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Thomas Ross

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THE RHETORICAL TAPESTRY OF RACE: WHITE INNOCENCE AND BLACK ABSTRACTION

THOMAS ROSS*

Nineteenth-century Americans lived in a truly racist society. Racist talk and racial epithets were accepted forms of public discourse. Black persons were first enslaved, and later segregated and subjugated, by law. And their Supreme Court sanctioned all of this in the name of the Constitution. In matters of race, the period was shameful and tragic for the Court and the culture.

We live in a different time. Expressions of racial inferiority and other racist talk are no longer accepted forms of public discourse. De jure segregation is gone. And our Supreme Court, however controversial some of its decisions on race, seems to be proceeding in a responsible manner. Whatever our shortcomings and disappointments on matters of race, few of us suppose that we are creating a history for which those who follow will feel a sense of tragedy and shame comparable to that which we feel for the Court and culture of the previous century.

The purpose of this paper is to shake this comfortable sense of assurance about our historical standing and thus encourage us to rethink our choices about race. I hope to bring about this discomfort, and this rethinking, by showing that the essential rhetorical themes of the nineteenth-century cases we now discredit are the themes of our contemporary cases. When we see that we talk and argue about race in much the same way as our predecessors whose

* Professor of Law, University of Pittsburgh School of Law. B.A., University of Virginia, 1971; J.D., University of Virginia, 1974. I acknowledge the help and support of Maxine S. Krasnow and Margaret A. Hackbarth.

choices stain our legal history, we shall have good reason to rethink our own choices.

Part I of this paper explores the nature of legal rhetoric and defines the two rhetorical themes that are interwoven within the rhetorical tapestry of race, then and now. These themes are "white innocence," the insistence on the innocence of contemporary whites,[1] and "black abstraction," the refusal to depict blacks in any real and vividly drawn social context. Part II lays out the rhetoric of white innocence and black abstraction in several of the most infamous nineteenth-century race cases. Part III does the same for several of the most important contemporary cases. In Part IV, I examine in more depth the cultural significance and power of the ideas of white innocence and black abstraction and argue that these ideas have no proper place in our legal discourse about race. Part V concludes with the hopeful possibilities that arise from an alternative discourse: the discourse of narrative.

I. The Magic of Legal Rhetoric

Rhetoric is a magical thing. It transforms things into their opposites. Difficult choices become obvious. Change becomes continuity. Real human suffering vanishes as we conjure up the specter of righteousness. Rhetoric becomes the smooth veneer to the cracked surface of the real and hard choices in law.

The excellent lawyer is always a master rhetorician. In a moment, she can construct multiple arguments for any given position. She can respond to assaults and make her own devastating attacks on the rhetoric of others. She seems to have an almost instinctive feel for rhetoric, spotting the suppressed and problematic premise in an argument like a predator sensing the weak animal in a herd of prey.

This rhetorical facility is no happenstance. It is a product of our legal culture and history. Our culture has elevated the art of rhetoric to a central position. Although we are not unique in our need to make and to justify hard choices, perhaps no other contemporary group so worships the art of rhetoric.

The significance of rhetoric is evident, for example, in the manner by which we define our cultural heroes. Our heroes are our great judges. The judges who have an unambiguous claim to being heroes are those we see as excellent in both choice and rhetoric.

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1. *See* Ross, *Innocence and Affirmative Action*, 43 Vand. L. Rev. 297 (1990).

Robert Ferguson ascribed to Holmes, our most obvious hero, and to all judges who would be great, the dual cultural role of warrior and magician.[2] The judge first makes the hard choice, the act of the warrior. He then turns to us and makes that choice intellectually coherent and thus tolerable by his rhetoric, the act of the magician.[3] This metaphorical description of the essence of great judging reveals the centrality of rhetoric.

The greatest challenge for the judge as rhetorician is to make coherent the choices that might divide us as a community. The greatest of those kinds of challenges throughout our legal history have been those triggered by race. From *Dred Scott v. Sandford*[4] through the most recent affirmative action cases, judges have tried desperately to make smooth the cracked surface of the law's response to race relations.[5] The stakes have always been frighteningly high. The apparent paradoxes have made the rhetorical work daunting. In *Dred Scott*, Chief Justice Taney's awful magic imposed a coherence on the paradox of the choice to deny black persons the status of "citizens" within a society ostensibly devoted to the principle of individual human freedom. Again and again in our legal history, we have seen the rhetorical magic spun around the choices of race, obscuring the conflicts and paradoxes, smoothing over choices for which we would later feel nothing but shame.

These special challenges produced a special rhetoric: the legal rhetoric of race.[6] The legal rhetoric of race exhibits much variety. Each judge, each case, each choice produced a unique magic. Yet, a pattern emerges out of this tapestry of our legal rhetoric of race. The legal rhetoric of race embodies two central themes: white innocence and black abstraction.

White innocence is the insistence on the innocence or absence of responsibility of the contemporary white person. The rhetoric of the nineteenth-century judges advanced this idea of white innocence in various ways. This idea also could be found in the

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2. *See* Ferguson, *Holmes and the Judicial Figure*, 55 U. CHI. L. REV. 506, 517 (1988).

3. *Id.*

4. 60 U.S. (19 How.) 393 (1856).

5. *See* G. MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 523-34 (1962); Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1327 (1986) (stating that for more than a decade "the coalition principally responsible for the Civil Rights Revolution . . . has been riven by bitter disagreement over the means by which American society should attempt to overcome its racist past").

6. *See, e.g.*, Miller, *Constitutional Law and the Rhetoric of Race*, in 5 PERSPECTIVES IN AMERICAN HISTORY 147-200 (D. Fleming & B. Bailyn eds. 1971).

rhetoric outside the judicial context.[7] The proslavery rhetorician who grounded his argument in the denial of the humanness of the slave, in the reduction of the slave to a chattel, was insisting on his own innocence. Slavery was not, for him, a matter of subjugation and denial of the principle of freedom. Slavery was instead a natural, even moral, disposition of another species of creature. In this vision, slavery no more tainted the white person than did the penning and use of his cattle.[8]

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7. In an essay published in 1832, Thomas R. Dew, professor at the College of William and Mary, set forth what has been described as the "most thorough and comprehensive justification of the institution [of slavery]" produced to that time. G. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY 44 (1971) [hereinafter BLACK IMAGE]. Dew described slavery as something imposed upon the contemporary white society and as nothing for which they should feel any sense of reproach:

> If ever [a] nation stood justified before Heaven, in regard to an evil, which had become interwoven with her social system, is not that country ours? Are not our hands unpolluted with the original sin . . .? Where is the stain that rests upon our escutcheon? There is none . . . ! Virginia . . . has nothing to reproach herself with—"the still small voice of conscience" can never disturb her quiet. She truly stands upon this subject like the Chevalier Bayard—"*sans peur et sans reproche.*"

T. DEW, REVIEW OF THE DEBATE IN THE VIRGINIA LEGISLATURE OF 1831 AND 1832, at 45-46 (reprinted by Negro Universities Press 1970). The Chevalier Bayard was a French soldier of the late fifteenth, early sixteenth century. The hero of many battles, Bayard lived a life of near-mythical dimensions. "To his contemporaries he was the faultless knight—heroic, devout, generous, and kindly." 1 ENCYCLOPEDIA BRITTANICA 978-79 (1990). The Chevalier Bayard thus was the perfect model for the southern white seeking to express his innocence.

A spokesperson for abolition, Thomas Marshall of Virginia, used his own version of white innocence in debates in the Virginia House of Delegates in 1832:

> We believe that there is not the slightest moral turpitude in holding slaves under existing circumstances in the south. We *know* too that the ordinary conditions of slaves in Virginia is *not* such as to make humanity weep for his lot. Our solicitations to the slaveholders, it will be perceived, are founded but little on *the miseries of the blacks.* We direct ourselves almost exclusively to the injuries slavery inflicts on the whites.

The Speech of Thomas Marshall, in the House of Delegates of Virginia, on the Abolition of Slavery, 12 AM. Q. REV. 383 (1832).

8. Professor George M. Fredrickson has written several particularly illuminating books on the history and nature of racism. *See* G. FREDRICKSON, THE ARROGANCE OF RACE: HISTORICAL PERSPECTIVES ON SLAVERY, RACISM, AND SOCIAL INEQUALITY (1988) [hereinafter ARROGANCE]; BLACK IMAGE, *supra* note 7. His essay, *Masters and Mudsills: The Role of Race in the Planter Ideology of South Carolina*, powerfully describes a particular metaphorical version of racism—the "mud-sill" theory. G. FREDRICKSON, *Masters and Mudsills: The Role of Race in the Planter Ideology of South Carolina*, in ARROGANCE 15-27 (1988). Fredrickson quotes from a speech that Senator Hammond of South Carolina delivered in the United States Senate in 1858:

> In all social systems there must be a class to do the menial duties, to perform the drudgery of life. That is a class requiring but a low order of intellect and but little skill. Its requisites are vigor, docility, fidelity. Such a class you must have . . . . It constitutes the very mud-sill of society . . . .

For the judges whose racism was less virulent, the rhetoric embodying white innocence had to have a more sophisticated structure. The legal rhetorician often made the premise of white innocence an implicit conclusion. White innocence was nonetheless an important theme. For example, in Taney's reliance on a form of originalism in his interpretation of the Constitution in *Dred Scott*, he was able to push responsibility away from himself and contemporary whites in general and back to the preceding generations who had so thoroughly subjugated the black person, at least in Taney's story, that Taney and his contemporaries had no choice but to conclude that the Constitution could not have included the black person as a citizen.[9]

Both originalism and, more generally, the assertion of judicial helplessness are not unique to the cases about race. Originalism interpretive theory in various forms has been a constant piece of the constitutional rhetoric throughout American legal history.[10] The idea of judicial helplessness implied in the principle of precedent is one of the central myths of our law, with all the real power of any large myth.[11] The rhetoric of white innocence is thus created out of several familiar rhetorical tools.

White innocence was a rhetorically created myth. First, the judicial helplessness version of white innocence exemplified by Taney's opinion in *Dred Scott* was a charade. Taney could have chosen otherwise; this is the nature of a choice. Second, the version of white innocence that cast the contemporary whites as free of responsibility or guilt was just not sensible. The institution of slavery preceding the Civil War and the institution of de jure segregation in the aftermath of emancipation were each the product of an ongoing collective choice by then contemporary whites not to intervene. The rhetoric of white innocence permitted white magicians to pretend for themselves, and for their white contem-

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> Fortunately for the South we have found a race adapted to that purpose to her hand . . . . Our slaves are black, of another, inferior race. The *status* in which we have placed them is an elevation. They are elevated from the condition in which God first created them by being made our slaves.

Id. at 23.

9. *See infra* notes 23-32 and accompanying text.

10. *See, e.g.*, R. BERGER, GOVERNMENT BY JUDICIARY (1977); Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U.L. REV. 226 (1988); Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507 (1988). *But see* Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

11. *See* R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 232-38 (1975).

poraries, that the horrific circumstances of the blacks were, after all, not the white person's fault.

The second theme in the nineteenth-century legal rhetoric of race is black abstraction. Black abstraction is the rhetorical depiction of the black person in an abstract context, outside of any real and rich social context. Although abstraction is a rhetorical tool not unique to the rhetoric of race, it proved especially useful in the race cases. Black abstraction pervaded the rhetoric of race in the nineteenth century. For example, the assertion that a law that segregates by race does not connote racial inferiority makes sense only in the abstract context created in *Plessy v. Ferguson*.[12] By not placing the black person in the real social context of the late nineteenth century, Justice Brown was able to say with a straight face that any racial stigma flowing from de jure segregation simply must be self-imposed.[13]

The power of black abstraction is that it obscures the humanness of black persons. We can more easily think of black persons as not fully human so long as we do not see them in a familiar social context. We can accept the absence of stigmatization in de jure segregation, or its self-imposed quality, so long as we resist empathy.[14] As soon as we begin to imagine the actual circumstances of black persons in nineteenth-century America and the pain and humiliation of de jure segregation, the rhetoric of Brown's opinion for the Court in *Plessy* starts to unravel.[15] The great power of black abstraction is its power to blunt the possible empathetic response.

Black abstraction and white innocence worked together in the legal rhetoric to obscure the degradation of blacks and to absolve

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12. 163 U.S. 537, 544 (1895) ("Laws permitting, and even requiring, [black and white] separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other . . . .").

13. *Id.* at 551.

14. *See* Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 409-13 (1989) (asserting the power of narrative as a means of experiencing empathy).

15. With no opportunity to participate in the political decisions regarding their own future, Negroes—even those who were college and university graduates—were unable to intervene effectively at any point. They were compelled, therefore, to accept decisions made for them by their former masters and the other whites who were eligible to serve their states under the Lincoln and Johnson plans of Reconstruction. Not only were Negroes without any voice in the decisions about their future, but they were also without any protection against the mistreatment or injustices to which they were subjected by the decision-makers. They *could and did* protest the enactment of harsh black codes by the state legislatures, but their protests were scarcely heard in the state capitals or even in Washington.

A. WEINSTEIN & F. GATELL, THE SEGREGATION ERA, 1863-1954, at 47-48 (1970).

the contemporary whites of responsibility for any images of degradation that might have passed through the filter of black abstraction. Thus, these rhetorical themes made the choices of the nineteenth-century judges intellectually coherent and smoothed over the conflict between the reality of subjugation and the abstract principles of freedom and equality.

Today, we discredit both the choices the Court made in *Dred Scott* and the rhetoric that Taney constructed.[16] The same can be said of the *Civil Rights Cases*,[17] *Plessy*, and other nineteenth-century cases on race.[18] Moreover, the rhetorical theme of white innocence sounds tinny to our twentieth-century ears. How could those judges have smoothed over the reality of responsibility and choice in their actions? Similarly, the theme of black abstraction and its denial or eclipse of the humanness of the black person are abhorrent to our contemporary notions of race.

Yet, the rhetorical themes of the nineteenth-century cases on race are still the essential themes of our contemporary legal rhetoric of race. In the contemporary legal rhetoric created by those Justices who seek to limit efforts to undo the contemporary reality of racial segregation and economic subjugation, we see the insistence on white innocence and the abstract depiction of the black person.[19] Although the precise rhetorical structures are different, the central themes of white innocence and black abstraction run through the tapestry of our legal rhetoric of race, then and now.

This paper focuses on the rhetoric of two sets of cases, a set of legal choices we now discredit and our own choices. This focus clarifies the arguments that constitute our legal discourse about race. By this particular comparison of the two sets of rhetoric, we can see that the themes and implicit premises of much of contemporary rhetoric bear a similarity to a rhetoric and a set of choices we now disavow. This family resemblance ought to make us rethink our rhetoric and thereby rethink our choices. If we can see the implicit claim to innocence and begin to wonder about it, if we can be more attentive to the real and rich social context in

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16. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-21, at 1516 (2d ed. 1988). Tribe refers to Taney's rhetoric as based on an "odious hierarchy." *Id.*

17. 109 U.S. 3 (1883).

18. *See* Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of* Runyon v. McCrary, 98 YALE L.J. 565 (1989) (contrasting the restrictive interpretive mode of the Court in the Reconstruction cases with the expansive interpretation to achieve the "obvious ends" of the Constitution in the fugitive slave cases).

19. *See infra* notes 91-129 and accompanying text.

which our choices are played out, we may begin to push our legal discourse of race past its current tragic state of impasse.

II. Legal Rhetoric of Racism in the Nineteenth Century

For many, the rhetoric supporting the institution of slavery was constructed simply. Once one got past establishing the nonhuman nature of blacks, the rest was easy. If the white person had any moral obligation in the matter, that obligation was to use the blacks to further the interests of society, a society from which the black was excluded. The horrific conditions of slave existence became the tokens of charity and benevolence to the black brute. This particular rhetoric took various forms but always avoided any real conflict in values and principles by placing the black outside the community of humans.[20]

The rhetoric of the nineteenth-century Justices seems at first glance to be not at all like this form of virulent racism. Yet, their rhetoric often worked in much the same manner, not explicitly denying, but obscuring the humanness of the black as part of a rhetoric dressed up in abstractions, syllogisms, and legal vernacular. The abstract principles of individual freedom and human equality, ideas that were at the core of Revolutionary and constitutional discourse, ostensibly conflicted with the reality of slavery, and later in the century, the reality of de jure segregation and oppression of blacks. This ostensible conflict was the cracked surface of reality which demanded the smoothing veneer of legal rhetoric. Those judges who denied themselves the rhetorical move of the most virulent form of racism, the move explicitly placing blacks outside the human community, had to be more sophisticated in their arguments. They had to construct a more subtle rhetorical artifice, yet one that embodied its own version of racism.

The best of the rhetoricians constructed exquisitely horrific rhetorical structures to justify choices that society has since discredited. As examples, this paper analyzes the Court's opinions in *Dred Scott*, the *Civil Rights Cases*, and *Plessy*.[21] These cases, we now say, form a tragic chapter in the Court's jurisprudence of race.[22] Woven through the Court's opinions in *Dred Scott*, the *Civil Rights Cases*, and *Plessy*, the themes of white innocence and black

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20. *See* Arrogance, *supra* note 8, at 15-27.

21. Plessy v. Ferguson, 163 U.S. 537 (1896); The Civil Rights Cases, 109 U.S. 3 (1883); Dred Scott v. Sandford, 60 U.S. 393 (1856).

22. *See supra* notes 16 and 18.

abstraction made intellectually coherent the subjugation of blacks. This rhetoric did not create the conditions of subjugation. The rhetoric, however, did dress up the choices which were, at the least, not choices to mitigate that subjugation. In this sense, the rhetoric was a symptom of the disease of racism that gripped the legal culture, and the larger culture, of nineteenth-century America.

A. Dred Scott *and Taney's Narrative of Subjugation*

Chief Justice Taney's opinion in *Dred Scott* stained the Court's history and virtually ruined the historical standing of its author.[23] Nonetheless, it is a remarkable and revealing rhetorical structure.

Taney's opinion was infamous in his time mostly for its declaration that Congress lacked the power to prohibit slavery in the Territories, thus declaring the Missouri Compromise unconstitutional.[24] The opinion is infamous in our time for its assertion that blacks were not citizens of the United States.[25] To establish the latter assertion, Taney's central rhetorical structure was the narrative of subjugation. He told the story of the subjugation of blacks through colonial times and into the constitutional period.[26] Linking this narrative with an original intent interpretive theory, he concluded that because the drafters of the Constitution could not have imagined blacks as citizens, he was bound by their intentions on the matter.[27]

Taney's narrative is remarkable in various ways. First, it poses a challenge to one of the central points of this paper. I argue that black abstraction was a central theme, that the rhetoricians typically portrayed the black outside of any real and rich social context. Yet, Taney placed the black in a social context and purported to tell the black person's story.

Taney's narrative of subjugation is a departure from black abstraction, but in form only and, in all important respects, is simply another way of arriving at the rhetorical end of black

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23. The decision "wrecked the reputation of Chief Justice Taney; and it impaired the prestige of the Court for years to come." W. LEWIS, WITHOUT FEAR OR FAVOR 423 (1965).

24. *Id.* at 425.

25. "The effect of Taney's statement [that the Negro had no rights that the white man was bound to respect] was to place Negroes of the 1780s—even free Negroes—on the same level, legally, as domestic animals. As 'historical narrative,' it was a gross perversion of the facts." D. FEHRENBACHER, THE DRED SCOTT CASE 349 (1978).

26. *See* Dred Scott v. Sandford, 60 U.S. 393, 407-21 (1856).

27. *Id.* at 404-05.

abstraction. The essential purpose of black abstraction is to deny, or obscure, the humanness of the black person. Taney got to that end by narrative, not abstraction.

Taney could make his narrative achieve his end because of the inescapable ideology of any historical narrative.[28] Taney made a set of choices in the construction of his narrative. He chose not simply what to tell out of the rich set of possibilities; he also chose to place his narrative in a particular place and time and then, from within that place and time, he chose what pieces of that story to tell. Taney did not, for example, choose to place any portion of his narrative of the black person in Africa, where the black person was part of a real and rich culture. Taney chose not to tell the story of seventeenth-century colonial life with its relative tolerance for the black person.[29] Moreover, in his constructed narrative, he found virtually no place for the story of the free blacks living in the constitutional period.[30]

Taney's narrative of subjugation was neither lie nor fiction. Blacks were subjugated in the various ways he chronicled. He constructed his narrative, however, for a rhetorical end. Taney's narrative thus demonstrated that the rhetoric of black abstraction, like any rhetoric, can be put aside whenever the same rhetorical ends can be achieved otherwise. Taney's narrative coupled with his interpretive theory achieved perfectly the rhetorical ends of white innocence and black abstraction. He argued that the narrative demonstrated the pervasive subjugation of blacks preceding the constitutional era. Thus, the Founding Fathers never could have intended that this subjugated race would be citizens with the same constitutional status as white persons. Under his professed interpretive theory, these intentions concluded the matter.

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28. *See* H. WHITE, METAHISTORY: THE HISTORICAL IMAGINATION IN NINETEENTH-CENTURY EUROPE (1973); H. WHITE, TROPICS OF DISCOURSE: ESSAYS IN CULTURAL CRITICISM (1978).

29. *See* ARROGANCE, *supra* note 8, at 189-205. Professor Fredrickson explored the relative tolerance in the 1600's and the transition to a "consistently racist society" beginning at the end of the seventeenth century. *Id.* at 198. Judge Higginbotham documented this transition to a consistent and virulent racism in colonial America. A. HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978).

30. No one of that race had ever migrated to the United States voluntarily; all of them had been brought here as articles of merchandise. The number that had been emancipated at that time were but few in comparison with those held in slavery; and they were identified in the public mind with the race to which they belonged, and regarded as a part of the slave population rather than the free.

Dred Scott, 60 U.S. at 411.

> The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution . . . . On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.
>
> It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.[31]

Thus, the constructed narrative and the interpretive theory formed a complete rhetorical edifice. Blacks simply were not citizens. The rhetoric made this appalling conclusion coherent.

Taney's narrative reduced blacks to an inferior, if not subhuman, status, not just in history but in the moment. By telling his particular story, Taney made an assertion about history. By using the story to justify the conclusion that blacks could not be citizens, Taney reinforced the "less than human" legal status of black persons in his own time.

Taney's use of the original intent theory in this case also is connected with the theme of white innocence. Although the original intent interpretive theory is not unique to the *Dred Scott* case, its use did permit Taney to push away responsibility for his choice. Depending on the extent of Taney's racism, he may have felt little need to evade personal responsibility for his choice.[32] Nonetheless, his originalism theory permitted him to pretend that he was not saying blacks ought not be deemed citizens. He merely was saying that the Constitution, properly interpreted, did not include them. Whether a conscious evasion or not, Taney's theory is an example

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31. *Id.* at 404-05.

32. "Pleading lack of time in the preparation of his Dred Scott opinion, he prepared a voluminous supplement justifying his conclusions on the issue of Negro citizenship." W. LEWIS, *supra* note 23, at 428.

of the white man taking the position of nonculpability for the circumstances of the black person.

In a more general sense, Taney's opinion suggested a naturalness to the subjugation of the blacks. In his rhetorical world, blacks were unidimensional characters, everywhere and always subjugated. This portrayal suggested that the subjugation was a product of their natural difference as opposed to the brute force of the white master race. This suggestion of naturalness or inevitability mitigated the dissonance between the reality of subjugation and the principles of freedom and equality.

B. The Civil Rights Cases *and the "Special Favorites"*

The Reconstruction Amendments[33] negated the formal rhetoric of Taney's opinion in *Dred Scott.* Legal rhetoric, at least in its explicit premises, could not deny blacks the status of citizen. Moreover, any originalism interpretive argument had to accommodate a new set of "Founding Fathers" who created their piece of the Constitution at an importantly different moment in our history.

The scope of the Reconstruction Amendments has been, from their beginning, a controversial issue.[34] In the *Civil Rights Cases,* the Court held that the first and second sections of the Civil Rights Act of 1875, Congress's effort to provide some source of statutory protection for the southern blacks in the waning days of Reconstruction, were unconstitutional.[35] Justice Bradley, writing for the majority, concluded that neither the thirteenth nor the fourteenth amendment gave Congress the power to enact a law that prohibited racial discrimination in public accommodations and conveyances.[36] Bradley's opinion relied on the concept of "state action" to limit the authority that the fourteenth amendment granted to Congress.[37] The statute, he argued, regulated private action. The fourteenth amendment did not reach such private action.[38] The thirteenth amendment did not authorize the federal statute because racial segregation in public facilities was not

33. U.S. CONST. amends. XIII & XIV.
34. *See* Kennedy, *Reconstruction and the Politics of Scholarship,* 98 YALE L.J. 521 (1989).
35. The Civil Rights Cases, 109 U.S. 3 (1883).
36. *Id.* at 31-32.
37. *Id.* at 25.
38. *Id.* at 11.

deemed a "badge" of slavery.[39] In Bradley's words, "what has it to do with the question of slavery?"[40]

Bradley's opinion contained perhaps the most outrageous example of black abstraction in the nineteenth-century rhetoric:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.[41]

Bradley's fantastic assertion is coherent only in the abstract. In the abstract, the statute sought to create a protection especially for black citizens. But this special treatment was the product of the reality of pervasive oppression of blacks by whites. The purpose of the federal statute struck down in the case was to create the possibility of some continued federal presence and power in the South to protect the blacks as Reconstruction came to a close and the federal government began what became ultimately an abandonment of the southern blacks.[42] Thus, the statutes especially protected black citizens. The whites of course were not especially favored precisely because they were the oppressors.

Harlan, in dissent, responded to the "special favorites" argument:

> It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws . . . . What the nation, through Congress, has sought to accomplish in reference to that race is—what had already been done in every State of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more . . . . The one underlying purpose of congressional legislation has been to

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39. *Id.* at 21.

40. *Id.*

41. *Id.* at 25.

42. [B]lacks in the Redeemers' New South found themselves enmeshed in a seamless web of oppression, whose interwoven economic, political, and social strands all reinforced one another. In illiteracy, malnutrition, inadequate housing, and a host of other burdens, blacks paid the highest price for the end of Reconstruction and the stagnation of the Southern economy.

E. FONER, RECONSTRUCTION 598 (1988). Professor Randall Kennedy has written a thoughtful review essay on Foner's book and Reconstruction as a piece of historical turf to which our contemporary factions lay claim. Kennedy, *supra* note 34.

> enable the black race to take the rank of mere citizens.[43]

Harlan's opinion, unlike Bradley's, reflected some sense of the reality of nineteenth-century America, some sense of the actual social context in which the statute would have operated.

Bradley's opinion also has an abstract quality in its assertion that only the random acts of individuals victimized blacks and that victimized blacks simply could get redress in the state courts.

> The wrongful act of an individual, unsupported by any [state] authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress.[44]

Bradley's suggestion was disconnected from the reality of the social context. The wrongs for which blacks might have sought redress were rapidly becoming the official state policy.[45] Redress in the state courts was a fanciful illusion—except on the rhetorical field of abstraction.

By keeping his rhetoric above the field of play and in the strata of abstract assertions, Bradley thereby was able to make assertions that were laughable in their real and operating context. He was able to smooth over the dissonance in the Court's exercise of its power to void a statute designed to address the real and pervasive oppression of black citizens. In Bradley's rhetorical world, the Civil War and the Reconstruction Amendments ended all forms of state-sanctioned racial oppression. All that was left were the random acts of individual lawbreakers. And the state courts, of course, would redress those acts effectively.

Bradley's opinion also expressed the theme of white innocence. He stressed the potential for the victimization of the innocent

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43. The Civil Rights Cases, 109 U.S. at 61 (Harlan, J., dissenting).

44. *Id.* at 17.

45. [T]he structure of segregation and discrimination was extended by the adoption of a great number of the Jim Crow type laws . . . . The mushroom growth of discriminatory and segregation laws during the first two decades of this century piled up a huge bulk of legislation . . . . Much ingenuity went into the separation of the races in their amusements, diversions, recreations, and sports.

A. WEINSTEIN & F. GATELL, *supra* note 15, at 86-87.

white race. He conjured the specter of some future municipal code that would govern the private lives and choices of whites, compelling them to accept black persons into their communities on terms of equality. The federal statute "steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules."[46] This intrusion into the white man's prerogatives was the true violation of rights at stake in the case. White people were merely expressing preferences based on a pervasively embraced ideology of racism. The Court guaranteed to the whites their right to express and live out their racism.

Bradley's opinion at once obscured the degradation of blacks in the aftermath of Reconstruction and implied the innocence of the whites who were in fact responsible for this degradation. In Bradley's rhetorical world: blacks must assume the responsibilities of mere citizens and not seek special favor in the law; there is no state-sanctioned racism, only the isolated private wrongs that are not a source of guilt or responsibility for the white race; and, perhaps most importantly, the Court must protect innocent whites from the victimization of forced integration.[47]

C. Plessy *and the Self-Imposed Stigma*

In *Plessy v. Ferguson*,[48] the Court reviewed a Louisiana statute that segregated railroad passengers by race, a statute that exemplified the proliferating new "Black Codes" which established de jure segregation throughout the South in the late nineteenth century.[49] Justice Brown spoke for the majority of the Court and held the statute constitutional. That the segregation law posed no thirteenth amendment problem was "too clear for argument."[50] He reduced the fourteenth amendment conflict to the question whether the statute was a "reasonable regulation," a question that implied the extension of "a large discretion" to the legislature.[51] Brown found the statute to be reasonable in its connection with "estab-

46. The Civil Rights Cases, 109 U.S. at 14.

47. Contemporary debate about affirmative action contains echoes of Bradley's arguments. Rhetoricians who oppose affirmative action often assert that affirmative action is a form of legal favoritism based on race, that racism is essentially a thing of the past, and that affirmative action victimizes innocent whites. *See* Ross, *supra* note 1, at 298.

48. 163 U.S. 537 (1896).

49. *Id.*

50. *Id.* at 542.

51. *Id.* at 550.

lished usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."[52]

The only problem with the reasonableness of the law was that the law was grounded in its sanction of racism. The "traditions" were those of racism; the "comfort" was that experienced by whites who were legally protected from the physical proximity of blacks; and the threat to "public peace" was the specter of whites reacting violently to the efforts of blacks to take a place of social equality. Both the law itself and the reasons for the law that Brown advanced were expressions of the pervasive and especially virulent racism that gripped this country in the latter nineteenth century.[53]

Nonetheless, the legal rhetoric of Brown's opinion in *Plessy* made the choice somehow intellectually coherent. Brown built his opinion on the assertion that segregation by law does not degrade or stigmatize the black person. "Laws permitting, and even requiring, [racial segregation] in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other . . . ."[54] Moreover, Brown asserted that any sense of stigma felt by a black person would be self-imposed:

> We consider the underlying fallacy of plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.[55]

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52. *Id.*

53. *See* BLACK IMAGE, *supra* note 7, at 256-82.

54. *Plessy*, 163 U.S. at 544. The brief for the segregationist position also expressed the formal equality of the statute:

> *[A]ny* passenger insisting on going into a coach or compartment to which, by race, he does not belong, shall be liable to be punished according to its provisions. Should a *white* passenger insist on going into a coach or compartment to which by race he does not belong, he would thereby render himself liable to punishment according to this law. There is, therefore, no distinction or unjust discrimination in this respect *on account of color.*

Brief on Behalf of Defendant in Error at 14-15, Plessy v. Ferguson, 163 U.S. 537 (1896), *reprinted in* 13 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 95-96 (1975) [hereinafter LANDMARK BRIEFS] (Brief of M.J. Cunningham, Attorney General of Louisiana).

55. *Plessy*, 163 U.S. at 551. The Louisiana Supreme Court made this self-imposed stigma argument and incorporated it in the brief filed by the Attorney General of Louisiana:

> We have been at pains to expound this statute because the dissatisfaction

These assertions seem patent nonsense to us now. And they were just as patently nonsensical in Brown's time and place. The purpose and effect of the racial segregation laws throughout our legal history always have been the same—to express the racial inferiority of the blacks. These laws were a product of, and an expression of, racism, then and later. When a black person subject to laws commanding racial segregation in railroad cars felt thereby a sense of stigma, she had not misunderstood the message, she had not revealed some idiosyncratic sensitivity; rather, she had heard and received the message sent by those responsible for the law.

Only in some abstract conception of the society could one say, with a straight face, that these segregation laws were not premised on racism and did not express a message of racial inferiority. Only in this abstract conception could the argument of equal treatment of each race under the law have any real power. Any real attempt

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> felt with it by a portion of the people seems to us so unreasonable that we can account for it only on the ground of some misconception. Even were it true that the statute is prompted by a prejudice on the part of one race to be thrown in such contact with the other; one would suppose that to be a sufficient reason why the pride and self-respect of the other race should equally prompt it to avoid such contact if it could be done without the sacrifice of equal accommodations.

Brief on Behalf of Defendant in Error at 51-52, Plessy v. Ferguson, 163 U.S. 537 (1896), *reprinted in* 13 LANDMARK BRIEFS, *supra* note 54, at 131 (Brief of M.J. Cunningham, Attorney General of Louisiana).

The lawyers for Plessy tried to return the argument to the plane of reality:

> Perhaps it might not be inappropriate to suggest some questions which may aid in deciding this inquiry. How much would it be *worth* to a young man entering upon the practice of law, to be regarded as a white man rather than a colored one? Six-sevenths of the population are white. Nineteen-twentieths of the property of the country is owned by white people. Ninety-nine hundredths of the business opportunities are in the control of white people. These propositions are rendered even more startling by the intensity of feeling which excludes the colored man from the friendship and companionship of the white man. Probably most white persons if given a choice, would prefer death to life in the United States *as colored persons.*

Brief for Plaintiff in Error at 9, Plessy v. Ferguson, 163 U.S. 537 (1896), *reprinted in* 13 LANDMARK BRIEFS, *supra* note 54, at 27, 36 (Brief of James C. Walker). Plessy's lawyers also coined a particularly apt phrase to describe the stigmatizing message of the laws:

> [T]he discrimination in question is along the line of the late institution of slavery, and is a distinct disparagement of those persons who thereby are statutorily separated from others because of a Color which a few years before, with so small exception, had placed them within that *line.* It therefore amounts to a *taunt by law* of that previous condition of their class—a taunt by the State, to be administered with perpetually repeated like taunts *in word* by railroad employés, in places of public business resort within Louisiana.

Brief for Plaintiff in Error at 7-8, Plessy v. Ferguson, 163 U.S. 537 (1896), *reprinted in* 13 LANDMARK BRIEFS, *supra* note 54, at 10-11 (Brief of S.F. Phillips and F.D. McKenney).

actually to imagine the motivation for the passage of these laws and the effect the laws would have on black citizens unravels Brown's argument.

At several points in the opinion, Brown did leave the rhetorical field of black abstraction and demonstrate the reality of racism. Specifically, he did so through the expression of his own racism, which was part of the public and widely shared ideology of his time. Brown argued that if a state legislature dominated by blacks passed a racial segregation law like the one challenged in *Plessy*, the white race would not assume it was an expression of the inferiority of the white race.[56] Here, Brown stepped out of the realm of abstraction and made a sensible comment on the society in which he lived. Brown's society was an essentially racist society in which the very notion of a white man thinking himself inferior to a black man on account of race was lunatic.[57]

Brown revealed again his sense of the real society within which these laws operated in his concluding passage. Brown referred to the inherent problem in the implementation of a racial segregation law; that is, the problem of defining a "white" person. Brown noted that a statutorily specified blood ratio typically resolved this definitional problem. The state statutes on this subject differed. In some states, "the predominance of white blood must only be in the proportion of three fourths."[58] In other states, "any visible admixture of black blood stamp[ed] the person as belonging to the colored race."[59] These laws defining the status of being white were patently racist. The conception of "tainted black blood" is obvious when the spectrum of white ranges from "only . . . three fourths" white blood to the absence of any "visible admixture."

Brown's opinion also embodied the theme of white innocence. The self-imposed stigma argument permitted the white to evade responsibility for any degradation felt by the black person. Moreover, the racism expressed explicitly and implicitly throughout the opinion gave a naturalness and logic to the de jure segregation which, in turn, let the white person off the hook. Blacks were different and inferior. Thus, the segregation of blacks was natural and not an act of oppression.

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56. "We imagine that the white race, at least, would not acquiesce in this assumption." *Plessy*, 163 U.S. at 551.

57. *See* BLACK IMAGE, *supra* note 7, at 187-88.

58. *Plessy*, 163 U.S. at 552.

59. *Id.*

By considering the circumstances of the black person in an abstract context and by asserting the natural inferiority of the black race, Brown's opinion rhetorically mitigated any possible conflict between the declared constitutionality of de jure segregation and the ostensible constitutional principle of equality. Thus, in *Plessy*, as in *Dred Scott* and the *Civil Rights Cases*, rhetoric embodying the themes of black abstraction and white innocence helped smooth over the cracked surface of the tragic reality of the Court's response to the enslavement and degradation of blacks in nineteenth-century America.

III. THE CONTEMPORARY RHETORIC OF RACE

We have our own cracked surface of tragic reality. Prior to *Brown v. Board of Education*,[60] our tragedy was the continuing presence of de jure segregation and all that it entailed. Post-*Brown*, the tragedy is different but nonetheless powerful. Black people constitute a disproportionate percentage of the poor.[61] Segregation has shifted from de jure to de facto.[62] The efforts to use constitutional principles and federal courts to desegregate our society have not worked and our courts seem to be withdrawing from the struggle.[63]

As we walk away from the contemporary reality of economic deprivation and segregation of blacks, we run into the conflict it poses. In a society committed to racial equality, in a society in which racism is no longer part of the official ideology nor part of accepted political and legal discourse, how are we to account for

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60. 347 U.S. 483 (1954).

61. "Among whites, 11.4 percent of all persons were poor compared to 31.3 percent among blacks and 29 percent among Hispanics." M. KATZ, THE UNDESERVING POOR 241 (1989). These figures were computed as of 1985 and gauged poverty after taking account of various government transfer programs such as Aid to Families with Dependent Children. As of 1982, the median income of all black families was only 55.3% of the median income figure for white families. *See* THE QUESTION OF DISCRIMINATION: RACIAL INEQUALITY IN THE U.S. LABOR MARKET 58, Table 3.3 (S. Shulman & W. Darity, Jr. eds. 1989). *See generally* R. FARLEY & W. ALLEN, THE COLOR LINE AND THE QUALITY OF LIFE IN AMERICA (1987).

62. *See* Massey & Denton, *Suburbanization and Segregation in U.S. Metropolitan Areas*, 94 AM. J. SOC. 592 (1988). *But cf.* McKinney & Schnare, *Trends in Residential Segregation by Race: 1960-1980*, 26 J. URB. ECON. 269, 278 (1988) ("Segregation was lower in 1980 than it was in 1960."). For a thoughtful analysis of the impact of residential segregation on legal efforts to integrate the public schools, see Farley, *Residential Segregation and Its Implications for School Integration*, 39 LAW & CONTEMP. PROBS. 164 (1975).

63. *See, e.g.*, L. TRIBE, *supra* note 16, §§ 16-19, at 1493-1501 (chronicling the Court's retreat from school desegregation). *See generally We the People: A Celebration of the Bicentennial of the United States Constitution*, 30 HOW. L.J. 623 (1987).

the separation and apparent subjugation of black citizens? Moreover, as the Court retreats from the effort to bring about change, the conflict seems even more pressing. Still, we go on as though economic deprivation and segregation of blacks somehow makes sense.

Our ability to make intellectually coherent and tolerable this apparent conflict is largely a product of a rhetoric much like the legal rhetoric of the nineteenth century. Like the earlier rhetoric, our version helps smooth over the apparent inconsistency between our realities and our principles. Our rhetoric also expresses our version of the themes of white innocence and black abstraction.

At one time, we might have supposed that we would not have had to face such a conflict in the late twentieth century. That time was the moment of *Brown v. Board of Education*.[64] *Brown* changed much and held the promise of more. Yet, one can see in *Brown* both the promise and the specter of what was to come by discerning both the change and the continuity in the rhetoric of race.

A. The Promise of Brown

Brown v. Board of Education was a moment of transition. It dramatically changed constitutional law. It set off a firestorm of controversy about the institutional role of the Court, which is still raging today.[65] In important ways, nothing could ever be the same after *Brown*.

The case was also a moment of transition in the legal language and rhetoric of race. The advocates for racial segregation brought to the Court a rhetoric that advanced the following propositions: (i) segregation did not harm blacks (if anything, blacks were its beneficiaries); (ii) whites had no reason to apologize or feel ashamed; and (iii) the felt need of whites for segregation ought to be respected and, if integration were to come, it must be done with careful attention to the potential harm to whites.[66]

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64. 347 U.S. 483 (1954); *see* R. KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976).

65. *See* R. BERGER, *supra* note 10; *Addresses Construing the Constitution*, 19 U.C. DAVIS L. REV. 1-30 (1985) (essays by Justices Brennan and Stevens and by Edwin Meese, III); Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Soifer, *Review Essay—Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

66. *See infra* notes 67-71 and accompanying text.

The legal champions of segregation brought their versions of white innocence and black abstraction to the debate. The Attorney General of Virginia, J. Lindsay Almond, argued:

> They are asking you to disturb the unfolding evolutionary process of education where from the dark days of the depraved institution of slavery, with the help and the sympathy and the love and the respect of the white people of the South, the colored man has risen under that educational process to a place of eminence and respect throughout this nation. It has served him well.[67]

From North Carolina came I. Beverly Lake, arguing:

> I speak on behalf of a State which is conscious of no wrongdoing in this matter. North Carolina is proud of her record in the field of Negro education. Today North Carolina is, in fact, educating more Negro children than any other state in the Union. And she is educating them well.[68]

His Texas counterpart, John Ben Shepperd, repeated the theme of paternalism and the moral virtue of the segregationist:

> There is no *discrimination* on the part of the State of Texas in administering its public school system, only *separation* of the races. It is the belief of the people of this State that discrimination against the individual can best be eliminated by segregation of the races in the educational system. It is the evil of discrimination and not segregation per se that is condemned by the United States Constitution.[69]

Shepperd pleaded for the Court's sensitivity to "the individual rights, mores and beliefs of the Southern people."[70] And he closed with a threat:

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67. Transcript of Oral Argument at 11, Davis v. County School Bd. of Prince Edward County, 347 U.S. 483 (1954), *reprinted in* 49A LANDMARK BRIEFS, *supra* note 54, at 512 (Argument of J. Lindsay Almond on Behalf of Appellees).

68. Transcript of Oral Argument at 69, Brown v. Board of Educ., 347 U.S. 483 (1954), *reprinted in* 49A LANDMARK BRIEFS, *supra* note 54, at 1211 (Argument of I. Beverly Lake on Behalf of the State of North Carolina as the Friend of the Court).

69. Brief of John Ben Shepperd, Attorney General of Texas, Amicus Curiae at 3-4, Brown v. Board of Educ., 347 U.S. 483 (1954), *reprinted in* 49A LANDMARK BRIEFS, *supra* note 54, at 1044-45.

70. *Id.* at 5, *reprinted in* 49A LANDMARK BRIEFS, *supra* note 54, at 1046.

> Compulsion can only arouse resentment, individual discrimination, and, as experience has demonstrated in other states, violence. The objectives reached by the War between the States left a scar of bitterness and resentment that is visible even now in some parts of the South. Such, we hope, will not be the result of this Court's May 17th decision.[71]

Each of these men expressed the rhetorical themes of the innocence of the white and the absence of harm to the black.

The segregationists also were adamant in their denial of any racist motives. The lawyer for North Carolina spoke of the mysterious nonracist phenomenon, "race consciousness":

> [E]verybody in North Carolina—practically everybody in North Carolina—is either Anglo-Saxon or Negro. As a result of that, we have more consciousness of race in North Carolina than is to be found in some of the border and northern states. That race consciousness is not race prejudice. It is not race hatred. It is not intolerance. It is a deeply ingrained awareness of a birthright held in trust for posterity.[72]

The Texas Attorney General assured the Court: "Texas loves its Negro people and Texas will solve their problems its own way."[73]

The star of the segregationist advocates was John W. Davis.[74] The Justices listened with virtually no interruptions to his oral argument as he defended the constitutionality of racial segregation in the public schools. Davis too expressed the themes of the absence of racism and the absence of any harm to the blacks. He argued, with an elegant brutality:

> You say that [segregation is a product of] racism. Well, it is not racism. Recognize that for sixty centuries and more humanity has been discussing questions of race and race tension, not racism. Say that we make special provisions for the aboriginal Indian population of this country; it is not racism. Say that 29 states have miscegenation statutes now in force which they believe are of beneficial protection to both races. Disraeli said,

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71. *Id.*

72. Transcript of Oral Argument at 13-14, Brown v. Board of Educ., 347 U.S. 483 (1954), *reprinted in* 49A LANDMARK BRIEFS, *supra* note 54, at 1227-28.

73. Transcript of Oral Argument at 56, Brown v. Board of Educ., 347 U.S. 483 (1954), *reprinted in* 49A LANDMARK BRIEFS, *supra* note 54, at 1270 (Argument of Attorney General John Ben Shepperd on Behalf of the State of Texas as the Friend of the Court).

74. *See generally* W. HARBAUGH, LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS (1973).

> "No man," said he, "will treat with indifference the principle of race. It is the key of history."[75]

Davis concluded his oral argument thus:

> Let me say this for the State of South Carolina. . . . It is confident of its good faith and intention to produce equality for all of its children of whatever race or color. It is convinced that the happiness, the progress and the welfare of these children is best promoted in segregated schools, and it thinks it a thousand pities that by this controversy there should be urged the return to an experiment which gives no more promise of success today than when it was written into their Constitution during what I call the tragic era.[76]

Davis's rhetoric, and the rhetoric of the other segregationist lawyers, expressed a form of white innocence and black abstraction. The segregationist rhetoricians insisted on the absence of racism as a motive. Blacks were not harmed. The only victims on the horizon were the whites who might be compelled to give up a way of life, without good reason. Only an abstract depiction of the context could advance this benign picture of school segregation. To say that racism was absent from the explanation for the segregation laws made no sense once one considered the laws in any real social and historical context. To assert that segregation did not harm blacks seemed ludicrous when one imagined the history of separate but unequal education.[77] The entire rhetorical structure tumbled with the embrace of even so simple an imagining as the feelings and circumstances of black children being bussed many miles across Texas to the black school, passing along the way the schools for white children.[78]

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75. Transcript of Oral Argument at 43, Brown v. Board of Educ., 347 U.S. 483 (1954), *reprinted in* 49A LANDMARK BRIEFS, *supra* note 54, at 491 (Argument of John W. Davis on Behalf of Appellees).

76. *Id.* at 44, *reprinted in* 49A LANDMARK BRIEFS, *supra* note 54, at 492.

77. *See generally* C. WOODWARD, THE STRANGE CAREER OF JIM CROW (3d ed. 1974).

78. Of the two hundred and thirteen Texas counties listing Negro scholastics, one hundred forty-six counties offer a complete Negro high school, twenty-one counties offer some Negro high school, but not twelve grades, and thirty-six counties offer only Negro elementary school. Ten counties operate no school for Negroes; however, these counties have ten or fewer Negro scholastics. Negro scholastics in counties not having a complete twelve grades are transported at State expense to other schools.

Brief of John Ben Shepperd, Attorney General of Texas, Amicus Curiae at 8, Brown v. Board of Educ., 347 U.S. 483 (1954), *reprinted in* 49A LANDMARK BRIEFS, *supra* note 54, at 1049.

The most eloquent response to the segregationist rhetoric was that of Thurgood Marshall. Marshall spoke thus:

> They can't take race out of this case.
> . . . .
> . . . [T]he only way that this Court can decide this case in opposition to our position is that there must be some reason which gives the state the right to make a classification . . . and we submit the only way to arrive at this decision is to find that for some reason Negroes are inferior to all other human beings. . . . The only [explanation] is an inherent determination that the people who were formerly in slavery, regardless of anything else, shall be kept as near that stage as is possible; and now is the time, we submit, that this Court should make it clear that that is not what our Constitution stands for.[79]

Marshall insisted that segregation was by its nature an expression of racial inferiority and a product of just such racist motives. He denied the innocence of the white segregationist and argued the palpable harm to the stigmatized black person. Marshall knew well the rhetorical themes of white innocence and black abstraction and met them—head on.

The Court decided the *Brown* case in two stages: first, the declaration of the unconstitutionality of segregated public schools in the *Brown I* opinion;[80] and, second, the adoption of the "with all deliberate speed" remedy in the *Brown II* opinion.[81] In the *Brown I* opinion, the Court resisted the rhetoric of black abstraction. "To separate [school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[82] This move represented the promise of a change in the rhetoric of race that paralleled the promised change in constitutional law in *Brown I*.

The other important feature of the rhetoric of *Brown I* was the Court's treatment of the rhetorical theme of white innocence. The segregationist rhetoricians had expressed this theme in their insistence on the absence of racism. On this issue, the *Brown I*

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79. Transcript of Oral Argument at 21-22, Brown v. Board of Educ., 347 U.S. 483 (1954), *reprinted in* 49A LANDMARK BRIEFS, *supra* note 54, at 522-23 (Rebuttal Argument of Thurgood Marshall on Behalf of Appellants).

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

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

82. *Brown I*, 347 U.S. at 494.

opinion offered a howling silence.[83] The Court spoke not at all of the racist motives for segregation. This silence thus left standing the segregationists' insistence on white innocence.

This silence is important to an understanding of the history of the rhetoric of race.[84] The point is not that the Court erred in failing to reject explicitly the formal assumption of white innocence. The cost of an explicit charge of racist motives would have been at least the loss of unanimity in the *Brown* decision. The important observation is that the price of unanimity was, in effect, the preservation of the rhetoric of white innocence. In this sense, *Brown I* was both a moment of transition and a moment of continuity in our rhetoric of race. Black abstraction was rejected; white innocence was left intact.

We cannot know what would have been different had the Court explicitly rejected white innocence. We can see, however, the significance of the choice not to do so in the Court's choice of remedy in *Brown II*.[85]

Having concluded that segregated schools violated the constitutional rights of black families, the Court had to decide what to do about it. On the issue of remedy, Thurgood Marshall's position was simple and powerful. Beyond any delay necessary to put the machinery of desegregation into effect, he granted no basis for further delay. Having found that segregated schools violated the constitutional rights of black families, the Court had the duty to remedy that violation.[86]

In *Brown II*, the Court rejected Marshall's simple analysis and adopted the "with all deliberate speed" remedy.[87] Again, there were powerful pragmatic arguments for the delay in implemen-

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83. "[T]he venial fault of the opinion [in *Brown*] consists in its not spelling out that segregation . . . is perceptibly a means of ghettoizing the imputedly inferior race . . . . That such treatment is generally not good for children needs less talk than the Court gives it." Black, *supra* note 65, at 430 n.25.

84. "The draft, wrote the Chief, was 'prepared on the theory that the opinions should be short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory.' " B. SCHWARTZ, SUPER CHIEF 97 (1983).

85. *Brown II*, 349 U.S. 294 (1955).

86. Brief for Appellants in Nos. 1, 2, and 3 and for Respondents in No. 5 on Further Reargument at 11-16, Brown v. Board of Educ., 349 U.S. 294 (1955), *reprinted in* 49A LANDMARK BRIEFS, *supra* note 54, at 647.

87. The judgments below, except that in the Delaware case, are accordingly reversed and the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.

Brown II, 349 U.S. at 301.

tation. Yet, whether right or wrong, the implicit backdrop of white innocence made the delay in implementation intellectually and socially tolerable. Had the Court in *Brown I* spoken of the racism that motivated the segregation laws, the delay in *Brown II* would have been more difficult to justify. To permit some period of time for families to adjust to a new way of life is one thing; to permit racists a period of continued expression of their racism out of fear of their resistance and lawlessness is another thing.

Nonetheless, *Brown* could have been understood in its time as a moment of transition in both the law and rhetoric of race. As with all periods of important transition, society must give up some things and yet, at the same time, hold on to some of the past. White innocence as a rhetorical theme might have been a piece of the past, kept in *Brown* but soon to fade away.

B. Contemporary Rhetoric of Race

An analysis of the rhetoric of our contemporary cases on race reveals that the rhetorical promise of *Brown* was as incompletely fulfilled as its promise of change in law and society. Thirty-six years after *Brown*, we live in an essentially segregated society; our current law provides no real basis for change; and the rhetoric of race looks more and more like its nineteenth-century counterpart.

To support the last of these sad conclusions, this paper analyzes three contemporary cases: *Milliken v. Bradley*;[88] *City of Memphis v. Greene*;[89] and *City of Richmond v. J.A. Croson Co.*[90] These cases span the past twenty-five years and each is an important chapter in the story of race and the Constitution. These cases reveal in especially powerful ways the contemporary legal rhetoric of race.

1. Milliken *and the End of the Promise of* Brown

In *Milliken*, the Court faced the difficult, but easily anticipated, question whether the Constitution empowered the federal courts to order interdistrict bussing to achieve racial integration in the public schools. The emerging pattern in metropolitan areas of black city schools and white suburban schools made the question easily anticipated. The apparent necessity of interdistrict bussing

88. 418 U.S. 717 (1974).
89. 451 U.S. 100 (1981).
90. 488 U.S. 469 (1989).

as the only workable remedy, coupled with the typical absence of overt racial discrimination within the suburban school districts, made the question difficult. A majority of the Court, in an opinion written by Chief Justice Burger, concluded that the remedy was virtually unavailable.[91]

Milliken thus represented the end of the promise of *Brown* for public school integration. Once *Milliken* functionally took away from the federal courts the power to order interdistrict bussing to implement desegregation, the common pattern of de facto housing segregation in most parts of this country assured de facto segregation in the schools.[92]

A central part of Burger's rhetorical structure was the "perpetrator perspective" built in Part II of his opinion.[93] The perpetrator perspective was a search for perpetrators of racial discrimination.[94] This search became a means of limiting the reach of the law—the remedy was limited to reach only proven perpetrators. Burger concluded that the suburban school districts were not perpetrators. The suburban school districts had not committed a racially discriminatory act; they had simply provided public education to the people who lived within their community, people who happened to be virtually all white. In Burger's words:

> [There was] no showing of significant violation by the 53 outlying school districts and no evidence of any interdistrict violation. . . . To approve the remedy ordered by the court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in *Brown I* and *II* or any holding of this Court.[95]

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91. "Most unfortunate of all is the Court's unwillingness even to consider—let alone to counteract—the role of government agencies other than school boards in promoting and perpetuating the residential segregation that will inevitably undermine the effort to eliminate racial isolation in the public schools." L. TRIBE, *supra* note 16, §§ 16-19, at 1500; *see* Farley, *supra* note 62.

92. *Milliken*, 418 U.S. at 744-45, 757. *See generally* P. DIMOND, BEYOND BUSING: INSIDE THE CHALLENGE TO URBAN SEGREGATION 110-18 (1985); E. WOLF, TRIAL AND ERROR: THE DETROIT SCHOOL SEGREGATION CASE 23-80 (1981).

93. *Milliken*, 418 U.S. at 737-47.

94. *See* Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-57 (1978) (criticizing the perpetrator perspective); Ross, *supra* note 1, at 299-308 (discussing the power and danger of the "rhetoric of innocence" in affirmative action); Sullivan, *The Supreme Court, 1985 Term—Comment: Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 91-98 (1986) (criticizing the sin-based paradigm of affirmative action).

95. *Milliken*, 418 U.S. at 745.

This perpetrator perspective is a manifestation of both white innocence and black abstraction. The reality of the *Milliken* case, which even Burger acknowledged, was the existence of a virtually all black metropolitan school system and a virtually all white suburban school system in Detroit.[96] Burger insisted that this was not something for which the suburban whites bore any responsibility. Thus, to impose the remedy of bussing on the suburban whites would be a victimization of innocents.

A rhetorical movement to an abstract conception of the two school systems makes plausible this assertion of white innocence. Burger did not discuss the real social context in which the case arose and the social phenomena that accounted for the de facto segregation.[97] More particularly, he refused to address the phenomenon of "white flight." When Detroit dismantled its dual, segregated city school system, the white citizens of the city began leaving for the suburbs. White families moving to the Detroit metropolitan area clustered in the white suburbs. The suburban schools became white, the city schools black, not by happenstance but through a complex set of private and public choices.[98] Burger's rhetorical structure obscured the reality of white flight, thereby suggesting that the segregation of the suburban school districts was serendipitous or somehow mysterious. This rhetorical move preserved the nonperpetrator status of the suburban school districts. It also raised doubts about the victim status of the black school children locked into the segregated city school system. After all, if this pattern of segregation just happened, no one is to blame and no one is a victim.

When one acknowledges the phenomenon of white flight as the central part of the explanation of the existence of the all-white suburban schools, the matter of innocence and victimization becomes more complex. White flight does not automatically make all whites guilty, nor does it establish the victimization of the black

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96. *Id.* at 726-27.

97. "[W]ithin many—but not all—metropolitan areas, the out-migration of a substantial proportion of white families of childbearing age is responsible in large part for the existence of central cities with large black populations and surrounding suburban rings with primarily white populations." Farley, *supra* note 62, at 191. Burger considered such matters irrelevant: "The dissents also seem to attach importance to the metropolitan character of Detroit and neighboring school districts. But the constitutional principles applicable in school desegregation cases cannot vary in accordance with the size or population dispersal of the particular city, county, or school district as compared with neighboring areas." *Milliken*, 418 U.S. at 748 n.22.

98. *See* Farley, *supra* note 62, at 191; *see also Milliken*, 418 U.S. at 804-05 (1974) (Marshall, J., dissenting) (predicting the possibility of white flight).

children. It does suggest, however, that the perpetrator perspective operates at a level of abstraction which obscures the complexity of de facto school segregation.

Burger's opinion thus offered a contemporary example of white innocence and black abstraction. Burger's rhetorical move, to ignore or obscure the real social context in which these stories are played out, is similar to the black abstraction in *Plessy* and the *Civil Rights Cases*. Both the nineteenth-century abstraction and the contemporary version in *Milliken* are alike in their refusal to depict the black person as a fully-rounded human living in a real and vividly described social context.

A tragic irony is that the Court in *Milliken* undid the promise of *Brown* through an opinion whose central rhetorical piece was the refusal to speak of the obvious racism present in the social context. As Warren's opinion in *Brown* did not speak of the racism at work in de jure segregation of the public schools, Burger's opinion in *Milliken* did not speak of the racism at work in de facto segregation of the public schools. The silence in *Brown* was presumably the price of unanimity. *Milliken* may suggest that society paid a special price for that particular silence, the price of leaving intact for Burger and others the powerful rhetoric of white innocence.

2. Greene *and the Wall*

In *City of Memphis v. Greene*,[99] a majority of the Court concluded that the city's decision to erect a traffic barrier that separated a white neighborhood from a black neighborhood was neither a violation of the thirteenth amendment nor a violation of section 1982 of the Civil Rights Act of 1866.[100] Scholars generally do not deem *Greene* to be an important case.[101] Perhaps the fact that the Court did not decide it on equal protection grounds made this case seem marginal to some. Nonetheless, just as the traffic barrier took on symbolic dimensions to the black plaintiffs, the *Greene*

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99. 451 U.S. 100 (1981).

100. *Id.* at 129. Section 1982 establishes equal rights of all citizens to inherit, purchase, lease, sell, hold, and convey real and personal property. 42 U.S.C. § 1982 (1990).

101. Several of the standard constitutional law casebooks treat *Greene* only as a note case rather than as a main case. *See, e.g.*, E. BARRET, JR., W. COHEN & J. VARAT, CONSTITUTIONAL LAW (8th ed. 1989); W. LOCKHART, Y. KAMISAR, J. CHOPER & S. SHIFFRIN, CONSTITUTIONAL LAW (6th ed. 1986); R. ROTUNDA, MODERN CONSTITUTIONAL LAW (3d ed. 1989). *But see* L. TRIBE, *supra* note 16; Lawrence, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 357 (1987).

decision, understood as constitutionally sanctioning the state's construction of a "wall" separating a white neighborhood from a black one, is a symbolically powerful chapter in the Court's jurisprudence.

The plaintiffs in *Greene* brought their action under section 1982 and the thirteenth amendment, presumably hoping to avoid the burden of proving discriminatory intent that the Court grafted on to the equal protection clause in *Washington v. Davis*.[102] The Court in *Greene* formally evaded the discriminatory intent issue by concluding that (i) the plaintiffs had no cognizable "property" interest under section 1982[103] and (ii) one could not sensibly characterize the street closing as a badge of slavery under the thirteenth amendment.[104]

Notwithstanding the Court's formal finesse of the discriminatory intent issue, Justice Stevens devoted the bulk of his majority opinion to a characterization of the street closing as the product of a concern for safety and traffic and not an act based on any notions of racism.[105] After an extended discourse on the factual context, Stevens summarized the "critical facts" thus:

> The city's decision to close West Drive was motivated by its interest in protecting the safety and tranquility of a residential neighborhood. The procedures followed in making the decision were fair and were not affected by any racial or other impermissible factors. The city has conferred a benefit on certain white property owners but there is no reason to believe that it would refuse to confer a comparable benefit on black property owners. The closing has not affected the value of property owned by black citizens, but it has caused some slight inconvenience to black motorists.[106]

Stevens concluded that there was "no basis for concluding that the interests favored by the city in its decision were contrived or pretextual."[107]

The rhetoric of Stevens' opinion is a striking combination of abstraction and innocence. Stevens argued that factors not related to race motivated the street closing and thus, in effect, no per-

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102. 426 U.S. 229 (1976).
103. *Greene*, 451 U.S. at 123-24.
104. *Id.* at 126.
105. *Id.* at 111-19.
106. *Id.* at 119-20.
107. *Id.* at 128.

petrators existed.[108] The absence of perpetrators was a claim to innocence that was made possible, yet again, by the refusal to place the case in any real and vivid social context. Stevens was able to accept self-serving assertions by Memphis city officials of concern for excessive traffic precisely because he had moved the rhetorical field to some abstract place where racism was presumed absent unless spoken bluntly.

The alternative summary of the facts in Justice Marshall's dissent reveals the black abstraction at work in Stevens' opinion. Marshall placed the case in its concrete context—Memphis, Tennessee, a city with "a very real history of racial segregation—a history that has in the past led to intercession by [the] Court."[109] Marshall offered this different version of the "critical facts":

> First, as the District Court found, Hein Park (the white neighborhood protected by the traffic barrier) "was developed well before World War II as an exclusive residential neighborhood for white citizens and these characteristics have been maintained." Second, the area to the north of Hein Park, like the "undesirable traffic" that Hein Park wants to keep out, is predominantly Negro. And third, the closing of West Drive stems entirely from the efforts of residents of Hein Park.[110]

These facts, "combined with a dab of common-sense," revealed to Marshall the racism at work in the *Greene* case.[111]

The *Greene* case contains yet another echo of the nineteenth-century rhetoric. Stevens concluded with a civics lesson on the burdens of citizenship, directed at the black residents of Memphis:

> Because urban neighborhoods are so frequently characterized by a common ethnic or racial heritage, a regulation's adverse impact on a particular neighborhood will often have a disparate effect on an identifiable ethnic or racial group. To regard an inevitable consequence of that kind as a form of stigma so severe as to violate the Thirteenth Amendment would trivialize the great purpose of that charter of freedom. Proper respect for the dignity of the residents of any neighborhood requires that they accept the same burdens as well as the same benefits

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108. *Id.* at 110-29.

109. *Id.* at 143-44 (Marshall, J., dissenting).

110. *Id.* at 138 (Marshall, J., dissenting).

111. "But the evidence in this case, combined with a dab of common-sense, paints a far different picture from the one emerging from the majority's opinion." *Id.* at 155 (Marshall, J., dissenting).

of citizenship regardless of their racial or ethnic origin.[112]

Thus, in Stevens' vision, when the blacks objected to the street closing, they objected to carrying the ordinary burdens of citizenship. Similarly, in the nineteenth-century version, the black citizens in the *Civil Rights Cases* refused to accept the ordinary burdens of citizenship and sought special treatment.[113] Stevens also suggested in the above-quoted passage that any sense of stigma felt by blacks was constitutionally trivial and, in any event, was a product of the black person's misunderstanding of the nature of the governmental action.[114] This echoes the argument in *Plessy* that the blacks misunderstood the message of de jure segregation and simply imagined a message of racial inferiority in the laws.[115] These arguments, in the *Civil Rights Cases*, *Plessy*, and now in their contemporary form in *Greene*, are advanced by the rhetoric of black abstraction.

3. Croson *and the White Victims of Affirmative Action*

Perhaps the most divisive contemporary race issue is that of affirmative action.[116] In *City of Richmond v. J.A. Croson Co.*,[117] the Court took what Justice Marshall in dissent called "a deliberate and giant step backward in [the] Court's affirmative action jurisprudence."[118] The majority in *Croson* concluded that the city's set aside of thirty percent of the subcontracting work on city construction jobs for minority firms was an unconstitutional denial of equal protection of the law to the white contractors.[119]

The closest analog to *Croson* in the nineteenth-century cases is the *Civil Rights Cases*.[120] In each case, the Court considered and rejected governmental efforts to meet a perceived specter of racial discrimination. And in each instance, the Court used the rhetorical themes of abstraction and innocence.

Justice O'Connor's opinion for the Court in *Croson* expressed perfectly the theme of black abstraction. She rejected the premise

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112. *Id.* at 128.

113. *See supra* notes 41-42 and accompanying text.

114. *Greene*, 451 U.S. at 128.

115. *See supra* notes 54-55 and accompanying text.

116. *See* Kennedy, *supra* note 34.

117. 488 U.S. 469 (1989).

118. *Id.* at 529 (Marshall, J., dissenting).

119. "Because the city of Richmond has failed to identify the need for remedial action in the awarding of its public construction contracts, its treatment of its citizens on a racial basis violates the dictates of the Equal Protection Clause." *Croson*, 488 U.S. at 511.

120. *See supra* notes 33-47 and accompanying text.

of racial discrimination in the construction industry in Richmond, Virginia. She labeled the City Council's premises as "generalized assertions" and "amorphous claims."[121] O'Connor dismissed large statistical disparities in the black population and black participation in construction work for the city as the wrong set of numbers.[122]

O'Connor's arguments work well on a rhetorical field apart from the history and reality of Richmond, Virginia. Again, Marshall revealed the black abstraction at work in the majority opinion. Marshall dissented and wrote of Richmond's "disgraceful history" of race relations.[123] He argued: "[A] majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice. I, however, do not believe this Nation is anywhere close to eradicating racial discrimination or its vestiges."[124] Marshall told the stories of Richmond's massive resistance to school integration, its efforts to dilute the black vote, and other state-sanctioned racial discrimination in Richmond.[125] He thus tried to shift the rhetorical field, to move into a vividly depicted social context.[126] He fought against the abstraction of O'Connor's rhetoric.

Justice Scalia's concurring opinion embodied both of the rhetorical themes but was especially impassioned in its expression of white innocence. He spoke of the white victims of affirmative action. When we implement affirmative action, "we play with fire, and much more than an occasional DeFunis, Johnson, or Croson burns."[127] Scalia spoke of those who might seek to "even the score" and suggested that innocent whites might suffer unjustly at the hands of blacks.[128] In this rhetorical work, Scalia expressed a theme of white innocence that can be connected with the nineteenth-century rhetoric. He also invited a connection with another piece of the public rhetoric of the nineteenth century—the fear of black insurrection and revenge.[129] Both connections depend on the

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121. *Croson*, 488 U.S. at 499-500.
122. *Id.* at 500-02.
123. *Id.* at 528-35 (Marshall, J., dissenting).
124. *Id.* at 552 (Marshall, J., dissenting).
125. *Id.* at 544-45 (Marshall, J., dissenting).
126. *See* Ross, *supra* note 14, at 405-09.
127. *Croson*, 488 U.S. at 527 (Scalia, J., concurring).
128. *Id.* at 528 (Scalia, J., concurring).
129. In his treatise on the practical impossibility of emancipation, Professor Dew described the specter of black insurrection:

conception of the potential victimization of the innocent white person.

Thus, in *Milliken*, *Greene*, and *Croson*, we made intellectually tolerable our own choices through a rhetoric that bore a disturbing similarity to the rhetoric of those nineteenth-century cases we now disavow. This alone ought to make us reconsider our contemporary choices. A more careful consideration of the precise nature and cultural significance of the ideas of white innocence and black abstraction provides yet more reason to reconsider this way of talking.

IV. White Innocence and Black Abstraction

A. White Innocence

To understand the power of the theme of white innocence, one must begin with the power of the cultural conception of innocence. To be innocent is an important thing everywhere in our culture. The argument for the white person's innocence in matters of race connects with the cultural ideas of innocence and defilement. The very contrast between the colors, white and black, is often a symbol for the contrast between innocence and defilement. Thus, the theme of white innocence in the legal rhetoric of race draws its power from more than the obvious advantage of pushing away responsibility. It draws power from the cultural, religious, and sexual themes its terms suggest.

White and black often symbolize some form of good and bad.[130] Black or darkness has been the symbol of evil for many Western cultures. Darkness is, in many Western religions, a symbol of the anti-God, Satan by any name.[131] "Black magic" is often used to

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> [H]is very worthlessness and degradation will stimulate him to deeds of rapine and vengeance; he will oftener engage in plots and massacres . . . every year you would hear of insurrections and plots, and every day would perhaps record a murder . . . the tender mother [would] shed the tear of horror over her babe as she clasped it to her bosom; others of a deeper die would thicken upon us; those regions where the brightness of polished life has dawned and brightened into full day, would relapse into darkness, thick and full of horrors . . . .

T. Dew, *supra* note 7, at 101-02. *See generally* K. Stampp, The Peculiar Institution: Slavery in the Ante-Bellum South (1956).

130. "Blackness and darkness are almost always associated with evil, in opposition to the association of whiteness and light with good." J. Russell, The Devil: Perceptions of Evil From Antiquity to Primitive Christianity 64-65 (1977).

131. "During the period of the witch epidemic the demon appeared most often of all as

describe a perverse form of magic and worship. In Christian sects, darkened churches symbolize the days of Lent, whereas the glory of Easter is a time to throw open the windows and let in the light.

The sexual connotations of white innocence are many and complex.[132] Put simply, white often symbolizes innocence as chaste, whereas black symbolizes noninnocence, as in the defiled and the defiler. In our culture, the white wedding dress is a double symbol of the connection between white and innocence and the significance of sexual innocence of women.

The black person is often depicted as the sexual defiler. For example, Shakespeare's depiction of Othello, although an uncommonly rich portrait of a black person in literature, expressed the idea of the black as sexual defiler.[133] The stereotypical conception of the black person as sexually wanton is longstanding.[134]

The contrast between black and white in its sexual context is most vividly captured in miscegenation statutes, always accompanied by images of the black man's defilement of the white

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a 'black man.'" R.E.L. MASTERS, EROS AND EVIL 15 (1962). "The Devil's blackness may derive from his association with darkness, which symbolizes death, annihilation, and the terrors of the night." J. RUSSELL, *supra* note 130, at 253. "Sometimes the devil wears green or grey, but mostly he is dressed in black . . . ." W. WOODS, A HISTORY OF THE DEVIL 185 (1973).

132. *See* Ross, *supra* note 1, at 309-10.

133. *See* P. MASON, RACE RELATIONS 63 (1970); *see also* J. WASHINGTON, JR., ANTI-BLACKNESS IN ENGLISH RELIGION: 1500-1800, at 87 (1984).

134. It is clear that among Englishmen there was indeed a vague prejudice against blacks even before the first colonists set foot in North America. As a result of early contacts with Africa, Englishmen tended to associate blackness with savagery, heathenism, and general failure to conform to European standards of civilization and propriety. Contributing to this predisposition to look upon Negroes with disfavor were the conscious and unconscious connotations of the color black. The association of black with evil was of course deeply rooted in Western and Christian mythology; it was natural to think of Satan as the Prince of Darkness and of witchcraft as black magic. On the unconscious level, twentieth-century psychoanalysts have suggested, blackness or darkness can be associated with suppressed libidinous impulses. Carl Gustav Jung has even argued that the Negro became for European whites a symbol of the unconscious itself—of what he calls "the shadow"—the whole suppressed or rejected side of the human psyche. The rudiments of such a complex may have manifested themselves in Elizabethan England. A tendency to project upon blacks the kind of libidinous sexuality that whites tried to suppress in themselves would certainly have been helped along by a hazy and inaccurate knowledge of African sexual practices and by a smirking consideration of what was implied by the fact that many Africans went around completely or virtually naked.

ARROGANCE, *supra* note 8, at 191.

woman.[135] Commentators on southern culture have noted the recurring mythology of the black man as the oversexed, large, would-be defiler of the innocent white woman.[136] Griffith's epic motion picture, "Birth of a Nation," depicts the suicide of the innocent white woman seeking to avoid the touch of the black man, whom Griffith has portrayed as a slobbering beast.[137]

This connection is still with us. Our media's obsession with the violent sexual assault of a white woman by a group of blacks in the "Central Park jogger" case[138] suggests that the sexual connotation of white innocence persists.[139] The notion of the black person as oversexed and dirty is part of our cultural stereotypes.[140] The unconscious racism which our culture continues to teach expresses the terror of the black defiler of the innocent white. In 1966, *Loving v. Virginia*[141] finally declared unconstitutional our most vivid legal expression of this form of racism, the miscegenation statutes, although the Court's opinion lacked any real expression of outrage.

The rhetorical theme of white innocence thus connects with the cultural, religious, and sexual notions of innocence, sin, and defilement. The power of the rhetoric comes in part from its ability to conjure in us at some unconscious level the always implied contrast to white innocence, viz, the black one who is both defiled and the potential defiler.

White innocence is thus a special rhetorical device. When the nineteenth-century Justices insisted on white innocence as part of

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135. In Latin American society, marriage limited to one's own color led to a mystic transposition of the wife before the altar of God. The symbolism of the color white played a preponderant role in this transposition. . . . White signified purity, innocence, and virginity. A woman whose skin was not entirely white suggested the carnal merely by her color.

Bastide, *Color, Racism, and Christianity*, in COLOR AND RACE 34, 40 (1968).

136. "[T]he growing myth of the black man as a genetic sexual monster fanned the Negrophobia of the 1890s, a myth encouraged by novelists such as Thomas Nelson Page and later trumpeted by Thomas Dixon, Jr." J. KINNEY, AMALGAMATION! 153 (1985).

137. *See* W. WADE, THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA 119-39 (1987).

138. *See 3 Youths Guilty of Rape And Assault of Jogger*, N.Y. Times, Aug. 19, 1990, at 1, col. 1.

139. "[E]ven though whites express much less biological racism and much more support for the principles of racial equality and integration than they used to, they can still find plenty of reasons to object to one or another forms of actual change in the racial status quo." Hochschild & Herk, *"Yes, But . . .": Principles and Caveats in American Racial Attitudes*, in NOMOS XXXII-MAJORITIES AND MINORITIES 316 (1990). One of the white caveats to change relates to social contacts between men and women of different races. *Id.* at 312.

140. "[R]acially prejudiced people . . . believe the out-group is dirty, lazy, oversexed, and without control of their instincts (a typical accusation against blacks)." Lawrence, *supra* note 101, at 333.

141. 388 U.S. 1 (1966).

the rhetorical veneer placed over the choices to subjugate the black, they were inviting the reader to draw on the cultural themes of innocence. These cultural themes of innocence in the nineteenth-century context invited in turn images of the black as the sexual defiler, as the very embodiment of sin or evil.

The irony is that the rhetoric of white innocence was arguably less powerful in its nineteenth-century version because these cultural connections and images were part of accepted public ideology and discourse. People spoke publicly of blacks as degenerate, dirty, and beast-like. The rhetoric of white innocence thus might have been merely an alternative way of expressing a widely accepted vision of blacks and whites—the vision of blunt and explicit racism.

On the other hand, the rhetoric of white innocence in its contemporary form may be rhetorically more powerful. Our public ideology and discourse is one of nonracism. Judges cannot say out loud that blacks are inferior. Lawyers cannot make arguments with the explicit premises of racism. When the contemporary rhetoric of white innocence invites the cultural connections and images, we may be tapping into a repressed vein of unconscious racism which cannot be expressed in any way but indirectly and metaphorically.

We thus ought to set aside the rhetoric of white innocence for several reasons. First, its family resemblance to the rhetoric of cases we now disavow makes it suspect. Second, when we consider the implicit premises of our claim to innocence, we see a much more complicated set of circumstances. Finally, when we consider the cultural connections that the rhetoric invites and the fact that those connections are part of the unconscious racism that persists in our culture, we have the most powerful reason of all to stop talking this way.

B. Black Abstraction

In various ways, legal rhetoric denied, or obscured, the full humanness of the black person. By doing so, we made legally coherent the nineteenth-century legal choices first to enslave and thereafter to segregate the black person. Slavery became legally coherent when the subject was not human. De jure segregation became legally coherent when whites supposed that blacks suffered no harm and experienced no stigma, except perhaps a self-imposed stigma.

As we employed black abstraction in legal rhetoric, we also typically depicted the black as something less than a full human in literature and art. With but several notable exceptions, Amer-

ican writers either ignored the black or depicted him as a simple, one-dimensional character.[142] Until the public emergence of the black literary artist in the twentieth century, American public literature was generally the product of white authors and generally depicted the black as either a saint, a suffering victim, or a wild beast.[143] American art similarly depicted the black as a unidimensional figure.[144] In most instances, black persons occupy the shadows, the periphery of paintings, or are depicted as one of several common stereotypes.

In either legal rhetoric or artistic expression, the denial of the full humanness of the black person has been a central and tragic part of our discourse. Black abstraction functioned as a lens through which we remade the context in which our choices were played out. We abstracted away the pieces of reality that might have made those choices less comfortable.

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142. Sterling Brown, a black poet and literary theorist, eloquently spoke of this phenomenon: "Whether the Negro was human was one of the problems that racked the brains of the cultured Old South. The finally begrudged admission that perhaps he was, has remained largely nominal in letters as in life. Complete, complex humanity has been denied to him." S. BROWN, THE NEGRO IN AMERICAN FICTION 2-3 (1937); *see also* D. BRODERICK, IMAGE OF THE BLACK IN CHILDREN'S FICTION (1973); IMAGES OF THE NEGRO IN AMERICAN LITERATURE (S. Gross & J. Hardy eds. 1966).

143. The late arrival of black authors to public literature was obviously a legacy of the laws which forbade the education of blacks in the pre-Civil War period and assured blacks, at best, unequal educational opportunities in the post-Civil War period. Racism was, and is, part of the explanation of the absence of blacks from any particular public place, including public mainstream American literature. Blacks, in fact, created literature throughout our history. For a critical reading of this literature, see H. GATES, JR., FIGURES IN BLACK: WORDS, SIGNS, AND THE "RACIAL" SELF (1987).

On the stereotypical depiction point, see N. TISCHLER, BLACK MASKS: NEGRO CHARACTERS IN MODERN SOUTHERN FICTION (1969):

> Until recently, very few authors have been able to pierce the veil of idealization or stereotyping to look honestly at the Negro. Noble savages populated eighteenth century fiction and philosophic mammies replaced them in the nineteenth century . . . . [T]he usual catalogue of Negro stereotypes [in American fiction include]: the tragic mulatto, the comic Sambo, and the faithful retainer.

Id. at 24. In the racist vision, the depiction is natural, of course, not stereotypical. *See* J. NELSON, THE NEGRO CHARACTER IN AMERICAN LITERATURE (1926). Professor Nelson closed his review of the depiction of blacks in American literature with this sentence: "Without exemplifying exalted qualities or filling the position of epic hero, [the black] has proved a great comic type, and for many decades has lent to much of American fiction a raciness, an enlivening element, a savor of the natural and primitive which could ill be spared." *Id.* at 137.

144. The artistic stereotypical depiction of blacks was the theme of a recent art exhibit, *Facing History: The Black Image in American Art 1710-1940*, at the Corcoran Gallery of Art in Washington, D.C. *See* Kimmelman, *Black Images of the Past: Servile, Subhuman*, N.Y. Times, Jan. 18, 1990, at C21, col. 3. *See generally* 4 H. HONOUR, THE IMAGE OF THE BLACK IN WESTERN ART pts. 1, 2 (1989).

Black abstraction also worked in another equally tragic way. In addition to the rhetorical functions of giving an implicit logic to slavery and de jure segregation and making intellectually tolerable the reality of contemporary de facto segregation and the law's retreat from addressing that segregation and its implications, this black abstraction, in law and elsewhere in our culture, makes more difficult the empathetic response of the white person to the suffering of the black person. Empathy, as used here, connotes the capacity to share, in some imperfect way, in the suffering of another person. We easily can achieve some degree of empathy for the suffering of those whom we think of as familiar. Although the empathy may not move us to personal sacrifice or even to a lesser intervention in any particular case, we understand their suffering because we have an obvious and easily accessible analog, our own suffering. We have a more difficult time achieving empathy for the suffering of people we think of as unfamiliar. We can separate ourselves more easily from their circumstances; we can simply not imagine that they suffer; we can suppose some sense of justice in whatever suffering we are forced to see.[145]

When we see that white innocence and black abstraction fill our legal rhetoric of race, we have reason to doubt that our choices are any better than the nineteenth-century choices that stain our legal history. We have reason to wonder whether our choices are made from any real sense of empathy with those who suffer. We have reason to doubt the justice of it all.

White innocence and black abstraction make us more comfortable in our choices. They helped make coherent the despicable legal choices of the nineteenth century. They continue to serve in contemporary legal choices about race. Yet, they provide a source of shelter that we should struggle to give up. We should struggle to see the problematic quality of white innocence and the "make believe" world depicted through black abstraction.

V. A Turn to Narrative

Changing the way we talk about race is not simply a matter of resolve. We cannot slough off the assumptions and attitudes that determine in part the language we use. White innocence and black abstraction never have been simply rhetorical structures that we

145. *See* Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989). *See generally* R. RORTY, CONTINGENCY, IRONY AND SOLIDARITY (1989).

made up by ourselves. They always have been a product of both the imagination of the rhetorician and the influences of history and culture. To change truly the way we talk about race requires a parallel change in attitudes and assumptions. As language and rhetoric shape assumptions and ideas, assumptions and ideas shape language and rhetoric. This intertwined relation is what makes a change in language and rhetoric so powerful, and so difficult. It is thus a struggle.

In this struggle, we may turn to narrative. Both white innocence and black abstraction are rhetorically vulnerable to the power of narrative. Although narrative can be used to distance others, as in Justice Taney's narrative of subjugation, it can also edify. When the black person is depicted as a fully-rounded human being living within a rich social context in the midst of a culture and a history, the black person's humanness cannot be forgotten or obscured. The reality of stigmatization, humiliation, and pain brought on by segregation and the racism that motivates segregation crushes the rhetoric of formal equality and self-imposed stigmas. Moreover, the innocence of the white person becomes a more complex matter. When we see the collective choices of whites as a flight from intimacy with black persons, as a fear of the intimacy of neighborhood, school, family, and physical relations, and when we imagine the pain and anger this must impose on those from whom whites flee, we cannot simply nod acknowledgement at the premise of white innocence in the rhetoric of race.

There are those who can help in this struggle. The storytellers are here. Justice Thurgood Marshall has never ceased his insistence on narrative and his struggle against the abstract depiction of blacks. He is not alone.[146] We need only listen and hear. Hearing the stories will not provide any easy answers. It will give us something much less comforting, but essential. It will increase the chance that our choices on matters of race, however hard and problematic, will not become in history a story of tragedy and a source of shame.

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146. One could not possibly list all our important storytellers. To support this textual point, I simply list here some of those whose stories I have heard. They are Derrick Bell, Charles Black, Leon Higginbotham, Charles Lawrence, Mari Matsuda, and Patricia Williams. *See* D. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); A. HIGGINBOTHAM, JR., *supra* note 29; Black, *My World with Louis Armstrong*, 95 YALE L.J. 1595 (1986); Lawrence, *supra* note 101; Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989).