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## The Survival of Racism Under the Constitution

Juan Williams

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# THE SURVIVAL OF RACISM UNDER THE CONSTITUTION

JUAN WILLIAMS\*

## I. INTRODUCTION

This subject would seem a more appropriate setting for a scholar than a journalist, and I am no scholar. I am encouraged, however, by the wise words of Susan B. Anthony, the fierce nineteenth-century leader of the struggle for women's rights. Miss Anthony was not married; nonetheless, she delivered biting lectures on the political and social inequities in the relationship between American men and women. Samuel May, a well-known abolitionist of that time, attended one of her speeches, and afterward stood to complain that an unmarried woman has "no business discussing marriage."<sup>1</sup> Holding her temper, but not her wit, Miss Anthony replied, "And you are not a slave, Mr. May, what business do you have lecturing on slavery!"<sup>2</sup> I'll take that caustic injunction as license to write on the subject of equality and the Bill of Rights.

Modern day Mr. Mays may be held in check by the politically incorrect thought that your humble author, though neither a lawyer nor a constitutional scholar, is a black man and a journalist. I have some standing, therefore, to discuss the Bill of Rights, a document that greatly affects my human existence in this great Republic, as well as my ability to pursue my profession.

## II. BLACK CRITICISM OF THE BILL OF RIGHTS

A grateful black American journalist such as I presumably will offer unique testimony to those "real life" benefits, both personal and professional, that have come to him because of the Bill of

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\* Portions of this article originally appeared in an essay for the Starkoff Institute Conference, Babel and Beyond: Ethics, Opportunity, and Power in a Multicultural Society, Los Angeles, California, Oct. 13-15, 1991.

1. RANDOM HOUSE BOOK OF JOKES AND ANECDOTES 115 (Joe Claro ed., 1990) [hereinafter JOKES AND ANECDOTES].

2. *Id.*

Rights. History tells us, however, that this presumption about successful blacks is a dangerous one.

The San Francisco Patent and Trademark Law Association knows this well. In 1987, that group asked Justice Thurgood Marshall to give a speech in commemoration of the Constitution's bicentennial.<sup>3</sup> No one can be certain what the group expected to hear from Marshall. One reasonably could assume, however, that the group knew that Marshall was the nation's first black Supreme Court Justice and the man who, as a lawyer, made the Constitution the centerpiece of the legal strategy he employed to persuade the Supreme Court to end school segregation in the landmark case, *Brown v. Board of Education*.<sup>4</sup> Whatever the expectation, Justice Marshall did not deliver a celebratory address. Invited to speak about the nation's Constitution and its founding precepts of equality, freedom, and justice, Marshall generated national headlines by telling his audience that the Constitution "was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government and its respect for the individual freedoms and human rights we hold as fundamental today."<sup>5</sup>

Marshall's tough words were the product of an attitude that reminded this listener of words spoken in a similar circumstance by one of Marshall's heroes, the nineteenth-century abolitionist writer Frederick Douglass—a man whose bust sits on Marshall's desk.<sup>6</sup> Douglass was invited to celebrate the founding of the nation in an 1852 speech on the Fourth of July.<sup>7</sup> With picnics and fireworks making for a fun day, Douglass disrupted the celebration by saying,

Fellow citizens, pardon me and allow me to ask, why am I called upon to speak here today? What have I or those I represent to do with your national independence? Are the great principles of

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3. *Justice Marshall's Views; Constitution "Defective From the Start,"* LEGAL TIMES, May 11, 1987, at 15 [hereinafter *Justice Marshall's Views*].

4. 347 U.S. 483 (1954).

5. *Justice Marshall's Views*, *supra* note 3, at 15.

6. Juan Williams, *Marshall's Law*, WASH. POST MAG., Jan. 7, 1990, at 12, 15.

7. Frederick Douglass, *The Meaning of July 4th for the Negro*, in THE WORLD'S GREAT SPEECHES 804 (Lewis Copeland & Lawrence W. Lamm eds., 1973).

political freedom and of national justice, embodied in that Declaration of Independence, extended to us.<sup>8</sup>

Later he concluded, "What to the American slave is your 4th of July. I answer, a day that reveals to him more than all other days of the year, the gross injustice and cruelty to which he is the constant victim. To him your celebration is a sham . . . ."<sup>9</sup>

Some might view Justice Marshall's comments, even more so than Mr. Douglass', as whining from an ingrate. After all, the judge spoke at a time when the Constitution had been amended by the Bill of Rights as well as by the Civil War Amendments,<sup>10</sup> which ended slavery<sup>11</sup> and extended citizenship rights.<sup>12</sup> Why not speak of the good of the Constitution and focus on its ideals? Why did he not speak about how he had personally employed the Constitution's ideals in service to attaining rights for his black clients? Finally, why could Justice Marshall not speak of the good spirit the Constitution's authors exhibited in creating amendments to correct the flaws in the original document?

As for Mr. Douglass, his proximity to the reality of legal slavery in the United States might prompt his critics to hold their tongues. Some might not be able to restrain themselves, however, from pointing out that neither the Declaration of Independence nor the Constitution uses the term "slave," much less permits slavery. Also, neither document separates Americans into blacks, whites, Asians, Hispanics, or that notorious category, "other." Although the Constitution does establish a three-fifths measure for counting the population of slaves—black people—as opposed to counting the population of free men—white people<sup>13</sup>—it was the slaveholding southern states that favored counting blacks fully as they sought to increase their power in a national legislature based on

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8. *Id.* at 807.

9. *Id.*

10. U.S. CONST. amends. XIII, XIV, XV.

11. "Neither slavery nor involuntary servitude . . . shall exist within the United States . . . ." *Id.* amend. XIII, § 1.

12. See *id.* amend. XIV, § 1 ("All persons born or naturalized in the United States . . . are citizens of the United States . . . ."); *id.* amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

13. *Id.* art. I, § 2, cl. 3 (amended 1865).

population as well as retain a legal right to hold slaves.<sup>14</sup> Robert Goldwyn, the constitutional scholar, argues that the three-fifths compromise was a matter of political accommodation, and not an expression of the value of black human beings versus the value of white human beings.<sup>15</sup>

These critical responses to Douglass and Marshall are on solid scholarly ground. They seem extraneous, however, when one considers that Marshall, like Douglass, spoke from a deep well of emotion. The words of both men contain the fiery rage that comes from knowing the reality of American racial injustice: wrongs perpetuated against human beings under the rule of law that the hallowed Constitution and Bill of Rights established. Both men suffered indignities as a result of discriminatory laws; both men dedicated their lives to the fight for equal rights supposedly enshrined in the Declaration of Independence and the Constitution.

### III. THE PERVERSION OF IDEALS

The Constitution and its amendments offer great protection to American minorities, possibly more protection than can be found in the precepts of any other nation on this earth. As a black American and as an American journalist, I know all too well the sting of not being a member of the majority. Fortunately for me, the Bill of Rights, composed by Virginia's own James Madison, is a special friend to minorities of all stripes. It places limits on the government's authority to violate the individual citizen's right to worship,<sup>16</sup> to speak,<sup>17</sup> to write and publish,<sup>18</sup> to assemble,<sup>19</sup> to hold property free from usurpation by the government without compensation,<sup>20</sup> and to be free from unreasonable search and seizure.<sup>21</sup> These principles came from a desire to avoid transforming the

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14. ROBERT GOLDWYN, *WHY BLACKS, WOMEN, AND JEWS ARE NOT MENTIONED IN THE CONSTITUTION, AND OTHER UNORTHODOX VIEWS* 13 (1990).

15. *Id.*

16. U.S. CONST. amend. 1.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* amend. V.

21. *Id.* amend. IV.

American federal government into a government of oppression, especially one oppressive of minorities.

With true foresight, Madison argued with another Virginian, Thomas Jefferson, that the ten amendments in the Bill of Rights were necessary additions to the Constitution because the new republic's ruling majority could misuse the government by making it an instrument of oppression.<sup>22</sup> Madison did not argue that a tyrannical elite controlling the government might run over the majority; instead, he argued, displaying a magnificent ability to foresee danger, that an impulsive majority in a frenzy over some problem might abuse the government's control of tax revenue, military power, and laws to run over individual and privacy rights.<sup>23</sup> The rights of racial and ethnic minorities in America have their most stalwart defender in those protections. Douglass and, especially, Justice Marshall, used the liberties enunciated in those documents—liberties for all men—in their fight for equal rights. As I noted earlier, however, it remains a source of bitter irony to those men, as well as to me, that despite this language of high ideals, our nation could twist itself into such a hideous contortion as to allow for the tyrannical practices of state-enforced slavery and legal discrimination. This situation begs the question: Why has racial prejudice found a home in a nation born with the promise to pursue such a high-minded ideal as "equality?"

In the specific case of black Americans, the rights listed for American citizens in the Declaration of Independence and Constitution simply went ignored. Blacks did not receive full recognition as American citizens until the Civil War Amendments.<sup>24</sup> The society that created the Declaration, the Constitution, and Bill of Rights, was racially separate. Although the Framers were able to comprehend the ideals of justice, equality, and freedom, the America that existed when they drafted the Constitution was a nation already deep in the mire of oppression based on skin color. Benjamin Banneker, the black mathematician, wrote to Jefferson to ask how the language of the Declaration could speak of men

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22. THE FEDERALIST No. 42, at 289-93 (James Madison) (M. Walter Dunne ed., 1901).

23. *Id.*

24. See *supra* notes 10-12 and accompanying text. To the credit of the authors of the Bill of Rights, they noted that these amendments reflected the acceptance of racism or slavery by the American people.

being "created equal,"<sup>25</sup> when Jefferson, one of its authors, was a slaveholder, and therefore, a member of a fraternity that employed "fraud and violence"<sup>26</sup> to keep slaves under "groaning captivity."<sup>27</sup> In our democratic society, the white majority acted without regard to the Bill of Rights in enacting laws that enforced this inequality of treatment and inequality of opportunity.<sup>28</sup> Slavery, lynching, and rape were illegal acts when people with white skin were the victims. When it came to blacks, however, the nation's majority was blind to perceptions of criminality.<sup>29</sup> From the majority's point of view, having to deal with an inferior race was a matter of the white man's burden.

The racism of this majority, and its murderous instinct regarding black people and Native Americans, leads to this conclusion: equality is a function of attitude formed by popular opinion, not the nation's laws. Neither the laws nor the founding precepts of the Constitution or the Bill of Rights determines the level of equality that black people, women, members of religious minorities, or any other discreet group experience day to day in America. Equality is a byproduct of the popular opinion of the day; the way that the white majority—and even other blacks and minorities—treats a black person or any other minority is a consequence of stereotypes. The stereotypes produce attitudes that lead to human actions and laws that, history tells us, can justify the most horrendous oppression.<sup>30</sup>

One could say that stereotypes and popular opinion shift here and there, but the Bill of Rights stands as a pillar of principle. One could also say that the ideals in the Bill of Rights flow directly from the Declaration of Independence's assertion of equality among men.<sup>31</sup> One could take the argument to higher levels and speak of God as our common father, or scientists could report that all of mankind shares a common ancestor in a black woman who

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25. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

26. BENJAMIN QUARLES, *THE NEGRO IN THE AMERICAN REVOLUTION* 43 (1961).

27. *Id.*

28. TERRY EASTLAND & WILLIAM BENNETT, *COUNTING BY RACE: EQUALITY FROM THE FOUNDING FATHERS TO BAKKE AND WEBER* 27 (1979).

29. *Id.* at 92, 109-10.

30. *See id.* at 58-88.

31. QUARLES, *supra* note 26, at 43.

walked the Nile Valley. None of those arguments makes a bit of difference, however, absent the need to present them to a nation's white majority that, for most of America's history, has operated on the basis of shared negative racial attitudes toward black people specifically, and nonwhite male people generally. The Bill of Rights, therefore, is a curb on such popular opinion. It asserts that the popularly elected government may hold any set of beliefs but may not interfere with any individual's right to worship,<sup>32</sup> to speak,<sup>33</sup> to do business,<sup>34</sup> or to occupy land.<sup>35</sup>

A popularly elected government, presumably reflecting popular opinion after all, allowed Ku Klux Klan terrorism of black Americans after the Reconstruction.<sup>36</sup> A democratically elected government in Mississippi could never find a white man guilty of killing a black person no matter what the evidence.<sup>37</sup> A democratically elected government operating under the Bill of Rights allowed Chief Justice Taney to write in *Dred Scott v. Sanford*<sup>38</sup> that blacks were "so far inferior, that they had no rights which the white man was bound to respect."<sup>39</sup> Today, after the passage of the Civil Rights Act of 1964<sup>40</sup> and the Voting Rights Act of 1965,<sup>41</sup> a democratically elected government tolerates the politics of pointing fingers at black people for the indecent rates of childhood death among poor blacks, for the crime that riddles poor black neighborhoods, and for the high level of drug abuse and bad schools. Despite high ideals, the majority not only allows the demagoguery of a Willie Horton advertisement<sup>42</sup> crafted to appeal to white fears of

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32. See U.S. CONST. amend. I.

33. See *id.*

34. See *id.* ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble . . .").

35. See *id.* amend V ("No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.").

36. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION* 425-44 (1984).

37. *Id.* at 426, 428, 457.

38. 60 U.S. 393 (19 How. 1856).

39. *Id.* at 407.

40. 42 U.S.C. § 2000e (1988).

41. 42 U.S.C. § 1971 (1988).

42. See Stephen Engelberg, *Bush, His Disavowed Backers and a Very Potent Attack Ad*, N.Y. TIMES, Nov. 3, 1988, at A1.



black criminals, but regularly responds to these ugly demagogic appeals.<sup>43</sup>

#### IV. THE POLITICS OF RACISM

Playing on the power of misguided opinion in order to achieve a political end, for good or bad, is an old game. Here is a humorous illustration of this point. While visiting England in 1727, Voltaire was surrounded by a mob.<sup>44</sup> His brilliant writing did not matter to these Englishmen; they saw only a Frenchman, and that was all they needed to start shouting, "Hang the Frenchman!"<sup>45</sup> Voltaire was too quick of mind for the ruffians, no matter what their opinion of the French. "Englishmen," he said, "you want to kill me because I am a Frenchman? Am I not already punished enough in not being an Englishman?"<sup>46</sup> The crowd not only applauded but saw to it that Voltaire got home safely; the bigot's instinct for self-aggrandizement benefitted Voltaire. That same instinct, however, can turn ugly and lead to lynchings, and most often it is sated only after being fed by blood or the kind of Jim Crow laws that require separate water fountains and separate schools, and prohibit whites from teaching blacks. That type of bigotry was common in this nation at the end of the last century and the start of this century. Today, its specter is visible both here and abroad.

##### A. *South Africa*

A personal story serves to illustrate another point. In 1990, I traveled to South Africa, the land of Apartheid—legal racial discrimination. I met with African National Congress leader Nelson Mandela who, maintaining resolute dignity and determination after twenty-seven years in jail, was still advocating armed revolution to compel the white government to negotiate a new constitution that would treat blacks and whites equally, with rights as individuals in a democratic society.<sup>47</sup> I went to a rally of white Afrikaners who protested the release of Nelson Mandela and the

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43. *Id.*

44. JOKES AND ANECDOTES, *supra* note 1, at 128.

45. *Id.* at 129.

46. *Id.*

47. Juan Williams, *At the Gates of Freedom*, WASH. POST MAG., Apr. 8, 1990, at 16, 23.

prospect of black majority rule under a democratic constitution.<sup>48</sup> Speakers at that rally said white immigrants, their forefathers, had built a modern, technologically superior South Africa from a jungle of wild animals, primitive tribes, and social rule based on black tribal warfare.<sup>49</sup> I remember fearing for my safety as I watched these white people denouncing others as primitives while carrying the detached heads of black dolls on pointed sticks. These were dramatic moments in my life as a journalist.

In truth, however, the meeting with Mandela and watching the fury of the whites are not what has stayed with me since that trip. What stays with me to this day, and every day that I walk fearfully through bombed-out black neighborhoods in any big American city, with their knots of unemployed men, drug dealers, and petty criminals, is a conversation I had with Zeph Mothopeng. Then the president of the Pan-Africanist Congress, a radical and violent anti-Apartheid group, Mothopeng did not believe in sharing power with whites under a new constitution; he wanted natives—black South Africans—to rule South Africa while whites returned to the lands from which they came.<sup>50</sup>

What I remember of Zeph Mothopeng, who is now dead, is the cold detachment in his voice as he spoke about the black drunks in the violent worker hostels throughout his city of Soweto; the young black criminals who regularly shot each other, as if for sport, in the name of tribal and gang wars; and the girls who were filthy prostitutes, seemingly from the moment of puberty.<sup>51</sup> Through Mothopeng's eyes these people were broken by the "oppressor's tactics."<sup>52</sup> He said that first the whites had used language to demean native South Africans, calling black people "Bantus" and "bushmen," so that "people should despise themselves and feel inferior."<sup>53</sup> The Dutch and English settlers next went about "killing farm animals raised by black Africans to ensure that the Africans would have to work in the white-owned mines to get food."<sup>54</sup>

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48. *Id.*

49. *Id.*

50. *Id.* at 25.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

*B. United States**1. The Views of Whites*

Mothopeng's ideas stay with me to this day as I contemplate the incongruities in a nation that is able to produce the Bill of Rights and yet is unable to achieve racial equality. Just as many white South Africans look down on black South Africans, some white Americans look at the decrepit state of many black neighborhoods, the breakdown of the black family, and the endless black-on-black violence, and are now party to a popular opinion that blacks are inferior. Reaching this conclusion requires a baffling forgetfulness of the history of oppression that America has imposed on black people. It requires a willingness to posit blacks as different—perhaps not quite so human, smart, industrious, spiritual, or good looking as whites. As a reporter, I have come to see this action as the heart of all justification for oppressing other people. This attitude allows too many Americans to say they believe in the precepts of the Bill of Rights while, at the same time, conducting their lives, schools, hospitals, newspapers, political parties, and government so as to accept, and even profit from, the inferior treatment and status of black people in general, and from the condition of poor black people in particular.

President Abraham Lincoln, debating Stephen Douglas on slavery, made this point: "Our government rests in public opinion. Whoever can change public opinion, can change the government . . . [T]he 'central idea' in our political opinion, at the beginning was, and until recently has continued to be, the equality of 'men.'"<sup>55</sup> Despite the central place that the concept of equality occupies in our national identity, it has been closeted behind a majority public opinion that views blacks as inferior. This hypocrisy, as obvious as a painfully bright light to Frederick Douglass and Thurgood Marshall, prompted their words of rage about America and its Declaration of Independence and Constitution.<sup>56</sup>

A 1990 survey by the National Opinion Research Center at the University of Chicago found that 78% of respondents thought

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55. HARRY V. JAFFA, *CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES* 309 (1959).

56. See *supra* notes 5-9 and accompanying text.

black Americans are more likely than whites to “prefer to live off welfare”<sup>57</sup> and less likely to “prefer to be self-supporting.”<sup>58</sup> The survey, a demographically representative sample of the American population, with whites, blacks, Hispanics, and Asians represented in proportion to their numbers in the population, found that: 62% thought blacks more likely to be lazy; 56% said blacks were more prone to violence; 53% said the black population is less intelligent; and over half—51%—said blacks were less patriotic.<sup>59</sup> Respondents viewed Hispanics in a similarly negative light.<sup>60</sup> Asians had smaller negative numbers, but 46% said Asians also wanted to live on welfare; 55% said they were less patriotic; 36% said they were less intelligent; and 34% said they were lazy.<sup>61</sup>

The basis for all these judgments was the comparison between the minority groups and the majority group: whites. In other words, most Americans—certainly most white Americans—assumed that people with white skin have better attributes—intelligence, self-sufficiency, and patriotism, for example—than any other racial group. These figures exhibit the heart of the monster that has managed to take the Bill of Rights and transform it from a passionate tribute to humanity into a mere perfunctory statement about our national ideals that we read to school children. Maybe this monster explains why most Americans tell pollsters they do not know what the Bill of Rights stands for.<sup>62</sup> When surveyors ask Americans about principles in the Bill of Rights, such as the right to a free press, they overwhelmingly indicate that they oppose the freedom of the press in many circumstances.<sup>63</sup>

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57. Lynne Duke, *Whites' Racial Stereotypes Persist; Most Retain Negative Beliefs About Minorities, Survey Finds*, WASH. POST, Jan. 9, 1991, at A1.

58. *Id.*

59. *Id.*

60. *See id.* (“Hispanics were rated at equally negative levels.”).

61. *Id.*

62. Fred Strasser, *Poll: Americans are Fuzzy on Rights*, NAT'L L. J., Dec. 23, 1991, at 6, 6.

63. *See, e.g., For the Record*, WASH. POST, Oct. 3, 1990, at A22 (revealing Americans' attitudes toward freedom of the press).

## 2. *Blacks' Views*

I offer a highly personal discussion of the madness and psychological strain involved in being black in America. One of the absurdities for a black American is finding out from childhood that in many instances, blacks will treat whites better than they will treat a fellow black person. Maybe black Americans should not be surprised that in a society where blacks have served whites, labored in fields for whites, and more, many black people seem socially conditioned to give white people better treatment than they give other black people. A familiar adage illustrates my point: "For some black folks the white man's ice is always colder." This negative attitude among some blacks toward their own, and anything created or sold by one of their own, is another part of the bent reality that people can come to accept as normal when living in a cesspool of racism.

This distortion and its effect on black people's view of themselves is evident in now-famous research done by psychologist Kenneth Clark.<sup>64</sup> Assessing the effects of elementary school segregation on black children in the 1940s, Dr. Clarke found a disturbing result: black children, looking at white dolls, described the dolls in positive terms as being "nice" and "better."<sup>65</sup> When they looked at black dolls, however, these black elementary school children said the blacks dolls were "bad" and "a nigger."<sup>66</sup> A recent effort to reexamine the self-image of black children produced much the same result: low self-esteem and an astoundingly negative self-image.<sup>67</sup>

What heights of madness can this defeating and debilitating race consciousness reach? Even among black people, research has shown that advantages arise for those who look whiter than other blacks. For example, in the *American Journal of Sociology*, Professors Verna Keith and Cedric Herring wrote: "Several studies . . . have noted that, in past generations, higher-status blacks tended

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64. See JUAN WILLIAMS, *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965*, at 20 (1987).

65. *Id.*

66. *Id.* at 23.

67. See Yvonne S. Lamb, *Doll Play and a Child's Self-Image*, WASH. POST, Sept. 9, 1991, at B5 (citing a similar 1985 study).

to have lighter skin tones than lower-status blacks and that light skin tone was an important criterion for attaining prestige within the black community."<sup>68</sup> The study found that that advantage continues in 1991: "[C]omplexion continues to play a significant role in such stratification outcomes as educational attainment, occupation and income among black Americans."<sup>69</sup>

Dire consequences on many fronts confront a black person trying to live a full life during this time in America. Possibly the most threatening is an attitude of impotence which Professor Shelby Steele describes in his controversial book, *The Content of Our Character*.<sup>70</sup> Steele writes that too many black leaders continue to stress the idea of blacks as victims, even as opportunities have opened up for black achievement, because of the end of rigid segregation. "[O]ppression conditions people *away* from all the values and attitudes one needs in freedom—individual initiative, self-interested hard work, individual responsibility, delayed gratification . . . . I believe that since the mid-sixties our weakness in this area has been a far greater detriment to our advancement than any remaining racial victimization."<sup>71</sup> In other words, some black people are stuck in the mode of thinking of themselves as perpetual victims and do not seize opportunity or show a willingness to work. Whether whites or blacks are to blame for the problem is a maddening, chicken-and-egg puzzle.

## V. COUNTERING RACIST ATTITUDES

The one man who was able to break through this murderous web of negative racial attitudes among black and white Americans was Martin Luther King, Jr. In fact, King was able to shift public opinion to the offensive and, incredibly, use it as a leverage point to press for both an end to segregation and the opening of equal opportunity. His ability to speak to white as well as black Americans and to express the psychological and emotional pain of being treated as an inferior, his appeals to a common tradition of reli-

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68. Cedric Herring & Verna Keith, *Skin Tone and Stratification in the Black Community*, 97 Am. J. Soc. 760, 761 (1991).

69. *Id.* at 765.

70. SHELBY STEELE, *THE CONTENT OF OUR CHARACTER* (1990).

71. *Id.* at 68-69.

gious morality, and his use of the national precept of "all men are created equal,"<sup>72</sup> fueled the political pressure that led to passage of the Civil Rights Act.<sup>73</sup> The miracle of King's public ministry was his success in changing public opinion by breaking through the cultural thicket of prejudicial racial attitudes that continues to breed a tolerance for treating black people as inferiors.

#### A. *The Continuing Racial Struggle*

In the absence of any King-like appeal to a morality above these negative racial opinions, the nation has returned to a racial struggle that is, at its base, a fight against the majority's negative impulses toward minorities. Another recent survey conducted for a coalition of Civil Rights groups confirms this return of negative political perceptions among members of the majority.<sup>74</sup> "The Civil Rights organizations and proponents of civil rights were no longer seen as . . . addressing generalized discrimination, valuing work and being for opportunity,"<sup>75</sup> Celinda Lake, the author and director of the survey concluded. "The proponents weren't seen as speaking from those values."<sup>76</sup>

Lake told *Washington Post* reporter Thomas B. Edsall that the reverse in public attitude toward civil rights issues over the past years was, in part, due to civil rights leaders' focusing their efforts on preferential treatment and quota systems instead of King's point of emphasis—equal opportunity.<sup>77</sup> Lake noted that most Americans, especially "blue collar voters, economically marginal younger voters, ticket-splitting, swing white southern voters,"<sup>78</sup> now view civil rights groups as another special interest group.<sup>79</sup> This negative opinion of black people and other minorities, therefore, is not only a daily hurdle for black people; it is also shaping

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72. KEITH MILLER, *VOICE OF DELIVERANCE: THE LANGUAGE OF MARTIN LUTHER KING, JR.* 66, 145 (1992).

73. See *id.* at 179 (illustrating how King was largely responsible for the passage of the Act).

74. See Thomas B. Edsall, *Rights Drive Said to Lose Underpinnings: Focus Groups Indicate Middle Class Sees Movement as Too Narrow*, WASH. POST, Mar. 9, 1991, at A6.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

the character of our national politics and giving further impetus to politicians to pander to the most negative and divisive racial opinions and attitudes in the American character.

This awful situation leads me to think that Thomas Jefferson may have been prescient when he said: " 'Deep rooted prejudices entertained by the whites'. . . and 'ten thousand recollections, by the blacks, of the injuries they have sustained,' combine to make equal, peaceful coexistence between blacks and whites impossible."<sup>80</sup> We are also, however, way past the point of having black people leave, an option that President Lincoln once considered.<sup>81</sup> So we Americans settle into our racial discontent, with flares of resentment regularly lighting our nation's emotional and political sky.

### *B. Affirmative Action*

Currently the major argument in this nation is over affirmative action: the concept that government, schools, and private employers should give blacks some preference because of past injuries. This entails encouraging college admission and employment policies to accept blacks, possibly of lesser credentials. Resistance to this social policy by a majority of American whites can be summed up in a few words: "It's not fair."

Politicians widely exploit this sense among whites of being cheated. The likes of former Ku Klux Klan Imperial Grand Wizard David Duke and United States Senator Jesse Helms consistently exploit the belief. Duke regularly asks his audiences whether they resent people who want "something for nothing,"<sup>82</sup> and live off welfare while hard-working white folks are paying high taxes.<sup>83</sup> In his successful 1990 senatorial campaign, North Carolina's Helms ran a now-famous advertisement showing a white male's hand crumbling a rejection letter from an employer while a voice spoke a message of resentment, the heart of which was: "You needed that

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80. HOWARD SCHUMON ET AL., *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* 2 (1985).

81. FONER, *supra* note 36, at 6.

82. Martin Schram, *Louisiana's White Voters Raise Hatred's Banner*, *NEWSDAY*, Oct. 11, 1990, at 68.

83. *Id.*



job and you were the best qualified but it had to go to a minority because of a racial quota."<sup>84</sup>

This white antipathy for, or at least discomfort with, affirmative action has a bitterly ironic tone from a black perspective. Black Americans support not only race-based affirmative action, but several recent polls indicate that over half of black Americans favor the use of flat-out quotas and compulsory hiring formulas to force companies to hire blacks.<sup>85</sup> Black Americans probably support such programs because black people do not trust whites to be fair to them. History indicates that black people are not crazy for coming to such a conclusion.

### 1. *The Need for Affirmative Action*

Black people were not allowed to participate fully in this nation's armed services until the end of World War II.<sup>86</sup> The color barrier in professional sports remained intact until 1947, when Jackie Robinson was allowed to play baseball for the Brooklyn Dodgers.<sup>87</sup> In both cases, the assumption, which seems incredible today given the disproportionate number of blacks in basketball, football, and the military, was that blacks were not so athletically skilled as whites, and their presence would create disruptions by weakening unity.<sup>88</sup> Beneath these rationalizations, however, was opposition to the idea of allowing blacks to participate fully in American life.

In 1951 Thurgood Marshall travelled to the Far East, at the request of President Truman, to review racial-discrimination complaints against the Army.<sup>89</sup> When Marshall met General Douglas MacArthur, he asked him why no blacks were present in the elite unit guarding the general.<sup>90</sup> The reply was that no blacks were

84. Jesse Helms Senatorial Reelection Television Advertisement (1990).

85. Juan Williams & Jodie T. Allen, *Candid Talk About Quotas: Are Both Sides Being Dishonest About What They're After?* WASH. POST, Dec. 9, 1990, at K1.

86. See Constance B. Motley, *The Supreme Court Civil Rights Litigation, and Deja Vu*, 76 CORNELL L. REV. 643, 645 (1991) (describing the treatment of blacks in the armed forces in World War II).

87. Juan Williams, *After the Cheering Stopped, Jackie Robinson Played Harder Than Ever*, WASH. POST MAG., April 12, 1987, at 34, 35.

88. *Id.* at 37.

89. Williams, *supra* note 6, at 19.

90. *Id.*

qualified by their battlefield performance.<sup>91</sup> Marshall then told MacArthur that he had met a black sergeant “who has killed more people with a rifle than anybody in history. And he’s not qualified?”<sup>92</sup> The general did not reply, so Marshall then asked, “Well, now, general, remember yesterday you had that big band playing at the ceremony over there?”<sup>93</sup> After MacArthur said that he had seen the band, and that they were terrific, Marshall paused and asked, “‘Now, general, just between you and me: Goddamit, don’t you tell me that there’s no Negro that can play a horn!’ That’s when he said for me to go,”<sup>94</sup> Marshall later recalled.

Although explicit segregationist barriers to blacks in the workforce have been crumbling, and great progress has been made, as evidenced by the emergence of a large and growing black middle class, blacks still earn about sixty-three cents to the dollar earned by white males.<sup>95</sup> That statistic is a consequence of higher rates of poverty among blacks.<sup>96</sup> If eliminating the presence of poor blacks—especially female-headed, single-parent families—were possible, the progress of middle-class blacks likely would put them nearer to white wage earners. Similarly, the Census Bureau reported in 1988 that white households have ten times the median wealth of black households and eight times the wealth of Hispanic households.<sup>97</sup>

This higher rate of black poverty is a consequence of several real factors, beginning with history. Blacks have an indisputable record of sustained rates of higher unemployment,<sup>98</sup> a higher rate of school dropouts,<sup>99</sup> and even for those blacks with jobs, a failure to be promoted to top, “power” positions in American companies.<sup>100</sup>

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91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. Spencer Rich, *Gap Found in Wealth Among Races: Census Shows Whites are Far Better Off*, WASH. POST, Jan. 11, 1991, at A3.

96. *Id.*

97. *Id.*

98. Joseph R. Meisenheimer, *Job Market Slid in Early 1991, Then Struggled to Find Footing*, MONTHLY LABOR REV., Feb., 1992, at 3, 16.

99. William A. Henry III, *Civil Rights: What Price Preference?*, TIME, Sept. 30, 1991, at 30, 30.

100. Charles Boisseau, *Pay—A Matter of Black and White*, HOUSTON CHRON., Sept. 20, 1991, at 1.

These conditions persist to this day. In other words, blacks, as a class of people, find they are still excluded from key, high-paying positions in American industry in the absence of any "affirmative action" by employers to correct this bias. Although whites resent the prospect of blacks and other minorities possibly having an edge or preference in competition for jobs, American blacks are concerned with the concrete reality of a white majority and the practice of racial prejudice in job markets, schools, and businesses.<sup>101</sup> In every arena of American life, whites long have had a tremendous advantage and they still possess that advantage—namely, being white.

One might ask exactly how being white translates into an advantage. To critics of affirmative action, the advantage of whiteness is greatest in the minds of black people. The critics would argue that whites have to compete for the opportunities and jobs they hold. They might say that the so-called advantage of being white may not have so much to do with skin color *per se* as it does with the impression white skin offers the world; it is an indication that a person likely possesses a superior education, personal discipline, company loyalty, stable family life, and other positive qualities. The critics ask, why, then, should whites be punished for these superior characteristics and qualities that result from hard work?<sup>102</sup> The flaw in this formulation is that it is thoroughly rooted in racial stereotypes. Neither whites nor blacks are born with good education, disciplined minds, or other attributes of value to employers and society. The possibility of getting a good education, learning how to study and work within a group in a disciplined manner, and accomplishing a task, are themselves opportunities.

American society generally has apportioned those opportunities on the basis of race.<sup>103</sup> One example of this segregation of opportunity is the extremely segregated history of America's professional and graduate schools.<sup>104</sup> Whites undoubtedly have benefitted from this system. Some whites claim, however, that they did not set up

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101. *Id.*

102. See, e.g., Terene P. Jeffrey, *Minority Party: Why Democrats Face Defeat in 1992 and Beyond*, NAT'L REV., Dec. 16, 1991, at 53, 53.

103. See *supra* notes 95-101 and accompanying text.

104. See, e.g., Renee Cordes, *Professor to Protest for Another Year*, NAT'L JURIST, Apr. 1992, at 6, 6-7 (discussing discrimination in Harvard Law School's faculty-hiring process).

this system but, having been born into it, unwittingly reaped its benefits.<sup>105</sup> Their plea of innocence is a refusal to take responsibility for the racist constructs of a society that traditionally has put poor quality and underfunded schools or no schools in black communities.<sup>106</sup> For these whites the bottom line is that they are confident that they are better prepared for a job than most, if not all, blacks and do not want to lose out because they are not black.

Whites, as a group, although not necessarily as individuals, have had the freedom to build, from generation to generation, social contacts, educational advantages, and wealth. They offered these stepping stones toward success to their children, assuring them, as a group, a superior start and greater likelihood of success, when compared to black children as a group. Martin Luther King, Jr., spoke directly to this point:

Among the many vital jobs to be done, the nation must not only radically readjust its attitude toward the Negro in the compelling present, but must incorporate in its planning some compensatory consideration for the handicaps he has inherited from the past. It is impossible to create a formula for the future which does not take into account that our society has been doing something special *against* the Negro for hundreds of years. How then can he be absorbed into the mainstream of American life if we do not do something special *for* him now, in order to balance the equation and equip him to compete on a just and equal basis?

[But] [w]henver this issue of compensatory or preferential treatment for the Negro is raised, some of our friends recoil in horror. The Negro should be granted equality, they agree; but he should ask nothing more. On the surface this appears reasonable, but it is not realistic. For it is obvious that if a man is entered at the starting line in a race three hundred years after another man, the first would have to perform some impossible feat in order to catch up with his fellow runner.<sup>107</sup>

Experience supports King's theories. Usually a person becomes aware of a job opening through a relative or close friend. For example, an uncle brings his nephew in when he hears the company is

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105. See William E. Schmidt, *Jim Crow is Gone, But White Resistance Remains*, N.Y. TIMES, Apr. 6, 1985, at 1.

106. *Id.*

107. MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 146 (1964).

going to start hiring. The uncle vouches for the otherwise unknown job applicant to the personnel office and promises to exert a stern influence over the young man in case there is any problem, be it tardiness, drinking, or a chip on the shoulder. Similarly, studies have shown that executives most often hire young people who seem to be from a background similar to the executive's background—the same school, neighborhood, or fraternity.<sup>108</sup> A personnel officer looking at an applicant's references and seeing a name he immediately recognizes is more likely to give that applicant serious consideration, a fact that works to the benefit of whites far more often than blacks.<sup>109</sup>

This process is the way people get hired in America. The system is biased against outsiders, including poor whites, immigrants, and women. Blacks, as the ultimate outsiders for most of American history, because of their legally enforced disenfranchisement and lack of economic or social status, are the worst victims of this prejudiced system. In his 1980 book *Getting Started: The Youth Labor Market*, Massachusetts Institute of Technology economist Paul Osterman wrote:

The pattern of job-finding methods differs by race. Whites and blacks make essentially equal use of friends, but whites use parents and relatives twice as frequently as blacks. As a result, whites find 57 percent of their jobs through personal contacts, but blacks find only 33 percent in this manner. Furthermore, primary jobs are more frequently found through parents and relatives while secondary jobs are best found through friends. The relative inability of blacks to use parents and relatives thus seems to handicap them in their search for primary employment . . . blacks are forced into greater reliance on formal institutions such as schools, employment agencies and manpower programs. The proportion of blacks using these institutions is over twice that of whites.<sup>110</sup>

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108. PAUL OSTERMAN, *GETTING STARTED: THE YOUTH LABOR MARKET* 15-19 (1980).

109. *Id.*

110. *Id.* at 143-44.

## 2. *Justification of Affirmative Action*

In 1992, not quite thirty years after the passage of the Civil Rights Act<sup>111</sup> and the nominal end of legal discrimination, blacks as a group remain the most deeply damaged victims of this system by every measure of educational attainment, income, and wealth.<sup>112</sup> Blacks therefore symbolize a continuing disruption in a nation based on the founding principle of equality. The national policy question remains how to deal with this inequality that is so deeply tied to race, and how to build a strategy to capture the public opinion on this issue and transform it into a constituency for action.

The affirmative action fight is not about denying a hard-working young white person a job in order to give it to a black person because of the color of his or her skin. The debate is about the American government's responsibility, as well as American society's responsibility, to repair damage knowingly inflicted upon people because of their race or gender. Any argument over affirmative action really boils down to the question of a society's responsibility for historically having perpetuated injustice upon a group of people. The government enters into the equation only because government is the democratically elected agent for the society—first in enforcing the discrimination, and now in attempting to correct that wrong.

In the case of Japanese internees, American society's recognition of its responsibility amounted to apologies and checks for several thousand dollars to every person who had his constitutional rights denied by being forced into camps during World War II.<sup>113</sup> In the case of slaves freed by the Emancipation Proclamation<sup>114</sup> the government made, but never met, promises of forty acres and a mule.<sup>115</sup> With the passage of the Civil Rights Act came the promise of a "color blind" society. No longer would race be a basis for excluding people from opportunity. That promise was sufficient for

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111. 42 U.S.C. § 2000e (1988).

112. See *supra* notes 95-100 and accompanying text.

113. See Act of Aug. 10, 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988) (implementing restitution to Japanese internees).

114. The Emancipation Proclamation, No. 17, 12 Stat. 1268 (1863).

115. FONER, *supra* note 36, at 70-71.

some who were quick to enter schools and corporations and tough enough to compete as best they could in a business culture still tainted by prejudice and stereotypes about women and minorities.

But what about the others, people arguably more damaged by centuries of discrimination, who did not move so quickly through newly opened doors? This group, the so-called underclass, continues to live in bitter poverty in America, plagued by bad schools, crime, drugs, and an apocalyptic breakdown of family structure.<sup>116</sup> In this confusing mix of social circumstances, determining society's responsibility to black people—the people the society once purposely victimized—is sometimes difficult.

With the end of legal segregation, some black people prosper as others continue to falter; the black community is now split between the "haves" and the "have nots." The "haves" are those people who have been able to keep their family lives stable, gain access to good schools, get an education, and finally break through the door of corporate America, either by getting jobs with some promise of a future or starting their own businesses. The "have nots," are those people who have been unable to hold together under the tremendous and oppressive power of a government that allowed slavery and segregation. They have not gained access to good schools in the brief thirty-eight years since the Supreme Court's decision in *Brown v. Board of Education*<sup>117</sup> and the end of legally segregated public education. Without stable families, good schools, and lives absent drugs and violence, these "have nots" have been unable to gain the education they need to break into the world of work in a meaningful way.

What is society's responsibility to black Americans, a group that includes some who have fled the bonds of oppression and others who still seem locked in its dark cells? If that responsibility includes affirmative action—preferences in awarding jobs, scholarships, and contracts—how long should the government allow that affirmative action plan to continue in the name of equality before it amounts to an unfair advantage? This problem is most often dismissed as overwhelming. A simple answer, however, exists in the

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116. See generally KEN AULETTA, *THE UNDERCLASS* (1982) (describing poverty in America).

117. 347 U.S. 483 (1954).

form of appeals to basic fairness to all involved; affirmative action will have achieved its purpose when there is no more discrimination.

When he was head of the Equal Employment Opportunity Commission, Justice Clarence Thomas once told me a story about a group of boys playing cards on a hot Georgia front porch.<sup>118</sup> One of the boys had been discovered cheating. Thomas' solution was to stop the cheating and play on.<sup>119</sup> Equitable distribution of the money the cheater had won through corruption was so complex an operation that it would have stopped the whole game.<sup>120</sup> Thomas offered the story as an analogy to the situation between whites, who have profited in America through racism, and blacks who speak angrily of being cheated. Thomas does not see how compensation can be arranged for centuries of racial discrimination.<sup>121</sup> This appealing resolution of continuing the game, however, even when it is clear that the cheating has stopped, has the effect of sanctioning the status quo, or leaving in place the disadvantages visited on some groups in the past while securing the advantages given to some other groups in the past.

Another proposal is to offer assistance to blacks who remain ill educated and impoverished. These people lead lives of despair. As a matter of political argument, their condition is without rebuttal from the left or right. The squalid neighborhoods where they live, the crime, drugs, early death, and violence all too common in their day-to-day existence, are bomb craters on the modern social landscape. Dealing with this human and social blight is in society's best interest. Society's agent in this case is the government; having ensured an end to oppressive tactics, the government now has a clear moral responsibility to the people who suffered the most severe damage by those tactics. No substantial argument can counter the claim that slavery and segregation have damaged the majority of black people living in poverty in America.

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118. Juan Williams, *A Question of Fairness: Clarence Thomas, a Black, Is Ronald Reagan's Chairman of the Equal Employment Opportunity Commission*, ATLANTIC MONTHLY, Feb. 1987, at 70, 78.

119. *Id.*

120. *Id.*

121. *Id.* at 79.



Black people who have broken barriers and gained access to education also have to cope with legal racism's legacy in academic and corporate settings. They, too, deserve some consideration. The help given to the educated, and therefore able, black man and woman, however, aims largely at helping them to rise above the so-called "glass ceiling" that limits able black people because their white bosses and colleagues, uncomfortable at some gut level, do not trust even able black people to exercise authority.

Arguments also exist concerning how to discern discrimination. For example, in the congressional debate over the 1991 Civil Rights Act,<sup>122</sup> much of the discussion centered on whether statistical disparities between the percentage of minorities in a workforce and the percentage of minorities in the local labor pool was sufficient grounds for charging an employer with discrimination.<sup>123</sup> Despite its fascinating calculus, this argument is at the margins of the big picture.

The compelling issues still concern those people in the underclass, who continue to be radically disenfranchised from the society. Arguments over quotas have little relevance to the awful, brutal lives these people live. Generally, they do not have the education, training, or job skills to be in the market for a position that theoretically might have to be given to a black person because of the imposition of affirmative action or quota. The drastic and dire condition of the underclass creates a political opportunity; their lives are so awful that people can not deny the injustice of allowing people to live so horribly. The very question of how to help the underclass generates support for helping people, a simple idea that transcends racial divisions, political divisions, and even divisions over the idea that blacks, as society's victims, should be entitled to some special help from the government. The simple idea we need to embrace is the creation of opportunity for poor people, those who have few opportunities to gain education, skills training, and job experience.

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122. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (to be codified at 42 U.S.C. §§ 1981-2000e).

123. See 137 CONG. REC. S15445 (1991) (statement of Sen. Robb) (discussing the discriminatory status of policies that result in disparate racial impact).

Affirmative action aimed at the poorest people could even be race-neutral; the bottom line would be that the program assist the poor to get out of poverty. Blacks, as a disproportionately poor group, would disproportionately benefit from such a new brand of affirmative action. The key to this approach is avoiding the classic vision of any help given to blacks as "unfair" to hard-working whites. The brand of affirmative action I am advocating would simply give people, all people, the chance to work hard.

## VI. CONCLUSION

Ultimately, the chance to speak freely, and the chance to use one's talent as one chooses, to learn, to work, and to live without intrusion, is the ideological core of the Bill of Rights. Instead of citing the Bill of Rights' protections as a theoretical construct for individual Americans' liberties, we should bring the Bill of Rights to life as the basis of resolving the central dilemma in American history—racial inequality. No guarantees exist under the Bill of Rights, but it does contain assurances of equality of opportunity to handle responsibilities and pursue a good life. These assurances are all our society—and its government—can offer. If our nation lives up to that promise, inviting the future Frederick Douglasses and Thurgood Marshalls of America to lecture on the glories of the Bill of Rights will not involve fear of being on the wrong end of a chastening lecture. The problem is not in the Bill of Rights; it is without flaw as a document of theory. The flaw lies in its application and the opinions and attitudes we have employed to distance ourselves from the glory of the Bill of Rights.