argument is more than an important constitutional argument. It is a widely held, racially polarizing social argument. The near-universal belief in it is without doubt the single most powerful source of popular resentment of affirmative action. If the belief could somehow be undercut, the resentment toward affirmative action and the associated racial polarization might be diminished."²¹²

²⁰⁹ Minnow, *supra* at ___

²¹⁰ Skrentny, *Colorlines* *supra* at 48

At the heart of the battle over affirmative action was a debate about the very meaning of liberalism itself. ... The deep-rooted white opposition to affirmative action was at bottom a defense of a racial status quo that marginalized blacks in urban labor markets—a situation solidified by New Deal labor and economic policies that disproportionately benefited white workers. Affirmative action's critics masked their own unacknowledged identity politics in seemingly neutral, universalist rhetoric that they themselves had rejected only a few years earlier.

²¹¹ Lipsitz, *Possessive Investment in Whiteness* *supra* at 55

²¹² RONALD J. FISCUS, *THE CONSTITUTIONAL LOGIC OF AFFIRMATIVE ACTION: MAKING THE CASE FOR QUOTAS* 7-8 (Stephen L. Wasby, ed.) (Duke University Press, 1992) [hereinafter *Fiscus, Constitutional Logic*]. ("Until the innocent persons argument is squarely met, no defense of affirmative action is going to be wholly persuasive... more forcefully... until the premise of innocence is effectively refuted, no degree of burdening [of whites by affirmative action] will be principled.") Interestingly, although a supporter of affirmative action as a wise and important public and private policy, Professor Fiscus unconsciously associates the "near universal" belief in white innocence, primarily among *whites*, as being representative of all Americans. Similarly, in suggesting that affirmative action will not be persuasive without reconciling the innocence argument, the question that immediately presents itself is, 'persuasive to whom -- whites?' This phraseology ignores all the non-whites (and whites) to whom affirmative action is already persuasive despite impassioned claims of white innocence. This typifies the association of whiteness with humanity or at least with all (real) Americans generally. In this inadvertent phrasing he has effectively erased all non-white (as well as white) Americans who do not "believe" in the "self evident truth" of white innocence. In addition the exclusive focus on white resentment ignores the

Professor Fiscus concludes that if the premise of white innocence “could be rebutted, or at least narrowed...some critics of affirmative action might well be persuaded of its constitutionality ...others [would] be deprived of a seemingly powerful argument against it...[and] supporters ...would gain new confidence that their judgment is correct.” Thus, because of its power to engender such profound white resentment, in the hands of the Supreme Court, the rhetoric of white innocence is not simply used to resolve affirmative action claims; instead it amounts to a power that is wielded as a weapon of white supremacy in order to justify, legitimize, and maintain the existing racial status quo. Under such circumstances it is hardly surprising that America’s debate over affirmative action consists largely of such strident opposing camps.²¹³

A. Whiteness as Coterminous with Innocence

Although the Court frequently invokes the rhetoric of innocence and equates it presumptively with whiteness, it neither provides nor even attempts to provide, a definition for the term.²¹⁴ This is especially problematic, because without some degree of

fact that there is non-white resentment as well. In fact, much of the non-white resentment that is ignored by the white gaze, is based not simply on the presence and dominance of white supremacy, but also on the fact that so many whites perceive of themselves as racially innocent. Non-white, but especially Black resentment is rarely ever discussed unless it is demeaned by being characterized as “black rage,” “black outrage” or “black anger,” but never dignified simply as resentment. In short, when whites react negatively to race, they are being resentful, when blacks do the same, they are exhibiting rage. This rhetoric perpetuates the essentialism of whiteness and the marginality of non-whiteness, and paints whiteness as synonymous with reasonableness and non-whiteness with irrationality and bestiality. See Thernstrom, *Black and White*, supra at 496-97.

²¹³ See, Lawrence D. Bobo, *Race, Interests, and Beliefs about Affirmative Action: Unanswered Questions and New Directions*, in Skrentny, *Colorlines* supra at 191 (“The debate over affirmative action often seems to involve two warring camps, each of which stakes a mutually exclusive claim to moral virtue...opponents see their antagonists as advancing a morally bankrupt claim to victim status and the spoils of racial privilege...”)

²¹⁴ The ideology of innocence does not appear to have a particularly significant influence on the Court in the absence of race. In stark contrast to its receptivity to the concerns of white innocence, the Court appears to be surprisingly resistant and unsympathetic to claims of both “actual innocence,” (See _____) as well as “constitutional innocence,” (See _____). Therefore, it appears that the power of innocence

definitional precision, the Court’s invocation of white innocence has no substantive content that can be reasonably applied, rejected, or even rationally evaluated by the lower courts.²¹⁵ However, although it is not always clear precisely *what* the Court means when it invokes the rhetoric of innocence, it is clear *who* they are referring to— they are referring to whites. Thus, through the deployment of the rhetoric of white innocence, the Court appears to have constructed a mythologized and racialized concept of constitutionally cognizable innocence that does not just *include* whites, but is in fact *coterminous* with whiteness.²¹⁶

The equivalence of whiteness with innocence is revealingly illustrated in Justice O’Connor’s majority opinion in *Grutter*.²¹⁷ In discussing the second prong of the strict scrutiny test, she explained that the essence of the ‘narrowly tailored’ requirement is its capacity to ensure that race conscious remedies are constitutionally sustainable only to the extent that they “work the least harm possible to... innocent persons competing for the same benefit.”²¹⁸ She goes on to argue that, “[t]o be narrowly tailored, a race conscious admissions program must not unduly burden individuals who are not members of the favored racial ... groups.”²¹⁹

over the courts is not based on innocence alone but rather on the particular power of the ideology of white innocence.

²¹⁵ See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW, THIRD EDITION-VOLUME ONE*, (Foundation Press, 2000) 368 (arguing that “the ultimate issue is whether it is possible and appropriate to translate the principles underlying the constitutional provision at issue into restrictions on government, or affirmative definitions of individual liberty, which courts can articulate and apply.”)

²¹⁶ Although O’Connor also says that “Narrow tailoring, therefore, requires that a race-conscious admission program not unduly harm members of any racial group,” *Id* at 29 the overall tenor of her references to and use of the concept of innocence strongly suggests that she, along with the rest of the current Court, does in fact equate innocence with whiteness.

²¹⁷ *Grutter v. University of Michigan*

²¹⁸ *Grutter* at 29

²¹⁹ *Id* at 29 (“[t]he purpose of the narrow tailoring requirement is to ensure that the means chosen fit the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”)

In this way, Justice O'Connor argues that the proper constitutional measure of narrow tailoring consists of the extent to which race conscious remedies avoid harming a group she describes as "innocent persons." This group of innocent persons consists of those who are not included in the so-called "favored racial group." Thus Justice O'Connor characterizes the beneficiaries of race conscious programs as members of a "favored racial group" and conversely by implication, those who do not necessarily benefit as members of a non-favored racial group. Since the members of the "favored racial groups" in race conscious programs are by definition non-white persons, O'Connor's logic clearly suggests that the category of "innocent persons," she has in mind who must be protected from harm by strict scrutiny's narrow tailoring test, consists exclusively of an undifferentiated group of bedfellows who are all white.

Moreover, it also suggests that the primary unifying characteristics of the members of this group are their whiteness, innocence, and victimization from race conscious affirmative action programs. Any doubt in this regard is resolved by her conclusion in *Grutter* in which she noted that the Law School affirmative action program had passed constitutional muster because, "in the context of its individualized inquiry...the admissions program does not unduly harm nonminority applicants."²²⁰

Since O'Connor does not define the term innocence, she does not attempt to establish the innocence of this all white group she imagines. Thus from the Court's perspective, the racial innocence of whites is not a result of logical argument with which one could take issue, instead it appears to be judicially noticed and thereby beyond debate. It is indeed problematic that the Court simply presumes the existence of racial innocence, racially equates it with whiteness and neither engages in nor insists that it be

²²⁰ *Grutter*, supra at 30

subject to elements of proof or critical inquiry of any sort. It is especially problematic because to the extent that innocence becomes constitutionally coterminous with whiteness, how is non-whiteness to be regarded – as not innocent or guilty? What are the implications of an implicit constitutional presumption of a binary juxtaposition of white innocence against non-white guilt? Moreover, it is also both curious and highly problematic that this grouping of innocent whites is obviously quite over- inclusive. By definition it must commingle such interesting bedfellows as committed white anti-racists on one extreme, to rabid and committed white supremacists on the other.²²¹

Under this theory, the general category of whites would include people from both extremes of the innocence spectrum and all the gradations in between. As such, to the extent that the concept of innocence is thought to be coterminous with whiteness, it is clearly over-inclusive because it would include many who are clearly not innocent, such as the Grand Dragon of the Ku Klux as well as many who are such as committed white anti-racists. Therefore, the Court’s deployment of the notion of innocence is to be inherently too imprecise and over inclusive a concept to be worthy of serious constitutional consideration.

B. Affirmative Action and the Ideology of White Innocence

²²¹ Although by logical inference O’Connor assumed that the plaintiff Barbara Grutter was an “innocent white,” suppose instead that it was known that the plaintiff was an avowed white supremacist who hated anyone who was not white, actively practiced racial discrimination and advocated violent racial holy war? Under O’Connor’s view of white innocence even this person would be considered racially innocent. Therefore under O’Connor’s view, racial guilt has been defined out of existence because all whites are by definition racially innocent without regard to their individual views, values, or politics. Thus, one could argue that her category of innocent whites is not only overbroad, but also fatally incoherent because it assumes racial innocence solely on the basis of skin color regardless of the individual facts of particular white lives that would strongly contest that description.

Each of the four primary elements of the ideology of white innocence identified earlier have been deployed by the Court, to one extent or another, in resolving racially inflected claims of constitutional protection. However, the Court's primary reference when it invokes the rhetoric of white innocence appears to focus on the third and fourth elements of the ideology involving racism and racial benefit. Frequently the Court's invocation of white innocence is revealed as being deeply embedded in a metric which the Court refers to as strict scrutiny,²²² which requires that in order to pass constitutional muster, explicitly race conscious government programs must satisfy a bifurcated test which requires first, that they serve a compelling state interest,²²³ and second be narrowly tailored²²⁴ to achieve that interest.

1. Innocent of Race

Recall that the earlier discussion of this element of the ideology of white innocence points out the inherent contradiction in this element. On the one hand, the white-centered-perspective holds that whiteness is not a race, but rather being simply the ordinary and regular unraced norm. However, simultaneously, they are also acutely aware of their own racialized whiteness, and the non-whiteness of racial others, and

²²² *Richmond v. J.A. Croson Co.* (1989) (Holding that strict scrutiny must be applied to all government use of racial classifications, whether invidious, remedial, or benign.)

²²³ *Id.*

²²⁴ The standard of narrow tailoring does not require that such programs be the most narrowly tailored alternative possible. As the Court said in *Grutter* "narrow tailoring does not require exhaustion of every conceivable race neutral alternative, [it]...does however, require serious, good faith consideration of workable race neutral alternatives." *Grutter* at 27. See also, *Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986) (noting that the standard of narrow tailoring "require[s] only a good faith effort...to come within a range demarcated by the goal itself.") *id.* at 495 and *Grutter* at 23. See *Richmond v. J.A. Croson, Co.* (1989), The narrow tailoring standard serves the important constitutional purpose of ensuring that any race conscious remedial program not only serves a compelling state interest, but also "fit[s]...the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Grutter* at 21, citing *Crosen* at 493

consider those differences to be somehow reflective of real and essential biological differences.

This element of the ideology of whiteness is on display in the Court's affirmative action jurisprudence and reflected in the Court's discussion of racial neutrality. In *Grutter*, O'Connor's majority opinion noted, again in the context of discussing the narrow tailoring aspect of the strict scrutiny test, that although "narrow tailoring does not require exhaustion of every conceivable race-neutral alternative...[it] does however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity that the university seeks."²²⁵

Taking race into account, or its opposite, not doing so or race neutrality, are generally and demeaningly understood to mean considering the non-whiteness of non-whites. However, taking race into account should also require considering the whiteness of whites; and there have been precious few calls for the elimination of taking this racial marker into account by affirmative action's detractors. In effect, one could argue that their position amounts to one in which they want to ignore non-whiteness, especially blackness, but they want to continue to take into account whiteness.

In effect, Justice O'Connor's view of asking admissions officers to seriously and in good-faith consider race neutral alternatives, is tantamount to asking them to do what no one in America is capable of doing – that is of imagining an entirely "raceless person." What would such a person look like; how would they function in a society that is so keenly aware and dependant on perceived racial identity; how would their racelessness affect their treatment, experiences, and opportunities. It is an absurd and unknowable fantasy in twenty-first century America because there are no unraced people,

²²⁵ *Grutter*, supra at 27

no model or paradigm to draw on from which to even imagine one. In America, one is either white or non-white; race is always there. Thus, if racial neutrality amounts to ignoring non-whiteness, the only coherent category left is whiteness. As a consequence any attempted regime of race neutrality would in effect create a situation where everyone would be presumed to be white...not unraced.

Thus, the Court's idea of race neutrality is a fantasy of the white-centered-perspective that projects assumptive whiteness on to every applicant. There is nothing racially neutral about such a program, with or without the express use of racial terms. As a result, those who are in fact white get their files reviewed from a perspective that matches their own, which amounts to a racial benefit, not a neutral fact. However, those who are non-white are assumed to be white, and do not get their files read by a sympathetic and compatible perspective. In fact, since their files would usually be reviewed from a white-centered-perspective, their own racial perspective is neither recognized nor valued, and their lives and accomplishments are reviewed from a perspective that they do not share.

More importantly, admission decisions that purport to not take race into account, and thereby claim to be racially neutral are fundamentally hypocritical and irrational. They are hypocritical because they assume that race can be erased as a relevant factor in the development of a person's life up to the point of application. Moreover, these programs also assume that an individual's personal racial history of struggle and success is irrelevant to a rational evaluation of their future prospects of success and public contribution.

This view reflects a distinctly white-centered-perspective on race. Because most whites have the luxury of not having to think of themselves in racial terms, they can easily project that the same must be true of everyone else. But for most non-whites, and especially blacks, racial identity is not something they can afford to ignore, because ordinary social intercourse in America is filled with constant reminders to non-whites that they are not white.

The Court's ideal of racial neutrality is also irrational because, in the context of university admissions a candidate's past strengths and future potential cannot be rationally evaluated without all of the candidate's most relevant pieces of information. For many non-white applicants, their racial identity is a relevant piece of information, because for them such an identity forms an important part in determining who they are, how they got this way, where they want to go, why they want to go there, and the strength of their motivation to accomplish those goals. To arbitrarily ban this type of highly relevant and probative information from active consideration by admission officials is to be willfully blind to the overall detriment of the applicant's admission prospects and the institution's commitment to evaluate the whole candidate.

This position does not depend on a universal relevance of racial experience for all non-whites, but rather for the universal allowance for its possibility, recognition, and respect. To the extent that race forms an important part of the empirical social reality in the lives of many non-white applicants, racial neutrality constitutes an arbitrary, irrational, and counterproductive policy that strongly advantages whites and heavily burdens non-whites. In short, such a racially neutral policy is effectively not racially neutral at all. Thus racial neutrality is only coherent and reasonable when considered

from a starting point of a white-centered-perspective. From a non-white-centered-perspective, it is a policy that appears to be unrealistic, unfair, highly raced, and deeply naive.

2. Innocent of Racial Perspective

The narrative of white innocence constitutes what Toni Morrison calls the “timeless and timely narratives upon which expressive language rests, narratives so ingrained and pervasive they seem inextricable from reality.”²²⁶ Through this rhetorical narrative the Supreme Court has deeply insinuated into American constitutional discourse a powerful and irresistible association between whites as a group, and innocence; as the real victims of affirmative action programs. This powerful and pernicious rhetorical narrative characterizes whites as innocent and helpless victims who metaphorically, have been forcibly strapped to the front of the cannon barrel of affirmative action and have been unjustly punished for the benefit of the unharmed and the undeserving.

The Court’s use of the rhetorical narrative of white innocence has been remarkably successful in framing and fueling the general affirmative action debate. This is partially because innocence constitutes an essential characteristic of white racial identity and of the popular presumption of the racial innocence and neutrality of the law generally. However, the Court’s choice to champion the cause of white innocence has

²²⁶ Cite the House that Race Built

“fueled rather than doused”²²⁷ the racial flames of discord, division, and distrust in American legal discourse and in the popular imagination. Paradoxically, the Court’s approving use of the language of white racial innocence, has implicitly put the government’s rhetorical imprimatur on this racialized characterization of innocent white victimization. So much so in fact, that this rhetoric and its various permutations now constitute one of the few areas of common ground and uncritical acceptance among many who fill the ranks of both supporters *and* detractors of affirmative action programs.²²⁸

Consequently, both sides in the hotly contested affirmative action debate both wittingly and unwittingly accept, reproduce, and reinforce a rhetorical narrative of contemporary American racial reality that constructs and perpetuates a normative and discursive association between innocence and whiteness. This congruence of opinion affirming a racialized association between whiteness and innocence fundamentally undermines any moral case in support of affirmative action programs and strengthens the moral basis of its detractors by allowing them to “don the armor of moral innocence in their war against affirmative action.”²²⁹

²²⁷ ANATOMY OF RACISM, (David Theo Goldberg, Ed.) (University of Minnesota Press, 1990) 296 [ANATOMY OF RACISM]

²²⁸ For notable examples of supporters of affirmative action expressing acceptance and support, at some level, for the ideology of white innocence in the affirmative action context, See *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 548 (1989) (Marshall, J. dissenting, noting that “like the federal provision, Richmond’s has a minimal impact on *innocent third parties.*”) (emphasis added) and (Blackmun, J. dissenting, similarly pointing out that “even though one might sympathize with those who – though *possibly innocent themselves*—benefit from the wrongs of the past decades.”) (emphasis added) *id.* at 561. CHRISTOPHER EDLEY, JR, NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION AND AMERICAN VALUES, (Farrar, Straus & Giroux, (1996) 159, 160 (arguing that there is a *moral* cost to affirmative action programs *because of the harm to whites* and suggesting therefore that great care be taken to insure that there is a particularly clear need for such programs and that they be carefully limited in scope and duration to match that need) See also, Patricia J. Williams, THE ALCHEMY OF RACE, AND RIGHTS: DIARY OF A LAW PROFESSOR, (Harvard University Press, 1991) 60 (arguing that even if *whites are innocent victims of affirmative action programs*, it should not be overlooked that *blacks are innocent too* therefore “it does no one much good, to make race issues contests for some Holy Grail of innocence.”) (emphasis added)

²²⁹ Lawrence Bobo, Race Interests, and Beliefs about Affirmative Action: Unanswered Questions and New Directions, in COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION AND CIVIL RIGHTS OPTIONS FOR AMERICA, (John David Skrentny, ed) (University of Chicago Press, 2001) 207.

By deploying the rhetorical narrative of white innocence, the Court has been able to effectively, “alchemize” these “cases about discrimination against disadvantaged groups, into narratives in which African Americans [and other non-whites]...seek to deprive white[s] ...of their rightful interests.”²³⁰ Thus, by cloaking the non- favored group in affirmative action policies (whites) in the rhetorical narrative of innocence, the Court has made innocence synonymous with whiteness. As a result, “invoking innocence has provided the Court with rhetorical cover for its policy choice[s]”²³¹ of either approving or disapproving the limited use of race as a legitimate selection criterion, while simultaneously advancing the “racial project”²³² of preserving and protecting a status quo of white dominance and white privilege.

When the Court adopts the white perspective as the presumptive lens through which to see and describe American racial reality, it ratifies and emboldens the segment of the public that shares that perspective. Instead of engaging the nation in a dialogue in which it acknowledges that there is more than one appropriate perspective from which to see affirmative action, the Court implicitly endorses the view that there is only one correct factual description and that is the white perspective. Moreover, by failing to even acknowledge that there is a contest among perspectives, the Court suggests that their

²³⁰ Seth Harris, *Innocence and the Soprano's*, 49 N.Y.L. SCH. L. REV. 577, 580 (2005) [hereinafter Harris, *Innocence and the Soprano's*]

²³¹ Id

²³² MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960'S TO THE 1990'S* 2d Ed. (Routledge, 1994) [RACIAL FORMATION] 56-58

A racial project is simultaneously an interpretation, representation, or explanation of racial dynamics and an effort to reorganize and redistribute resources along particular racial lines. Racial projects connect what race means in a particular discursive practice and the ways in which both social structures and everyday experiences are racially organized, based on that meaning. ...They are always multiply determined, politically contested, and deeply shaped by their historical context...and always concretely framed...and unstable.

view is not white at all but in fact a racially neutral, objective description of racial reality, rather than the racially biased perspective that it really is.

3. Innocent of Racism

As indicated earlier, one of the defining features of the innocence of racism element of the ideology of white innocence was the notion that racism is largely a thing of the past in contemporary America, with the exception of rogue individual racists who act out of a taste for discrimination. However, from a non-white-centered-perspective, the problem of racism is neither solved nor reserved to individual guilty perpetrators. Instead, this perspective focuses on systemic racial discrimination that is “the result of the ways that racial inequalities were embedded in urban space and urban institutions.”²³³

The primary meaning associated with the Court’s use of the rhetoric of white innocence appears to be focused on an absence of any white moral blameworthiness for racism. Under this view, when the Court refers to innocence and equates it with whiteness, it could be understood to mean that contemporary whites are not responsible or blameworthy for the history and legacy of racism in American where “race still matters” so very much in terms of access to the good things in life.²³⁴ For example, in *Bakke* Justice Powell noted that “there is a measure of inequity in forcing innocent persons in respondent’s position to bear the burdens of redressing grievances not of their making.”²³⁵

²³³ COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS OPTIONS FOR AMERICA, 44 (John David Skrentny, ed) (University of Chicago Press, 2001) [hereinafter Skrentny, Colorlines]

²³⁴ See *infra*

²³⁵ *Bakke* at 298

Similarly, the Court in *Bakke* also described innocent persons as those who “bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.”²³⁶ In his dissent in *Adarand*, Justice Souter expressed a similar sense of white innocence when he said, “the result may be that some members of the historically favored race are hurt by that remedial mechanism, however innocent they may be of any personal responsibility for any discriminatory conduct.”²³⁷ In this sense, innocence is regarded as suggesting the absence of personal responsibility or moral blameworthiness for creating the racial problems that race conscious programs like affirmative action are designed to remedy.

The ideology of white innocence acts as an inherent dampening factor on the compelling state interest prong of the strict scrutiny standard because this test is ultimately based on a perception of the significance of race as a social problem and involves a sense of proportionality. This judgment will necessarily be significantly influenced by the extent to which racism is considered a thing of the past and only contemporaneously manifest by the rogue individual in isolated and non-systemic ways, or a contemporary and deeply insidious systemic and institutional problem. By masking the contemporaneous, systemic, institutional and daily reality of racism in America, the courts can artificially limit the occasions when affirmative action is deemed to be necessary and appropriate.

The Court’s focus on the innocent whites who could be negatively impacted by race conscious programs elides the issue of the systemic, institutional nature of racial bias. The search for racial bogey men in the institutions decisional hierarchy, or its

²³⁶ *Bakke*, at 310

²³⁷ *Adarand Contractors, Inc. v. Pena*, at 270

recent historical record, or in an adjudicated finding of actual discrimination, allows the Court to avoid the core problem of institutionally racially discriminatory practices that are so deeply embedded into the levers of social oppression that the machine of racial oppression no longer requires either a caretaker or a rogue operative to keep it functioning.

If the Court wants to analyze affirmative action programs against an assumptive social background of racial reality that views racial discrimination as primarily individualistic, consciously intentional, and rare, then it has the burden of establishing these factual premises as being real and accurate and not merely a reflection of their personal racial bias. Instead, the Court simply asserts this view of America's racial reality without any attempt to document, analyze, or even acknowledge its contested nature. It is thus asserted as an unracial and objective report of reality, when in fact it is little more than a reflection of a distinctly white-centered-view of hotly contested racial terrain.

From a non-white-centered-perspective, the more appropriate and accurate view of racial reality holds that racial discrimination in contemporary America is less the product of individual rogue racists and more an institutional, systemic, unconscious, and ubiquitous feature of everyday life. However, rather than even recognizing that there is a competing paradigm of racial experience in this respect, the Court imposes its own view without comment, suggesting that they are doing nothing more than projecting their own personal racial biases as representative of racial reality.

For example in *Crosby* Justice Stevens concluded that the city's set aside program "stigmatizes the disadvantaged class with the unproven charge of past racial

discrimination.”²³⁸ In making this argument Justice Stevens clearly assumed not only that the racial status quo in the city of Richmond was neutral but that the white business men engaged in the construction industry were innocent of racial discrimination. He argues that while the class of white contractors “unquestionably includes some white contractors who are guilty of past discrimination against blacks, ...it is only habit, rather than evidence or analysis, that makes it seem acceptable to assume that every white contractor covered by the ordinance shares in that guilt.”²³⁹ He concludes that this category is clearly overbroad because “it must be assumed that at least some [of the white contractors] have never discriminated against anyone on the basis of race.”²⁴⁰

How did Justice Stevens reach the conclusion that “it must be assumed” that at least some of the white contractors in Richmond had never engaged in racial discrimination against anyone? He specifically refers to the absence of either “fact or reason,” supporting a blanket indictment of the class, yet he provides neither fact nor reason in support of his own conclusion of the obviousness of racial innocence among at least some members of this group. Instead his conclusion smacks of a projection of personal racial bias and is comprehensible only from a white-centered-perspective.

However, from a non-white-centered-perspective the history of racism, repression, resistance, and avoidance in Richmond supplies ample factual evidence from which to conclude that all of the white contractors in the city are presumed to have engaged in racial discrimination absent specific evidence to the contrary.²⁴¹ From this

²³⁸ Croson, supra at 516 (Stevens, J. concurring)

²³⁹ Id

²⁴⁰ Id (thus he concludes that “imposing a common burden on such a disparate class merely because each member of the class is of the same race stems from reliance on stereotype rather than fact or reason.”)

²⁴¹ See Croson supra at 554 (Marshall, J. dissenting) (“Richmond’s leaders had just witnessed decades of publicly sanctioned racial discrimination in virtually all walks of life – discrimination amply documented in the decisions of the federal judiciary. This history of purposefully unequal treatment forced upon

perspective, whites do not receive a presumption of being non-racist. In contrast, Justice Stevens' argument clearly presumes the opposite, that whites are presumed to be non-racist generally absent evidence to the contrary, a view that indicates that despite the substantial evidence of the city's deeply racist past, all whites should be presumed to be non-racist. This view can only be coherent and sustainable from a white-centered-perspective.

It is important to note that the City Council in Croson was not dominated by blacks bent on revenge against the long years of racist city government. Instead it was a racially mixed group that had the full support of the white as well as black members; and the support of the white mayor. When the Court enters into this arena of political compromise of competing racial perspectives, it is wholly inappropriate for it to arbitrarily pick the white perspective as the controlling matrix by which the constitutionality of the program in question is to be judged. The Court clearly did precisely this, as evidenced by many of its stated conclusions offered in defense of its decision. For example the Court argued that the absence of blacks from meaningful participation in the construction industry might be the result, not of long history of racialized exclusion by the local players, but rather perhaps because there is something about black people that inclines them not to choose to participate in the construction industry. As Justice O'Connor observed:

“There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other

minorities, not imposed on them, should raise an inference that minorities in Richmond had much to remedy.”)

than construction. The mere fact that black membership in these trade associations is low, standing alone, cannot establish a prima facie case of discrimination.”²⁴²

Just precisely what “other industries” did Justice O’Connor have in mind that blacks may be “disproportionately attracted to”? This is a very disturbing and ominous reference and whatever she had in mind, the very idea that any racial group would necessarily be inclined either toward or away from any particular industry, simply on the basis of their racial identification, strongly invokes rejected notions of racial essentialism and stereotyping that are supposed to be a relics of America’s racist past, and by any reasonable standard, inappropriate measures of constitutional principles.

However, notions of occupational racial essentialism that naturally inclines black people either toward or away from particular industries and occupations is a white stereotype and fantasy of long standing in America. It is therefore clearly a product of a white perspective on a racialized “other” which is not shared by blacks themselves or by a non-white-centered perspective. Nevertheless, it was a perspective that was casually adopted by the Court without comment, justification, evidentiary support, or any defense whatsoever. It was in effect, a fact of which the Court inappropriately presumed to take judicial notice. However, in reality, it was nothing more than the naked adoption by the Court of the white perspective as the controlling matrix of reality, in a manner that is patently arbitrary, and completely at odds with the racial compromise worked out fairly in the local political process.

The essence of the Court’s error in choosing a particular racial perspective to control its view of the case is not necessarily that it has made the wrong choice. The important point is that is has made a choice at all. The metaphysical truth of the competing racial perspectives is not within the Court’s province. The practical realities of efficiently and constitutionally managing

²⁴² Richmond v. J.A. Croson, supra at 503

the affairs of state are the only things with which the Court may be legitimately concerned. Thus where the competing racial perspectives have reached a fair and acceptable compromise in the political process the Court has no constitutional basis to interfere.²⁴³

Part of the Court's problem in this regard stems from what many regard as its misunderstanding of the moral imperative of the Equal Protection Clause. Both Justices Kennedy and Scalia explicitly endorsed a view that considers that "the moral imperative" of that Amendment is nothing more than "racial neutrality."²⁴⁴ That is a technical and superficial reading of the Fourteenth Amendment that can withstand neither historical nor rational scrutiny. Although it does not exhaust the Amendment, one of its principal targets was the elimination of racial caste in America. As Cass Sunstein has persuasively argued in describing the "anticaste principle,"²⁴⁵ "an important purpose of the Civil War Amendments was the attack on racial caste."²⁴⁶ The moral imperative of the Fourteenth Amendment, as well as all of the Civil War Amendments was not to achieve racial neutrality as an end in itself, but rather only to use it as

²⁴³ See Tribe, *American Constitutional Law*, supra (which requires courts to "avoid deciding political questions."). See also, Linda Sandstrom Simard, *Standing Alone: Do We Still Need the Political Question Doctrine*, 100 DICK. L. REV. 303, (1996). But see, Earl M. Maltz, *Voting Rights After Shaw v. Reno: Political Questions and Representational Politics: a Comment on Shaw v. Reno*, 26 RUTGERS L. J. 711 (1995) (calling for the retention and expansion of the political question doctrine.) and Louis Henkin, *Is There a Political Question Doctrine*, 85 Yale L.J.597 (1976).

²⁴⁴ *Richmond v. J.A. Croson*, supra at 518

²⁴⁵ Cass Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994) [hereinafter Sunstein, *Anticaste Principle*] (defining the anticaste principle as "forbid[ing] social and legal practices from translating highly visible and morally irrelevant differences into systematic social disadvantages, unless there is a very good reason for society to do so.")id at 2411. Professor Sunstein explains his choice of the anticaste principle by observing that:

I emphasize the anticaste principle, not because it exhausts the concept of equality, but because it captures an understanding that has strong roots in American legal traditions, has considerable independent appeal, is violated in many parts of American life, and fits well with the best understandings of liberty. In other words, the anticaste principle is an important and perhaps insufficiently appreciated part of the lawyer's conception of equality under the American Constitution.

Id at 2412.

²⁴⁶ Id 2435

one tool among many to achieve the ultimate goal of eliminating the sense of racial caste that had justified and sustained racial slavery for over 200 years.

The Court's willingness to project its own racial views is apparent in other contexts as well. For example, in *Richmond v. J.A. Croson*, the Court argues that the affirmative action plan endorsed by the city will likely have a negative impact on black business people who would benefit from it. This is because, as Justice Stevens argues in his concurrence, "although it stigmatizes the disadvantaged class with the unproven charge of past discrimination, it actually imposes a greater stigma on its intended supposed beneficiaries."²⁴⁷

The disadvantage that Justice Stevens had in mind is caused by the fact that, as he observed "a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race."²⁴⁸ Two questions quickly come to mind. First, how does he know this; what is Justice Steven's authority for this proposition? Second, who are the "many" that will perceive affirmative action programs in this way; moreover why does their view count for so much with the Court?

First, Justice Stevens's primary legal authority for this proposition is his own opinion in *Fullilove v. Klutznick*, which he quotes at length.²⁴⁹ Second, clearly the "many" that Justice Stevens had in mind consists of those he refers to as the "disfavored group," by which he means whites. Thus, Justice Stevens is explicitly arguing that because the white perspective will view this program negatively, and will regard its

²⁴⁷ *Croson*, supra at 516 (Stevens, J., concurring in part and concurring in the judgment) (citing his own opinion in *Fullilove v. Klutznick*, 448 U.S. 448 (1980))

²⁴⁸ *Id.* at 517

²⁴⁹ *Id.*

beneficiaries as “less qualified,” that somehow this is a constitutionally cognizable consideration of sufficient importance to weigh heavily in favor of overturning the program. As if to emphasize what he apparently believes is a strongly made point, he follows the extensive quoted passage from Fullilove by concluding with “accordingly, I concur...”²⁵⁰

Having judicially noticed the white-centered-perspective, without any evidentiary support whatsoever, the Court does not then measure it against the non-white perspective and engage in a rational evaluation of the competitors. In fact no other perspectives are even acknowledged, leaving the clear impression that the white perspective not only exhausts the rational field but also reflects the personal views of the individual justices on the Court.

Do non-whites generally agree with this view? Do blacks generally agree? Do the past black beneficiaries agree? The Court does not know, does not ask, and is apparently not interested in knowing. Instead, its rhetorical language clearly suggests that in the Court’s mind, there is only one rational perspective on this issue and it is articulated in the white perspective of the “many.” Thus, the perspective, experience, and opinion of the beneficiaries is not relevant. The white-centered-perspective can determine the existence of stigma even better than those who supposedly suffer from its burden. Again, this illustrates the Court’s arbitrary racial preference of the white perspective.

Moreover, even if Justice Stevens’s prediction of the white reaction is correct, why is it constitutionally relevant? Unfortunately he does not tell us. Moreover, his argument suggests that the degree of resentment and disrespect by the “many” who share the white perspective on this matter, will somehow be different than their current view of

²⁵⁰ Croson, supra at 518

the beneficiary group if the program was overturned. However, from a non-white-centered-perspective it can be reasonably argued that the reality is that the degree of racism, of racial disrespect, and resentment of whites toward non-whites, especially blacks, and especially in the South, did not begin with affirmative action and would not end if affirmative action disappeared tomorrow. From this perspective such disrespect and low regard for blacks by whites already exists, not only in the South but all over America, and to such a high degree that whatever incremental addition might be caused by Richmond's program is but a drop in a preverbal bucket of racism. In short, it would make little or no difference at all in the ambient degree of white resentment.

Thus the Court fails to adequately justify its choice of the white perspective on the issue of resentment and disrespect. Moreover, it also does not explain why the amount of such feelings, even if in fact engendered by this program, would make a difference in the racial status quo. Which leaves the question open, how much white racial resentment is necessary in order to be constitutionally cognizable? Justice Stevens's argument in *Fullilove*, repeated in *Croson*, and cited in *Grutter* by Justice O'Connor, suggests that the mere fact that white resentment exists at all, in whatever degree, is automatically constitutionally cognizable. Therefore, in a stark implication of the equal protection clause of the Fourteenth Amendment, it also suggests that non-white resentment has not received comparable constitutional consideration. In fact it has received far less than a comparable amount because it has received none at all. Thus, from a constitutional perspective, it appears that racial resentment is only relevant if it is white.

Finally, there is one additional problem with Justice Stevens's argument that again emphasizes its profound racial influenced quality. His conclusion regarding

negative assumptions about the qualifications of the beneficiaries of racial preference programs does not seem to apply outside of the racial arena. For example, there is no evidence of similar assumptions regarding the beneficiaries of veteran's preference programs or of legacy preference programs. Thus, either Stevens is wrong about the reaction to preference programs or the resentment or disrespect he anticipates is not due to a rational inference that the beneficiaries of preference must be deficient if they need such a program, but rather to the racial identity of the beneficiaries. However, a non-white-centered perspective would argue that any white resentment that may be identified as emanating from such programs actually pre-dated their creation and used the programs' existence to justify negative feelings that already existed.

III. White Innocence and the Fourth Amendment

The substantive content of the "reasonable person" standard starkly reveals the ubiquity and insidiousness of the narrative of white innocence as seen through the lens of the white-centered-perspective. Although the Court has never expressly said so, a careful analysis of its reasoning in a wide range of cases suggests, at least in the context of constitutional criminal law, that the proverbial legal touchstone of the "reasonable person" in fact reflects the perspective of the innocent white person. Thus, the "reasonable person" standard is not some abstract, ideological metric that is colorless, unraced, or inherently raceless.

Instead, it is a distinctly socially raced perspective which reflects only one racial view and masquerades as objective reality. Thus as articulated by the Court, the

reasonable person standard neither reflects nor respects any account of reality that is not mediated through the white-centered-perspective. Moreover, the Court's choice of the white-centered-perspective as the baseline for the reasonable person standard reflects a fundamentally arbitrary and unprincipled racial preference for whiteness in violation of constitutional guarantees of both Due Process Clause and Equal Protection²⁵¹.

1. Seizure of the Person

The discipline of constitutional criminal law, particularly the Fourth Amendment,²⁵² provides a revealing and illuminating window on the interplay between the ideology and rhetoric of white innocence and the racial paradox of competing racialized perspectives on reality. An excellent illustration of how the Court has made this arbitrary racial preference for the white over the non-white perspective can be found in a line of cases that address the legal standard under which a government seizure of one's person has occurred that is sufficient to trigger Fourth Amendment constitutional scrutiny.

In *Florida v. Bostick*,²⁵³ the defendant claimed that he had been illegally seized when “two armed Broward County Sheriff officers wearing bright green “raid” jackets,”²⁵⁴ boarded his interstate bus at a rest stop in Florida while they were engaged in a random drug interdiction sweep of interstate buses. When they boarded the bus, “the officers admittedly without articulable suspicion picked out the defendant”²⁵⁵ who was seated at the rear seat of the bus, and interrogated him. During this interrogation Bostick

²⁵¹ See infra Section IV

²⁵² United States Constitution Fourth Amendment

²⁵³ *Florida v. Bostick*, 111 S.Ct. 2382, 2385 (1991)

²⁵⁴ Carbado, (*E*)*racing the Fourth Amendment*, supra at 975.

²⁵⁵ *Florida v. Bostick*, supra

remained seated on the rear seat of the bus, while the two officers stood over him in the aisle. While both officers were armed, one of the officers was “holding a recognizable zipper pouch, containing a pistol.”²⁵⁶ Although disputed by Bostick at trial, the trial court found as a fact that at the request of the officers Bostick consented to a search of his luggage. In his bags the officers found contraband and arrested him for trafficking in narcotics.

Bostick argued that the search violated the Fourth Amendment because he had been illegally seized by the officers at the time it occurred. He urged the Court to find that under the “free to leave” test articulated in *Michigan v. Chesternut*, he in fact did not, and moreover, no reasonable person similarly situated would have felt free to leave. In support of this position he pointed out that because the police encounter “took place in the cramped confines of a bus” it was intimidating because the police “tower[ed] over a seated passenger and there was little room to move.”²⁵⁷ Although the Florida Supreme Court agreed with Bostick’s characterization of the police encounter, the Supreme Court did not and overturned and remanded the case.

Writing for the Court Justice O’Connor concluded that under these facts there was “some doubt whether a seizure occurred.”²⁵⁸ She argued that the Court had long recognized that a seizure did not occur for Fourth Amendment purposes merely because “the police ask questions of an individual, ask to examine the individual’s identification and request consent to search his or her luggage – so long as the officers do not convey a

²⁵⁶ Id at 2384 (citing the Florida Supreme Court’s opinion)

²⁵⁷ Id at 2386 (in addition, Bostick noted that “the bus was about to depart [and] [h]ad Bostick disembarked, he would have risked being stranded and losing whatever baggage he had locked away in the luggage compartment.”) id.

²⁵⁸ Id at 2388

message that compliance with their request is required.”²⁵⁹ Both Bostick and the Court agreed that the appropriate legal standard governing the constitutional question of seizure was to the reasonable person. However, the Court disagreed that the appropriate question was whether a reasonable person would feel free to leave. Instead, Justice O’Connor argued that the correct rule under these circumstances rested less on the “free to leave” test, and more “on the principle that those words were meant to capture.”²⁶⁰

i. Reasonable Person Test

Justice O’Connor explained that the traditional free to leave test was inadequate to the circumstances of the interior of a bus setting and that the more “appropriate inquiry is whether a reasonable person would feel free to decline the officers’ request or otherwise terminate the encounter.”²⁶¹ The Court was emphatic that the “crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.”²⁶² Moreover, the Court noted that a reasonable person could engage in this behavior and ignore the police requests “without fearing prosecution.”²⁶³

In measuring the “coercive effect of” Bostick’s “encounter”²⁶⁴ with the police, the Court did not find the physical circumstances in the back of the bus particularly probative. To the extent that Bostick felt physically confined, the Court concluded that it

²⁵⁹ Id

²⁶⁰ Id at 2387

²⁶¹ Id

²⁶² Id (citing *Chestnut*, supra at 569)

²⁶³ Id. (“we have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.”) (citing *Delgado*, supra; *Royer*, supra; and *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed. 2d 357 (1979)/

²⁶⁴ *Florida v. Bostick*, supra at 2387

was causally unconnected to the police presence. Rather, they held that he was “confined in a sense, but this was the natural result of his decision to take the bus; it says nothing about whether or nor the police conduct at issue was coercive.”²⁶⁵ Moreover, the Court did not consider the fact that one of the officers was holding a pistol in his hand particularly coercive either. Interestingly, in reaching this conclusion, the Court recharacterized the Florida Supreme Court’s factual account, and did not acknowledge, as Florida court had, that the officer was “holding” a pistol in his had in a “recognizable zipper pouch.”²⁶⁶ Instead the Court described the scene as one in which the officer was merely “carried a zipper pouch containing a pistol—the equivalent of carrying a gun in a holster.”²⁶⁷

The Court never explained how it reached this conclusion of effective equivalence between the pouch and a holster. Apparently it was a matter which the Court was prepared to make a matter of judicial notice. Moreover, regardless of whether the pistol was ‘held’ or ‘carried,’ or whether there was any meaningful distinction between having a gun in a holster or in hand, the Court observed that it could not reasonably be a source of intimidation because, as Justice O’Connor argued “the gun was never removed from its pouch, pointed at Bostick, or otherwise used in a threatening manner.”²⁶⁸

The Court’s decision in *Bostick* is remarkable for a number of reasons, not the least of which is the deft manner in which the fact that Bostick was a Black man and the two police were white was completely erased from the majority’s decision as to what

²⁶⁵ Id

²⁶⁶ Id at 2384 (citing the Florida Supreme Court)

²⁶⁷ Id at 2385

²⁶⁸ Id at 2385 (thus, in referring to Justice Marshall’s dissenting opinion Justice O’Connor noted that “the dissent’s characterization of the officers as “gun-wielding inquisitor[s]” is colorful, but lacks any basis in fact.”)

constituted the “totality of the circumstances.” In this way, as a result of the Court seeing the factual scenario of this case through what some have described as “the racial lens of colorblindness,”²⁶⁹ Bostick’s Blackness was rendered both invisible and irrelevant. However, despite its colorblind rhetoric, it would not be accurate to suggest that the Court erased race completely from the case. The is true because as articulated by the Court, the focus of the reasonable person test is only nominally on the citizen; it is more pointed focused on the police officer’s perspective, and in so doing renders the officer’s whiteness both relevant and determinative.

ii.. The Irrelevance of Race to the Reasonable Person Standard

Despite the Court’s acknowledgement that the relevant controlling legal standard clearly and explicitly requires a consideration of the “totality of the circumstances,” it implicitly concluded that the race of the parties in a citizen-police encounter was not a relevant legal consideration in determining whether the target of police questioning would reasonably feel an inhibiting amount of intimidation and coercion. Thus the Court can be fairly understood to suggest that the fact that Bostick was Black and the two officers were white, was irrelevant to a judgment on the voluntariness of his purported consent to a search of his luggage.

Although the Court did not expressly address the issue of the racial identity of the parties to a police-citizen encounter, in fact by not recognizing race at all, and by noting that “the reasonable person standard... does not vary with the state of mind of the particular individual being approached, the Court implicitly ruled racial considerations out of bounds for judicial consideration. This decision is quite shocking in light of the

²⁶⁹ Carbado, (E)racing the Fourth Amendment, *supra* at 976

substantial body of evidence and literature collected and disseminated not only by the academic community but by the police community as well, that clearly recognizes that the relationship between the police and non-whites generally, but especially Black men, is fraught with mutual feelings of “fear and loathing.”²⁷⁰

The Court’s rhetoric of colorblindness masks the pivotal fact that in contemporary America the perceived race of the citizen is a principal animating and frequently determinative factor that both infects and inflects every encounter between the police and the public. In short, whites and non-whites, but especially Blacks, are treated differently by the police, simply because they are perceived as white or non-white, or especially Black.²⁷¹

The Court could not possibly have been ignorant of the well known antipathy that exists between Black men and the police and the fact that “many blacks operate under the assumption that police/citizen encounters are potentially life threatening.”²⁷² Thus their failure to even address this issue in applying the reasonable person test, makes it clear that the Court felt that the race of the target of police interrogation is simply not a relevant consideration in determining how a reasonable person would react under similarly situated circumstances. However, one could persuasively argue that unless the reasonable person similarly situated to Bostick were also racially regarded as Black, he would not be sufficiently similarly situated to be an accurate measure of appropriate behavior.

²⁷⁰ Carbado, (E)racing the Fourth Amendment, *supra* at 976

²⁷¹ *Id.* . . . esp. his story about how the police did not know how to react to Black Englishmen speaking accented British until they could locate them racially in the Caribbean

²⁷² Carbado, (E)racing Race, *supra* at 1014 (“stereotypes about crime and criminality, and the nexus between police abuse and race, render the nature of . . . police encounters . . . qualitatively and quantitatively different for blacks.”) *id.*

iii. Multiple Interpretations of Reasonableness

The Court's reasoning reflects their view that there is only one interpretation of reasonableness. However, the reasonable person test is amenable to multiple and antinomic interpretations based on their particular racial experiential perspectives. Thus a common racial experiential foundation would yield common interpretations. Conversely, antipodal or completely opposite racial experiential foundations would necessarily lead to discordant and often even inconsistent interpretations. This combination of non-synchronous white versus non-white racial interpretations constitutes a critical racial paradox. This racial paradox requires the law to choose between competing racially inflected experiential foundations as the arbiter of racial reality. This choice is critical because in many cases it is likely to be outcome determinative. Thus the Due Process Clause assures American citizens that the government will not make this choice arbitrarily, irrationally, or on the basis of bias or prejudice.

At minimum the Constitutional guarantees of the Due Process Clause should ensure that the choice between controlling racial perspectives is based on a rational process. However, at this moment in America's history the Court makes this choice unconsciously, covertly, inarticulately and without the benefit of any rational evaluative process. The Court chooses the white perspective as the default standard because it has been inclined to identify the white perspective with an assumptive mythology of unracial reality. This myth of an objective unracial reality that is accessible only through the white perspective is insidious, seductive and deeply oppressive to those who do not share participate in the national myth.

Recognizing multiple racially inflected interpretations of reasonableness is not the same as suggesting that the reasonable person standard should vary “with the state of mind of the particular individual”²⁷³ involved in an encounter with the police. Rather it represents recognition of only a binary distinction in perspective along a white versus non-white continuum. Although there may be sub-perspectives within the non-white category representing ethnic or national boundaries, the resolution of those conflicts is relatively minor compared to the significance of rejecting the legitimacy of the white monopoly on legally recognized reality.

The Court tries to solve this racial perspective paradox by defining one of its contradictory features out of existence. However, the non-white perspective will not disappear just because the Court refuses to recognize its existence. The distinctly white perspective on racial reality has achieved its legal currency, interpretive dominance, and judicial legitimacy through the obfuscation of its own racial contingency and the rhetorical subordination of competing racialized perspectives and interpretations. This legitimacy is unearned, undeserved, and inappropriate because it has no rational basis and was not the product of a rational process. Instead, it is the product of an irrational assumption of whiteness as an unraced, normative and racially objective lens on racial reality. Moreover, this white perspective is not the legitimate victor of a contest between competing racialized interpretations. Instead, it was implicitly declared beyond the reach of competing views and anointed the winner by the Court.

²⁷³ Bostick, *supra* at 2388 (O’Connor J.,)

iv. The Black or Non-White Reasonable Person Standard

The Bostick Court refused to take Bostick's blackness into account in applying the reasonable person test. In effect, ignoring the fact that Bostick is Black, and failing to acknowledge the white racialized character of the reasonable person standard is tantamount to the Court suggesting that a Black or any other non-white person will only be deemed by the law to be acting reasonably when they are acting like whites. Of course, neither this nor any reasonably politic court would ever explicitly hold that blacks must act white in order to be regarded as reasonable. Yet the conception of the reasonable person as articulated by Justice O'Connor amounts to precisely the same thing.²⁷⁴

Thus it could be argued that the aim of the white-centered-perspective is total domination, where non-whites are expected to eventually abandon their own non-white identity and perspective and act like, think like and to see both themselves and the rest of the world through the white-centered-perspective. However, unlike ethnic Europeans who have long since made this deal and thus assimilated into whiteness, capitulation for non-whites will not make them into whites. However, from the non-white-perspective, it will make them more palatable to whites and thereby facilitate continued white supremacy and dominance.²⁷⁵

IV. Constitutional Concerns with White Innocence

The rhetoric of white innocence creates and perpetuates a mythology of a generalized racial "innocence of law"²⁷⁶ which considers the legal landscape to be free of

²⁷⁴ Compare to fleeing while black

²⁷⁵ See Devon Carbado, ___Yale L.J. ___ (2004)

²⁷⁶ See, Peter Fitzpatrick, Racism and the Innocence of Law, in CRITICAL LEGAL STUDIES, 119 (Peter Fitzpatrick and Alan Hunt, Eds.) (Basil Blackwell, 1987) [RACISM AND THE INNOCENCE OF LAW]

systemic racial biases absent the insertion of race through affirmative action programs. In this way the constitutional rhetoric of white innocence reinforces white supremacy by legitimating the status quo as the product of racially neutral social, political and individualistic decisions and discursive dynamics. Rather than being constructed by systemic and institutional racist practices and stereotypes, it posits that racism is only problematic to the extent that it is the product of the blameworthy actions of individual bad actors, who are motivated by conscious and intentional racism. In this way, it reinforces the broad discursive innocence of whites collectively by locating racially discriminatory behavior outside the normative structure of whiteness, and characterizing it as aberrant and individualistic.

1. Due Process

The Due Process Clause, "like its forebear in the Magna Carta ... was intended to secure the individual from the arbitrary exercise of the powers of government'"²⁷⁷ Thus, due process necessarily presumes both rationality and materiality. That is, the essence of the Due Process Clause is a guarantee of a degree of reasonableness that matters – that makes a difference on the outcome.

A process that makes no difference on the outcome is an irrelevancy and is no process at all. Thus, if the white-centered perspective always wins and in so doing

("Liberal cosmology provides a particular protection of law's innocence...[but] on the contrary racism is compatible with and even integral to law.")id at 119, 121. As if absent explicit governmental uses of racial categories to benefit non-whites, the competition for government benefits is in fact racially neutral territory and devoid of existing racially determinative influences; as if absent explicit racial remedies, the competitive scene is a racially pristine canvass uncontaminated by pre-existing and outcome determinative elements of highly racialized preference, privilege, and advantage.

²⁷⁷ Note, IN THE HEAT OF THE CHASE: DETERMINING SUBSTANTIVE DUE PROCESS VIOLATIONS WITHIN THE FRAMEWORK OF POLICE PURSUITS WHEN AN INNOCENT BYSTANDER IS INJURED, 30 Val. U. L. Rev. 161, 1995

achieves a kind of unquestioned hegemony, it cannot be said to have been the result of a reasonable process. Instead, it is evidence of a deeply flawed and broken process that has in a very real sense made whiteness the measure of realness. The choice for non-whites under this despotic rule of the white perspective has been to either allow it to supplant their own racialized experience of the world, or to achieve a type of “bi-visibility” whereby they can be visually fluent in both racial perspectives.

Non-whites in America have always struggled to achieve a degree of mastery over this kind of racial bi-visibility of perspective as a survival mechanism. The need for such fluency began when the first chains of racialized slavery were forged in the English colonies, and continues to the present day to impress itself with frightening speed, intensity, and clarity on every non-white, but especially Black face that immigrates to America.²⁷⁸ Thus for non-whites in America, racial bi-visual fluency is an essential survival skill. Some non-whites have always absorbed and accepted the non-white

²⁷⁸ See, Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 958, 959 (2002) (describing the racial initiation into being Black in America of two Black brothers from England in their first perceived white on black contact with American police. “the encounter left us more racially aware and less racially intact...[it was a] racial game...as part of a broader informal naturalization process that structured the racial terms upon which I became American...it facilitated my (intra)racial integration into black American life.”) Professor Carbado describes the experience of he and his brother with the Los Angeles police as effectively rendering them:

In a racial state of rightlessness, effectively outside the reach of the Fourth Amendment. The experience, in other words was disciplinary. Although I didn’t know it at the time, we were one step closer to becoming black Americans. Unwillingly, we were participating in a naturalization ceremony within which our submission to authority reflected and reproduced black racial subjectivity. We were being pushed and pulled through the racial body of America to be born again. A new motherland awaited us. Eventually we would belong to her. Her racial burden was to make us Naturalized Sons...our rite of passage was almost complete...my brother needn’t have said anything, I was beginning to see the white over black racial picture.

Id at 956-957. See also, WINTHROP D. JORDAM, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO*, 1550 (1968); See, Devon W. Carbado, *Motherhood and Work in Cultural Context: One Woman’s Patriarchal Bargain*, 21 HARV. WOMEN’S L.J. (1998); KENNETH L. KARST, *BELONGING TO AMERICA; EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989).

perspective as their own and even preached it to their fellows²⁷⁹, however, the vast majority have historically and continue to choose bi-visual fluency over total perspectival surrender, occupation, and colonization by the white-centered-perspective.²⁸⁰

Through the lens of the white-centered-perspective not only are whites perceived to be innocent, but the law itself is also similarly regarded. The ideological underpinnings of this view is a form of judicial self-inflicted colorblindness, whereby the Court and the general public presume the law itself to be free of racial inflection, presumption or bias. From the non-white-centered perspective, the law constitutes a primary engine in the creation and perpetuation of both race itself and the racialization of society. When the Court adopts one of these perspectives as the controlling lens of a case, it has an obligation to at minimum explain its choice.

However, instead the Court chooses the white-centered-perspective, not as the prevailing party in a contest between combatants, but rather as the naturally or divinely anointed seer of reality, as if there was never any real choice to make. This choice is supported by neither reason nor logic, and thus, at its core it represents a fundamentally arbitrary assertion of governmental power that is anathema to a system grounded on due process guarantees. This is true because any process that results in arbitrary decisions cannot possibly lay claim to being a “due process.” In addition it constitutes a clear unconstitutional racial preference by government without even a colorable claim to advancing a compelling state interest or being narrowly tailored. Thus, seeing racial reality through the white-centered-perspective inclines the Court to make arbitrary racial

²⁷⁹ Cite black lynching writer; Booker T. Washington, McWhorter, Steele etc.

²⁸⁰ Cite bell hooks on “de-colonializing” our minds.

preferences in favor of whiteness that are antipodal, meaning that they are simultaneously irrational, glaringly obvious, and totally invisible.

2. Arbitrariness

One of the most fundamental constitutional rights consists of the right to be free from arbitrary and capricious government decision making. In order to survive constitutional scrutiny under the Due Process Clause and the Fourteenth Amendment, among others, government decisionmaking must have at minimum a rational basis. In short, a fundamental requirement of ordered liberty in a participatory democracy consists of the right to be free of government decisionmaking grounded in bias, personal prejudice, or vindictiveness.

V. Recommendations

A. Acknowledging Competing Racial Perspectives

If the Court were to implement the analytical approach that this article suggests, it could have significant implications for both the results and the constitutional analysis for future race cases. For example, if we were to apply this approach to Croson Justice Scalia could not have simply argued that the Constitution forbids racial categorization *per se* and thus cannot accommodate the notion of benign discrimination. He would have been constrained to acknowledge that although this reflects a legitimate construction of the Constitution, it is also based on a distinctly white perspective. Public honesty would have then compelled him to acknowledge that from a non-white-centered perspective, and especially a black perspective, the racial prohibitions of the Civil War Amendments

are fundamentally anti-subordination in character and were intended to police racial categories only to the extent that they contributed to the creation or perpetuation of a system of subordination and racial caste.²⁸¹

From this perspective, racial classifications by the state are perfectly legitimate, so long as they do not create or perpetuate a system of subordinate racial caste. Although Justice Stevens argues in *Croson* that the white business not favored under the city's plan were stigmatized by the program,²⁸² there can be no serious argument that affirmative action programs have in any way contributed to incarcerating whites as group to a lower and subordinated social class. Thus, it would to be conceded that taken from the starting point of the non-white perspective; benign discrimination plans by government do not run afoul of the anti-discrimination prohibitions of the fourteenth amendment unless and until whites as a group are realistically threatened with being reduced to a socially subordinate lower caste.

Having distinguished the two competing threshold perspectives and the logical extension of both, one disallowing all racial categories on a per se basis and the other condemning such classifications strictly under the anti-subordination principle, how then does the court justify a choice of one over the other. Neither has an exclusive command of the truth. Each is premised on a distinctly racialized view of reality, and based on that logical foundation, leads rationally to its conclusion. How then does the Court break the tie between competing perspectives? Which ever perspective the Justices choose under

²⁸¹ See supra Section _____

²⁸² See *Croson*, supra at 516 (ironically Justice Stevens refers to city's set aside program as stigmatizing "the disadvantaged class with the unproven charge of past racial discrimination," however, he does not bother to prove that this group—white contractors—has in fact been stigmatized at all.

these conditions, their reasoning would expose and reveal a great deal about their thinking with respect to the racial perspectives appropriate for the law to consider.

A simple majoritarian justification would be seductive, but quite problematic. This is because at minimum it would inexorably lead to difficulty in those jurisdictions where whites have already become or are fast becoming a numerical minority. Moreover, nationally it has been estimated that somewhere between 2025 – 2050 America will cease to have a numerically dominant majority race. Thus, with whites as a racial group in clear and inexorable decline as a numerical majority, a majoritarian basis would be very thin and shifting ground upon which to base a tie breaking preference between the competing racial perspectives. Judicial expressions of personal identification with either perspective would be obviously inappropriate bases for distinction as well.

A principled and rationally articulated, non-raced based distinction between the two perspectives would be indeed difficult if not impossible. The Court would then be forced to consider a compromise between them thus, unlike the status quo, acknowledging a high degree of respect for both. The ultimate result would thus be a product of policy and practicality rather than one fraudulently alleged to derive from a race neutral application of pure reason. As a compromise solution it would likely satisfy neither side completely, but both sides would participate to some degree in the final result and thus neither would be left out; no clear winner, but no clear losers either. This approach is consistent with the finest traditions of participatory democracy and in fact precisely reflects the constitutional origins of the American experiment in popular government.

Conclusion

The normative deployment of the rhetoric of white innocence in both the Supreme Court's affirmative action and Fourth Amendment jurisprudence demonstrate that the Court is unreflectively locked into a white-centered-perspective or master framework in terms of its ability to perceive and understand America's racial reality. As a consequence, this racially limited perspective distorts the Court's appreciation for the full and balanced texture of racial reality in contemporary America and thus both limits its analysis and dooms its remedies to inadequacy and ineffectiveness in combating the nation's real intractable racial problems.

The answer to this problem is simultaneously both deceptively simple and abstractly complex. It begins with a simple act, as captured in Martha Minnow's observation in the epigraph of this article, of recognizing that "any point of view, including one's own, *is* a point of view."²⁸³ From this simple act comes an implicit recognition of the existence and thus validation of opposing points of view. In this way, those, particularly the Supreme Court, who are locked into a white-centered-perspective, can come to recognize and appreciate that their views on racial matters reflect only a particular racial experience formed in a racially oriented culture that neither speaks for nor completely exhausts the metaphysical truth about America's racial reality.

Thus, through this recognition they can come to not only to appreciate their own perspective as both racialized and limited, but also simply ***as only a perspective***, and thus to respect competing perspectives that may see the world through a different colored perspectival lens. Without that threshold recognition the differences in racially inflected

²⁸³ Minnow, Justice *supra* at 15

perspectives “admit no common ground,” and result in “black and white Americans tak[ing] possession of distinct paradigms. In the extreme, blacks and whites look upon the social and political world in fundamentally different and mutually unintelligible ways...speaking across different theoretical paradigms.”²⁸⁴ As a consequence, “white and black citizens appear to have a terrible time talking to one another about race.”²⁸⁵ However, despite the size of the gap that separates the white-centered from the non-white-centered view of racial reality, it is not impossible to engage in “democratic discussion across the racial divide...but it is hard.”²⁸⁶

A significant part of the problem in speaking across different racial paradigms is that the white-centered-perspective, especially as articulated by the Supreme Court, refuses to acknowledge that it *is* a racial paradigm or reflects a particular racial perspective. Therefore it cannot recognize the existence of any legitimate competition. In the logic of this perspective, since it represents the objective truth, its only competition must be falsity, error or untruth. Any dissenting opinions are thus derisively dismissed as interest based ideologies or identity politics and are engaged only for the purpose of enlightening them or bringing them up to the point where they can be converted to also see the world through the white-centered-perspective. This is essentially missionary work to save the godless and savage soul, not political engagement with respected and worthy ideological opponents. This is not a sound basis for deliberation. By definition, such a perspective seeks not mutual respect but rather demands absolute surrender, total capitulation and thus assimilation.

²⁸⁴ Kinder & Sanders, *Divided by Color* supra at 288

²⁸⁵ Id

²⁸⁶ Id (“Given the tragic nature of our history – “Deep rooted prejudices entertained by whites; ten thousand recollections, by the blacks of the injuries they have sustained,” as Jefferson put it—could hardly be otherwise.”)

Thus finding common ground requires first, attaining “a language of mutual respect,”²⁸⁷ because as Cornel West said so eloquently, we must come to “respect the scars and wounds of each other,” and hopefully through that process of mutual respect, also come to see the critical influence that those scars and wounds have in determining the perspectival line of sight from which we all experience and understand racial reality. This simple act of mutual respect and validation can potentially have deeply transformative and healing effects on America’s discordant racial dialogue, which in the end could allow us to talk about race more comfortably, productively, and realistically; as race is actually lived in America rather than merely how it is imagined and perceived through a white-centered lens. This is a goal we must achieve if racial inequality is ever to be solved. The work is hard but “the stakes are high”²⁸⁸ and thus failure is not an option.

²⁸⁷ Id at 289

²⁸⁸ Id (noting that “Race, Du Bois chastened us, is “merely a concrete test of the underlying principles of the great republic” As it was in the beginning of the twentieth century, so it is now.”) (citing the W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK*, (Vintage Press [1903], 1990))