FIFTY YEARS AFTER *BROWN*, THE CIVIL RIGHTS IDEOLOGY AND TODAY'S MOVEMENT

BRANDON M. LOFTON*

I.
INTRODUCTION

"For the master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change."[1]

In April of 2003, nearly fifty years after the Supreme Court declared "[s]eparate educational facilities are inherently unequal" in *Brown v. Board of Education*,[2] we[3] found ourselves back before the Court, once again fighting for genuine access to education. African Americans[4] and hundreds of other people from diverse backgrounds and regions of the country gathered on the steps of the Court while our cause was argued inside. We chanted fervently, waived signs declaring "diversity is a compelling state interest," and cheered enthusiastically as numerous speakers repeatedly proclaimed that day to be the start of the "New Civil Rights Movement."

However, persistent societal inequities and the Supreme Court's subsequent decisions in the Michigan cases[5] call into question the appropriate strategies and philosophy of this new movement. As we celebrate the fiftieth anniversary of *Brown* and the victories it helped usher in, we must also study the limitations of these victories and how the lessons of the past should shape our continued advocacy.

This article examines the ideological underpinnings of the Civil Rights Movement and questions whether these principles form a viable framework for

---

* J.D., New York University School of Law, 2004; B.A., University of North Carolina at Chapel Hill, 2001. I would like to thank Professor Derrick Bell and the editing team at the Review of Law and Social Change for their input and guidance. Most of all, I thank my parents and my wife Kellie for their support.

1. AUDRE LORDE, SISTER OUTSIDER 112 (Nancy K. Bereano ed., 1984).

2. 347 U.S. 483, 495 (1954).

3. Given the subject matter of this paper, analyzing the Civil Rights Ideology and its continued viability for African Americans, I chose "us" and "we" when making specific reference to African Americans instead of "they" and "them." As an African American writing about notions of Black identity, freedom, and the importance of advocating from one's own perspective, it seemed contradictory and unsatisfactory to discuss such personal notions in traditional, detached language. This is not a disinterested analysis of what "they need to do" for the continued struggle, but a personal reflection on what "our" role will be in carrying on the legacy of "our" forbearers.

4. African American and Black are used interchangeably throughout this paper to refer to people of African descent living in the United States.

5. Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

shaping today's advocacy. African Americans, having obtained the hard fought victories of the Civil Rights Movement, continue to face obstacles that require strategies rooted in more comprehensive ideological beliefs. These beliefs include conceptions of Black identity, freedom, and the sufficiency of American promises. The practical implication of adopting more comprehensive ideological beliefs is an acknowledgment of the inherent limitations of "traditional civil rights" advocacy and the development of strategies that compensate for these limitations.

Understanding these limitations means examining the ideology shaping the countless protests, sit-ins, lawsuits, and marches of the Civil Rights Movement.[6] Through these efforts, Black people successfully dismantled legalized racial apartheid in the United States and achieved the most significant judicial and legislative victories since Reconstruction.[7] The Civil Rights Ideology is rooted in core beliefs about Black identity, freedom, and American society that continue to influence advocacy today.[8] However, these core beliefs prove too narrowly conceived to enable African Americans to fully address contemporary challenges facing our communities. The judicial and political framing of the affirmative action debate illustrates this point. Until an alternative ideological framework is adopted to supplement the limitations of "traditional civil rights" advocacy, we will be confined in our efforts to bring about genuine change.

While "ideology" carries several meanings in different disciplines, this article employs a very particular conception of the term. I use it to refer to an organized and coherent "set of ideas that explains and evaluates social conditions, helps people understand their place in society, and provides a program for social and political action."[9] An ideology helps to justify political stances, identify allies and opponents, and "serves as a filter of what one 'sees' and responds to in the social world."[10] Thus, an ideology defines an agent, describes freedom for the agent, and provides a program of action to attain that

---

6. I refer to the system of beliefs and ideals underlying these efforts as the Civil Rights Ideology.

7. *See generally* Steven F. Lawson, *The Selma Movement and the Voting Rights Act of 1965*, *in* CIVIL RIGHTS SINCE 1787: A READER ON THE BLACK STRUGGLE 539 (Jonathan Birnbaum & Clarence Taylor eds., 2000) [hereinafter CIVIL RIGHTS SINCE 1787] (discussing the success of grassroots efforts to increase Black political participation); Nicolaus Mills, *What Really Happened at the March on Washington?*, *in* CIVIL RIGHTS SINCE 1787, *supra*, at 493 (discussing leadership in the Civil Rights Movement).

8. *See, e.g.*, Eddie Bernice Johnson, A Message from Chairwoman Johnson, Address at the Ceremonial Swearing In of the Caucus at the Library of Congress (Jan. 3, 2001) (transcript on file with the author) (proclaiming "[t]his is the America of Martin Luther King's dream . . .[t]his is our America, my America and your America . . . ."); National Association for the Advancement of Colored People Mission Statement, *at* http://www.naacp.org/about/about_mission.html (last visited Sept. 28, 2005) (stating that the mission of the NAACP is to "ensure the political, educational, social and economic equality of rights of all persons...").

9. TERENCE BALL & RICHARD DAGGER, POLITICAL IDEOLOGIES AND THE DEMOCRATIC IDEAL 9 (2d ed. 1995).

10. MICHAEL C. DAWSON, BLACK VISIONS 5 (2001).

freedom.[11] In other words, an ideology is a system of ideas and beliefs that explains and evaluates social conditions[12] based on a conception of freedom.[13]

Ideologies that seek to explain and ultimately improve social and political conditions facing marginalized groups must provide an accurate and contextualized conception of those conditions, as well as of identity and of freedom, in order to be effective. These "liberation ideologies" attempt to address the subordinating conditions facing their particular agents.[14] Throughout the history of African American political thought, the core beliefs underlying the many diverse Black ideologies have been conceptions of what it means to be Black, what it means to be free, and the sufficiency of American promises of liberty.[15] For example (as discussed in greater detail later), Black Liberal ideologies, like the Civil Rights Ideology, have primarily defined Black identity in terms of American citizenship, defined freedom as inclusion into American society, and presumed the sufficiency of American promises of liberty. Black Nationalist ideologies, like those of the Black Power Movement, however, defined Black identity in terms of African-rooted culture, defined freedom as self-determination, and denied the sufficiency of American promises of liberty.[16] The practical as well as ideological implications of these core beliefs will frame my discussion of the Civil Rights Ideology.

I begin Section II by discussing the major judicial and legislative victories of the Civil Rights Movement including *Brown*, the Civil Rights Act of 1964, and the Voting Rights Act of 1965. These victories helped remove legal barriers to African American inclusion into American society and continue to inspire advocacy efforts of marginalized groups around the world.[17] In the context of these victories, I analyze the underlying Civil Rights Ideology that shaped the

---

11. BALL & DAGGER, *supra* note 9, at 14–15.

12. An agent is the actor or primary subject of an ideology. *See id.* at 16. In the context of the Civil Rights Movement, African Americans are the primary agents and authors. *See generally* Roy Wilkins, *Steady As She Goes, Keynote Address at NAACP 57th Annual Convention (July 5, 1966), in* THE CIVIL RIGHTS READER: BASIC DOCUMENTS OF THE CIVIL RIGHTS MOVEMENT 131, 131–39 (Leon Friedman ed., rev. ed. 1968) [hereinafter THE CIVIL RIGHTS READER] (discussing the aim of the Civil Rights Movement as gaining equality for African Americans).

13. Freedom is an ideology-specific notion that the agents seek to achieve. While its components vary, it generally takes the form of some agent being free from some obstacle or free to achieve some condition. BALL & DAGGER, *supra* note 9, at 14–15. As Ball and Dagger note, even "racist ideologies" have freedom as their goal in that they want their agent (usually a nation or race) free of something (inferior elements) to achieve their goal (historical greatness). *Id.* at 16.

14. *See id.* at 208.

15. *See*, DAWSON, *supra* note 10, at 12 (listing several core concepts or questions that must be addressed by Black ideologies including "[h]ow is blacks' position in society explained?;" "[w]ho are friends . . . .?" and "[w]hat stance should African Americans take toward what has been labeled the 'American Creed,' 'American Liberalism,' and the 'American Liberal Ideology'?").

16. *See id.* at 87 (describing Black Nationalism as focused on "cultural, social, economic, and political separation from white America").

17. Colloquium Panel, A Comparative International Perspective on *Brown*, *in* Relearning *Brown*: Applying the Lessons of *Brown* to the Challenges of the Twenty-First Century, New York University School of Law (Feb. 19, 2004).

movement and informed its goals. While the core beliefs of Civil Rights Ideology proved instrumental in inspiring many of the Civil Rights Movement, they may ultimately prove too narrowly conceived to adequately address the challenges facing African Americans today. The conceptions of Black identity, freedom, and American society that shape the Civil Rights Ideology are confined to the American legal and political context. Black identity is principally defined in terms of American citizenship. Freedom is conceptualized solely in terms of full inclusion into American society, and American promises of liberty are presumed sufficient to obtain freedom. These core beliefs fail to account for the full complexity of Black identity or African American experiences in the United States. As such, they fail to provide a viable framework for organizing contemporary African American advocacy.

Section III explores some practical consequences of the narrow core beliefs of the Civil Rights Ideology through the example of affirmative action. The judicial and political framing of affirmative action in terms of "diversity," "harm to innocent Whites," and a "color-blind constitution" reveal the limited effectiveness of these forms of advocacy.[18] Implicit in this approach is the dependency of marginalized groups on majority interests and the legitimizing of their marginalization. Confining conceptions of African American identity and freedom to the American legal and political context prevents the Civil Rights Ideology from addressing this limitation.

Section IV calls for an alternative ideology whose core beliefs more fully reflect the complexity of African American identity and freedom. Adoption of such an ideology should provide a framework for practical strategies that address the inherent limitations of traditional legal and political advocacy. Addressing these limitations is critical in today's effort to bring about genuine socio-political change.

II.
THE IDEOLOGY BEHIND THE MOVEMENT

"When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir . . . . It is obvious today that America has defaulted on this promissory note in so far as her citizens of color are concerned . . . . And so we've come to cash this check, a check that will give us upon demand the riches of freedom and the security of justice."[19]

A. Historical Events

During the Civil Rights Movement, African American demands based on

18. *See, e.g.*, Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978).

19. Martin Luther King, Jr., I Have a Dream, Address Before the March on Washington (Aug. 28, 1963), *reprinted in* CIVIL RIGHTS SINCE 1787, *supra* note 7, at 504, 504–05.

promises contained in the Constitution and the Declaration of Independence achieved unprecedented success. These demands, articulated both inside and outside courtrooms, dismantled legalized racial segregation through a series of victories that included *Brown v. Board of Education*,[20] the Civil Rights Act of 1964,[21] and the Voting Rights Act of 1965.[22] These victories and the strategies that produced them continue to be celebrated by marginalized groups around the world. Briefly discussing these victories will provide context for discussing the ideology that shaped the movement.

The victories of the Civil Rights Movement directly resulted from the massive collaborative efforts of Black organizations and their White allies to dismantle legalized racial segregation in the United States. Following a successful campaign by the National Association for the Advancement of Colored People ("NAACP") against segregated public education that culminated in *Brown*, mass organizing efforts highlighted the injustice of segregation in all public facilities.[23] The Montgomery Bus Boycott,[24] the Sit-In Movement,[25] the Freedom Rides,[26] and numerous mass demonstrations all highlighted the brutality and oppression suffered by Black people under legalized racial subordination.[27] While the organizations coordinating these actions often espoused differing views on strategy and appealed to different constituencies, they all focused on ending segregation and achieving equality for African Americans.[28] To that end, divergent organizations were able to collaborate in a number of efforts, including the 1963 March on Washington and the march from Selma to Montgomery, and they successfully fought for the

20. 347 U.S. 483 (1954).

21. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a–2000h-6 (2000)).

22. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971–1974e (2000)).

23. *See* Jonathan Birnbaum & Clarence Taylor, *Introduction: The Modern Civil Rights Movement*, *in* CIVIL RIGHTS SINCE 1787, *supra* note 7, at 327 (noting that *Brown* represented the foundation for the campaign to end segregation).

24. Just one year after *Brown*, the Black community in Montgomery, Alabama refused to ride the buses until they were desegregated. African Americans organized car pools and other means of transportation to travel back and forth to work. The Boycott gained national attention and successfully ended segregation on the buses. *See* MARTIN LUTHER KING, JR., STRIDE TOWARD FREEDOM, *in* THE CIVIL RIGHTS READER, *supra* note 12, at 33.

25. In 1960, four students from North Carolina's Agricultural and Technical State University sat for hours at a Woolworth "Whites only" lunch counter without being served. This bold move ushered in a wave of demonstrations that brought national attention to segregation in public accommodations. THE CIVIL RIGHTS READER, *supra* note 12, at 43.

26. During the Freedom Rides, an interracial group of activists from the Congress of Racial Equality traveled on buses from Washington, D.C., and were met with violent and deadly reactions in deep Southern towns. This graphically illustrated the divide between the law declared by the Supreme Court and its enforcement in the South. *Id.* at 51.

27. *See generally* LET NOBODY TURN US AROUND: VOICES OF RESISTANCE, REFORM, AND RENEWAL: AN AFRICAN AMERICAN ANTHOLOGY (Manning Marable & Leith Mullings eds., 2000).

28. *Id.* at 369–70.

Civil Rights Act of 1964 and the Voting Rights Act of 1965.[29]

1. Brown v. Board of Education[30]

Brown was the capstone victory in a long line of cases strategically argued by the NAACP's Legal Defense and Education Fund to challenge the "separate but equal" doctrine established in *Plessy v. Ferguson*.[31] This doctrine judicially sanctioned racial segregation in various public facilities.[32] The *Plessy* Court held that state-sponsored barriers to African Americans neither violated the Thirteenth Amendment prohibition on slavery nor the Fourteenth Amendment Equal Protection Clause.[33] Distinguishing between the denial of political rights and the separation of races on a social basis, the Court rejected Homer Plessy's argument that the forced separation stamped Black people with a "badge of inferiority."[34] The Court reasoned that social prejudices could not be overcome by legislation and concluded: "If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."[35]

Over fifty years later in *Brown*, however, the NAACP's legal team successfully convinced the Court that "in the field of public education the doctrine of 'separate but equal' has no place."[36] Building on prior legal victories in graduate school level segregation, the NAACP argued that, by their very nature, segregated public schools were not and could not be made equal.[37] The Supreme Court unanimously agreed, declaring that "separate educational facilities are inherently unequal" and therefore violated the Equal Protection Clause of the Fourteenth Amendment.[38]

The *Brown* Court relied heavily on the importance of public education and

29. *See* Steven F. Lawson, *The Selma Movement and the Voting Rights Act of 1965*, *in* CIVIL RIGHTS SINCE 1787, *supra* note 7, at 539, 539–45 (recounting the collaborative organizing in Selma, particularly between SCLC and SNCC); Nicholas Mills, *What Really Happened at the March on Washington?*, *in* CIVIL RIGHTS SINCE 1787, *supra* note 7, at 493, 493–500 (detailing the organization of the March on Washington amidst internal organizational conflicts); Malcolm X, *The Ballot or the Bullet*, *in* CIVIL RIGHTS SINCE 1787, *supra* note 7, at 589, 594–603 (discussing the commonalities in ideology, specifically the belief that Blacks should have the power to control their own communities, among civil rights organizations).

30. 347 U.S. 483 (1954).

31. 163 U.S. 537 (1896). The strategy orchestrated by the NAACP involved litigating a series of cases where segregation was deemed unequal in certain circumstances. Under the leadership of Charles Hamilton Houston and Thurgood Marshall, the NAACP Legal Defense Fund used the financial costs of segregation as a basis to argue overturning of segregation as a whole. Harvard Sitkoff, *The NAACP and* Brown, *in* CIVIL RIGHTS SINCE 1787, *supra* note 7, at 341, 342–43.

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

33. *Id.*

34. *Id.* at 551.

35. *Id.* at 552.

36. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

37. *Id.* at 488.

38. *Id.* at 495.

the feelings of inferiority generated by segregation.[39] In the Court's words, "education is perhaps the most important function of state and local governments."[40] Further, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[41] Moreover, separating children "of similar age and qualifications solely because of their race" creates a feeling of inferiority "that may affect their hearts and minds in a way unlikely ever to be undone."[42] Despite its concern for the psychological well-being of Black children and its strong declaration that such segregation is unconstitutional, the Court merely required states to "make a prompt and reasonable start" to desegregate their schools with "all deliberate speed."[43]

Both the relatively weak compliance provision and implicit assumptions about African American inferiority have inspired criticism of the *Brown* decision.[44] Notwithstanding many valid concerns raised in these critiques, *Brown* still represents an important moral victory over segregation. As some scholars observe, the decision "heightened the aspirations and expectations of African-Americans as nothing before had. It proved that the Southern segregation system could be challenged and defeated."[45] Equally important, notes Professor Michael Klarman, was the reaction of Southerners who violently resisted integration.[46] Images of brutal suppression of demonstrations transmitted through television moved "previously indifferent northern whites" to demand national civil rights legislation.[47] The televised confrontations between peaceful civil rights protestors and often-violent White mobs and police squads helped illustrate the need for federal civil rights protection.

2. *Legislative Victories*

In addition to the victory in *Brown*, African American activists and allies secured two other significant achievements during the Civil Rights Movement: the Civil Rights Act of 1964[48] and the Voting Rights Act of 1965.[49] Together

39. *Id.* at 493–94.

40. *Id.* at 493.

41. *Id.*

42. *Id.* at 494.

43. Brown v. Bd. of Educ., 349 U.S. 294 (1955).

44. *See* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2001) (critiquing *Brown* through re-written versions of the decision).

45. Sitkoff, *supra* note 31, at 345.

46. Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 11 (1994).

47. *Id.*

48. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a–2000h-6 (2000)).

49. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971–1974e (2000)).

with *Brown*, these legislative victories officially abolished the regime of legalized segregation in the United States. Because these acts prohibited discrimination in areas such as education, public accommodations and facilities, and employment and voting, they have been called the "crowning accomplishment of the Civil Rights Movement of the 1950s and 1960s."[50] They created commissions to investigate claims of discrimination and authorized the Attorney General to institute suits on behalf of victims of discrimination.[51]

It was the civil rights demonstrations and campaigns that helped create national support for federal civil rights legislation. As Professor Klarman asserts, the successive administrations of John F. Kennedy and Lyndon B. Johnson were "spurred into action" by growing outrage among northern Whites over the violent southern repression of peaceful civil rights demonstrations.[52]

In the summer of 1963, Dr. Martin Luther King, Jr. organized a non-violent demonstration in Birmingham, Alabama, fully anticipating that the city's sheriff, Bull Conner, would respond with violence.[53] As expected, Conner used vicious police dogs and high-pressured water hoses to attack the peaceful demonstrators, many of whom were children.[54] Television and newspaper reporters brought the news to the entire nation and as a result, public support and outcry for civil rights increased.[55] Consequently, President Kennedy introduced the Civil Rights Act into Congress citing the "street demonstrations, mass picketing and parades [that] have brought these matters to the Nation's attention . . . ."[56]

Similar public outcry following Bloody Sunday spurred President Johnson to introduce voting rights legislation. On March 7, 1965, voting rights demonstrators began a march from Selma to Montgomery, Alabama. As they crossed the Edmund Pettus Bridge at the edge of Selma, county "posse[s] and state troopers went on a rampage against the marchers."[57] As Professor Klarman recounts, "ABC television interrupted its evening broadcast of Judgment at Nuremberg for a long film report of the gruesome scenes from Selma of peaceful demonstrators being assailed by stampeding horses, flailing clubs, tear gas, and other officially sanctioned violence."[58] Following this report, demonstrations were held in support of the Selma marchers, and numerous Congressmen called for voting rights legislation and threatened to introduce their own bills if Johnson failed to act.[59]

---

50. Jack M. Balkin, *History Lesson*, LEGAL AFF., Aug 2002, at 44.

51. *Id.*

52. Klarman, *supra* note 46, at 141.

53. *Id.* at 145–46.

54. *Id.*

55. *Id.*

56. President John F. Kennedy, Report to Congress Outlining a Civil Rights Bill (June 19, 1963), *in* THE CIVIL RIGHTS READER, *supra* note 12, at 245, 259.

57. Klarman, *supra* note 46, at 148.

58. *Id.*

59. *Id.* at 149.

Responding to this public and political outcry, Johnson introduced the Voting Rights Act. In a speech addressing a joint session of Congress, Johnson began by stating:

> At times history and fate meet at a single time in a single place to shape a turning point in man's unending search for freedom .... So it was last week in Selma, Alabama. There, long-suffering men and women peacefully protested the denial of their rights as Americans. Many were brutally assaulted. One good man—a man of God—was killed.[60]

Thus, like the Civil Rights Act of 1964, the Voting Rights Act of 1965 represented a major legislative victory resulting from an appeal to American morality.

B. The Civil Rights Ideology

Brown, the Civil Rights Act of 1964, and the Voting Rights Act of 1965 reflect the underlying core beliefs of the Civil Rights Ideology shared by the numerous organizations and individuals that fought to achieve them. From legal appeals to the Supreme Court calling for the abolition of segregation in schools to moral appeals to legislatures and the executive branch calling for the dismantling of segregation altogether, a comprehensive set of ideals and beliefs was employed.

Briefly stated, the core beliefs of the Civil Rights Ideology are (a) the Black identity is primarily an American identity; (b) as American citizens, freedom for African Americans is full equality with White citizens in the United States; and (c) American promises of liberty found in the Constitution and Declaration of Independence are sufficient to address the challenges facing Black communities. These beliefs place the Civil Rights Ideology squarely in line with the Black Liberalism of African American movements since slavery.[61]

African American leaders have long made clear their reliance on this core set of beliefs. For instance, speaking at an event commemorating the twenty-seventh anniversary of the abolition of slavery, Frederick Douglass argued that the so-called "Negro problem" was actually a question of "whether [American society] ... can be made to include and protect alike and forever all American citizens."[62] Similarly, in 1951 Ralph Bunche declared, "[f]ull equality is the answer. There is no other. In a democracy there can be no substitute for equality. The Negro can never be content with less. I am sure you agree with me that we shall carry on this fight until we achieve full

60. President Lyndon B. Johnson, Speech Before Congress (Mar. 15, 1965), *in* THE CIVIL RIGHTS READER, *supra* note 12, at 260, 260–61.

61. For an in-depth discussion of the beliefs and assertions underlying the multiple variants of Black Liberalism, see DAWSON, *supra* note 10, at 238–313.

62. Frederick Douglass, The Nation's Problem: An Address Before the Bethel Literary and Historical Society in Washington, D.C. (April 16, 1889), *reprinted in* AFRICAN AMERICAN SOCIAL AND POLITICAL THOUGHT, 1850–1920, at 311, 314 (Howard Brotz ed., 1992).

equality; until, Americans, we are all free and equal."[63] Understanding the Civil Rights Ideology against this historical context aids in evaluating its core beliefs.

1. The Black Identity

The Civil Rights Ideology primarily defines African Americans as American citizens. From this perspective, the rights, hopes, and dreams of Black people stem from their identity as citizens of the United States. This does not mean that adherents to the Civil Rights Ideology and other Black Liberals (unlike some Black Conservatives) deny any cultural distinctiveness of African Americans. Rather, implicit in the Ideology's goals and strategies is a conception of Black identity that remains largely confined to the American context.

The conception of Black identity as primarily American is evident in the discourse of the movement. In his keynote address at the 1966 convention of the NAACP, for example, then-president Roy Wilkins affirmed the identity of African Americans as American citizens.[64] Criticizing the emerging views of the Black Power movement, Wilkins stressed:

> We seek, therefore . . . the inclusion of Negro Americans in the nation's life, not their exclusion. This is our land, as much so as it is any American's . . . . The task of winning our share is not the easy one of disengagement and flight, but the hard one of work, of short as well as long jumps, of disappointments, and of sweet successes.[65]

Similarly, in his famous "I Have a Dream" speech, Martin Luther King, Jr. based his demands and claims on the government upon Black people's status as American citizens. King declared that the "architects of our republic . . . were signing a promissory note to which every American was to fall heir. . . . And so we've come to cash this check . . . ."[66] It is the African American status as American citizens, as owners and heirs to the promises of the republic that entitles African Americans to justice.

2. Freedom

Just as Black identity is understood as American citizenship, freedom for African Americans is conceptualized as full equality with White American citizens. Under this view, Black people will gain freedom once truly equal access and inclusion into American social and political structures is achieved. Attaining this freedom requires active, non-violent protest because advancement

63. DAWSON, *supra* note 10, at 267.
64. Wilkins, *supra* note 12, at 131.
65. *Id.* at 133.
66. King, *supra* note 19, at 504–05 (1963) (emphasis added).

is dependent on the privileged class of Americans being willing to share power and status.

In Wilkins's NAACP address, he passionately argued, "The end was always to be the inclusion of the Negro American, without racial discrimination, as a full-fledged equal in all phases of American citizenship. The targets were whatever barriers, crude or subtle, which blocked the attainment of that goal."[67] Initially, the three main Black organizations—the Southern Christian Leadership Conference ("SCLC"), the Student Nonviolent Coordinating Committee ("SNCC") and the Congress for Racial Equality ("CORE")—explicitly adopted the ideal of non-violent protests and sit-ins as the means to achieving the goal of equality.[68] In its publication of the "Program of the Southern Christian Leadership Conference," the SCLC proclaimed that its aim was "achieving full citizenship rights, equality, and the integration of the Negro in all aspects of American life."[69] The SCLC declared that African Americans were part of American society and should reject any notion of supremacy and instead push for full intergroup and interpersonal integration.[70] Moreover, according to the SCLC, Black people had a duty to disobey unjust laws (e.g., segregation) through non-violent means in order to call public attention to them.[71]

The Civil Rights Ideology's conception of freedom and the non-violent means to achieve it were closely interwoven to appeal to dominant American sensibilities. As Professor Michael Dawson observes, adherents to the Civil Rights Ideology believed that "[a]ctivism is important because one needs to prove one's worth as a citizen . . . and demonstrate black worthiness for full economic social and political equality and participation in American society."[72] Accordingly, King advised participants in the Montgomery Bus Boycott that if they protested "with dignity and Christian love" the "historians will have to pause and say, 'There lived a great people.'"[73]

3. America

According to the Civil Rights Ideology, American promises of liberty are

67. Wilkins, *supra* note 12, at 131.

68. LET NOBODY TURN US AROUND, *supra* note 27, at 369–70, 391–95. SNCC would later reject the Civil Rights Ideology and directly question the nature of the African American identity that it asserted. SNCC Position Paper on Black Power, *in* LET NOBODY TURN US AROUND, *supra* note 27, at 448. Similarly, CORE would come to endorse Black Power as an alternative ideology and strategy to the Civil Rights Movement. Floyd McKissick, *CORE Endorses Black Power*, *in* LET NOBODY TURN US AROUND, *supra* note 27, at 458.

69. Program of the Southern Christian Leadership Conference (1957), *in* LET NOBODY TURN US AROUND, *supra* note 27, at 392.

70. *Id.* at 394 ("[SCLC] rejects any doctrine of black supremacy for this merely substitutes one kind of tyranny for another. . . . SCLC works for integration. Our ultimate goal is genuine intergroup and interpersonal living—*integration.*").

71. *See id.* at 393.

72. DAWSON, *supra* note 10, at 260.

73. KING, *supra* note 24, at 33, 41.

sufficient for achieving equality and, therefore, freedom. Furthermore, as the maker of the promise of liberty and equality, American government and society possess an inherent authority and duty to alleviate the inequities facing its marginalized communities. Despite systemic unfairness and long-standing injustice, the United States retains sufficient moral legitimacy by way of its noble ideals and creed. As Ralph Bunche asserted in 1941, "Paradoxical as it may seem in light of the historical record, however, the fact remains that the Constitution did lay the basis for the most broad ideological pattern of individual human equality, human liberty, and human rights that the modern world has known."[74]

Like Black Liberals of other times and perspectives, adherents to the Civil Rights Ideology frequently appeal to the principles of the Constitution and the Declaration of Independence as proof of the great ideals that America possesses and should fulfill. Professor Dawson notes that historically, the majority of Black activists have argued that the demands of African Americans "are fully consistent with the broad principles of American democracy."[75] Indeed, Martin Luther King, Jr.'s "I Have a Dream" speech opened with a direct reference to the promise made by the federal government in the Emancipation Proclamation. He powerfully asserted that "one hundred years later, the Negro still is not free; one hundred years later, the life of the Negro is still sadly crippled by the manacles of segregation and the chains of discrimination . . . ."[76] King reminded the government that American founders made the promise of "life, liberty, and the pursuit of happiness" to citizens through the Constitution and the Declaration of Independence but that "America has defaulted on this promissory note in so far as her citizens of color are concerned."[77]

Throughout the Civil Rights Movement, appeals to "American identity" and "American equality" were understood in terms of sharing the privileges of White American society. Allusion to the founding documents and the "American promise of equality" references the responsibility of government leaders to put democratic ideology into practice by creating a more equal society than that which existed historically in the United States.

According to this theory, the United States government and society not only have the authority to grant freedom, but they also have the duty to do so. Failure to do so would be decidedly un-American. Accordingly, as Professor Dawson notes, Black Liberals believe that "America can only redeem itself by finally becoming a society where blacks have gained justice and equality."[78] Under the Civil Rights Ideology, this redemption not only serves broader justice concerns, but also serves White Americans' self-interest.

---

74. DAWSON, *supra* note 10, at 252.
75. *Id.* at 247.
76. King, *supra* note 19, at 504.
77. *Id.*
78. *Id.*

Civil Rights leaders urged that America as a nation, not just African Americans, would suffer if the denial of equality went uncorrected. They stressed the growing discontent among Black people as a source of instability for the nation. During King's "I Have a Dream" speech, he issued a clear warning to American government officials:

> This is no time to engage in the luxury of cooling off or to take the tranquilizing drug of gradualism. Now is the time to make real the promises of democracy . . . . It would be fatal for the nation to overlook the urgency of the moment. This sweltering summer of the Negro's legitimate discontent will not pass until there is an invigorating autumn of freedom and equality.[79]

The growing unrest among African Americans gave credence to the warnings of King and other civil rights leaders.

C. *Limitations of Civil Rights Ideology*

The core beliefs of the Civil Rights Ideology are defined squarely within the American social and political context. African American identity is principally defined in terms of American citizenship; freedom is understood as full equality with White Americans; and America itself (both politically and socially) is judged solely on the basis of adherence to its own values articulated in the Constitution and the Declaration of Independence. Evaluating American society based solely on its fulfillment of its own ideals and promises amounts to an adoption of American philosophical premises and traditions. This results in an impaired ability to explain and evaluate social conditions of African Americans.

First, the Black identity is too complex and multi-dimensional to be narrowly defined in terms of American citizenship. The historical and cultural aspects of African American identity include and simultaneously transcend American influence and context. The trans-continental experiences, multiple ethnic origins, systemic oppression and various political and social influences of African Americans have occupied and perplexed Black scholars for years.[80] As Cornel West observes, "The black collective quest for a name that designates black people in the U.S. continues—from colored, Negro, black, Afro-American, Abyssinian, Ethiopian, Nubian, Bilalian, American African, African to African American."[81] While various leaders and organizations throughout history have sought to define Black identity as either chiefly American or African, both of these conceptions prove too limited to accurately describe African Americans.[82]

---

79. King, *supra* note 19, at 505.

80. *See* HENRY LOUIS GATES, JR. & CORNEL WEST, THE FUTURE OF THE RACE 94 (1996).

81. *Id.*

82. *See* Wilkins, *supra* note 12, at 131–39 (conceptualizing Black identity as an American identity). *Compare* LET NOBODY TURN US AROUND, *supra* note 27, at 372 (describing the impact of Black Power in formulating Black identity as an African identity).

As one scholar notes:

> African Americans created themselves, but not just as they pleased, not under circumstances chosen by themselves, but under circumstances directly encountered, given, and transmitted from the past. It was in the context of their African history and the prevailing social and economic relationships that African Americans created culture, religion, family, art forms, political institutions, and social and political theory.[83]

Limiting African American identity to American citizenship fails to sufficiently account for this complexity and consequently results in an inadequate core belief about Black identity, one that poses serious limitations on the Civil Rights Ideology's potential effectiveness. Since an ideology is a system of ideas and beliefs that explains and evaluates societal conditions to an agent and provides a program of action to achieve freedom, it cannot be truly effective if it rests on inaccurate conceptions of its agents. The ability of an ideology to define accurate and empowering conceptions of freedom and programs of action hinges on a comprehensive understanding of the agent. For example, writing about the nature of freedom, Gerald MacCallum observes that any concept of freedom is inherently triadic—meaning someone is free from something to do something.[84] And since some obstacles and conditions are unique to particular identities, freedom (for any particular person or group) is necessarily shaped by identity.

Second, although defining African Americans as primarily American citizens leads to the conclusion that freedom consists of equality, equality itself proves inadequate as a conception of freedom. As many activists from the Civil Rights Movement later concluded, achieving racial equality in America may not be possible.[85] Professor Dawson observes that this conclusion is a bitter yet common development among Black Liberals, including DuBois, King, Bunche and members of SNCC.[86] Accordingly, civil rights activist and law professor Derrick Bell declared, "Black people will never gain full equality in this country. Even those Herculean efforts we hail as successful will produce no more than temporary 'peaks of progress,' short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance."[87] Tellingly, in 2000, 71% of African Americans believed that racial progress would "not be achieved in their lifetime or would never be achieved at all" in America.[88]

---

83. LET NOBODY TURN US AROUND, *supra* note 27, at xvii.

84. Gerald C. MacCallum, Jr., *Negative and Positive Freedom*, 76 PHIL. REV. 312, 314 (1967).

85. DAWSON, *supra* note 10, at 275–78.

86. *Id.*

87. Derrick A. Bell, Jr., *Racial Realism*, *in* CRITICAL RACE THEORY 302, 306 (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas. eds., 1995).

88. DAWSON, *supra* note 10, at 318.

Assuming these "Disillusioned Liberals"[89] are wrong in their assessments, it is not clear that "equality" represents a sufficient conception of freedom. Narrowly speaking, African Americans achieved formal equality with Whites through the removal of legal barriers to inclusion during Civil Rights Movement and nevertheless still suffer disproportionate harms and continue to occupy a subordinate position in the United States.[90] Even adopting a broader conception of equality (equal educational quality, equal income, etc.) still provides an incomplete conception of freedom. Achieving this form of equality would fail to account for the immense psychological and cultural harms of racism, derived from the historical designation of African Americans as "others."[91]

Finally, evaluating American society solely on the basis of American promises and ideals inherently limits the viability of the Civil Rights Ideology as a framework for analyzing systemic marginalization. For a liberation ideology that seeks to alleviate subordinating conditions facing its agents, relying on such a framework may prove useful in guaranteeing equitable adherence to a society's promises and ideals. However, it provides no basis for recognizing inherent limitations or inadequacies of a society's promises. Reliance on American promises and ideals found in the Constitution and the Declaration of Independence presents a problem by ceding ultimate moral authority to the American governmental bodies charged with interpreting these ideals. These governing bodies are free to interpret and define these ideals in ways completely contrary to African American interests and devoid of historical context without effective redress. This article will explore this point more thoroughly in the context of affirmative action.

The Civil Rights Ideology's flawed core beliefs, resulting from the near wholesale adoption of American philosophical definitions of identity, freedom and society, ultimately renders it inadequate as a framework for continued advocacy. The complete adoption of a society's theoretical perspective proves problematic for any group seeking to address pervasive problems in that society. The overall functions of "liberation ideologies" are to identify and ultimately alleviate the subordinating conditions facing a marginalized group.[92] Successfully performing this function becomes difficult when the entire frame of reference for advocacy originates not from the group itself, but rather from the historically dominant group in that society. As evidenced by affirmative action

89. "Disillusioned Liberal" is a term of art used by Michael Dawson to refer to a specific category of Black Liberalism. *Id.* at 273–80.

90. Neil Gotanda, *A Critique of "Our Constitution is Color Blind,"* 44 STAN. L. REV. 1, 44–45 (1991). Gotanda argues that the Supreme Court's formal use of race allows it to find a superficial level of equality that analyzes discrimination on individual terms and ignores the broader manifestations of racial subordination such as "housing, education, employment, and income for a large portion of the Black community."

91. For a discussion of Black Americans' stigma as "others," see Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1358–59 (1988).

92. BALL & DAGGER, *supra* note 9, at 207–09.

jurisprudence, this leaves the subordinated group without the adequate tools to address some of the deepest social and political realities and limits the potential for liberation.

III.
THROUGH THE LENS OF AFFIRMATIVE ACTION

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to principles of constitutional liberty.[93]

A. Affirmative Action Jurisprudence and Legislation

Despite the success achieved during the Civil Rights Movement, growing resistance to affirmative action, starting in the 1970s, began to limit efforts to increase African American access into American society.[94] Beginning with *Regents of California v. Bakke*,[95] continuing with *City of Richmond v. J.A. Croson Co.*,[96] capped off by *Adarand Constructors, Inc. v. Pena*,[97] the Supreme Court's notion of a "color-blind" Constitution transitioned from promoting diversity to limiting affirmative action policies.[98] Following suit, in the 1990s, federal courts began to limit and dismantle state affirmative action programs in educational institutions.[99] Likewise, state political campaigns—sparked by California's Proposition 209, which eliminated affirmative action in California state colleges and universities[100]—threatened any narrow use of affirmative action left open by the courts. Between 1997 and 2003, ninety-four anti-affirmative action resolutions and/or bills were introduced on the state level.[101] By 2002, judicial and legislative challenges to affirmative action became so strong that advocates urged the Supreme Court to uphold what remained of affirmative action in higher education.

The public discourse surrounding affirmative action provides the clearest illustration of the practical consequences of the Civil Rights Ideology. Affirmative action serves as an important component in remedying the effects of

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

94. *See* Melissa Cole, *The Color Blind Constitution, Civil Rights–Talk, and a Multicultural Discourse for a Post-Reparations World*, 25 N.Y.U. REV. L. & SOC. CHANGE 127, 151 (1999).

95. 438 U.S. 265, 298 (1978).

96. 488 U.S. 469, 521 (1989) (Scalia, J., concurring).

97. 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

98. Cole, *supra* note 94, at 151–52.

99. *See, e.g.*, *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996); *Podeberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994).

100. CAL. CONST. art. I, § 31 (amended by Proposition 209).

101. AMERICANS FOR A FAIR CHANCE, ANTI-AFFIRMATIVE ACTION THREATS IN THE STATES: 1997–2003 1 (2004), *available at* http://www.civilrights.org/issues/affirmative/Affirmative%20Action%20State%20Report.pdf.

discrimination and racial subordination suffered by African Americans and other marginalized groups in the United States. It has been used to help provide members of these groups meaningful access to key arenas of American society, including education and employment.[102] In many respects, affirmative action represents the most controversial contemporary issue in race relations and has become the most visible issue of African American equality. Despite the purpose of remedying past discrimination and increasing opportunity, the debate and jurisprudence surrounding affirmative action have been predominately focused on concerns of "harm to innocent Whites," a "color-blind constitution" and the benefits of "diversity." This is illustrated in *Bakke*,[103] *Hopwood*,[104] Proposition 209 and, most recently, *Grutter v. Bollinger*.[105]

1. Regents of the University of California v. Bakke[106]

In *Bakke*, the Medical School of the University of California at Davis noticed the lack of any African American, Mexican American or American Indian students in its first class of fifty students.[107] To address this situation, the Medical School instituted a special admissions program for such minorities that included a separate screening and interview process. When the class size of the Medical School increased from fifty to one hundred, sixteen seats were reserved for special admitted students.[108] From 1971 to 1974, the program was responsible for the admission of sixty-three students of color to the Medical School, while 44 students of color entered through regular admission during the same period.[109]

The California Supreme Court held that the program was unconstitutional and ordered that Bakke (a White student who had twice been rejected by medical schools despite having higher grades and scores than some admitted students of color) be admitted.[110] The United States Supreme Court granted certiorari, reversing in part and affirming in part.[111] Justice Powell, announcing the judgment of the court,[112] reasoned that because the Equal Protection Clause of

---

102. *See generally* Holzer, Harry J. *Affirmative Action After Grutter: Still Worth Preserving?*, 14 GEO. MASON U. CIV. RTS. L.J. 217 (2004).

103. 438 U.S. 265, 266 (1978).

104. 78 F.3d. 932 (5th Cir. 1996).

105. 539 U.S. 306 (2003).

106. 438 U.S. 265 (1978).

107. *Id.* at 272.

108. Special admitted students included students of color and those that identified as economically or educationally disadvantaged. *Id.* at 274–275.

109. *Id.* at 275–76.

110. *Id.* at 272.

111. *Id.* at 266–67, 271–72.

112. In *Bakke*, a five justice majority invalidated the particular affirmative action plan in question while a different five justice majority upheld the use of racial preferences in appropriate circumstances. Powell was the fifth vote for each faction and therefore drafted the opinion. GIRARDAU A. SPANN, THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT

the Fourteenth Amendment applied equally to all individuals irrespective of race, any "racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[113] In other words, the Medical School's program to increase educational opportunities for students of color would be subject to the same strict scrutiny standard used to invalidate segregationist policies that had long excluded Black people from education. Powell further argued "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."[114]

Powell held that the Medical School's special admission program failed the strict scrutiny test. To pass this level of scrutiny, a classification must serve an interest that is constitutionally permissible and substantial, and the classification must be necessary to safeguard that interest.[115] Powell held that preferring members of any group solely on the basis of race is facially invalid, and that the Medical School's program was not necessary to the substantial interests in countering societal discrimination, increasing medical services to underprivileged communities, and obtaining the educational benefits of diversity.[116] Moreover, while supporting the notion that universities could give preferences based on race and other factors to increase diversity, Powell insisted that the Medical School's program violated the Fourteenth Amendment's Equal Protection Clause because it discriminated against innocent Whites by telling them that "they are totally excluded from a specific percentage of the seats in an entering class."[117]

Justice Powell's decision in *Bakke* reflects the view of a "color-blind constitution."[118] Under this view, race is an improper consideration for the government, regardless of whether the consideration is "detrimental" or "benign."[119] As Powell insists, "racial and ethnic distinctions of any sort are inherently suspect . . . ."[120] Accordingly, any distinction based on race must be treated with the same level of scrutiny used to strike down state segregation because of the potential harm to "innocent Whites." These same arguments were used by the Fifth Circuit to strike down affirmative action in *Hopwood v. Texas*.[121]

DECISIONS ON RACE AND REMEDIES 15 (2000).

113. *Bakke*, 438 U.S. at 290–91.

114. *Id.* at 298.

115. *Id.* at 305.

116. *Id.* at 305–20.

117. *Id.* at 319.

118. *See* Cole, *supra* note 94, at 151.

119. *Id.* at 152.

120. *Bakke*, 438 U.S. at 291.

121. 78 F.3d 932 (5th Cir. 1996).

2. Hopwood v. Texas

For the class entering the University of Texas School of Law in 1992, African American and Mexican American applicants were reviewed on a separate admissions track than other students, that allowed for lower threshold for GPA and LSAT scores.[122] The Law School instituted this program in order to increase racial diversity and to remedy past discrimination by the University of Texas and the Texas educational system against students of color.[123] The Fifth Circuit, however, rejected these justifications and held:

> [The Law School] may not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school.[124]

The court reasoned that such efforts violated the American promise of equality.[125]

The Fifth Circuit began its analysis by stating that the Equal Protection Clause was meant to prevent State discrimination on the basis of race, further asserting that it "seeks ultimately to render the issue of race irrelevant in governmental decision-making."[126] The court also stressed that Fourteenth Amendment rights are individual and do not confer "benefits on a person based solely upon his membership in a specific class of persons."[127]

Following a strict scrutiny standard, the Fifth Circuit analyzed each of the Law School's stated interests. The court held that achieving a racially diverse student body was not a compelling interest under the Fourteenth Amendment.[128] It reasoned that classifying "persons on the basis of race for the purpose of diversity frustrates, rather than facilitates, the goals of equal protection."[129] The court argued that treating minorities as a group rather than as individuals promoted stereotypes and fueled racial hostility.[130] The court even cited *Brown* to support its argument that "government's use of racial classifications serves to stigmatize."[131]

Similarly, the Fifth Circuit rejected the Law School's interest in remedying the present effects of past discrimination. Recognizing that *Bakke* determined

122. *Id.* at 936–38.
123. *Id.* at 941.
124. *Id.* at 962.
125. *Id.* at 944.
126. *Id.* at 940.
127. *Id.* at 941.
128. *Id.* at 944.
129. *Id.*
130. *Id.* at 945.
131. *Hopwood*, 78 F.3d at 947.

that remedying past discrimination was a compelling government interest, the court nevertheless held that the Law School may not remedy "*societal* discrimination."[132] According to the court, the Law School only had a compelling interest in remedying its own past discrimination, not that of the Texas educational system or even the University of Texas itself.[133] Moreover, the court rejected the evidence provided by the Law School of its own past discrimination.[134]

Like the *Bakke* decision, the Fifth Circuit's reasoning in *Hopwood* reflects the "color-blind constitution" argument and an unwillingness to harm "innocent Whites." The idea that the government must avoid taking account of race in decisionmaking took precedence over consideration of eliminating racial disparities. Likewise, the concern for people of color affected by past discrimination was outweighed by concern that the admissions program would create some form of discrimination against Whites. *Hopwood* was upheld by the Supreme Court, indicating approval of the Fifth Circuit's severe limitations on affirmative action.

3. California Proposition 209

In 1996, the California "Civil Rights Initiative" offered Proposition 209 for popular vote.[135] The proposed referendum read, "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[136] California voters approved the measure and effectively ended affirmative action within the state. The arguments advanced by proponents of Proposition 209 not only reflect color-blind values and the desire to protect White Americans, they also represent the usurpation of the memory and meaning of the Civil Rights Movement itself.

In their supporting argument for Proposition 209, then California Governor Pete Wilson and leaders from the California Civil Rights Initiative appealed directly to the ideal of color-blind law. The writers asserted, "Government should not discriminate. It must not give a job, a university admission, or a contract on race or sex. Government must judge all people equally, without

132. *Id.* at 949.

133. *Id.* at 951.

134. *Id.* at 953.

135. According to Pete Wilson and the other officials who authored this document, Proposition 209 was titled the California Civil Rights Initiative "because it restates the historic Civil Rights Act" in a way that prohibits reverse discrimination. Pete Wilson, Ward Connerly, & Pamela A. Lewis, Argument in Favor of Proposition 209 (1996), *available at* http://vote96.ss.ca.gov/Vote96/html/BP/209yesarg.htm.

136. Proposition 209: Text of Proposed Law (1996), *available at* http://vote96.ss.ca.gov/Vote96/html/BP/209text.htm. *See* CAL. CONST. art. I, § 31.

discrimination!"[137] The coalition further argued, "We are all Americans. It's time to bring us together under a single standard of equal treatment under the law."[138] The advocates assured readers that they were suggesting a return "to the fundamentals of our democracy: individual achievement, equal opportunity and *zero tolerance for discrimination against—or for—any individual.*"[139]

The proponents of Proposition 209 mainly objected to the harm that White Americans purportedly suffered as a result of affirmative action. They argued that "[t]oday, students are being rejected from public universities because of their RACE."[140] They went on to explain how government contractors and employees were also being harmed because their race "does not meet some 'goal' or 'timetable.'"[141] This language relies on the perverse argument that White Americans need to be protected from state discrimination.[142]

Perhaps more perverse is how the proponents of Proposition 209 effectively claimed the Civil Rights Movement as their own. They accomplished this not only by naming the effort to dismantle affirmative action the California Civil Rights Initiative, but also by opening their argument in support of Proposition 209 by declaring, "[a] generation ago, we did it right. We passed civil rights laws to prohibit discrimination. But special interests hijacked the Civil Rights Movement. Instead of equality, governments imposed quotas, preferences, and set-asides."[143] In this argument the Civil Rights Movement is imagined as a government-led (or even conservative-led) movement to end any consideration of race, and affirmative action is perceived as the enemy of this movement. However, the Civil Rights Movement's goal was African American freedom from racial subordination.[144] In California, the memory and ideology of the Civil Rights Movement have now, ironically, been usurped as tools to frustrate government efforts to provide meaningful educational and employment opportunities to African Americans through affirmative action.

---

137. Wilson, Connerly & Lewis, *supra* note 135.

138. *Id.*

139. *Id* (emphasis in original).

140. *Id* (capitalization in original).

141. *Id.*

142. Eric K. Yamamoto, Susan K. Serrano, Minal Shah Fenton, James Gifford, David Forman, Bill Hoshijo & Jayna Kim, *Dismantling Civil Rights: Multiracial Resistance and Reconstruction*, 31 CUMB. L. REV. 523, 545 (2001).

143. Wilson, Connerly & Lewis, *supra* note 135.

144. *See* Cass R. Sunstein, *What the Civil Rights Movement Was and Wasn't (With Notes on Martin Luther King, Jr. and Malcolm X)*, 1995 U. ILL. L. REV. 191, 200–01 (1995) (suggesting that King was not abstractly promoting a colorblind society, but rather was speaking to "issues of lower caste status" in a particular historical context).

4. Grutter v. Bollinger[145]

The University of Michigan Law School followed a policy of admitting "a mix of students with varying backgrounds and experiences who will respect and learn from each other."[146] In addition to grades and LSAT scores, Michigan considered "soft variables" that included, among other things, the "ways in which the applicant will contribute to the life and diversity of the Law School."[147] This consideration reflected a goal of "achiev[ing] that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts."[148] In particular, Michigan's affirmative action policy reaffirmed its commitment to the inclusion of "African Americans, Hispanics and Native Americans."[149] The Law School's stated rationale was that the enrollment of a "critical mass" of underrepresented students would ensure them the "ability to make unique contributions to the character of the Law School."[150]

The Supreme Court upheld this policy, finding that the "Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race . . . to further a compelling interest in obtaining the educational benefits that flow from a diverse student body."[151] Accordingly, the Law School's affirmative action policy satisfied the strict scrutiny standard that is required whenever the government engages in "race-based action," regardless of whether it is to exclude underrepresented minorities or increase their access.[152] By subjecting Michigan's policy to strict scrutiny, the Court affirmed its previously articulated belief in a color-blind constitution, in that race is "a group classification long recognized as in most circumstances irrelevant and therefore prohibited."[153] Strict scrutiny is satisfied and the Constitution not violated when the "race-based action" is narrowly tailored to serve a compelling governmental interest.[154]

Endorsing Justice Powell's view in *Bakke*, the Court found educational diversity a compelling governmental interest.[155] This finding was largely rooted in the benefits students of color would bring to the rest of the student body. The Court stressed that the Law School's interest is not simply to "assure within its

145. 539 U.S. 306 (2003). This case was argued and decided along with *Gratz v. Bollinger*, 539 U.S. 244 (2003), in which the University of Michigan's undergraduate affirmative action program was struck down because it was not narrowly tailored enough. I only discuss the *Grutter* case because it most clearly illustrates the diversity rationale.

146. *Grutter*, 539 U.S. at 314.

147. *Id.* at 315–16.

148. *Id.* at 315.

149. *Id.* at 316.

150. *Id.*

151. *Id.* at 343.

152. *Id.* at 327.

153. *Id.* at 326.

154. *Id.* at 327.

155. *Id.* at 325.

student body" a percentage of a group "merely because of its race or ethnic origin," but rather to secure the "educational benefits" that diversity would produce.[156] In addition to providing more spirited classroom discussions, diversity would also prepare students for the "increasingly global marketplace" by exposing students to "widely diverse people, cultures, ideas and viewpoints."[157] The Court cited several *amicus* briefs from businesses and the United States military stating the practical benefits of diversity to the effectiveness of their employees.[158] Similarly, the Court recited testimony from the faculty chair of the committee that drafted the affirmative action policy that it "did not purport to remedy past discrimination," but rather aimed to reap the educational benefits of including students with "a perspective different from that of members of groups which have not been victims of such discrimination."[159]

The Court found Michigan's admission policy to be narrowly tailored to achieving this compelling government interest. While a university may not reserve a percentage of seats for students of color, as in *Bakke*, it may consider race as a plus factor among a number of factors.[160] A university's admissions program must be flexible enough so that "each applicant is evaluated as an individual" and race is not the defining feature of the application.[161] According to the Court, because one "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race,"[162] there are "serious problems of justice connected with the idea of preference."[163] Thus, an affirmative action program "must not 'unduly burden individuals who are not members of the favored racial and ethnic groups.'"[164] The Court characterizes race-conscious admissions policies as "so dangerous" that they must not be employed any longer than the legitimate interest demands.[165] The Court effectively ends its argument by assuring, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[166]

Even ignoring the arbitrariness of twenty-five years and the troubling implications of eventually having race become irrelevant to furthering diversity interests, the Court's reasoning reveals stark political realities facing African Americans. The discursive framing of the affirmative action debate in terms of

156. *Id.* at 328–29.
157. *Id.* at 330.
158. *Id.* at 330–31.
159. *Id.* at 319.
160. *Id.* at 335.
161. *Id.* at 337.
162. *Id.* at 341–42 (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984)).
163. *Id.* at 341 (quoting Regents of the Univ. of California v. Bakke, 438 U.S. 265, 298 (1977)).
164. *Id.* (quoting Metro Broad. Inc. v. FCC, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting)).
165. *Id.* at 342.
166. *Id.* at 343.

"a color-blind constitution," "harm to innocent Whites" and "diversity" illustrates the inherent dependency Black and other minority interests on majority interests, the usurpation of Black interests, as well as the legitimation of continued Black subordination. The flaws in the Civil Rights Ideology's core beliefs prevent it from aiding African Americans in counteracting this reality.[167]

B. Implications for the Civil Rights Ideology

1. Dependency

Whether supporting or opposing affirmative action, judicial and political decision-makers do so, not on the basis of African American interests, but rather on the basis of White interests. The Court in *Grutter* effectively balanced the educational benefits Whites receive from diversity against the harm suffered by innocent Whites to determine whether the affirmative action policy violates the colorblind constitution. Consequently, African Americans' interest in gaining educational access through affirmative action is largely dependent on the extent to which White students benefit.

This phenomenon is not limited to the affirmative action context, but as observed by Professors Derrick Bell and Richard Delgado, is indicative of the African American experience in the United States. In his controversial landmark article, *Brown v. Board of Education and the Interest-Convergence Dilemma*, Professor Bell asserts:

> The interest of Blacks in achieving racial equality will be accommodated only when it converges with the interests of Whites. However, 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.[168]

Accordingly, Fourteenth Amendment protections for African Americans depend not on "the character of harm suffered by blacks or the quantum of liability proved," but rather on judicial conclusions about whether the remedies sought "will secure, advance or at least not harm" societal interests deemed important to White America.[169]

As noted by Bell and later expanded upon by Delgado, this phenomenon accounts for the early Civil Rights gains, such as *Brown*, as well as subsequent disappointments. In addition to unease about the immorality of racial inequality,

---

167. Cole, *supra* note 94, at 128 ("The failure of affirmative action, I believe, results from its roots in 'civil rights-talk'—the discourse that defines how civil rights are understood and discussed.").

168. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

169. *Id.*

elite decision makers in the Supreme Court, State Department and other bodies were particularly concerned about America's international credibility in its Cold War struggle, increased militancy and expectations of Black World War II veterans, and segregation as a barrier to industrializing the South in their support of Civil Rights measures such as *Brown*.[170] For example, Acting Secretary of State Dean Acheson sent a memorandum to the chairman of the Fair Employment Practices Commission stating:

> The existence of discrimination against minority groups in this country has an adverse effect upon our relations with other countries. We are reminded over and over by some foreign newspapers and spokesmen, that our treatment of various minorities leaves much to be desired . . . . Frequently we find it next to impossible to respond to our critics in other countries. . . . We will have better international relations when the reasons for . . . resentment have been removed.[171]

However, as both Bell and Delgado observe, with the end of the Cold War and shifting White interests, African Americans faced decreasing support for Civil Rights measures,[172] especially when the benefits of these measures were perceived to come at the expense of White Americans.[173]

Likewise, the affirmative action debate and jurisprudence effectively illustrate the inherent dependency of marginalized groups upon majority interests.[174] Black interests in educational opportunities depend upon a weighing of the benefits and harms to White Americans. The Civil Rights Ideology proves incapable of aiding African Americans in confronting this inherent dependency because it grounds the conception and justification for African American freedom on the legal and ideological values defined in the Constitution and Declaration of Independence. Doing so effectively cedes to the judiciary the ultimate moral authority in determining the characteristics and parameters of equality. Consequently, no matter how perverse or historically inaccurate the arguments in the above cases, the Court has license to define what equality means and disregard the arguments of civil rights activists. The only recourse for African Americans under the Civil Rights Ideology is to criticize the reasoning and decisions of the Court. This recourse is limited since the Supreme Court possesses unchecked moral authority in deciding these issues.

---

170. *See id.* at 524–25; Richard Delgado, *Explaining the Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369, 372–73 (2002) (reviewing MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000)).

171. Delgado, *supra* note 170, at 373–74 (quoting information from Dudziak's book).

172. *Id.* at 376.

173. Bell, *supra* note 168, at 527.

174. For a discussion of affirmative action and the dependency of the interests of marginalized communities in the context of policing, see Liyah Kaprice Brown, *Officer or Overseer? Why Police Desegregation Fails as an Adequate Solution to Racist, Oppressive, and Violent Policing in Black Communities*, 29 N.Y.U. REV. L. & SOC. CHANGE 757 (2005).

Questioning the inherent dependency of African Americans on White interests calls into question the Civil Rights Ideology's assumption of the sufficiency of American promises.

2. Legitimized Inequities

In the affirmative action debate, the view of American society as colorblind and race-neutral fuels the erroneous belief that policies benefiting people of color violate the principle that all people should compete "under a single standard of equal treatment under the law,"[175] and that such policies confer "benefits . . . based solely upon . . . membership in a specific class of persons."[176] Even in *Grutter*, where the affirmative action policy was upheld, the Court (while conceding that discrimination still exists) set an arbitrary sunset provision of twenty-five years when affirmative action will no longer be needed.[177] This reflects the widely held view that society is basically fair, notwithstanding some lingering *de minimis* discrimination, and overall, African Americans and other people of color have equal opportunity in society. Under this view, any inequities remaining after the dismantling of segregation are more the result of personal failures than societal failures.

Scholar Robert Gordon explains this general phenomenon by arguing that use of the law by disadvantaged groups inherently legitimates the existing order and the group's continued subordination.[178] Gordon notes the inability of the traditional liberal theory of law to explain why people passively suffer injustice or why the legal system reinforces class-based, racial and sexual inequalities.[179] If, as the liberal vision asserts, the law were a response to the social demands of interest groups then such developments would not occur.[180] According to Gordon, these historical and practical trends can best be explained by a vision of law as a product of the demands of the ruling class that also works to legitimate class society.[181]

By "'legitimating' class society," Gordon refers to the role of the legal system in giving the existing order the appearance of being "approximately just."[182] Rather than being a product of competing interests, the law functions as a tool of the dominating class.[183] Accordingly, the law must work to legitimize the existing hierarchy so as to induce both the dominant and dominated classes

175. Wilson, Connerly & Lewis, *supra* note 135.

176. Hopwood v. Texas, 78 F.3d 932, 941 (5th Cir. 1996).

177. Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

178. Robert W. Gordon, *New Developments in Legal Theory*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 413, 415–25 (David Kairys ed., 2d ed. 1990).

179. *Id.* at 417.

180. *Id.*

181. *Id.* at 416–17.

182. *Id.* at 417.

183. *Id.*

to accept the hierarchy.[184] This is accomplished by the legal system appearing to be universal and operating with a degree of independence from the dominant interest. The legal system, therefore, "makes it possible for other classes to use the system against itself... and force it to make good on its utopian promises."[185] Thus, the law can serve as an agent for positive gains by disadvantaged groups.

However, the very process of realizing that change ultimately serves to deepen the legitimacy of the system as a whole. As Gordon notes, the labor movement's victory in securing the legal rights to organize and strike also placed them into the framework of legal regulation that solidified the legitimacy of "management's making most of the important decisions about conditions of work."[186] Consequently, the law could "screw poor people" in countless and specific ways and appear "basically uncontroversial, neutral, [and] acceptable" in the process.[187]

The ability to maintain the existing hierarchical order and appear neutral in doing so is a critical feature of what Gordon calls the "most effective kind of domination"—hegemony.[188] Borrowing from Antonio Gramsci's[189] concept, Gordon argues that the law aides in the establishment of hegemonic power by convincing both the dominant and subordinate classes that the "hierarchical relations in which they live and work are natural and necessary."[190] This ensures that the existing conditions in society continue to serve the interests of the dominant class with the consent of the dominated. Thus, the law maintains class domination by giving the existing order the appearance of legitimacy.

Likewise, following African Americans' successful dismantling of legalized racial segregation during the Civil Rights Movement, American society came to be viewed as race-neutral. As the affirmative action cases illustrate, the courts began operating from a view of society as color-blind as early as the 1970s.[191] Recent polls suggest that American citizens, while recognizing that some interpersonal discrimination still exists, largely view American society as race-neutral and fair. For example, a 2002 study by the Gallup Organization reveals that sixty-two percent of American adults believe that the country's criminal justice system respects the civil rights of African Americans.[192] A similar study

184. *Id.*

185. *Id.*

186. *Id.* at 418.

187. *Id.*

188. *Id.*

189. Antonio Gramsci was an early Italian Marxist scholar who theorized that authoritative power is maintained by the state through both the military and coercion. Crenshaw, *supra* note 91, at 1351 n.74.

190. *See* Gordon, *supra* note 178, at 418.

191. *See* Cole, *supra* note 94, at 151.

192. The Gallup Organization, *Gallup Poll Social Series: Minority Rights and Relations* (June 2002).

reveals that seventy-nine percent believe Black children have the same educational opportunities as White children.[193] Sixty-one percent of U.S. citizens believe that the system for casting and counting votes is fair to all Americans.[194] Sixty-two percent of Americans think that African Americans have the same or greater opportunity in life as Whites have.[195] Moreover, while the majority of Americans recognize that at least some discrimination still exists against African Americans,[196] sixty-nine percent of Whites think that Blacks are treated "the same as whites" in their local community.[197]

An examination of American legal and social systems reveals anything but racial equality and neutrality. For example, the 2000 Census reveals that while an estimated eight percent of White (non-Hispanic) families are below the poverty level, twenty-three to twenty-five percent of African Americans families fall below this level.[198] Also, while thirty percent of White Americans possess a college or advanced degree, only seventeen percent of African Americans have attained this status.[199] In addition, African Americans are incarcerated at upwards of eight times the rate of Whites.[200] This trend of disparate treatment is particularly strong in the area of drug offenses. While Whites commit more drug crimes than Blacks, African American men are admitted to state prison at a rate thirteen times greater than White men.[201] In at least fifteen states, more than seventy percent of drug offense prisoners are Black, reaching ninety percent in a few states like Maryland and Illinois.[202]

Thus, the appearance of a color-blind American society legitimizes continued inequities facing African Americans. Because society is viewed as race-neutral, the disparate treatment of African Americans appears fair and even justified.[203] As one scholar notes:

---

193. The Gallup Organization, *Attitude Towards Public Schools* (May 2001).

194. The Gallup Organization, *November Wave 1* (Nov. 2001).

195. WASHINGTON POST, KAISER FAMILY FOUNDATION & HARVARD UNIVERSITY, RACE AND ETHNICITY IN 2001: ATTITUDES, PERCEPTIONS, AND EXPERIENCES 2 (2001).

196. Over seventy percent of Americans recognize that at least some discrimination exists against African Americans. *Id.* at 3.

197. The Gallup Organization, *The Gallup Poll Social Audit: Black-White Relations in the United States—2001 Update* 7 (July 2001), *at* http://media.gallup.com/GPTB/specialReports/sr010711.PDF.

198. HOUSING AND HOUSEHOLD ECONOMIC STATISTICS DIVISION, UNITED STATES CENSUS BUREAU, COMPARING EMPLOYMENT, INCOME, AND POVERTY: CENSUS 2000 AND THE CURRENT POPULATION SURVEY 53, 57 (Sept. 2003).

199. UNITED STATES CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2003 3 (June 2004), *available at* http://www.census.gov./prod/2004pubs/p20-550.pdf.

200. Human Rights Watch, *Punishment and Prejudice: Racial Disparities in the War on Drugs*, Vol. 12, No. 2 (G), section III (May 2000), *available at* http://hrw.org/reports/2000/usa/Rcedrg00.htm#P54_1086.

201. *Id.* at section VI, Table 14.

202. *Id.* at section VI, Table 13.

203. *See* Crenshaw, *supra* note 91, at 1366; Gotanda, *supra* note 90, at 3; Cheryl I. Harris, *Whiteness as Property*, *in* CRITICAL RACE THEORY, *supra* note 87, at 287.

> The existing state of affairs is considered neutral and fair, however unequal and unjust it is in substance. Although the existing state of inequitable distribution is the product of institutionalized White supremacy and economic exploitation, it is seen by Whites as part of the natural order of things, something that cannot legitimately be disturbed.[204]

These popular attitudes are evident in the arguments of Conservatives that ignore social realities facing African Americans, concluding that any differences in status reflect actual differences in ability.[205] Such a contradiction enables a judge to "advocate the importance of racial equality while arriving at a decision detrimental to black Americans."[206]

The Civil Rights Ideology proves incapable of enabling African Americans to address this political reality because of its core beliefs about American society. Assuming the sufficiency of American promises found in the Constitution and Declaration of Independence, an adherent to the Civil Rights Ideology is confined to view continued inequities facing Black people as either the result of interpersonal racism or as persistent vestiges of the Jim Crow era. Continued racial inequities are viewed as an unfortunate result of misinformed Americans who do not fully understand the prevalence of racial prejudice or who improperly assume that hundreds of years of racial oppression can be rectified in fifty years or less. However, continued racial inequities and the legitimating of Black subordination is the result of more inherent properties of American law and society. Questioning these inherent properties requires questioning core beliefs about American society itself and therefore moving outside of the Civil Rights Ideology.

C. Alternative Legal Strategies

Every strategy, no matter how creative, that is rooted in a belief in the ultimate moral authority of American institutions will depend on White interests and will be subject to usurpation and/or elimination in the name of fairness and race-neutrality. This has already been seen in the context of affirmative action and will likely prove the fate of several alternative strategies advocated for people of color.

For example, scholar Roy Howell proposes an international lawsuit filed by

---

204. Harris, *supra* note 203, at 288.

205. *See* Bernie D. Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium?*, 18 HARV. BLACKLETTER L.J. 1, 29 (2002). *See also* Crenshaw, *supra* note 91, at 1344 (noting Black Conservatives such as Thomas Sowell who suggest that it is real differences between African Americans and White Americans and not discrimination that produces inequalities in living conditions); Gotanda, *supra* note 90, at 40 (noting how the Supreme Court's use of "formal-race"—devoid of the historical and social realities facing African Americans—in decisions regarding voting rights, affirmative action and jury selection "legitimates racial inequality and domination").

206. Bell, *supra* note 87, at 307.

African Americans as an alternative to traditional domestic civil rights litigation.[207] He argues that domestic legal and political struggles will "at best only maintain the status quo," because they are now merely defensive battles to protect the victories of the Civil Rights Movement from conservative attacks.[208] Instead, Howell calls for African Americans to file an international lawsuit against the United States in a foreign jurisdiction based on Section 55(c) and 56 of the United Nations Charter.[209] While Howell does not fully elaborate on the charges that would be brought, he asserts that the international attention resulting from the lawsuit would, along with a public relations campaign documenting discrimination, put international pressure on the United States to negotiate better treatment of African Americans.[210]

Howell's approach poses an interesting alternative to "traditional" civil rights litigation. Initiating an international lawsuit would certainly get around the problem of ceding ultimate moral authority to the American government. The very act of filing an international suit acknowledges an authority greater than the United States. It does not, however, completely escape the inherent dependency illustrated in the affirmative action discourse. Pursuing international litigation as a means of pressuring the United States into better treatment for African Americans and other people of color explicitly calls for American policy-makers to weigh majority harms and benefits in deciding Black interests. This may certainly prove appropriate and pragmatic given the historical and political reality that African American interests are in fact dependent upon the majority. However, without an accompanying strategy to confront this reality or even an implicit moral condemnation of it, any gains realized from this strategy will prove temporary at best—lasting only as long as and to the extent that the decision-makers care about international opinion.

Neil Gotanda advocates another alternative legal strategy that calls for courts to analyze racial issues in the same manner as religious issues.[211] According to Gotanda, employing a "free exercise" and "establishment" analysis of race would enable courts to consider racial remedies as policy decisions and recognize Black and White cultures as "legitimate aspects of the American social fabric" without endorsing racism.[212] Such an analogy would also enable courts to prevent the government from establishing racial subordination and White supremacy by using concepts of race divorced from historical and societal realities.[213] Thus, employing a religion analysis of racial issues would enable

207. Roy Carleton Howell, *The New Legal Strategy for Black Americans in the Twenty First Century*, 17 T. MARSHALL L. REV. 59, 68–77 (1991).

208. *Id.* at 62.

209. *Id.* at 68–69 (noting that in 1947 civil rights attorneys discussed challenging the United States government under Sections 55(c) and 56 of the United Nations Charter).

210. *Id.* at 76.

211. Gotanda, *supra* note 90, at 64–65.

212. *Id.* at 67.

213. *Id.*

courts to effectively remedy discrimination without perpetuating continued Black subordination through color-blind constitutionalism.

Free Exercise and Establishment Clause litigation certainly represents a creative way of avoiding the Equal Protection precedent developed through affirmative action. It does not, however, effectively address Black dependency, as it explicitly relies on celebrated American constitutional ideals for justification. By rooting arguments for racial justice in analogies to the Free Exercise and Establishment Clauses, this strategy succumbs to precisely the same problem African Americans now face from rooting arguments in the Equal Protection Clause. As seen in the affirmative action cases, this enables the Supreme Court to advance majority interests and legitimate Black subordination without challenge. It may be perfectly appropriate to pursue this strategy given that the Court has the power to define Equal Protection and the freedom of religion clauses regardless of the ideology African Americans adopt. However, acknowledging this power should be clearly distinguished from ceding the moral authority to define Black freedom. As illustrated in the affirmative action debate, ceding this moral authority leads to legitimating Black subordination.

Therefore, without the ideological ability to confront African American dependency and the legitimating of continued Black subordination, creative strategies and tactics are of limited lasting importance. Even efforts celebrated as being successful will at best "produce no more than temporary 'peaks of progress,' short-lived victories."[214] "The master's tools," ultimately "will never enable us to bring about genuine change."[215] Achieving true empowerment will require an alternative ideology.

IV.
CONCLUSION: THE NEED FOR A SELF-DEFINED, MORE COMPREHENSIVE IDEOLOGY

In order for African Americans to be free, we must have the ability to define, for ourselves, what that freedom is. Definition equals ownership and until we own our freedom and even ourselves, we will never be free.[216]

What do we own? Not enough land, not enough homes, not enough banks to give my brother a loan. What do we own? The skin on our backs, we rent and we ask for reparations, then they hit us with tax.[217]

In a much cited passage from *The Souls of Black Folk*, W.E.B. DuBois wrote of the strange burden of viewing the world and one's self from another's

214. Bell, *supra* note 87, at 306.

215. LORDE, *supra* note 1, at 112.

216. Focus group interview with student participant, University of North Carolina at Chapel Hill (Spring 2001) (on file with author) (analyzing African American identity and conceptions of freedom in the United States).

217. NAS, *Black Zombie*, *on* THE LOST TAPES (Columbia Records 2002).

perspective, noting, "It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity."[218] Over one hundred years later, African Americans continue to carry this burden both in personal living and in political thought. In the midst of celebrations marking the fiftieth anniversary of *Brown v. Board of Education* and in the wake of affirmative action jurisprudence re-enforcing dependency on majority interests and the legitimating of minority subordination, African American advocacy must proceed, not from core beliefs primarily defined by the promises of the Constitution and Declaration of Independence, but from core beliefs defined by the collective experiences and perspective of the Black community itself.

A growing sense of the need for an ideology defined by the Black community produced increasing frustration and disillusionment with the Civil Rights Movement among younger activists during its later years. These activists began to identify more with Black Nationalists and gained national visibility during the 1966 march through Mississippi when Stokely Carmichael (later known as Kwame Toure) publicly gave the call for Black Power.[219] Explaining the ideological departure from the Civil Rights Movement that was growing among the Black community and arguing for a new theoretical framework, Carmichael and Charles V. Hamilton argued, "Black people must redefine themselves, and only *they* can do that. Throughout this country, vast segments of the black communities are beginning to recognize the need to assert their own definitions, to reclaim their history, their culture; to create their own sense of community and togetherness."[220] This process of redefinition was viewed as vital to Black liberation and could only take place after African Americans rejected America's conception of their identity and reclaimed both their history and their cultural heritage.[221]

The call for redefining and claiming African American identity was not confined to the Black Power period that followed the Civil Rights Movement, but has been consistently made by Black Nationalists throughout various historical periods and ideological incarnations. This is one of the oldest ideologies within the African American community (second only to Black Liberalism) and it has "provided the most enduring challenge to both the black and white liberal traditions."[222] The diverse forms and belief structures of Black Nationalism include, for example, Marcus Garvey's Universal Negro Improvement Association ("UNIA") movement, the writings and teachings of

218. W.E.B. DUBOIS, THE SOULS OF BLACK FOLK 8 (1903).

219. *See* RHODA LOIS BLUMBERG, CIVIL RIGHTS: THE 1960S FREEDOM STRUGGLE 135, 137–38 (rev. ed. 1991).

220. STOKELY CARMICHAEL & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA 37 (1967).

221. *Id.* at 38–39.

222. DAWSON, *supra* note 10, at 85.

Malcolm X, the "revolutionary nationalism" of the Black Panther Party and the "cultural nationalism" of the Nation of Islam.[223] Despite this diversity, "a defining characteristic of all black nationalism is the absolute acceptance of the principle that blacks within the United States should define their own destiny."[224]

Still, Black Nationalist ideologies may themselves not fully account for the complexity of Black identity. A full critique and discussion of Black Nationalist ideologies is beyond the scope of this article. However, some commentators critique Black Nationalist organizations for the prevalence of sexism against Black women.[225] Given the multiple dimensions of Black identity discussed in Section II and the intersectionality[226] of race, class and gender, an accurate conception of Black identity can only be achieved through the collective collaboration of all members of the Black community. Any conception of Black identity that marginalizes certain members of the community (i.e. Black women) will be inherently incomplete, as it misses or underrepresents a vital component of African American experience.

The development of accurate and empowering core beliefs for the formation of an alternative "liberation ideology" requires the active participation of the ideology's agents. If the ideology aims to adequately explain and evaluate social conditions, help its agents understand their position in society, and provide a program for social and political action, its core beliefs must grow from the collective experiences and values of its agents.[227] For African Americans, this proves especially vital, given the inherent complexity of Black identity and experience. Alternative media of communication must be developed and critical thought must be encouraged. This process may produce an effective liberation ideology to guide African American advocacy that truly reflects the experiences and values of the Black community.

Such an ideology would acknowledge that African Americans are not just American citizens, but world members of the African Diaspora and a significant economic, social and political force in our own right. Therefore, freedom or liberation cannot be fully measured or defined by the level of equal access in the United States, but must also include measures of the economic, social and political well-being of our communities. Any continued strategies must proceed not only from the ideal of securing individualized opportunities, but also from the ideal of strengthening our communities, both on a domestic and international level. In other words, whether called "New Civil Rights Movement" or not, any

223. *See generally id.* at 94, 95, 105, 111 (discussing Black Nationalism).

224. *Id.* at 92.

225. *Id.* at 146.

226. *See generally* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (providing more information on intersectionality).

227. *See* BALL & DAGGER, *supra* note 9, at 208 (discussing features of liberation ideologies and how such ideologies relate to oppressed groups).

new strategy must be culturally relevant to our communities—that is rooted in, responsive to, and evaluated under a liberation ideology truly reflecting Black identity and freedom.

There are, however, costs to marginalized groups pursuing advocacy strategies and making claims from their perspective and formulated from their ideologies. At least one scholar argues that these costs are prohibitive. Professor Kimberlé Crenshaw argues that racism and the "otherness" of African Americans effectively necessitate adopting or appealing to the dominant American legal ideology.[228] Crenshaw acknowledges the role of such an appeal in legitimizing Black subordination, but rejects the possibility of directly challenging the American legal belief system due to the status of African Americans as "others."[229] Ultimately, Crenshaw concludes that African Americans must effectively adopt and seek to transform the dominant American legal ideology while minimizing the costs of doing so.[230]

Crenshaw begins her argument by acknowledging the role of civil rights rhetoric in legitimizing African American subordination. She observes, "[T]he societal adoption of racial equality rhetoric does not itself entail a commitment to end racial inequality. Indeed, to the extent that antidiscrimination law is believed to embrace colorblindness, equal opportunity rhetoric constitutes a formidable obstacle to efforts to alleviate conditions of white supremacy."[231] Moreover, engaging in advocacy based on American values may harm the ability of African Americans "to name their reality" and to engage in future collective action.[232] Despite these harms, Crenshaw rejects the claim of Critical Legal Scholars (such as Robert Gordon) that directly challenging the dominant ideology can lead to liberation.[233]

Crenshaw's rejection of this assertion stems from the failure of Critical Legal Studies scholars to account for the role of racism in maintaining the existing order.[234] By creating an illusion of unity between the dominant and subordinate White classes based on the exclusion of Black Americans as "others," racism has legitimized the dominant order.[235] In other words, racism legitimized American society to poor Whites based on the subordinate "other" status of African Americans. This status was premised on stereotypes of African Americans as lazy, unintelligent, immoral and ignorant, among other negative characteristics.[236] Accordingly, the "stigma of 'otherness' . . . effectively precludes [African Americans'] potentially radicalizing influence

228. Crenshaw, *supra* note 91, at 1365–66.
229. *Id.* at 1385.
230. *Id.* at 1387.
231. *Id.* at 1346.
232. *Id.* at 1349.
233. *Id.* at 1357.
234. *Id.* at 1356.
235. *Id.* at 1372.
236. *Id.* at 1373.

from penetrating the dominant consciousness."[237]

Taken together with Gordon's assessment of the inherent legitimating consequences of legal advocacy, African Americans and other marginalized groups are left with a very troubling dilemma. If appealing to society's dominant discourse and engaging in legal advocacy based on the prevailing American framework ultimately serves to legitimize a group's marginalized position, as Gordon asserts, and advocating from a distinctly African American perspective is invariably doomed by the "otherness" created by racism, as Crenshaw argues, then what is to be done?

According to Crenshaw, African Americans must resolve the dilemma by appealing to American values while minimizing the costs of doing so. In order to be heard, African Americans must speak the language of the American belief system.[238] This involves appealing to the dominant American liberal ideology and framing arguments in these terms. The hope is that by using the dominant ideology, African Americans can change it to better serve their needs.[239] Despite the legitimizing effects of doing so, Crenshaw argues, "as long as race consciousness thrives," reliance on rights rhetoric is necessary.[240] Assuming that the "most significant aspect of Black oppression" is what is believed about Black people, and "not what Black Americans believe," African Americans must use the dominant rights rhetoric to challenge other Americans' views of them.[241] Crenshaw asserts that such usage proved powerful in the Civil Rights Movement and transformed the dominant ideology.[242] Ultimately, according to Crenshaw, the task for African Americans is to effectively employ American legal values and appeal to the dominant liberal ideology to advance their interests while minimizing the "costs of engaging in an inherently legitimating discourse."[243]

Crenshaw's assertion that African Americans must appeal to and rely on American legal and ideological values rests on at least two primary assumptions. The first is that "the most significant aspect of Black oppression" is not what we (as Black people) believe about ourselves, but what White people believe about us as "other."[244] This supposition undervalues the destructive effects to the Black community of adopting an ideology that legitimizes our own subordination. Loss of hope in the Black community is one such effect[245] which

237. *Id.* at 1359.

238. *Id.* at 1385.

239. *Id.*

240. *Id.*

241. *Id.* at 1358.

242. *Id.* at 1386.

243. *Id.* at 1387 (asserting that these costs can be minimized by creating conditions for the "maintenance of a distinct political thought" informed by the conditions of Black people).

244. *Id.* at 1358.

245. *See* CORNEL WEST, RACE MATTERS 22 (1994). West notes that an ahistorical approach to race in the United States "contributes to the nihilistic threat in Black America." Thus, the Civil Rights Ideology's failure to examine past injustice contributed to the contemporary rise in Black hopelessness.

has been described by Cornel West in 1994 as "the profound sense of psychological depression, personal worthlessness, and social despair so widespread in black America."[246] Failing to put the self-image of the Black community at the forefront of the discussion by adopting an ideology that legitimized Black subordination led to the collapse of the African American coalition.[247] The resulting factions included Black Conservatives, who argued that African American subordination was no longer caused by racism, but rather that cultural inferiority limited individual success.[248] As effective advocacy requires collective action, these fractures hampered the movement for change. Thus, the *most significant* aspect of Black subordination *is* what African Americans think and believe. Without hope or unity, and with "representatives" of the Black community claiming Black culture to be inferior, the possibility for progressive action is virtually nonexistent.

The second premise underlying Crenshaw's conclusion is that the status of African Americans as "other" precludes directly challenging American society and therefore requires appealing to the dominant ideology to realize gains.[249] This belief reflects the reality that racism does make African Americans and other people of color into "others" whose perspective is often marginalized. However, given the immense costs of adopting the dominant ideology, continued advocacy should instead speak from a distinctly Black perspective while minimizing the alienation that may result. This self-valuing shift works to preserve the integrity of the movement.

Professor Linda Greene notes that collective action (such as protests and boycotts) enables African Americans to make demands outside the dominant American legal value system.[250] Greene observes that the SCLC's picket of the PGA tournament at Shoal Creek, the Operation Push threat to boycott Nike, and Professor Derrick Bell's decision to leave Harvard Law School (because they refused to hire a Black female law professor), all represent direct challenges to extant power relations that do not rely on civil rights litigation or legislation.[251] Through these actions, African Americans challenge power structures without appealing to the dominant institutional logic, proving that we have the power to advance our interests through individual and collective action.

The belief that African Americans must appeal to the dominant value system in order to advance their interests also undervalues the potential influence and special voice that may actually stem from the status of "other." Several speakers at the *New York University Review of Law & Social Change's*

246. *Id.* at 20.

247. Jones, *supra* note 205, at 27 (citing STEPHEN STEINBERG, TURNING BACK: THE RETREAT FROM RACIAL JUSTICE IN AMERICAN THOUGHT AND POLICY 109 (1995)).

248. *Id.* at 29.

249. Crenshaw, *supra* note 91, at 1367.

250. Linda S. Greene, *Civil Rights at the Millennium—A Response to Bell's Call for Racial Realism*, 24 CONN. L. REV. 499, 512 (1992).

251. *Id.* at 511–12.

"Relearning *Brown*" colloquium noted the influence and inspiration that African American advocacy and thought has had on people in other nations.[252] In the domestic context, unique expressions of Black culture have heavily influenced "mainstream" America for the past century, with just one example being hip hop.[253] Although Black-infused media, art and activism may be co-opted or eliminated by majority political and financial interests, they nonetheless reveal Black expression. Despite the difficulties of adopting an ideology rooted in Black perspective, the costs of not doing so are too great. The despair, hopelessness and sheer burden of "looking at oneself through the eyes of another" necessitate an ideology whose core beliefs are rooted in the collective values of the Black community if advocacy is going to be truly progressive and reflective of the Black experience. Thus, for advocacy to achieve its greatest potential, African Americans must resolve to advocate from an African American perspective while working to minimize the alienation of doing so.

In practice, this means several things. First, it means learning from the lessons of the past and being as inclusive as possible in formulating an African American perspective. Such a perspective must fully take account of the complexity and rich history of Black people in the United States. Second, it means evaluating societal inequities and conditions. The ability of marginalized groups to assess conditions facing their communities from their own perspectives is imperative in a society that assimilates and claims movements as its own (e.g., affirmative action opponents claiming the Civil Rights Movement as their own). Finally, it means that when legal advocacy or appeals to dominant norms are employed, their inherent limitations must be acknowledged. Whether it legitimates inequities or not, legal advocacy remains a powerful tool. However, advocates should acknowledge the limitations of legal strategies so that additional tactics may be taken to help compensate for the weaknesses of a strictly legal approach.

For example, despite the fact that the legality of affirmative action continues to be decided on the basis of majority, and not minority, interests, it nonetheless has helped provide many students of color with educational opportunities that may not have otherwise been available. In the city-contracting context, affirmative action programs have helped distribute resources to Black businesses that they may not have otherwise been able to acquire. This does not mean, however, that we should ignore the limitations of affirmative action jurisprudence and fail to acknowledge that courts will permit such programs only to the extent that the benefits to White citizens do not outweigh the harms. Instead, additional strategies should be developed to enhance the impact of affirmative action on our communities. Sample strategies include the

252. Colloquium Panel, *supra* note 17.

253. *See generally* TRICIA ROSE, BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA xiv–xv (1994) (noting the general influence of hip hop on various cultures throughout the world).

development of culturally-centered ventures such as charter schools, educational organizations, Black businesses and community development. These ventures should operate together so that affirmative action is a piece of a broader effort to strengthen and improve communities.

Whether termed "The New Civil Rights Movement" or another name, as we work to address inequities facing many African American and other marginalized communities in the United States, let us proceed with the benefit of fifty years of hindsight. The demonstrated inability of the Civil Rights Ideology to confront the stark realities of dependency on majority interests and legitimizing of continued inequities, combined with the immense costs of hopelessness and despair resulting from the burden of "looking at oneself through the eyes of others," show that continuing to use "the master's tools" is not an option that takes advantage of the potential of the Black community. Marginalized communities must advocate on the basis of their distinctive perspectives while working to minimize the costs of the resulting alienation. No matter their names, the movements and strategies of today must be culturally relevant to our communities.