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OF CULTURAL DETERMINISM AND THE LIMITS OF LAW

*Paul R. Dimond**

*Gene Sperling***

CIVIL RIGHTS: RHETORIC OR REALITY?. By *Thomas Sowell*. New York: William Morrow & Co. 1984. Pp. 164. \$11.95.

According to Thomas Sowell, the civil rights community is possessed by a vision that sees all differences between racial and ethnic groups and the genders in income, prestige, mobility, and residential location as being possibly caused only by two factors: innate inferiority or discrimination. Because notions of innate inferiority have become so morally repugnant, discrimination is seen as the cause of the large gaps between different groups in our society (pp. 15-21).

Sowell rebuts this supposed civil rights "rhetoric" with a dose of harsh social-Darwinist "reality": cultural factors are largely responsible for the inferior and segregated status of blacks in America (pp. 19, 29, 45), and only a rugged intra-group commitment by minority individuals to compete effectively can close the current social and income gaps. For proof of his vision, Sowell cites the relative success of groups that historically have been the objects of discrimination and of charges of innate inferiority, for example, Jews, Japanese and Chinese all over the world, and West Indians in the United States (pp. 26-29, 31, 47, 77-79, 130-31).

Based on his alternative vision, Sowell offers the following points of guidance to a society concerned with social equality:

(1) Affirmative action remedies designed to redress systemic injuries caused by past discrimination are inappropriate because cultural differences explain the relatively inferior status of blacks and women. Female-headed households, especially those headed by black females in urban ghettos, are for Sowell a prime example of how the lower status of a group evolves through cultural factors rather than through discrimination (pp. 48, 74-82).

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(2) Affirmative action benefits primarily those blacks already more advantaged (*e.g.*, credentialed, middle-class blacks, mostly in two-parent households) and makes more disadvantaged blacks (*e.g.*, poor, uncredentialed blacks, predominantly in female-headed households) worse off by securing racially earmarked benefits for the few at the expense of neutral, free market conditions that would aid the many (pp. 51-53, 86-90, 110).

(3) Calls for affirmative action serve to politicize racial and ethnic differences which, in turn, can lead to racial polarization, barbarism, or even genocide by the majority against the minority group seeking racial preferences (pp. 33-35, 90, 118).

(4) Unnamed (except for Andrew Young (p. 139)) civil rights leaders, as well as federal judges, who have cited discrimination as the cause of inferior black status and espoused affirmative action as the remedy, have contributed to a decline in community and personal standards and in family responsibility among many blacks today (pp. 85, 118-20), and to the growing racial intolerance of so many whites (pp. 118-19).¹

(5) Law, political effort, and governmental action are unable to alter cultural patterns (pp. 19-21, 29-33, 48-50, 74).² Sowell's attack on the limits of law and political action runs deep: such action is "neither necessary nor sufficient for economic advancement" (p. 32) and has had an "unpromising record" (p. 35) as a means for raising the incomes of low-income groups; indeed, legal and political action has contributed to "counter-chauvinism" by the dominant groups in society against minorities (pp. 33-34). He argues that many ethnic groups even prospered under diverse regimes of discrimination although, at least as Sowell would have it, immigrant Germans "were notorious for their *non*-participation in politics in colonial Pennsylvania,"³ the Chinese "have studiously avoided politics" (p. 30), and "Jews only belat-

1. Sowell's attempt to blame modern civil rights advocates for white backlash is rather like blaming Frederick Douglass for slavery or W.E.B. DuBois for Jim Crow segregation because they chose to protest such racial subjugation directly. Sowell fears that as long as blacks blame the white majority for their downtrodden status they will be diverted from the task of pulling themselves up. See pp. 85, 118-20. Yet Jesse Jackson's educational excellence program and voter registration drive, as well as his presidential candidacy, illustrate that calls for black self-reliance can be made while challenging whites to confront, rather than rationalize, existing racial inequalities. Dr. Martin Luther King, W.E.B. DuBois, and Frederick Douglass provide other examples of black civil rights advocates who called for self-reliance while at the same time inspiring frontal challenges to discrimination, segregation and slavery. See text at notes 21, 22, 29, 42 *infra*.

2. The debate over the limits of law and the impact of public values and norms on cultural folkways and social inequality has been longstanding. Compare *Plessy v. Ferguson*, 163 U.S. 537 (1896), with *Plessy*, 163 U.S. at 557-60 (Harlan, J., dissenting). See also A. BICKEL, *POLITICS AND THE WARREN COURT* (1965); R. COVER, *JUSTICE ACCUSED* (1975); O. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978); L. FULLER, *THE MORALITY OF LAW* (1969).

3. P. 30 (emphasis in original).

edly sought public office" (p. 31).⁴ For Sowell, "[g]roups that have the skills for other things seldom concentrate on politics" (p. 32).

I. COMPETING VISIONS

Recognition of the causal power of cultural factors in determining inequalities between racial groups and the counterproductive force of affirmative action and civil rights rhetoric is Sowell's cornerstone for hard-headed public policy today. Sowell proposes that *Brown v. Board of Education*⁵ and the Civil Rights Act of 1964⁶ be understood simply as outlawing all forms of invidious discrimination against individuals by mandating strict race neutrality (pp. 37-38). From this perspective, Sowell proclaims that affirmative race-conscious remedies are counter-

4. Sowell's contention that the minority groups that have prospered have generally been apolitical is subject to dispute. Consider a few counterexamples. After using organized protest to combat hotel discrimination against Jews as early as 1877, see L. DAWIDOWICZ, *ON EQUAL TERMS: JEWS IN AMERICA, 1881-1981*, at 40-41 (1980), American Jews "mounted a successful campaign to prohibit discrimination in places of public accommodation in 1913." N. COHEN, *NOT FREE TO DESIST: THE AMERICAN JEWISH COMMITTEE 1906-1966*, at 384 (1972). In Woodrow Wilson's administration, Jews were "thrilled" by the influence of Bernard Baruch, Louis D. Brandeis and Henry Morgenthau. L. FUCHS, *THE POLITICAL BEHAVIOR OF AMERICAN JEWS* 60 (1956). In 1930, Jews were elected governors of New Mexico (Arthur Seligman), Illinois (Henry Horner), and Oregon (Julius Meier), and Franklin D. Roosevelt won the New York governorship with a Jewish running mate, Herbert Lehman. *Id.* at 68-69. And during F.D.R.'s reign, anti-Semitic charges of something like favoritism were made because of the overwhelming political support of Jews for Roosevelt and because of the many Jewish advisors on whom he relied (e.g., Lehman, Morgenthau, Felix Frankfurter, and Anna Rosenberg). *Id.* at 99. According to Lawrence Fuchs, however, "If Jews had not rewarded their friends with votes they would certainly be different from any other group which has ever crossed the American political scene." *Id.* at 60 (emphasis added).

The Japanese have also been politically active. At the turn of the century, for example, they organized "demonstrations and meetings of their own . . . , mak[ing] thousands of speeches and publish[ing] dozens of books and pamphlets" in successfully opposing their inclusion in the 1902 Chinese Exclusion Act. R. DANIELS, *THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION* 23 (1968). When herded into concentration camps on the West Coast, the Japanese challenged such action through what they felt was the most politically feasible alternative: litigation. See *Korematsu v. United States*, 323 U.S. 214 (1944), particularly the 200-page amicus brief filed by the Japanese-American Citizens League. To the degree the Japanese *did* try to keep a low profile politically, it obviously did not prevent racial backlash. See generally P. IRONS, *JUSTICE AT WAR* (1983). From 1950 to 1952, Mike Masoka, the president of the Japanese-American Citizens League, "a powerful and effective lobbyist in the House and Senate," initiated and helped steer through a provision in the 1952 McCarran-Walter Act eliminating some of the discrimination against Japanese-Americans. M. FUKUDA, *LEGAL PROBLEMS OF JAPANESE-AMERICANS* 69-71 (1980).

Sowell also continually refers to the apolitical nature of the Chinese. Pp. 20, 27-30, 33. Like blacks, however, the Chinese have for more than a century coordinated their protest efforts through a carefully designed litigation strategy, of which *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), is only the most prominent result. See also McClain, *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CALIF. L. REV. 529, 567 (1984) ("The enactment of section 16 of the Civil Rights Act of 1870 should be seen as the culmination of a long, patient struggle by the leadership of the mid-nineteenth century Chinese immigrant community to achieve basic civil rights and to secure for themselves the principle of equal treatment under law.").

5. 347 U.S. 483 (1954).

6. Pub. L. No. 88-352, §§ 101 *et seq.*, 78 Stat. 241 (1964).

productive aberrations.⁷

The premise of this view of social reality is that discrimination can best be understood by scrutinizing separately the racial content of each isolated transaction (e.g., securing a house, a job, an education, or a bus seat) without regard to the larger context in which those decisions take place. Discrimination occurs, and personal freedom is denied, only if a particular decisionmaker intentionally imposes racial barriers to an individual exchange. Although some groups and individuals can overcome such barriers solely on the strength of their own drives and because of the limited ability of any authority positively to impose discrimination (pp. 26-29, 31, 47, 77-79, 130-31), Sowell concedes that isolated racial hurdles which exist under the law should nevertheless be stricken for the sake of a color-blind public morality (pp. 37-38).⁸

To one, like Sowell, who insists on the view that civil rights issues arise only in the context of isolated transactions, race-conscious remedies are anathema. Such group remedies sweep far beyond any individual wrongs and, at best, give unjustified advantages to members of the minority group who have suffered no harm, while imposing costs on innocent whites who have done no wrong.⁹ At worst, affirmative

7. See pp. 33-35, 39-42, 61-69, 139.

8. In defining his civil rights "reality" in the contexts of employment, pp. 37-42, 59, and school desegregation, pp. 61-69, Sowell assumes that once an individual is theoretically free to engage in transactions, his civil rights problems as such are over. See p. 139; but see note 9 *infra*. Sowell ignores the possibility that systemic effects of past discrimination may obstruct the formal "free choice" of the individual. See U.S. COMM. ON CIVIL RIGHTS, SOUTHERN SCHOOL DESEGREGATION, 1966-67, at 88 (1967), quoted in *Green v. County School Board*, 391 U.S. 430, 440-41 n.5 (1968) (discussed at note 50 *infra*). Not surprisingly, Sowell is touted by Assistant Attorney General W. Bradford Reynolds in support of the notion that color-blind public morality is the *only* defensible national policy. See W. Reynolds, *The Department of Justice Looks at EEO Enforcement* (Jan. 22, 1982) (text of speech on file at *Michigan Law Review*).

9. Imagine, however, a country in which a color line has been drawn by the white majority, on one side of which whites can live and on the other blacks must reside. Whites maintain signs declaring the racial divide for several generations. An anti-majoritarian court then declares such forced segregation illegal. The white majority responds by taking down the signs and forbidding any affirmative relief on the grounds that (1) the higher law now requires absolute color blindness, (2) no individual is formally subject to racial proscriptions any longer, and (3) current white families are not responsible for the caste restrictions imposed by their forebears on blacks. Although we concede that the reality of discrimination in America has always been considerably more complex, imposing a color-blind standard on a racially skewed gameboard can be understood as freeing in the systemic bias of the prior discrimination, thereby allowing it to continue to work against the current members of the racial minority. See, e.g., *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971); *North Carolina Bd. of Educ. v. Swann*, 402 U.S. 43, 46 (1971); *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., separate opinion); Marshall, *A Comment on the Nondiscrimination Principle in a "Nation of Minorities,"* 93 YALE L.J. 1006, 1006 (1984) (discussing the inappropriateness of applying an "ideal society" principle of "color-blindness" in a society "still permeated by racial discrimination and . . . by the traces of racial oppression").

While the exact relationship between such a caste system and economic and career opportunities cannot be calibrated precisely, neither can the reality of some causal nexus be dismissed. *Bakke*, 438 U.S. at 395-96 (Marshall, J., separate opinion). One can only speculate on how many life chances are denied and networks of opportunity foreclosed to minority children confined to urban and rural ghettos as compared to their white counterparts. See Carter, *The Freedom Train Has Lost Its Momentum*, Wall St. J., June 21, 1984, at 35, col. 6 ("Ask any black youngster

action and school busing, for example, serve to rekindle the racialism that leads to backlash as newly aggrieved whites strike back.

There is, however, a different vision of social reality, one which is neither so simplistic as Sowell's caricature of civil rights rhetoric nor as narrow as Sowell's own view. Under this view, individual transactions are seen as taking place in the context of larger markets and social spheres that have been shaped by a variety of factors that are subject to some influence, for good or ill, by public action and concerted private effort. Although causal connections are neither simple nor capable of precise delineation, there remains real concern that institutional bias and systemic discrimination have left enduring barriers that continue to obstruct the opportunities of members of historically victimized groups.

The recognition that such caste wrong persists does not lead one who holds this view to attribute all current disparities directly to historic grievances. Neither does it absolve individual members of minority groups from taking personal responsibility for their own fates. But this approach does not permit causal uncertainty and complexity to be used as rationalizations for excusing the historic majority from confronting the continuing legacy of racial discrimination. This anti-caste view recognizes that all individuals have a basic right to be free from any systemic headwinds of lingering discrimination, while society as a whole has an obligation to assist members of historic outgroups to join the mainstream.¹⁰ There may be transactional costs, inefficiencies and dislocations along the way, but something more than a micro-level zero-sum game is at stake: Making room at the top does not necessarily require a free fall at the bottom.¹¹ Such a reconstruction process requires all of the institutions in our democracy — and the people — to consider diverse remedies and programs that do something more than just declare proven discrimination unlawful.¹²

in any city whether he and his friends have anything in common with their white contemporaries in the suburbs, and you'll be lucky if he only laughs in your face. They might as well be living on different planets, and the gulf is growing.").

10. See generally Dimond, *The Anti-Caste Principle*, 30 WAYNE L. REV. 1 (1983).

11. For example, the conflict between protecting seniority status and protecting affirmative action plans can be alleviated by choosing not to lay off anyone or by implementing work sharing plans. See Summers & Love, *Work Sharing as an Alternative to Layoffs by Seniority: Title VII Remedies in Recession*, 124 U. PA. L. REV. 893 (1976). In *Firefighters Local 1784 v. Stotts*, 104 S. Ct. 2576 (1984), however, the Supreme Court decided in favor of seniority, see note 53 *infra*, and ignored the fact that "[t]he preliminary injunction did not require the city to lay off any white employees at all. In fact, several parties interested in the suit, including the union, attempted to persuade the city to avoid layoffs entirely by reducing the working hours of all fire department employees." 104 S. Ct. at 2602 (Blackmun, J., dissenting).

12. In traditional, two-tier equal protection review, race is seen *prima facie* as an irrational basis on which to exclude minority persons from neighborhoods, schools, work places, benefit programs, and the front of the bus; strict scrutiny has been applied to such suspect classifications. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944); *McLaughlin v. Florida*, 379 U.S. 184 (1964). Although neither of us believes that a two-tier approach should be the central focus of judicial review of race cases, see, e.g., Dimond, *supra* note 10, at 7-8 n.19, race-conscious reme-

II. HISTORICAL REFRAINS AND CONTEMPORARY CHOICES

For societies, as well as individuals, it often seems easier to wish away rather than confront the painful vestiges of past wrongdoing. It is not easy to face the dilemmas of causal uncertainty and the dislocations inherent in overcoming caste barriers. It is easier, and often more popular, either to posit a clean slate or to wring one's hands over the limited effectiveness and counterproductivity of specific remedies or of governmental reform in general. Sowell's rhetoric combines all of these rationalizations:

[T]he crusade for civil rights ended years ago. [P. 117.]

[T]he battle for civil rights was won, decisively, two decades ago. [P. 139.]

The scramble for special privilege, for turf, and for image is what continues today under [the "civil rights"] banner. [P. 117.]

[T]he mindset [*i.e.*, viewing discrimination as the cause of social and economic disparities and segregation between groups] and agenda of the past [*i.e.*, overcoming the effects of past discrimination] are no longer working. [P. 139.]

Of course, when discrimination is viewed from the narrower perspective of isolated transactions without regard to the larger social context, it is even easier to argue that outlawing particular racial wrongs affords complete relief. For example, the claim that affirmative action legislation to protect blacks is not appropriate was heard during the abolition of slavery just as it is today during the process of dismantling caste discrimination.¹³ It is therefore hardly surprising that rhetoric and "reality" similar to that espoused by Sowell were embraced as national public policy at another time in our history — the period from 1883 to 1896, when the Supreme Court marked the end of the first Reconstruction. In the *Civil Rights Cases*,¹⁴ for example, the Court held that Congress lacked power to outlaw racial exclusion and segregation in inns, theaters, public conveyances and other public accommodations by declaring that, at least as of 1883, the freedman had "take[n] the rank of mere citizen, and cease[d] to be the

dies can be understood as a rational approach to tearing down caste barriers and to overcoming their enduring effects. If caste discrimination aimed at subjugating a particular minority group has succeeded in inflicting any such systemic injury, group remedies are tailored to fit the group wrong. Such rational remedial responses, however, are a far cry from any claim to group rights. See Dimond, *supra* note 10, at 6-10.

13. For example, in 1864 such claims were made by a member of the American Freedman's Inquiry Commission: "The [N]egro does best when let alone We must beware of all attempts to prolong his servitude, even under pretext of caring for him. The white man has tried taking care of the [N]egro by slavery, by apprenticeship, by colonization, and has failed disastrously in all; now let the [N]egro try to take care of himself." *Quoted in* D. DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 177 (1970). Senator James W. Grimes echoed this sentiment during early debates on the Freedmen's Bureau: "Are they free men, or are they not? If they are free men, why not let them stand as free men . . . ?" CONG. GLOBE, 38th Cong., 1st Sess. 2972 (1864).

14. 109 U.S. 3 (1883)

special favorite of the laws.”¹⁵ After all, ran the argument, the Civil War Amendments, the earlier Civil Rights Acts, and the Freedmen’s Bureau had long since abolished slavery and attempted to provide something more than formal equality under the law to the former slaves. With “the aid of [such] beneficent legislation,” wrote Justice Bradley for the Court, the freedmen surely had “shaken off the inseparable concomitants of [the] state” of slavery.¹⁶ In the absence of a clearly identifiable act of discrimination or other default by a particular State, the Court rejected Solicitor General Phillips’ argument that the 1875 Civil Rights Act, “considering what must be the social tendency in at least large parts of the country,” represented “appropriate legislation” by Congress under the enforcement sections of the Civil War Amendments.¹⁷

In *Plessy v. Ferguson*,¹⁸ the Supreme Court placed its imprimatur on Jim Crow caste legislation and behavior for decades to come by upholding state imposition of segregation. The grounds offered by the Court in support of this outrage presage Sowell’s current rationalizations: law “is powerless to eradicate racial instincts . . . , and the attempt to do so can only result in accentuating the difficulties of the present situation. . . . If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.”¹⁹

Thomas Sowell’s vision for today also echoes other voices that

15. 109 U.S. at 25.

16. 109 U.S. at 25.

17. 109 U.S. at 7 (summary of Sol. Gen. Brief). *But see* 109 U.S. at 14, 17 (discussed in Dimond, *supra* note 10, at 17 & n.45). Justice Harlan’s retort to the majority’s sophistry was direct: “The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens. . . . At every step in this direction, the nation has been confronted with class tyranny [against blacks].” 109 U.S. at 61-62.

18. 163 U.S. 537 (1896).

19. 163 U.S. at 551-52. The Court added, if “the enforced separation of the two races stamps the colored race with a badge of inferiority . . . , it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.” 163 U.S. at 551. In his dissent, Harlan rejoined: “Every one knows that the statute in question had its origin in the purpose . . . to exclude colored people from coaches occupied by or assigned to white persons. . . . [Such] enactments . . . proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens.” 163 U.S. at 557, 560. Harlan added, of course, the now famous quotation, “Our Constitution is color-blind” 163 U.S. at 559. Read in its full context, however, Harlan’s notion resembles more an anti-caste than simply a race-neutral standard of judicial review: “[T]here is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among its citizens.” 163 U.S. at 559. And in his dissent in the *Civil Rights Cases*, 109 U.S. 3, 62 (1883), Harlan had said, “If the constitutional amendments be enforced, . . . there cannot be, in this republic, any class of human beings in practical subjection to another class”

In addition to Sowell, pp. 39-42, others use similar statements made by the proponents of the 1964 Civil Rights Act some 68 years later to support the concept of “colorblindness.” *See, e.g., Reynolds, Individualism v. Group Rights: The Legacy of Brown*, 93 YALE L.J. 995, 999-1000 (1984). In 1964 as in 1896, however, “colorblindness” meant primarily one thing in contemporaneous context to civil rights advocates — ending caste subjugation of blacks. Thus, these pleas

served to rationalize the end of the first Reconstruction. In arguing that cultural drive and individual initiative must substitute for political action and race-conscious calls for redress, Sowell offers a prescription similar to that advocated by Booker T. Washington in 1895 for curing "the Negro problem":

It is at the bottom of life we must begin, and not at the top

. . . In all things that are purely social we can be as separate as the fingers, yet one as the hand in all things essential to mutual progress.

. . . .

The wisest among my race understand that the agitation of questions of social equality is the extremest folly, and that progress in the enjoyment of all the privileges that will come to us must be the result of severe and constant struggle rather than of artificial forcing.²⁰

Responding to Washington's plea "that black people give up . . . political power [and] insistence on civil rights," W.E.B. DuBois reminded that the "result of this tender of the palm-branch . . . has been . . . the disfranchisement of the Negro [and] the legal creation of a distinct status of civil inferiority for the Negro."²¹ DuBois then offered an alternative call:

[T]he problem of the twentieth century is the problem of the color line.

. . . .

. . . [T]he Negro is in danger of being reduced to semi-slavery

. . . .

. . . [T]he hands of none of us are clean if we bend not our energies to righting these great wrongs.²²

With the glacial progress following his calls to confront the color line directly, DuBois later came to argue for black self-reliance and economic self-sufficiency, but never on the grounds that the color line had been eliminated or Jim Crow subjugation by the white majority overcome.²³

for "colorblindness" can be understood more broadly as a call to halt the invidious use of skin color to exclude minority persons from the mainstream of national life.

20. 3 THE BOOKER T. WASHINGTON PAPERS 584-86 (L. Harlan ed. 1974). The sort of compromise Washington espoused, of course, served to reinforce the dominant white majority's understanding. Compare W.E.B. DuBois, *THE SOULS OF BLACK FOLK* 42-44 (1961), with *Plessy*, 163 U.S. at 551-52 (quoted in text at note 19 *supra*), and W. SMITH, *THE COLOR LINE* (1905), and W. SUMNER, *FOLKWAYS* 77-78 (1940). Indeed, Washington likely borrowed the "separate as fingers" analogy from the author of another post-Reconstruction "compromise," Rutherford B. Hayes. When Washington was teaching at the Hampton Institute in May 1880, ex-President Hayes delivered an address there in which he said:

We would not undertake to violate the laws of nature, we do not wish to change the purpose of God in making these differences of nature. We are willing to have these elements of our population separate as the fingers are, but we require to see them united for every good work, for national defense, one, as the hand. And that good work Hampton is doing.

3 THE BOOKER T. WASHINGTON PAPERS, *supra*, at 582-83 n.9.

21. W.E.B. DuBois, *supra* note 20, at 48-49.

22. *Id.* at 23, 52-53.

23. See, e.g., W.E.B. DuBois, *THE AUTOBIOGRAPHY OF W.E.B. DuBois* (1968); W.E.B. DuBois, *DUSK OF DAWN* (1940).

Despite warnings by many to proceed more cautiously, Dr. Martin Luther King continued to answer the call of DuBois three score years later by leading nonviolent protests. Those protests were met by the violent "counter-chauvinism" (pp. 33-34) of whites, for example Bull Connor's vicious dogs, clubs, and hoses in Birmingham, Alabama.²⁴ The results of such concerted political confrontation by blacks with the white majority's color line include the 1964 Civil Rights Act and the Voting Rights Act of 1965.²⁵ Today we face the choice whether to continue the reconstruction process started by the modern civil rights movement or, as Washington advised before, to denigrate direct challenges to discrimination.

Sowell's rhetoric, in sum, provides a haunting refrain to that which marked the end of the first Reconstruction a century ago. It is not too much to ask that the nation pause to consider the awful consequences of accepting the rationalizations which ended the first Reconstruction before embracing Sowell's similar vision of reality today to finish the second.²⁶

III. STRAW MEN

Sowell, of course, has a ready-made response to this comparison of his rhetoric with that of the post-Reconstruction era — a personal and sometimes openly bitter epilogue (pp. 123-40) which seeks to characterize criticism of his analysis as merely the toppling of "straw man" views that Sowell has never advocated, or as "blind mudslinging" by Joe McCarthy-type slanderers.

While Sowell thus seeks to proclaim "The Degeneration of Racial Controversy" (p. 123), an examination of his own work in this book

24. See M.L. KING, *WHY WE CAN'T WAIT* (1963) (Birmingham protest); see also M.L. KING, *STRIDE TOWARD FREEDOM* (1962) (Montgomery bus boycott).

25. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1973-1973p (1982)).

Economic boycotts directed against employers also contributed to breaking the whites-only color bar in public and private employment. See generally M.L. KING, *WHY WE CAN'T WAIT*, *supra* note 24, at 105-06; H. SITKOFF, *THE STRUGGLE FOR BLACK EQUALITY, 1954-1980*, at 146, 149 (1981). Now that the Supreme Court has provided broad first amendment protection for such direct action in the economic arena, see *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), it remains to be seen the extent to which such concerted pressure will be able to contribute more generally to the economic advancement of minority Americans.

26. Commenting on criticisms about his Atlanta Exposition address, Washington expressed a view in 1901 quite similar to Sowell's view in 1984:

My own belief is . . . that the time will come when the Negro in the South will be accorded all the political rights . . . entitled to him. I think, though, that the opportunity to freely exercise such political rights will not come in any large degree through outside or artificial forcing, but will be accorded to the Negro by the Southern white people themselves
BOOKER T. WASHINGTON AND HIS CRITICS 30 (H. Hawkins ed. 1974). Compare Sowell: "[P]olitics has special disadvantages for ethnic minority groups [C]hauvinism almost invariably provokes counter-chauvinism." P. 32. For an analysis of how the Washington/Sowell strategy fared after the first Reconstruction, see C. WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1974).

reveals that it is Sowell himself who prefers to do battle with straw men. Five examples will suffice. *First*, as Michael Harrington has noted, Sowell creates his own straw man civil rights advocate who thinks "discrimination is the only reason for statistical differences between racial and ethnic groups" in order to create "simplistic dichotomies" that can be attacked on the basis of simplistic dichotomies.²⁷ Yet Sowell's attack, as Harrington points out, is "irrelevant, since I know of no serious civil rights partisan who engages in such obvious simplifications."²⁸ There is an alternative to the simplistic views that only culture, discrimination, or innate inferiority can be the cause of current intergroup disparities.²⁹

Second, Sowell's analysis of cause and effect relationships since 1954 between periods of civil rights agitation and the passage of civil rights laws, and between the passage of those laws and economic gains by blacks, is similarly skewed. To dispel the efficacy of the 1964 Civil Rights Act, Sowell points to the greater proportionate gains that were made by blacks in high-level professions in the decade before 1964 than in the decade after 1964.³⁰ But do the gains made in the decade before the 1964 Act have nothing to do with the growing black political protest fanned by *Brown* and led by Dr. King?³¹ Do these gains

27. Harrington, *Straw Men in Struggle* (Book Review), THE NEW REPUBLIC, June 11, 1984, at 37.

28. *Id.* Sowell responds to Harrington's criticisms by calling them "reckless tactics" that "betray the desperation" of civil rights advocates confronting his criticism. Letter from Thomas Sowell to the Editors, THE NEW REPUBLIC, July 9, 1984, at 2. Harrington, however, had opened his book review by complimenting most of the works Sowell had previously written. See Harrington, *supra* note 27, at 37. Harrington, of course, is not the only victim of this "reverse McCarthyism," *i.e.*, the notion that all who criticize Sowell are like Joe McCarthy. Others included in Sowell's "new McCarthyism," p. 127, are Lem Tucker, Christopher Jencks, Carl Rowan, Lester Thurow, Patricia Roberts Harris, Roger Wilkins, St. Clair Drake and Charles L. Black. Pp. 124-35.

29. See Part I *supra*. Civil rights advocates, going back at least to W.E.B. DuBois, have realized that strong antidiscrimination enforcement and comprehensive reform, while integral elements of racial equality, are not the sole means to achieving it. Wrote DuBois:

The bright ideals of the past, — physical freedom, political power, the training of brains. . . . [t]he power of the ballot. . . . the freedom of life. . . . the freedom to love. . . . [w]ork, culture, liberty, — all these we need, not singly but together, not successively but together, each growing and aiding each, and all striving toward that vaster ideal that swims before the Negro people, the ideal of human brotherhood. . . .

W.E.B. DUBOIS, *supra* note 20, at 21-22.

30. See p. 49. Sowell also makes a vague claim concerning black gains "[i]n other kinds of occupations" in the 1940's — the decade of World War II. P. 49. Yet as Professor James Jones has recently written: "It is conventional wisdom that during periods of scarce human resources marked by war and other periods of intense economic activity there was increased participation by Blacks and women in the work force." Jones, *The Genesis and Present Status of Affirmative Action in Employment Economics: Legal and Political Realities* 48 (Sept. 1984) (speech at Annual Meeting of the American Political Science Association).

31. The large gap between the promise of *Brown* and the reality of continuing Jim Crow segregation gave Dr. King's repeated calls for racial justice and cries against continued delay in addressing the issue a moral claim on the national conscience. See Note, *Judicial Right Declaration and Entrenched Discrimination*, 94 YALE L.J. 1743, 1746-48 (1985) authored by Mr. Sperling. The impact of that civil rights movement is still being felt in all aspects of American life.

reflect a "catastrophic . . . politicization of race" resulting from civil rights agitation (p. 35)? Does the slowness of the progress after the 1964 Civil Rights Act in narrowing many of the economic gaps between blacks as a group and whites show that political action is ineffective³² or that the 1964 Civil Rights Act represented but another step in the larger task of continuing the second Reconstruction? For example, the House Report for the Equal Employment Opportunity Act of 1972 that amended the 1964 Act candidly noted, "Despite the commitment of Congress to the goal of equal employment opportunity for all citizens, the machinery created by the Civil Rights Act of 1964 is not adequate" to combat the "recognized . . . prevalence of discriminatory . . . practices in the United States"³³

Similarly, Sowell challenges the effectiveness of affirmative action to remedy disparate employment patterns for blacks and whites by citing statistics drawn from the period after the adoption by the Department of Labor of "goals and timetables" in 1971.³⁴ Those statistics, Sowell claims, show no "acceleration in the long trend of rising black representation in [professional and technical] occupations" (p. 49). Whether things would have been worse had there been no such affirmative efforts, and the interrelationship between public policy and complex economic, business, social, and political factors are never discussed in Sowell's book.³⁵ The citation of such simplistic "before and after" statistics may be intended only to topple the equally simplistic

For us, the primary issue raised by Sowell's critique is not the relative efficacy of that movement, but whether its business should be declared at an end.

32. It seems bizarre that Sowell, who begins by asserting that political action is "unpromising" as a means to economic advancement for black Americans, p. 35, and who then goes on to deplore the lack of empirical study, p. 133, never even discusses, let alone analyzes, the effects of the *economic* boycotts conducted by the civil rights movement. Nor does Sowell even mention the likes of A. Philip Randolph, Roy Wilkins, Martin Luther King, Jr., or Jesse Jackson.

33. H.R. REP. NO. 238, 92d Cong., 1st Sess. 3 (1971), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2137, 2139. The Senate Report added:

Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" . . . and the literature . . . is replete with discussion of . . . perpetuation of the present effect of pre-act discriminatory practices *through various institutional devices*, and testing and validation requirements.

S. REP. NO. 415, 92d Cong., 1st Sess. 5 (1971) (emphasis added).

34. Equal Employment Opportunity in Apprenticeship and Training, 36 Fed. Reg. 6810, 6812-13 (1971) (codified at 29 C.F.R. §§ 30.4, 30.5 (1984)).

35. Economic and employment figures since 1971 can also be interpreted as supporting the need for affirmative action. Robert Kuttner and others have described how trends in international trade have wiped out hundreds of thousands of middle-class, basic industry jobs, which historically have been viewed by some as a vital stepping-stone for the economic advancement of minorities and ethnic groups. *See* Kuttner, *The Declining Middle*, THE ATLANTIC MONTHLY, July 1983, at 60-62, 69; *see also* R. REICH, THE NEXT AMERICAN FRONTIER 207-12 (1983). Minorities, represented disproportionately on the bottom rung, were hit hard by such trends. Blacks with college degrees and luck, writes Michael Harrington, "made gains because of that economic trend and because of affirmative action, which does work to limit discriminatory patterns in an expanding labor market but not to create jobs in declining areas of employment." Harrington, *supra* note 27, at 38.

"civil rights" straw man posited by Sowell.³⁶ If the only point of Sowell's exercise is that there is uncertainty concerning the causes of social and economic inequalities among groups, we concede the point. This concession, however, only begins the dialogue over how to confront the continuing gaps between groups.³⁷

Third, Sowell argues that *Brown v. Board of Education* was based primarily on "psychological doctrine, without foundation in logic or law" (p. 71), and misled subsequent courts into ordering busing to integrate schools on the mistaken premise that blacks would learn better if placed in schools next to white pupils, because schools with too many black students are somehow inherently inferior (pp. 61-72). Such charges are unfounded. First, Chief Justice Warren has denied that the infamous footnote 11 was a motive force in the *Brown* decision.³⁸ Second, a companion case outlawing segregation in District of

36. While Sowell repeatedly calls for evidence, *see, e.g.*, pp. 133, 138, he himself relies on broad macroeconomic statistics to buttress causal inferences which challenge affirmative action. Yet causation at that level is quite complex, uncertain, and subject to diverse interpretations. And in the area of anti-discrimination law that Sowell mocks the most, to wit, class-action disparate impact cases, pp. 37-60, there are many specific examples of almost revolutionary employment improvement for blacks. As Douglas B. Huron, a former attorney in the Nixon-Ford Civil Rights Division of the Justice Department, has detailed, affirmative action remedies were clearly and directly responsible for breaking the exclusive dominance of whites in the Alabama state government. *See Huron, But Government Can Help*, Washington Post., Aug. 12, 1984, at B1, col. 2. In 1972 all of the state troopers, officers and Department of Public Safety support personnel in Alabama were white. Only a handful of other state agency employees were nonwhite. District Judge Frank Johnson remanded the matter to the state agencies — allowing them up to two years — for a remedy. Only after their failure did Johnson order comprehensive affirmative relief. Black state troopers now constitute over 20% of the force, and nearly 25% of the support personnel are black, owing largely to the state's eventual response to Judge Johnson's decrees. *Id.*

Nor is this an isolated example. The Detroit Police Department went from 6% black in 1967 to 27.9% black in 1984 as a result of affirmative action remedies for "invidious racial discrimination in the Detroit Police Department." *N.A.A.C.P. v. Detroit Police Officers Assn.*, 591 F. Supp. 1194, 1199-200 (E.D. Mich. 1984). "Police brutality against citizens has been greatly reduced and is almost nil at the present time." 591 F. Supp. at 1206. Affirmative action programs were also responsible for breaking the color line in other state agencies and state highway patrols. *See, e.g., Morrow v. Dillard*, 580 F.2d 1284, 1288 n.24 (5th Cir. 1978) (affirmative action decree to remedy the "all-White Patrol" and "all-white favoritism" in Mississippi Department of Public Safety and Mississippi Highway Safety Patrol). Between 1972 and 1982 the number of black police officers in the United States increased by 50%. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 420 (1984). Between 1973 and 1981, the number of blacks employed by state and local governments increased by 49%, while the number of hispanics increased by 64%. *Id.* at 305. A recent scholarly study has also demonstrated the macro-level success of affirmative action. *See Leonard, The Impact of Affirmative Action on Employment*, 2 J. LAB. ECON. 439, 459 (1984) ("affirmative action has actually been successful in promoting the employment of minorities and females").

37. Such causal complexity is commonly an aspect of the equity court's task of remedying a declared wrong. For example, in *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 367 (1977), the Court wrote:

The denial of Title VII relief on the ground that the claimant had not formally applied for the job could exclude from the Act's coverage the victims of the most entrenched forms of discrimination. Victims of gross and pervasive discrimination could be denied relief precisely because the unlawful practices had been so successful as totally to deter job applications from members of minority groups.

38. *See R. KLUGER, SIMPLE JUSTICE* 706 (1976).

Columbia schools never relied on any such "scientific" authority,³⁹ and per curiam decisions outlawing segregation in parks, theaters and public conveyances followed *Brown*.⁴⁰ Third, most legal scholars have also criticized the so-called equal educational opportunity rationale claimed by Sowell as the basis for declaring governmentally condoned segregation unconstitutional.⁴¹ The reason, however, is that the *Brown* decision has an airtight claim to moral and constitutional integrity wholly unrelated to any social science study: those who are in the mainstream and in control may not seek to label any group inferior and to reduce it to a second-class status.⁴² Finally, subsequent desegregation decisions in the Supreme Court (and *most* lower courts)⁴³ were based expressly on a review of the evidence of governmental and

39. See *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

40. Only one week after *Brown*, the Court also vacated a decision upholding Jim Crow laws in recreational parks. *Muir v. Louisville Park Theatre Assn.*, 347 U.S. 971 (1954). Subsequent per curiam decisions made clear that the holding in *Brown I* rested not on a narrow concept of equal educational opportunity based on "modern authority," but instead on a broad principle condemning state-imposed racial segregation and exclusion. See, e.g., *New Orleans City Park Improvement Assn. v. Detiege*, 358 U.S. 54 (1958) (park facilities); *Gayle v. Browder*, 352 U.S. 903 (1956) (buses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (golf courses); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (beaches).

41. In the years immediately following *Brown*, leading constitutional scholars criticized footnote 11 while applauding *Brown's* other, and substantially more solid, constitutional foundations. See, e.g., Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 430 n.25 (1960); Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 159 (1955); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); see also Dimond, *supra* note 10, at 23-27; Dimond, *Strict Construction and Judicial Review of Racial Discrimination under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 MICH. L. REV. 462, 510 n.256 (1982).

42. The core of this claim can be found in Chief Justice Warren's opinion for the Court in *Brown*, 347 U.S. at 494-95: "[T]he policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. . . . Any language in *Plessy v. Ferguson* contrary to this finding is rejected." See Dimond, *supra* note 10, at 23-25; Dimond, *supra* note 41, at 509-11. Given the outrageous language and rationale of *Plessy*, see note 19 *supra* and accompanying text, it was long past time for the nation finally to credit the nearly century-old claim of Frederick Douglass: "We want mixed schools not because our colored schools are inferior to white schools — not because colored instructors are inferior to white instructors, but because we want to do away with a system that exalts one class and debases another." 4 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 289 (P. Foner ed. 1955). This same sentiment was aptly expressed by Judge Sobeloff in *Brunson v. Board of Trustees*, 429 F.2d 820, 826 (4th Cir. 1970), in explaining the basis for federal judicial intervention in school segregation cases:

It is not founded upon the concept that white children are a precious resource which should be fairly apportioned. It is not . . . because black children will be improved by association with their [supposed] betters. . . . School segregation is forbidden simply because its perpetuation is a living insult to the black children and immeasurably taints the education they receive. This is the precise lesson of *Brown*.

43. Sowell cites a Los Angeles busing decision as proof that more recent decisions have ordered racial mixing on the false premise that blacks need to sit next to whites in school in order to learn. P. 69. In addition to being an isolated example of judicial misperception, see notes 39-42 *supra* and 44 *infra*, this citation is deceiving for several reasons. First, Judge Egly was a single Los Angeles Superior Court Judge. Second, his decree was based on a controversial interpretation of both the evidence (which also included proof of historic discrimination) and the California state (not the federal) Constitution. Third, this state-court decision was later overturned by the California Court of Appeals. *Crawford v. Board of Educ.*, 113 Cal. App.3d 633, 170 Cal. Rptr. 495 (Cal. Ct. App. 1980), *aff'd*, 458 U.S. 527 (1982). This is hardly sufficient evidence to

customary discrimination contributing to segregation and not on any assessment of educational inputs and outputs or the supposed educational harm of segregated (or benefits of integrated) schooling.⁴⁴

In sum, and once again contrary to Sowell's claims (pp. 64-68), evidence and findings of discrimination, not blind pursuit of any "racial mixing" (p. 68), have been the hallmark of judicial decisions concerning school segregation.⁴⁵ Evidence in open court has remained the

sustain the otherwise unsupported assertion by Sowell that federal courts generally ordered "racial mixing" unrelated to prior discrimination. P. 68.

44. Sowell's contention that the "modern authority" cited in footnote 11 contains assumptions that "have continued to haunt school desegregation," p. 64, is false. The major Supreme Court rulings have been based on evidence and findings of systemic intentional discrimination against blacks. See, e.g., *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 537 (1979) (*Dayton II*) (desegregation order based on failure to remedy historic dual system); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 455 (1979) (desegregation required because of purposefully segregative practices with continuing system-wide impact); *Keyes v. School Dist. No. One*, 413 U.S. 189, 203 (1973) (city-wide desegregation required after finding of state-imposed segregation in a substantial portion of district); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18-21 (1971) (desegregation required because of the variety of policies used as "potent weapon[s] for creating or maintaining a state-segregated school system"); *Griffin v. County School Bd.*, 377 U.S. 218 (1964) (desegregation order based on a decade of intentional acts by state and district, including closing schools to prevent black students from attending school with whites); *Cooper v. Aaron*, 358 U.S. 1, 9 (1958) (describing evasive schemes and even armed force used to exclude black students in Little Rock, Arkansas, under the auspices of the state). Indeed, in *Keyes*, the Court expressly eschewed a modified equal educational opportunity rationale, 413 U.S. at 1293-95, which had been adopted by District Judge William Doyle. *Keyes v. School Dist. No. One*, 313 F. Supp. 61, 83 (D. Colo. 1970). Instead, the Court based its finding of constitutional violation and remand for reconsideration of remedy on the standard of proof and evidence of intentional discrimination. 413 U.S. at 208-09, 213-14.

As for the lower courts, and contrary to Sowell's other assertions, pp. 64, 69-72, they too were moved in their rulings by massive proof of intentional discrimination as a substantial contributing factor (not a sole cause) of continuing segregation. See, e.g., *Brinkman v. Dayton Bd. of Educ.*, 583 F.2d 243 (6th Cir. 1978), *aff'd*, 433 U.S. 406 (1979); *Penick v. Columbus Bd. of Educ.*, 429 F. Supp. 229 (S.D. Ohio 1977), *aff'd*, 443 U.S. 449 (1979); *Evans v. Buchanan*, 393 F. Supp. 1218 (D. Del. 1974), *aff'd per curiam*, 423 U.S. 963 (1975); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 300 F. Supp. 1358, 1381; 306 F. Supp. 1299 (W.D.N.C. 1969), *aff'd*, 402 U.S. 1 (1971). For a more detailed account of the proof, strategies, and findings in the lower courts in the Wilmington, Dayton, and Columbus school cases, see P. DIMOND, *BEYOND BUSING: INSIDE THE CHALLENGE TO URBAN SEGREGATION* (1985).

45. Sowell nevertheless cites the overturning of mandatory busing in Los Angeles in *Crawford v. Board of Educ.*, 113 Cal. App.3d 633, 170 Cal. Rptr. 495 (Cal. Ct. App. 1980), *aff'd*, 458 U.S. 527 (1982), as an example of the ineffectiveness of preferential policies: "When mandatory busing was overruled and stopped in Los Angeles, school integration continued. There are long waiting lists of people of all races for the 'magnet' schools of that city." P. 111.

For three reasons, Sowell's choice of this example reaches the height of irony. First, such voluntary desegregation is required in Los Angeles without any findings of intentional discrimination because California courts interpret their state Constitution to require desegregation regardless of the cause of such segregation. *Jackson v. Pasadena City School Dist.*, 59 Cal. 2d 876, 881, 382 P.2d 878, 31 Cal. Rptr. 606 (1963). Although Proposition I outlawed mandatory reassignments as a remedy in the absence of a federal constitutional violation, California courts still require school boards to take other feasible steps to alleviate school segregation under the "results" approach that Sowell denounces. Pp. 53-60, 65-69. See *McKinney v. Board of Trustees*, 31 Cal. 3d 79, 92-93, 181 Cal. Rptr. 549, 642 P.2d 460 (1982). Second, "magnet school" plans, like "majority-to-minority" transfer programs, see *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26-27 (1971), usually include "preferential" policies of one kind or another. Finally, the effectiveness of "magnet schools," standing alone, as a remedy in overcoming (rather than increasing) segregation is subject to dispute. See, e.g., *Evans v. Buchanan*, 416 F. Supp. 328,

ally of those civil rights advocates who claim that a caste system of segregation still divides too much of the country; these advocates ask only for a fair hearing of their claim, unobscured by predetermined rationalizations for current segregation.⁴⁶

Fourth, Sowell's hope that *Brown* can be understood as a narrow ruling barring only discriminatory limits on an individual's choice of school (pp. 37-38, 64, 68, 71) is just as wide of the mark. *Brown* involved more than the right of individual black children to transfer to otherwise whites-only schools; it sought a "transition to a racially non-discriminatory school system,"⁴⁷ allowing delay in individual transfers only because of "the public interest in the elimination of . . . obstacles in a systematic and effective manner."⁴⁸ Sowell's crabbed understanding of discrimination as involving individual transactions removed from their socio-historical context is repeated in his discussion of *Green v. County School Board*.⁴⁹ The Court did not, as Sowell implies (pp. 66-68), reject the ideal of free choice on the assumption that "racial mixing was considered a good thing" (p. 68). Instead, the Court rejected the discriminatory reality of the particular "free choice" plan as it operated in 1967 in New Kent County, Virginia.⁵⁰ Sowell's at-

345-46 (D. Del. 1976). According to former Assistant Attorney General for Civil Rights Drew Days III, "experience has shown" that magnet schools "rarely, if ever, will . . . be effective without some mandatory student assignment." Days, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309, 325-27 n.80 (1984). Days cites a recent study by private consultants for the Reagan administration's Department of Education: "The districts showing the most progress in districtwide desegregation using magnets employ a variety of methods both voluntary and involuntary, as part of a total desegregation plan, including pairing, rezoning, two-way busing and mandatory assignment." J. LOWREY & ASSOC., SURVEY OF MAGNET SCHOOLS ANALYZING A MODEL FOR QUALITY INTEGRATED EDUCATION 32 (1983). See also Dimond, *supra* note 10, at 42-60 (discussion of systemic market remedies).

46. See P. DIMOND, *supra* note 44; Dimond, *supra* note 10, at 42-48.

47. *Brown v. Board of Educ.* [*Brown II*], 349 U.S. 294, 301 (1954) (emphasis added).

48. *Brown II*, 349 U.S. at 300. As Judge Wisdom counseled,

"[S]egregation is a group phenomenon. Although the effects of discrimination are felt by each member of the group, any discriminatory practice is directed against the group as a unit and against individuals only as their connection with the group involves the anti-group sanction." . . . With this predicate it is not surprising that *Brown II* . . . fashioned a remedy appropriate for the class. . . . *Brown II* subordinated the "present" right in the individual plaintiffs to the right of Negroes as a class to a unitary, nonracial system — some time in the future.

United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 866-67 (5th Cir. 1966) (quoting Meador, *The Constitution and the Assignment of Pupils to Public Schools*, 45 VA. L. REV. 517, 523 (1959)).

49. 391 U.S. 430 (1968).

50. The Court makes no mention of any "educational benefit" rationale in its ruling. Instead, the Court recites facts which demonstrate that New Kent County ran its schools on virtually a dual basis, with one school primarily for whites and the other reserved exclusively for blacks. See *Green*, 391 U.S. at 441-42. The Court did not, however, declare freedom-of-choice plans unconstitutional *per se*, even in the context of dismantling dual systems. 391 U.S. at 439. Professor Dimond has argued that the basic policy choice concerning pupil assignments to schools (compulsory assignment vs. family election) still rests largely with the states. See Dimond, *supra* note 10, at 44-48, 61. Indeed, the refusal of the Court, the Congress, and the states to consider the range of available alternatives in remedying the comprehensive caste discrimina-

tack on the Court, therefore, is irrelevant because much in the Court's segregation rulings is lost or obscured in Sowell's translation.⁵¹

Fifth, Sowell's view of the Burger Court's decisions on affirmative actions is just as myopic. He misses the many tensions which pull on the Court and on the individual justices. Perhaps Sowell's shortsightedness derives from his focus on *United Steelworkers v. Weber*⁵² (pp. 41-42). The case involved a dispute over the legality under the 1964 Civil Rights Act of an affirmative action program voluntarily adopted by United States Steel and the United Steelworkers' Union. Reasonable minds, of course, may differ over what role the Court should play in ascertaining congressional purpose in such cases and what Congress specifically "intended" when it did not consider the particular issue before the Court.⁵³ The curious aspect of Sowell's analysis is that he never discusses the Burger Court's two major constitutional rulings on affirmative action, *Fullilove v. Klutznick*⁵⁴ and *Regents of the University of California v. Bakke*.⁵⁵ As a result, Sowell apparently proceeds on the false assumption that the Court has either embraced a standard of equality of results (p. 42) or adopted Sowell's imagined civil rights vision that all group disparities result from discrimination (p. 42).⁵⁶

tion wrong, not only in the schools but in all aspects of community life, only serves to obscure this issue. *Id.* at 33-62.

51. While we do not applaud the Burger Court's segregation rulings, *see* note 50 *supra* and note 71 *infra*, Sowell's criticism appears to be based on a complete misunderstanding of what the Court has ruled and why.

52. 443 U.S. 193 (1979).

53. While Congress did not conclusively sanction or prohibit race-conscious remedies, the affirmative plan voluntarily adopted in *Weber* is consistent both with the overriding purpose of the act — ending the "glaring . . . discrimination against Negroes which exists throughout our Nation," H.R. REP. NO. 914, 88th Cong., 1st Sess. 18 (1963), *reprinted in* EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 at 2018, and with the "preferred means for achieving this goal" — "[c]ooperation and voluntary compliance." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

For his attack on race-conscious remedies, Sowell relies on Senator Humphrey's remark that § 703(j) "does not require an employer to achieve any kind of racial balance." P. 39 (emphasis added). This quotation, however, does not buttress Sowell's claim for several reasons. First, § 703(j) is geared toward defining the violation, not limiting the scope of the remedy. Second, the affirmative action plan in *Weber* was voluntary, not required. Third, Humphrey's comments must be read in the context in which they were made, during consideration of an act designed to begin to do away with systemic discrimination against blacks as a group. *See* note 19 *supra*. Finally, Sowell ignores the legislative history for the 1972 amendments to Title VII, in which the committee reports cite approvingly to cases involving race-conscious remedies. S. REP. NO. 415, 92d Cong., 1st Sess. 5 n.1 (1971). With those examples in mind, the Congress broadened § 706(g) — the remedial provision — so that a remedial decree could include "any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g) (1982).

54. 448 U.S. 448 (1980).

55. 438 U.S. 265 (1978).

56. *Weber*, *Bakke* and *Fullilove* hardly represent a vision of equal results — even from the Brennan wing of the Burger Court. Rather, these affirmative action cases offer somewhat muddled plurality decisions which provide clear guidance on only one issue: it is not unconstitutional per se for majority-dominated institutions to seek to afford race-conscious relief to members of minority groups which have been the butt of past discrimination.

Sowell, therefore, misses the point of the Court's rulings to date on affirmative action: the Court has been unwilling to prohibit responsible legislative assemblies elected by the people (expressly Congress, but presumably state legislatures as well)⁵⁷ from grappling with the difficult public policy issues raised by a history of discrimination against minority out-groups and adopting affirmative action as a remedy.⁵⁸ Sowell may wish that the Court would impose a straitjacket to outlaw once and for all such legislative consideration of the issue, arising as it does in a variety of circumstances over time, but the Court has generally acted to encourage a broad range of flexible legislative responses to the problem, at least for the time being.⁵⁹ How such a limited role for unelected Supreme Court justices can be labelled an

57. *Fullilove* offered important insights into the institutional considerations that may most concern certain members of the Court. When it was Congress and not the courts (or unrepresentative faculty admission committees and unelected university regents) devising the remedy, the Supreme Court did not apply formalistic right-remedy tailoring notions. See *Fullilove*, 448 U.S. at 477-78, 483 (Burger, C.J.); 448 U.S. at 502-03 (Powell, J., concurring). See generally Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). Instead, the Court offered strong moral as well as constitutional approval of the "minority business enterprise" (MBE) provision of the Public Works Employment Act of 1976. Wrote Burger, "The legislative objectives of the MBE provision must be considered against the background of ongoing efforts directed toward deliverance of the century-old promise of equality of economic opportunity." 448 U.S. at 463. Wrote Powell, "Congress properly may — and indeed must — address directly the problems of discrimination in our society." 448 U.S. at 499.

While the opinion in *Fullilove* was based expressly on the "competence" of Congress to deal with a problem "national in scope," 448 U.S. at 478, the underlying rationale rests on a "considered decision" by an elected legislature and executive. 448 U.S. at 473. This suggests that the Court will view as equally legitimate attempts by state legislatures (in contrast to unelected, official elites, as in *Bakke*) to respond, particularly in view of the responsibility imposed directly on the states by § 1 of the fourteenth amendment.

58. While the Court's response in *Bakke* and *Fullilove* may be unsatisfactory to those impatient with persistent racial inequality, the Court has at least kept the doors open for the political process to confront the problems of systemic wrongs and comprehensive remedies. Concern for the costs to be borne by innocent whites has been a major competing claim raised by some members of the Court, as well as the Reagan administration, for opposing affirmative action. See *Firefighters Local 1784 v. Stotts*, 104 S. Ct. 2576 (1984); *Fullilove v. Klutznick*, 448 U.S. 448, 514 (1980) (Powell, J., concurring); Reynolds, *supra* note 19, at 1004. While the plight of innocent whites affected by race-conscious remedies is an important concern, Assistant Attorney General Reynolds seems bent on avoiding consideration of the possibility that the *failure* to make any affirmative efforts also may impose costs on innocent people: the innocent members of minority communities may not have the same opportunities for advancement as their majority counterparts because of the persistent effects of systemic discrimination directed against the minority as a group. See Part I *supra*.

59. The Supreme Court has tended to review "benign" racial classifications with "less" than a "strict scrutiny" standard. See, e.g., *Fullilove*, 448 U.S. at 490; *Bakke*, 438 U.S. at 359 (Brennan, J., separate opinion). The standards of review of race-conscious classifications can perhaps best be understood in light of the anti-caste principle, see Dimond, *supra* note 10, at 14-15, 37, and John Hart Ely's "representation-reinforcing" theory. Writes Dean Ely:

When the group that controls the decisionmaking process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking. A White majority is unlikely to disadvantage itself for reasons of racial prejudice; nor is it likely to be tempted either to underestimate the needs and deserts of Whites relative to those of others, or to overestimate the costs of devising an alternative classification that would extend to certain Whites the advantages generally extended to blacks.

"especially brazen . . . perversion[] of the law" (p. 120) is a mystery.⁶⁰

Sowell's vituperative battles with largely irrelevant or imagined opponents serve only to obscure his analyses of particular programs, which are at least thought-provoking. He observes, for example, that affirmative action increases employer demand for highly qualified blacks but decreases demand for blacks with fewer qualifications or no track record (p. 53); that the marketplace does not necessarily impose or foster caste discrimination (pp. 80-82); that minimum wage laws do not aid black teenagers (p. 87); and that licensing and governmental regulation may harm blacks as a group (pp. 87-89). Sowell's rhetoric, however, challenges the efficacy of any form of affirmative action and largely negates discrimination as a factor in the pervasive segregation and substantial inequality still experienced by blacks as a group in this country. In his quest to make a case for individual rights to equal opportunity and against group claims to equal results, Sowell has for-

Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 733 (1974). See also J. ELY, *DEMOCRACY AND DISTRUST* 170-72 (1980).

The anti-caste principle and Ely's "we-they" theory put a different twist on the issue of institutional competence raised in the text at note 57 *supra*: close scrutiny will be paid to any classification benefiting those who control the classification-making process. The anti-caste principle thus offers whites protection from being relegated to a second-class status within a system in which they (or any identifiable ethnic or religious minority) are in the minority, instead of protection from race-conscious attempts to elevate disadvantaged groups to full citizenship.

Justice Brennan's opinion (joined by Justices White, Marshall, and Blackmun) in *Bakke* showed a keen understanding of the proper purposes and potential dangers of racial classifications. Brennan directed the main focus of inquiry into whether the particular classification at issue stigmatized or singled out any politically powerless out-group. 438 U.S. at 355-62. Brennan also would apply "strict and searching" scrutiny, 438 U.S. at 361-62, to protect blacks (and identifiable white ethnic and religious minorities) against the dangers he articulated in *United Jewish Organizations v. Carey*, 430 U.S. 144, 168 (1977) (Brennan, J., concurring).

60. The Court has played a similar role in interpreting congressional statutes. For example, the apparent conflict in Title VII between seniority and affirmative action drifted through the federal courts for several years. In *Firefighters Local 1784 v. Stotts*, 104 S. Ct. 2576 (1984), however, the Court held that Title VII barred federal courts from modifying a previously entered affirmative hiring and promotion consent plan in order to protect the newly employed minorities from lay-offs under a bona fide seniority system. The Court left open the issue of whether voluntary affirmative action programs and race-conscious decrees based on constitutional rather than statutory violations may modify bona fide seniority systems. Despite the far-reaching interpretation of the *Stotts* decision by William Bradford Reynolds, see *Justice Dept. Declares Win Over Quotas*, *Washington Post*, June 14, 1984, at A1, col. 1, at least two lower courts have already ruled that the decision has no application where a constitutional violation has been found. See *NAACP v. Detroit Police Officers*, 591 F. Supp. 1194 (E.D. Mich. 1984), and *Arthur v. Buffalo Teachers Federation*, 712 F.2d 816 (2d Cir. 1982), *cert. denied*, 104 S. Ct. 3555 (1984), where the Supreme Court refused to review a case similar to *Stotts*, except that findings of intentional discrimination had been made.

Perhaps most crucial, however, *Stotts* leaves Congress with the power to decide whether to give greater protection to affirmative action programs. Where the Supreme Court limits its rulings to matters of statutory interpretation, Congress may always show its objection by passing new legislation. For example, when the Supreme Court interpreted § 2 of the Voting Rights Act as enacting a convoluted intent standard, *City of Mobile v. Bolden*, 446 U.S. 55 (1980), Congress responded by passing the Voting Rights Act Amendments of 1982, officially adopting a broader "results" test. Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (1982) (codified at 42 U.S.C. § 1973 (1982)).

gotten that another critical individual right and a more complex reform vision may still be at issue: the individual right to be free from systemic injury and group wrong in a society where caste discrimination may still play some ugly part.⁶¹

IV. JUDICIAL REVIEW IN A DEMOCRACY

Because of his misreading of judicial decisions, Sowell fails to consider the appropriate role of an antimajoritarian court in reviewing legislative decisions designed to benefit identifiable groups who, Sowell concedes (pp. 13-14, 74, 109), have been the subject of crippling official oppression in the past. Although Sowell may be more certain than others of the limited continuing impact of caste subjugation which was practiced decades ago, it is surprising that Sowell does not applaud the Court for giving elected legislatures as well as private employers, associations and even lower courts some leeway to grapple with this nettlesome issue. Contrary to Sowell's implication (p. 35), this process and the Court's warily deferential response to it are a far cry from the "politicization of race" that is said to have given rise to, among other tragedies, the Holocaust. For the Court to outlaw all legislative consideration of the systemic effects of discrimination and all attempts to formulate affirmative responses is to restrict legislative discretion and thus to promote judicial activism.⁶² The modern Court, of course, has

61. Sowell's unwillingness to consider social context in analyzing individual freedom from discriminatory barriers is glaring in his chapter, "The Special Case of Women." Pp. 91-108. Sowell's major claim is that discrimination does not cause differences in pay between men and women; rather, "[m]ost of these differences relate to marriage and motherhood." P. 92. After all, "[m]arriage increases a man's rate of participation in the labor force compared to single men and reduces a woman's labor force participation rate compared to single women." P. 93.

As with racial matters, Sowell's argument is largely irrelevant, because few women's rights advocates would deny that — viewed in a vacuum — marriage and pregnancy-related factors affect employment patterns. In matters of sex discrimination, however, Sowell refuses to consider what most of the women's rights legal scholars have claimed — that systematic patterns, resulting in part from discriminatory and stereotypical treatment of women, have created institutional biases under which equal opportunity is denied to women even where an individual transaction is not tainted by a sexist motive. See generally C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979); Blumrosen, *Wage Discrimination, Job Segregation and Women Workers*, 6 WOMEN'S RTS. L. REP. 19 (1979-80); Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55 (1979); Ginsberg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 SUP. CT. REV. 1; Law, *Rethinking Sex and The Constitution*, 132 U. Pa. L. Rev. 955 (1984). Compare *Muller v. Oregon*, 208 U.S. 412, 422 (1908), with *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

While discussions of systematic sex discrimination can be complex, Sowell refuses even to question what forces and attitudes have created existing institutional arrangements. This blindness allows him to take surprisingly discriminatory positions. For example, Sowell claims that sex discrimination against women in the police and fire departments is defensible because, having established totally sex-segregated forces, "the introduction of women, as well as homosexuals" could compromise performance due to "powerful emotional attachments." P. 24.

62. In reviewing congressional measures to redress racial discrimination, the Court generally has rejected such an active role. See, e.g., *Fullilove*, 448 U.S. at 478; *City of Rome v. United States*, 446 U.S. 156, 176-77 (1980); *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

more strictly reviewed even legislative actions by the majority in-group that exclude minority out-groups.⁶³ But that is consistent with at least one representation-reinforcing vision of the Court's proper role: protect the minority out-group from caste discrimination at the hands of the majority in-group.⁶⁴ Consistent with this anti-caste principle, whites are also offered judicial protection from any attempt to single any of them out for relegation to second-class status, but *not* judicial protection from race-conscious attempts by elected legislatures and executive officials to include minorities in the economic, educational, residential, and social mainstream.⁶⁵

The tougher question for judicial review is what role the Court should play in declaring rights and imposing remedies itself. The current debate on rights and remedies among the justices⁶⁶ and the commentators⁶⁷ focuses primarily on the tension between the judicial desire to tailor remedies to do no more than overcome the direct effects of limited wrongs and the need to provide effective remedies for systemic wrongs. At times participants in this debate decry the claimed ineffectiveness of certain remedies⁶⁸ or contend that particular officials' actions, when viewed in isolation from one another and the underlying social context, have no continuing impacts requiring any remedy at all.⁶⁹ At other times, sweeping remedies are ordered based on findings that the intentionally discriminatory actions of particular officials contributed directly to all of the pervasive injury alleged, again without regard to the larger social context.⁷⁰

This debate seems trapped within an adjudicative framework that sees no role for the judiciary unless the individual wrongdoer can be haled into court to answer to specific victims' charges and, once such a personal wrong is found, binds the judiciary to provide full compensation. Given the causal complexities and the extent of the proof of historic caste discrimination that can be marshalled, this narrow

63. See note 12 *supra*.

64. See note 59 *supra*.

65. See, e.g., *Bakke*, 438 U.S. at 357-58, 369-76 (Brennan, J., separate opinion); J. ELY, *supra* note 59, at 170-72; Dimond, *supra* note 10, at 14; Ely, *supra* note 59, at 733.

66. Compare *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 463-64 (1979), with *Columbus*, 443 U.S. at 479-83 (Powell, J., dissenting) (analyzed in P. DIMOND, *supra* note 44, and Dimond, *supra* note 10, at 31-48).

67. See, e.g., Fiss, *supra* note 57; Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983) (characterizing judicial approaches to desegregation cases as either "right-maximizing" or "interest balancing").

68. See, e.g., *Estes v. Metropolitan Branches of the Dallas NAACP*, 444 U.S. 437, 448-51 (1980) (Powell, J., dissenting) (criticizing some desegregation plans as employing "self-defeating" remedies).

69. See, e.g., *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 501-24 (1979) (Rehnquist, J., dissenting); see also *Rizzo v. Goode*, 423 U.S. 362 (1976).

70. See, e.g., *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 458-68 (1979); *Dayton II*, 443 U.S. at 534-41 (discussed in P. DIMOND, *supra* note 44, at 386, 394-402, and Dimond, *supra* note 10, at 37 n.141).

understanding of public law adjudication and the need for courts to match rights and remedies serves to divide the justices into two camps: those who seek to limit remedies by minimizing wrongs and those who seek to maximize remedies by finding particular official wrongdoing as the direct cause of current disparities.⁷¹

There is, however, another vision of judicial review that may be more sensitive both to the Court's proper role and to the complexity of the cases raising claims of systemic wrong and wide-ranging harm: declare the wrong, require the states to come forward with a commensurate remedy, encourage the Congress to confront the problem on a broader basis, and then independently review the responses of the responsible officials and legislatures. Rather than becoming obsessed with the costs or necessity of judicial imposition of particular remedies, even the Burger Court could then confront, for example, the evi-

71. *Milliken v. Bradley*, 418 U.S. 717 (1974), may represent the most patent example of this division. Chief Justice Burger, writing for four members of the Court, refused to review the evidence that an area-wide system of community discrimination in housing had combined with state-imposed segregation of blacks in one-race schools in the inner city to produce an expanding core of "blacks-only" schools within the City of Detroit, surrounded by a steadily receding "ring" of "whites-only" schools and communities. 418 U.S. at 728 n.7. Even a scholar sympathetic to restricting busing remedies found this refusal to face the principal issue in the case unwarranted. See J. WILKINSON, *FROM BROWN TO BAKKE* 223-29 (1979). In a separate opinion, Justice Stewart went further; he purported to review the extensive evidence and findings of such area-wide discrimination, see *Bradley v. Milliken*, 345 F. Supp. 914, 932-33, 939-40 (E.D. Mich. 1972); *Bradley v. Milliken*, 338 F. Supp. 582, 587, 592 (E.D. Mich. 1971), but could find none. 418 U.S. at 756 n.2. Instead, Stewart concluded that the concentration of blacks in central cities was "caused by unknown and unknowable factors." 418 U.S. at 756 n.2. See generally Note, *Housing Discrimination as a Basis for Interdistrict School Desegregation Remedies*, 93 YALE L.J. 340, 348-53 (1983) (discussing cases in which the Court refused to see a causal relationship between housing discrimination and school segregation).

The apparent concern over massive interdistrict busing throughout a major metropolis, see *Milliken v. Bradley*, 418 U.S. at 741-45, blinded these justices to the key issue: whether the proof and findings of a comprehensive system of containment of black families within a state-imposed core in the inner city warranted a holding of unconstitutional segregation. Given the fact that the court of appeals had already vacated the district court's order outlining an area-wide remedy and remanded for reconsideration in the trial court, see *Bradley v. Milliken*, 484 F.2d 215, 252 (6th Cir. 1973), the Supreme Court could first have reviewed the violation without addressing the remedy (as in *Brown I*). Instead, the Court acted to absolve suburban white America of responsibility for the ghetto without any meaningful consideration of the basic violation issue. See Dimond, *supra* note 10, at 39-42. Four justices vigorously dissented from the majority's sleights of hand. See *Milliken*, 418 U.S. at 757 (Douglas, J.); 418 U.S. at 762 (White, J.); 418 U.S. at 781 (Marshall, J.). Justice Brennan joined in Justice White's and Justice Marshall's dissents.

In contrast to *Milliken*, Justice Stewart wrote for a unanimous Court in *Hills v. Gautreaux*, 425 U.S. 284 (1976), that the constitutional wrong committed by HUD in restricting the public housing choices of blacks to locations within center-city Chicago amounted to an area-wide violation authorizing area-wide remedies. In *Gautreaux*, unlike in *Milliken*, the Court perceived that the remedy could be limited to allowing black families the choice of moving, if they wished, to subsidized housing opportunities in the white suburbs. There was no fear of intrusive remedies, and there was unanimous appreciation of the area-wide nature of the wrong of confining black families within blacks-only ghettos. See *Gautreaux*, 425 U.S. at 299; see also Dimond, *supra* note 10, at 39-42. If the Court would concentrate on declaring violations in light of the evidence, findings, and constitutional principles rather than fearing the consequences of remedies which are better left for initial promulgation by others and ultimate review by the Court on another day, there might be both greater consistency and more honesty in the Burger Court's segregation rulings.

dence that a caste system of racial ghettoization still divides much of the country and declare fully the extent of any continuing wrong.⁷²

Because of the progress already made during the second Reconstruction, the Court is in a better position to speak plainly with us about the extent of any continuing caste wrong *and* about the limits of the judicial process in providing specific remedies. Whether large gaps would thereby be created between declared rights and judicial remedies and whether such gaps would spur action or reaction should not obscure the reality of judicial review: it can serve to remind all of us that we have not eradicated discrimination against an out-group just because we take down the whites-only signs from neighborhoods, schools, and jobs, even if the Court itself cannot open every old door and build new ones so that we can all enter together. Where Sowell's rhetoric would lead the Court to cut off all discussion of race-conscious remedies by condemning affirmative action once and for all, this alternative understanding of judicial review would encourage the continuing dialogue over rights and wrongs and redress in contemporary America.⁷³

CONCLUSION

We hope that a majority of the people and of the Court are not so close-minded in their vision of cultural reality or in the rhetoric of equal opportunity to foreclose claims and evidence that a system of caste still must be confronted by all our public and private institutions before we claim victory in the long struggle to eradicate discrimination against blacks in this country. Given our sad experience with the termination of the first Reconstruction, surely we ought not end the sec-

72. In *Brown I* and *Brown II*, of course, the Warren Court did bifurcate consideration of the issues of violation and remedy. This does not mean, however, that we approve of all aspects of the *Brown* approach. First, remanding admittedly difficult remedial problems to the legislative process or to executive officials does not have to mean accepting all deliberate delay. *But see Brown II*, 349 U.S. 294, 301 (1955). Imposing deadlines for a timely response by the responsible party and judicial ordering of provisional remedies until a meaningful response is forthcoming are viable alternatives. Second, the Court can place the duty to come forward with a responsive remedy on the appropriate party. In *Brown II*, however, the Court failed to focus attention on the constitutionally responsible party, *i.e.*, the states, rather than local school districts. Finally, *Brown I*, being the powerful declaration that it was, should have been explained in its fullest and simplest terms in order to give the ruling its full force politically, legally and socially. *See* notes 37-42 *supra*; *see generally* Note, *Judicial Right Declaration and Entrenched Discrimination*, *supra* note 31.

73. *See generally* Note, *Judicial Right Declaration and Entrenched Discrimination*, *supra* note 31. Professor Dimond has explored this role for the Court from diverse perspectives in race cases, *see, e.g.*, P. DIMOND, *supra* note 44, at 395-402; Dimond, *supra* note 10, as well as in other specific types of cases. *See* Abrams & Dimond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 MINN. L. REV. 75 (1984). In a forthcoming essay, Dimond explores this form of "provisional review" as it applies to the full range of constitutional cases that come before the Court. *See* Dimond, *Toward an Alternative Form of Judicial Review under the Constitution*, HASTINGS CONST. L.Q. (forthcoming 1985).

ond Reconstruction prematurely, whatever our rationale.⁷⁴ Any costs of grappling with the evidence of discrimination and with our national conscience over the need for and forms of affirmative action pale before the risks of adopting any color-blind whitewash which stubbornly declares that the current conditions and future prospects of racial minorities and women are culturally determined and not a fit subject for any public intervention. The law may have its limits, but Thomas Sowell has failed to make his case that we have reached them, or that we should declare the second Reconstruction finished.

74. In the *Civil Rights Cases*, [109 U.S. at 25] the Court wrote that the Negro emerging from slavery must cease "to be the special favorite of the laws." . . . We cannot in light of the history of the last century yield to that view. Had the Court in that decision and others been willing to "do for human liberty and the fundamental rights of American citizenship, what it did . . . for the protection of slavery and the rights of the masters of fugitive slaves," [*id.*, at 53] (Harlan, J., dissenting), we would not need now to permit the recognition of any "special wards."

Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 401 (1978) (Marshall, J., separate opinion).