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Whiteness as Innocence

David Simson

WHITENESS AS INNOCENCE

DAVID SIMSON†

ABSTRACT

Current antidiscrimination law is exceedingly hostile to the project of race-conscious remediation—the conscious use of race to mitigate America's persistent racial hierarchy. This Article argues that this broad hostility can be traced in significant part to what I call "Whiteness as Innocence" ideology. This ideology is a system of legal reasoning by which the formal principle of equality is filled with the substantive principle of white racial dominance via invocations of white innocence. That is, under this ideology, ideas about white innocence influence legal decisions on who is "alike" and "unalike" and what constitutes "alike" and "unalike" treatment in race-conscious remedies cases in ways that generally favor whites as a group yet appear consistent with, perhaps even required by, the ideal of racial equality. As a result, Whiteness as Innocence reasoning legitimizes doctrinal outcomes that help perpetuate America's racial hierarchy by making them appear to be decisions about responsibility, fairness, and desert, rather than exercises of racial power. In this process, innocence has displayed a malleable meaning and become presumptively attached to the law's understanding of whiteness itself. This illustrates in powerful ways that race is a socially and legally constructed concept. Whiteness as Innocence ideology has shaped important aspects of American race law in favor of perpetuating racial hierarchy. The most significant contemporary example is strict scrutiny doctrine as developed in the 1970s and 1980s under the lead of Justice Lewis Powell. Whiteness as Innocence ideology influenced all major aspects of this doctrine that have hamstrung race-conscious remedial efforts since then: (1) its strict standard of review; (2) its restrictions on the purposes for which race-conscious remedies can be used; and (3) its firm limits on the ways in which such remedies can be implemented. Important cases before and after that time, reaching from Dred Scott to decisions of today, also illustrate the long historical arch of this ideology. Whiteness as Innocence ideology allows racist premises of white superiority to infiltrate legal doctrine and creates racial hostility and resentment. Reform efforts seeking to promote racial justice ought to be

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freed from the strictures imposed by this ideology. This may well have to involve redefining the meaning of white innocence itself.

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INTRODUCTION

"In a guilty world, a price must be paid for the experience of innocence; in the United States, one could argue that Whites' experience of innocence is paid for by minorities."[1]

The ideal of equality has been an elusive aspiration since the founding of the United States. The quest for equality and freedom, after all, was one of the principal battle cries that led the American colonies to declare their independence and suffer through a long Revolutionary War.[2] Racial equality, too, has long been an American ideal, and has also been at the center of much pain and suffering on American soil; the Civil War and the conflicts surrounding the Civil Rights Movement of the 1950s and 1960s

1. L. Taylor Phillips & Brian S. Lowery, *Herd Invisibility: The Psychology of Racial Privilege*, 27 CURRENT DIRECTIONS PSYCHOL. SCI. 156, 160 (2018).

2. Famously, the Declaration of Independence held it "self-evident, that all men are created equal." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

only being the most prominent examples.[3] Yet, in matters of racial equality, it seems that the United States is mired in persistent cycles of progress and retrenchment.[4] Slavery was followed by emancipation, which was followed by segregation.[5] Segregation was followed by desegregation and antidiscrimination,[6] which was followed by de facto resegregation.[7]

Our current moment is a microcosm of this broader pattern. The election of President Barack Obama in 2008 engendered hopes among many that a different kind—a more lasting—progress had been made toward racial equality and harmony.[8] Yet, these hopes have been dashed by subsequent events and, in particular, the 2016 Presidential Election. Today, we live in a time of racially inflected immigration bans and border walls. These bans and walls are said to be necessary to keep at a distance racialized groups of people that are alleged threats to the very foundation of the United States.[9] Notwithstanding their exclusionary and anti-egalitarian character, both bans and walls are implicitly alleged to be consistent with America's fundamental values as part of a program said to "Make America Great Again."[10]

We also live in a time in which many people believe that efforts to accomplish racial integration and inclusion and address a long history of racial oppression and subordination, the practice of affirmative action foremost among them, have swung in the wrong direction.[11] These efforts, it is said, not only fail to help those who they are intended to benefit,[12] but

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3. IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 8, 385–87 (2016).

4. *See, e.g.*, Devon W. Carbado, *Afterword: Critical What What?*, 43 CONN. L. REV. 1593, 1607–08 (2011) (describing this "reform/retrenchment dialectic" in the history of American race relations).

5. On emancipation, see, e.g., ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 2–3 (2014). On segregation, see, e.g., C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 33–34 (3d ed. 1974).

6. *See, e.g.*, CLAY RISEN, THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT 78 (2014).

7. For example, the dissent in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 803 (2007) (Breyer, J., dissenting), included an entire appedix with evidence on the resegregation of American schools. *Id.* at 867–79.

8. KENDI, *supra* note 3, at 495–96.

9. President Donald Trump has called Mexicans "rapists," criminals, and drug dealers. *See, e.g.*, Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), http://time.com/4473972/donald-trump-mexico-meeting-insult. He has claimed that "Islam hates us" and that "[w]e can't allow people coming into this country who have this hatred of the United States." Trump v. Hawaii, 138 S. Ct. 2392, 2436 (2018) (Sotomayor, J., dissenting) (quoting Brief of the Roderick and Solange MacArthur Justice Center as *Amicus Curiae* in Support of Respondents at 8, 23, *Trump*, 138 S. Ct. 2392 (Nos. 16-1436 & 16-1540)).

10. *Trump*, 138 S. Ct. at 2435.

11. *See, e.g.*, Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game that They Are Now Losing*, 6 PERSP. ON PSYCHOL. SCI. 215, 216 (2011) (finding in a representative sample that "[b]y the 2000s, some 11% of Whites gave anti-White bias the maximum rating on [a 10-point] scale in comparison with only 2% of Whites who did so for anti-Black bias").

12. For example, Justice Thomas has consistently maintained that affirmative action programs hurt their beneficiaries. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 371-73 (2003) (Thomas, J., concurring in part and dissenting in part) (describing Justice Thomas's view of the "harm the [University

they affirmatively hurt their own set of victims. The influence of these sentiments is illustrated by the fact that the legality of affirmative action is perpetually on life support,[13] and a new set of challenges is coming.[14]

It is somewhat popular to treat the current moment as exceptional, unusual, outside the norm. And, in some respects, this is perhaps fair. But with respect to ideas about racial equality and their treatment by the law, the current moment is also in important ways a continuation of patterns that trace back a very long time. These continuities relate to the ways in which a country and legal system officially dedicated to equality, including racial equality, and the rule of law have managed to justify the reality of a persistent racial hierarchy that favors those who count as "white" over all others.[15]

This Article argues that a significant part of the heavy lifting was done through what I call "Whiteness as Innocence" ideology. This ideology combines two extremely powerful concepts in both law and public imagination: equality and innocence. It fuses them into a legal thought system that predictably prioritizes the interests of whites,[16] yet masquerades as racially egalitarian and impartial.[17] In this way, Whiteness as Innocence ideology has continuously legitimized the dominant status of

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of Michigan] Law School's racial discrimination visits upon its test subjects," i.e. the beneficiaries of the school's affirmative action program).

13. In the most recent challenge to a university affirmative action program, the Court upheld the program by a bare 4–3 majority. *See* Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198 (2016).

14. The current lawsuit against Harvard University, which claims that the University illegally discriminates against Asian-American applicants in admissions, has drawn particular attention. *See, e.g.*, Anemona Hartocollis, *'Lopping,' 'Tips' and the 'Z-List': Bias Lawsuit Explores Harvard's Admissions Secrets*, N. Y. TIMES (July 29, 2018), https://www.nytimes.com/2018/07/29/us/harvard-admissions-asian-americans.html.

15. Indeed, the persistence and extent of this oppressive racial hierarchy has been so pervasive that, as Cheryl Harris has excellently shown, it has arguably created a property interest in whiteness that has persisted, in ever-shifting forms, from the earliest days of the United States to today. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1731 (1993).

16. In this Article, I frequently use terms describing racial groups such as "whites" or "blacks" or "nonwhites." My use of these terms should not be read to imply that there is anything fixed or essential about these groups, or that they exist, or have ever existed, in some easily identifiable, unchanging way. Rather, race and racial groups "exist" not in the sense that they are undeniable biological facts, but rather in the sense that race is an undeniable *social* and *legal* construct that structures how people think of themselves, and how they are treated by other people and social institutions, including the law. *See infra* notes 29–30. To be sure, there is much instability, change, conflict, and confusion in how race as a construct has operated depending on contexts of time and space. But there is also stability, particularly but not solely in the American context, in the fact that (1) race has consistently been used as a marker of social difference; (2) racial groupings that distinguish those that are considered "white" from those that are not have long been cognizable in American society; (3) these groupings have been used to construct and defend oppressive social hierarchies that are built around ideas of white supremacy; and (4) these hierarchies have consistently distributed social benefits based on perceived degrees of separation from "pure" whiteness at the top, and blackness at the bottom. *See infra* notes 29–30; *see also* Harris, *supra* note 15, at 1736 ("[M]ainly whiteness has been characterized, not by an inherent unifying characteristic, but by the exclusion of others deemed to be 'not white.'").

17. This ideology, then, can be viewed as what Thomas Ross has described as the "smooth veneer to the cracked surface of the real and hard choices in law" related to racial equality, a veneer that makes seemingly "coherent the choices that might divide us as a community." Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 2–3 (1990).

whites in the racial hierarchy of the United States by making it seem consistent with American social and legal commitments to the principle of equality. Thus, Whiteness as Innocence ideology creates what social psychologists Jim Sidanius and Felicia Pratto have called "*plausible deniability*, or the ability to practice discrimination, while at the same time denying that any discrimination is actually taking place."[18]

Equality as an abstract formal principle commands that "likes should be treated alike" and "things that are unalike should be treated unalike in proportion to their unalikeness."[19] Scholars have noted broad societal agreement on the fundamental importance of following the command of equality.[20] Importantly, the Supreme Court has stated that this principle forms the basic constitutional command underlying the Equal Protection Clause of the Fourteenth Amendment.[21] However, while this formal concept of equality is powerful in establishing the important principle of consistency,[22] by itself it does not "tell us anything substantive" about what kinds of equality should be considered acceptable or just.[23] Substantive principles and values that are external to the idea of equality are necessary "to decide which people we want to treat the same, and which differently."[24]

This Article argues that, in the context of antidiscrimination law and race-conscious remediation,[25] Whiteness as Innocence ideology is the system of legal reasoning by which the formal principle of equality is filled

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18. *See* JIM SIDANIUS & FELICIA PRATTO, SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HIERARCHY AND OPPRESSION 43 (1999).

19. *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 543 (1982); *see also* EQUALITY: SELECTED READINGS 2 (Louis P. Pojman & Robert Westmoreland eds., 1997) (calling this principle "formal equality").

20. *See* EQUALITY: SELECTED READINGS, *supra* note 19, at 1 ("In the minds of many, equality has come to be identified with *justice*.").

21. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." (quoting Plyer v. Doe, 457 U.S. 202, 216 (1982))); Reed v. Reed, 404 U.S. 71, 76 (1971) (stating that under Equal Protection Clause, a "classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike'") (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

22. EQUALITY: SELECTED READINGS, *supra* note 19, at 3.

23. *Id.* at 2; *cf.* LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES 3–4 (2013) (quoting legal realist Karl Llewellyn, describing "that curious, almost universal sense of justice which urges that all men are properly to be treated alike in like circumstances. As the social system varies, we meet infinite variations as to what men or treatments or circumstances are to be classed as 'like'; but the pressure to accept the views of the time and place remains.").

24. Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575, 578 (1983).

25. In this Article, I use the terms "race-conscious remedies" and "race-conscious remediation" broadly and anchor them to the idea of racial hierarchy. I include in these terms any decision by an actor, public or private, that consciously considers race with the aim of reducing the existing racial hierarchy that disproportionately distributes benefits and resources to those constructed as "white," and away from those constructed as "nonwhite." *See, e.g.*, David Simson, *Fool Me Once, Shame on You; Fool Me Twice, Shame on You Again: How Disparate Treatment Doctrine Perpetuates Racial*

with the substantive principle of white racial dominance[26] via invocations of white innocence. Under Whiteness as Innocence ideology, legal decisions on who is "alike" and "unalike" and what constitutes "alike" and "unalike" treatment are made in ways that favor the interests of whites as a group and at the same time protect the dominant social status of whites from egalitarian critique.[27] The concept of innocence plays the critical role of legitimizing these racially biased equality determinations by presenting them as decisions about responsibility, fairness, and desert rather than exercises of racial power and self-interest.[28]

In playing this role, the idea of innocence has taken on a malleable meaning. It has also arguably been racialized and become attached to the meaning of "whiteness" itself—illustrating in powerful ways the socially[29]

Hierarchy, 56 HOUSTON L. REV. (forthcoming 2019) (manuscript at 26–27) (on file with author) (reviewing research on racial disparities in employment outcomes); Emily Badger et al., *Extensive Data Shows Punishing Reach of Racism for Black Boys*, N.Y. TIMES (Mar. 19, 2018), https://nyti.ms/2GGpFZw (reviewing data on racial disparities in lifetime economic success). My underlying assumption is that a racial hierarchy that is grounded in a long history of legalized white supremacy, *see generally, e.g.*, WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550–1812 (2d ed. 2012); Harris, *supra* note 15, at 1715–24, is illegitimate, particularly in a society with fundamental egalitarian aspirations like the United States. Thus, if a particular race-conscious action or policy is taken to reduce this hierarchy and distributes increased social benefits to nonwhites, I consider it a "remedy" for purposes of this Article. I accordingly use the term "remedy" somewhat more broadly than the common use of the term describing the types of relief a litigant may receive after proving a violation of the law. *See, e.g.*, EMILY SHERWIN ET AL., AMES, CHAFEE, AND RE ON REMEDIES 2 (Robert C. Clark et al. eds., 2012) ("The object of a [remedies course] is to teach the judicial remedies available for violations of legal rights."). Race-conscious remediation as I define it includes affirmative action programs, statutory or court-ordered antidiscrimination remedies that consider race in defining their beneficiaries, but also decisions like that of pre-Civil War Congress to prohibit slavery in certain territories. I use this expansive definition because I believe that it is in this broadly defined area of race-conscious remediation (i.e., on the battleground of America's longstanding racial hierarchy) that the law's concept of racial equality is most contested and impactful.

26. The substantive principle of "white racial dominance," as I use it here, means the preservation of the dominant position of whites in the American racial hierarchy and the protection of their interests, as well as the subordination of nonwhites and their interests—particularly when the latter conflict with the interests of whites. *Cf.* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (proposing that important race cases have arguably been guided by a principle of "interest convergence" by which the "interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites" and "the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites").

27. One way to think about the claim in this Article is that Whiteness as Innocence ideology is an important legal mechanism through which the property interest in whiteness that Cheryl Harris identified has accomplished its longevity.

28. *Cf.* Cecil J. Hunt, II, *The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence*, 11 MICH. J. RACE & L. 477, 497 (2006) ("Inherent in notions of Whiteness are also notions of 'innocence' that suggest that White rule is not merely the result of outside imposition by force.").

29. That race is not a natural, fixed, or biological concept, but instead a social construction, has long been a fundamental claim of Critical Race Theory (CRT). *See, e.g.*, Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994); David Simson, *Exclusion, Punishment, Racism, and Our Schools: A Critical Race Theory Perspective on School Discipline*, 61 UCLA L. REV. 506, 527–32 (2014) (summarizing relevant CRT research). One way to describe the claim that race is a social construction is to say that the racial *categories* we use to describe ourselves and others in racial terms (e.g., "white"),

and legally[30] constructed nature of race. This racialized innocence concept has shaped important aspects of American law governing racial equality throughout American history. Perhaps the most important contemporary example is the doctrine of strict scrutiny that developed in the 1970s and 1980s and continues to govern most government actions that use racial classifications.[31] But there are important Supreme Court decisions and doctrines, both before and after that time period, that also arguably bear the imprint of Whiteness as Innocence ideology—including decisions issued just this past term.[32] Whiteness as Innocence ideology seems to play an especially important role during times when the stability of existing racial hierarchy, and the privileged position of whites within it, is uncertain. In such times, the ideology has been mobilized to protect existing

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the *rules* we use to determine whom to put into which category, and the *meanings* we assign to those racial categories are the product of social processes and contestations that develop in particular contexts—not "natural" or "biological" "facts" that exist unchanged over time. *See, e.g.*, Carbado, *supra* note 4 at 1610; Simson, *supra*, at 528–32 (reviewing graphical illustration and examples of this process). Racial groups, categorization rules, and meanings are the outcome of complex processes that reflect economic, ideological, political, and other power struggles. The precise content and boundaries of race are thus historically and contextually contingent to some extent. Nell Irvin Painter's historical analysis of whiteness illustrates this point, by providing various examples of how understandings of "whiteness" have been unstable and contested over time, notwithstanding the efforts of many race "scientists" and other intellectuals to imbue race with a fixed character. *See generally* NELL IRVIN PAINTER, THE HISTORY OF WHITE PEOPLE (2010). However, while the specifics of race may change, the use of race to mark social difference and to create and protect a racial hierarchy in which those who are constructed as "white" dominate, and those who are not are subordinated, is remarkably stable over time. *See, e.g.*, KENDI, *supra* note 3, at 2–3; *see also* SIDANIUS & PRATTO, *supra* note 18, at 61 (noting that "for most of U.S. history, race . . . has been and remains the primary basis of social stratification"). The law plays a role in this process and, most of the time, functions to legitimate and perpetuate, rather than eradicate, racial inequality and the oppression of nonwhites. *See, e.g.*, Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1336 (1988); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1053–54 (1978).

30. *See, e.g.*, IAN F. HANEY-LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE, at xiii–xiv (1996); Laura E. Gómez, *Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field*, 6 ANN. REV. L. & SOC. SCI. 487, 487 (2010) (arguing race and the law "coconstruct each other"). The legal system has played a role in racial construction in various ways. It has laid down rules setting the boundaries of racial categories—for example, before the U.S. Supreme Court invalidated racial miscegenation laws in *Loving v. Virginia*, 388 U.S. 1, 2 (1967), a large number of states had statutes defining the racial category of "white" and various categories of "nonwhite" groups to police the racial purity goals of such laws. *See, e.g.*, HANEY-LÓPEZ, *supra*, at 117–19. It has also adjudicated claims regarding who falls into which racial category—for example in the naturalization context in the 1920s, the U.S. Supreme Court rejected claims by immigrants from India and Japan that they were "white" for purposes of naturalization laws, which deep into the 20th century required a showing that one was a "free white person" before one could naturalize. *See* United States v. Thind, 261 U.S. 204, 214–15 (1923); Ozawa v. United States, 260 U.S. 178, 197–98 (1922). And, importantly, it has deeply infused racial categories with social and legal meanings. Perhaps the most infamous example of this is Chief Justice Roger Taney's opinion in *Dred Scott v. Sandford*, which declared that members of the "negro African race" could not be citizens of the United States, because at the time of the framing of the Constitution they "had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit." 60 U.S. 393, 407–08 (1856), *superseded by constitutional amendment*, U.S. CONST. amend XIV. I discuss *Dred Scott* in more detail in Section III.A below.

31. *See infra* Section II.A.

32. *See infra* Part III.

hierarchy from significant interference through law, and it has often succeeded in doing so.

This Article uncovers and describes Whiteness as Innocence ideology and its influence on the law of racial equality and race-conscious remediation. Its aim is mostly descriptive. I want to show how this ideology has continuously helped to square the circle of making America's tenacious racial hierarchy legally consistent with the country's egalitarian aspirations. In Part I, I first explain key Whiteness as Innocence concepts. I explore different definitions and meanings of innocence, as the term interacts with whiteness, and relate them to different types of race-conscious remedies cases. I also introduce what I call "white innocence legal moves," that is legal arguments that connect ideas about whiteness, innocence, and equality in ways that protect the racial privilege of whites. In Part II, I then show how these moves, and Whiteness as Innocence ideology more generally, operated in an important set of Supreme Court cases in the 1970s and 1980s to put the brakes on ongoing projects of race-conscious remediation. I discuss these cases first because they explicitly invoke the innocence of alleged white "victims" of race-conscious remedies and thus make the operation of Whiteness as Innocence ideology more tangible. Indeed, it was these very cases that led to an initial set of scholarship on the idea of white innocence whose insights I partially rely and build upon.[33] In addition, Whiteness as Innocence ideology, as applied in these cases, came to influence the following major aspects of today's race-conscious remedies doctrine: (1) the hostile standard of review for race-conscious decision-making, regardless of who benefits from it; (2) limitations on the purposes for which race-conscious remediation can be used and the types of institutions that can properly engage in it; and (3) strict limits on the implementation and permissible forms of race-conscious remediation. Thus, it is important to analyze this formative period. In Part III, I briefly expand the scope of the inquiry both backward and forward in time to show the long historical arch of Whiteness as Innocence reasoning. The ideology arguably reaches back as far as *Dred Scott v. Sandford*.[34] The recently decided cases of *Abbott v. Perez*[35] and *Trump v. Hawaii*[36] show

33. *See, e.g.*, RONALD J. FISCUS, THE CONSTITUTIONAL LOGIC OF AFFIRMATIVE ACTION 2, 4–5, 7 (Stephen L. Wasby ed., 1992); Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1005, 1010–14, 1016, 1019–21 (1989); David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?*, 91 COLUM. L. REV. 790, 790–91, 793–94 (1991); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 298–300 (1990); Ross, *supra* note 17, at 2; Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 80–81 (1986). For later articles that return to the idea of white innocence in similar contexts, *see, e.g.*, Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 VAND. L. REV. 297, 301–02 (2015); Neil Gotanda, *Reflections on* Korematsu, Brown *and White Innocence*, 13 TEMP. POL. & CIV. RTS. L. REV. 663, 672–73 (2004); Seth D. Harris, *Innocence and the Sopranos*, 49 N.Y.L. SCH. L. REV. 577 *passim* (2004); Hunt, *supra* note 28, *passim*.

34. 60 U.S. 393 (1857).

35. 138 S. Ct. 2305 (2018).

36. 138 S. Ct. 2392 (2018).

its continued influence today. In Part IV, I offer initial thoughts on the normative and doctrinal implications of my analysis.

I. WHITENESS AS INNOCENCE CONCEPTS

A. White Innocence Types and the General White Innocence Presumption

The word "innocence" can have many different meanings. As scholars have pointed out, it may narrowly mean not being guilty of a specific offense or charge[37] or being wrongly accused[38]; or, more broadly, it may mean absence of moral blameworthiness[39] or moral purity.[40] In the context of race in the United States, considerations of innocence related to whiteness inevitably have to confront at least two sobering facts: (1) the United States has a long and undeniable history of racism and racial oppression imposed by whites on nonwhite groups,[41] and (2) as a result of this history, whiteness has historically meant, and continues to mean, privileged access to material and psychic benefits that come with occupying a dominant position in a longstanding and persistent racial hierarchy[42] grounded in white supremacy.[43]

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37. Harris, *supra* note 33, at 577.

38. Hunt, *supra* note 28, at 498.

39. *Id.*

40. Harris, *supra* note 33, at 577.

41. Illustrative scholarship analyzing parts of this history include, for example, EDWARD E. BAPTIST, THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM (2014); JORDAN, *supra* note 25; IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA (2005); KENDI, *supra* note 3, at 31–32, and many others. As CRT scholars have argued, "historically, racism has been constitutive of, rather than oppositional to, American democracy." Carbado, *supra* note 4, at 1613.

42. That whites, as a group, occupy a preferred position in America's racial hierarchy is reflected in racial disparities across indicators of well-being and social status and should be a fairly uncontroversial claim. For a brief summary of relevant examples, see, e.g., Victoria C. Plaut, *Diversity Science: Why and How Difference Makes a Difference*, 21 PSYCHOL. INQUIRY 77, 79–80 (2010) (giving examples related to wealth and employment, criminal justice, education, and health). For an argument related to the psychic benefits associated with whiteness, see, e.g., DAVID R. ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS 6–13 (rev. ed. 2007).

43. In this piece, I use Frances Lee Ansley's definition of white supremacy:

> By 'white supremacy' I do not mean to allude only to the self-conscious racism of white supremacist hate groups. I refer instead to a political, economic and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings.
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> . . . .
>
> [M]y choice of words is made with an eye toward helping us consciously situate ourselves in reality. The term 'white supremacy' is emphatically *not* used here to inflate rhetoric, or to deny that some forms of white supremacy are more virulent than others. . . . On the other hand, I fail to see how Americans can avoid recognizing that we still live in a white supremacist system.

Ansley, *supra* note 33, at 1024 n.12, 1025. Particularly in light of recent events like those in Charlottesville, the persistence of white supremacy may have become clearer for a greater number of (especially white) Americans than was the case before.

Consequently, when it comes to innocence and whiteness, two ideas that respond to these facts inevitably take center stage: responsibility[44] and desert. To claim *racial* innocence, *white* innocence, innocence notwithstanding the history and reality of whiteness, can mean two different things. It may mean not being an active participant in the country's widespread and ongoing history of racial discrimination, therefore not sharing responsibility for its individual outcomes, and as a result being able to claim a narrower "absence of specific guilt" innocence. I call this "Type 1 White Innocence." Alternatively, it may mean not having benefitted from this history in achieving one's social station,[45] but rather having earned one's place through merit separate from the influence of race,[46] thus deserving this place,[47] and as a result being able to claim broader "moral purity" innocence. I call this "Type 2 White Innocence." In addition to these two different types of white innocence, claims about white innocence may be made at an individual level, as to a particular white person (a worker, student, or contractor, for example), or at an aggregate level related to whites in general.

A person's willingness to distinguish between types of white innocence, and to apply a particular type of white innocence to cases involving questions of racial equality, will be influenced by that person's baseline view of the propriety of existing racial hierarchy in American society. The more one thinks that racism is only a thing of the past, and that current resource distributions reflect the results of legitimate merit-based competition, the more one will be inclined to see (and defend) white innocence of all kinds.[48]

Whiteness as Innocence ideology proceeds from a visceral baseline presumption that whites, as a group and in the present,[49] are legitimately

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44. *See, e.g.*, Ross, *supra* note 17, at 3 ("White innocence is the insistence on the innocence or absence of responsibility of the contemporary white person.").

45. *See, e.g.*, Hunt, *supra* note 28, at 513 (arguing that many whites "view the current disproportionate social, economic, and political benefits enjoyed by Whites as the unracialized and normal results of their individual merit and hard work. In this way, Whiteness is regarded as being innocent of either benefiting from or perpetuating historic racism or its contemporary legacy.").

46. One can reasonably question whether in a society like the United States this is possible. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) ("Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists."). For purposes of this Article, however, I will assume that it is possible. More importantly, the Justices whose application of Whiteness as Innocence ideology this Article analyzes clearly seem to think that it is possible. *See generally infra* Part II.

47. For purposes of this Article, I assume that merit is an appropriate basis for determining desert and thus highly relevant to the distribution of social privileges.

48. *Cf.* Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1126–27 (2008) (discussing differences between whites and blacks are likely to define "racial discrimination" as a result of their different incentives and information).

49. As described in Section I.C below, this view about the legitimacy of white privilege in the present does not necessitate denying the reality of past white-over-nonwhite racism, and in fact often

occupying their dominant position in the American racial hierarchy.[50] In this view, whites' current disproportionate possession of societal resources and privileges is, as a general presumption, not the result of racism and race discrimination.[51] Instead, it is the result of meritorious actors succeeding in a normally functioning, competitive society, and therefore presumptively legitimate.[52] Consequently, people who subscribe to this ideology presume that, absent evidence to the contrary, innocence of both Type 1 and Type 2 applies to whites individually and as a group.[53] I call this the "general white innocence presumption" (GWIP).

B. Race-Conscious Remedies, Equality, and Innocence

Race-conscious remedies cases involve a complicated interaction between white innocence, as defined above, and racial equality. There are three important considerations in such cases that relate to white innocence and racial equality: First, what is the legal standard of review for race-conscious remedies cases? Second, what are the permissible reasons or purposes that should allow an institution to engage in race-conscious remediation? Third, which form may the race-conscious remedy take, that is how may it be implemented?

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involves acknowledging it. It does involve denying that past racism delegitimizes racial hierarchy in the present, however.

50. I consider this baseline sentiment a visceral one, rather than a deliberately developed thought system. My argument that this presumption exists is grounded in empirical research, however. Social psychology research, particularly pursuant to Social Dominance Theory (SDT), provides persuasive empirical evidence that this baseline presumption is one that American whites, in particular, are likely to make. For example, SDT researchers have found that American whites are substantially more likely to score high on a measure called "Social Dominance Orientation" (SDO), which measures individual preferences for group inequality and for social systems to be structured as group-based hierarchies, and includes items such as: "Some groups of people are simply inferior to other groups"; and "An ideal society requires some groups to be on top and others to be on the bottom." Arnold K. Ho et al., *The Nature of Social Dominance Orientation: Theorizing and Measuring Preferences for Intergroup Inequality Using the New SDO$_7$ Scale*, 109 J. PERSONALITY & SOC. PSYCHOL. 1003, 1028 (2015); *id.* at 1021 tbl.11 (research findings showing higher SDO levels for whites); *see also* Felicia Pratto, *The Puzzle of Continuing Group Inequality: Piecing Together Psychological, Social, and Cultural Forces in Social Dominance Theory*, 31 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 191, 230–31 (1999). Given the long history of American racial hierarchy and the fact that most whites are likely aware of their own dominant position within it, these findings support the view that a *racial* ideology such as I describe here is likely operating, consciously or unconsciously, in many whites (and, to a lesser extent, in other racial groups as well). For a more detailed discussion of SDO, SDT, and an argument that judges are likely to be high-SDO individuals on the whole, see Simson, *supra* note 25, at 14–31.

51. *See* Hunt, *supra* note 28, at 513.

52. Thus, the ideology is implicitly based on a premise of white racial superiority at a group level. The ideology allows for individual exceptions and variation, and thus is a softer form of the premise than beliefs in the inherent biological inferiority of all nonwhites, which also have a long history in the United States and elsewhere. KENDI, *supra* note 3, at 31–32; PAINTER, *supra* note 29, at 59–64, 66–67, 70–71. But in presuming the legitimacy of the racially disparate status quo allocation of resources, it nonetheless is based on a belief of white group racial superiority of some kind, be it cultural, religious, or otherwise. *Cf.* Ross, *supra* note 33, at 299 ("Put simply, the rhetoric of innocence is connected to racism."). As noted above, *see supra* note 50, there is empirical evidence persuasively suggesting that this premise is common.

53. *See supra* note 51.

The questions of the appropriate standard of review and of permissible purposes are closely interconnected in cases involving issues of racial equality. With respect to permissible purposes, the relevant racial equality question concerns the selection of the beneficiaries of the remedy. By my definition,[54] any race-conscious remedy involves treating whites differently from nonwhites because it selects nonwhites, in particular, to receive a given benefit. Therefore, formal racial equality demands that there is a purpose grounded in an "unalikeness" between the two groups that is proportionate to the differential treatment. To the extent that white innocence is considered relevant to this determination, it involves considerations of white innocence at the group level. If whites as a group can claim either Type 1, or, especially, Type 2 White Innocence, and thus are meritorious contenders for the privileges distributed by race-conscious remediation, selecting nonwhites as the sole beneficiaries of a given remedy becomes more difficult to justify. A judge reasoning from the GWIP, therefore, will approve fewer purposes as legitimate bases for distributing benefits to nonwhites. On the other hand, if neither type of innocence can be claimed and the GWIP is inapplicable, nonwhites, as either the victims of race-based discrimination or being disadvantaged in a racially rigged competition, become more proportionately unlike their white competitors. This, in turn, more easily justifies race-conscious remedial action.

The standard of review chosen to decide the legality of race-conscious remedies reflects a judicial determination regarding how likely it is that a proportionate "unalikeness" between racial groups can be found that justifies the "unalike" treatment involved. This is essentially a conclusion on how much the decision makers that implement a race-conscious remedy can be trusted in their determination that nonwhites are sufficiently "unalike" from whites to justify the different treatment. A judge harboring greater suspicion will implement a stricter standard of review and will require the decision maker to provide a more persuasive justification for treating whites and nonwhites "unalike."

With respect to remedy implementation, the relevant racial equality question relates to the treatment of the nonwhite beneficiaries of the remedy versus the treatment of those who are not beneficiaries but are also affected by the remedy. As with any redistribution from a given status quo, race-conscious remedies cases involve a "cost" to the people who are benefitting from the status quo.[55] Because, as noted above, whites generally occupy a dominant position in American society,[56] it is usually (though not necessarily) whites who experience the "cost" of reduced privileges compared to the status quo in race-conscious remedies cases. One question

54. *See supra* note 25.

55. My use of the term "cost" does not imply a judgment about the propriety or impropriety of the cost. It simply means a reduction in privileges compared to the status quo before the race-conscious remedy. A cost could include, for example, having to give up an unearned race-based advantage one would have had if a racially discriminatory selection process had continued.

56. *See supra* note 42 and accompanying text.

that is raised by such cases, therefore, is whether, and to what extent, this cost should be imposed on whites, that is whether the imposition of the cost at issue is justified.

Determining how the implementation of a race-conscious remedy relates to racial equality, and how any equality determinations are affected by white innocence, requires attention to different types of race-conscious remedies cases. The redistribution involved, the cost imposed on status quo beneficiaries as a result, and the racial equality implications that follow, may take several forms depending on the type of case. I focus on three main types of cases.

First, a race-conscious remedies case may involve whites having to share their existing privileges (for example, seniority privileges in a job) with new nonwhite beneficiaries who are granted access to those same privileges and, thus, dilute the exclusivity of the privileges. This scenario usually appears in cases in which the race-conscious remedy is part of the relief granted to an identified victim of proven race discrimination.[57] Cases like this arguably involve "like treatment" of the white and nonwhite persons involved by virtue of whites and nonwhites receiving the same privileges as a result of the remedy. Thus, the relevant racial equality question is whether whites and nonwhites are "alike" or similarly situated in relevant respects.

Second, a race-conscious remedies case may involve nonwhites receiving privileges (for example, jobs during a hiring process, promotions, government contracts, or admission to a school or university) that, under status quo rules for the distribution of these privileges, would have gone to whites instead.

Third, a race-conscious remedies case may involve whites having to give up privileges they previously enjoyed (for example, a job during a layoff), while nonwhites get to continue to enjoy these privileges.

The second and third scenarios may arise in cases in which the redistribution is part of the relief granted to an identified victim of prior discrimination, or they may arise in what are usually called "affirmative action" cases in which the beneficiaries are not necessarily identified victims of a proven case of prior discrimination.[58] In either case, both scenarios involve "unalike" treatment of the white and nonwhite persons involved, with the cost being borne by the white persons. Thus, the relevant racial-

57. In these cases, the remedy is "race-conscious" in only a secondary way, in the sense that the beneficiary is not selected directly based on race, but rather based on having experienced prior race-based discrimination. *Cf.* Paul Brest, *Affirmative Action and the Constitution: Three Theories*, 72 IOWA L. REV. 281, 284 (1987); Noah D. Zatz, *Special Treatment Everywhere, Special Treatment Nowhere*, 95 B.U. L. REV. 1155, 1158 (2015). Because Whiteness as Innocence ideology has played a significant role in these types of cases as well, I also include them in the definition of race-conscious remediation, and in the analysis in this Article.

58. *See, e.g.*, United Steelworkers of Am. v. Weber, 443 U.S. 193, 197 (1979) (describing as an "affirmative action plan" a program of race-based admissions quotas to a training program voluntarily adopted by an employer to address broad minority underrepresentation in craft positions).

equality question is whether the white and nonwhite persons involved are "unalike" in a proportionate way so that the treatment should be considered equal, even if unalike. If the nonwhite beneficiaries of a remedy are victims of prior race discrimination, this victim status clearly distinguishes the white and nonwhite persons involved as "unalike," and thus may be one basis for justifying the unalike treatment as consistent with racial equality.

The two types of white innocence discussed in Section I.A affect these equality determinations in different ways. For example, assume that a particular white innocence claim is factually valid and is raised as relevant to determining whether a particular race-conscious remedy is consistent with racial equality. To the extent that a claim to narrow Type 1 White Innocence forms the basis of the equality determination, it would suggest that both whites and nonwhites who are affected by the remedy are fundamentally "alike." Neither personally participated in the racial discrimination that led to the hierarchical status quo. As a result, under this framing, cases involving the first type of race-conscious remedy would be consistent with racial equality because they create "alike treatment" of people who are alike in the relevant respect. Cases involving the second and third type of remedy would be more suspect because they involve different treatment of white and nonwhite individuals who are alike in a relevant way. Thus, the relevant "unalikeness" that would make equal the "unalike" treatment would have to be found outside the realm of Type 1 White Innocence (for example, in a finding that Type 2 White Innocence is not applicable). If the broader Type 2 White Innocence forms the basis of the equality determination, it would suggest that whites and nonwhites are fundamentally "unalike." Whites with Type 2 White Innocence have earned their existing privileges through merit, while nonwhite beneficiaries have not (yet).[59] Vis-à-vis such a white person, race-conscious remediation of all three types is suspect (at least on pure formal equality grounds). In sum, cases of the second and third type of remedy are most vulnerable to attack as inconsistent with racial equality based on their treatment of "innocent" white nonbeneficiaries. As far as the formal principle of equality goes, the legitimacy of such remedies depends on a determination that, at a minimum, Type 2 White Innocence is not available.

On the other hand, if a white innocence claim is not factually valid, the equality implications for race-conscious remedies cases are very different. If either type of white innocence is absent, either because of participation in race discrimination or because, while not engaging in race discrimination directly, a person benefitted from the spoils of American white-over-nonwhite racial hierarchy in achieving their existing privileges, whites and nonwhites are "unalike" to the detriment of nonwhite

59. This is not the same as concluding that the nonwhite beneficiary is not also meritorious in the abstract. It is simply to say that the status quo outcome for the white person was the result of merit whereas the nonwhite person has not yet demonstrated (or been able to demonstrate) the same merit.

persons. This would justify "unalike" treatment of whites and nonwhites, and the relevant question would be what the proportional "unalike" treatment should entail to effectuate racial equality.

To summarize, for Whiteness as Innocence ideology to be successful in making racial hierarchy seem consistent with racial equality in race-conscious remedies cases, it is important that (1) the innocence of whites is raised as a relevant consideration in evaluating the propriety of a given remedy; and (2) as often as possible, both types of white innocence are considered to be applicable. In this context, therefore, the GWIP is particularly powerful in stacking the deck against race-conscious remediation because it presumes, absent evidence to the contrary, that both types of white innocence apply at the group as well as at the individual level. Accordingly, courts and justices who have used Whiteness as Innocence ideology have utilized various types of legal arguments, or what I call "white innocence moves," to "prove" the GWIP's accuracy, apply it to limit race-conscious remediation, and thus preserve America's racial hierarchy while making it seem consistent with racial equality.[60]

C. White Innocence Moves

What white innocence legal moves have in common is that they try to protect the integrity of the GWIP and apply as broad a conception of white innocence in race-conscious remedies cases as possible to limit the reach of remediation while making this limitation seem consistent with, perhaps demanded by, racial equality. White innocence moves can be defensive or offensive.

Defensive white innocence moves are related to the responsibility aspect of white innocence, and are concerned with establishing the absence of affirmative wrongdoing by whites. Thus, they mostly relate to whether Type 1 White Innocence is available and whether a claim to Type 2 White Innocence remains possible.

The main defensive white innocence move is to use standards of wrongdoing that require very specific types of evidence and apply to a small group of people and actions. For example, this move may involve requiring that only definitive evidence of clearly identified misbehavior by a specific wrongdoer, shown to have caused clear race-based harm to individual nonwhites, is sufficient to call into question presumed Type 1 White Innocence and justify a race-conscious legal response. In other words, one specific white innocence move is to apply what is often called

60. In the terminology of SDT, Whiteness as Innocence can be viewed as a "hierarchy-enhancing" ideology, or "legitimizing myth," that sustains existing group-based hierarchy and gives it longevity. *See, e.g.*, SIDANIUS & PRATTO, *supra* note 18, at 40, 104. For further discussion of the concept and its relevance to the legal system, see Simson, *supra* note 25, at 15–24.

the "perpetrator perspective" of racial discrimination.[61] This move is powerful because it narrows the group of whites who can be considered to have forfeited the benefit of the GWIP. Another related defensive move is to limit the number of actors that are empowered to determine that the GWIP has been overcome.

Offensive white innocence moves are related to the desert aspect of white innocence. They are concerned with either establishing that whites have not benefitted from American racism or establishing the affirmative merit of different types of whites affected by race-conscious remediation. Thus, they relate to whether Type 2 White Innocence is available.

One important offensive white innocence move is to conflate Type 1 and Type 2 White Innocence and, thus, to transfer the innocence implications of broad moral white innocence to situations in which only narrow specific guilt white innocence has been shown.[62] This is a particularly influential move in race-conscious remedies cases of the second and third type described above. In those cases, if Type 1 White Innocence is available, whites and nonwhites are "alike" on that basis and their unalike treatment seems inconsistent with racial equality. But if the white persons involved, despite their Type 1 White Innocence, cannot claim Type 2 White Innocence because they benefit from race-based advantages, then white and nonwhite persons are unalike on that basis, and remedies that respond to the advantage accruing to whiteness may still treat them equally. Conflating Type 1 and Type 2 White Innocence, therefore, powerfully undermines the legitimacy of the second and third types of race-conscious remedies by obscuring their potential to create racial equality.

Another offensive white innocence move is to use legal reasoning that acknowledges white racism in the past but denies that this past racism either undermines the legitimacy of white privilege in the present or justifies interference with it.[63] Yet another move is to treat white privilege as

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61. *See, e.g.*, Freeman, *supra* note 29 (describing the perpetrator perspective as one focused on "actions . . . inflicted on the victim by the perpetrator" and operating in a "world composed of atomistic individuals whose actions are outside of and apart from the social fabric and without historical continuity" and in which "law views racial discrimination not as a social phenomenon, but merely as the misguided conduct of particular actors"). Some scholars have connected claims of white innocence with the perpetrator perspective, but these scholars have viewed the perpetrator perspective as the source of claims to white innocence. *See, e.g.*, *id.* at 1055 (noting that the idea of fault associated with the perpetrator perspective "creates a class of 'innocents,' who need not feel any personal responsibility for the conditions associated with discrimination"); *see also* Boddie, *supra* note 33, at 322 (describing "innocence paradigm" as the "moral byproduct" of the perpetrator perspective); Sullivan, *supra* note 33, at 94 (arguing that "a focus on sin begets claims of innocence"). In my view, the causation goes the other way: The GWIP encourages the use of the perpetrator perspective, rather than being a result of it.

62. *See* Harris, *supra* note 33, at 580 (calling this a "subtle bait-and-switch of one definition of 'innocence' for the other").

63. *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1146 (1997) (arguing that "the repudiation of past practices plays a complex role within equal protection law" and that "the act of repudiating past practices can exculpate present practices, if we characterize the wrongs of the past narrowly enough to

equivalent with abstract notions of "merit" in a circular fashion by presuming that, absent evidence to the contrary, whites who occupy an advantaged position do so because they are more meritorious than others competing for that position.[64] A fourth offensive white innocence move is to connect the GWIP with ideas about the nature of race itself, such that white privilege appears naturalized rather than as the result of oppressive social-power dynamics.[65] This last move illustrates powerfully the socially constructed, and thus to some extent indeterminate, nature of race and how this indeterminacy has been used to preserve American racial hierarchy within a racial equality framework.[66]

Often, the application of white innocence moves is accompanied by arguments that race-conscious remediation that falls outside of narrow parameters and is inconsistent with the GWIP is "victimizing" whites who are merely exercising their legitimate rights and privileges.

Taking together the implications of the above conceptual structure, Whiteness as Innocence reasoning often takes the following general form: First, judges influenced by Whiteness as Innocence ideology raise white innocence as a relevant, and important, factor in determining the permissibility of a race-conscious remedy. Second, they apply white innocence moves to assert the GWIP as accurate and applicable. Third, they use the GWIP to claim (at least implicitly) that race-conscious remediation is inconsistent with racial equality. Fourth, they conclude that race-conscious remediation is not permissible, or must be strictly circumscribed, to prevent the victimization of whites.

I argue that this reasoning process and white innocence moves have a long history in the Supreme Court, where multiple Justices have used them to inscribe Whiteness as Innocence ideology into American jurisprudence on race. This ideology has been particularly powerful during historical moments when the existing racial hierarchy was under attack and legal

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differentiate them from current regulatory forms"); *cf.* Gotanda, *supra* note 33, at 673 (noting in discussing the relevance of "white innocence" in the context of *Brown v. Board of Education* that "innocence" can be thought of "in the sense that the Aha! Moment has, through the use of a 'new' beginning, cut off the moral, social, economic and political ties to the past," that is, that "the 'innocence' is the innocence of a new beginning").

64. *See, e.g.*, Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799, 812–13 (2003) (noting that "[o]ne widespread response" by whites to challenges to white privilege posed by affirmative action was to "invoke[] the concept of merit and defend[] the dominant norm with a circular argument: to the extent whiteness is dominant in a workplace or throughout society, it is the product of merit; merit, not unearned privilege, created the present allocation of work").

65. *Cf.* Harris, *supra* note 15, at 1763 ("[Q]uestions pertaining to definitions of race then are not principally biological or genetic, but social and political: what must be addressed is who is defining, how is the definition constructed, and why is the definition being propounded. Because definition is so often a central part of domination, critical thinking about these issues must precede and adjoin any definition.").

66. There are also arguably other white innocence moves that I do not discuss in this Article, but that other scholars have proposed. *See, e.g.*, Ross, *supra* note 17, at 2, 6 (discussing use of the rhetorical device of "black abstraction").

justification was needed to preserve as much of the hierarchy as possible while preserving a seeming commitment to racial equality. In the next two Parts, I describe how this ideology can be seen in important cases on race-conscious remediation throughout the history of American race law. I begin with a relatively brief, but crucial, moment in the development of modern race-conscious remedies doctrine from the mid-1970s to the late 1980s. This was a period of uncertainty regarding how strongly the legal system would intervene in America's racial hierarchy in the aftermath of the Civil Rights Movement. Important questions of first impression, both in interpreting recently passed statutes and in interpreting the Constitution, reached the Court, which featured several recently appointed Justices. I show how over a series of cases relating to university admissions, government contracting, and employment,[67] a number of those Justices, led by Justice Lewis Powell, subtly but powerfully asserted the GWIP and utilized white innocence moves to reject any far-reaching role for race-conscious remediation in undoing America's racial hierarchy. I foreground the cases of this period because the connection between whiteness and innocence is drawn explicitly, the influence of Whiteness as Innocence ideology on race-conscious remedies doctrine can thus be traced in more obvious ways, and the doctrinal results of this process continue to govern in many respects today.

II. SEEING WHITENESS AS INNOCENCE CLEARLY: THE 1970S AND 1980S

The race-conscious remedies cases of the 1970s and 1980s arose at a historical moment of significant uncertainty regarding the stability of American racial hierarchy. The campaign to obstruct or defy the ruling in *Brown v. Board of Education*[68] competed with the racial justice efforts of the Civil Rights Movement. The 1960s saw the enactment of controversial civil rights legislation including the Civil Rights Act of 1964,[69] the Voting Rights Act of 1965,[70] and the Fair Housing Act of 1968.[71] Yet, significant social upheaval persisted.[72] The election of Richard Nixon in 1968 repre-

67. I focus on these areas because they involved some of the most important cases regarding race-conscious remedies at the time and featured explicit invocations of white innocence. This focus is also consistent with that of other work on race-conscious remediation related to this period. *See, e.g.*, FISCUS, *supra* note 33, at 37, 48; MICHEL ROSENFELD, AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY 43 (1991) (noting that the book's "examination of affirmative action will be largely confined to the contexts of university admissions and job hiring"); Sullivan, *supra* note 33, at 78–80.

68. 347 U.S. 483 (1954).

69. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

70. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

71. Civil Rights Act of 1968, tit. VIII, Pub. L. No. 90-284, §§ 801–15, 82 Stat. 73, 81–89.

72. For example, urban riots exposed that racial prejudice, racialized poverty, unemployment, and police violence continued to oppress communities of color, and the Black Power and Black Nationalist movements became prominent on the national scene. *See generally* JOSHUA BLOOM & WALDO E. MARTIN, JR., BLACK AGAINST EMPIRE: THE HISTORY AND POLITICS OF THE BLACK PANTHER PARTY (2013).

sented, at least in part, a backlash against racial change, progress, and unrest.[73] Nixon ran on a platform that promised conservative judges,[74] and he appointed four Justices with conservative records: Warren Burger as Chief Justice in 1968; Harry Blackmun in 1970; and Lewis Powell and William Rehnquist in 1971. The legal system's position vis-à-vis major changes to the country's racial hierarchy was thus uncertain. New laws suggested the possibility of significant changes to old habits of regulating race relations, while new Justices and political leaders, with an apparently much lower appetite for such changes, suggested significant obstacles.

Some of the early returns indicated surprisingly far-reaching possibilities for change. These included the Supreme Court's unanimous 1971 decision in *Griggs v. Duke Power Co.*[75] Authored by Nixon appointee Chief Justice Burger, *Griggs* held that the 1964 Civil Rights Act's prohibition against racial discrimination in employment applied not only to intentional discrimination but also to employment practices that caused a disproportionate statistical impact on members of a racial minority group and were not job related or a business necessity.[76] President Nixon himself also showed support for civil rights initiatives early on, strengthening efforts to open employment opportunities for racial minority workers in industries like construction by pushing for minority hiring goals as a condition of federal funding.[77] Moreover, lower federal courts became involved in policing the business practices of employers and required changes to the existing routines of employers and unions.[78] Universities also began to institute race-conscious student admissions programs.[79] These developments went beyond merely policing racial bigotry and insinuated that the law might require, or at least permit, deliberate efforts to reallocate social privileges toward nonwhites via race-conscious remediation. It was in this environment that Whiteness as Innocence ideology appeared explicitly and played a prominent role in putting the brakes on far-reaching racial change. The development can be seen across the different considerations in race-conscious remedies cases described above: (1) the relevant stand-

73. *See, e.g.*, IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS 23–24 (2014) ("Nixon also began to hammer away at the issue of law and order. In doing so, he drew upon a rhetorical frame rooted in Southern resistance to civil rights. . . . By the mid-1960s, 'law and order' had become a surrogate expression for concern about the civil rights movement.").

74. *See, e.g.*, Chris Hickman, *Courting the Right: Richard Nixon's 1968 Campaign Against the Warren Court*, 36 J. SUP. CT. HIST. 287, 300 (2012) ("Nixon's second campaign for the White House did not pioneer criticism of the Warren Court; it just perfected it.").

75. 401 U.S. 424 (1971).

76. *Id.* at 431.

77. *See* RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW 47–50 (2013). As Kennedy notes, there are competing interpretations of President Nixon's motivations. *See id.* at 50–51.

78. *See, e.g.*, Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1771–75 (1990).

79. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 269–70 (1978).

ard of review; (2) the permissible purposes for race-conscious remediation; and (3) limits on the implementation of different types of race-conscious remedies. The process developed slowly, gained steam over time, and eventually became the backbone of significant parts of what we consider "settled doctrine" in cases of race-conscious remediation today.

A. The Standard of Review for Race-Conscious Remediation

For any lawyer or law student today who is asked about the standard of review that applies when race is used to allocate benefits or burdens among people, the answer is clear: The standard of review is the same for any explicit use of race, no matter whether race is used to effect racial segregation or to implement a race-conscious remedy, and the type of review is the most strict and rigorous that is available.[80] But as clear as that answer may be today, the question was very much in dispute during the 1970s and 1980s. Indeed, today's standard gathered steam slowly, emerging initially in the jurisprudence of only one of President Nixon's appointees: Justice Lewis Powell. But Justice Powell ensured that Whiteness as Innocence ideology would play an important role in answering the question, and his analysis eventually prevailed.

The question of the appropriate standard of review for race-conscious remediation was first explicitly raised in *Regents of University of California v. Bakke*.[81] The Court had to decide whether University of California Davis School of Medicine could, in accordance with Title VI of the 1964 Civil Rights Act[82] and the Constitution's Equal Protection Clause, set aside a specified number of seats (sixteen out of one hundred) for members of racial minority groups when admitting its incoming student class.[83] Four

80. The context in which the standard of review question has been most clearly raised is when a government actor engages in race-conscious remediation of the "affirmative action" type, *see supra* Section I.B, and the action is challenged under a constitutional equal protection analysis. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 570 U. S. 297, 310 (2013) (noting that "the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny'" (quoting Loving v. Virginia, 388 U.S. 1, 11 (1967))). When race-conscious remediation is implemented as part of the relief for proven prior discrimination, the standard of review question is usually not relevant. As noted above, the choice of standard of review reflects a judicial determination regarding how likely it is that a proportionate "unalikeness" between racial groups exists that justifies the "unalike" treatment involved. There is no serious dispute as to the answer to this question in cases of victims of prior discrimination. Only nonwhites suffered a violation of their right to nondiscrimination. Thus, in receiving a remedy that whites do not receive, they are treated "unlike" whites in proportion to their different circumstances as discrimination victims. However, as discussed further below, white innocence has still played a role in determining whether the *implementation* of a remedy for such victims may nevertheless inappropriately burden whites who were not victims of discrimination. *See infra* Section II.C.

81. 438 U.S. at 287–88 (opinion of Powell, J.).

82. Title VI prohibits racial discrimination in programs that receive funds from the federal government. 42 U.S.C. § 2000(d) (2018).

83. This is, at least, the way in which *Bakke* is usually framed. As Justice Powell himself noted, however, it was not actually the case that UC Davis formally set aside these seats for racial minorities only. Rather, such seats were intended for "economically and/or educationally disadvantaged" students, and there were many white students who were part of the "special admissions process" through which such seats were filled (though it does appear that no white student was offered admission through this process). *See Bakke*, 438 U.S. at 274–76, 275 n.5 (opinion of Powell, J.). Racial minority students were only considered, moreover, if they asked to be considered economically or educationally

Justices believed that UC Davis's program violated neither Title VI nor the Constitution (thought to be coextensive in this context).[84] Four Justices believed that a constitutional ruling was unnecessary because the program violated Title VI.[85] Writing only for himself, Justice Powell delivered the decisive opinion declaring that the program, as implemented by UC Davis, violated both Title VI and the Constitution (which Justice Powell also deemed coextensive), but that similar race-conscious remediation might be permissible under different circumstances.[86]

The crucial starting point for Justice Powell's analysis was his choice regarding the applicable standard of review. Justice Powell concluded that if the government used race as a consideration in distributing benefits, the standard of review had to be the same—the most stringent one—regardless of which racial group would benefit from the use of race.[87] Importantly, Justice Powell grounded his reasoning squarely in Whiteness as Innocence ideology. As an initial matter, he made clear that the standard of review question had to be answered within the framework of formal racial equality: "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. If both are not accorded the same protection, then it is not equal."[88] Of course, as noted above, this formal requirement of racial equality did not answer the question of what the "same protection," that is treating likes alike or unlikes unalike, would consist of. As UC Davis argued, for example, whites were different from nonwhites in that whites were "not a discrete and insular minority"[89] and, thus, the University could be trusted in treating whites and nonwhites unalike in the admissions process. Justice Powell disagreed, and in so doing invoked another step of Whiteness as Innocence reasoning: He raised innocence as a relevant and important factor in determining the permissibility of race-conscious remedies.[90] As Justice Powell stated in rejecting a more permissive standard

disadvantaged. *See id.* at 272 n.1, 274–75. It seems clear that many aspects of the *Bakke* litigation, including the description of how the program operated, were highly artificial and designed to enable a Supreme Court ruling on the constitutionality of race-based affirmative action. *See, e.g.*, Derrick A. Bell, Jr., Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3, 5 (1979) (noting how, on appeal, the University's "attorney sacrificed one issue after another in order to facilitate Supreme Court review of the constitutionality of the Davis admissions program").

84. *See Bakke*, 438 U.S. at 324–26 (Brennan, J., White, J., Marshall, J., and Blackmun, J., concurring in the judgment in part and dissenting in part). Justices White, Marshall, and Blackmun also wrote separate opinions.

85. *See id.* at 408, 412 (Stevens, J., concurring in the judgment in part and dissenting in part). Chief Justice Burger, Justice Stewart, and Justice Rehnquist joined the opinion of Justice Stevens. *Id.* at 408.

86. *See id.* at 287, 305–320 (opinion of Powell, J.).

87. *See, e.g., id.* at 291 ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.").

88. *Id.* at 289–90.

89. *Id.* at 290 (internal quotation marks omitted).

90. *Id.* at 298.

of review: "The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious."[91]

Next, Justice Powell combined two white innocence legal moves to assert the accuracy of the GWIP: First, he appealed to a particular conception about the nature of race, in this case "race as ethnicity,"[92] to naturalize the assumptions of the GWIP.[93] Second, in so doing, he acknowledged past racism against nonwhites but denied that this racism delegitimized white privilege in the present.[94] In this case, Justice Powell arrived at this conclusion through a kind of "reverse originalism" method of constitutional interpretation.

Justice Powell initially acknowledged that the Equal Protection Clause, as part of the Reconstruction Amendments, was a response to white enslavement and oppression of blacks, and was originally intended to benefit black Americans in response to this racism.[95] However, in the same breath, he asserted that this original purpose was essentially irrelevant to the racial equality question facing the Court in the present because (1) a reactionary Supreme Court in the late nineteenth century had immediately read this original purpose out of the Fourteenth Amendment and thus relegated the Equal Protection Clause to "decades of relative desuetude";[96] and (2) while in desuetude, there had been significant white immigration from various European ethnic groups, each of which "had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic majority, but of a 'majority' composed of various minority groups."[97] In Justice Powell's description, race was the same as ethnicity (and perhaps nationality). The "white 'majority' itself [was] composed of various minority groups" of European ethnics.[98] In other words, European ethnic groups could be considered as separate racial groups. Therefore, the distinction between whites and blacks was in essence the same as that between "Celtic Irishmen," Austrians, and Italians.[99] Further, all of these groups had suffered past race discrimination, and the degree of discrimination was, for Justice Powell's purposes, equivalent as well.[100]

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91. *Id.* at 294 n.34; *see also id.* at 298 (arguing that "there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making").

92. *See* Ian Haney-López, *'A Nation of Minorities': Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1041 (2007).

93. *See id.* at 1029–43.

94. *See id.* at 1035–41.

95. *Bakke*, 438 U.S. at 291 (opinion of Powell, J.).

96. *Id.*

97. *Id.* at 292.

98. *Id.* at 295.

99. *Id.* at 292 & n.30.

100. While Justice Powell did not state this conclusion directly, he still insisted that there was simply "no principled basis for deciding" whether the harm suffered by one group was substantially different from that suffered by another, and that therefore such distinctions were of no consequence to

Justice Powell then used this construction of race as ethnicity to shore up the alleged accuracy of the GWIP and, in particular, Type 2 White Innocence at the group level.[101] If white ethnic groups were racial minorities with their own history of facing race discrimination, the racist oppression of blacks in the past could do little to challenge the presumptive legitimacy of white privilege in the present. If past race discrimination was a universal phenomenon that affected all racial groups, including whites, contemporary differences in racial privilege could not be explained by a difference in past exposure to race discrimination. Past race discrimination against nonwhites may have been an undeniable and unfortunate reality, but it did not undermine the assertion that white privilege in the present was a function of merit. Instead, given universal race discrimination in the past, including against whites, white privilege in the present looked more like white groups meritoriously overcoming their own adversity, "earning" their privilege, and thus possessing Type 2 White Innocence (as postulated by the GWIP).[102] By contrast, blacks' lack of privilege looked more like blacks lacking merit and asking for preferential treatment as "special wards entitled to a degree of protection greater than that accorded others"[103] to compensate for this lack of merit.

Of course, this innocence construction was built on presumptions only, and only those presumptions that were consistent with the GWIP. Intellectually, and historically, the fact that white ethnic groups also faced discrimination from *other* white ethnic groups (which some certainly did) is independent of whether *all* white groups (1) discriminated on a racial basis against nonwhite groups because they were not white (which most groups did);[104] and (2) collectively benefitted from being on a higher step in a racial hierarchy that was unwaveringly built around white supremacy and distributed its benefits based on degrees of separation from "pure" whiteness at the top and blackness at the bottom. This hierarchy may not have put all white ethnic groups at the very top at all times, but they *were* distinguishable from, and thus earned race-based advantages over, those considered not white who were perpetually placed at the bottom.[105] Justice

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the legal analysis. *Id.* at 296–97. As a legal matter, in other words, the harm suffered by each group was equivalent.

101. *Id.* at 292–96.

102. *See* Boddie, *supra* note 33, at 334 ("Powell's focus on white ethnic groups facilitated his conclusion that the same level of scrutiny should apply to policies that both benefited racial minorities and disadvantaged whites. Innocence again operated as a subtext. Because different white ethnic groups too had been subjected to discrimination, they were all in some measure 'innocent' victims.").

103. *Bakke*, 438 U.S. at 295 (opinion of Powell, J.).

104. For an example discussing relationships between blacks and the Irish, see ROEDIGER, *supra* note 42, at 133–56.

105. *See, e.g.*, PAINTER, *supra* note 29, at 66, 71, 180 (providing examples of racial "method[s] of human classification" of "racial scientists" inevitably placing blacks at the bottom of constructed racial hierarchies); *id.* at 201 (noting complexities in the definition of "whiteness" over time but noting that "multiple enlargements" occurred "against a backdrop of the black/white dichotomy"); *see also* Morton J. Horwitz, *The Jurisprudence of* Brown *and the Dilemmas of Liberalism*, 14 HARV. C.R.–C.L. L. REV. 599, 607 (1979) ("[T]o suggest, as Justice Powell does in *Bakke*, that the nature and

Powell dismissed these considerations as "intractable"[106] and fundamentally outside of judicial competency,[107] and in the process he erased all distinctions between types of race discrimination.

With this erasure accomplished, and the GWIP fortified, Justice Powell's conclusion that there should not be any less scrutiny applied to government uses of race that benefitted nonwhites seemed logical as a matter of racial equality. In a world in which whites enjoyed presumptive Type 2 White Innocence,[108] Justice Powell could indeed claim that there were "serious problems of justice connected with the idea of preference itself" and "a measure of inequity in forcing innocent persons [like Bakke] to bear the burdens of redressing grievances not of their making."[109] If the privileged admissions position of whites was presumptively earned, whites and nonwhites were not "unalike" in any proportionate way that would easily justify treating the groups differently by providing benefits specifically to nonwhites. Disturbing the expectations of whites in favor of other similarly placed groups would be unfair, arbitrary, and inconsistent with racial equality by providing similarly situated nonwhites "a degree of protection greater than that accorded others."[110] As discussed further below, such unalike treatment could only be justified by special, "compelling" reasons, and judges had to take care to strictly scrutinize and limit remedial uses of race in the affirmative action context.

The application of Whiteness as Innocence reasoning also allowed Justice Powell to flip the perception of who was being harmed in the case: It was *whites* who were being victimized by the overreach of a government institution not willing to recognize the validity of the GWIP and the innocence of whites.[111] Under this Whiteness as Innocence view, if the kind of race-conscious remediation at issue in *Bakke* were allowed, racial equality would suffer. Or to put it another way, strictly limiting such remediation,

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quality of discrimination experienced by blacks in America is different only in degree from that suffered by Jews or Italian-Americans is in my view a serious misunderstanding of American history").

106. *Bakke*, 438 U.S. at 295 (opinion of Powell, J.).

107. *See id.* at 297 (noting that determining differences in the extent of racial harm suffered by "various minority groups" "does not lie within the judicial competence").

108. As Justice Brennan noted, other baseline assumptions were available and would have led to a different outcome. *Id.* at 365–66 (Brennan, J., White, J., Marshall, J., and Blackmun, J., concurring in the judgment in part and dissenting in part) ("If it was reasonable to conclude—as we hold that it was—that the failure of minorities to qualify for admission at Davis under regular procedures was due principally to the effects of past discrimination, then there is a reasonable likelihood that, but for pervasive racial discrimination, respondent would have failed to qualify for admission even in the absence of Davis' special admissions program.").

109. *Id.* at 298 (opinion of Powell, J.).

110. *Id.* at 295.

111. *See* Boddie, *supra* note 33, at 334–35 ("By sleight of hand, Powell had created a narrative that whites suffered 'group-based disadvantage' from affirmative action, while erasing from the equal protection framework the persistent group subordination of racial minorities that affirmative action sought to address."). Thus, such innocent contemporary whites could justifiably feel "outrage" when denied opportunities by affirmative action. *Bakke*, 438 U.S. at 294 n.34 (opinion of Powell, J.).

even if it meant perpetuating almost all-white institutions,[112] was fully consistent with a commitment to racial equality.

As time went on, Justice Powell would not only reiterate this view laid out in *Bakke*,[113] but he would also gather additional followers for it. For example, in the 1986 case *Wygant v. Jackson Board of Education*,[114] the Court struck down the attempt of a public-school board and union to voluntarily provide special layoff protection to racial minority employees in a collective bargaining agreement negotiated after a long history of racial tension in the district. Four Justices now subscribed to the conclusion that the level of review did not change based on which racial group benefitted from a race-conscious remedy, and this conclusion required little more than restating, and citing to, Justice Powell's opinion in *Bakke*.[115] A majority of the Supreme Court eventually adopted Justice Powell's strict scrutiny requirement as to state actors in 1989, in *City of Richmond v. J.A. Croson Co.*[116] While not relying on white innocence explicitly, Justice O'Connor, announcing the judgment of the Court, relied specifically on Justice Powell's opinions in *Wygant* and *Bakke* and affirmed Justice Powell's racial equality conclusions in *Bakke*.[117] Thus, while Justice Powell had left the Court two years earlier, his conclusions—developed specifically in reliance on Whiteness as Innocence ideology—had become sufficiently accepted to garner majority support on the Court without the need

112. That this would be a logical consequence of striking down UC Davis's program was reflected in the admissions numbers prior to the institution of the program. The last entering class before the school began to use its race-conscious measures included ninety-seven whites and three Asian-Americans, but "no blacks, no Mexican-Americans, and no American Indians." *Id.* at 272.

113. For example, in *Fullilove v. Klutznick*, the Court upheld a congressional affirmative action program that set aside a percentage of federal funds for construction projects for minority-owned businesses. 448 U.S. 448 (1980). The plurality opinion of Chief Justice Burger granted Congress deference in making assumptions as to the applicability of the GWIP, and particularly Type 2 White Innocence, noting that "it was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities." *Id.* at 485 (plurality opinion). While Justice Powell joined the plurality opinion, he also wrote separately to reiterate that, in his view, strict scrutiny was the only appropriate standard of review. *See id.* at 496 (Powell, J., concurring). He also agreed that Congress was entitled to special deference in determining that nonwhites were sufficiently "unalike," because they had been victimized by past race discrimination in the construction industry, and in determining that the different treatment in the set-aside was proportionate to addressing this past discrimination. *See id.* at 516–17 (noting that while, as per Justice Powell's own *Bakke* opinion, "racial classifications . . . are fundamentally at odds with the ideals of a democratic society implicit in the Due Process and Equal Protection Clauses," "the issue here turns on the scope of congressional power, . . . Congress has been given a unique constitutional role in the enforcement of the post-Civil War Amendments," and "where Congress determined that minority contractors were victims of purposeful discrimination and where Congress chose a reasonably necessary means to effectuate its purpose" there is no constitutional violation).

114. 476 U.S. 267 (1986).

115. *Id.* at 273 (plurality opinion joined in relevant part by Chief Justice Burger, Justice Rehnquist, and Justice O'Connor).

116. 488 U.S. 469 (1989).

117. *Id.* at 494 (O'Connor, concurring) (noting that agreement with the requirement of strict scrutiny "stems from our agreement with the view expressed by Justice Powell in *Bakke* that '[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.'" (quoting *Bakke*, 438 U.S. at 289–90 (opinion of Powell, J.))).

to revisit the accuracy of their baseline assumptions. This became even more clear in 1995 when, in *Adarand Constructors, Inc. v. Peña*,[118] the Supreme Court rejected even the notion that Congress was entitled to some deference in this space. Justice O'Connor, this time writing for a clear majority, again invoked Justice Powell.[119] Strict scrutiny, rooted in Justice Powell's *Bakke* opinion, continues to govern the Supreme Court's analysis in affirmative action cases to this day.[120]

B. Permissible Purposes for Race-Conscious Remediation

As noted above, the purposes for which a race-conscious remedy is undertaken are highly relevant to determining its relationship to racial equality, and judges' views about white innocence will influence what purposes they believe can legitimately justify such a remedy.[121] Today's jurisprudence on permissible purposes for race-conscious remediation also largely traces back to Justice Powell's *Bakke* opinion. Thus, it should not be surprising that this jurisprudence is firmly grounded in Whiteness as Innocence ideology, hostile to race-conscious remediation, and supports the perpetuation of existing racial hierarchy while claiming fidelity to racial equality.

In *Bakke*, after having determined that strict scrutiny ought to apply to all race-conscious affirmative action programs, Justice Powell turned to the mechanics of strict scrutiny. The starting point in this strict scrutiny "machine"[122] is the identification of the government interest ostensibly justifying the use of race and an evaluation of whether this interest is sufficiently "substantial"[123] or "compelling."[124] While UC Davis offered various justifications for its program,[125] Whiteness as Innocence ideology played its main role in Justice Powell's rejection of the interest in "countering the effects of societal discrimination."[126] Justice Powell's disap-

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118. 515 U.S. 200 (1995).

119. *Id.* at 235 ("Our action today makes explicit what Justice Powell thought implicit in the *Fullilove* lead opinion: Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.").

120. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 303 (2013) (reversing lower court opinion on the constitutionality of a university admissions program because it "did not hold the University to the demanding burden of strict scrutiny articulated in *Grutter* and *Regents of Univ. of Cal. v. Bakke*").

121. *See supra* Section I.B.

122. *Cf.* Jerry Kang, *Rethinking Intent and Impact: Some Behavioral Realism About Equal Protection*, 66 ALA. L. REV. 627, 636–37 (2015) (investigating operation of the so-called "Equal Protection Machine").

123. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978) (opinion of Powell, J.).

124. *Id.* at 308.

125. The University argued that its program helped improve the low representation of racial minorities in medical schools, counter the effects of societal discrimination, increase the number of physicians likely to practice in underserved communities, and obtain the educational benefits of a diverse student body. *Id.* at 305–06. Justice Powell rejected all interests but the last as insufficiently compelling. *Id.* at 311–12.

126. *Id.* at 306.

proval of this interest is particularly important because remedying the effects of systemic racial discrimination throughout society, in the past and present, has long been what many people see as the "principal justification for racial affirmative action," as did UC Davis and the U.S. government in *Bakke*.[127] This is because this justification acknowledges, and tries to counteract, the long and vast history of racial subordination experienced by nonwhite groups in the United States—a history that continues to a significant extent today. It recognizes that institutions ought to be empowered to counteract this "American Dilemma,"[128] and that broad and decisive race-conscious action may well be necessary to do so. It thus "gives the most weight and urgency to the case for affirmative action."[129] In the language of this Article, an acknowledgment of the existence of wide-ranging societal discrimination, discrimination that is often structural and carries forward practices that are based in overt, prior discrimination and now quietly perpetuate its effects, amounts to a frontal attack on the GWIP. In particular, it is an attack on the assertion of Type 2 White Innocence and the idea that the absence of Type 1 White Innocence necessarily means Type 2 Innocence.

While comparatively brief, Justice Powell's analysis on this point again was steeped in Whiteness as Innocence ideology. For Justice Powell, the essential line that had to be drawn was between "identified" discrimination, that is "judicial, legislative, or administrative findings of constitutional or statutory violations" on the one hand, and "societal discrimination," that is discrimination not (yet) reduced to such a finding on the other.[130] It was permissible to treat whites and nonwhites unalike to remedy the former but not to address the latter. Consistent with Whiteness as Innocence ideology, and similar to his reasoning in the context of standards of review, Justice Powell quickly raised the innocence of whites as the most important consideration that justified drawing this distinction: "We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations."[131]

In this single sentence, Justice Powell efficiently combined various white innocence moves that asserted, fortified, and applied the GWIP in an effort to limit race-conscious remediation in the name of racial equality. For one, while Justice Powell made his statement in general terms, it was clear in this case that the "innocent individuals" he was referring to were white applicants. Moreover, in line with the GWIP, their innocence (of

127. KENNEDY, *supra* note 77, at 192–94.

128. GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY, at xliii (1944).

129. KENNEDY, *supra* note 77, at 79–81.

130. *Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

131. *Id.*

both types) and superior merit was presumed, rather than subject to a factual determination.[132] In addition, by describing nonwhites as "perceived . . . members of relatively victimized groups," Justice Powell implicitly but clearly imported his previous conclusion, made in determining the applicable standard of review, that all racial groups had faced essentially equivalent levels of race discrimination in the past—including whites.[133] Whether one group had been harmed more than another was a matter of "relative perception" dependent on the observer's views alone. By extension, Justice Powell therefore also imported his description of whites as meritorious actors at a group level, who had overcome their own history of facing discrimination. Nonwhites, by contrast, had failed to do so and were asking for "special ward" status and preferential treatment instead.

If this was the baseline status of the groups competing for societal benefits, racial equality clearly required more than "societal discrimination" to justify the "unalike" treatment involved. Suspicious of whether the groups were even "alike" in their claim to admission, to Justice Powell nonwhites clearly were not "unalike" (in the sense of having been unfairly disadvantaged) proportional to their receipt of admission preferences. Justice Powell thus required that his suspicion that racial equality was being sacrificed be disspelled by clear evidence of wrongdoing that showed that the generally applicable GWIP was not applicable in a particular situation. Only then could race-conscious action be authorized. After all, it was only in such circumstances that "the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated."[134] Absent such findings of wrongdoing, the race-conscious remedy was "unalike" treatment out of any proportion to the unalikeness (if any) of the people involved. This would be a situation in which "it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another."[135] Finally, such evidence of wrongdoing was also necessary to ensure that any interference with the GWIP remained strictly limited to the specific situation that justified abandoning it, so that "the least harm

132. Justice Powell did suggest that applicants like Bakke had Type 2 White Innocence because it was white applicants' test scores and grades that caused their overrepresentation absent the race-conscious remedy, not any advantage rooted in race discrimination. *See id.* at 308 n.44. However, this ignored both that grades and test scores were not the only aspects that determined merit in the application process; and that, as Justice Brennan pointed out, even if only test scores and grades were used as the standard of merit, it could easily be suggested that whites had profited from pervasive past and ongoing race discrimination in education and thus had been beneficiaries of American racial hierarchy. *See id.* at 370–73 (Brennan, J., White, J., Marshall, J., and Blackmun, J., concurring in the judgment in part and dissenting in part); *see also* Harris, *supra* note 15, at 1770–72 (questioning the assertion of Bakke's superior merit).

133. *Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

134. *Id.*

135. *Id.* at 308–09.

possible to other innocent persons competing for the benefit" would be done.[136]

Permitting the remediation of "societal discrimination" as a justification for the redistribution of societal benefits to nonwhites, on the other hand, was inherently incompatible with the GWIP, and, by extension, racial equality. Doing so would have implied that American society as a whole had created and sustained a maldistribution of social privileges that was far-reaching, illegitimate, and thus presumptively in need of remediation. Societal discrimination as a concept makes the opposite assumption from the GWIP, namely that Type 2 White Innocence cannot generally be presumed. While the GWIP constructs whites and whiteness to be largely *outside* of the sphere of responsibility for, and benefit of, race-based privilege in the present, that is as bystanders or "innocent third parties" to it, societal discrimination sweeps whites *into* its orbit as potential perpetrators, perpetuators, or at least beneficiaries of past and present race discrimination.[137] It would permit "unalike" treatment to the benefit of nonwhites in many circumstances in which the GWIP suggests that whites are, at the very least, alike in their entitlement to a given benefit. If one accepts Whiteness as Innocence ideology, as Justice Powell did, this purpose for race-conscious remediation simply could not be approved.

Indeed, Justice Powell moved to further restrict the threat of race-conscious remediation by applying the white innocence move of limiting the institutions that were permitted to determine that the predicate discrimination for race-consciousness existed. Justice Powell concluded that institutions like UC Davis, "isolated segments of our vast governmental structures," were not even *competent* to make such a finding absent express legislative authorization.[138] While he did not explain precisely why,[139] the few words Justice Powell offered in support of this conclusion

136. *Id.* at 307–08 (finding evidence of violations necessary because, in such cases "the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined" and "remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit").

137. In other words, societal discrimination as a concept suggests that whites collectively share responsibility for the oppressed status of nonwhites by virtue of participating in, or benefiting from, the operation of a racist society. The GWIP, and Justice Powell, on the other hand, assume that "persons like [Bakke] . . . bear *no* responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered." *Id.* at 310 (emphasis added). Thus, the GWIP is the polar opposite of the assumption that, in a society like the United States, in which racism and racial oppression have been permanent and defining features, essentially everyone participates in the continued subordination of nonwhites by operating within a racist institutional structure and cultural belief system. *See* Lawrence, *supra* note 46 ("Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists." (footnote omitted)).

138. *Bakke*, 438 U.S. at 309 (opinion of Powell, J.).

139. Justice Powell briefly asserted that UC Davis was not competent to make the relevant findings because "[i]ts broad mission is education, not the formulation of any legislative policy or the

again suggest that for him, absent clear evidence to the contrary, the presumptions of the GWIP governed: Whites like Bakke bore "no responsibility for whatever harm the beneficiaries of the [affirmative action] program are thought to have suffered."[140] By contrast, it could *not* be presumed that nonwhites were the victims of systematic racial discrimination. This was merely something that the University "perceived."[141] And if that was so, unalike treatment in favor of nonwhites could not be squared with racial equality. It would represent but a naked "privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination."[142] Racial equality was not only consistent with, but basically demanded, that race-conscious remediation in the name of a purpose such as the remediation of "societal discrimination" be disapproved.

The governmental interest that Justice Powell did approve as compelling, obtaining the benefits of a racially diverse student body, was in a different position within Whiteness as Innocence ideology. As Elise Boddie has noted, diversity appealed to Justice Powell precisely because it did not require any inquiry into questions of racial group privilege or benefits derived from racial discrimination.[143] A "farm boy from Idaho" could benefit from such a program just like a nonwhite applicant could.[144] Because pursuing an interest in diversity did not require UC Davis to question white innocence, Justice Powell was much more comfortable extending deference to the University's decision-making, indeed awarding it the benefit of presumptive legality.[145]

As with his conclusions regarding standard of review, Justice Powell's conclusions with regard to permissible purposes for race-conscious remediation also gained traction over time. First, in the Title VII context, while the Supreme Court (in the absence of Justice Powell)[146] upheld the

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adjudication of particular claims of illegality." *Id.* Yet this stance is not particularly convincing because it is not clear why UC Davis would not be able to make such findings as a matter of *educational* policy, an area in which Justice Powell was clearly comfortable to grant broad leeway to the University. *See id.* at 312–13 (explaining the importance of respecting universities' academic freedom, including in selection of their student bodies); *id.* at 318–19 (according university admissions decisions, if made on an individualized basis, a presumption of legality and legitimacy).

140. *Id.* at 310.

141. *Id.*

142. *Id.*

143. *See* Boddie, *supra* note 33, at 335–36.

144. *Bakke*, 438 U.S. at 316 (opinion of Powell, J.).

145. *Id.* at 318–19.

146. United Steelworkers of Am. v. Weber, 443 U.S. 193, 209 (1979) (stating that neither Justice Powell nor Justice Stevens was present). Justice Stevens recused himself because a close friend was an executive for the defendant. Tony Mauro, *Stevens Offers an Inside Look*, CTR. FOR INDIVIDUAL RTS. (Oct. 6, 2003), https://www.cir-usa.org/2003/10/stevens-offers-an-inside-look. Justice Powell was absent because he had to undergo surgery. Linda Greenhouse, *High Court Hears Arguments in a Challenge to Affirmative Action Plans*, N.Y. TIMES, Mar. 29, 1979, at A19.

general ability of private employers to implement race-conscious affirmative action programs in *United Steelworkers of America v. Weber*,[147] it did so only under narrow and limited circumstances. While the opinion is not a model of judicial clarity, the Court suggested that an employer could only engage in affirmative action for the purpose of trying to "eliminate conspicuous racial imbalance[s] in traditionally segregated job categories."[148] This predicate, later confirmed more clearly,[149] was similar to (though admittedly somewhat less demanding than) the type of "identified discrimination" that Justice Powell had referenced in *Bakke*.[150] Thus, even without the influence of Justice Powell, the Court consolidated around permitting race-conscious programs only under limited circumstances.

Returning to the constitutional context in *Fullilove v. Klutznick*,[151] Justice Powell, who reiterated the demand for identified discrimination as a predicate for race-conscious remediation but gave deference to Congress in finding such discrimination,[152] was outdone in his commitment to protecting white innocence by the dissent of Justices Stewart and Rehnquist. The dissenters not only rejected deference for Congress in its fact finding toward "identified" discrimination[153] and Congress's related conclusions[154] but also strongly railed against any sense that societal discrimination or disadvantage could ever justify race-consciousness. After all, "[n]o race . . . has a monopoly on social, educational, or economic disadvantage," and, if anything, the greatest number of disadvantaged people were white.[155] The implication was that if whites were just as disadvantaged as nonwhites, and thus were "alike" in relevant respects, those whites who dominated government procurement had presumptively meritoriously worked their way to their dominant position, as the GWIP holds. Thus, they could not, consistent with racial equality, be treated differently

147. *Weber*, 443 U.S. at 197. The question in *Weber* was whether it was permissible under Title VII for an employer and a union to voluntarily set up a training program for craft skills in an aluminum plant in response to high levels of racial segregation in skilled craft jobs if the program admitted applicants based on separate "seniority tracks" for white and black applicants and reserved 50% of its slots for black workers until the employer's craft workforce roughly resembled the racial demographics of the workforce in the area. *Id.* at 197–99. The fight in *Weber* mostly focused on the proper interpretation of the voluminous and complex legislative history of Title VII, a dispute that did not feature explicit arguments about white innocence.

148. *Id.* at 209.

149. *See* Johnson v. Transp. Agency, 480 U.S. 616, 631 (1987). Somewhat surprisingly, given the significant number of affirmative action cases decided after *Johnson* in the constitutional context, the Supreme Court has not revisited this question under Title VII since *Johnson*.

150. *Weber*, 443 U.S. at 209.

151. 448 U.S. 448 (1980).

152. *See Fullilove*, 448 U.S. at 502–06 (1980) (Powell, J., concurring).

153. *See id.* at 527 (Stewart, J., dissenting) (noting that, unlike a court, Congress "has neither the dispassionate objectivity nor the flexibility that are needed to mold a race-conscious remedy around the single objective of eliminating the effects of past or present discrimination").

154. *Id.* at 528 (denying that there was sufficient evidence of past racial discrimination to justify a race-conscious remedy).

155. *Id.* at 529–30, 530 n.11.

from nonwhites, even if those nonwhites were also generally disadvantaged.[156] Race-conscious remediation, even if implemented by Congress, had to be strictly curtailed.

As in the standard of review context, *Wygant* featured four Justices who agreed with Justice Powell's position in *Bakke* and strongly rejected societal discrimination as a compelling purpose by relying on white innocence.[157] They came to this conclusion, moreover, by explicitly applying the white innocence moves of acknowledging past racism but denying its relevance in the present and demanding particularized evidence of wrongdoing before race-conscious remediation could be considered consistent with racial equality.[158] And *Croson*, in this context too, assembled a majority of the Court around this point[159] that persists to this day.[160]

C. The Implementation of Race-Conscious Remedies

Even if a race-conscious remedy overcomes the serious hurdles that Whiteness as Innocence ideology has created at the standard of review and permissible purposes stages, even more Whiteness as Innocence and racial equality challenges await in evaluating its implementation. As noted above in Section I.B, the racial equality and white innocence implications at the stage of remedy implementation depend on the kind of race-conscious remedy that is involved. In the 1970s and 1980s, white innocence was raised explicitly in efforts (mostly successful) to limit race-conscious remediation of each type.

1. Sharing Existing Privileges

Race-conscious remedies cases may involve whites having to share their existing privileges (for example, seniority privileges in a job) with new nonwhite beneficiaries who are granted access to those same privileges. This scenario may come up in cases in which the race-conscious

156. *Cf. id.* at 532 (noting that through programs such as the set-aside, "the Government implicitly teaches the public that the apportionment of rewards and penalties can legitimately be made according to race—rather than according to merit or ability").

157. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (plurality opinion). The four Justices—Justice Powell, Chief Justice Burger, Justice Rehnquist, and Justice O'Connor—were the same as in the context of the standard of review.

158. *Id.* ("No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.").

159. Justice O'Connor relied explicitly on Justice Powell's disaggregation of whiteness that had justified a claim to white innocence in *Bakke*. As Justice O'Connor stated, to accept the defendant's claim "that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group" in a "mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505–06 (1989).

160. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 731 (2007) (stating that past rulings establish "that remedying past societal discrimination does not justify race-conscious government action").

remedy is part of the relief granted to an identified victim of proven race discrimination.[161] Recall that because these cases arguably involve "like treatment" of the white and nonwhite persons, the relevant racial equality question is whether whites and nonwhites are "alike" in relevant respects.[162] Recall also that, to the extent that innocence is a standard by which racial equality is measured, if a white incumbent can claim only Type 1 White Innocence, this type of remedy would appear consistent with racial equality, while if the incumbent can claim Type 2 White Innocence, it would not.[163]

Perhaps the first modern Supreme Court case[164] in which the notion of the "innocent white victim" of race-conscious remediation explicitly appeared, the 1976 Title VII case of *Franks v. Bowman Transportation Co.*,[165] involved this type of race-conscious remedy. At issue in *Franks* was whether Title VII permitted a federal court to award retroactive seniority credit to a class of black job applicants as an equitable remedy for having illegally been denied employment as truck drivers because of their race.[166] Writing for the majority, Justice Brennan answered that it did, and that in general courts *should* grant such relief.[167] Thus, where race discrimination in hiring had been proven, a court could not only order that the victim of such discrimination be hired but ordinarily should also award seniority credit for the time the victim would have been employed absent discrimination.

This conclusion was met with objections by three of President Nixon's appointees in two separate dissents: one by Chief Justice Burger, writing for himself; and another by Justice Powell, joined by Justice Rehnquist. Both dissents relied heavily and explicitly on Whiteness as Innocence ideology to justify their preferred, more stringent limits on the implementation of this type of remedy. As is typical for Whiteness as Innocence reasoning, Justice Powell's dissent quickly raised white innocence as an important consideration: The majority was wrong because its

161. As noted above, in these types of cases, questions about the standard of review are usually not relevant. *See supra* Section I.B. Because there has been a finding of discrimination, moreover, it is clear in these cases that there is a permissible purpose for the remedy.

162. *See supra* Section I.B.

163. *See supra* Section I.B.

164. *See* Ansley, *supra* note 33, at 1017 (noting *Franks* as "one of the first occasions on which our Innocent Victim can be heard").

165. 424 U.S. 747 (1976).

166. *Id.* at 750. Until the 1991 Civil Rights Act amended Title VII to provide for a right to jury trial as well as compensatory and punitive damages, equitable remedies granted by courts were the only remedies available to successful Title VII plaintiffs. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072–73 (providing for compensatory and punitive damages and the right to a jury trial).

167. *Franks*, 424 U.S. at 771 (stating that "the denial of seniority relief" to discrimination victims is acceptable "only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination" (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975))).

decision to make retroactive seniority credit a presumptively appropriate remedy "ignore[d] entirely the equities that may exist in favor of innocent employees."[168] Awarding "competitive seniority" (greater protection from layoff, priority in bidding for job openings, etc.), in particular, "directly implicate[d] the rights and expectations of perfectly innocent employees," and, thus, it was not appropriate to award it as a general rule and in most cases.[169] Rather, it had to be weighed, in each case, whether the costs borne by "innocent" employees outweighed the need to provide more complete relief to the proven victims of discrimination.[170] According to Justice Powell, it was also clear that the incumbent employees could claim both Type 1 and Type 2 White Innocence. In a footnote, he remarked:

> Some commentators have suggested that the expectations of incumbents somehow may be illegitimate because they result from past discrimination against others . . . . Such reasoning is badly flawed. Absent some showing of collusion, the incumbent employee was not a party to the discrimination by the employer. Acceptance of the job when offered hardly makes one an accessory to a discriminatory failure to hire someone else. Moreover, the incumbent's expectancy does not result from discrimination against others, but is based on his own efforts and satisfactory performance.[171]

Justice Powell thus again used various white innocence moves to assert the accuracy and applicability of the GWIP, demand stricter limits on race-conscious remediation, and justify the result by appealing to racial equality. First, while Justice Powell never explicitly described the "innocent" incumbent employees as white, it was again clear that white employees comprised the group.[172] Second, consistent with the GWIP, the innocence (of both types) of the white incumbents was presumed rather than asserted as a factual matter.[173] No factual showings were necessary for either type of innocence to attach and weigh in the balance against the interests of proven victims of discrimination. Third, Justice Powell applied the offensive white innocence move of conflating Type 1 and Type 2 White Innocence, and thus gave incumbents the benefits of broader moral purity innocence. For Justice Powell, because the seniority expectations of whites were not the result of active participation in discrimination, they must have been the result of the white workers' "own efforts and satisfactory performance."[174] This was the case even though the question of how

168. *Id.* at 782 (Powell, J., concurring in part and dissenting in part).
169. *Id.* at 788.
170. *Id.* at 790.
171. *Id.* at 788 n.7.
172. The case arose in a Georgia district court as a class action brought by black employees claiming a pattern or practice of race discrimination. *Id.* at 750–51 (majority opinion). Even if not all of the incumbent employees allegedly harmed by the seniority remedy were white, the prototypical incumbent who passed the discriminatory hiring hurdles certainly was.
173. *Cf.* Ross, *supra* note 33, at 299–300 (noting, in describing his concept of "rhetoric of innocence," that in this rhetoric "'innocence' is a presumed feature, not the product of any actual and particular inquiry").
174. *Franks*, 424 U.S. at 788 n.7 (Powell, J., concurring in part and dissenting in part).

well incumbent employees were doing their job, or if they were doing a good job at all, was not part of the case or subject to any conclusive factual finding. This was a broad definition of Type 2 White Innocence indeed. Absent a showing of actual collusion with the employer in its illegal hiring decisions, white employees could not be considered to have benefited from the employer's discrimination, even though they had built their seniority at an employer with a proven pattern or practice of racial discrimination in hiring against black applicants.

As noted above, this broad assertion of Type 2 White Innocence was critical in making the remedy seem questionable as a matter of racial equality. White incumbents with only Type 1 White Innocence would, at most, be "alike" to the discrimination victims, in that neither were the "wrongdoers."[175] Thus, granting both groups equal seniority benefits would mean treating likes alike and be consistent with racial equality. Painting the white incumbents as meritorious holders of Type 2 White Innocence, however, made them unlike the discrimination victims in that the incumbents had earned their current status through "satisfactory and often long service,"[176] while the discrimination victims had not. Thus, rather than treating likes alike, the relief was a "preference based on [the] fiction"[177] that the nonwhite beneficiaries would have also succeeded on the job and treated those beneficiaries like the white incumbents even though they were unalike in relevant respects. Accordingly, the relief impinged on the equality interests of the white incumbents and it had to be carefully evaluated in each case whether this was justified, rather than treating the relief as presumptively appropriate like the majority did.[178] In Justice Powell's construction, in other words, preserving the ability to limit the relief of the black plaintiffs was necessary to protect a commitment to racial equality.

In a brief but remarkable dissent, Chief Justice Burger further illustrated the strength of the GWIP by putting the presumption in both contractual and criminal law terms. He claimed that "[i]n every respect an innocent employee is comparable to a 'holder-in-due-course' of negotiable paper or a bona fide purchaser of property without notice of any defect in the seller's title."[179] In other words, Chief Justice Burger not only constructed white employees as entitled (quite literally, holding metaphorical title) to the benefits of their position in the hierarchy[180] but also presumed them to hold these benefits in good faith and without any knowledge that

175. *Id.* at 789.
176. *Id.* at 790.
177. *Id.* at 793.
178. *Id.* at 794.
179. *Id.* at 781 (Burger, C.J., concurring in part and dissenting in part).
180. *See* RESTATEMENT (FIRST) OF PROP. § 539 (AM. LAW INST. 1944).

they had benefitted from illegitimate conduct.[181] Given this legal entitlement, providing a remedy to black victims of race discrimination that impinged on these white interests was tantamount to sanctioning the crime of robbery—"judicial approval of 'robbing Peter to pay Paul.'"[182] Racial equality surely did not sanction such a thing.[183]

Justice Powell and Chief Justice Burger did not prevail in their views in this case. Writing for the majority, Justice Brennan argued that "[i]f relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed."[184] In Justice Brennan's view, the white and nonwhite employees were unalike, but in the opposite direction of that suggested by Justice Powell: The black plaintiffs were victims of discrimination, while the incumbents were not, and this unalikeness justified, at the very least, alike treatment in terms of seniority benefits—or what Justice Brennan called, "[A] sharing of the burden of the past discrimination."[185] This alike treatment, after all, was less than what was arguably due to the (unalike because previously disadvantaged) discrimination victims and, thus, surely a compromise that did not interfere with the racial equality interests of white incumbents.[186]

Notably, however, what Justice Brennan did not contest were Justice Powell's presumptions regarding white innocence: that only collusion with the employer could take white incumbents outside of the GWIP;[187] that white employees did not benefit from their employer's racial discrimination; and that they meritoriously fulfilled their jobs. Thus, while warding off the dissent's attack on the legal question of Title VII relief in this type of case,[188] the majority offered no rebuke to the dissent's emerging Whiteness as Innocence arguments and arguably accepted some of its premises in at least a limited way. This foreshadowed the greater success of Whiteness as Innocence ideology in future cases that involved race-conscious remedies more at odds with the interests of "innocent" whites.

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181. *See* U.C.C. § 3-302(a) (AM. LAW INST. & UNIF. LAW COMM'N 2002) (defining "Holder in Due Course").

182. *Franks*, 424 U.S. at 781 (Burger, C.J., concurring in part and dissenting in part).

183. Indeed, Chief Justice Burger suggested that white incumbents may even be able to sue for a remedy of their own if they were "injured" by the holding of the majority. *See id.*

184. *Id.* at 775 (majority opinion) (quoting United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2d Cir. 1971)).

185. *Id.* at 777.

186. Because none of the employees who had been hired instead of the illegally rejected black applicants had to give up any of their seniority, it was actually the black plaintiffs who had to compete with others equal in seniority whom they would not have had to compete with in the absence of discrimination. Indeed, "most discriminatees even under an award of retroactive seniority status [would] remain subordinated in the hierarchy." *Id.* at 776.

187. Justice Brennan referred to the white incumbents as "arguably innocent." *Id.* at 774.

188. *Franks* continues to be good law under Title VII.

2. Not Receiving Privileges Others Receive

Race-conscious remedies cases may also involve nonwhites receiving privileges as part of the remedy that under the status quo rules would have gone to whites. As noted above, because such remedies involve "unalike" treatment of the white and nonwhite persons involved, with the cost being borne by certain white persons, they are vulnerable to attack as inconsistent with formal racial equality if innocence is the basis for the equality determination and either type of white innocence is raised as an objection.[189] Perhaps not surprisingly, therefore, Whiteness as Innocence ideology has been more successful in strictly limiting race-conscious remediation of this type.

The constitutional race-conscious remedies cases that over time came to apply Justice Powell's strict scrutiny standard fall into this category. In *Bakke*, Justice Powell noted that even if a race-conscious remedy pursued a compelling interest, it had to be "precisely tailored" to serving that interest[190] or "necessary" to achieving it.[191] Because white innocence did not feature in his discussion of the diversity interest he accepted as compelling,[192] however, Justice Powell did not elaborate on the relationship between white innocence and remedy implementation. Over the 1980s, however, Whiteness as Innocence ideology came to justify increasing restrictions on the implementation of race-conscious remedies in this type of case.

Fullilove, the first case post-*Bakke*, in some ways presented the "best case" scenario for this kind of race-conscious remediation within the Whiteness as Innocence framework: A narrow program[193] that was grounded in specific legislative findings by Congress of the continuing effects of prior racial discrimination against nonwhites in the construction industry that Congress wanted to address.[194] While, somewhat surprisingly, the plurality opinion written by Chief Justice Burger (joined by Justices White and Powell)[195] rejected some Whiteness as Innocence-based arguments, these parts of the opinion owed mostly to the plurality's deference to Congress as a uniquely powerful institution, particularly when it

189. *See supra* Section I.B.

190. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) (opinion of Powell, J.).

191. *Id.* at 305 (quoting *In re* Griffiths, 413 U.S. 717, 722 (1973)).

192. *See supra* Section II.B.

193. The Court specified that the program at issue was estimated to affect a mere 0.25% of the value of all construction work nationwide in the year in which it first applied. Fullilove v. Klutznick, 448 U.S. 448, 484 n.72 (1980) (plurality opinion).

194. In *Fullilove*, the Court still gave judicial deference to Congress's findings and actions. *See id.* at 472. *Adarand* later rejected such deference as inappropriate in the context of race-conscious remedies. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 235 (1995).

195. Justice Marshall wrote for himself, Justice Brennan, and Justice Blackmun to reiterate their position from *Bakke* that race-conscious remediation, if designed to help previously subordinated racial minority groups, should be subjected to reduced judicial scrutiny. *Fullilove*, 448 U.S. at 517–19 (Marshall, J., concurring).

had made specific findings of discrimination it wished to remedy. For example, while Chief Justice Burger cited to Justice Brennan's opinion in *Franks* in declaring that Congress could require burden sharing by firms "innocent of any prior discriminatory actions,"[196] he did so only after stating that no institution had greater remedial power than Congress[197] and that such burden sharing still needed to be part of a "limited and properly tailored remedy."[198] Similarly, Chief Justice Burger acknowledged that "it was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities,"[199] that is that Type 2 White Innocence did not necessarily apply to them. Chief Justice Burger did so, however, only to confirm that Congress's specific findings of the effects of past discrimination were reasonable in this case, rather than asserting this as a generally credible proposition. Therefore, while not an example of Whiteness as Innocence fundamentalism, Chief Justice Burger's opinion in essence merely confirmed that, in appropriate circumstances, the most powerful government institution, Congress, could set aside the GWIP in a "limited and properly tailored" way when distributing some of its privileges on a race-conscious basis.

More importantly, in his separate concurrence, Justice Powell pushed Whiteness as Innocence with much greater force. Critically, he argued that white innocence was always relevant in determining the validity of the implementation of a race-conscious remedy.[200] In Justice Powell's view, a "race-conscious remedy should not be approved without consideration of an additional crucial factor—the effect of the set-aside upon innocent third parties."[201] Type 1 White Innocence seemed sufficient to raise racial equality concerns when Congress treated whites and nonwhites "unalike."[202] In *Fullilove*, Justice Powell was willing to accept "marginal unfairness" to innocent whites[203] that was neither "sufficiently significant" nor "sufficiently identifiable" to outweigh Congress's "unique" remedial power.[204]

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196. *Id.* at 484 (plurality opinion).

197. *Id.* at 483 ("It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress.").

198. *Id.* at 484.

199. *Id.* at 485.

200. *Id.* at 514 (Powell, J., concurring).

201. *Id.* Here, again, it was clear that Justice Powell thought of white contractors when he referenced "innocent third parties," since he used the term "innocent nonminority contractors" elsewhere to describe the same group. *Id.* at 515.

202. *Id.* at 514 (describing challengers of congressional remedy as "innocent of wrongdoing").

203. *Id.* at 515.

204. *Id.* at 515–16. Recall that for Justice Powell, the ability to overcome the GWIP requires a clearly competent institution to make specific findings of discrimination. In *Fullilove*, arguably the most competent institution, Congress, had made specific findings justifying its implementation of an exceedingly narrow program. Yet, still, Justice Powell made a point to note that the plaintiffs had "contend[ed] with some force that they [had] been asked to bear the burden of the set-aside even though they are innocent of wrongdoing." *Id.* at 514. Had Congress implemented a program that went beyond helping 4% of all contracting businesses in the United States compete more effectively for a

But in using this innocence-based reasoning, Justice Powell had created the impression that this type of race-conscious remediation, by definition, was inconsistent with racial equality and would merely be tolerated when the inconsistency was not too severe. In line with this description, Justice Powell made clear that such unalike treatment, if used by an institution other than Congress, may well be unconstitutional.[205] Justice Stewart's dissent took an even stronger stance in support of Whiteness as Innocence in arguing that the congressional program was unconstitutional. Stewart argued that Congress had overstepped its bounds because it had not provided waivers or exemptions for state governments or white contractors who had not individually engaged in racial discrimination.[206] In other words, in the face of Type 1 White Innocence, the demand of racial equality required whites to be exempted completely from the implementation of the race-conscious remedy.[207]

In the Title VII context, too, Whiteness as Innocence reasoning narrowed the implementation standards for this type of race-conscious remedy from early on. In *Weber*, for example, the Court specifically noted that the remedy at issue[208] was permissible only because the way it was implemented did not "unnecessarily trammel the interests of [incumbent] white employees."[209] In other words, Justice Brennan gave the interests of white workers doctrinal preeminence in deciding what limits should be placed on affirmative action programs. This was, at least implicitly, grounded in Whiteness as Innocence reasoning. For one, the Court built its doctrine around the GWIP in presuming that the status quo privileges of white workers, even if earned at employers whose workforce featured a "conspicuous racial imbalance in traditionally segregated job categories," were held legitimately (i.e., there was Type 2 White Innocence) and, thus, entitled to judicial solicitude.[210] Indeed, as with Justice Powell in *Fullilove*, this framing justified a sentiment that the Court was approving a departure from the principle of racial equality by permitting unalike treatment "in

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mere 0.25% of annual construction funds, and challenged Whiteness as Innocence to a greater degree, Justice Powell indicated that he may well have decided differently, even if it was Congress who was acting. *Id.* at 514–17.

205. *Id.* at 515 n.14 ("Nor do I conclude that use of a set-aside always will be an appropriate remedy or that the selection of a set-aside by any other governmental body would be constitutional.").

206. *Id.* at 530 n.12 (Stewart, J., dissenting).

207. In Justice Stewart's view, that is, "the guarantee of equal protection prohibits the government from taking detrimental action against innocent people on the basis of the sins of others of their own race." *Id.*

208. As noted above, *Weber* concerned whether it was permissible to have separate seniority tracks for whites and blacks that decided priority in access to a training program in which 50% of the seats were reserved for blacks for some time. *See supra* note 147. Because the workforce was largely white, some white workers were not accepted to the program until after black workers with less seniority were accepted. United Steelworkers of Am. v. Weber, 443 U.S. 193, 199 (1979).

209. *Id.* at 208. Given Justice Brennan's proviso that his opinion was not meant to "define in detail the line . . . between permissible and impermissible affirmative action plans," *id.*, it would not become clear until later that this was an explicit doctrinal requirement of Title VII affirmative action law. *See infra* note 221 and accompanying text.

210. *Weber*, 443 U.S. at 208–09.

the wrong direction" (against meritorious whites and in favor of nonwhites) so long as it was not "too bad" of a departure.[211] Thus, the language used by the Court justified a sentiment in white workers that *every* voluntary affirmative action program, by definition, was "trammeling" their legitimate interests and exposing them to racial inequality.[212] The only question was whether this was necessary or not.

These sentiments, in both legal contexts, further proliferated as the 1980s went on. For example, in the 1986 Title VII case *Local 28, Sheet Metal Workers International Ass'n v. EEOC*,[213] the Supreme Court approved the authority of a district court to impose race-conscious remediation (via race-based union-membership quotas) in response to the defendant's egregious Title VII violations and repeated disregard of court orders, even if this remedy benefitted some workers who were not identifiable discrimination victims.[214] Whiteness as Innocence ideology influenced multiple opinions. Writing for a plurality, Justice Brennan again noted that race-conscious remedies should not "unnecessarily trammel[] the interests of white employees."[215] Justice Powell concurred, repeating his conviction that a "factor of primary importance" was "the effect of the [remedy] upon innocent third parties."[216] Justice Powell continued to present this type of race-conscious remediation as a racial equality problem, though acceptable in this case.[217] Justice O'Connor similarly framed the remedy as inconsistent with racial equality because it was "preferential treatment" that should only be used "where clearly necessary if these preferences would benefit nonvictims at the expense of innocent nonminority workers."[218] And Justice Rehnquist, joined by Chief Justice Burger, noted that Title VII simply did not "sanction the granting of relief to those who were not victims at the expense of innocent nonminority workers injured by racial preferences."[219] Whiteness as Innocence had clearly taken center stage and contributed significantly to the Court's curtailment of the ability of courts

211. *Id.* at 205–06.
212. *Id.* at 205–09.
213. 478 U.S. 421 (1986).
214. *Id.* at 448–49. The main question before the Court was whether Title VII limited race-conscious remedies to cases in which they only benefitted identified victims of prior discrimination, or if they could also benefit persons not identified as specific victims. The latter group could include black applicants for union membership that may not have applied during a period of proven discrimination, but now would benefit from a mandatory membership quota imposed on the union. *Id.* at 426. The Court also briefly addressed a claim under the Equal Protection Clause. *Id.* at 479–80. While not agreeing on the precise analysis that applied to such situations, a majority of the Court held that, given the egregious conduct at issue, benefitting nonvictims was permissible with certain limitations under both Title VII and the Constitution. *See id.* at 479–83.
215. *Id.* at 479 (quoting *Weber*, 443 U.S. at 208).
216. *Id.* at 486 (Powell, J., concurring in part and concurring in the judgment) (alteration in original) (quoting Fullilove v. Klutznick, 448 U.S. 448, 514 (1980) (Powell, J., concurring)).
217. *Id.* at 488 (emphasizing in upholding the remedy that "it does not appear that nonminorities will be burdened directly, if at all").
218. *Id.* at 492–93 (O'Connor, J., concurring in part and dissenting in part).
219. *Id.* at 500 (Rehnquist, J., dissenting).

to respond to even egregious violations of antidiscrimination law against nonwhites.[220]

As with the standard of review and purpose inquiries, these doctrines, grounded in Whiteness as Innocence reasoning, continue to govern today.[221]

3. Giving Up Privileges Others Get to Keep

Finally, perhaps the most significant intrusion into interests of whites that are grounded in existing racial hierarchy is involved in race-conscious remedies cases in which the implementation of the remedy requires whites to give up privileges they previously enjoyed (for example, a job during a layoff), while nonwhites get to continue to enjoy these privileges. Like the second type of remedy just discussed, these cases also feature "unalike" treatment of the white and nonwhite persons involved, with the cost being borne by the white persons. Thus, such remedies are vulnerable to white innocence attacks of various kinds.[222] Because they involve taking a privilege that whites previously enjoyed, they are most inconsistent with the GWIP. Arguably, and not surprisingly, Whiteness as Innocence ideology has been most successful in limiting race-conscious remediation in such cases.

For example, in the 1984 Title VII case *Firefighters Local Union No. 1784 v. Stotts*,[223] a majority of the Court[224] held that a federal district court could not modify an existing consent decree—put in place to remedy a fire department's persistent exclusion of blacks in hiring and promotions—to add a race-conscious layoff plan that would protect nonwhite hiring gains

220. When the constitutional question raised only briefly in *Sheet Metal Workers* was raised squarely in *United States v. Paradise*, 480 U.S. 149 (1987) (plurality opinion), a similar result emerged. A splintered Court upheld a race-conscious promotion remedy ordered by a federal district court in response to egregious and recalcitrant conduct by the Alabama Department of Public Safety. *Id.* at 153. But regardless of the ultimate position on the merits, white innocence played a large role in most of the opinions. *See id.* at 182 (stating that the remedy was acceptable because it "did not impose an unacceptable burden on innocent third parties"); *id.* at 188 (Powell, J., concurring) (stating that in deciding the constitutionality of the order, the "effect of the order on innocent white troopers" is "particularly important"); *see also id.* at 199–200 (O'Connor, J., dissenting) (stating that the remedy is not sufficiently narrowly tailored given what "protection of the rights of nonminority workers demands" and because other alternatives were available that would have achieved the order's purpose "without trammeling on the rights of nonminority troopers"). Justice O'Connor's dissent was joined by Chief Justice Rehnquist and the recently appointed Justice Scalia. *Id.* at 196.

221. A majority of the Court confirmed the "unnecessary trammeling" aspect of Title VII doctrine governing voluntary affirmative action in *Johnson*. *See* Johnson v. Transp. Agency, 480 U.S. 616, 637–38 (1987). Similarly, in the constitutional context, a majority of the Court reaffirmed Justice Powell's tailoring view in *Adarand*. *See* Adarand Constructors, Inc v. Peña, 515 U.S. 200, 235 (1995) ("Our action today makes explicit what Justice Powell thought implicit in the *Fullilove* lead opinion: Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.").

222. *See supra* Section I.B.

223. 467 U.S. 561 (1984).

224. Justice Powell, Chief Justice Burger, and Justice Rehnquist joined the majority opinion of Justice White. *See id.* at 564. Justice O'Connor also joined that opinion but wrote a separate concurrence as well. *Id.* at 584.

made by the initial decree[225] if such a modification interfered with the seniority rights of whites in favor of blacks who were not "proven victim[s] of discrimination."[226] Whiteness as Innocence reasoning was crucial to this holding. Raising the relevance of white innocence, the Court found it simply "inappropriate to deny an innocent employee the benefits of his seniority in order to provide a remedy in a pattern-or-practice suit" to nonvictims.[227] While not specifying which type of white innocence was at issue (though either might have sufficed), it appears that the Court presumed Type 2 White Innocence to be available. This is because the Court also held that *even if* blacks could prove that they were actual discrimination victims, the interests of whites against layoff had to be weighed against the victims' interests in complete and immediate relief, à la Justice Powell's approach in *Franks*.[228] That the consent decree had been adopted because blacks had previously been excluded from the department, which artificially inflated the seniority of all white employees in a racially specific way, did not disturb the presumptive legitimacy of the entitlement of white employees to their seniority privileges. Thus, the GWIP and racial equality demanded that the authority of district courts to interfere with these privileges be curtailed.[229]

In *Wygant*,[230] the Supreme Court came to a similar conclusion in a case involving constitutional claims. At issue was a race-conscious layoff remedy adopted by a school board and union in a collective bargaining agreement that had been negotiated in response to a long history of racial tension in the district.[231] Rejecting not only the interest in addressing "so-

225. The initial decree did not address layoffs. *Id.* at 566–67.

226. *Id.* at 576 n.9.

227. *Id.* at 575.

228. *Id.* at 578–79. *Stotts* was the first white innocence case in which Justice Sandra Day O'Connor, appointed only after *Bakke* and *Fullilove*, clearly expressed her determination to also support Whiteness as Innocence ideology. Citing among other cases to Justice Powell's *Bakke* opinion to express her concern that race-conscious remedies are likely to be unearned preferences for nonwhites that interfere with legitimate privileges of innocent whites—and thus implicitly a serious racial equality issue—Justice O'Connor noted that "[e]ven when its remedial powers are properly invoked, a district court may award preferential treatment only after carefully balancing the competing interests of discriminatees, innocent employees, and the employer." *Id.* at 588 (O'Connor, J., concurring) (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307–09, 308 n.44).

229. Similar to *Franks*, moreover, while disagreeing with the majority's Title VII analysis, the dissent once again did not challenge the way in which the majority asserted white innocence. The dissent agreed that the race-conscious layoff plan's effect had been "to shift the pain of the city's fiscal crisis onto innocent employees" and that there was significant "difficulty of reconciling competing claims of innocent employees who themselves are neither the perpetrators of discrimination nor the victims of it." *Id.* at 620–21 (Blackmun, J., dissenting). In other words, white and nonwhite employees were at most "alike" in that they both were not perpetrators of discrimination. Thus, a race-conscious remedy that treated whites and nonwhites unalike would only seem appropriate if there was no "less painful way of reconciling the competing equities." *Id.* at 621.

230. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

231. *Id.* at 270.

cietal discrimination" as a permissible purpose for race-conscious remediation as noted above,[232] the Court also strongly relied on Whiteness as Innocence reasoning with regard to remedy implementation. Elaborating on the "narrowly tailored" requirement for this type of case, and building on his reasoning in the second type of case above, Justice Powell concluded that layoff protection was an inappropriate race-conscious remedial tool irrespective of government purpose because it put too intrusive of a burden on "innocent individuals."[233] While acknowledging that racial equality and the eradication of racial discrimination were important goals in the abstract,[234] Justice Powell's innocence-based reasoning throughout the 1970s and 1980s had come to frame race-conscious remediation as fundamentally inconsistent with racial equality. Thus, such remediation could only be allowed where the burdens imposed on whites were minimal. The greater the intrusion into white interests, the more inappropriate the remedy, and layoff was always too great of an intrusion.[235] Whiteness as Innocence ideology had succeeded in its purpose: It had put in place a legal logic in which racial equality itself, now filled with the substantive principle of white racial dominance via invocations of white innocence,[236] required sharp limits on efforts that try to reduce America's persistent racial hierarchy. We continue to live with the results today, both as a matter of doctrine, and as a matter of persistent racial hierarchy.

III. THE LONG HISTORICAL ARCH OF WHITENESS AS INNOCENCE

For reasons discussed further in Part IV, the fact that many aspects of today's race-conscious remedies doctrine are firmly grounded in Whiteness as Innocence ideology would be sufficiently important in its own right to question this doctrine's legitimacy. Whiteness as Innocence ideology's long history of protecting white racial dominance provides additional reasons to do so. The use of Whiteness as Innocence ideology by courts to protect America's racial hierarchy did not originate in the 1970s, nor did it end in the late 1980s. Rather, consistent with the position of CRT scholars that "historically, racism has been constitutive of, rather than oppositional to, American democracy,"[237] the Whiteness as Innocence reasoning of the 1970s and 1980s is but the most explicit episode in a long historical arch of using white innocence to make racial hierarchy appear consistent with racial equality. This continuity in American jurisprudence on race is

232. *See id.* at 276.
233. *Id.* at 282–83.
234. *Id.* at 280–81 (referencing the "Nation's dedication to eradicating racial discrimination").
235. *Cf.* Sullivan, *supra* note 33, at 95 ("Justice Powell's distinction between hiring and layoffs may have intuitive appeal as a compromise between always taking white innocence into account and never doing so. But viewing white sacrifice as a matter of degree cannot dispel the perception of innocence that the paradigm of sin sets up—a perception that makes even lesser sacrifices seem unfair. It may not fly in Canarsie to tell white workers that they need not pay for the sins of discrimination with jobs they already have, but that they must do so with jobs or promotions they might otherwise have gotten but for affirmative action.").
236. *See supra* notes 25–28 and accompanying text.
237. *See, e.g.*, Carbado, *supra* note 4, at 1613.

highly problematic and ought to be systematically uncovered so that it can be properly addressed. In making a partial start to this project, I focus on two Whiteness as Innocence moves that arguably connect some of the most infamous race cases of the 19th century with the 1970s and 1980s, and forward in time all the way to cases decided just this past Supreme Court term. These two moves are: (1) acknowledging white racism in the past but denying that it delegitimizes white privilege in the present; and (2) connecting the GWIP with ideas about the nature of race itself, such that white privilege appears naturalized rather than as the result of oppressive social power dynamics.

A. Acknowledging but Ignoring the Racist Past: From Dred Scott *to* Abbott v. Perez

While *Dred Scott*,[238] the famous 1856 Supreme Court case declaring the legitimacy of slavery across the United States, in many ways seems far removed from today, it can productively be analyzed within the Whiteness as Innocence framework. For one, it was decided at a moment of significant uncertainty as to the persistence of American racial hierarchy as it then existed. Major compromises on slavery in the drafting of the Constitution,[239] the "Missouri Compromise" of 1820,[240] and the "Compromise of 1850"[241] did not provide lasting satisfaction on either side of the issue. The conflict came to a judicial head in 1856 in *Dred Scott*. Thus, Whiteness as Innocence could play a role in preserving the hierarchy while giving it continued legitimacy. The case also involved issues of race-conscious remediation broadly defined, such as whether state or federal law could grant citizenship to blacks, and whether Congress had the power to prohibit the expansion of slavery into territories under its jurisdiction. As is well-known, the Court[242] rejected all such remedial steps as impermissible.[243]

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238. 60 U.S. 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend XIV.

239. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 3 ("three-fifths clause" counting slaves as three-fifths of a person in determining states' representation in House of Representatives); U.S. CONST. art. I, § 9, cl. 1 (allowing the Atlantic slave trade to continue legally until 1808); U.S. CONST. art. IV, § 2, cl. 3 ("Fugitive Slaves" clause ensuring that slaves escaping into free states could not be freed by the laws of such states). *See also* JORDAN, *supra* note 25, at 321–25 (discussing compromises made on slavery in the framing of the Constitution).

240. Broadly, this compromise involved the admission of Maine (without slavery) and Missouri (permitting slavery) as states, and the prohibition of slavery in areas of the Louisiana territory north of the parallel 36°30′. *See, e.g.*, BAPTIST, *supra* note 41, at 156–58 (2016).

241. This compromise was a package of five separate bills that resolved disputes about territories acquired during the Mexican-American War. It included, among other things, the admission of California as a free state and a stringent federal fugitive slave law, and reserved the question of slavery in the New Mexico and Utah territories—all in an attempt to defuse tensions between pro- and anti-slavery forces. *See, e.g.*, *id.* at 337–42.

242. *Dred Scott* was so important in the minds of all of the Justices that each of them wrote a separate opinion. For simplicity, I refer here mainly to the opinion for the Court by Chief Justice Taney, which a number of the other Justices explicitly agreed with. *See, e.g.*, *Dred Scott*, 60 U.S. at 454 (Wayne, J., concurring); *id.* at 469 (Grier, J., concurring).

243. *See id.* at 404 (majority opinion) (stating that blacks with ancestors brought to the Untied States and sold as slaves "are not included, and [were] not intended to be included, under the word 'citizens' in the Constitution"); *id.* at 451–52 (stating that the power of Congress to interfere with

Importantly for the purposes of this Article, the Court's reasoning was deeply grounded in aspects of Whiteness as Innocence ideology. In particular, it modeled the white innocence move of acknowledging racism in the past yet denying that such racism delegitimized the privilege of whites in the present—a move that future cases would also use. The application of the move helped square racial hierarchy and racial equality via assertions of white innocence.

Perhaps the most infamous, and most frequently quoted, statement of the opinion is that blacks could not be citizens because they "had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."[244] What is less frequently discussed is that, in making this statement, Chief Justice Taney did not purport to speak for himself or his contemporaries but rather for the Framers' generation six decades earlier.[245] Indeed, Chief Justice Taney appeared to disclaim such racist assumptions on the part of his own generation when he stated that general phrases like "the people" or "all men," as they were used in the Declaration of Independence, "would seem to embrace the whole human family, and if they were used in a similar instrument *at this day* would be so understood."[246] That is, if Chief Justice Taney and his contemporaries had written the Declaration of Independence, its terms would have included blacks in the group of people whose rights and freedoms were being declared.

But, according to Chief Justice Taney, the terms were not so understood by the Framers' generation, including in the drafting of the Constitution.[247] This was determinative of the rights of blacks in the present because, as a matter of proper constitutional interpretation, the Constitution had to be read "as it was understood at the time of its adoption."[248] Perhaps "public opinion or feeling" had changed regarding blacks since then, both "in the civilized nations of Europe" and the United States itself.[249] But paying attention to any such developments to give a "more liberal construction in . . . favor" of blacks would be nothing short of "abrogat[ing] the judicial character" of the Court.[250] The Constitution's meaning could

property rights in territories is limited, in this respect there is no distinction between property in slaves and other property, and thus the Missouri Compromise bill was "not warranted by the Constitution"); *id.* at 452–53 (Scott's having lived in Illinois did not make him free when the laws of Missouri held him to be a slave upon his return).

244. *Id.* at 407.

245. This does not mean that Chief Justice Taney necessarily disagreed with the statement. But as discussed below, he did not think that his view or that of his contemporaries was relevant to the legal question at issue.

246. *Dred Scott*, 60 U.S. at 410 (emphasis added).

247. *See id.* ("[I]t is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration.").

248. *Id.* at 426.

249. *Id.*

250. *Id.*

only be changed by amendment, not by judicial decision, and if the Court did not protect the Constitution's original meaning, it would "falter in the path of duty."[251] In other words, the very nature of constitutional law, and the proper methodology of judicial interpretation, required giving force to the Framers' prejudiced views, irrespective of Chief Justice Taney's own views or that of the people of his time. Thus, through his choice of a strict originalist method of interpreting the Constitution,[252] Chief Justice Taney could disconnect the whites of his time from the racism of the Framers' generation but still allow them to benefit from this racism with constitutional legitimacy and imprimatur. In this way, Chief Justice Taney not only shifted responsibility for the continued dehumanization of blacks by whites away from himself and his Court,[253] and the whites of his time, thereby creating Type 1 White Innocence; he also created Type 2 White Innocence by constructing white racial domination in the present as an affirmatively legitimate and "innocent" exercise of constitutionally protected property rights.[254] From the standpoint of racial equality and constitutional rights, unalikes were treated differently in proportion to their unalikeness as determined by the Framers.

This is, of course, similar to the move that Justice Powell would later use in *Bakke*, albeit in reverse.[255] Recall that Justice Powell acknowledged white racism in the past by accepting that the Fourteenth Amendment was originally framed to protect blacks and their newly established rights from undeniable white domination and oppression.[256] Yet, through a kind of "reverse originalism," Justice Powell simultaneously rejected the idea that this original understanding justified race-conscious intervention in favor of blacks to counteract persistent white dominance in the present because of what had happened *since* the framing.[257] Chief Justice Taney also acknowledged white racism at the framing yet denied that this racism justified race-conscious intervention in favor of blacks in the present, but *notwithstanding* what had happened since the framing and by employing "traditional" originalism.

In both cases, disconnecting the legitimacy of white privilege in the present from racism in the past allowed the Justices to insulate present racial privilege and yet make doing so seem consistent with racial equality. Justice Powell accomplished this by flattening the nature of race and race

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251. *Id.*

252. *See also* Ross, *supra* note 17, at 11–12 (also connecting Chief Justice Taney's choice of "original intent theory" with ideas of white innocence).

253. *See also Dred Scott*, 60 U.S. at 454 (Wayne, J., concurring) (noting that in deciding the case "we have only discharged our duty as a distinct and efficient department of the Government, as the framers of the Constitution meant the judiciary to be, and as the States of the Union and the people of those States intended it should be, when they ratified the Constitution of the United States").

254. Indeed, Chief Justice Taney made it a point to argue that property rights in slaves were expressly protected by the Constitution. *See id.* at 451 (majority opinion) (noting that "the right of property in a slave is distinctly and expressly affirmed in the Constitution").

255. *See supra* Section II.A.

256. *See supra* note 95 and accompanying text.

257. *See supra* notes 95–99 and accompanying text.

discrimination in a way that allowed him to portray whites as more meritorious than nonwhites in comparable struggles to overcome equivalent levels of discrimination, and in doing so he erased the existence of a perpetual racial hierarchy built on ideas of white supremacy. In Justice Powell's construction, race discrimination against all groups had made whites and nonwhites alike with respect to their history of victimization and, consequently, racial equality required that their interests be protected in like fashion. Chief Justice Taney accomplished the same result by tying the nature and legitimacy of constitutional rights to society's views on race at a single, earlier moment in time and claiming that these views were beyond challenge.[258] This allowed him to transport the "unalikeness" determination of the Framers into the present and to reject race-conscious intervention in favor of nonwhites on that basis. In the process, Chief Justice Taney both erased differences of opinion at the framing itself[259] and ignored the possibility that struggles over slavery since the framing could, and should, have influenced the meaning of broad constitutional provisions.

In both Justice Powell's and Chief Justice Taney's constructions, whites were merely "innocently" exercising their constitutionally protected rights. Indeed, they were constructed as a beleaguered group, endangered in its enjoyment of legitimate rights by a tyrannical, overreaching government.[260] Thus, while superficially oppositional ways of interpreting the Constitution, Chief Justice Taney's and Justice Powell's reasoning can be seen as connected via a shared commitment to apply Whiteness as Innocence ideology to preserve white dominance while ostensibly staying true to fundamental principles of equality. When it was necessary to protect the interests and innocence of whites in the 1970s, "[t]he clock of our liberties . . . [could not] be turned back to 1868."[261] When it was necessary to protect the interests and innocence of whites in the 1850s, the clock *had to be* turned back to 1787.

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258. *See Dred Scott*, 60 U.S. at 426 ("[I]f anything in relation to the construction of the Constitution can be regarded as settled, it is that which we now give to the word 'citizen' and the word 'people.'").

259. As Justices McLean and Curtis pointed out in dissent, it was simply inaccurate to claim that all of the Framers had the same views on slavery and black citizenship and that the term "citizen" was, by definition, excluding blacks. *See id.* at 537 (McLean, J., dissenting) ("[W]e know as a historical fact, that James Madison, that great and good man, a leading member in the Federal Convention, was solicitous to guard the language of that instrument so as not to convey the idea that there could be property in man."); *id.* at 575–76 (Curtis, J., dissenting) ("[S]ubstantial facts . . . show, in a manner which no argument can obscure, that in some of the original thirteen States, free colored persons, before and at the time of the formation of the Constitution, were citizens of those States. . . . [I]n at least five of the States they had the power to act, and doubtless did act, by their suffrages, upon the question of its adoption. It would be strange, if we were to find in that instrument anything which deprived of their citizenship any part of the people of the United States who were among those by whom it was established.").

260. *Id.* at 449–51 (majority opinion) (connecting interference with property rights in slaves with ideas of "despotic powers" of government).

261. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 295 (1978) (opinion of Powell, J.).

The continued purchase of this type of reasoning, and its ability to evolve to contexts beyond those at issue in the 1970s and 1980s, can be seen in *Abbott*,[262] decided in June 2018. *Abbott* was a voting rights case with an admittedly complicated fact pattern and legal analysis. It involved the redistricting efforts of the Texas legislature after the 2010 census, as well as multiple court decisions that came about when those efforts were subsequently challenged.[263] For purposes of this Article, however, the case essentially involved the following: First, the Texas legislature adopted a set of districting plans in 2011, which were then challenged in court and not used.[264] Due to upcoming elections, the initial plans were replaced by interim maps drawn by a federal court with instructions from the Supreme Court to start with the 2011 maps and make modifications where required by voting rights law.[265] The Texas legislature adopted the interim plans with minor changes in 2013.[266] However, court challenges to both the 2011 and 2013 plans continued. In 2017, the district court made the following findings after multiple trials: First, the 2011 plans had been adopted by the legislature with the intent to discriminate against racial minority voters in various ways.[267] Second, the decision by the 2013 legislature to adopt the district court's interim plans had also been made with the same discriminatory intent, as well as with the aim to insulate the discriminatory 2013 plans from further challenge.[268] As a result, the district court ordered the adoption of new plans, but Texas challenged the court's order in the Supreme Court.[269]

The Supreme Court ruled for Texas.[270] In doing so, the Court applied a version of the white innocence move of acknowledging past racism but denying that it legitimized race-conscious intervention in the present. The Court ruled that the district court had improperly shifted the burden of proving intent from the plaintiffs to the government when, in finding that the 2013 legislature had acted with discriminatory intent, it relied in part on the fact that the government had not given any indication that it had changed its mind between 2011 and 2013.[271] According to Justice Alito's majority opinion, this question, when properly viewed, concerned the legislature's innocence: "The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination. '[P]ast discrimination cannot, in the manner of original sin,

262. 138 S. Ct. 2305 (2018).
263. *Id.* at 2313.
264. *Id.* at 2315.
265. *Id.* at 2316.
266. *Id.* at 2317.
267. *Id.* at 2317–18.
268. *Id.* at 2318.
269. *Id.* at 2319.
270. *Id.* at 2313–14.
271. *Id.* at 2313.

condemn governmental action that is not itself unlawful.'"[272] While the "historical background" of a particular legislative action was relevant in determining its intent, it did not "flip[] the evidentiary burden on its head."[273]

While, of course, the case is more complicated, one way to read the majority's ruling is that it determined that the lower court had not properly respected the legislature's presumptive Type 1 White Innocence against a charge that the legislature was trying to protect the political dominance of whites. In turn, this failure doomed the lower court's efforts to demand race-conscious remediation. Importantly, characterizing the legal question as one of burden of proof rather than fact allowed the Supreme Court to claim for itself the prerogative of answering the question whether the legislature actually had had discriminatory intent.[274] The Supreme Court forcefully answered in the negative.[275] This was despite the fact that, as the dissent pointed out, the district court, using the Supreme Court's own intent standard[276] and explicitly putting the burden of proof on the *plaintiffs* to prove intent, had made a clear factual finding of discriminatory intent after trial.[277]

While applying only a modified version of the white innocence move of acknowledging past racism but denying its relevance in the present as that move is discussed above, the majority's ruling in *Abbott* still shares many of its defining characteristics. For one, the ruling is based on a broad presumption of innocence applied to a legislature that allegedly acted in favor of preserving the dominance of whites within the existing racial hierarchy.[278] Also, while acknowledging relevant discrimination against nonwhites in the past, the majority forcefully rejected that this past undermined the legitimacy of the legislature's actions in the present and even modified the relevant standard of review to reach this conclusion.[279] The majority also applied a modified version of basing its decisions on notions of equality: In the majority's view, the district court had improperly treated

272. *Id.* at 2324 (alteration in original) (quoting City of Mobile v. Bolden, 446 U.S. 55, 74 (1980)).

273. *Id.* at 2325.

274. This is because applications of law are reviewed without deference to the lower court's findings, while factual findings are reviewed only for "clear error," a standard that is much more deferential to the lower court's findings. *Id.* at 2326.

275. *See id.* at 2326–30.

276. *Id.* at 2346 (Sotomayor, J., dissenting) (stating that the district court followed the applicable intent standard "virtually to a tee").

277. *Id.* at 2352 (stating that various parts of the district court's orders "unequivocally confirm its understanding that the burden remained on the challengers to show that the 2013 Legislature acted with invidious intent"); *id.* at 2353 (noting that "the District Court, having held a trial on these factual issues, concluded that the challengers had met their burden").

278. As the dissent noted, the allegation that the Texas legislature had intentionally discriminated in districting against nonwhite groups was not an aberration. *See id.* at 2346 (quoting the district court as noting that over "the last four decades, Texas has found itself in court every redistricting cycle, and each time it has lost" (quoting Texas v. United States, 887 F. Supp. 2d 133, 161 (2012))).

279. *See id.* at 2349.

the 2011 and 2013 legislatures alike—as motivated by discriminatory intent—when they were not alike in relevant ways.[280] One legislature's intent had been shown, the other legislature's intent had not.[281] Indeed, the 2013 legislature was affirmatively innocent of such intent.[282] Finally, the Court denied that race-conscious remediation, that is redrawing maps so that they did not intentionally discriminate against nonwhites, was appropriate and approved the existing maps instead.[283]

Hostility to race-conscious remediation, grounded in the basic moves of Whiteness as Innocence ideology, thus lives on strongly today, and it is showing its ability to morph into new forms along the way.

B. *Using Ideas About Race to Justify Hierarchy Maintenance: From* Plessy *to* Trump v. Hawaii

A second example of the long historical arch of Whiteness as Innocence ideology can be seen in how courts have used the malleable nature of race to justify America's racial hierarchy as consistent with racial equality via invocations of white innocence. A historical example of this process is *Plessy v. Ferguson*,[284] the famous case of "separate but equal." *Plessy*, too, was decided at a time of uncertainty regarding racial hierarchy when it reached the Supreme Court in 1896. As C. Vann Woodward has noted, race relations in the southern states, even after the Compromise of 1877, but before 1900, had not yet developed into the kind of "repression and rigid uniformity" that would characterize the full-blown Jim Crow racial segregation era.[285] When *Plessy* reached the Court, there "were still real choices to be made."[286]

But the Court again exercised its choice to protect existing hierarchy. In upholding a Louisiana segregation statute as consistent with equal protection, the command of racial equality, and white innocence, the Court relied on a definition of race as natural and biological difference.[287] Because, in the Court's view, distinctions "founded in the color of the two races . . . must always exist so long as white men are distinguished from the other race by color,"[288] the Court thought it clear that, "in the nature of things," racial equality was demanded only in the legal and political

280. *Id.* at 2325 (majority opinion).
281. *Id.* at 2326–27.
282. *Id.* at 2327.
283. *See id.* at 2330.
284. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).
285. WOODWARD, *supra* note 5, at 33.
286. *See id.* at 44.
287. There is, of course, much more that can be, and has been, said about the complexities of the construction of race involved in *Plessy*. *See, e.g.*, Harris, *supra* note 15, at 1746–50. My aim here is only to point out that the Court relied on one particular notion of race, race as a biological fact, to justify white racial dominance, assert the innocence of white privilege within the existing racial hierarchy, and make the hierarchy seem consistent with the perceived requirements of racial equality.
288. *Plessy*, 163 U.S. at 543.

sphere, not in the social sphere.[289] While racial equality demanded "absolute equality of the two races before the law,"[290] and, thus, alike treatment in jury service, for example,[291] the natural unalikeness of the racial groups allowed for proportionate distinctions to be made in legislation regulating the social sphere.[292] Social inequalities, moreover, were presumptively not a function of improper race discrimination, but the innocent "result of natural affinities" and relative judgments "of each other's merits."[293] Because of this, and because legislation protecting the rights of blacks would be generally "powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences,"[294] the Court concluded that a legislature might as well accept those differences and legislate in accordance with them.[295] Coming to this inevitable conclusion would indeed be something positive. It would help not to "accentuat[e] the difficulties of the present situation."[296]

Comparing this construction of race in *Plessy* with that in *Bakke* along a shared Whiteness as Innocence dimension helps reconcile two superficially oppositional ways of thinking about race and law.[297] This reconciliation is in line with (1) CRT claims that race is not a natural or biological fact but a social and legal construction;[298] and (2) Whiteness as Innocence ideology, according to which the construction of race chosen by the legal system is one that protects existing racial hierarchy while apparently staying within the bounds of racial equality. The first point is illustrated by the two fundamentally different ideas about the nature of race relied on, and legally produced, by the Court: race as natural, biological, and permanent "color differences" versus race as ethnicity. More importantly for purposes of this Article, the second point is illustrated by the fact that in each case a construction of race was chosen that would help support what I consider a fundamental, visceral baseline assumption based on which various influential Supreme Court Justices have interpreted American race law: the GWIP. This move allowed these Justices to protect the dominant status of whiteness in the American racial hierarchy while ostensibly acting in accordance with principles of racial equality. In *Plessy*, constructing race as natural and permanent "color" difference helped the Court shift responsibility for oppressive racial segregation

289. *See id.* at 544.
290. *Id.*
291. *Id.* at 545.
292. *Id.* at 544 ("[I]n the nature of things, [the Fourteenth Amendment] could not have been intended to . . . enforce social, as distinguished from political, equality . . . . Laws permitting, and even requiring, [the] separation [of racial groups] . . . have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.").
293. *Id.* at 551.
294. *Id.*
295. *See id.* at 551–52.
296. *Id.* at 551.
297. *Cf. supra* Section III.A (using Whiteness as Innocence interpretation to reconcile superficially oppositional choices on how to interpret the Constitution in *Dred Scott* and *Bakke*).
298. *See supra* notes 29–30.

away from whites toward nature.[299] In *Bakke*, race as ethnicity helped Justice Powell portray whites not as beneficiaries of a longstanding racial hierarchy built on white supremacy, but as their own class of victims that should not be disadvantaged by race-conscious remedies afforded to nonwhites.[300] In both cases, the Court's chosen construction of race managed to naturalize racialized privileges as presumptively deserved and not to be disturbed by "preferential" intervention in favor of people of color.

The most recent incarnation of using a particular definition of race in the service of Whiteness as Innocence ideology is the idea that race is "merely 'skin color,'" essentially empty of independent meaning, irrelevant to basically all decision-making,[301] and yet a criterion with a pernicious past that ought to be avoided wherever possible.[302] This notion of race is intimately tied to the ideology of colorblindness[303] and an anticlassification jurisprudence of race.[304] There are many examples of how this notion of race, and the anticlassification jurisprudence that is built upon it, have been mobilized to limit race-conscious remediation as much as possible, and to asymmetrically protect the interests of whites over those of nonwhites.[305] But this construction of race, and its use to broadly protect white innocence, was also on display, in a less obvious way, just months ago in *Trump*.[306] In that case, the Court upheld the latest incarnation of President Donald Trump's self-styled "travel ban" Executive Order as consistent with, among other things, the equality demand of the First Amendment's Establishment Clause.[307] It did so notwithstanding numerous explicit statements from President Trump himself indicating that he intended to single out Islam in matters of immigration.[308] The Court found innocence for President Trump in the fact that the order was "neutral on

299. *Plessy*, 163 U.S. at 544.

300. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 292–98 (1978) (opinion of Powell, J.).

301. *See, e.g.*, Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 4 (1991) (calling this notion of race "formal-race").

302. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) (noting that "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification" (quoting Gratz v. Bollinger, 539 U.S. 244, 270 (2003))).

303. *See, e.g.*, Gotanda, *supra* note 301, at 6 ("Under color-blind constitutionalism, references to 'race' mean formal-race.").

304. The perhaps most well-known statement of this jurisprudence is Chief Justice Roberts's statement that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents*, 551 U.S. at 748.

305. For two well-known examples, *see generally* Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012); Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1 (2013); for an example illustrating such asymmetries in the Title VII context, *see generally* Simson, *supra* note 25.

306. Trump v. Hawaii, 138 S. Ct. 2392 (2018).

307. *See id.* at 2417 (majority opinion) (noting that the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another" (quoting Larson v. Valente, 456 U.S. 228, 244 (1982))).

308. The dissent catalogued the many explicit examples. *See id.* at 2435–38 (Sotomayor, J., dissenting).

its face."[309] In particular, the majority used the facial neutrality of the order to ward off the dissent's attack that upholding the order was the religious equivalent of the infamous *Korematsu v. United States*[310] decision that upheld the racist internment of Japanese-Americans during World War II.[311] Rejecting it as "wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission,"[312] the majority went as far as ostensibly overruling *Korematsu*.[313]

In so doing, the Court essentially suggested that what had been wrong with *Korematsu*, and what provided the shelter of innocence for President Trump's order, was that the *Korematsu* order facially classified on the basis of race, while the *Trump* order did not. This is another iteration of the extreme version of colorblindness that Chief Justice Roberts proposed in *Parents Involved*, when he suggested that what had been wrong with racial segregation in schools was merely that it classified schoolchildren by race.[314] This stance necessitates a view of race that is completely severed from social meaning and history because it treats the use of race as equally abhorrent in all circumstances. It forbids essentially all race-conscious remediation while turning a blind eye to practices that continue to subordinate communities of color so long as such practices do not explicitly classify by race. This is, of course, not a new insight.[315] But it is important to also recognize that the continuously expanding fervor with which this extreme view of colorblindness is being pursued further weaponizes the ideas and ideology of Whiteness as Innocence. In doing so, it again relies on the purchase of the ideal of equality.

In this context, *Trump* is in some ways the mirror image of *Abbott*, with the uniting factor being that the Court chose constructions of innocence and equality that facilitated the maintenance of white dominance. In

309. *Id.* at 2418 (majority opinion). This case, too, is much more complex than the aspect that is discussed in this Article, as it involved intricate matters of national security and executive power. *See id.* at 2422. It also involved, at least on its face, questions of religion rather than race, though these two categories seemed to influence each other significantly in this context. *Cf.* Simson, *supra* note 29, at 528–32 (reviewing graphical illustration and examples of a model of social construction of race in which religion and race can be co-constitutive). Still, it is important to point out the arguable Whiteness as Innocence dimensions of the opinion to illustrate how far the ideology continues to travel.

310. 323 U.S. 214 (1944), *abrogated by Trump*, 138 S. Ct. 2392.

311. *Trump*, 138 S. Ct. at 2447–48 (Sotomayor, J., dissenting).

312. *Id.* at 2423 (majority opinion).

313. *Id.*

314. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747–48 (2007).

315. Among the large amount of scholarship that has addressed these points, Ian Haney-López perhaps puts it most succinctly, when he calls the Supreme Court's current approach to race discrimination an "intentional blindness" that distinctly favors the interests of whites. Haney-López, *supra* note 305, at 1784 ("As we grapple with the present and look to the future, we should no longer see equal protection as divided between intent and colorblindness. Instead, we should understand it as unified under what might best be termed 'intentional blindness.' Combining the names of the two doctrines, this portmanteau expresses the marrow of the Court's racial jurisprudence—which seems intentionally blind to racial context, including the persistence of racial discrimination against non-Whites, and the desire of democratic majorities to remedy this lingering stain on American justice.").

Abbott, the Court thought it improper to consider the 2011 and 2013 legislatures alike by finding that there was a continuity of discriminatory intent, notwithstanding thorough factual findings on this point by the lower court.[316] In *Trump*, the Court found it improper to treat President Trump and other presidents who had issued similar orders unalike even though there was a clear difference in the evidence of discriminatory intent surrounding their actions.[317] In justifying its upholding of the order, in spite of President Trump's open bigotry and scheming to circumvent the law,[318] the majority claimed that President Trump had to be treated alike with other presidents who had also issued similar immigration orders, perhaps even with less supporting paperwork.[319] It claimed that, in reviewing the facially neutral order, the Court was obligated to "consider not only the statements of a particular President, but also the authority of the Presidency itself," which is very broad in the areas of national security and immigration.[320] In other words, President Trump had to be treated alike with other presidents, no matter what he said publicly about his intent, so long as his order was facially neutral. This is a presumption of Type 1 White Innocence that is essentially impossible to overcome. The construction of race as empty of independent meaning, and its anticlassification corollary, underlie this contemporary iteration of the GWIP.

Trump and *Abbott* thus illustrate the continued march forward of the complementary mechanisms of racial retrenchment that characterize the contemporary moment: Overt hostility to race-conscious remediation, and a permissive stance towards the subordination of nonwhites, so long as it is slightly disguised in facial neutrality. They fit into a long history of using race, innocence, and equality to legitimize racial hierarchy. Only time will tell how long this moment of retrenchment will last.

IV. THE DESTRUCTIVE IMPLICATIONS, AND FLAWS, OF WHITENESS AS INNOCENCE

As I hope to have demonstrated in this Article, Whiteness as Innocence ideology is powerful, it has a long history, and it remains with us today in many different forms. While the main aim of this Article is to lay out the contours of Whiteness as Innocence ideology and to systematically investigate its operation, I close with some thoughts about why, notwithstanding the odds, we ought to find a way to reduce its influence on race-conscious remedies jurisprudence. If the United States is to take another step forward in the process of reform and retrenchment that has so consistently characterized its way of regulating race,[321] it is important that we minimize the ideology's influence on the law of race and equality. Apart

316. *See supra* Section III.A.
317. *Trump*, 138 S. Ct. at 2418.
318. *Id.* at 2436 (Sotomayor, J., dissenting).
319. *Id.* at 2409 (majority opinion).
320. *Id.* at 2418.
321. *See generally* Crenshaw, *supra* note 29, at 1349–52, 1368, 1382–83.

from the definitional fact that Whiteness as Innocence ideology makes seemingly coherent a persistent racial hierarchy grounded in white supremacy with American egalitarian aspirations, the ideology is flawed in other ways as well. In this Part, I offer some thoughts on those flaws and possible doctrinal steps that could minimize the influence of Whiteness as Innocence ideology.

A. Flaws of Whiteness as Innocence

The most fundamental problem with Whiteness as Innocence ideology is that it enables inherently racist premises to infiltrate legal doctrine under the guise of widely cherished values such as fairness, legitimate entitlement, and protection of the innocent. Under Whiteness as Innocence ideology, racial disparities in access to social privileges are considered to be "caused by race" only to the extent that the causal connection reaffirms white racial dominance. They are *not* caused by race in the sense of whites engaging in racial discrimination against nonwhites. This conclusion regarding Type 1 White Innocence is protected by requiring highly specific evidence to contradict it and by defining actionable "discrimination" narrowly and as divorced from any systemic, institutional, or historical context. Disparities *are* caused by race in the sense that whites have earned their privileged position through their "superior" merit (Type 2 White Innocence), and nonwhites have failed to equalize their access to social privilege by their own shortcomings, preferring to ask for "special ward" status and preferential treatment instead. These premises are so engrained in the ideology that they can be presumed rather than having to be tested in individual cases.

There are important reasons in principle to reject such racist presumptions and to prevent them from influencing legal doctrine, the Court's own longstanding rhetoric among them.[322] If we are to take some of the proponents of Whiteness as Innocence ideology at their word that they believe that race is, in almost all cases, an "irrelevant factor" regarding a person's merit or desert,[323] then these proponents should be the most concerned about widespread racial disparities in social privileges that are longstanding and one-sided in favor of the same racial group: whites. They should be the most concerned with ensuring that all racial groups, random variation aside, achieve the same level of social privilege because persistent deviations from such a distribution indicate that race is a cause of society systematically and predictably treating some groups better than others

322. In *Strauder v. West Virginia*, for example, the Court declared that the Fourteenth Amendment included the right to "exemption from legal discriminations, implying inferiority in civil society." 100 U.S. 303, 308 (1879), *abrogated on other grounds by* Taylor v. Louisiana, 419 U.S. 522 (1975).

323. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989) (describing the "ultimate goal" of equal protection as elimination "from governmental decisionmaking [of] such irrelevant factors as a human being's race" (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 320 (1986) (Stevens, J., dissenting)).

based on an irrelevant characteristic.[324] Certainly, such proponents should not be willing to underwrite an assumption that whites are presumptively entitled to a disproportionately large share of social privileges. As Parts II and III above illustrate, however, this is what Whiteness as Innocence ideology has done.

Even apart from these reasons in principle, what we know about the operation of race in American society also suggests that there is no factual basis for Whiteness as Innocence's presumptions. Presumptions are only compelling if they are based on facts that are generally accurate. But, a large and growing reservoir of research shows that we can neither presume "superior" white merit nor the absence of systemically significant race discrimination in favor of whites and to the detriment of nonwhites.[325]

And yet, Whiteness as Innocence ideology has been highly successful and is responsible for many of the roadblocks that proponents of greater racial justice confront today. As Part II showed, Whiteness as Innocence ideology is baked into many of the doctrinal cornerstones that continue to govern race-conscious remedies today. Current doctrine is exceedingly hostile towards race-conscious remediation as a result.[326] Further, as Part III illustrated, this modern legacy of Whiteness as Innocence ideology is deeply connected to a long history of using this ideology to mold the law to delegitimize race-conscious remediation. Even worse, though predictable, Whiteness as Innocence ideology seems to play a particularly prominent role at historical moments when lasting change to America's pernicious racial hierarchy seems possible. These historical continuities between the premises of today's doctrine and some of the most denounced

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324. *See* Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357, 1399–1401 (2017) (explaining why correlations in outcomes by race suggest race as a causal factor and why the "reverse causation problem" does not typically apply in the race context); *see also* FISCUS, *supra* note 33, at 19–20 (arguing that if one believes that there are no racial differences at birth in ability or character, then distribution of social privileges should match racial demographics).

325. I note just a couple of examples, but there are many others. For a discussion of how the phenomena of "stereotype threat" and explicit and implicit bias show the biased nature of "merit" in the educational context, and how it predictably advantages whites, see, e.g., Devon W. Carbado et al., *Privileged or Mismatched: The Lose-Lose Position of African Americans in the Affirmative Action Debate*, 64 UCLA L. REV. DISCOURSE 174, 200–14 (2016). For a discussion of so-called "audit studies" in the employment context that show how a significant number of employers favor identically qualified white workers over nonwhite workers, see, e.g., Simson, *supra* note 25, at 34–35.

326. *See, e.g.*, Cheryl I. Harris, *Limiting Equality: The Divergence and Convergence of Title VII and Equal Protection*, 2014 U. CHI. LEGAL F. 95, 98 (2014) ("Comparative analysis of Title VII and constitutional standards" shows that "interpretations . . . have weakened anti-discrimination protection for non-whites, while enabling whites' challenges to those same remedial measures" and that "[t]he interplay between Title VII and equal protection has functioned asymmetrically to (re)produce an unequal doctrinal terrain."); *see also* Darren Lenard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL'Y & L. 1, 4 (2015) ("Some of the harshest critics argue that the Court has inverted the meaning of equal protection such that it no longer protects vulnerable classes. Others contend that the Court extends protection primarily to advantaged groups.").

cases of earlier periods alone should give us reason to question contemporary approaches to racial equality.[327] As Reva Siegel has aptly noted, "In matters of constitutional interpretation, no less than in other spheres of life, the nation makes choices for which it can be held morally accountable."[328] If our analysis, performed with "the kind of skeptical or critical detachment that a historical understanding of our position affords," shows that we continue to "rationaliz[e] practices that perpetuate historic forms of stratification" just as "the interpretive choices of our predecessors" did, then we must take responsibility for the consequences—and change them.[329] This Article suggests an urgent need to do precisely that.

And there are more specific reasons still to challenge the premises and implications of Whiteness as Innocence ideology and legal reasoning. First, using white innocence as the framework for regulating race-conscious remediation creates a false impression of what race-conscious remediation is about. It inappropriately frames race-conscious remedies as punishment and as the outgrowth of tyrannical government. This framework distracts from, perhaps erases, the true purpose of such measures, which is the empowerment of the oppressed. As a result, it fundamentally shifts the priorities of the law in regulating race-conscious remediation away from ensuring the effectiveness of this empowerment and toward policing appropriate limits on government punishment. The concept of innocence is incredibly powerful in American society.[330] One of the most sacred principles in the American legal system is the principle of "innocent until proven guilty" in criminal law. This principle is thought to be so fundamental as a source of protection of the individual against government overreach and tyranny that the government must generally meet the most stringent burden of proof to overcome it: proof "beyond a reasonable doubt." By relying on the ideology of Whiteness as Innocence, and crafting legal arguments that paint race-conscious remediation as fundamentally inconsistent with such innocence—and with racial equality itself—the cases discussed in this Article subtly but surely place the institutions

327. *See, e.g.*, Ross, *supra* note 17, at 37 (arguing that the "family resemblance" of the "rhetoric of white innocence" to "the rhetoric of cases we now disavow makes it suspect"). Indeed, Justice Marshall presciently made this point in *Bakke*, though tellingly in an opinion writing only for himself. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 402 (1978) (opinion of Marshall, J.) ("I fear that we have come full circle. After the Civil War our Government started several 'affirmative action' programs. This Court in the *Civil Rights Cases* and *Plessy v. Ferguson* destroyed the movement toward complete equality. For almost a century no action was taken, and this nonaction was with the tacit approval of the courts. Then we had *Brown v. Board of Education* and the Civil Rights Acts of Congress, followed by numerous affirmative-action programs. *Now*, we have this Court again stepping in, this time to stop affirmative-action programs of the type used by the University of California.").

328. Siegel, *supra* note 63, at 1145.

329. *Id.* at 1148.

330. *Cf.* Ross, *supra* note 33, at 299–301 (describing the "rhetoric of innocence" in the affirmative action context); *id.* at 307–09 (connecting notions of innocence to cultural forces and ideas connected to "religion, good and evil, and sex").

that practice race-conscious remediation in the role of the tyrannical government ready to punish at will.[331] On the flipside, they place the white workers, students, and contractors that are affected by race-conscious remedies in the role of an unwitting suspect facing punishment not only for a crime they did not commit but for what seems to them the mere exercise and enjoyment of their legitimate rights and entitlements. This is an outcome that our legal tradition teaches us should be avoided at all costs. Thus, it is not surprising that legal doctrine flowing from Whiteness as Innocence reasoning is fundamentally concerned with putting strict limits on the possibility of such an outcome at all levels—from the applicable standard of review to remedy implementation.

But, at least in my view, race-conscious remediation is not about the punishment of whites.[332] It is instead about providing a more equitable share of society's resources to those who unjustly have been forced to the lower levels of a persistent and resilient racial hierarchy grounded in white supremacy. It is also an attempt to ensure that this hierarchy stops perpetuating itself at some point. UC Davis in *Bakke*, or Congress in *Fullilove*, were not trying to punish whites. Their goal was to provide educational opportunities and access to the market for communities that previously had only subordinated access to such social benefits. Even in cases like *Franks* or *Sheet Metal Workers,* in which race-conscious remediation was a response to adjudicated wrongdoing, the goal of giving seniority to minority truck drivers or forcing the union to admit more racial minority members was aimed at achieving the end of discrimination and eradicating its effects, not punishment. It was about giving those who previously were wrongly denied a stable job, or representation in collective bargaining, access to such benefits. In other words, race-conscious remedies are about bottom-up empowerment, not top-down punishment. Focusing on white "innocence," and thus implicitly punishment, as a primary concern in evaluating the legitimacy of race-conscious remedies inappropriately shifts the focus of doctrine away from ensuring that this empowerment objective is most effectively achieved.[333] It pretends that race-conscious remediation

331. This anxiety about government overreach is reflected in many of the cases discussed above—in Justice Burger's fear of government robbery of whites in *Franks,* Franks v. Bowman Transp. Co., 424 U.S. 747, 781 (1976) (Burger, J., concurring in part and dissenting in part); Justice Powell's anxiety about the lack of "institutional competency" of UC Davis to make the decision to consider race to the disadvantage of whites like Bakke, *Bakke*, 438 U.S. at 289–90 (opinion of Powell, J.); Justice Powell's rejection of layoffs of whites as too excessive of a tool to protect gains for nonwhites in *Wygant*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283–84 (1986); and so on.

332. *Cf.* Harris, *supra* note 33, at 633–35 (in a similar context, making the point that "returning ill-gotten gains is not 'punishment'").

333. *Cf.* Harris, *supra* note 15, at 1780 ("[T]he property interest in whiteness has skewed the concept of affirmative action by focusing on the sin or innocence of individual white claimants with vested rights as competitors of Blacks whose rights are provisional and contingent, rather than on the broader questions of distribution of benefits and burdens. This focus improperly narrows the affirmative action debate to corrective/compensatory issues, to the exclusion of distributive issues. Asking distributive questions about affirmative action is not only conceptually warranted, but is an effective beginning to disentangling whiteness from property through refocusing on the extent to which the existing, distorted distribution results directly from racial subordination.").

is about something that it is not, and thus makes it an easier target for judicial criticism and curtailment.

Second, challenging and rejecting the role of Whiteness as Innocence ideology in shaping legal doctrine helps turn on its head the assertion that race-conscious remediation is inappropriate because it leads to racial tension and resentment. Race-conscious remedies have been criticized on these grounds, both in the explicit white innocence cases[334] and thereafter.[335] But the persuasiveness of this claim is to a significant extent dependent on the validity of claims to white innocence and their relationship to racial equality. Anxieties about social tension and hostility resulting from race-conscious remedies have been tied directly to white innocence. The most prominent example is Justice Powell's opinion in *Bakke*, where he claimed that it is precisely "[t]he denial to innocent persons of equal rights and opportunities [that] may outrage those so deprived and therefore may be perceived as invidious."[336] In other words, it is not race-conscious remediation itself that causes racial tension or hostility but rather the fact that this remediation interferes with innocent whites and their equality interests.[337]

One can persuasively argue, however, that it is actually today's race-conscious remedies doctrine that creates racial hostility. It tells whites the following: (1) they should feel presumptively entitled to their current social privilege, and indeed that they meritoriously earned it; (2) absent specific findings to the contrary, their social privilege is presumptively unconnected to racial discrimination against nonwhites either by themselves, by others, or in the past (even though this discrimination is acknowledged in the abstract); (3) notwithstanding their personal "innocence" as established by (1) and (2), they will have to pay some of the price to make up for other people's missteps. In other words, their interests will have to be "trammeled"; (4) the beneficiaries of the race-conscious remedies that impose a cost on whites are not equally meritorious as whites themselves; and (5) thus, whites ought to remain vigilant at all times that

334. *See, e.g.*, *Bakke*, 438 U.S. at 298–99 (opinion of Powell, J.) (arguing that a more lenient standard of review for race-conscious remediation efforts "well may serve to exacerbate racial and ethnic antagonisms rather than alleviate them").

335. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (unless strictly limited, racial classifications may "lead to a politics of racial hostility"). Some scholarship has suggested that there may indeed be an "antibalkanization principle" that is driving the decisions of more moderate conservative Justices in race-conscious remediation cases and leads them to allow some such remediation, but only if the form in which it is undertaken minimizes the social tension resulting from such remedies. For a detailed analysis, see Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1300–03 (2011).

336. *Bakke*, 438 U.S. at 294 n.34 (opinion of Powell, J.).

337. *Cf.* Chang, *supra* note 33, at 809 n.57 ("One might argue that any statute or constitutional provision adopted to combat racist actions—such as the thirteenth amendment's abolition of slavery, the fourteenth amendment's equal protection clause, or the Civil Rights Act of 1964—could foment racial prejudice. Until legislatures began to adopt affirmative action programs, however, courts never considered whether the gains toward racial justice were worth ancillary impediments to racial justice.").

institutions that engage in race-conscious remediation not *unnecessarily* trammel their interests or impose costs on them that are "too high" or not "narrowly tailored." In other words, what entitles whites to feel abused is precisely the fact that current doctrine constructs whites as innocent and as persistently treated unequally by race-conscious remediation. And it is that fact that causes whites to resent both racial minorities and the institutions that ostensibly "trammel" the interests of whites on behalf of those minorities for imposing a cost on whites that they would rather not bear.

Empirical research suggests that the self-perception of American whites is indeed going in precisely this direction.[338] Given the publicity attached to Supreme Court cases on race-conscious remediation, Whiteness as Innocence ideology in the cases discussed above may well have played some role in this development. Therefore, a concern about racial hostility should do more to call into question legal doctrines limiting race-conscious remediation based on presumptive white innocence than doctrines permitting such remediation.[339]

Third, it is important to recognize Whiteness as Innocence ideology as an indispensable foundation for the legal ideology of "colorblindness" that has taken hold in jurisprudence related to race over the last three decades or so. Much of the scholarly criticism of contemporary jurisprudence on race focuses on the deleterious effects of judicial claims that "[o]ur Constitution is colorblind"[340] and the implementation of such a vision by a conservative judiciary.[341] As noted above, this implementation, in the form of the "anticlassification" principle that treats all governmental uses of race with equal hostility,[342] has been criticized along many fronts. Most

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338. *See* Norton & Sommers, *supra* note 11, at 215–17. Asking study participants to rate the level of discrimination that both white and black Americans have faced in each decade from the 1950s to the 2000s, Norton and Sommers found that white Americans believed that anti-black bias started to sharply decline in the 1970s, and that by the 2000s, whites on average experienced greater levels of anti-white bias in American society than black Americans experienced anti-black bias. *Id.* at 216. Indeed, "[b]y the 2000s, some 11% of Whites gave anti-White bias the maximum rating on our [10-point] scale in comparison with only 2% of Whites who did so for anti-Black bias." *Id.* Norton and Sommers also found that whites appear to take a strong zero-sum view of racial bias, so that "within each decade and across time, White respondents were more likely to see decreases in bias against Blacks as related to increases in bias against Whites . . . whereas Blacks were less likely to see the two as linked." *Id.* at 217.

339. *See* FISCUS, *supra* note 33, at 7–8 ("[T]he innocent persons argument is more than an important constitutional argument. It is a widely held, racially polarizing social argument. The near-universal belief in it is without doubt the single most powerful source of popular resentment of affirmative action. If the belief could somehow be undercut, the resentment toward affirmative action and the associated racial polarization might be diminished.").

340. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

341. There is a variety of excellent work on the topic of colorblindness in various fields. Examples include: THE MYTH OF RACIAL COLORBLINDNESS: MANIFESTATIONS, DYNAMICS, AND IMPACT (Helen A. Neville et al. eds., 2016); Haney-López, *supra* note 305; Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010); Siegel, *supra* note 305.

342. *See, e.g.*, Siegel, *supra* note 305, at 1287–88. In theory, the principle of "colorblindness" could be interpreted as a distributive justice commitment to more equal (i.e., colorblind) societal *outcomes*, not simply as a procedural justice commitment to formally equal treatment as is postulated by

prominently, it does not distinguish between uses of race to segregate and further white supremacy on the one hand, and those to integrate and combat white supremacy on the other.[343] It has also played a key role in the development of a jurisprudence that overwhelmingly dismisses claims of discrimination by nonwhites, while treating discrimination claims of white "reverse discrimination" plaintiffs with much greater solicitude.[344] These critiques of conservative colorblindness are essential to efforts aiming to reduce American racial hierarchy.[345]

Focusing our attention on Whiteness as Innocence ideology can further help undermine the persuasiveness of colorblindness reasoning. The assertion that race-conscious remedies cause harm to innocent whites has been used as a foundational piece of evidence for claims that colorblindness as practiced by the Court is appropriate in the first place. Therefore, undermining Whiteness as Innocence ideology helps remove one of the central pillars of contemporary colorblindness ideology as well. As noted above, anticlassification colorblindness prominently has been justified by arguing that racial classifications as such are "'in most circumstances irrelevant and therefore prohibited'" as a basis for government decision-making in all but the most compelling circumstances.[346] But, as Professor Alan Freeman notes, this conclusion is "hardly intuitively obvious."[347] In the context of efforts to eradicate the pernicious influence of racism in American society, the relevance of race seems too clear and Justice Blackmun's conclusion that "[i]n order to get beyond racism, we must first take account of race" seems much more persuasive.[348] Whiteness as Innocence ideology helps proponents of colorblindness out of this conundrum because it ostensibly proves that all uses of race—even the allegedly "good ones" to effect race-conscious remediation—have "victims."[349] And

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the anticlassification principle. *See, e.g.*, Eric D. Knowles et al., *On the Malleability of Ideology: Motivated Construals of Color Blindness*, 96 J. PERSONALITY & SOC. PSYCHOL. 857, 859–60 (2009). However, the conservative majority on the Supreme Court has consistently interpreted the principle as one of procedural justice only. *Id.* at 857.

343. Justice Stevens famously noted that the principle "would disregard the difference between a 'No Trespassing' sign and a welcome mat." Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting).

344. *See supra* Section III.B.

345. I have contributed to such critiques in other work. *See* Simson, *supra* note 25, at 22–23, 57–58 (connecting colorblindness to human tendencies to create and perpetuate racial hierarchy).

346. *Adarand*, 515 U.S. at 214 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)); *see also supra* Section III.B.

347. Freeman, *supra* note 29, at 1066.

348. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (opinion of Blackmun, J.) ("I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.").

349. Justice Scalia vividly made this claim in his concurrence in *Croson*. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 527 (1989) (Scalia, J., concurring) (arguing that "even 'benign' racial quotas have individual victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race" and that when the Court or

not only do they have victims, but these victims are "innocent" yet still have to pay the price for race-conscious remediation when their own privileges were either meritoriously earned,[350] unconnected to any racial wrongdoing (narrowly defined) that has occurred,[351] or both. In other words, all racial classifications are bad because we accept that those which oppress nonwhites are bad, but we now also know that even those classifications that ostensibly help previously oppressed groups are bad because they disadvantage and victimize innocent whites. What is more, limiting race-conscious remediation under Whiteness as Innocence ideology is said to be consistent with the principle of formal racial equality. Undermining the foundation of this argument, by being more rigorous about interrogating the premises on which it is based, should help to push along arguments against a colorblindness ideology that has powerful supporters.

B. Doctrinal Implications

For all of these reasons, we ought to not only abandon the use of Whiteness as Innocence ideology in discourse on race-conscious remedies but we must also rethink the many doctrinal flow-on effects that the ideology has had. The implications of such a move for legal doctrine are complex and vary to some extent from context to context given the broad definition of race-conscious remedies I have used. Thus, a full analysis of what alternative doctrines could look like will have to come in future work. At a minimum, however, I believe that abandoning Whiteness as Innocence ideology should affect doctrine at all of the stages at which the ideology was clearly crucial for the development of the law as it stands today.

Take, for example, the question of government interests that can permissibly justify race-conscious remediation. Whiteness as Innocence ideology was crucial in rejecting the interest in counteracting "societal discrimination" as a compelling justification for race-conscious action.[352] If Whiteness as Innocence ideology was properly viewed as an inappropriate basis for legal doctrine, this conclusion would lose most of its strength. Revitalizing the interest in remedying societal discrimination as a permissible basis for race-consciousness would bring legal doctrine more in line with many people's broad conviction that counteracting the *systemic* harmful effects of a social infrastructure built in significant part on notions

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society depart from hostility to racial classifications, "we play with fire, and much more than an occasional DeFunis, Johnson, or Croson burns").

350. *See, e.g.*, Johnson v. Transp. Agency, 480 U.S. 616, 676–77 (1987) (Scalia, J., dissenting) (affirmative action under Title VII creates "nonminority or male victims" and passes them over in favor of "less capable" workers, thus turning a "statute designed to establish a color-blind and gender-blind workplace . . . into a powerful engine of racism and sexism"); *see also supra* Section I.B.

351. Recall Justice Powell's claim in *Bakke* that he was justified to conclude that all racial classifications must meet the same, most rigid, scrutiny in part because there is "a measure of inequity in forcing innocent persons [like Bakke] to bear the burdens of redressing grievances not of their making." *Bakke*, 438 U.S. at 298 (opinion of Powell, J.).

352. *See supra* Section II.B.

of white supremacy is the most appropriate purpose for affirmative action.[353] This revitalization could be a particularly productive step in the context of voluntary race-conscious remediation through affirmative action programs by institutions, public or private, that want to take ownership of creating a more racially equitable future for American society. Actions grounded in such a purpose are much more consistent with claims that we ought to strive for a society in which race is systemically irrelevant to people's life successes than Justice Powell's conclusion in *Bakke* that such institutions are presumptively overstepping their competencies.[354]

Apart from societal discrimination, freeing the doctrine from its excessive focus on the innocence of whites could allow for the implementation of programs with more forward-looking purposes such as "dispelling . . . any idea that white supremacy governs our social institutions"; "eliminat[ing] from [institutions'] operations all de facto embodiment of a system of racial caste"; and creating "a [more] racially integrated future."[355]

Similarly, uncovering and rejecting Whiteness as Innocence ideology should give a fresh boost to arguments fought over whether the standard of review should differ depending on which groups are benefitted by a race-conscious program. Ridding ourselves of Whiteness as Innocence ideology suggests that a more lenient standard for programs benefitting nonwhite racial minorities is indeed appropriate, notwithstanding the many complexities that come with such a conclusion. In implementing such a differentiated approach, existing doctrine could be freed from the requirement that race-conscious remedies must not "unnecessarily trammel" the interests of whites. Rather, it could focus on how to best accomplish the "collective effort to address a major social problem: the continuing trauma of racial division in America."[356] Because "[m]embership in a polity entails contributing to the alleviation of its woes, just as it means sharing in the riches of its benefits,"[357] what should be foregrounded is the effectiveness of a program in reducing racial hierarchy, not the extent to

353. *See supra* note 126 and accompanying text.

354. *See, e.g.*, Khiara M. Bridges, *Race Matters: Why Justice Scalia and Justice Thomas (and the Rest of the Bench) Believe that Affirmative Action Is Constitutional*, 24 S. CAL. INTERDISC. L.J. 607, 656 (2015) ("At present, efforts to repair the damage caused by this country's history of racism and exclusion can only be justified by not making reference to this country's history of racism and exclusion. There is something deeply unsettling about that. More satisfying would be a jurisprudence that allows us to speak frankly about our dreadful history and how that history continues to have repercussions. Much more satisfying would be a jurisprudence that allows us to say, emphatically and often, that our *present* is dreadful in many ways. We exist in a nation in which non-white people are poorer, sicker, more frequently incarcerated, die earlier, and more likely to die violent deaths. Given the intuitive injustice of those facts, we ought to develop a jurisprudence that not only unties the hands of any state actor who wants to remedy them, but actively encourages them to use their hands to build a different, more just society.").

355. Sullivan, *supra* note 33, at 96. As Sullivan notes, "[W]hite claims of 'innocence' [would] count for less" in such circumstances. *Id.*

356. KENNEDY, *supra* note 77, at 111.

357. *Id.*

which it interferes with existing white privilege. Of course, if there are ways to distribute widely any burdens that this creates, such steps should absolutely be considered.[358] But considerations of interference with privilege should not stunt remediation in the first place.

Perhaps most broadly, questioning current invocations of white innocence could help jumpstart a project to redefine what white innocence should mean. As social psychologists Taylor Phillips and Brian Lowery have suggested, one way to define innocence in a society governed by white dominance in a persistent racial hierarchy is to redefine innocence "as *anti*-maintenance."[359] In other words, "To claim innocence, individual Whites would . . . have to actively dismantle privilege at individual, interpersonal, and societal levels."[360] Given the long history of Whiteness as Innocence ideology in its current iteration, this is a daunting project indeed. But if fundamental American aspirations toward equality, and racial equality, are ever to truly flourish, approaches that seem daunting to us today will be required.

CONCLUSION

The United States, perhaps today more so than in quite some time, is caught between the reality of persistent racial hierarchy and prejudice on the one hand, and aspirations toward equality in general—and racial equality in particular—on the other. As this Article has shown, legal ideology has long played a significant role in supporting America's racial hierarchy, has warded off many legal attacks on this hierarchy, and yet in the process has made the hierarchical end-result seem consistent with principles of equality. Ideas about the need to protect "white innocence," in particular, have asserted a strong influence on the way in which the legal system tells us to think about whether racial injustice and inequality exists, who is harmed and victimized by it, and what we are allowed to do about it. The resulting ideology, what I call Whiteness as Innocence ideology, is grounded in racist premises, and it has a long history that we can trace from some of the most vilified legal cases of our past to the very present. It also has many negative implications and effects. We ought to make this ideology visible, discuss and reject it, and build a more equitable future free from its constraints.

358. *See, e.g.*, Ansley, *supra* note 33, at 1067–73.

359. *Cf.* Phillips & Lowery, *supra* note 1, at 160 ("[T]o correct the incentive problems created by herd invisibility, innocence would need to be redefined as *anti*-maintenance rather than mere neutrality.").

360. *Id.*