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"WAS BLIND, BUT NOW I SEE": WHITE RACE CONSCIOUSNESS AND THE REQUIREMENT OF DISCRIMINATORY INTENT*

*Barbara J. Flagg***

Advocating race consciousness is unthinkable for most white liberals.¹ We define our position on the continuum of racism by the degree of our commitment to colorblindness; the more certain we are that race is never relevant to any assessment of an individual's abilities or achievements, the more certain we are that we have overcome racism as we conceive of it. This way of thinking about race is a matter of principle as well as a product of historical experience. It reflects the traditional liberal view that the autonomous individual, whose existence is analytically prior to that of society,² ought never be credited with, nor blamed for, personal characteristics not under her own control, such as gender or race, or group membership or social status that is a consequence of birth rather than individual choice or accomplish-

* The hymn "Amazing Grace," written by John Newton (1725-1807), first appeared as one of the Olney Hymns, a collection published by Newton and William Cowper in 1779. Newton had been captain of a slave ship from 1750 to 1754, but a religious conversion gradually led him to repudiate his former occupation and eventually to write an antislavery pamphlet titled "Thoughts upon the African Slave Trade." Many believe that "Amazing Grace" expresses Newton's gratitude for having become able to comprehend the extent of the evil in which he had participated.

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1. *Race* has many meanings. For the purposes of this article, I define *white person* loosely, as an individual of European descent who, following the prevailing system of racial classification, has no known trace of African or other non-European ancestry. I adopt this definition because the core of the concept of whiteness in this article is white racial hegemony in the United States. Individuals of known nonwhite ancestry are unlikely to fall into the transparency syndrome. For an insightful discussion of the complexities of racial classification, including the "one drop of blood" rule, see Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1, 23-36 (1991).

2. As Alison Jaggar describes it, traditional liberalism views human beings "as individual atoms which in principle are separable from social molecules." ALISON M. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* 29 (1988). Thus individuals' "essential characteristics, their needs and interests, their capacities and desires, are given independently of their social context and are not created or even fundamentally altered by that context." *Id.* *Liberal* is used throughout in the classical, rather than political, sense.

ment.³ The colorblindness principle also grows out of the historical development of race relations in the United States, in which, until quite recently, race-specific classifications have been the primary means of maintaining the supremacy of whites.⁴ In reaction to that experience, whites of good will tend to equate racial justice with the disavowal of race-conscious criteria of classification.⁵

Nevertheless, the pursuit of colorblindness progressively reveals itself to be an inadequate social policy if the ultimate goal is substantive racial justice.⁶ Blacks continue to inhabit a very different America than do whites.⁷ They experience higher rates of poverty and unem-

3. Some strands of liberal theory also posit rationality as the essential quality of the individual; they deem socially constructed characteristics, including those that are biological in origin but laden with social significance, such as race and gender, incidental to personal identity. *Id.* at 28-29. Consequently, this liberal approach conceives meritocracy as a system in which benefits and burdens are distributed in accord with one's deeds — presumably the products of rational choice — rather than characteristics over which one has no apparent control. See ROBERT BLAUNER, *RACIAL OPPRESSION IN AMERICA* 267 (1972); Richard H. Fallon, Jr., *To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination*, 60 B.U. L. REV. 815 (1980); Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 362-85 (1988); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 709-10; Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989).

4. GEORGE M. FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY* (1981).

5. Scholars have analyzed the principle disapproving race consciousness under a variety of labels. See, e.g., T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991) ("colorblindness"); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) ("antidiscrimination principle"); Gotanda, *supra* note 1 ("formal-race"); D. Kennedy, *supra* note 3 ("colorblind meritocratic fundamentalism"); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758 ("integrationism").

6. As will become apparent, I do not mean to suggest that race consciousness should be embraced on a merely temporary basis, with colorblindness remaining the long-term goal, a position sometimes espoused by proponents of race-specific affirmative action. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., dissenting) ("In order to get beyond racism, we first must take account of race. There is no other way."); J. Skelly Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. CHI. L. REV. 213, 244 (1979). Instead, the vision offered here is of a transformed consciousness of race, one that begins with whites' reexamining and taking responsibility for our own consciousness of whiteness. For an argument that the existing constitutional rule is not, and cannot be, colorblind, see David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99 (arguing that the prohibition against even accurate racial generalizations demonstrates that the existing rule is based on race-consciousness rather than colorblindness).

7. I focus on blacks as the group most centrally affected by white supremacy for two principal reasons. First, the dynamics of blacks' oppression are unique, as evidenced, for example, by the institutions of slavery and racial apartheid, which provide the core definition of race discrimination in this society. Second, I would like to encourage white readers to reexamine our habit of thinking of race discrimination as a monolithic phenomenon, and to reflect on the different forms it may take with respect to different nonwhite racial groups, issues, and circumstances. To remind the reader that some, but certainly not all, of what I say about blacks applies equally to other racial groups, I intermittently will substitute *nonwhite* for *black* in the text. See Neil Gotanda, *"Other Non-Whites" in American Legal History*, 85 COLUM. L. REV. 1186 (1985) (review-

ployment⁸ and are more likely to live in environmentally undesirable locations than whites.⁹ They have more frequent and more severe medical problems, higher mortality rates, and receive less comprehensive health care than whites.¹⁰ Blacks continue disproportionately to attend inferior and inadequate primary and secondary schools.¹¹ Proportionately fewer blacks than whites complete college, and those who do so still confront the "glass ceiling" after graduation.¹² Blacks are no better off by many of these measures than they were twenty years ago,¹³ and in the recent past even the colorblindness principle itself, once seen as a promise of a brighter future for blacks, has been deployed instead to block further black economic progress.¹⁴

Arguments that race consciousness has a positive face have begun to appear in the legal literature. Critical race theorists in particular have focused on the salience of race to legal analysis,¹⁵ arguing com-

ing PETER IRONS, *JUSTICE AT WAR* (1983)) (arguing that analysis of issues as they affect nonblack racial minorities should differ from analysis with respect to blacks).

I have chosen not to capitalize *black*, for reasons that are, paradoxically, related to Kim Crenshaw's reason for doing so. In her view, "Blacks, like Asians, Latinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988). However, part of the agenda for this article is to encourage white people to break free from our tendency to associate *race* with people of color, and to develop instead a positive racial awareness of whiteness. Accordingly, I think it most appropriate here either to capitalize *both black and white*, or to capitalize *neither*, and, in the interest of defusing potential charges of essentialism, I have opted for the latter.

8. ANDREW HACKER, *TWO NATIONS* 93-106 (1992); U.S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES: 1991*, at 38, 386 (1991) [hereinafter *STATISTICAL ABSTRACT*].

9. See Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. (forthcoming March 1993).

10. HACKER, *supra* note 8, at 231.

11. See JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* (1991).

12. HACKER, *supra* note 8, at 107-12, 234.

13. See, e.g., *STATISTICAL ABSTRACT*, *supra* note 8, at 454 (reporting that median income of whites increased almost 10% from \$32,713 in 1970 to \$35,975 in 1989; for blacks the 1970 median was \$20,067 and in 1989 only \$20,209, an increase of less than one percent).

14. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (applying strict scrutiny to all race-specific classifications, including those designed to remedy past discrimination); see also DERRICK A. BELL, JR., *AND WE ARE NOT SAVED* 123-39 (1987); Frances L. Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1000, 1010-23 (1989) (both criticizing affirmative action doctrine); Donald E. Lively, *The Supreme Court and Affirmative Action: Whose Classification Is Suspect?*, 17 HASTINGS CONST. L.Q. 483, 486-87 (1990) (criticizing requirement of discriminatory intent).

15. A partial listing of the very rapidly expanding critical race literature includes BELL, *supra* note 14; DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* (3d ed. 1992); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Ansley, *supra* note 14; John O. Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201 (1982); Crenshaw, *supra* note 7; Kimberlé Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, in *THE POLITICS OF LAW* 195 (David Kairys ed., 2d ed. 1990); Harlon L. Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435 (1987); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L.

pellingly that race does and should matter in all aspects of the law, from legal doctrine and theory to the conduct of legal education and the composition of the legal academy.¹⁶ Many of these authors have articulated critiques of colorblindness in the course of developing the critical perspective on race. In addition, and perhaps in response to the critical race literature, two recent articles by authors not ordinarily associated with that movement focus more directly on whites' conceptualizations of colorblindness and race consciousness.

Alexander Aleinikoff has argued that racial justice cannot be attained absent recognition of the social significance of race; whites' increased, color-conscious attention to black perspectives and experience is a crucial ingredient in the effort to eradicate the difference race has made in this society.¹⁷ Gary Peller has described the historical development of contemporary antidiscrimination norms. He argues that integrationism — colorblindness expressed as social policy — holds the dominant position it does in white ideology at least in part in response to the "threat" that the black nationalism of the 1960s and 1970s posed to whites.¹⁸

Each of these insightful articles, however, tends to align race consciousness with consciousness of blackness, emphases which may be largely the consequence of the subjects these authors address: race-conscious affirmative action and black nationalism, respectively.¹⁹

REV. 2411 (1989) [hereinafter Delgado, *Storytelling*]; Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991); Freeman, *supra* note 3; Freeman, *supra* note 5; Gotanda, *supra* note 1; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) [hereinafter Lawrence, *Unconscious Racism*]; Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) [hereinafter Matsuda, *Looking to the Bottom*]; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991) [hereinafter Matsuda, *Accent Discrimination*]; Gerald Torres, *Local Knowledge, Local Color: Critical Legal Studies and the Law of Race Relations*, 25 SAN DIEGO L. REV. 1043 (1988); Gerald Torres & Kathryn Milun, *Translating Yonnonondio By Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625; Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219; Robert A. Williams, Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, 5 LAW & INEQ. J. 103 (1987).

16. On the latter, see Kimberlé W. Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NATL. BLACK L.J. 1 (1989); Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

17. See Aleinikoff, *supra* note 5, at 1113-25.

18. See Peller, *supra* note 5, at 820-44.

19. Note, however, that Peller's is a historical account of the association of race consciousness with black nationalism, on the one hand, and integrationism with white liberalism, on the other. He concludes his analysis with a call for whites to "reinterpret our role in race relations so

Nevertheless, caution is in order, because whites' tendency to focus our attention in matters of race on nonwhites can be just one more building block in the edifice of white supremacy. Whites' endeavors to understand our own and blacks' ways of thinking about blackness are never unimportant, but a thorough reexamination of race consciousness ought to feature a careful consideration of whites' racial self-conception.

The most striking characteristic of whites' consciousness of whiteness is that most of the time we don't have any. I call this the *transparency* phenomenon: the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific. Transparency often is the mechanism through which white decisionmakers who disavow white supremacy impose white norms on blacks. Transparency operates to require black assimilation even when pluralism is the articulated goal; it affords substantial advantages to whites over blacks even when decisionmakers intend to effect substantive racial justice.

Reconceptualizing white race consciousness means doing the hard work of developing a positive white racial identity, one neither founded on the implicit acceptance of white racial domination nor productive of distributive effects that systematically advantage whites.²⁰ One step in that process is the deconstruction of transparency in the context of white decisionmaking.²¹ We can work to make explicit the unacknowledged whiteness of facially neutral criteria of decision, and we can adopt strategies that counteract the influence of unrecognized white norms. These approaches permit white decisionmakers to incorporate pluralist means of achieving our aims, and thus to contribute to the dismantling of white supremacy. Making nonobvious white norms explicit, and thus exposing their contingency, can begin to define for white people a coequal role in a racially

that we might self-consciously understand ourselves as *whites*, as having a particular identity that was historically constructed through the economy of race relations." *Id.* at 847. This article attempts to contribute to that project.

20. According to psychologist Janet Helms, a leading author on racial identity theory, the development of a healthy white racial identity requires the individual to overcome those aspects of racism — whether individual, institutional, or cultural — that have become a part of that person's identity, and in addition to "accept his or her own Whiteness, the cultural implications of being White, and define a view of Self as a racial being that does not depend on the perceived superiority of one racial group over another." Janet E. Helms, *Toward a Model of White Racial Identity Development*, in *BLACK AND WHITE RACIAL IDENTITY* 49 (Janet E. Helms ed., 1990).

21. I define *white decisionmaking* expansively, to include any instance in which whites play a significant role in formulating operative norms, rules, or criteria of decision, even if they are administered by blacks. Of course, at the margins, determining whether decisionmaking is "white" may appear a tricky task. However, given the reality of white supremacy and the pervasiveness of the transparency phenomenon, false negatives are more worrisome than false positives.

diverse society.²²

In constitutional law, facially race-neutral criteria of decision that carry a racially disproportionate impact violate the Equal Protection Clause only if adopted with a racially discriminatory intent.²³ This rule provides an excellent vehicle for reconsidering white race consciousness, because it perfectly reflects the prevailing white ideology of colorblindness and the concomitant failure of whites to scrutinize the whiteness of facially neutral norms.²⁴ In addition, the discriminatory intent rule is the existing doctrinal means of regulating facially neutral government decisionmaking. When government imposes transparently white norms it participates actively in the maintenance of white supremacy, a stance I understand the Fourteenth Amendment to prohibit.²⁵ We need, therefore, to reevaluate the existing discriminatory intent rule from the perspective of the transparency phenomenon, and to consider a revised approach to disparate impact cases that implements the insights gained from that reassessment.

Perhaps an ideal equal protection rule would address all the numerous ways that race influences facially neutral white decisionmaking, from stereotyping and unconscious or repressed racial bias to conscious but covert discrimination, but this article does not attempt to construct a rule or set of rules to reach all violations of the constitutional equality guarantee. While acknowledging that different rules might be appropriate in different contexts, this article will single out

22. Gerald Torres has explained the way existing antidiscrimination law, while rejecting meaningful remedies for historical discrimination, nevertheless has created the conceptual space for valorizing cultural pluralism. See Torres, *supra* note 15, at 1068-69. For a description of cultural pluralism, see Kevin M. Fong, Comment, *Cultural Pluralism*, 13 HARV. C.R.-C.L. L. REV. 133 (1978).

Becoming self-consciously white can be a painful process, because whiteness situates us as heirs of a legacy of exploitation and domination of nonwhites, a history upon which most would likely prefer not to dwell. At the same time, however, increasing our awareness of whiteness presents an opportunity to reconceive the egalitarian ideals by which we often say we are defined. Just as whiteness renders us privileged and powerful, it equally positions us as able substantially to reconstruct the meaning of race in our society.

23. In this article I make no distinctions among *motive*, *purpose*, and *intent*.

24. Most fundamentally, the requirement of discriminatory intent embodies a colorblindness perspective insofar as it views all, and only, decisions that overtly or covertly take race into account as constitutionally impermissible, but rejects the view that unequal outcomes ought to be equally constitutionally suspect. See *infra* text accompanying notes 70-72 for a discussion of additional ways in which the existing discriminatory intent rule reflects the dominant white ideology of race.

Of course, the Supreme Court's current affirmative action doctrine, which mandates strict scrutiny of all race-specific government decisionmaking, is also an expression of the colorblindness principle. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion); 488 U.S. at 520-21 (Scalia, J., concurring); see also Aleinikoff, *supra* note 5, at 1060-65; Paul Brest, *Affirmative Action and the Constitution: Three Theories*, 72 IOWA L. REV. 281 (1987).

25. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *infra* notes 216-24 and accompanying text.

transparency for special consideration. The imposition of transparently white norms is a unique form of unconscious discrimination, one that cannot be assimilated to the notion of irrationalism that is central to the liberal ideology of racism.²⁶ While racial stereotyping can be condemned as the failure accurately to perceive the individual for who he really is, and bias as the inability to exclude subjective misconceptions or hostilities, or both, from one's decisionmaking processes, transparency exemplifies the structural aspect of white supremacy. Beyond the individual forms of racism that stereotyping, bias, and hostility represent lie the vast terrains of institutional racism — the maintenance of institutions that systematically advantage whites — and cultural racism — the usually unstated assumption that white culture is superior to all others.²⁷ Because the liberal gravitates toward abstract individualism and its predicates, she generally fails to recognize or to address the more pervasive harms that institutional and cultural white supremacy inflict.²⁸ The exercise of focusing exclusively on the transparency phenomenon as an exemplar of structural racism, then, has transformative potential for the white liberal, both on the personal level and as a springboard for reflection on what it means for government genuinely to provide the equal protection of the laws.²⁹

26. See Peller, *supra* note 5, at 768-69. Peller provides a useful list of texts setting forth the cognitive or individualist conception of racism, *id.* at 768 n.16, and makes clear that this way of thinking about race is highly problematic. See *id.* at 844-47. Related discussions of the connection between rationalism and dominant conceptions of race discrimination can be found in Aleinikoff, *supra* note 5, at 1067-68; Gotanda, *supra* note 1, at 43-44; Lawrence, *Unconscious Racism*, *supra* note 15, at 330.

In emphasizing the unconscious forms of racism, I mean neither to discount the continuing presence of overt white hostility toward blacks nor to deny the reality of the modern forms of whites' belief in the cultural inferiority of black people. See Crenshaw, *supra* note 7, at 1376-81; Peggy C. Davis, *Law As Microaggression*, 98 YALE L.J. 1559 (1989).

27. See JAMES M. JONES, PREJUDICE AND RACISM 129-31, 147-49 (1972). Jones defines individual racism as the belief that black people as a group are inferior to whites. *Id.* at 118. I would elaborate Jones' three categories to include unconscious forms of individual, institutional, and cultural racism. For example, individual racism may encompass conscious or unconscious attitudes and behaviors that reflect, in one way or another, the belief in white superiority. See Lawrence, *Unconscious Racism*, *supra* note 15, at 328-44. Jones does recognize the unconscious dimension of institutional racism, defining it as the maintenance of institutions that advantage whites "whether or not the individuals maintaining those practices have racist intentions." JONES, *supra*, at 131. Similarly, the imposition of white cultural norms on blacks should be considered cultural racism whether or not the white decisionmaker harbors a conscious belief in the superiority of white culture. See Robert E. Friedman, *Institutional Racism: How to Discriminate Without Really Trying*, in RACIAL DISCRIMINATION IN THE UNITED STATES 384 (Thomas F. Pettigrew ed., 1975).

28. See *supra* notes 2-3 and accompanying text. Though uncommon, it is of course possible to recognize and address structural forms of racism within a liberal conceptual framework. Indeed, it might be said that this article's argument that the transparency phenomenon demonstrates that ostensibly race-oriented decisionmaking is in fact race-specific constitutes just such an attempt.

29. Of course, a transparency-conscious constitutional rule is not the only way one might set out to combat the effects of transparency in government decisionmaking; legislative and adminis-

Part I briefly reviews the case law that has established and elaborated the requirement of discriminatory intent. I discuss the theoretical background against which *Washington v. Davis* was decided, a debate over the possibility and propriety of judicial review of legislative motive. I suggest that the significant institutional difficulties associated with the triumphant discriminatory intent rule, together with the many substantive criticisms leveled against it, might lead one to expect to see relative doctrinal instability here. On the contrary, the requirement of discriminatory intent has been one of the most stable doctrines in modern constitutional law. I conclude with the speculation that the rule owes its longevity, at least in part, to its conformity with distinctively white ways of thinking about race discrimination.

Part II invites the white reader to undertake the project of becoming conscious of transparency. I pose questions designed to prompt whites to reflect on this phenomenon, and I offer a story illustrative of some of the ways transparency can influence white decisionmaking. I then argue that recognizing transparency impels adoption of a radical skepticism regarding facially race-neutral criteria of decision. The skeptical stance operates as a presumption against the neutrality in fact of any facially neutral criterion of decision employed by a white decisionmaker.

In Part III, I reexamine the requirement of discriminatory intent from the perspective of transparency. The existing rule sharply distinguishes conscious from unconscious reliance on race in decisionmaking; though both constitute race-specific decisionmaking, only the former is constitutionally impermissible. Transparency undermines each of two possible justifications for the Court's position: that unconscious discrimination is relatively rare, and that conscious discrimination is relatively more blameworthy than unconscious discrimination. This Part concludes with a discussion of a theoretical alternative to the practice of blaming.

Part IV proposes an alternative to the existing discriminatory intent rule. The principal features of the proposed rule are that it places on government the burden of justifying all facially neutral criteria of decision that have disparate effects, it mandates pluralist interpretations of government purposes whenever possible, and it requires government to adopt plaintiff-formulated means of achieving those purposes whenever such means are at least as effective as existing measures. I then consider two objections to the proposed rule: that it

trative approaches might be equally, or more, effective. However, the scope of this article is limited to the ways a constitutional rule might contribute to the effort.

abandons the colorblindness principle, and that it engages the courts too deeply in economic redistribution. I argue in reply that a carefully conceived race consciousness, one that begins with whites' consciousness of whiteness, can provide better distributive racial justice than the colorblindness principle and is at least equally consistent with the underlying liberal values of equality and autonomy. With regard to the institutional critique, I conclude that the proposed rule indeed has some redistributive effects but that the goal of combatting structural racism clearly justifies these effects.

I. THE REQUIREMENT OF DISCRIMINATORY INTENT

The Supreme Court first set forth the discriminatory intent requirement in 1976, in *Washington v. Davis*.³⁰ In that case the Court addressed the constitutionality of "Test 21," a written examination developed by the U.S. Civil Service Commission and administered to applicants for positions as officers in the Metropolitan Police Department of the District of Columbia.³¹ Two rejected black applicants argued that Test 21 was racially discriminatory in that its effect was to disqualify black applicants at approximately four times the rate of white applicants; the plaintiffs did not allege intentional discrimination.³² The challengers lost in the District Court³³ but were, temporarily, more successful on appeal: the Court of Appeals concluded that the applicable constitutional standard should be borrowed from *Griggs v. Duke Power Co.*,³⁴ a Title VII case.³⁵ In *Griggs*, as it was then understood, the Supreme Court had ruled that disparate impact alone, without proof of discriminatory intent, would be adequate to support the finding of a statutory violation absent proof by the employer that the facially neutral criterion in question was related to job

30. 426 U.S. 229 (1976).

31. 426 U.S. at 234-35. The full text of Test 21 appears at *Davis v. Washington*, 512 F.2d 956, 967-76 (D.C. Cir. 1975), *rev'd*, *Washington v. Davis*, 426 U.S. 229 (1976). It was a multiple choice examination that included questions on vocabulary, analogies, and reading comprehension, plus two categories of questions best characterized as designed to test familiarity with mainstream culture. One set of questions asked the examinee to identify the correct policy justification behind a specified legal rule. For example, the applicant had to choose the best answer to "The purpose of trademarks is to . . ." Question 13, 512 F.2d at 968. The second category of cultural questions required interpretation of aphorisms, such as "Habits are at first cobwebs, at last cables," and "They wrangle about an egg and let the hens fly away." Questions 52 & 63, 512 F.2d at 973, 974.

32. *Davis*, 426 U.S. at 235.

33. The District Court decided challengers' constitutional claim on a motion for partial summary judgment. 426 U.S. at 234.

34. 401 U.S. 424 (1971).

35. Though plaintiffs in *Davis* had raised other statutory claims, they had not pursued a Title VII action because it was not then applicable to the federal government. *Davis*, 426 U.S. at 238 n.10.

performance.³⁶ Though the District of Columbia petitioners challenged only the Court of Appeals' application of the *Griggs* approach, not the standard itself, the Supreme Court viewed the lower court's reliance on *Griggs* as plain error and set itself the task of correcting the mistake.³⁷ The constitutional rule, the Court said, is that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."³⁸ Facially neutral laws with racially disparate effects, therefore, receive strict scrutiny only on a demonstration of discriminatory intent.³⁹

Justice White's opinion for the *Davis* Court rested the intent requirement principally on two arguments. First, the Court rejected a "group rights" approach to race discrimination.⁴⁰ Notwithstanding that the failure rate for blacks as a group was higher than for whites, individual black applicants who failed the facially neutral test, the Court said, "could no more successfully claim that the test denied them equal protection than could white applicants who also failed."⁴¹ Second, the Court expressed concern that a rule mandating strict scru-

36. The *Griggs* opinion reads: "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. at 431. The Court elaborated: "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." 401 U.S. at 432. The language seems reasonably straightforward: intent is no part of a disparate impact claim. However, chiefly because the facts of the case strongly suggested that the employer had adopted the challenged facially neutral job requirements as a pretext for discrimination, some have read the *Griggs* disparate impact approach to provide no more than an indirect method of proving discriminatory intent. See *infra* notes 48-51 and accompanying text. For a different argument supporting the second interpretation of *Griggs*, see George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297 (1987).

37. *Davis*, 426 U.S. at 238.

38. 426 U.S. at 240.

39. The *Davis* Court allowed that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." 426 U.S. at 242. However, it appears that in most contexts the existence of any nondiscriminatory explanation will defeat the inference of invidious intent. Cf. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960):

If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible . . . that the legislation is *solely* concerned with segregating white and colored voters

. . . Against this claim the respondents have never suggested, either in their brief or in oral argument, any countervailing municipal function which Act 140 is designed to serve. 364 U.S. at 341-42 (emphases added).

40. Owen Fiss provided the early exposition of a group-disadvantaging principle as a foundation for what seems to be a pure impact approach to facially neutral government decisionmaking in Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 147-70 (1976). Alan Freeman notes, however, that whether some notion of intent is relevant to Fiss' analysis remains uncertain. See Freeman, *supra* note 5, at 1062 n.57.

41. *Davis*, 426 U.S. at 246.

tiny in all disparate effects cases would engage it in far-ranging economic redistribution. Such a rule "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."⁴²

Justice Stevens joined the majority opinion in *Davis*, but wrote separately to explain that in his view the distinction between discriminatory impact and discriminatory purpose was not as bright as it might at first seem, because "[f]requently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds."⁴³ The Court later clarified its position on this issue in *Personnel Administrator v. Feeney*,⁴⁴ a sex discrimination case. Feeney challenged a Massachusetts statute granting a nearly absolute preference in state civil service employment to veterans; she contended that because the class of veterans was overwhelmingly male, the preference inevitably and foreseeably operated to exclude women from the civil service. The Court rejected Feeney's argument, and with it Stevens' foreseeable effects approach, adopting instead the rule that discriminatory intent means that the decisionmaker chose a challenged facially neutral course of action " 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."⁴⁵

The *Davis* rule represented a significant departure from the *Griggs* approach to disparate impact claims. The Title VII plaintiff bore the burden of persuasion only on the factual issue of disparate effects; the burden of production and persuasion then shifted to the employer to show that the challenged practice was a "business necessity."⁴⁶ A liberal reading of the *Griggs* analysis saw it as standing for the proposition that unjustified racially disparate effects, standing alone, constituted a violation of Title VII; intent played no part in a disparate impact claim. On this interpretation, *Davis* rested on an obviously

42. 426 U.S. at 248.

43. 426 U.S. at 253 (Stevens, J., concurring).

44. 442 U.S. 256 (1979).

45. 442 U.S. at 278-79.

46. The burden of production requires the party to produce admissible evidence sufficient to raise a genuine question of fact on the issue; the burden of persuasion requires the party to persuade the fact finder, ordinarily by the preponderance of the evidence standard, on the issue. See Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1216 (1981). The history of the business necessity doctrine is discussed *infra* note 142.

and, to many, inexplicably, different conception of discrimination than did *Griggs*.⁴⁷

On the other hand, some interpreted *Griggs* only to establish an indirect method of proving discriminatory intent.⁴⁸ Even on this reading, however, *Davis* set forth a much less "plaintiff friendly" rule than did *Griggs*. Plaintiff's showing of disproportionate effects was understood to raise an inference of discriminatory purpose that placed on the Title VII defendant a substantial burden of rebuttal.⁴⁹ In contrast, the constitutional disparate impact challenger seemed to bear the burden of persuasion throughout.⁵⁰ As the *Feeney* case illustrated, at least in the realm of employment discrimination, the existence of *any* nonracial explanation for a demonstrated disparate impact would be sufficient to defeat the inference of discriminatory purpose.⁵¹ In effect, in constitutional cases, the defendant had only the burden of production, but not of persuasion, on the question of a "racially neutral" explanation for the disproportionate effects.

The Court's reluctance to infer discriminatory intent from disparate effects in constitutional cases might be symptomatic of the difficulty it had wrestled with for some time prior to *Davis* in determining the proper role of legislative motive in constitutional analysis.⁵² In 1960 the Court had stated that "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end."⁵³ The idea that

47. On the comparison between the Title VII and constitutional disparate impact rules, the *Davis* Court said only: "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today." 426 U.S. at 239.

48. George Rutherglen argues that this is the more plausible reading of *Griggs*. Rutherglen, *supra* note 36, at 1299-311. For more comprehensive accounts of the two interpretations of *Griggs* described here, and of the theories of equality that they embody, see Robert Belton, *The Dismantling of the Griggs Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 YALE L. & POLY. REV. 223 (1990); Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971); L. Camille Hébert, *Redefining the Burdens of Proof in Title VII Litigation: Will the Disparate Impact Theory Survive Wards Cove and the Civil Rights Act of 1990?*, 32 B.C. L. REV. 1 (1990).

49. See Rutherglen, *supra* note 36, at 1312-14.

50. A recent empirical study suggests that the more significant impact of the intent requirement may be a low volume of intent cases filed, rather than low success rates for plaintiffs. Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151 (1991).

51. See Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1115-16 (1989). Ortiz hypothesizes that the Court's uneven application of the intent requirement reflects interest balancing; when interests such as education, voting, or jury service are at stake, plaintiff has a relatively easier time proving discriminatory intent. *Id.* at 1140-41.

52. John Ely described the Court's confusion concerning motive review as having reached "disaster proportions" by 1970. John H. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1207 (1970).

53. *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) (quoting *Western Union Tel. Co. v. Foster*, 247 U.S. 105, 114 (1918)). *Gomillion* considered the constitutionality of a scheme to

legislative action might be invalidated on account of a perceived impermissible purpose seemed to take hold in a series of religion cases.⁵⁴ In 1968, however, the Court reversed direction, stating in the draft card burning case, *United States v. O'Brien*,⁵⁵ that "[t]he decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted."⁵⁶ The Court did not, however, change its earlier position with respect to the religion cases, so the matter could hardly be seen as settled.⁵⁷ The final pre-*Davis* pronouncement came in 1971, in *Palmer v. Thompson*.⁵⁸ In that case, petitioners challenged the decision by Jackson, Mississippi to close its public swimming pools in the wake of a federal court judgment declaring that the operation of segregated public facilities constituted a denial of equal protection; they argued that the closing was unconstitutional because it had been motivated by the city's desire to avoid integrating the pools. The Court reiterated its *O'Brien* position:

[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it. . . .

....

It is true there is language in some of our cases interpreting the Fourteenth and Fifteenth Amendments which may suggest that the motive or purpose behind a law is relevant to its constitutionality. But the focus in those cases was on the actual effect of the enactments, not upon the motivation which led the States to behave as they did.⁵⁹

Many of the federal courts of appeals interpreted the language of the *Palmer* opinion to mean that legislative motive was entirely irrelevant to constitutional analysis; it gave them additional reason to conclude, like the Court of Appeals in *Davis*, that the *Griggs* rule should be applied to constitutional disparate impact cases.⁶⁰

redraw the boundaries of Tuskegee, Alabama in such a way that all but a very few black voters came to reside outside the city limits. The resulting boundary lines, in the Court's words, formed "an uncouth twenty-eight-sided figure." 364 U.S. at 340. No explanation for the bizarre shape other than race discrimination was possible. See *supra* note 39.

54. See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Two Guys v. McGinley*, 366 U.S. 582 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Kasher Super Mkt.*, 366 U.S. 617 (1961).

55. 391 U.S. 367 (1968).

56. 391 U.S. at 383 (quoting *McCray v. United States*, 195 U.S. 27, 56 (1904)).

57. See, e.g., *Board of Educ. v. Allen*, 392 U.S. 236, 242-43 (1968) (citing, *inter alia*, *McGowan* and *Schempp*, but remarking that the test developed by the religion cases "is not easy to apply").

58. 403 U.S. 217 (1971).

59. 403 U.S. at 224, 225 (citations omitted).

60. See, e.g., *Munoz Vargas v. Romero Barcelo*, 532 F.2d 765, 766 (1st Cir. 1976); *Tyler v.*

The problems with motive review had been described in *O'Brien*. Scholars had characterized them as issues of ascertainability, futility, and disutility.⁶¹ The difficulty of ascertaining legislative motive was apparent: "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it"⁶² Futility referred to the ability of the legislature to rehabilitate an invalidated law simply by reenacting it with a recitation of "permissible" purposes. Disutility represented the concern that declaring legislative acts unconstitutional on the basis of motive alone might result in the invalidation of laws that were otherwise beneficial in their operation.

John Hart Ely and Paul Brest led the way in making the case for motive review.⁶³ Each acknowledged the strength of the objections to such review, but each reached the conclusion, by somewhat different routes, that the need for a mode of review that would reach illicit government objectives outweighed its disadvantages.⁶⁴ Though the argument that the presence of an illicit motive is a sufficient condition for judicial invalidation of a legislative act does not entail the proposition that such a motive ought to be a necessary condition for invalidation, the contributions of Ely and Brest clearly helped pave the way for the *Davis* requirement of discriminatory intent.⁶⁵

Despite these scholarly underpinnings, there were several compel-

Vickery, 517 F.2d 1089, 1095 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976); Bridgeport Guardians, Inc. v. Civil Serv. Commn., 482 F.2d 1333, 1336 (2d Cir. 1973); Hawkins v. Town of Shaw, 461 F.2d 1171, 1172 (5th Cir. 1972) (en banc) (per curiam); Castro v. Beecher, 459 F.2d 725, 732-33 (1st Cir. 1972); Carter v. Gallagher, 452 F.2d 315, 326 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972); Harper v. Mayor of Baltimore, 359 F. Supp. 1187, 1200 (D. Md. 1972), *modified and aff'd. sub nom. Harper v. Kloster*, 486 F.2d 1134 (4th Cir. 1973).

61. For in-depth discussions of these issues, see Paul Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 119-28; Ely, *supra* note 52, at 1212-17. The problems of ascertainability, futility, and disutility arise similarly with respect to administrative decisionmaking, though the question of ascertainability might take on a somewhat different form in that context. Brest also considered a more exclusively legislative issue, impropriety — the lack of proper respect for the decision of a coordinate branch of government. See Brest, *supra*, at 128-30.

62. *O'Brien*, 391 U.S. at 384.

63. Ely, *supra* note 52; Brest, *supra* note 61.

64. Ely argued for the necessity of motive review in certain limited circumstances, which he described as cases of random and discretionary choice. See Ely, *supra* note 52, at 1228-49. Brest argued for a more comprehensive approach to motive review. See Brest, *supra* note 61, at 130-31, 134-43.

65. The Supreme Court cited Brest's work in *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 n.12 (1977), a case that solidified the requirement of discriminatory intent.

The problem of motive review represented a dilemma for process theory. In its emphases on discrete roles for the coordinate branches and on considerations of institutional competence, process theory seemed to advise against judicial review of legislative motives. See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33 & n.117 (1959). On the other hand, as Ely and Brest recognized, process theory also needed an account

ling reasons to predict that the *Davis* rule would have a troubled history. First, the institutional factors counseling against judicial review of legislative motives are still operative. Second, we might expect the anomaly created by adopting significantly different approaches to disparate impact analysis in Title VII and constitutional cases to trouble the Court. Finally, the discriminatory intent requirement has borne steady and intense academic criticism.⁶⁶ Nevertheless, the discriminatory intent requirement has been remarkably stable, surviving unchanged for more than fifteen years. The rule's persistence over a period characterized by the Court's modification, reinterpretation, and outright overruling of dozens of precedents⁶⁷ calls for an attempt at

of the legitimacy of legislative action; legislative consideration of illicit objectives was a paradigm case of process failure.

The basic outline of political process theory — the application of process theory to the legislative process in particular — had been laid out in footnote four of *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938), and in a short article by Richard A. Givens, *The Impartial Constitutional Principles Supporting Brown v. Board of Education*, 6 How. L.J. 179 (1960). However, the visibility of Ely's and Brest's articles in the early 1970s on motive review may have marked a turning point in the evolution of process theory into its political process refinement. For an illuminating description of process theory in the 1950s, and the argument that the early process theorists failed to consider the problem of legislative competence, see Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REF. 561, 610-12 (1988). Several perspectives on motive review are included in Symposium, *Legislative Motivation*, 15 SAN DIEGO L. REV. 925 (1978).

66. Since the Court's decision in the *Davis* case, critics of the requirement of discriminatory intent have been numerous. As Chuck Lawrence has shown, the criticisms of *Davis* revolve around two principal themes: first, that an intent requirement places too heavy a burden on the "wrong" side of the dispute; second, that the harms of racial inequality exist independently of discriminatory intent. See Lawrence, *Unconscious Racism*, *supra* note 15, at 319-20. The critics include Gayle Binion, *"Intent" and Equal Protection: A Reconsideration*, 1983 SUP. CT. REV. 397 (advocating "serious" scrutiny in all disparate impact cases); Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977) (proposing heightened scrutiny when challenger is able to demonstrate some race-dependent decision was the cause-in-fact of the challenged disproportionate impact); Freeman, *supra* note 5 (claiming that discriminatory intent requirement reflects "perpetrator" rather than "victim" perspective); Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 50-52 (1977) (contending that stigma of caste cannot be confined to purposefully stigmatizing behavior); Lawrence, *Unconscious Racism*, *supra* note 15 (expanding doctrine to reach some varieties of unconscious discrimination); Ortiz, *supra* note 51 (arguing that doctrine is better explained as weighing interests than as regulation of inputs to legislative decisionmaking); Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977) (arguing that some form of intermediate scrutiny should be triggered in all disproportionate impact cases); Eric Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828 (1983) (arguing for extended causal chain linking discriminatory intent and injury to blacks); Robert A. Sedler, *The Constitution and the Consequences of the Social History of Racism*, 40 ARK. L. REV. 677 (1987) (contending that substantial burden of justification should attach to government actions having foreseeable discriminatory effects); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989) (claiming that existing discriminatory intent rule does reach unconscious discrimination, and, so construed, "defeats itself"); Pamela S. Karlan, Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111 (1983) (arguing for a broadened conception of intent).

67. In *Payne v. Tennessee*, 111 S. Ct. 2597 (1991), the Court acknowledged 34 previous cases spanning two decades in which it had overruled constitutional precedents in whole or in part,

explanation.

One relatively simple explanation for the stability of the requirement of discriminatory purpose is its intuitive appeal, or more precisely the appeal of the principles it embodies. Colorblindness is extremely attractive to white liberals,⁶⁸ and process theory's promise to regulate only the inputs to legislative decisionmaking, but not the substance of the resulting decisions, is extremely attractive to jurists confronting the countermajoritarian difficulty.⁶⁹ But there is, I think, another explanation: the *Davis* rule reflects a distinctively white way of thinking about race.

First, white people tend to view intent as an essential element of racial harm; nonwhites do not. The white perspective can be, and frequently is, expressed succinctly and without any apparent perceived need for justification: "[W]ithout concern about past and present intent, racially discriminatory effects of legislation would be quite innocent."⁷⁰ For black people, however, the fact of racial oppression exists largely independent of the motives or intentions of its perpetrators.⁷¹ Second, both in principle and in application the *Davis* rule presupposes the existence of race-neutral decisionmaking. Whites' level of confidence in race neutrality is much greater than nonwhites'; a skeptic (nonwhite, more likely than not) would not adopt a rule that presumes the neutrality of criteria of decision absent the specific intent to do

111 S. Ct. at 2610 n.1, and at least one instance of constitutional overruling was omitted from the Court's list. See *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Commn.*, 461 U.S. 375 (1983) (overruling *Public Util. Commn. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927)). Of those 36 cases (including *Payne* itself), 29 were decided either during the same term as, or subsequent to, the *Washington v. Davis* decision. In addition, there have been several cases in which at least one member of the Court has expressed a willingness to overrule a constitutional precedent. E.g., *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991) (plurality would overrule *Solem v. Helm*, 463 U.S. 277 (1983)); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (plurality would abandon *Roe v. Wade*, 410 U.S. 113 (1973)); *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980) (plurality would overrule *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943), as limited by *Industrial Commn. v. McCartin*, 330 U.S. 622 (1947)). In other cases a dissenter has accused the majority of having overruled *sub silentio*. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2880-81 (1992) (Scalia, J., dissenting in part); *Solem v. Helm*, 463 U.S. 277, 304 (1983) (Burger, C.J., dissenting); *United States v. Ross*, 456 U.S. 798, 827 (1982) (Marshall, J., dissenting).

68. See *supra* notes 1-5 and accompanying text.

69. For an argument that process theory fails to deliver on its promises in the disparate impact cases, see Ortiz, *supra* note 51, at 1113-19. The general criticism that process theory cannot escape substantive commitments has been advanced most persuasively in Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 733-40 (1985), and Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980). The appeal of process theory remains strong, however. See generally *Symposium on Democracy and Distrust: Ten Years Later*, 77 VA. L. REV. 631 (1991).

70. Robert W. Bennett, "Mere" Rationality In Constitutional Law: Judicial Review and Democratic Theory, 67 CAL. L. REV. 1049, 1076 (1979).

71. See Frances L. Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511, 1557-58 n.131 (1991); Lawrence, *Unconscious Racism*, *supra* note 15, at 319-20.

racial harm. Finally, retaining the intent requirement in the face of its demonstrated failure to effectuate substantive racial justice is indicative of a complacency concerning, or even a commitment to, the racial status quo that can only be enjoyed by those who are its beneficiaries — by white people.⁷²

A raised white consciousness of race would produce a very different rule in disparate impact cases. In particular, white people who take seriously the transparency phenomenon, and who want to foster racial justice, will look for ways to diffuse transparency's effects and to relativize previously unrecognized white norms. Existing doctrinal tools are adequate, in large measure, to accomplish these goals, if they are tailored to correct the evil of transparency. The process of reconstructing a disparate impact rule must begin, however, with a careful examination of the transparency phenomenon.

II. DECONSTRUCTING RACE NEUTRALITY

In this Part the white reader is invited to reexamine her customary ways of thinking about whiteness and, consequently, to reevaluate her attitude toward the concept of race-neutral decisionmaking. There is a profound cognitive dimension to the material and social privilege that attaches to whiteness in this society, in that the white person has an everyday option not to think of herself in racial terms at all. In fact, whites appear to pursue that option so habitually that it may be a defining characteristic of whiteness: to be white is not to think about it.⁷³ I label the tendency for whiteness to vanish from whites' self-perception the transparency phenomenon.⁷⁴

72. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522-23 (1980).

73. Some social scientists have recognized and discussed this phenomenon. See Robert W. Terry, *The Negative Impact on White Values*, in *IMPACTS OF RACISM ON WHITE AMERICANS* 119, 120 (Benjamin P. Bowser & Raymond G. Hunt eds., 1981) ("To be white in America is not to have to think about it.") (emphasis omitted); Judy H. Katz & Allen Ivey, *White Awareness: The Frontier of Racism Awareness Training*, 55 PERSONNEL & GUIDANCE J. 485, 486 (1977) ("White people do not see themselves as white.") (emphasis omitted). Janet Helms concludes that "it appears that most Whites have no consistent conception of a positive White identity or consciousness. As a consequence, Whites may feel threatened by the actual or presupposed presence of racial consciousness in non-White racial groups." Helms, *supra* note 20, at 50.

Transparency has been noted by some legal scholars as well. See, e.g., Aleinikoff, *supra* note 5, at 1066; Freeman, *supra* note 3, at 357-58; Gotanda, *supra* note 1, at 59 n.239.

74. Any claim about whites as a group, like claims about nonwhite groups or about the category "women," raises potential concerns about essentialism. See ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988). I suspect there is more homogeneity among whites' experience of transparency than there is among the experiences of whites or nonwhites regarding most other issues, but I do not ask the reader to accept this assertion on faith. Rather, I ask each white reader to verify in her own experience the claim that we *tend* to be unaware of whiteness. See *infra* note 81. On the problem of essentialism as it applies to feminist legal theory, see Harris, *supra* note 15.

I invite the white reader to explore white race consciousness by reflecting on her own experience with transparency; in section II.A I pose a series of questions designed to aid in that process of introspection. Those who are, or become, convinced that transparency is a pervasive fact of whites' conceptualization of ourselves have reason to be skeptical of purportedly race-neutral decisionmaking by white decisionmakers. The argument advanced in section II.B, in summary, is that because we tend not to see ourselves as white, we should not be confident of the race neutrality of criteria of decision formulated in predominantly white contexts. I propose that the white decisionmaker adopt a deliberate skepticism regarding the race neutrality of facially neutral criteria of decision.

A. *The Transparency Phenomenon*

*On a recent trip to Washington, D.C. my life partner, who is white, was visiting a white friend and bringing her up to date on family events and activities. When she mentioned that I have been teaching a new course on Critical Race Theory, her friend appeared puzzled and surprised. "But," said the friend, "isn't she white?"*⁷⁵

White people externalize race. For most whites, most of the time, to think or speak about race is to think or speak about people of color, or perhaps, at times, to reflect on oneself (or other whites) in relation to people of color. But we tend not to think of ourselves or our racial cohort as racially distinctive. Whites' "consciousness" of whiteness is predominantly *unconsciousness* of whiteness. We perceive and interact with other whites as individuals who have no significant racial characteristics. In the same vein, the white person is unlikely to see or describe himself in racial terms, perhaps in part because his white peers do not regard him as racially distinctive. Whiteness is a transparent quality when whites interact with whites in the absence of people of color. Whiteness attains opacity, becomes apparent to the white mind, only in relation to, and contrast with, the "color" of nonwhites.⁷⁶

I do not mean to claim that white people are oblivious to the race of other whites.⁷⁷ Race is undeniably a powerful determinant of social

75. This is a true story. For the reader who finds it distracting or irrelevant that I identify myself as lesbian in this story, I offer a brief explanation. In my view, though coming out as lesbian clearly plays a different role in the struggle against oppression than does the acquisition of self-consciousness of whiteness, each is crucial. Sexual orientation is no more irrelevant to personal identity than is race, or gender, or class.

76. See BELL HOOKS, *YEARNING: RACE, GENDER, AND CULTURAL POLITICS* 54 (1990).

77. Neil Gotanda calls this the technique of nonrecognition. Racial identity must first be recognized, then suppressed, so that race is "noticed, but not considered." Gotanda, *supra* note 1, at 16-18.

status and so is always noticed, in a way that eye color, for example, may not be.⁷⁸ However, whites' social dominance allows us to relegate our own racial specificity to the realm of the subconscious. Whiteness is the racial norm. In this culture the black person, not the white, is the one who is different.⁷⁹ The black, not the white, is racially distinctive. Once an individual is identified as white, his distinctively racial characteristics need no longer be conceptualized in racial terms; he becomes effectively raceless in the eyes of other whites. Whiteness is always a salient personal characteristic, but once identified, it fades almost instantaneously from white consciousness into transparency.⁸⁰

The best "evidence" for the pervasiveness of the transparency phenomenon will be the white reader's own experience: critically assessing our habitual ways of thinking about ourselves and about other white people should bring transparency into full view.⁸¹ The questions

78. See Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 585-86 (1977).

79. See Lawrence, *Unconscious Racism*, *supra* note 15, at 341-42. The interconnection between concepts of equality and the problem of the unstated norm is illuminated in MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 49-78 (1990).

80. The experiential asymmetry of race for white people that has just been described stands in sharp contrast to our insistence on a symmetrical legal analysis of race discrimination. "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-90 (1978) (opinion of Powell, J.)).

81. As noted above, social scientists have studied what I call the transparency phenomenon, and some legal scholars have mentioned it as well. See *supra* note 73. However, I do not rest my implicit claim that the transparency phenomenon is "real" — a better way of conceptualizing things — on the authority of social scientists or legal scholars, in part because they too must rely at bottom on the reported experience of white people. I believe we are more likely to take transparency seriously if we recognize it in our own lives than if our only acquaintance with it is third-hand "empirical" evidence. Moreover, as an epistemological matter I share Alan Freeman's assumptions that one can differentiate appearance from reality, that though there are no objective criteria of truth, one can *know* the world through experience, and that at times prevailing structures of thought distort one's own experiential knowledge. Freeman, *supra* note 3, at 322-23. Freeman's account of the process, and value, of critical reflection on consciousness is irreplaceable:

Only through engagement with truth revealed to be more ideological than real can one decide for oneself the extent of one's previous self-deception. I don't think anyone is exempt. There is a claim that ideology serves merely to comfort the oppressors by rationalizing their oppressions as fair and natural. This, however, is too simple. I readily concede that there is no universality of experience, that there is always the risk of over-projecting one's own. One should therefore respect the diversity of experiences and voices produced by encounters with different "truths," and *pay attention* to them. Moreover, one should seek out and try to understand knowledges that have been silenced, or forms of local resistance that have gone undetected. This is not to downplay the importance of the prevailing culture, though. Everything in my experience tells me that ostensibly shared culture is powerful, that oppressed as well as oppressors participate in it, however differently, and that pervasive ideological forms can also serve to perpetuate patterns of domination and hierarchy. I do not suggest that one can simply "unthink" domination and make it go away. Yet I believe that collective "unthinking" is a good step toward positive political activity.

Id. at 323.

that follow may provide some direction for the reader's reflections.

In what situations do you describe yourself as white? Would you be likely to include *white* on a list of three adjectives that describe you?⁸² Do you think about your race as a factor in the way other whites treat you? For example, think about the last time some white clerk or salesperson treated you deferentially, or the last time the first taxi to come along stopped for you. Did you think, "That wouldn't have happened if I weren't white"? Are you conscious of yourself as white when you find yourself in a room occupied only by white people? What if there are people of color present? What if the room is mostly nonwhite?⁸³

Do you attribute your successes or failures in life to your whiteness? Do you reflect on the ways your educational and occupational opportunities have been enhanced by your whiteness? What about the life courses of others? In your experience, at the time of Justice Souter's nomination, how much attention did his race receive in conversations among whites about his abilities and prospects for confirmation? Did you or your white acquaintances speculate on the ways his whiteness might have contributed to his success, how his race may have affected his character and personality, or how his whiteness might predispose him to a racially skewed perspective on legal issues?⁸⁴

If your lover or spouse is white, how frequently do you reflect on that fact? Do you think of your white friends as your white friends, other than in contrast with your friends who are not white? Do you try to understand the ways your shared whiteness affects the interactions between yourself and your white partner, friends, and acquaintances? For example, perhaps you have become aware of the absence of people of color on some occasion. Did you move beyond that moment of recognition to consider how the group's uniform whiteness affected its interactions, agenda, process, or decisions? Do you inquire about the ways white persons you know have dealt with the fact, and

82. Pat Cain reports that in her experience white women never include whiteness as one of the three adjectives. See Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 208 (1989-90).

83. Compare Justice Marshall's reflection: "[Y]ears ago, when I was a youngster, a Pullman porter told me that he had been in every city in this country . . . and he had never been in any city in the United States where he had to put his hand up in front of his face to find out he was Negro. I agree with him." Ruth Marcus, *Plain-Spoken Marshall Spars with Reporters*, WASH. POST, June 29, 1991, at A1, A10.

84. The obvious comparison here is to the role race was perceived to have played in the nomination and confirmation of Justice Clarence Thomas, a role that probably cannot be overstated. Of course, the different treatment of Souter and Thomas may reflect more than just the transparency phenomenon. However, facially race-neutral factors such as Souter's low public profile may themselves be examples of transparency: Could a black nominee possibly have filled Souter's political-strategic role for President Bush?

privilege, of their whiteness?⁸⁵

Imagine that I am describing to you a third individual who is not known to you. I say, for example, "She's good looking, but rather quiet," or "He's tall, dark, and handsome." If I do not specify the race of the person so described, is it not culturally appropriate, and expected, for you to assume she or he is white?⁸⁶

B. Race-Neutral Decisionmaking

*Like most kids, I liked to color things with crayons. If you wanted to draw a person with Crayola crayons back then, you used the "Flesh" crayon, a pinkish color that is now labeled "Peach." You could also draw an Indian with one of the red colors, or use a shade of brown, but we knew those weren't really skin colors.*⁸⁷

Transparency casts doubt on the concept of race-neutral decision-making. Facially neutral criteria of decision formulated and applied by whites may be as vulnerable to the transparency phenomenon as is the race of white people itself. This Part suggests that whites should respond to the transparency phenomenon with a deliberate skepticism concerning race neutrality.

At a minimum, transparency counsels that we not accept seemingly neutral criteria of decision at face value. Most whites live and work in settings that are wholly or predominantly white. Thus whites rely on primarily white referents in formulating the norms and expectations that become criteria of decision for white decisionmakers. Given whites' tendency not to be aware of whiteness, it's unlikely that

85. The transparency phenomenon appears across gender and class lines, though its manifestations may vary. Consider the last time a female sales clerk, secretary, or receptionist — someone you consider a functionary — behaved in a manner you found rude or discourteous. Did you attribute her behavior to race if she was black? If she was white?

86. I experienced an example of this phenomenon recently. My life partner and I purchased a house together, but I went alone to provide the necessary information and documents for the loan application; the loan officer was the one who actually filled out the application form. A space was provided at the bottom of the form for the applicants' race. Without asking any race-related questions about me or about my partner, whom he had never seen, the officer checked the designation "Caucasian" for each of us.

One social scientist was so confident of the presumption of whiteness that he incorporated it in his study design. White students were asked to compare a series of job candidates' resumes; researchers found it unnecessary to identify the race of the candidates described by these stimulus resumes. "Pilot testing had shown that white students in the subject population assumed that resumes without pictures described white [candidates]." John B. McConahay, *Modern Racism and Modern Discrimination: The Effects of Race, Racial Attitudes, and Context on Simulated Hiring Decisions*, 9 PERSONALITY & SOC. PSYCHOL. BULL. 551, 553 (1983).

87. Crayola changed the "Flesh" label to "Peach" in 1962. Judith Newmark, *Solving Problem of Too Much Flesh*, ST. LOUIS POST-DISPATCH, Sept. 14, 1992, at D4. However, I don't mean by this story to lend credence to the "things are getting better" conception of race relations. Even without the "Flesh" designation, I think most children, even if nonwhite, still would choose the same or a similar crayon if asked to pick out a skin color.

white decisionmakers do not similarly misidentify as race-neutral personal characteristics, traits, and behaviors that are in fact closely associated with whiteness. The ways in which transparency might infect white decisionmaking are many and varied. Consider the following story.⁸⁸

A predominantly white Nominating Committee is considering the candidacy of a black woman for a seat on the majority white Board of Directors of a national public interest organization. The black candidate is the sole proprietor of a small business that supplies technical computer services to other businesses. She founded the company eleven years ago; it now grosses \$700,000 annually and employs ten people in addition to the owner. The candidate's resume indicates that she dropped out of high school at sixteen. She later obtained a G.E.D. but did not attend college. She was able to open her business in part because of a state program designed to encourage the formation of minority business enterprises.

The candidate's resume also reveals many years of participation at the local and state levels in a variety of civic and public interest organizations, including two that focus on the issues that are of central concern for the national organization that is now considering her. In fact, she came to the Committee's attention because she is considered a leader on those issues in her state.

During the candidate's interview with the Nominating Committee, several white members question the candidate closely about the operation of her business. They seek detailed financial information that the candidate becomes increasingly reluctant to provide. Finally, the questioning turns to her educational background. "Why," one white committee member inquires, "didn't you go to college later, when you were financially able to do so?" "Will you be comfortable on a Board where everyone else has at least a college degree?" another asks. The candidate, perhaps somewhat defensively, responds that she is perfectly able to hold her own with college graduates; she deals with them every day in her line of work. In any event, she says, she does not see that her past educational history is as relevant to the position for which she is being considered as is her present ability to analyze the issues confronting the national organization. Why don't they ask her hypothetical policy questions of the sort the Board regularly addresses if they want to see what she can do?

The interview concludes on a tense note. After some deliberation,

88. This story is based on real events, but some changes have been made for the sake of my analysis.

the Committee forwards the candidate's name to the full Board, but with strong reservations. "We found her to be quite hostile," the Committee reports. "She has a solid history of working on our issue, but she might be a disruptive presence at Board meetings."⁸⁹

At least three elements of the decisionmaking process in this story may have been influenced by the transparency phenomenon. We can examine the first of these only if we assume away the obvious possibility that the intense questioning about the candidate's business might reflect the white members' skepticism concerning this black woman's ability to establish and manage a successful, highly technical small business, which would be an example not of transparency but of stereotyping.⁹⁰ With no such stereotyping at work, the white committee members would presumably question every Board candidate who owns a small business in exactly the same manner they queried the black woman. However, whites and blacks would not necessarily interpret even that questioning in the same way. It's predictable that a black interviewee might take exception to that line of questioning because of the common white stereotype of blacks as not very intelligent; given that the candidate has no prior knowledge of her white interviewers, she might reasonably at least wonder whether the questions arise from that stereotype, even if they in fact do not. A white candidate, on the other hand, would come to the interview without any history of being subjected to that particular stereotype, and so should be expected to respond to the line of questioning with greater equanimity.⁹¹ Transparency — here, the unconscious assumption that all interviewees will, or should, respond to a given line of questioning the way a white candidate (or the interviewers themselves) would respond — may account for the white questioners' inability to anticipate the larger meaning their queries might have for the nonwhite interviewee.

89. I have been asked what the nonwhite members of the Nominating Committee had to say about these events, if there were any present. My response is that it does not matter, because the organization and the Nominating Committee were pursuing white-defined goals and applying white-formulated norms. See *supra* note 21. Assimilation to whites' standards and expectations is a powerful and attractive strategy for survival and success for many nonwhites. Whether or not one regards such choices as "free" given the conditions of white supremacy in which they are made, they *are* choices made under the shadow of white domination. Whites, therefore, should never assume that the participation or acquiescence of nonwhites in a decisionmaking process "neutralizes" the whiteness of the norms being applied. The crucial questions are who formulated the norms in question and under what circumstances.

90. See *supra* notes 26-27 and accompanying text.

91. Of course, some white candidates might be disadvantaged relative to others by their failure to conform to unarticulated class-related expectations. On the ways race and class intersect, see DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1991); Ansley, *supra* note 14, at 1050-58; Calmore, *supra* note 15; Karl E. Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law*, 61 OR. L. REV. 157 (1982).

Second, the white committee members may be imposing white educational norms as well. Anyone smart enough to attend college surely would do so, they might assume. That assumption takes into account neither the realities of the inner city schools this woman attended, nor the personal and cultural influences that caused her to decide to drop out of high school, nor the ways the cost-benefit analysis of a college education might appear different to a black than to a white. This candidate's business success suggests that she made a rational and effective decision to develop her business rather than divide her energies between the business and school. Transparency may blind the white committee members to the whiteness of the educational norms they and their organization appear to take for granted.⁹²

The most troubling and perhaps least obviously race-specific aspect of the story is the ultimate assessment of the black candidate as "hostile." This seemingly neutral adjective is in fact race-specific in this context insofar as it rests on norms and expectations that are themselves race-specific. To characterize the candidate's responses as hostile is to judge them inappropriate. Such a judgment presupposes an unstated norm of appropriate behavior in that setting, one that reflects white experience, priorities, and life strategies. The committee members' expectations did not take into account some of the realities of black life in the United States that form part of the context in which the black candidate operates. The transparency of white experience and the norms that flow from it permitted the Nominating Committee to transmute the appropriate responses of the black candidate into a facially neutral assessment of "hostility."⁹³

At this point one may be tempted to conclude that what is needed is a more reliable technique for distinguishing genuinely race-neutral criteria of decision from those that only appear neutral. The above analyses of the white decisionmakers' failure to recognize white-specific norms might demonstrate only that they — and we — can do better. Perhaps we could use this and similar stories as points of departure for an attempt to correct white misperceptions of white-specific criteria of decision.

Three considerations, however, counsel against attempting to for-

92. I intend this *not* to be an affirmative action story; the black candidate's business experience made her at least as well qualified for the position she sought as would any white candidate's college education. The story is designed to illustrate the link between race and effective life strategies with respect to the acquisition of traditional resume credentials.

93. I find the "hostility" assessment especially troubling because it effectively labels the black candidate as "Other" before she ever takes her seat on the Board of Directors; she is marginalized from the very beginning. On the experience of marginalization, see BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* (1984).

mulate a "rule" that would distinguish transparent from authentically race-neutral criteria of decision. First, the black nominee's story presents only rudimentary examples of transparently white norms. There are doubtless more complex and subtle stories of transparency to be told, for which the task of recognition and analysis would be significantly more difficult. At the same time, white decisionmakers make the relatively simple errors illustrated by this story quite frequently, and some whites will resist or reject (or both) even the analyses I have proffered. Whites as a group lack the experiential foundation necessary even to begin to construct the analytic tools that would ground a comprehensive theory of transparency.

Second, transparency probably attaches more to word usages than to the words themselves. For example, *hostility* may not have a race-laden connotation in every instance in which a white decisionmaker employs it. The context of use — the combination of speaker, audience, decisionmaking process, and purpose — more likely supplies the racial content of the term *hostile* as applied. Thus, a general analysis of transparency might have to be, paradoxically, situation specific, with a concomitant exponential increase in the difficulty of the theoretical project.

Finally, the assumption that we can get better at identifying genuinely race-neutral decisionmaking presupposes that such a thing is possible. However, to repose any confidence in the concept of race neutrality is premature at best, because little supports it other than whites' subjective experience, itself subject to the transparency phenomenon. The available empirical evidence points in the opposite direction. Social scientists' work shows that race nearly always influences the outcomes of discretionary decisionmaking processes, including those in which the decisionmaker relies on criteria thought to be race-neutral.⁹⁴ There is, of course, no conclusive evidence that *no* instances of genuine race neutrality exist, but neither is there conclusive evidence to the contrary. The pervasiveness of the transparency phenomenon militates against an unsupported faith by whites in the reality of race-neutral decisionmaking.

I recommend instead that whites adopt a deliberate and thoroughgoing skepticism regarding the race neutrality of facially neutral criteria of decision. This stance has the potential to improve the distribution across races of goods and power that whites currently control. In addition, skepticism may help to foster the development of

94. See *infra* notes 105-13 and accompanying text.

a positive white racial identity that does not posit whites as superior to blacks.

Operating from a presumption that facially neutral criteria of decision are in fact white-specific may prompt white decisionmakers to engage in the sort of analysis presented earlier, when they would not otherwise have done so. Heightened awareness of formerly overlooked race specificity may, in turn, lead to the formulation of modified criteria of decision that are more attuned to, and more productive of, distributive racial justice. Had the white Nominating Committee members been aware of the race-specific dimensions of their questions concerning the candidate's business enterprise and educational background, they most likely would not have asked those questions. Perhaps they would have gone so far as to adopt the course suggested by the candidate herself — to pose for her hypothetical policy issues, her responses to which likely would have been more revealing of the contributions she would make as a black Board member.

Even when he looks for it, however, the white decisionmaker may not always be able to uncover the hidden racial content of the criteria he employs. In those instances, the skeptical stance may function to promote distributive justice in two different ways. First, the skeptical decisionmaker may opt to temper his judgment with a simultaneous acknowledgment of his uncertainty concerning nonobvious racial specificity. Thus, in the Nominating Committee example, the decisionmakers would have forwarded the nomination with a recommendation something like the following: "We experienced this candidate as somewhat hostile, but we are not sure whether there is some racial element that we do not fully understand influencing our judgment." The impact of whiteness on the final decision may thus be mitigated even in the absence of a complete analysis of transparency. The black candidate is more likely to be accepted by the full Board on a recommendation that does not unequivocally describe her as "hostile." Even assuming she winds up seated on the Board on either scenario, she certainly would be in a better position to have her views heard and fairly considered if she arrived without the unqualified label of hostility attached to her in advance.⁹⁵

Second, white decisionmakers might choose to develop pluralistic criteria of decision as a prophylactic against covert white specificity.

95. While the question whether or not the black nominee will be seated on the Board of Directors clearly is a distributive matter, the "hostility" label is less obviously so. However, the marginalization that is likely to accompany the assessment of her as "hostile" renders the distribution of power implicit in Board membership more illusory than real. In other words, labeling nonwhites as different reinforces existing white norms and thus precludes genuine racial redistribution even when nonwhites gain nominal participation in institutions of power.

In this approach the Committee would allow the nominee to characterize the qualifications, perspective, and experience she would bring to the Board if selected, with whatever emphasis she might choose to place on the fact that she would be a nonwhite member of a predominantly white group. The Committee would then report the candidate's assessment of her qualifications to the full Board and allow that policymaking body to decide whether the organization's ultimate goals might be furthered by the addition of this candidate.⁹⁶ This strategy seeks to minimize the effect of transparently race-specific criteria of decision by substituting, whenever possible, criteria formulated by the nonwhite candidate for criteria constructed by the predominantly white Nominating Committee members.

The skeptical stance may contribute to the development of a positive white racial identity by relativizing white norms. Even whites who do not harbor any conscious or unconscious belief in the superiority of white people participate in the maintenance of white supremacy whenever we impose white norms without acknowledging their whiteness.⁹⁷ Any serious effort to dismantle white supremacy must include measures to dilute the effect of whites' dominant status, which carries with it the power to define as well as to decide. Because the skeptical stance prevents the unthinking imposition of white norms, it encourages white decisionmakers to consider adopting nonwhite ways of doing business, so that the formerly unquestioned white-specific criterion of decision becomes just one option among many. The skeptical stance thus can be instrumental in the development of a relativized white race consciousness, in which the white decisionmaker is conscious of the whiteness and contingency of white norms.

Most white people have no experience of a genuine cultural pluralism, one in which whites' perspectives, behavioral expectations, and values are not taken to be the standard from which all other cultural norms deviate. Whites therefore have no experiential basis for assessing the benefits of participating in a pluralist society so defined. On the assumption that prevailing egalitarian mores preclude white supremacy as a justification for the maintenance of the status quo, adopting the skeptical stance in the interest of exploring cultural pluralism seems the most appropriate course of action for any white person who acknowledges the transparency phenomenon.

96. I don't mean to suggest that passing along a difficult decision is a solution to transparency; the Nominating Committee itself should make the relevant policy decision if that were the role assigned to it in the institutional structure.

97. See *supra* notes 24-29 and accompanying text.

III. A TRANSPARENCY-CONSCIOUS LOOK AT THE DISCRIMINATORY INTENT RULE

The threshold requirement that the constitutional plaintiff prove discriminatory intent operates to draw a sharp distinction between facially neutral but unconsciously race-specific instances of white decisionmaking, on the one hand, and the deliberate use of race, whether overt or covert, on the other; only the latter is constitutionally impermissible. Relying on a distinction among discriminators' states of mind seems a curious strategy for implementing the principle that the use of race as a criterion of decision is what constitutes the constitutional harm,⁹⁸ because the racial criterion is equally present in either case. Indeed, the chosen rule appears more suited to drive the race specificity of white decisionmaking underground — out of whites' awareness — than to eradicate it altogether.⁹⁹ However, the intent requirement might rest on either of two assumptions that, coupled with the perceived institutional costs of heightened scrutiny, provide ostensible justification for the decision to disapprove only the *purposeful* use of race in government decisionmaking. These foundational assumptions are, first, that unconsciously race-specific decisionmaking is relatively rare, or, second, that the conscious use of race as a factor in decisionmaking is more blameworthy than its unconscious use.¹⁰⁰

98. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (citizens' "'personal rights' to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking"); 488 U.S. at 520 (Scalia, J., concurring) (arguing that race discrimination is impermissible even as remedial measure).

99. See Janet W. Schofield, *Causes and Consequences of the Colorblind Perspective*, in PREJUDICE, DISCRIMINATION, AND RACISM 231, 248-50 (John F. Dovidio & Samuel L. Gaertner eds., 1986) (reporting that in integrated school with strong emphasis on colorblind norm, many teachers failed to use biracial or multicultural materials); Aleinikoff, *supra* note 5, at 1080 (arguing that strong colorblindness perpetuates existing white images of blacks); Lawrence, *Unconscious Racism*, *supra* note 15, at 335 (as overtly racist attitudes become culturally unacceptable, the individual must "repress or disguise racist ideas when they seek expression").

100. Throughout this Part I use the terms *unconscious discrimination* and *unconscious race discrimination* to mean the unconscious use of transparently white norms in decisionmaking. Thus, I am not focusing on the aspect of unconscious racism emphasized by Chuck Lawrence, which has more to do with unconscious hostility, stereotyping, or both. See Lawrence, *Unconscious Racism*, *supra* note 15, at 331-39; *supra* notes 26-27 and accompanying text. However, there may be a connection between one form of stereotyping and the transparency phenomenon. Lawrence describes the "cultural stereotype" that assumes that blacks are fit only for certain roles in society (such as musician or athlete), but not others (such as doctor or lawyer). Such a stereotype can lead a decisionmaker — for instance, an employer — to ascribe to white candidates attributes consistent with the cultural stereotype, but not do so with respect to black candidates, when the role in question is associated with whites. Lawrence, *Unconscious Racism*, *supra* note 15, at 343. I describe that process somewhat differently; I think it useful to recognize that the concepts associated with stereotypically white roles themselves come to bear a suppressed white connotation. Thus, for example, *articulate* comes to mean the manner of speaking associated with white professionals; *collegial* denotes the sort of relationship a white person would expect to have with a white colleague. Cf. *id.* at 343.

This Part examines the continued vitality of each of these foundational beliefs once the transparency phenomenon is accepted as descriptive of white race consciousness. I argue that transparency, and the skepticism it engenders regarding race neutrality, undermines each of these possible justifications for the *Davis* rule. The transparency phenomenon counsels skepticism regarding the perceived frequency of race-neutral decisionmaking in much the same way it does with respect to specific examples of facially race-neutral criteria of decision. In addition, the social science literature provides further evidence that unconscious race-specific decisionmaking is in fact relatively common, and the potential impact of transparency upon the research itself strengthens that conclusion. In regard to the relative blameworthiness of conscious and unconscious forms of race discrimination, transparency reveals the undesirable normative consequences of the existing requirement of discriminatory intent, and it suggests that the concept of blameworthiness itself requires reexamination in this context. This Part concludes with a brief discussion of a theoretical alternative to the practice of blaming.

A. *The Belief in the Rarity of Unconscious Race Discrimination*

The Court's decision to adopt a discriminatory intent rule that does not reach unconscious race-specific decisionmaking might rest on a belief that such discrimination does not commonly occur. Such a belief is, perhaps, the natural corollary of whites' widespread faith in the pervasiveness of race-neutrality. This faith, for example, views Klan and other overtly white supremacist attitudes as extreme, perhaps pathological, deviations from the norm of white racial thinking, as if those attitudes can be comprehended in complete isolation from the culture in which they are embedded.¹⁰¹ Similarly, whites tend to adopt the "things are getting better" story of race relations, which allows us to suppose that our unfortunate history of socially approved race discrimination is largely behind us.¹⁰² This nexus of white confidence in race neutrality might dictate that the law should treat the unconscious use of nonobviously race-specific criteria of decision as nothing more than the occasional deviation from the prevailing practice of race-neutral government decisionmaking. From this perspective, given that significant institutional costs are associated with judicial intervention,¹⁰³ unconscious race specificity seems too rare to

101. Cf. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 181-82 (1989) (contending that heterosexual intercourse is legitimated by distinguishing it from rape).

102. See Delgado, *Storytelling*, *supra* note 15, at 2417.

103. These institutional concerns are that any rule that reaches beyond intentional discrimi-

justify heightened review.

The transparency phenomenon provides two arguments against the view that unconscious race specificity is uncommon. At minimum, it counsels that we hesitate to acquiesce in any view that accepts race neutrality at face value, whether as a matter of fact or of frequency of occurrence. Second, transparency supports the stronger, affirmative argument that unconscious race-specific decisionmaking is so common that it is in fact the norm for white decisionmakers.

The belief that race-neutral decisionmaking is relatively common and unconsciously race-specific decisionmaking relatively uncommon stands analytically distinct from the belief that any particular instance of facially neutral decisionmaking is in fact what it seems. Even if the unconscious use of race were extremely rare, whites could still misperceive the true character of every one of the few instances in which race in fact was a factor in the decision. Conversely, the fact that whites frequently are unaware of the white-specific factors that may be used in white decisionmaking does not dictate one conclusion or another regarding the frequency with which such factors actually are employed. This analytic distinction notwithstanding, transparency counsels skepticism with respect to the frequency of race-neutral decisionmaking as well.

Because the transparency phenomenon creates a risk that whites will misapprehend the race-specific nature of apparently race-neutral decisionmaking, it simultaneously creates a risk that we will systematically underestimate the incidence of such decisionmaking. Each circumstance in which we fail to perceive accurately the racial content of our decisions contributes to the overall perception that race neutrality is the more common way of doing business. Thus, even though the conclusion that race specificity is the norm does not necessarily follow from transparency alone, we ought to adopt a healthy skepticism toward, rather than a blind faith in the pervasiveness of, race neutrality if we wish to be able more accurately to assess the role of race in white decisionmaking.¹⁰⁴

nation would engage the courts in too much judicial review, and that it would involve them in a form of economic redistribution. Chuck Lawrence discusses the relation between the "too much intervention" difficulty and substantive constitutional principles in Lawrence, *Unconscious Racism*, *supra* note 15, at 381-86. In short, judicial review is always justified when there is a constitutional value to be vindicated. On the problem of economic redistribution, see *infra* text accompanying notes 225-32.

104. Accordingly, the Supreme Court ought not to rely on the perceived rarity of unconscious discrimination as a justification for the requirement of discriminatory intent. The transparency phenomenon suggests that if the Court desires to adopt the proposition that whites engage in race-neutral decisionmaking more often than not, it should do so only following a careful examination of the facts pertaining to the area of white decisionmaking under consideration. Because no such discussion appears in any Supreme Court disparate impact decision, to the

Transparency also lends support to the stronger position that unconscious race-specific decisionmaking is so common that it is in fact the normal mode of white decisionmaking. This argument rests in part on an analysis of the outcomes of discretionary white decisionmaking. Numerous studies indicate that whites receive more favorable treatment than blacks in virtually every area of social interaction.¹⁰⁵ The weight of the evidence supports the conclusion that race affects whites' discretionary decisionmaking in areas as diverse as hiring and performance evaluations in employment settings;¹⁰⁶ mortgage lending, insurance redlining, and retail bargaining;¹⁰⁷ psychiatric

extent the Court has employed this line of reasoning at all it seems to have done so on the basis of an unexamined faith in race neutrality, one that is unjustified from the perspective of transparency.

105. See, e.g., Jack Citrin et al., *White Reactions to Black Candidates: When Does Race Matter?*, 54 PUB. OPINION Q. 74 (1990) ("[R]acial attitudes were a significant influence on the voting decisions of whites . . ."); Nicholas P. Lovrich, Jr. et al., *The Racial Factor in Nonpartisan Judicial Elections: A Research Note*, 41 W. POL. Q. 807 (1988) ("[R]ace is important in judicial elections . . ."). But see Jane A. Piliavin, *Age, Race, and Sex Similarity to Candidates and Voting Preference*, J. APPLIED SOC. PSYCHOL. 351, 366 (1987) ("[A]geism is . . . a far stronger effect than either racism or sexism.").

106. See Nyla R. Branscombe & Eliot R. Smith, *Gender and Racial Stereotypes in Impression Formation and Social Decision-Making Processes*, 22 SEX ROLES 627, 645 (1990) ("Our results also suggest that stereotypes may have an impact by shaping the criteria used to reach decisions. With minority candidates, more confidence may be desired in order to make a decision, leading to solicitation of additional information."); William G. Doerner et al., *An Analysis of Rater-Ratee Race and Sex Influences Upon Field Training Officer Program Evaluations*, 17 J. CRIM. JUST. 103 (1989) (reporting rater race effects observed in earlier phases of training program; later diminution of effects may be attributed to attrition); Kurt Kraiger & J. Kevin Ford, *A Meta-Analysis of Ratee Race Effects in Performance Ratings*, 70 J. APPLIED PSYCHOL. 56 (1985) (stating that race effects decline as percentage of blacks in workgroup increases); Kathryn M. Neckerman & Joleen Kirschenman, *Hiring Strategies, Racial Bias, and Inner-City Workers*, 38 SOC. PROBS. 433, 445 (1991) ("Our evidence suggests that negative preconceptions and strained race relations both hamper inner-city black workers in the labor market."); David A. Waldman & Bruce J. Avolio, *Race Effects in Performance Evaluations: Controlling for Ability, Education, and Experience*, 76 J. APPLIED PSYCHOL. 897, 899 (1991) ("Results confirmed our prediction that race effects would be obtained for rater race . . .").

107. See Glenn B. Canner et al., *Race, Default Risk and Mortgage Lending: A Study of the FHA and Conventional Loan Markets*, 58 S. ECON. J. 249, 251 (1991) ("[A]fter controlling for household and locational default risk, findings further suggest that minority households are somewhat less likely to obtain conventional financing than whites."); Gregory D. Squires & William Velez, *Insurance Redlining and the Transformation of an Urban Metropolis*, 23 URB. AFF. Q. 63, 63 (1987) ("In analyzing the distribution of homeowners insurance policies, a strong bias in favor of suburban and white neighborhoods and against inner-city and minority communities was found.").

Though not precisely following social scientists' methods, Ian Ayres' study of retail car negotiations illustrates both the effects of race and gender on everyday life and the difficulty of formulating adequate legal remedies. See Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 819 (1991) ("[W]hite males receive significantly better prices than blacks and women.").

diagnoses;¹⁰⁸ responses to patient violence in mental institutions;¹⁰⁹ and virtually every stage in the criminal law process: arrest,¹¹⁰ the decision to charge,¹¹¹ imprisonment,¹¹² and capital sentencing.¹¹³

Studies of the impact of race on white decisionmaking nearly always explain disparate race effects by focusing on negative assessments of, or undesirable outcomes for, nonwhites, rather than positive results for whites. That is, they adopt a conceptual framework in which unconscious race discrimination tends to be associated with bias or stereotyping rather than transparency. At the same time, each of the studies cited above controls the data for race-neutral variables, so that the influence of race on the decisionmaking process can be assessed in isolation from other factors. The transparency phenomenon suggests that the selected independent variables may in fact be transparently white-specific. When they are, race effects, though different in kind from those conceptualized by the researchers, are present after all.¹¹⁴

108. See Harold W. Neighbors et al., *The Influence of Racial Factors on Psychiatric Diagnosis: A Review and Suggestions for Research*, 25 COMMUNITY MENTAL HEALTH J. 301 (1989) (discussing two different and inconsistent assumptions underlying research on observed race differences in psychiatric diagnosis).

109. See Charles F. Bond, Jr. et al., *Responses to Violence in a Psychiatric Setting: The Role of Patient's Race*, 14 PERSONALITY & SOC. PSYCHOL. BULL. 448 (1988) (reporting that white hospital staff restrained violent nonwhite patients four times as often as similarly violent whites).

110. See Douglas A. Smith et al., *Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions*, 75 J. CRIM. L. & CRIMINOLOGY 234 (1984) (stating that police are more responsive to white victims of crime).

111. See Cassia Spohn et al., *The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 CRIMINOLOGY 175, 175 (1987) ("Hispanic males are most likely to be prosecuted fully, followed by black males, Anglo males, and females of all ethnic groups").

112. See George S. Bridges & Robert D. Crutchfield, *Law, Social Standing and Racial Disparities in Imprisonment*, 66 SOC. FORCES 699, 699 (1988) ("Blacks are more likely than whites to be imprisoned in states where the black population is a small percentage of the total population and predominantly urban.").

113. Each of the following studies found significant racial disparities in capital sentencing; all found that imposition of the death penalty was more likely if the victim was white, and some also found it more likely if the offender was black: David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); Sheldon Ekland-Olson, *Structured Discretion, Racial Bias, and the Death Penalty: The First Decade After Furman in Texas*, 69 SOC. SCI. Q. 853 (1988); Thomas J. Keil & Gennaro F. Vito, *Race, Homicide Severity, and Application of the Death Penalty: A Consideration of the Barnett Scale*, 27 CRIMINOLOGY 511 (1989) (Kentucky); M. Dwayne Smith, *Patterns of Discrimination in Assessments of the Death Penalty: The Case of Louisiana*, 15 J. CRIM. JUST. 279 (1987).

Additional literature examining the effect of race on discretionary decisionmaking in the criminal process is collected and discussed in Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988).

114. Researchers sometimes recognize the possible race-dependency of the variables they have posited as race-neutral. See, e.g., Canner et al., *supra* note 107, at 260 (reporting study results that borrower default risk as perceived by the lender has a significant effect on the type of loan obtained by borrower; also acknowledging that lender perceptions may be influenced by racial group data); Waldman & Avolio, *supra* note 106, at 901 (Racial disparities can be ex-

In sum, the social science literature indicates that race impacts most white decisionmaking most of the time, and the researchers' own susceptibility to transparency suggests that unconscious discrimination may be even more prevalent than the studies acknowledge. It follows that faith in the commonality of race-neutral decisionmaking is a component of white race consciousness that lacks any solid empirical support.

B. *The Belief that Conscious Discrimination Is More Blameworthy Than Unconscious Discrimination*

A second foundational belief that might be proffered to justify the line drawn by the discriminatory intent rule is that the conscious use of race-specific criteria of decision is more blameworthy than the unconscious use of race. That view is consistent with the familiar legal principle that conduct intended to cause a specified harmful result is more blameworthy than conduct that causes the same harm inadvertently. In other words, the law commonly recognizes degrees of culpability associated with different states of mind. In the criminal law, for example, the Model Penal Code distinguishes, and ranks hierarchically, four kinds of culpability, based on acts done purposely, knowingly, recklessly, or negligently.¹¹⁵ By analogy, if the harm of race discrimination lies in the use of race as a criterion of decision, the levels-of-culpability model would seem to suggest that the conscious or purposeful use of race as a criterion of decision should be deemed more blameworthy than the unconscious use of race.

In the *Washington v. Davis*¹¹⁶ opinion, the Court implicitly framed the issue as whether a showing of a racially disparate impact would trigger strict scrutiny or rational basis review.¹¹⁷ Thus, adopting the rule that heightened scrutiny would require proof of discriminatory intent meant that government actions reflecting only unconscious race discrimination would enjoy the presumption of constitutionality associated with rational basis review. To whatever extent the constitutional rule is founded on, or is designed to reflect, a conception of

plained as reflecting performance differences, but the latter "could potentially be traced to culturally biased predictive measures and qualitatively disparate life experiences.").

115. MODEL PENAL CODE § 2.02 (1985).

116. 426 U.S. 229 (1976).

117. Very shortly after *Davis* was decided, the Court settled on an intermediate level of scrutiny for sex discrimination cases, a doctrinal development that had been in the works for some time. See *Craig v. Boren*, 429 U.S. 190 (1976); Gerald Gunther, *Foreword: In Search of Evolving Doctrine On a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 34 (1972). Therefore, the option of applying a similar standard of review in disparate impact cases should have been clearly in view. See Kenneth L. Karst & Harold W. Horowitz, *The Bakke Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7, 24 (1979).

moral blameworthiness, the clear implication is that unconscious racism is not merely less blameworthy than its purposeful counterpart, but not blameworthy at all.

Clearly, a legal rule is not dispositive of the moral status of the conduct it proscribes or permits. For example, the "no duty to rescue" rule receives nearly universal criticism for its failure to impose liability for conduct commonly thought to be morally blameworthy.¹¹⁸ On the other hand, legal rules do carry normative messages, more insistently in some contexts than in others.¹¹⁹ We ought to take the normative dimension of the discriminatory intent rule quite seriously for at least two reasons.

First, the Court itself has emphasized the normative dimension of its constitutional liability rules by increasingly crafting "state of mind" requirements reminiscent of the discourse of criminal liability. In addition to the *Washington v. Davis* rule itself, the Court has held that neither an Eighth Amendment nor a Due Process violation may be predicated on negligent conduct alone,¹²⁰ has formulated good faith exceptions to the exclusionary rule and to the constitutional guarantee of a criminal defendant's access to evidence,¹²¹ and has fashioned a qualified immunity doctrine that partially insulates state and federal

118. See, e.g., W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56 (5th ed. 1984) (commenting that the law's refusal to impose an obligation to go to the aid of another who is in danger is "revolting to any moral sense").

119. See generally Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9, 28-30 (1986) (arguing that law can effect change in social beliefs and attitudes).

120. See *Daniels v. Williams*, 474 U.S. 327, 328 (1986) (holding that "the Due Process Clause is simply not implicated" by negligent deprivations of property or liberty); *Davidson v. Cannon*, 474 U.S. 344, 347 (1986); *Estelle v. Gamble*, 429 U.S. 97, 104-06 (1976) ("deliberate indifference" a prerequisite for an Eighth Amendment violation). The Court has left open the possibility that "something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause." *Daniels*, 474 U.S. at 334 n.3.

121. See *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) ("[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."); *United States v. Leon*, 468 U.S. 897 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984) (holding that evidence obtained in reasonable reliance on a search warrant subsequently determined to be invalid should not be excluded).

actors from section 1983¹²² and *Bivens*¹²³ liability.¹²⁴ Even though these requirements of intent or "bad faith" tend to be tested by objective standards,¹²⁵ and therefore are not literally mens rea requirements, the larger message is that there is a culpability element to (some) constitutional violations, which strengthens the analogy to criminal conduct.

Second, whites share no apparent consensus concerning the morality of unconscious race discrimination. Indeed, the transparency phenomenon suggests that no such consensus is attainable at present because unconscious discrimination that takes the form of transparently white-specific criteria of decision is by definition unseen by the white discriminator. Against this background, the manner in which the Court chooses to address unconscious discrimination inevitably will have a powerful normative effect, either to legitimate or to challenge accepted but unexamined white ways of thinking about race. The message that unconscious discrimination, if it exists, is not (very) blameworthy makes less likely that whites will cease to deny the existence of unconscious discrimination.

In eschewing heightened scrutiny for racially disparate effects absent proof of discriminatory intent, the Court sends two messages that operate to legitimate unconscious race discrimination. First, the discriminatory intent rule recreates transparency at the level of constitutional doctrine, for it affords a presumption of race neutrality to facially neutral criteria of decision without regard to the possibility that those criteria in fact reflect white-specific characteristics, attitudes, or experiences. The rule tends to reassure whites that all is well so long as we avoid the conscious use of race-specific bases for

122. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

123. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (creating a cause of action analogous to § 1983 claims applicable to federal officials).

124. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that immunity is to be granted unless federal official "violate[d] clearly established . . . constitutional rights of which a reasonable person would have known"). Though the qualified immunity doctrine is not itself a constitutional rule, it affects de facto whether the individual will be held liable for a constitutional violation.

125. See, e.g., *Leon*, 468 U.S. at 922 ("[T]he officer's reliance on [the warrant] must be objectively reasonable."); *Harlow*, 457 U.S. at 815-17 (holding inquiry into subjective intent not administrable).

decision.¹²⁶

The requirement of discriminatory intent also legitimates unconscious race discrimination by reinforcing a popular white story about progress in race relations. The central theme of this story is that our society has an unfortunate history of race discrimination that is largely behind us. In the past, the story goes, some unenlightened individuals practiced slavery and other forms of overt oppression of black people, but the belief in the inferiority of blacks upon which these practices were premised has almost entirely disappeared today. We, aside from the exceptional few who remain out of step with the times, think of blacks as the equals of whites and thus no longer accept race as a permissible basis for different treatment.¹²⁷ The Court's discriminatory intent rule contributes to this dominant story insofar as it treats as blameworthy the form of race discrimination most common in the past but refuses to regard with suspicion the unconscious discrimination that is at least as significant a cause of the oppression of black people today.¹²⁸

The undesirable normative consequences of a rule that treats conscious race discrimination as more blameworthy than unconscious discrimination should not, however, raise the inference that the better approach would be to treat unconscious racism as equally blameworthy as conscious discrimination. The more fruitful response, I suggest, is to question the practice of blaming itself. Blaming is not an effective, empirically well-founded, or prudent way of addressing the complete range of contemporary manifestations of race discrimination.

126. In fact, the reality may be even worse than just described. One study of modern racism confirmed the hypothesis that ambivalent whites are more likely to behave negatively toward blacks when nonracial values or beliefs can be invoked to explain the negative behavior than they are when no such explanation is readily available. See McConahay, *supra* note 86, at 552, 558. This might mean that the persistence of belief in race-neutral norms actually increases the incidence of behavior by whites that disadvantages blacks.

127. The shift in whites' racial attitudes, however, may be more apparent than real: whites express egalitarian mores that may reflect what is viewed as socially acceptable to a greater extent than what is actually believed. See John F. Dovidio & Samuel L. Gaertner, *Prejudice, Discrimination, and Racism: Historical Trends and Contemporary Approaches*, in PREJUDICE, DISCRIMINATION, AND RACISM, *supra* note 99, at 1, 8-9 (stating that individuals tend to report themselves as less biased than they actually are); Thomas F. Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 RUTGERS L. REV. 673, 688-89 (1985) (arguing that whites comply with new antidiscrimination norms without internalizing them).

128. The components of modern racism include:

(1) rejection of gross stereotypes and blatant discrimination; (2) normative compliance without internalization of new behavioral norms of racial acceptance; (3) emotional ambivalence toward black people . . . and a sense that blacks are currently violating traditional American values; (4) indirect "microaggressions" against blacks which is [sic] expressed in avoidance of face-to-face interaction with blacks and opposition to racial change for ostensibly nonracial reasons; (5) a sense of subjective threat from racial change, and (6) individualistic conceptions of how opportunity and social stratification operate in American society. Pettigrew, *supra* note 127, at 687.

Blaming is an ineffective response to modern discrimination because recognition of the transparency phenomenon complicates the formulation of a coherent policy regarding the blameworthiness of different forms of race discrimination. In a simplified universe of only conscious and unconscious (i.e., transparent) discrimination, there are three plausible approaches to assigning blameworthiness: society might label conscious, but not unconscious, discrimination, blameworthy; label both blameworthy; or label neither blameworthy. Brief reflection reveals that none of these approaches is likely effectively to address contemporary American forms of racial discrimination.

The position implied by the discriminatory intent rule, that conscious discrimination is blameworthy but unconscious discrimination is not, is counterproductive of the ultimate goal of racial justice. Invalidating only conscious racism provides an incentive for whites to repress and deny whatever racist attitudes they in fact harbor. As Chuck Lawrence has explained, psychoanalytic theory posits that individuals respond to conflicts between social norms that condemn racist attitudes and beliefs and their own racist ideas by excluding the latter from conscious recognition.¹²⁹ Thus, norms that label only conscious discrimination as blameworthy may be counterproductive, as they may operate primarily to perpetuate racist attitudes in a relatively intractable form.¹³⁰

To hold both unconscious and conscious race discrimination equally blameworthy is also unlikely to produce desirable consequences. First, blaming individuals for unconsciously held attitudes may produce paralyzing guilt when the racist character of those attitudes comes to light. Furthermore, condemning the individual for matters not within his conscious control seems inconsistent with the very concept of blameworthiness. Finally, assessing blame for what, in effect, nearly every white person does seems equally incongruous.

The final option is to regard both conscious and unconscious race discrimination as morally acceptable. There is merit in the proposition that race neutrality is at least an overblown norm; that race consciousness may not be the overarching evil it often seems to be. But there should be no doubt about the moral status of the end to which race consciousness historically has been directed: white supremacy. To dismiss too easily the immorality of race-conscious decisionmak-

129. See Lawrence, *Unconscious Racism*, *supra* note 15, at 335.

130. In addition, as Kate Bartlett and Jean O'Barr have pointed out, focusing on the more blatant forms of discrimination may create a climate of backlash and denial: "I certainly am not a racist: I would not do these things." Katharine T. Bartlett & Jean O'Barr, *The Chilly Climate on College Campuses: An Expansion of the "Hate Speech" Debate*, 1990 DUKE L.J. 574, 583.

ing, in a framework in which concepts of blame and innocence remain operative, would be to allow the inference that white domination of blacks is an acceptable social outcome.

In addition to exposing the incoherence of policies that emerge when blaming is applied to race discrimination, the transparency phenomenon casts doubt on a fundamental presupposition of that practice: that there exists a nonblameworthy alternative to the conduct for which blame is assessed. To say that either the conscious or unconscious use of race-specific criteria of decision is blameworthy is to suppose that some race-neutral alternative course of action might have been pursued instead.¹³¹ The lesson of transparency, however, is that in all likelihood race is always a factor influencing decisions that affect persons. To label one course of conduct blameworthy when there is no available "innocent" alternative seems simply unjust.

Finally, the Court's use of the notions of blame, violation, and remedy is imprudent because the aura of criminality surrounding these concepts undoubtedly increases the Court's resistance to finding constitutional violations that it might otherwise recognize. The Court understandably hesitates to suggest that another branch of government has engaged in criminal conduct.¹³² In a nonblaming framework, however, courts might become more effective participants in the effort to address and eradicate all forms of race discrimination from government decisionmaking.

The alternative to a discourse of blaming is a discourse of responsi-

131. Another effect of this aspect of blaming is to obscure whites' view of the structural components of contemporary racism. The alternatives are presented as conscious or unconscious race-specific decisionmaking, on the one hand, and race-neutral decisionmaking, on the other; no conceptual framework is evident for recognition of institutional or cultural racism, which are not amenable to the concept of blameworthiness. See Alan Freeman, *Antidiscrimination Law: The View from 1989*, in *THE POLITICS OF LAW*, *supra* note 15, at 121, 125.

132. The Court's insitutional resistance to finding another branch of government guilty of discriminatory intent cannot alone explain the notoriously uneven outcomes in cases in which proving intent was the central issue. The fact that constitutional challengers have been significantly more successful in jury selection, voting, and education cases than in employment and housing discrimination actions, compare *Davis v. Bandemer*, 478 U.S. 109 (1986) (plurality opinion); *Castaneda v. Partida*, 430 U.S. 482 (1977); and *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973) with *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) and *Washington v. Davis*, 426 U.S. 229 (1976), suggests that the Court might be more willing to overcome this resistance when it deems the constitutional value at stake to be relatively uncontroversial. Daniel Ortiz has hypothesized that the flexibility of the intent requirement allows the Court to stand back, by requiring proof of actual discriminatory purpose, when the interests at stake are ones the prevailing ideology leaves to market allocation, while permitting judicial intervention where the goods at issue — interests such as voting, jury participation, and education — ought to be assured to all persons, at least at some minimal level. See Ortiz, *supra* note 51, at 1140-41. This "fundamental interests" explanation of the application of the intent requirement illustrates the way process-theoretical difficulties may be overcome when a perceived consensus exists on a constitutional value commitment. See Lawrence, *Unconscious Racism*, *supra* note 15, at 381-86.

bility. In this model, one takes responsibility for correcting undesirable states of affairs without thereby accepting either blame for, or even a causal connection with, the circumstance that requires correction:

Notice first that to take responsibility for a state of affairs is not to claim responsibility for having caused it. So, for example, if I take responsibility for cleaning up the kitchen I am not thereby admitting to any role in creating the mess; the state of the kitchen may be the consequence of actions quite independent of me. . . .

In taking responsibility a woman chooses to make a commitment about a specific state of affairs.¹³³

The kitchen example is apt for the dimension of fault as well as causation: even if I have had a hand in creating the mess in the kitchen, the blameworthiness *vel non* of my past conduct is not relevant to the commitment to change the existing state of affairs that taking responsibility entails.¹³⁴

Any white decisionmaker can choose to take responsibility for the form of unconscious race discrimination transparency describes by adopting the skeptical stance with respect to facially race-neutral criteria of decision she employs. Deliberate skepticism regarding race neutrality permits the decisionmaker to step outside the framework of blame and guilt that rarely offers more than a choice between legitimation of the status quo and paralysis.¹³⁵ For government decisionmakers and the courts, deliberate skepticism provides an avenue for addressing unconscious discrimination while circumventing the problems of blaming described above. I will argue in Part IV that the Court can, and should, adopt a constitutional rule that requires government decisionmakers to take responsibility for unconscious race discrimination.

IV. A REFORMIST PROPOSAL

The white decisionmaker who takes responsibility for transparency has available a variety of measures that can ameliorate its effects. She can make explicit the whiteness of transparently white norms by labeling herself and her community's existing standards as white whenever

133. JOYCE TREBILCOT, *TAKING RESPONSIBILITY FOR SEXUALITY 2* (1983).

134. Though different in focus, this notion of responsibility intersects with Robin West's description of the concept of responsibility in Havelian liberalism. See Robin West, *Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43 (1990). To the extent that the existing discriminatory intent rule legitimates unconscious discrimination, it undercuts whatever tendency whites might otherwise have to take responsibility for unconscious and structural racism. See *supra* notes 126-28 and accompanying text.

135. See Joan B. Karp, *The Emotional Impact and A Model for Changing Racist Attitudes*, in *IMPACTS OF RACISM ON WHITE AMERICANS*, *supra* note 73, at 87, 89.

possible. She can examine the goals her decisionmaking processes are designed to serve, to see whether they too are effectively white-specific and, if so, whether they can be reconceptualized in a more racially inclusive manner. She can deliberately select rules of decision that do not advantage whites; she can adopt culturally diverse strategies for accomplishing her purposes.¹³⁶ Government decisionmakers too can and should take responsibility for race discrimination by confronting the transparency phenomenon. At bottom, they should do so for the same reason individual white people should: because it is the right thing to do. White people committed to fostering racial justice should expect no less of government — the body that exercises coercive power as the expression of a collective will that is in fact dominantly white — than we do of ourselves.

This Part sets forth a constitutional disparate impact rule designed to address the consequences of the transparency phenomenon as it affects government decisionmaking.¹³⁷ I recognize that not all government actions that arguably violate the Equal Protection Clause are products of transparency, and I emphasize that this proposal does not foreclose finding some government decisions unconstitutional because motivated by racial animus. Other conduct might properly be invalidated because animated by racial stereotyping. Accordingly, the disparate impact rule I propose would be only one piece in a complete equal protection jurisprudence. Borrowing the familiar doctrinal concepts of heightened judicial scrutiny (from existing equal protection jurisprudence) and burdens of production and persuasion (from judicial interpretations of Title VII), the rule aims to reach government decisions that carry racially disparate consequences and would likely not have been adopted but for the transparency phenomenon.

In outline, the proposed rule calls for heightened scrutiny of governmental criteria of decision that have racially disparate effects.¹³⁸

136. For reasons the transparency phenomenon should make obvious, these diverse strategies ideally should be initiated by nonwhites. However, relying on nonwhite input also has implications for the ways whites can take responsibility for structural racism. See *infra* note 179.

137. I don't mean to imply that I think the Supreme Court likely would move from the *Washington v. Davis* rule to this proposed rule at once. I do believe the proposal is adoptable, in the sense that it is consistent with Fourteenth Amendment principles and with what we know, on reflection, about the current forms of the problems it was designed to address. I hope that consideration of the contours of this transparency-conscious disparate impact rule will prompt further discussion of a variety of ways equal protection doctrine might respond to modern racism. See Ansley, *supra* note 14, at 1062, for a discussion of the strategic and consciousness-raising value of doctrinal approaches to reform.

138. Perhaps some government decisions rest on no articulable criteria of decision; if so, they lie beyond the scope of the rule proposed in this article. However, the rule is intended to reach any decision for which criteria *can* be articulated, even if government does not contemporaneously set forth the factors supporting its action. Suppose, for example, government has reached a particular decision not on some principled basis, but purely as the consequence of political pres-

The constitutional challenger bears the burden of persuasion on the question of the existence of racially disparate effects. Once disparate impact is proven, the burden of production shifts to government to articulate the purposes behind the challenged rule of decision. The reviewing court ought to interpret government's purpose(s) in as pluralist a manner as possible, but government has the option of resisting that interpretation in favor of an assimilationist construction of its goals. In that event, government will bear a burden of justification similar to that imposed under traditional intermediate scrutiny. Finally, whether governmental purposes are construed pluralistically or in an assimilationist manner, the constitutional challenger has the obligation to produce alternative means of achieving government's goals. Government must implement the challenger's proposals unless it can demonstrate that those alternatives provide less effective means of implementing its goals than the criteria of decision originally employed.¹³⁹

Section IV.A explicates the rule in greater detail. The remainder of this Part addresses two possible criticisms of the proposed rule: that the rule abandons the colorblindness principle and that it would engage the courts too deeply in economic redistribution. I argue that neither criticism is persuasive. First, colorblindness is not a satisfactory constitutional principle; second, the racially redistributive effects of the proposed rule would be both moderate and appropriate.

A. *A Reformist Disparate Impact Rule*

The thoroughly skeptical white decisionmaker regards all facially neutral criteria of decision as presumptively white-specific; the existence of racially disparate effects only confirms what his skepticism already counsels. Thus, the individual decisionmaker who takes transparency seriously has no need for a rule that treats facially neutral criteria of decision with racially disparate effects differently from facially neutral criteria in general. However, that stance is unworkable as a constitutional rule because it would require heightened judicial scrutiny of virtually every governmental decision. A rule that

sure. Ordinarily, persons disadvantaged by the policy can request, and expect to receive, an accounting of the criteria upon which the decision was (or rationally could have been) based. If no such explanation is possible, then the decision lies outside the scope of the proposed rule (though it likely would be unsupportable politically and might well fail constitutional rational basis review as well). If, as generally will be the case, government is able to articulate reasons for its action, these criteria of decision become the focus of the constitutional analysis described by the proposed rule.

139. Transparently white norms coerce assimilation under the guise of neutrality. As indicated in the text, the rule attempts to combat the assimilationist effects of transparency at both the purpose and means stages of analysis.

requires a showing of disparate effects as a predicate for heightened scrutiny is a satisfactory alternative because it provides for judicial intervention whenever the presumed transparency phenomenon has produced concrete racial consequences.¹⁴⁰

Because it is the issue that triggers heightened scrutiny, the constitutional challenger must have the burden of persuasion on the existence of racially disproportionate effects.¹⁴¹ However, the history of Title VII disparate impact litigation reveals a potential hazard. When courts have interpreted Title VII to place a heavy burden of persuasion on the defense on the issue of business necessity, defendants have attempted to avoid facing that burden by disputing plaintiff's proof of adverse impact.¹⁴² The ensuing evidentiary warfare has been intense and highly technical.¹⁴³ The *Washington v. Davis* rule provides no similar incentive for constitutional defendants to search out ways to contest plaintiffs' factual claims of disparate effects, because plaintiffs

140. Some may argue that the institutional concerns associated with judicial review — perhaps the countermajoritarian difficulty in particular — counsel further limitations on the scope of the proposed rule. However, the nature of the transparency phenomenon cuts in the opposite direction: the skepticism it engenders favors more, rather than less, review. Furthermore, even the processual approach to the problem of judicial review sees it as justified when there is a clear constitutional value to be vindicated. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution . . ."). From this perspective, transparency-conscious judicial review is justified as an expression of a widely shared norm prohibiting race-specific government decisionmaking.

Preoccupation with the institutional problem of judicial review can be debilitating. As Chuck Lawrence has put it, "[T]o give judicial economy priority over the recognition of constitutional injury seems wrong. It is to make a value choice that is no different from the decision to deny that injury recognition altogether." Lawrence, *Unconscious Racism*, *supra* note 15, at 384. Taking transparency seriously mandates overcoming one's initial resistance to expanded judicial review in disparate impact cases.

141. I borrow the concepts of burden of production and burden of persuasion from Title VII; they are defined *supra* note 46. The basic outline of the Title VII disparate impact analysis is set forth *supra* text accompanying notes 46-49.

142. Rutherglen, *supra* note 36, at 1329-31. For a history of the business necessity doctrine, see Pamela L. Perry, *Balancing Equal Employment Opportunities with Employers' Legitimate Discretion: The Business Necessity Response to Disparate Impact Discrimination Under Title VII*, 12 INDUS. REL. L.J. 1 (1990). The Supreme Court placed the burden of persuasion on the question of business necessity on the plaintiff in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989), but was overruled by Congress in the Civil Rights Act of 1991:

An unlawful employment practice based on disparate impact is established under this title only if (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact . . . and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity

Civil Rights Act of 1991, § 105, 42 U.S.C.A. § 2000e-2(k)(1)(A) (West Supp. 1992).

143. See, e.g., DAVID C. BALDUS & JAMES W.L. COLE, *STATISTICAL PROOF OF DISCRIMINATION* (1980); *STATISTICAL METHODS IN DISCRIMINATION LITIGATION* 69-209 (David H. Kaye & Mikel Aickin eds., 1986). For a (mostly) nonstatistical but critical examination of one form of job testing, see Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1157 (1991) (exposing theoretical difficulties underlying testing debates).

already bear the burden of proof of discriminatory intent.¹⁴⁴ However, given a rule that mandates heightened scrutiny upon proof of disproportionate effects alone, the potential for similar litigation strategies is evident.

Accordingly, the proposed rule anticipates the need for evidentiary guidelines concerning proof of adverse effects, and it permits the constitutional challenger to make such a demonstration by relying on a statistical disparity between the racial composition of the group selected by the challenged criteria of decision and that of the general population.¹⁴⁵ This approach differs from that adopted by the

144. As a practical matter, proof of discriminatory intent will be dispositive of disparate impact claims under *Davis*. In theory, proving intent only triggers strict scrutiny, so that it remains possible for government to defend the challenged practice as necessary to serve a compelling state purpose. On reflection, however, it's evident that once plaintiff has met the intent requirement, by showing that a facially neutral practice had been adopted "because of" its racially discriminatory effects, government would hardly be in a position to put forward a compelling justification for the practice. Thus the intent inquiry operates as the sole occasion for the court's examination of governmental purpose, but the examination is conducted with the burden almost entirely on the constitutional challenger. For a hypothesis concerning the instances in which the challenger's "burden of proof" on the issue of intent appears relatively lighter, see Ortiz, *supra* note 51, at 1140-41.

145. Other issues related to proof of adverse effects likely would become as hotly contested as they have been in the Title VII arena. These include the level of statistical significance necessary to establish a disparity, the question whether plaintiff must establish a causal connection between a demonstrated disparity and each of a group of challenged practices, and what is known as the bottom-line defense: whether employer may defend a practice known to have an adverse effect by showing that the outcome of its decisionmaking process, taken as a whole, is not racially disproportionate.

On the question of statistical significance, the proposed rule assumes an approach similar to that employed in Title VII cases. See sources cited *supra* note 143. However, the rule also assumes that resolution of this issue should always lean in plaintiff's direction, on the ground that transparency consciousness is better served by more, rather than less, review. For the same reason, the proposed rule would not require plaintiff to demonstrate that each challenged practice causes a disparate effect. In general, the causation problem will take on a somewhat different form under the proposed rule. See *infra* note 152. For a discussion of the arguments on each side of the Title VII question, see Robert Belton, *Causation In Employment Discrimination*, 34 WAYNE L. REV. 1235, 1291-93 (1988); Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 FORDHAM L. REV. 523, 560-64 (1991).

The bottom-line defense, in which the employer defends a criterion of decision that in isolation produces racially disproportionate effects by pointing to a racially balanced "bottom line" outcome of the decisionmaking process taken as a whole, presents a more difficult question for transparency-conscious review. In the Title VII context, the bottom-line problem has been described as a choice between implementing equality by providing employers an incentive to engage in affirmative action, or by encouraging the use of validated employment criteria. See Martha Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. REV. 305 (1983). Though my proposed rule does not necessarily disapprove explicitly race-conscious action, see *infra* note 182, and so would not reject the bottom-line defense for that reason, the interest in fostering cultural pluralism ultimately counsels scrutiny of any component of a decisionmaking process that can be shown to have a racially disparate effect. Assuming such an effect were the product of a transparently white-specific criterion of decision, the later affirmative measures could benefit only those applicants who had already satisfied the prior white-specific requirement. The racially balanced bottom line would not necessarily represent cultural diversity. Therefore, the proposed rule does not accept the bottom-line defense.

Supreme Court in *Wards Cove Packing Co. v. Atonio*,¹⁴⁶ a Title VII case in which the Court held that plaintiffs must demonstrate adverse impact on the basis of a comparison between the racial composition of the workforce occupying at-issue jobs and that of the "qualified . . . population in the relevant labor market."¹⁴⁷ The difference in techniques of proof reflects the distinction between blame and responsibility. The Supreme Court insisted on the comparatively restrictive labor market approach in part to insulate the employer from liability associated with racial disparities that are not the employer's "fault."¹⁴⁸ This conception of fault, though laden with causal connotations, clearly implicates notions of blameworthiness as well.¹⁴⁹ On the other hand, a rule designed to require government to take responsibility for racial justice regardless of who or what caused a given disparity would afford the constitutional challenger greater latitude on the question of the existence of disparate effects.

Of course, other methods for demonstrating disparate effects are less restrictive than the labor market approach but less expansive than the general population comparison.¹⁵⁰ An intermediate approach arguably might be warranted in the interest of moderating government's burden of justification or in order to regulate access to judicial review, but the rule proposed here declines to address those concerns by increasing the difficulty of plaintiffs' "prima facie case." As I will explain below, government's burden under this proposal would be considerably less than that of compelling justification.¹⁵¹ The fact that

146. 490 U.S. 642 (1989).

147. 490 U.S. at 650 (quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977)). The *Wards Cove* plaintiffs had relied on a comparison between the racial composition of the components of the workforce occupying relatively skilled and nonskilled positions. For a discussion of other, more common alternatives to the labor market comparison, see *infra* note 150.

148. 490 U.S. at 651-52 & n.7 ("If the absence of minorities holding such skilled positions is due to a dearth of qualified nonwhite applicants (for reasons that are not [the employer's] fault), [employer's] selection methods or employment practices cannot be said to have had a 'disparate impact' on nonwhites[.]" but the analysis would be different if employer's actions had deterred nonwhites from applying for those positions.).

149. On the normative dimension of legal attributions of causation, see H.L.A. HART & TONY HONORE, *CAUSATION IN THE LAW* 62-68 (2d ed. 1985).

150. Factors that plaintiffs might use to refine the pool against which they compare the racial composition of a group selected through challenged criteria of decision include geographical and time limitations, relevant skills and qualifications, and the use of census versus applicant-flow data. For a discussion of the alternative methods of proving disparate impact, and their relative merits, see Elaine Shoben, *Defining the Relevant Population in Employment Discrimination Cases*, in *STATISTICAL METHODS IN DISCRIMINATION LITIGATION*, *supra* note 143, at 55; Elaine W. Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII*, 56 TEXAS L. REV. 1, 6-19 (1977) (comparing general population, applicant flow, community composition, and relevant labor market approaches).

151. See *infra* text accompanying note 166.

a challenged criterion of decision could be shown to have racially disparate effects merely by comparing those with the racial composition of the general population is a desirable feature of the proposed rule. Mandating heightened scrutiny in more, rather than fewer, cases plausibly characterized as exhibiting disparate effects is consistent with the skepticism regarding race neutrality that consciousness of the transparency phenomenon impels: If we are to ferret out transparently white-specific criteria of decision, government should bear the task of justification more rather than less frequently.

Once challenger has proved the existence of racially disparate effects,¹⁵² government should have to articulate the purpose or goal the challenged criteria are designed to accomplish. Initially this is simply a burden of production, so that challenger need not guess at government's policies or purposes. However, transparency can infect government's purposes as readily as it can affect chosen means, so the interpretation of government's articulated purpose is critical.

Heightened, transparency-conscious scrutiny of governmental purposes requires the reviewing court to construe those purposes in a manner that does not perpetuate the covert imposition of white norms. One way to avoid the reintroduction of transparency is for courts to interpret government's goals in as culturally pluralist a manner as possible. That is, the reviewing court should inquire whether and to what extent government's articulated goal, viewed at an appropriate level of generality, may be construed to encompass objectives that need not be understood as white-specific. For example, in *Fragante v. City & County of Honolulu*¹⁵³ a Filipino job applicant who achieved the highest score on the applicable civil service examination was rejected for a position as a clerk at the Department of Motor Vehicles because he spoke English with a heavy Filipino accent. Had the case been liti-

152. In Title VII disparate impact cases the plaintiff has to "isolat[e] and identif[y] the specific employment practices that are allegedly responsible for any observed statistical disparities." *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656 (1989) (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988) (O'Connor, J., plurality opinion)). The proposed constitutional disparate impact rule does not impose the same difficulty upon plaintiffs because it requires government to articulate its criteria of decision. The challenger still bears the burden of persuasion on causation but, for the purpose of proving disparate effects, may tailor its identification of relevant populations to the particular decisional criteria articulated by the government.

153. 888 F.2d 591 (9th Cir. 1989). Another case that poses an interesting problem in multiculturalism, transparently white norms, and facially neutral but covertly race-dependent norms is *Rogers v. American Airlines*, 527 F. Supp. 229 (S.D.N.Y. 1981), which upheld the right of an employer to prohibit the wearing of braided hairstyles on the job. Both the criterion of decision — no braided hair — and the asserted purpose — projecting a "conservative, business-like image" — were transparently white. Interestingly, at one point the court analogized the issue to a prohibition against speaking languages other than English in the workplace. See *Rogers*, 527 F. Supp. at 232; *infra* note 177. For an illuminating analysis of *Rogers*, see Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365.

gated as a constitutional challenge to a facially neutral rule requiring clerks to speak "unaccented" English, the government most likely would have identified effective communication with the public as the purpose behind the rule.¹⁵⁴

The transparency of the norm of "unaccented" speech should be obvious. Fragante's speech was perceived as "difficult" by individuals who, consciously or unconsciously, preferred the speech of people with accents more nearly like that of white Americans.¹⁵⁵ This case also illustrates the temptation for government to attempt to justify a transparently white criterion of decision with an equally white-specific purpose. From that perspective, the central problem of the case is the suppressed whiteness of the notion of "effective communication" with the public, government's proffered "legitimate, nondiscriminatory reason."¹⁵⁶

Under the disparate impact analysis proposed here, a reviewing court ought to construe government's purpose, if possible, in a manner that would not advantage whites. That is, the court would have to presume the "public" to be a diverse community and give "effective communication" the broadest possible reading. If the court unconsciously interpreted "effective communication" to mean "effective communication with whites," it would have reintroduced transparency in a manner that would defeat the underlying goals of heightened scrutiny.

On the other hand, government ought to have the option of insist-

154. In fact, Mr. Fragante's was a Title VII case, analyzed by the court of appeals as a disparate treatment claim. That analysis first requires plaintiff to make out a prima facie case of discrimination based on a prohibited characteristic — here, national origin. The court apparently accepted the proposition that accent discrimination is national origin discrimination and assumed, without deciding, that Fragante had satisfied the requirements of a prima facie case of disparate treatment set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Fragante*, 888 F.2d at 595-96. The burden then shifts to defendant to articulate a "legitimate, non-discriminatory reason" for the adverse decision. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). The Department of Motor Vehicles' reason for not selecting Fragante was that his speech was "difficult to understand." *Fragante*, 888 F.2d at 597-98. The court described this as Fragante's "inability to communicate effectively with the public." 888 F.2d at 598. Finally, plaintiff must demonstrate that employer's proffered reason is in fact a pretext for discrimination. *Burdine*, 450 U.S. at 253. Mr. Fragante was unable to prove discriminatory intent. *Fragante*, 888 F.2d at 598. The case probably would not have been resolved differently on a traditional Title VII disparate impact analysis, because the court made clear its view that "defendants were motivated exclusively by reasonable business necessity." 888 F.2d at 598.

155. See Matsuda, *Accent Discrimination*, *supra* note 15, at 1361 & n.121.

156. Not only would at least some nonwhite listeners, namely Filipino speakers of English, have no difficulty at all with Fragante's speech, there is the additional troubling testimony of a linguist that some persons' difficulty in understanding him could be attributed to prejudice against the particular accent he had; any nonprejudiced individual would have no such difficulty. *Id.* at 1337-38. Thus, the nonobvious whiteness of government's purpose in this case might owe in part to white bias in addition to the unthinking imposition of white norms. Whites do not expect to have to learn to understand "low status" speech. *Id.* at 1351-52.

ing on a construction of its purpose that *is* white-specific, when it has good reasons for doing so. On occasion, context may provide a good reason: if, for example, all or nearly all of the persons with whom Mr. Fragante would come into contact were in fact white, government should be permitted to seek "effective communication" with that group, even if its purpose is thus effectively white-specific.¹⁵⁷ However, a rule of general applicability would require a more thorough evaluation of government's goals. Suppose government argued that "effective communication" should be construed in a white-specific manner for the sake of uniformity and that a *white* norm had been adopted because whites are the dominant group in this society.¹⁵⁸ At this stage the reviewing court would revert to a more traditional form of scrutiny, balancing government's interest in uniformity and whiteness against the burden the adoption of a white-specific rule would place on nonwhites. To prevail under this "mid-level" scrutiny, government's chosen purpose must be "important."¹⁵⁹ At minimum, an asserted interest in administrative convenience would not be sufficient.¹⁶⁰

Once the question of purpose has been settled, whether in an assimilationist or a pluralist manner, the burden of production shifts to the challenger¹⁶¹ to introduce means of achieving that purpose that do not disproportionately disadvantage nonwhites.¹⁶² In the *Fragante* sit-

157. However, government clearly could not have made this case on the actual facts of *Fragante*. The Department of Motor Vehicles position in question required contact with a very diverse public. See *id.* at 1335.

158. I hypothesize that government might adopt this rationale because I see the need for uniformity or standardization as government's best case for assimilationism. Similarly, I think that as a general rule the selection of *white* norms is best defended, if at all, on the basis of whites' numerical dominance, though the government may well be able to defend the substance of some white-associated norm independently of its whiteness in specific instances. I am not suggesting, however, that I think government ought to be able successfully to defend an assimilationist purpose with respect to accents in many circumstances.

159. This is the same standard required in sex discrimination cases. See *Craig v. Boren*, 429 U.S. 190, 197 (1976). In the context of a rule of general applicability, government's interest in standardizing accents would not satisfy this test, because the purpose lacks an adequate factual foundation: accent uniformity is unattainable. See *Matsuda, Accent Discrimination*, *supra* note 15, at 1395-96. Furthermore, one's accent is relatively fixed, though the argument from immutability is dangerous. *Id.* at 1400.

160. *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (plurality opinion).

161. Other nonwhite individuals or groups who are adversely affected by the existing decision criteria, or who expect to be disproportionately impacted by the proposed selection criteria, should be entitled to intervene. The court, exercising its equitable powers, would ultimately choose among all criteria proposed by plaintiffs and intervenors that would adequately satisfy government's legitimate objectives. See *infra* text accompanying notes 164-65.

162. A final comparison with Title VII doctrine is in order here. Early on, the Supreme Court said that even if the employer demonstrated that the criteria at issue were job related, the disparate impact plaintiff could still show that other criteria of selection, without similar racially disparate effects, would equally serve the employer's interest. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). Though the Court envisioned the introduction of alternative

uation the challenger might propose one or more functional tests for "effective communication with the public" that would measure, for example, the actual ability of the relevant set of listeners to comprehend Mr. Fragante's speech.¹⁶³ The challenger should be allowed at this stage to propose measures that would operate to the advantage of nonwhite applicants, as well as criteria of selection that would be racially neutral in effect.¹⁶⁴

Finally, government has the burden of persuasion on the question of means. Government must show that challenger's proposed alternative(s) will be less effective in achieving its purpose, as interpreted by the court, than the criteria of decision employed by the government. If government fails to carry its burden here, it will be required to employ challenger's criteria of decision either as a substitute for, or in parallel with, the criteria previously in use.¹⁶⁵ In the abstract, parallel use of alternative criteria of decision would be preferable in cases in which challenger's proposed criteria of selection operate to advantage

means as a method of proving discriminatory intent, see 422 U.S. at 425, commentators have argued that alternatives evidence has other valuable uses. Julia Lamber has made the case that proving less discriminatory alternatives can shed light on the employer's reasons for using challenged job criteria, and on the strength of the relation between those reasons and the selected criteria, as well as bearing on intent should plaintiff pursue a disparate treatment claim at the same time. Julia Lamber, *Alternatives to Challenged Employee Selection Criteria: The Significance of Nonstatistical Evidence in Disparate Impact Cases Under Title VII*, 1985 WIS. L. REV. 1.

Because the rule proposed here emphasizes transparency-conscious forms of purpose and means review, however, the reason for requiring the constitutional challenger to introduce alternative means is somewhat different. This requirement is designed to mitigate the burden imposed on government by a rule that mandates heightened scrutiny in all disparate impact cases. See *infra* note 179 and accompanying text.

163. The "relevant set" of listeners would be determined by the court's construction of the governmental purpose. An assimilationist interpretation would define the relevant group as being completely or essentially white; a pluralist interpretation would envision a more diverse audience. In either case, the challenger would have the opportunity to propose alternative criteria of selection that would effectuate government's goal.

Being clear about the relevant set of listeners is also a critical element of Mari Matsuda's proposed analysis of accent discrimination under Title VII. See Matsuda, *Accent Discrimination*, *supra* note 15, at 1374.

Mr. Fragante almost certainly would have prevailed had his speech been assessed under a functional test of intelligibility. Matsuda has pointed out the central irony of the actual case: no one in the courtroom experienced any apparent difficulty understanding Fragante's speech. *Id.* at 1338 & n.28. She also discusses issues of comprehensibility. *Id.* at 1373-79.

164. One example of an alternative that would advantage nonwhites is provided *infra* text accompanying note 177.

165. The parallel use of distinct criteria of decision should be distinguished from their serial use, or *stacking*. The latter refers to a sequential or combined set of discrete requirements, as would occur, for example, if applicants were required to possess a high school diploma *and* to achieve a specified minimum score on "Test 21." An example of parallel use would be a requirement that applicants have *either* a diploma or a minimum score on the test. In some circumstances, the parallel use of challenger's criterion could be implemented by combining it with the formerly employed selection device. For example, were challenger to propose a second test to be used in parallel with Test 21, the two could be administered as a single instrument and an appropriate minimum score selected.

nonwhites, and substitution would be appropriate if the proffered alternative had racially neutral effects. For example, in the *Fragante* scenario, a functional, actual-ability-to-be-understood test would not systematically advantage nonwhites over whites, and so substitution of that test for the hypothesized requirement of "unaccented" speech would be preferable.

Like the traditional forms of heightened scrutiny employed in equal protection analysis, the disparate impact rule proposed here places increased burdens of justification on government with respect both to its purposes and its means, but the rule does so with special attention to the transparency phenomenon. Thus, where traditional heightened review requires that government's purpose be unusually weighty (and, arguably, that it be contemporaneous with the challenged rule or decision and adequately supported in fact¹⁶⁶), transparency-conscious scrutiny requires government to articulate purposes that are neither overtly nor transparently white-specific. Government may impose norms that are effectively white, but it must announce its choice candidly, and it must bear a substantial burden of justification when it wishes to do so. Traditional heightened scrutiny then demands a sufficiently tight "fit" between government's goal and its chosen means; the proposed rule requires the use of alternative criteria of decision that have no racially disparate impact whenever doing so will not negatively affect government's permissible purposes.

The *Washington v. Davis*¹⁶⁷ facts provide another, more challenging application of the proposed rule.¹⁶⁸ In that case the challenged criterion of decision was "Test 21," a written test of "verbal ability, vocabulary, reading and comprehension." Test 21 had an undisputed disparate racial impact: black applicants failed it at four times the rate

166. See Gunther, *supra* note 117, at 33.

167. 426 U.S. 229 (1976).

168. The *Davis* facts are analyzed here as raising a problem of dialect, while *Fragante* concerned accent discrimination. A dialect is a variant of a language; accent refers to manner of pronunciation. One can speak any dialect in a variety of accents. In particular, the dialect known as standard English can be spoken with a Filipino accent, an African-American accent, or the accent known as "General American." See William R. Van Riper, *General American: An Ambiguity*, in DIALECT AND LANGUAGE VARIATION 123 (Harold B. Allen & Michael D. Linn eds., 1986).

The analysis that follows assumes, for the sake of discussion, that at least some of the unsuccessful *Davis* applicants were more proficient in the dialect known as Black English than in "standard" (White) English. In this respect, I depart from the more common hypothesis that the difficulties experienced by the actual *Davis* plaintiffs had been the result of inferior, segregated education. Black English is a fully developed language, and is described in J.L. DILLARD, *BLACK ENGLISH: ITS HISTORY AND USAGE IN THE UNITED STATES* (1972); GENEVA SMITHERMAN, *TALKIN AND TESTIFYIN: THE LANGUAGE OF BLACK AMERICA* (1977).

My intuition is that there is a difference between accent and dialect here: whites are more willing to tolerate and accommodate (some) accent pluralism than we are dialect variation.

of white applicants.¹⁶⁹ Government's articulated purpose was "modestly to upgrade the communicative abilities of its employees . . . particularly where the job requires special ability to communicate orally and in writing."¹⁷⁰

At the stage of purpose analysis, the reviewing court would begin with the presumption that government had not set out to foster in all its police officers only the "communicative abilities" of white persons, though government could, if it wished, make the case that that was precisely what it had intended.¹⁷¹ The underlying agenda of this sort of purpose review is to require government to clarify its goals, and concomitantly to expose transparently white-specific governmental purposes. If government was seeking officer-candidates able to communicate effectively with a diverse — in Washington, D.C., a majority black — public, a pluralist interpretation of its purpose would be most appropriate.¹⁷² On the other hand, if government was pursuing a degree of language standardization, say with the intent to "professionalize" the police department, it would be evident that "professionalization" had been implicitly defined by reference to white norms, and so further justification of that goal, and of the white language standard it incorporates, would be in order.¹⁷³

Judge Robb, who dissented from the court of appeals decision that held Test 21 unconstitutional, articulated government's best case for language standardization:

[M]odern law enforcement is a highly skilled professional service. In school and thereafter in practice a policeman must learn and understand

169. *Davis v. Washington*, 512 F.2d 956, 959 (D.C. Cir. 1975).

170. *Washington v. Davis*, 426 U.S. at 246.

171. The goal of this presumption against assimilationist interpretations of governmental purposes is to implement the attitude of radical skepticism concerning race neutrality at all levels of governmental decisionmaking, including judicial review.

172. Some police professionals have recognized the potential value of a diverse police force. See, e.g., Terry Eisenberg & James M. Murray, *Selection*, in *POLICE PERSONNEL ADMINISTRATION* 69-70 (O. Glenn Stahl & Richard A. Staufenberger eds., 1974).

173. Historically, education has been the centerpiece of the movement to professionalize the police. George D. Eastman & James A. McCain, *Education, Professionalism, and Law Enforcement in Historical Perspective*, 9 J. POLICE SCI. & ADMIN. 119 (1981). Differing views exist regarding the relation between higher education and police work. Compare, e.g., Daniel J. Bell, *The Police Role and Higher Education*, 7 J. POLICE SCI. & ADMIN. 467 (1979) (approving criminal justice programs in colleges and universities) and Roy R. Roberg, *An Analysis of the Relationships Among Higher Education, Belief Systems, and Job Performance of Patrol Officers*, 6 J. POLICE SCI. & ADMIN. 336 (1978) (arguing that higher education fosters less dogmatic belief systems, which improves job performance) with Lotte E. Feinberg & Arthur S. Pfeffer, "NEOTWY" Meets Plain English: A Case Study of Writing in the NYPD, 10 J. POLICE SCI. & ADMIN. 101 (1982) (arguing that liberal arts writing styles are not suited to police needs) and Jon Miller & Lincoln Fry, *Reexamining Assumptions About Education and Professionalism in Law Enforcement*, 4 J. POLICE SCI. & ADMIN. 187 (1976) (questioning whether education can increase police professionalism). In the context of the *Davis* hypothetical, Test 21 might be viewed as a proxy for educational attainment.

intricate procedures. He must understand a myriad of regulations, statutes and judicial rulings, and he will be called upon to apply them in his daily work. He must be able to present relevant facts in literate, clear and precise reports. When he testifies in court he must be articulate. He cannot achieve these goals unless he has a basic understanding of the English language and the meaning of words and the ability to perceive the import of written sentences.¹⁷⁴

In short, police officers must be able to comprehend and to speak White English because it is the language of law and the courtroom.

Whether language standardization constitutes an "important" government purpose in this context is a close question.¹⁷⁵ Arguably, language standardization in the police force (and in the courts, and government generally) implicates more than mere "administrative convenience." My own sense is that a reviewing court would deem it "important"; if so, it would survive judicial scrutiny under the proposed rule. At issue is the ability of the white majority to govern itself in its own language, and, if there is going to be a limit to cultural pluralism anywhere, it will most likely be located at or near the seat of government. Put somewhat more positively, the majority white government is entitled to require that the officers it engages to enforce the law are able to comprehend its commands.¹⁷⁶

In whatever manner government's purpose is finally construed, challengers may then formulate and propose alternative means of achieving government's goals that they believe will not disadvantage black applicants. If, for example, communication with the (racially mixed) public was the sought-after skill, challengers might come up with a "Test 22" that would measure language skills appropriate to one or more nonwhite segments of the community. They might then propose that all applicants be required to achieve a minimum combined score on Test 21 and "Test 22," or to receive some minimum score on *either* Test.¹⁷⁷

174. *Davis*, 512 F.2d at 966 (Robb, J., dissenting).

175. I imagine it is difficult in large part because of our unfamiliarity with this degree of candor concerning the whiteness of government's aims.

176. I remain troubled by this conclusion, though I think assimilationism in government is probably inevitable. Maybe that's what is troubling. Fran Ansley has commented to me that, at the same time, government has a duty to articulate its commands in ways that are comprehensible to its citizens.

177. For an example of the possible use of a single combined test, see *supra* note 165. In this example, there is likely to be considerable resistance to the suggestion that an applicant could satisfy the language skills requirement solely by demonstrating a proficiency in some dialect other than "standard" English, and the resistance would surely intensify with any suggestion that the alternative criterion at issue might be some foreign language, such as Spanish. In other words, whites would be unlikely to accept a proposal that would certify as qualified candidates who were in fact monolingual in some "nonstandard" dialect of English, such as Black English, or in a language such as Spanish or French. Challengers might be well advised, therefore, to propose a substitute for Test 21 that measured a more colloquial version of "standard" English,

Envisioning pluralist means of implementing a government goal that has been given a monocultural interpretation is more difficult. Perhaps the ingenious challenger could identify some sort of language acquisition test that would select applicants who could be expected to have a relatively easy time acquiring the required skill in "standard" English; but perhaps no such test is available. If none is, heightened scrutiny would have functioned to identify an area of government decisionmaking in which assimilationism is permissible. The increase in candor associated with acknowledging the whiteness of formerly transparent white norms would in itself constitute an advance in race relations.

If challengers propose alternative selection criteria, government must demonstrate that adoption of the proposed alternative to the sole use of Test 21 would impede its search for officers with "upgraded communicative abilities," as construed at the stage of purpose analysis. If it cannot sustain that burden, government must adopt challengers' recommendations. Continued use of Test 21 alone would, under those circumstances, constitute an unjustifiable refusal to take transparency seriously.

The deeper design of the proposed rule is to foster constructive dialogue concerning the necessity and appropriateness of assimilationist governmental purposes and means. The transparency phenomenon means that blacks evaluated under "facially neutral" norms in fact often face a choice between assimilation and exclusion. The proposed rule is intended to counteract the assimilationist force of transparency and to require government to confront the possibility of greater openness to cultural diversity in the formulation of public policy and the exercise of governmental power. At the same time, the constitutional challenger becomes responsible for proposing alternative means of achieving government's articulated goals.¹⁷⁸ This requirement operates to relieve a white-controlled government of some of the burden of diversification; it does not require whites suddenly to be able to envision remedies for a phenomenon that has too often escaped our awareness altogether.¹⁷⁹ Nonwhites who challenge transparently white-

in addition to criteria of decision that would test language proficiency more pluralistically defined.

The white reader who finds it improbable that a black person could be monolingual in Black English is directed to *Martin Luther King Jr. Elementary Sch. Children v. Ann Arbor Sch. Dist. Bd.*, 473 F. Supp. 1371 (E.D. Mich. 1979), in which the court sustained plaintiffs' claim for instructional accommodation of black children who spoke Black English at home.

178. In this proposal, government need not defend its chosen means vis-à-vis any less burdensome approach, but must do so only in regard to challengers' proffered alternatives.

179. There is a danger here of permitting white decisionmakers to evade responsibility for transparency, because the burden is on *challengers* to propose alternatives to facially neutral but

specific governmental criteria of decision must take an active role in reformulating them.¹⁸⁰

B. *The Colorblindness Objection*

The proposed rule clearly abandons the colorblindness principle, which disapproves any use of any race-specific criterion of decision, no matter what the race of the decisionmaker or of the persons respectively advantaged or burdened by that criterion.¹⁸¹ First, the proposed rule is founded on the presumption that facially neutral criteria of decision employed by white decisionmakers are in fact race-specific; the rule at least challenges the assumption of the colorblindness perspective that such a thing as a racially neutral criterion of decision is possible. Second, the rule permits government to take responsibility for disparate racial effects by adopting parallel race-conscious criteria of decision in appropriate instances.¹⁸² Finally, though the proposed rule does resemble colorblindness insofar as it mandates heightened scrutiny in the interest of mitigating the race-based effects of some covertly race-specific criteria of decision, it does so only when those effects flow from transparently white-specific bases of decision. That is, the rule contemplates heightened judicial scrutiny only when facially neutral criteria formulated or deployed by *white* governmental decisionmakers operate to disadvantage *nonwhites*. It is not symmetrical; heightened scrutiny is not appropriate when black governmental decisionmakers

white-specific criteria of decision. White people should not always rely on blacks to explain racism to us. See Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (Or Other -isms)*, 1991 DUKE L.J. 397, 401-08 (discussing problem of whites who want people of color to teach them about racism). Nevertheless, I adopt this reformist proposal primarily for the reason stated in the text: in order to moderate the immediate impact of the rule on whites.

180. The proposed rule also means to effect a modest transfer of power to nonwhites. When they, but not white people, recognize another way of doing things, the proposed rule requires that government implement the alternatives nonwhite challengers submit. In addition, the threat of litigation presumably would provide government decisionmakers an incentive to involve blacks in decisionmaking processes, in a meaningful way, whenever possible. On the value of nonwhite perspectives, see Stephen L. Carter, *When Victims Happen To Be Black*, 97 YALE L.J. 420 (1988); Jerome M. Culp, Jr., *Posner on Duncan Kennedy and Racial Differences: White Authority in the Legal Academy*, 41 DUKE L.J. 1095 (1992); Jerome M. Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39; Matsuda, *Looking to the Bottom*, *supra* note 15.

181. This discussion addresses colorblindness as a constitutional "mediating principle," as described by Fiss, *supra* note 40, at 107-08. Thus, I do not distinguish between a rule that regards racial classifications as presumptively invalid and one that holds them invalid per se.

182. This rule does not contemplate adoption of race-specific criteria of decision in response to transparency. However, in some cases challengers clearly will choose and propose alternatives because of their positive impact on nonwhites. See, for example, "Test 22," discussed *supra* text accompanying note 177.

formulate and apply facially neutral criteria that negatively impact whites.

A transparency-conscious disparate impact rule should not be symmetrical because transparency itself is a white-specific phenomenon. In our society only whites have the social power that renders our point of view perspectiveless, that elevates our expectations to the status of "neutral" norms, and that permits us to see ourselves and our race-specific characteristics as raceless. Assuming there are, or can be, meaningful instances in which nonwhites gain the power to formulate as well as to apply governmental rules of decision, the existence of any disparate negative effect on whites would trigger at minimum an immediate inquiry, by whites, into the possible racial components of such facially neutral rules. Nonwhite decisionmaking never benefits from transparency.

Nevertheless, colorblindness is such a powerful norm that many will see its abandonment as a serious defect of the proposed rule. Further reflection will demonstrate, however, that colorblindness is a highly problematic constitutional principle. Justice Scalia, the strictest adherent to the colorblindness principle currently on the Supreme Court,¹⁸³ staked out his position in the words of Alexander Bickel: "The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society."¹⁸⁴ The remainder of this Part will consider, in turn, the claims that colorblindness is an established constitutional principle, that it is morally self-evident, and that it is instrumental to the attainment of racial justice.

The available evidence suggests that its framers did not understand the Fourteenth Amendment to constitutionalize an abstract colorblindness principle. First, the series of race-conscious Freeman's Bureau Acts adopted in the same period as the Fourteenth Amendment

183. At this writing, no occasion has yet arisen for Justice Souter or Justice Thomas, as members of the Supreme Court, to delineate their precise views on the colorblindness principle. However, one can gain a sense of Justice Thomas' position from *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992) (opinion by Thomas, J.) (holding that preference for women owners in station permit process violates equal protection). Thomas' opinion failed to apply the degree of deference to congressional judgment arguably mandated by *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 563 (1990).

184. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (quoting ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (1975)). Bickel goes on to say: "Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others." BICKEL, *supra*.

supports the conclusion that the framers did not oppose race-conscious legislation *per se*.¹⁸⁵ However, the argument that those measures were directed at aiding the actual victims of prior discrimination dilutes their evidentiary value.¹⁸⁶ The stronger case against the colorblindness interpretation rests, ironically, on the work of Alexander Bickel, who reached the conclusion that the framers did not intend to outlaw segregated public education, antimiscegenation laws, or the exclusion of blacks from jury service and the vote.¹⁸⁷ Bickel concluded that the framers left open the question of giving "greater protection" than the Civil Rights Act of 1866, which for him would have meant extending the prohibition against race-conscious measures, "to be decided another day."¹⁸⁸ The colorblindness principle *has* become entrenched in doctrine, but rather gradually. As a matter of constitutional precedent, it is quite the new arrival on the block.¹⁸⁹

Contemporary commentators saw no unequivocal commitment to colorblindness in *Brown v. Board of Education*,¹⁹⁰ though some argued that the series of *per curiam* decisions that followed it compelled the

185. See Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

186. Laurence H. Tribe, "In What Vision of the Constitution Must the Law be Color-blind?", 20 J. MARSHALL L. REV. 201, 204 n.19 (1986) (attributing this point to the Brief of the United States as Amicus Curiae Supporting Petitioners at 14-15, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986)). The argument set forth in this paragraph generally follows that made by Tribe, *supra*.

187. See Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955). An earlier work by Frank and Munro reached a similar conclusion but stated the point less conclusively. See John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws"*, 50 COLUM. L. REV. 131, 167-68 (1950) (expressing reservations about the conclusion that the framers intended to prohibit segregated schools and describing evidence on question of miscegenation as unclear). Several prominent scholars who, like Bickel, are strong proponents of the colorblindness principle also concede that it cannot be located in the framers' intent. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 14 (1971); Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 21-22; William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 776 (1979).

188. Bickel, *supra* note 187, at 63.

189. Of course, Justice Harlan articulated a colorblindness principle in *Plessy v. Ferguson*, 163 U.S. 537 (1896), but he stated the proposition in dissent. See 163 U.S. at 559 (Harlan, J., dissenting).

190. 347 U.S. 483 (1954). The leading exponents of the view that *Brown* did not enact colorblindness were PAUL G. KAUPER, *FRONTIERS OF CONSTITUTIONAL LIBERTY* 217-19 (1956) ("This decision admitted of a variety of interpretations."), Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 426 (1960) (prohibition of segregation supportable on ground that it disadvantaged black children), and Wechsler, *supra* note 65, at 32 ("The Court did not declare . . . that the fourteenth amendment forbids all racial lines in legislation . . ."). But see, e.g., ALBERT P. BLAUSTEIN & CLARENCE C. FERGUSON, JR., *DESEGREGATION AND THE LAW: THE MEANING AND EFFECT OF THE SCHOOL SEGREGATION CASES* 145 (1957) (concluding that the Court had "declared that all classification by race is unconstitutional *per se*").

conclusion that *Brown* rested on colorblindness after all.¹⁹¹ However, subsequent desegregation decisions cut the other way; they tended to rely on racial balancing as a proxy for desegregation and on occasion suggested that race-conscious measures might be permissible outside the remedial context.¹⁹² Though the Court did adopt one rule embodying the colorblindness perspective in 1976 — the requirement of discriminatory intent¹⁹³ — it declined to do the same in the more controversial context of race-specific affirmative action when opportunities arose in 1974¹⁹⁴ and 1978.¹⁹⁵ The Court did not settle on an explicit doctrine requiring strict scrutiny of all race-specific measures until 1989.¹⁹⁶

191. *Gayle v. Browder*, 352 U.S. 903, *affg. per curiam* 142 F. Supp. 707 (M.D. Ala. 1956) (three-judge court) (buses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955), *vacating per curiam* 223 F.2d 93 (5th Cir. 1955), *overruled by* *McDermott Intl. Inc. v. Wilander*, 498 U.S. 337 (1991) (municipal golf courses); *Mayor of Baltimore v. Dawson*, 350 U.S. 877, *affg. per curiam* 220 F.2d 386 (4th Cir. 1955) (public beaches and bathhouses).

The argument that the *per curiam* decisions compel the inference that *Brown* rested on colorblindness is set forth in some detail in Andreas Auer, *Public School Desegregation and the Color-Blind Constitution*, 27 Sw. L.J. 454, 458-59 (1973). See also KAUPER, *supra* note 190, at 218-19; Van Alstyne, *supra* note 187, at 783; Wechsler, *supra* note 65, at 32.

192. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971); Auer, *supra* note 191, at 468-77 (stating that Court failed to clarify extent of government responsibility for de facto segregation); Freeman, *supra* note 5, at 1099-102 (describing "era of contradiction," in which the Court retained formal adherence to the "perpetrator" perspective while achieving results more consistent with the "victim" perspective); Torres, *supra* note 15, at 1057-58 (arguing that *Swann* and *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973), suggested expansion of a result-oriented approach beyond the realm of Title VII).

193. See *Washington v. Davis*, 426 U.S. 229 (1976). For a discussion of the relation between the intent requirement and colorblindness, see *supra* note 24.

In Alan Freeman's analysis, *Davis* marks the end of what he calls the era of rationalization, in which the implications of earlier "victim" perspective cases were limited and contained. Freeman, *supra* note 131, at 134. My interpretation of the cases is consistent with his on this point, but I emphasize the Court's apparent unwillingness to articulate an *unambiguous* "perpetrator" perspective principle at that time.

Another perspective on the significance, for the Court, of the difference between facially neutral classifications with disparate effects and racially explicit classifications is presented by David Chang, who argues that the two types of legislation ought to be indistinguishable for a true judicial conservative. David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?*, 91 COLUM. L. REV. 790 (1991).

194. See *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (dismissed as moot).

195. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (no majority on constitutional standard). Even absent a majority opinion, *Bakke* was the landmark case on affirmative action for several years. The Court was at least equally badly divided in five other cases that preceded and followed *Bakke*. See *United Jewish Orgs. v. Carey*, 430 U.S. 144 (1977) (fragmented 7-1 decision); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (6-3 decision; two three-member pluralities); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (5-4 decision; only four Justices specifying level of review); *Local 28, Sheet Metal Workers Intl. Assn. v. EEOC*, 478 U.S. 421 (1986) (on constitutional issue, five Justices finding no violation, four without specifying level of review; remaining Justices not reaching constitutional question); *United States v. Paradise*, 480 U.S. 149 (1987) (5-4 decision; no specification of standard of review).

196. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Michael Klarman identifies *McLaughlin v. Florida*, 379 U.S. 184 (1964) and *Loving v. Virginia*, 388 U.S. 1 (1967), as the cases in which the Court first adopted a presumption against the use of racial classifications. See Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L.

The evolution of the role of colorblindness in equal protection discourse is enlightening. Colorblindness was not in itself especially controversial in the early post-*Brown* era. Its significance lay in its potential to resolve the process-theoretical difficulties Wechsler had understood *Brown* to pose.¹⁹⁷ As one might expect, the colorblindness principle became an item of contention in its own right as the debate over affirmative action heated up. However, it shed its ties to process theory at the same time, largely because process theory, as refined by John Ely, found another approach to, and resolution of, the question of affirmative action: strict scrutiny is not appropriate when the white majority decides to favor nonwhites at its own expense.¹⁹⁸ Increasingly, colorblindness was defended in moral and substantive terms, featuring, for example, instrumental arguments that race-conscious measures would ultimately exacerbate racial tensions or that they inevitably stigmatize blacks.¹⁹⁹ This shift in theoretical perspective,

REV. 213, 254-57 (1991). However, these cases can be explained on the same rationale Klarman gives for not reading *Brown* to adopt a racial classification rule: they represent the elevation of interracial marriage "to the level of other fundamental rights with regard to which the Equal Protection Clause forbade racial discrimination." *Id.* at 247. The strict presumption against *all* racial classifications, stated in universal terms, did not command a majority of the Court until *Richmond*.

197. For a description of the process difficulties of *Brown*, see Peller, *supra* note 65; Wechsler, *supra* note 65, at 31-34. Commentators who understood colorblindness as a neutral solution to Wechsler's puzzle include Bork, *supra* note 187, at 14-15, and Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959). The collegial tone of the discussion is exemplified by Charles Black's comment that Pollak's colorblindness interpretation, which was markedly distinct from Black's own approach, seemed to him "a sound alternative ground for the desegregation holdings." Black, *supra* note 190, at 421 n.2.

198. John H. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 727 (1974). Michael Klarman describes this as the "disaggregation" of political process theory and the colorblindness principle. See Klarman, *supra* note 196, at 310-11. The divergence may be explained as a consequence of the evolution of process theory; the emphasis of political process theory on legislative competence removed the need to cling to models of judicial competence such as the colorblindness principle. See *supra* note 65. I am intrigued, however, by the fact that colorblindness, not political process theory, captured the mainstream position on affirmative action. One explanation is offered by Peller, *supra* note 5, at 835-44: colorblindness gained currency in reaction to the threat posed by black nationalism.

199. Opponents of affirmative action who rely, at least in part, on instrumental rationales include Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1321-22 (1986) (arguing that affirmative action leads to political struggle and stigmatizes beneficiaries); Posner, *supra* note 187, at 12 (arguing that affirmative action encourages bigotry); William B. Reynolds, *Individualism v. Group Rights: The Legacy of Brown*, 93 YALE L.J. 995, 1002-03 (1984) (arguing that mandatory busing harms public education); Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race,"* 79 WASH. U. L.Q. 147, 149 (1979) (arguing that affirmative action will require hiring less qualified persons); Van Alstyne, *supra* note 187, at 808 (arguing that affirmative action exacerbates racial tensions).

Instrumental arguments fit more comfortably with distributional conceptions of equality, which provide one basis for advocacy of affirmative action. Representative approaches include Derrick A. Bell, Jr., *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3 (1979); Fiss, *supra* note 40; Freeman, *supra* note 3; Randall Kennedy, *Persuasion*

from the "neutral" to the avowedly substantive, coincided, of course, with the conceptualization of the "innocent" white "victim" of affirmative action.²⁰⁰ One has to rephrase Bickel's famous remark: Whose ox was being gored at the time when colorblindness took center stage in the equality debate?²⁰¹

Turning from the legal to the moral realm, the principal foundation of colorblindness seems to be its enormous intuitive appeal. To "judge a person by the color of his skin" just seems wrong.²⁰² This moral insight may be the visceral rejection of its equally visceral opposite, the tendency of human beings to react negatively to persons of a different color than themselves.²⁰³ However, moral insights are at best problematic sources of constitutional doctrine²⁰⁴ and must in any event be subject to revision in the light of experience.

The colorblindness principle may also appear morally desirable by

and Distrust: A Comment on the Affirmative Action Debate, 99 HARV. L. REV. 1327 (1986); Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986).

200. See Ansley, *supra* note 14, at 1005-23 (describing change in tone of discourse and analyzing the concept of the "innocent" white affirmative action "victim"); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990) (exploring the connection between the rhetoric of innocence and racism).

201. Bickel's comment is reproduced *supra* note 184. Donald Lively contends that the arguments against affirmative action are consistent with a pattern of interpreting the Equal Protection Clause in ways that serve majority interests. Lively, *supra* note 14.

202. "I have a dream that my four little children one day will live in a nation where they will not be judged by the color of their skin, but by the content of their character." CORETTA SCOTT KING, MY LIFE WITH MARTIN LUTHER KING, JR. 239 (1969) (quoting Martin Luther King, Jr., Aug. 28, 1963). Of course, Dr. King's understanding of racism was multifaceted. See Peller, *supra* note 5, at 813-16.

203. Accordingly, the colorblindness principle frequently is treated in legal discourse as self-evident, as in Justice Scalia's *Richmond* opinion. Only one of the four authorities he cites makes any attempt at supporting the colorblindness principle. The authorities and full quotations are as follows: BICKEL, quoted *supra* text accompanying note 184; "Our Constitution is color-blind . . ." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting);

And now that it has become a settled rule of constitutional law that color or race is no badge of inferiority and no test of capacity to participate in the government, we doubt if any distinction whatever, either in right or in privilege, which has color or race for its sole basis, can either be established in the law or enforced where it had been previously established. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1961, 677 (Thomas M. Cooley ed., 1873); "[T]he same securities which one citizen may demand, all others are now entitled to." THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 439 (2d ed. 1871).

Justice Kennedy's analysis is similar: "The moral imperative of racial neutrality is the driving force of the Equal Protection Clause." *Richmond*, 488 U.S. at 518 (Kennedy, J., concurring).

204. Laurence Tribe remarks on the inconsistencies implicit in conservatives' adherence to strict colorblindness: they generally attempt to respect the intent of the Constitution's Framers, they regard judicial alteration of constitutional norms as impermissible, they advocate deference to political majorities when a constitutional provision is unclear, and they are reluctant to have courts fashion new rights. Tribe, *supra* note 186, at 206-07; see also Chang, *supra* note 193, at 800-09 (contending that distinction between disparate impact cases and affirmative action cases is inconsistent with judicial conservatism); Klarman, *supra* note 196, at 314-16 (arguing that the colorblindness approach is difficult to square with the judicial philosophy otherwise espoused by Justices who oppose affirmative action).

virtue of its relation to the liberal value of individual autonomy. Colorblindness often is seen as an expression of individual autonomy, which requires in part that persons not be held responsible or judged for personal characteristics not within their own control.²⁰⁵ Individuals ought to reap the fruits of their own industry, but they ought neither to benefit nor to be disadvantaged because of characteristics like race or gender that are a matter of birth.²⁰⁶

However, colorblindness is at best a paradoxical means of implementing autonomy values. On the one hand, autonomy is not served when the individual is pigeonholed by race; certainly the whole person is much more than the color of her skin.²⁰⁷ On the other hand, individual autonomy ought to include the power of self-definition, the ability to make fundamental value choices and to select life strategies to implement them.²⁰⁸ Such choices are not unbounded; for many indi-

205. Under our Constitution, the government may never act to the detriment of a person solely because of that person's race. The color of a person's skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible interest to government. *Fullilove v. Klutznick*, 448 U.S. 448, 525 (1980) (Stewart, J., dissenting) (footnote omitted); see also Aleinikoff, *supra* note 5, at 1063 (In the colorblind perspective, "[t]o categorize on the basis of race is to miss the individual."); R. Kennedy, *supra* note 3, at 1816 ("[R]acial generalizations . . . derogate from the individuality of persons insofar as their unique characteristics are subsumed in the image of the group to which they are deemed to belong.").

206. See *supra* note 3. Gary Peller describes the liberal rejection of race as a relevant personal characteristic as a function of rationalism: taking race into account reflects the irrationalism of prejudice or bias rather than the accurate perception of the person as an individual, independent of racial group identification. Peller, *supra* note 5, at 768-69. However, his analysis seems to me to lead to the conclusion that the rejection of an individual racial identity is analytically prior to the notion of rationalism: to take race into account is a matter of prejudice only if one already has decided that race is irrelevant to personal identity.

The question whether race is a matter of "individual" or "group" identity bears on doctrinal debates in another way as well. At least since the publication of Owen Fiss' article titled *Groups and the Equal Protection Clause*, cited *supra* note 40, the concept of group identity or group rights has been associated with an antisubordination interpretation of equal protection, and the notion of individual rights has come to serve as a proxy for the colorblindness interpretation. See, for example, the plurality opinion of Justice O'Connor in *Richmond*: "[T]he rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." 488 U.S. at 493 (quoting *Shelley v. Kramer*, 334 U.S. 1, 22 (1948)); see also *Washington v. Davis*, 426 U.S. 229 (1976) (discussed *supra* text accompanying notes 40-41); Reynolds, *supra* note 199, at 996.

There is indeed a necessary connection between the concept of subordination and groups: one cannot be subordinated, in the structural sense, as an individual. The individual's subordinate (or dominant) status is a product of the group(s) of which she is a member. However, this simple reality does not dictate that antisubordination analyses must adopt the concept of "group rights." Furthermore, the equation of colorblindness with the notion of individual rights is simply fallacious. As the discussion in the text should make clear, there is every reason to regard race as a central component of individual identity. See also sources cited *infra* note 208.

207. Note that this view incorporates only the notion of race as skin color; it does not recognize the status, historical, or cultural dimensions of race. For an examination of all four facets of race, see Gotanda, *supra* note 1, at 36-40, 56-59.

208. See Matsuda, *Accent Discrimination*, *supra* note 15, at 1389-92 (arguing that fostering individual autonomy requires acceptance of accent pluralism); see also D. Kennedy, *supra* note 3,

viduals, to be oneself is to share in the cultural values of a community to which one belongs by birth.²⁰⁹ Thus, for example, for many black people embracing blackness as an explicit and positive aspect of personal identity is an essential component in the process of self-definition.²¹⁰

Again, the *Washington v. Davis* facts are illustrative. Some black applicants almost certainly had grown up and continued to live in black neighborhoods in which Black English was the primary spoken dialect, and it was equally likely that some of those would prefer to use that dialect on the job as well. Test 21, however, measured proficiency in "standard" (White) English²¹¹ and likely signaled the intent of the police department to require the use of White English in the workplace. Even the Black English speakers who passed Test 21 must have experienced some loss, or displacement, of self on the job; the unsuccessful test takers essentially were told that they could not occupy the powerful post of police officer if they remained monolingual in Black English.²¹²

Proponents of the existing disparate impact rule appear to believe that individual autonomy is served when decisionmakers "ignore" the race of those affected by their decisions,²¹³ but the transparency phe-

at 722-26, 745-48 (arguing that individuality is not separable from culture); Peller, *supra* note 5, at 794 (stating that the nationalist perspective does not see group identity as opposed to individual freedom); Torres & Milun, *supra* note 15, at 658 (arguing that, if failure to respect cultural grouping limits individual self-determination, result is indefensible on liberal grounds).

209. Of course, the question of self-definition through community membership is multidimensional; two examples will illustrate the point. First, there is the perspective of many lesbians and gay men, who see themselves as having the sexual orientation they do as a matter of choice rather than birth. I imagine that the liberal who agrees with the principle that (some) immutable characteristics are irrelevant to personal identity would want to exclude this form of lesbian and gay self-identity from the category of irrelevance. Perhaps for that reason, civil rights claims of discrimination on the basis of sexual orientation often cast homosexuality as matter of birth, not choice. See Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989).

Second, there is the matter of the degree to which a community's norms are constrained by its oppression; self-defining choices become a most complex phenomenon when resistance to subordination is an essential component of community life. See Regina Austin, *Sapphire Bound*, 1989 WIS. L. REV. 539.

210. See Janet E. Helms, *An Overview of Black Racial Identity Theory*, in BLACK AND WHITE RACIAL IDENTITY, *supra* note 20, at 9.

211. Some examples of the questions included in Test 21 are reproduced *supra* note 31.

212. White outsiders too conceivably could experience some loss of autonomy if required to assimilate to "standard" English. In general, this observation only reinforces the point that assimilationism negatively impacts individual autonomy. However, I would offer a more specific contention as well: for black people, the autonomy costs of assimilationist policies are often race-related.

213. Neil Gotanda describes this as the rule of nonrecognition: race is first noticed, then suppressed, so that it is "not considered" in a decisionmaking process. Gotanda argues that the technique of nonrecognition helps maintain the subordination of nonwhites. See Gotanda, *supra* note 1, at 16-23. In a sense, the *Feeney* rule, which requires that a facially neutral practice have

nomenon, which suggests that colorblindness may operate instead as an opening for the unthinking imposition of white norms and expectations, belies that view. The proposed rule takes a broader view of personal autonomy and takes seriously the centrality of race to many individuals' self-definition.²¹⁴ For those who have to choose between the language, customs, hairstyle, dress, or lifestyle of their own community and a desirable job or other governmental benefit, the autonomy costs of transparently white norms are considerable.²¹⁵

The final category of arguments purporting to support the colorblindness principle may be characterized, loosely, as exemplifying antistatist concerns. Race consciousness — the explicit use of racial classifications as a means of disadvantaging nonwhites — has been the primary vehicle of racial subordination until quite recently.²¹⁶ The ideology of opposition to racial hierarchy evolved in reaction to the specific forms in which racial oppression had manifested itself. Rejecting racial distinctions seemed the natural avenue to reversing that history of oppression and achieving racial justice, especially during the "Second Reconstruction" of the 1950s and 1960s; colorblindness appeared to be the exact antithesis of the form of race consciousness that had been the root cause of racial subordination.²¹⁷ If "color" had marked an individual as inferior, then the refusal to recognize "color" would be the way to elevate him to equal status with whites. In effect, colorblindness became the rule-like proxy for an underlying, historically based antistatist principle.²¹⁸

The problem with the colorblindness principle as a strategy for

been adopted "because of, not merely in spite of," its racially disparate effects, is a doctrinal codification of the rule of nonrecognition. See *Feeney*, 442 U.S. at 278-79.

214. The belief that race is not central to individual identity may be just one more facet of the transparency phenomenon. Whites do not have to self-identify as white, because social institutions assume whiteness. See *supra* text accompanying notes 75-86.

215. Of course, individual autonomy is not an absolute value; it may be constrained when the constraint is substantially related to the accomplishment of important governmental purposes. See *supra* text accompanying notes 175-76.

216. See GILBERT T. STEPHENSON, *RACE DISTINCTIONS IN AMERICAN LAW* 348 (1910) (nearly every state and territory had some race-specific classifications). For a description of the pre-Civil War attitudes of white Americans toward blacks, see WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812* (1968).

217. Peller, *supra* note 5, at 836.

218. What is this but declaring . . . that no discrimination shall be made against [blacks] because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race, — the right to exemption from unfriendly legislation against them distinctively as colored, — exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race. *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1879); see also Aleinikoff, *supra* note 5, at 1076; Freeman, *supra* note 3, at 321; R. Kennedy, *supra* note 199, at 1335-36.

achieving racial justice is that it has not been effective outside the social context in which it arose. Like all rules, colorblindness is both over- and underinclusive with respect to the underlying policy — antisubordination — it is intended to implement.²¹⁹ It is underinclusive because the explicit use of racial classifications is no longer the principal vehicle of racial oppression; structural and institutional racism, of the sort illustrated by the transparency phenomenon, now are the predominant causes of blacks' continued inability to thrive in this society.²²⁰ Colorblindness is overinclusive insofar as it regards the explicit use of racial classifications to advantage blacks as equally blameworthy as the historical use of such classifications to blacks' disadvantage.²²¹ In each respect colorblindness fails to implement racial justice; that it is a failed social policy is evident from the statistics revealing that blacks are scarcely better off today than they were before this ideology took hold in the 1950s and 1960s.²²²

Liberals who wish to implement the goal of racial justice should give up the colorblindness principle in favor of a functional analysis of proposed means of achieving those ends. The proposed rule offers a better prospect for achieving racial equity²²³ because it permits non-whites to engage white-controlled government in a dialogue concerning the scope of government's goals and the range of means that might be effective in attaining them. It requires government to define its goals in ways that do not systematically favor whites, and it also requires government to utilize diverse means of achieving its goals whenever possible. Unlike the inflexible, acontextual, and ahistorical colorblindness principle, the proposed rule offers the opportunity for government to take responsibility for racial justice.²²⁴

219. Frederick Schauer has illustrated the problem of rules and underlying policies with the "no vehicles in the park" hypothetical, which traces its genealogy back to H.L.A. HART, *THE CONCEPT OF LAW* (1961). Assume that one's purpose in excluding vehicles is to reduce noise and air pollution. For any definition of *vehicle*, a strict rule prohibiting any "vehicle" from entering the park is necessarily both over- and underinclusive with respect to the articulated purpose. It is overinclusive as applied to a stationary, nonworking truck placed in the park as a war monument or to an electric golf cart; it is underinclusive with respect to a gasoline-powered generator. Schauer argues that over- and underinclusiveness with respect to purposes is the inevitable price one pays for the predictability of rules. Frederick Schauer, *Formalism*, 97 *YALE L.J.* 509, 524-26, 540-41 (1988). Pat Williams' sausage machine hypothetical provides another perspective on concepts and purposes. WILLIAMS, *supra* note 15, at 107-10.

220. See *supra* notes 105-13 and accompanying text.

221. See the discussion of the affirmative action debate, *supra* notes 197-201 and accompanying text.

222. Some relevant facts are cited *supra* notes 8-13 and accompanying text. The failure of colorblindness is also discussed in the sources cited *supra* note 14.

223. This is not meant to suggest that the ultimate goal should be measured solely in distributional terms. See *infra* note 232.

224. The proposed rule reflects an antisubordinationist interpretation of the Fourteenth Amendment. In this view, the guarantee of equal protection precludes government participation

C. *An Institutional Objection*

The institutional objection to the proposed rule mirrors the final, and for many, most persuasive argument articulated in *Washington v. Davis*:

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.²²⁵

In short, the proposed rule might require the courts to engage in a form of economic redistribution.²²⁶

Of course, the proposed rule would not cut so deeply into the economic status quo as would the alternative rejected by the *Davis* Court: strict scrutiny of all rules with racially disparate effects. Because the proposed rule imposes a lower level of scrutiny on a finding of disproportionate impact, government's burden of justification would be more easily sustained, and thus there would be fewer instances of judicial invalidation with which to be concerned.²²⁷

Nevertheless, the proposed rule does have, and is intended to have,

in the subordination of blacks by whites. The concept of subordination focuses not on intent, nor on an abstract rejection of racial classifications, but on racial hierarchy. It is concerned with issues like stigma, subordinate social status, and the systematic exclusion of blacks from access to intangible and material goods that are more freely available to whites. From the antisubordination perspective, an unbroken line of descent connects the Black Codes to racial apartheid to the transparency phenomenon. Other analyses that adopt some form of antisubordination perspective include LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1514-21 (2d ed. 1988); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); Freeman, *supra* note 5 (the "victim" perspective).

Robin West proposes an alternative interpretation of the Fourteenth Amendment, distinct from either colorblindness or the antisubordination principle, in Robin West, *Toward An Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111 (1991). The "abolitionist" approach emphasizes state protection of individuals against private violence and violation. *Id.* at 129-30. Thus, West argues, under this conception the state has an affirmative obligation to intervene in cases of marital rape and child abuse, for example, and, less plausibly, to provide a minimal level of subsistence. *Id.* at 140-42, 145-46.

225. *Washington v. Davis*, 426 U.S. 229, 248 (1976). The Court adds to the list of facially innocent criteria that might be adversely affected "tests and qualifications for voting, draft deferment, public employment, jury service, and other government-conferred benefits and opportunities . . . ; [s]ales taxes, bail schedules, utility rates, bridge tolls, license fees, and other state-imposed charges." 426 U.S. at 248 n.14 (quoting Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275, 300 (1972)).

226. The quoted passage also alludes to the "too much judicial review" objection, addressed *supra* note 140.

227. The *Washington v. Davis* facts provide an example of an assimilationist purpose that would be upheld against the level of scrutiny applicable under the proposed rule. *See supra* notes 175-76 and accompanying text. The purpose hypothesized there would probably not survive strict scrutiny, however.

some racially redistributive effects. The *Davis* argument points out a core dilemma in liberal egalitarian rhetoric: while we approve and are willing in some respects to foster racial equality, we endorse no similar economic egalitarianism.²²⁸ Thus, because our history of the overt and covert, intentional and thoughtless oppression of blacks by whites has placed the former in a relatively disadvantaged economic position, any attempt at racial reform runs afoul of our at least equally strong resistance to intervention in the existing distribution of economic goods, a resistance that is especially acute when the federal judiciary assumes responsibility to alter the status quo.²²⁹

The solution to the dilemma, I think, is for white people to acknowledge that taking responsibility for race discrimination does and should cost something.²³⁰ Implementing "Test 22" will indeed mean that fewer white officers will be hired onto the D.C. police force; employing criteria of selection that place more blacks in policymaking positions may well mean that government expends funds differently than before and expends relatively less to benefit whites. If the status quo results from a long history of the systematic privileging of whites, as it surely does, then one can only expect that a more racially just society would see a different, and more equal, distribution of societal goods.²³¹

The proposed rule in fact has relatively modest redistributive effects. It does no more than require government not to pursue thoughtlessly goals that advantage whites, and it permits nonwhites to propose inclusive means of accomplishing permissible goals; it does not man-

228. In effect, the mainstream view seems to be that "equal stratification" would achieve racial equality. Alan D. Freeman, *Race and Class: The Dilemma of Liberal Reform*, 90 YALE L.J. 1880, 1895 (1981) (reviewing DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* (2d ed. 1980)). On the weaknesses of this vision, see Ansley, *supra* note 14, at 1048-50.

229. Our cultural resistance to equitable wealth distribution is exacerbated for the judiciary by the "countermajoritarian difficulty," a legacy of process theory. See *supra* note 65. Judges are especially reluctant to engage in redistribution in the absence of a perceived cultural consensus mandating that course of action. However, judges often are prepared to intervene in the political process over the distribution of goods deemed "fundamental" because the label *fundamental* itself signals a significant degree of liberal consensus regarding that right. See Ortiz, *supra* note 51, at 1140-42. In my view, ample cultural justification exists to regard racial equality as an equally fundamental "right."

230. See Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME LAW. 5, 6 (1976) ("[W]hite self interest will prevail over black rights . . ."); Lively, *supra* note 14, at 492 ("Redress of the legacy and reality of racial injustice thus becomes a function of what does not offend the majority . . .").

With respect to the desegregation cases, Mary Dudziak has provided historical documentation to support Bell's descriptive thesis that whites adopt antiracist measures only when self-interest so directs. See Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

231. The Fourteenth Amendment certainly was intended to effect some degree of redistribution relative to the regime created by the Black Codes. The crucial question for white interpreters is how much redistribution we are willing to tolerate.

date absolute distributional equality.²³² It lays some of the burden of formulating more inclusive strategies at the feet of nonwhites, but it requires government to adopt those strategies whenever possible. To that extent, the proposed rule mandates a modest transfer of power as well as a somewhat more racially just distribution of benefits and burdens. We whites should expect no less from any rule that attempts seriously to address the structural racism of which transparency is one manifestation.

CONCLUSION

White people can do better than to continue to impose our beliefs, values, norms, and expectations on black people under the rubric of race neutrality. Recognizing transparency for the defining characteristic of whiteness that it is ought to impel us to a radical skepticism concerning the possibility of race-neutral decisionmaking. Operating from the presumption that facially neutral criteria of decision are in reality race-specific can prompt whites committed to the realization of racial justice to search for and adopt more racially inclusive ways of doing business. In this way, the skeptical stance can be instrumental in the development of a positive white racial identity, one that comprehends whiteness not as *the* (unspoken) racial norm, but as just one racial identity among many.

Whites who wish to see the destruction of racial hierarchy can hold government to the same standards of transparency consciousness. We can and ought to expect the institution designed to be representative of all the people not to contribute to the maintenance of white supremacy. The demand that government decisionmakers take responsibility for race discrimination by adopting the skeptical stance can be embodied in the rejection of the discriminatory intent requirement. A reformed disparate impact rule would prefer pluralist interpretations of government purposes, and it would require implementation through pluralist means whenever possible. Uncovering, naming, and counteracting the unrecognized whiteness of a white-dominated government and of the criteria of decision it employs is a first, crucial step in the realignment of social power that dismantling white supremacy entails.

232. Under this proposal, distributional inequality is permissible whenever government is able to defend an assimilationist purpose or is able to show that proposed pluralist means of accomplishing a permissible purpose would be less effective than existing means.