JUST DO IT

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INTRODUCTION

Racial injustice has always been a problem in the United States. The most salient victims of the Nation's discrimination against racial minorities have included indigenous Indians,[1] Chinese immigrants,[2] Japanese-American citizens,[3] Latinos,[4] and of course blacks.[5] But as the current war on terrorism illustrates, under the right conditions, almost any racial group can come within the scope of America's discriminatory focus.[6] It is common to suppose that that there is a

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This Article is also available at http://www.law.duke.edu/journals/lcp.

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I would like to thank Jerome Culp, Steven Goldberg, and Lisa Heinzerling for their help in developing the ideas expressed in this article. Research for this article was supported by a grant from the Georgetown University Law Center.

1. For a description of the ways in which we appropriated land from, and decimated the populations of, indigenous Indians, see LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 508-09 (2d ed. 1985); *see generally*, DEE BROWN, BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST (1970); PETER MATTHIESSEN, IN THE SPIRIT OF CRAZY HORSE: THE STORY OF LEONARD PELTIER AND THE FBI'S WAR ON THE AMERICAN INDIAN MOVEMENT (1980); MARI SANDOZ, CRAZY HORSE: THE STRANGE MAN OF THE OGLALAS (1942).

2. For a description of the manner in which xenophobic racial prejudices caused us to enact the Chinese Exclusion laws see FRIEDMAN, *supra* note 1, at 509-10.

3. The World War II exclusion order that led to the internment of Japanese-American citizens was upheld by the United States Supreme Court in *Korematsu v. United States*, 323 U.S. 214 (1944); *see also id*. at 239-41 (Murphy, J., dissenting, discussing racial prejudice and internment of Japanese-Americans but not German- or Italian-Americans); FRIEDMAN, *supra* note 1, at 672.

4. One way we have expressed our discriminatory impulses against Spanish-speaking racial minorities is through the adoption of English language laws. *See, e.g.*, Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) (vacating as moot a decision concerning the constitutionality of an Arizona law making English the official language of the State).

5. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857) (protecting the institution of slavery and holding that blacks could not be citizens within the meaning of the United States Constitution); *see also* Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding separate-but-equal racial segregation); *cf. id*. at 559 (opinion of Harlan, J., dissenting, describing blacks as inferior).

6. Legal commentators have noted the striking similarities that exist between the wartime detention of Japanese-Americans that was upheld in *Korematsu v. United States*, 323 U.S. 214 (1944), and the summary detentions of people of Middle Eastern ethnicity now authorized under executive orders, administrative agency regulations, and the USA PATRIOT Act in our post-September 11, 2001 war on terrorism. *See, e.g.*, Liam Braber, Comment, *Korematsu's Ghost: A Post-September 11th Analysis of Race and National Security*, 47 VIL. L. REV. 753 (2002); Developments, *Plight of the Tempest-Tost: Indefinite Detention of Deportable Aliens*, 115 HARV. L. REV. 1915, 1930-39 (2002); Jerry Kang, *Thinking Through Internment: 12/7 And 9/11*, 9 ASIAN L.J. 195, 197-200 (2002); Harold Hong Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23, 33-39 (2002); Lori Sachs, Comment, *September 11, 2001: The Constitution During Crisis: A New Perspective*, 29 FORDHAM URB. L.J. 1715, 1728-43 (2002); Huong Vu, Note, *Us Against Them: The Path to National Security is Paved by Racism*, 50 DRAKE L. REV. 661, 661-64, 691-93 (2002); Michael J. Whidden, Note, *Unequal Justice: Arabs in America and United States Anti-terrorism Legislation*, 69 FORDHAM L. REV. 2825, 2825-30, 2836-41 (2002). For a recent news story describing summary detentions of "material witnesses" in the war on terrorism see Steve Fainaru &

difference between the progressive and the conservative ends of the political spectrum concerning the issue of race. However, those commonly accepted differences pale in comparison to the overriding similarity that exists between progressives and conservatives. Both progressives and conservatives are liberals in the classical sense of the term. And the tenets of liberalism seem destined to preclude us from ever achieving any meaningful level of racial equality in the United States.

I

PROGRESSIVE AND CONSERVATIVE PERSPECTIVES ON RACE

Progressives and conservatives do have different normative perspectives on the issue of race. In describing these divergent perspectives, I have chosen to describe idealized conceptions of both. Like the "reasonable person" used as the model of due care in torts, my "progressives" and "conservatives" are theoretical abstractions rather than card-carrying members of any actual schools of thought. This has allowed me to avoid the potentially controversial exercise of identifying particular judges and commentators to illustrate the various claims that I am making. Nevertheless, I have attempted to describe my hypothetical progressives and conservatives in a manner that will make them seem both coherent and familiar.

Progressives are more likely than conservatives to view the culture's endorsement of the equality principle as a substantive commitment, and they are less likely to view it as having only rhetorical content. For that reason, progressives are more likely than conservatives to feel discomfort when witnessing the social, political and economic disadvantages that racial minorities experience in contemporary American culture. As a result, progressives are more likely than conservatives to identify discrimination against racial minorities as a problem that warrants remedial attention. Because progressives define the sphere of permissible public action in terms that are relatively broad, progressives tend to favor policies that seek to alter the racial status quo through legal intervention. Progressives are correspondingly less likely to believe that race relations issues can be resolved through deference to private preferences or market ordering. In addition, progressives are likely to infer from the Nation's long history of discrimination, and its present maldistribution of resources, that race is a culturally significant category. This causes progressives to be skeptical of purported colorblind or race-neutral approaches to the issue of race, and more receptive than conservatives to race-conscious affirmative action remedies for the problem of racial injustice. Progressives are also more likely to value diversity and to accept the relativity inherent in the concept of multiculturalism. As a result, progressives tend to believe that it is legitimate to recognize the existence of group rights as well as individual rights in our increas-

Margot Williams, *Material Witness Law Has Many in Limbo: Nearly Half Held in War On Terror Haven't Testified*, WASH. POST, Nov 24, 2002, at A1.

ingly multicultural society. This gives progressives a greater fondness for civic republican values than for interest group pluralism as the aspirational objective of governance.

Conservatives are less likely than progressives to view the culture's endorsement of the equality principle as a substantive commitment and are more likely to view it as having only rhetorical content. For that reason, conservatives are less likely than progressives to feel discomfort when witnessing the social, political, and economic disadvantages that racial minorities experience in contemporary American culture. As a result, conservatives are less likely than progressives to identify discrimination against racial minorities as a problem that warrants remedial attention. Because conservatives define the sphere of permissible public action in terms that are relatively narrow, conservatives tend to oppose policies that seek to alter the racial status quo through legal intervention. Conservatives are more likely to believe that race relations issues should be resolved through deference to private preferences and efficient market ordering. In fact, conservatives fear that the more serious threat to racial equality in contemporary American culture is posed by the danger of government interference with market ordering in a way that produces inefficient reverse discrimination. In addition, conservatives resist the suggestion that either the Nation's history of racial discrimination, or its present distribution of resources, makes race a culturally significant category. Conservatives tend to believe that the history of discrimination has little application to current race relations because that history has been largely superseded by the gains of the civil rights movement. Moreover, conservatives tend to believe that the present distribution of resources reflects merit and relative ability rather than any lingering commitment to past discrimination. As a result, conservatives are likely to favor only colorblind or race-neutral responses to any redistributive needs that might exist because of market failures in allocating resources. Conservatives also tend to oppose race-conscious affirmative action because it simply revives the evils of prior racial discrimination and diverts us from the desirable goal of prospective racial equality. Conservatives are also less likely to value diversity or to accept the relativity inherent in multiculturalism. As a result, conservatives tend to favor the recognition of individual rights but not group rights in a society that should be conceptualized as unitary rather than multicultural. This gives conservatives a greater fondness for the interest group pluralism they believe to be the essence of democracy than for communitarian civic republicanism as the aspirational objective of governance.

The Nation's current race-relations policy can be understood as a compromise between these progressive and conservative perspectives on race. Progressives have been successful in identifying race and its correlation with social, political and economic disadvantage as a problem that warrants remedial public intervention. Conservatives have been successful in establishing that any public intervention that does occur must be race-neutral in nature, so that such intervention does not itself constitute reverse racial discrimination against whites. Accordingly, the current law as developed by the Supreme Court and accepted

by contemporary American culture is that race-conscious affirmative action is largely unconstitutional, but that race-neutral redistributive measures that happen to include racial minorities among the class of beneficiaries are constitutionally permissible.[7] That compromise is arguably consistent with the aspirational goals of both pluralist and civic republican political theories, and it may signify that the culture is on its way to developing a durable solution to the problem of racial injustice. However, the present racial compromise is also subject to a less optimistic interpretation.

II

LIBERALISM

The reason that American culture has historically been unable to solve the problem of racial injustice is that American culture is committed to the political philosophy of liberalism.[8] Both progressives and conservatives share this commitment to such a degree that it overshadows the relatively insignificant differences that exist in their perspectives on race. Three important features of liberalism make it ill-suited to the pursuit of racial justice in the United States.

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7. Although the Supreme Court applies deferential rational basis review to most governmental classifications, *see* New York City Transit Authority v. Beazer, 440 U.S. 568, 592-94 (1979) (applying rational basis review to non-suspect classifications), the Court applies demanding strict scrutiny to racial classifications, even if those classifications are part of a benign affirmative action program. *See* Gratz v. Bollinger, 539 U.S. 244, 269 (2003) (applying strict scrutiny to racial affirmative action); Grutter v. Bollinger, 539 U.S. 306, 324-28 (2003) (same); Adarand Constructors v. Peña, 515 U.S. 200, 223-27 (1995) (same); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507-08 (1989) (same); *see also Adarand*, 515 U.S. at 237-38 (favoring race-neutral over race-based affirmative action); *Croson*, 488 U.S. at 509-10 (same). The Court almost always invalidates racial affirmative action under the strict scrutiny standard of review. *See, e.g.*, *Gratz*, 539 U.S. at 274-76 (invalidating affirmative action program used by University of Michigan undergraduate college); *Croson*, 488 U.S. at 498-509 (invalidating municipal affirmative action program for construction contractors); *cf. Adarand*, 515 U.S. at 239 (reversing lower court decisions upholding federal affirmative action program for construction contractors after intermediate scrutiny, and remanding for application of strict scrutiny); *see also* Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment, arguing that strict scrutiny is "strict in theory, but fatal in fact"); *see generally* GIRARDEAU A. SPANN, THE LAW OF AFFIRMATIVE ACTION, 156-59, 164-68 (2000) (discussing statistical outcomes in affirmative action cases, and discussing doctrinal effect of applying strict scrutiny). In one recent case, however, a racial affirmative action program was upheld after strict scrutiny. *See Grutter*, 539 U.S. at 343 (upholding affirmative action program used by University of Michigan law school); *see also Adarand*, 515 U.S. at 237 ("we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact,'" quoting *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring in judgment)). The limited significance of the *Grutter* decision, upholding the University of Michigan law school affirmative action program, is discussed in Girardeau A. Spann, *The Dark Side of* Grutter, 21 CONST. COMMENT. 179 (2004).

8. For general accounts of liberalism see RONALD DWORKIN, *Liberalism*, *in* A MATTER OF PRINCIPLE 181-213 (1985); MICHAEL J. GERHARDT ET AL., CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 245-50 (2d ed. 2000); AMY GUTMANN, LIBERAL EQUALITY 1-47 (1980); Will Kymlicka, *Liberalism*, *in* THE OXFORD COMPANION TO PHILOSOPHY 483-85 (Ted Honderich ed., 1995); H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM 1-11, 37-47 (1993); Mark Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, HARV. L. REV. 781, 781-86 (1983); MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 4-10, 21-23, 109, 269-76, 313 (1988).

First, classical liberalism places a high value on individual liberty.[9] An important component of individual liberty is the right to develop autonomous systems of personal beliefs and associational preferences that the culture must honor rather than override. However, both progressives and conservatives are part of a culture whose shared beliefs and associational preferences are premised on a view of racial minorities as inferior to whites. As a result, remedies for racial injustice that would disregard those beliefs and preferences are out of bounds in a liberal culture, even if those are the only remedies that promise to be effective.[10]

Second, the commitment to individual liberty forces liberals to believe that disputes about the allocation of resources in society can be satisfactorily resolved through the invocation of neutral allocation principles.[11] But the "neutrality" of those principles will necessarily reflect the normative preferences of the dominant culture. In a multicultural society, in which not only resource distribution is unequal but shared perspectives and normative values are absent, what passes for liberal neutrality is likely to consist of nothing more than a parochial refusal by those possessing power to recognize the legitimacy of claims for racial justice asserted by those who lack power. As a result, the concept of neutrality tends to be viewed as discriminatory rather than neutral by the racial minorities who feel victimized by those principles, and that prevents the concept of neutrality from satisfactorily serving the legitimating function that it is designed to serve.[12]

Third, liberalism is rooted in Enlightenment conceptions of reason.[13] Liberalism is committed to the belief that syllogistic rational analysis provides a reliable method for developing fair and equitable solutions to even our most intractable social problems. In recent years, however, critical race theory has argued that this commitment to reason often masks the ways in which legal and cultural norms are racially oppressive.[14] The preoccupation with reason causes the culture to treat socially constructed values as if they were absolute and objective rather than parochial and contingent. Critical race theory has sought to expose the racial tilt often embedded in current institutional arrangements and to escape the epistemological constraints of liberalism by emphasizing alternative conceptual methodologies, including multiculturalism, literary narrative, and identity politics.[15] However, the legitimacy of those efforts has met with lib-

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9. *See* POWELL, *supra* note 8 at 6, n.16 (discussing individual autonomy).

10. Examples of potentially effective remedies that are impermissibly illiberal are discussed in Part III, below.

11. *See* TUSHNET, *supra* note 8, at 23-24, 46.

12. For a discussion of the concept of legitimation as a technique for suppressing minority dissent see GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT & MINORITIES IN CONTEMPORARY AMERICA 150-60 (1993).

13. *See* POWELL, *supra* note 8 at 6, n.16 (discussing the Enlightenment attitude toward reason).

14. *See, eg.*, MARI J. MATSUDA ET AL., *Introduction* in WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 3-7 (1993).

15. *See, eg.*, Jerome McCristal Culp, Jr., *Neutrality, The Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform*, 45 RUTGERS L. REV. 965, 971-83 (1993); *see generally*

eral resistance, precisely because those alternatives are thought to be inconsistent with the tenets of Western Enlightenment thought.[16]

III

PROPORTIONALITY

It turns out that things can be done to address the problem of racial injustice in the United States. They range in scope from mild ameliorative measures to more comprehensive conceptual solutions. But the more effective a solution is likely to be, the more offensive it is likely to be to liberal conceptions of legitimacy. At the mild end of the spectrum, the culture can retain its basic aspirational values, but abandon what I term the "silly arguments" that have prevented it from applying those values in a way that promotes racial justice. I am referring to arguments such as the Supreme Court's assertion in its affirmative action cases that legal remedies cannot properly be used to eliminate the effects of general "societal discrimination,"[17] and Justice O'Connor's argument in *City of Richmond v. J.A. Croson Co.*,[18] that stark racial disparities are not enough to permit the Court to determine things like whether there has been a history of racial discrimination in Richmond, Virginia.[19]

A more ambitious alternative would be for the culture to de-emphasize the liberal conception of individual rights, which seems ironically to have been a major cause of racial oppression.[20] If the culture were able to surmount the obstacle of "rights," more interesting remedial measures would become available. For example, the culture could adopt meaningful antidiscrimination laws that actually addressed the problem of racial segregation in schools or residential neighborhoods.[21] It could permit individuals to attend particular schools or live

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MICHAEL J. GERHARDT ET AL., CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 375-421 (2d ed. 2000) (describing critical race theory).

16. *See, e.g.*, DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 5-12 (1997) (describing ways in which critical race theory is inconsistent with Western conceptions of reason).

17. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 496-98 (1989); *see also* Shaw v. Hunt, 517 U.S. 899, 909-10 (1996) (rejecting general societal discrimination); Wygant v. Jackson Bd. of Educ. 476 U.S. 267, 276 (1986) (opinion of Powell, J.) (same); *see generally* SPANN, *supra* note 7, at 168-69 (2000) (discussing general societal discrimination).

18. 488 U.S. 469 (1989).

19. *See id*. at 498-508 (1989) (discussing inadequacy of statistical evidence to establish history of discrimination in Richmond, Virginia construction trades).

20. One of the arguments that the Supreme Court has invoked as a reason to invalidate racial affirmative action programs is that those programs interfere with the individual rights of the whites who are burdened by affirmative action. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 322 (2003), citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 256, 310 (1978) (opinion of Powell, J.); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283-84 (1986) (considering burden on innocent whites in equal protection context); *cf.* United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979) (considering burden on innocent whites in Title VII context).

21. Urban racial segregation continues to be extensive in both residential and educational contexts. *See* DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993) (discussing concept of urban residential "hypersegregation" in book entitled "AMERICAN APARTHEID"); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 471-74 (4th ed. 2001) (discussing stark statistics involving racial segregation in public schools).

in particular neighborhoods only when doing so was consistent with the racial balance that the culture desired. However, that option would become available only if the culture were willing to override the private beliefs and associational preferences that have caused and perpetuated the culture's present forms of racial segregation. The remedy of reparations for the legacy of slavery would be an even more radical solution.[22] It would not only provide some measure of compensation for victims of past racial injustice, but it could potentially prompt the culture to favor present racial justice by forcing it to internalize the costs of its own racial attitudes.

The solution likely to be most effective in promoting racial justice in the United States is one that insists on racial proportionality in the allocation of all significant societal resources. By assuming unlawful discrimination co-exists with a racially disproportionate allocation of resources, this proportionality solution would train the culture to view racial equality as the norm rather than the exception. The liberal constraints of American culture likely make that solution politically and legally unavailable. But that was also true of slavery.[23] If the culture so desired, it could reformulate its political and legal constraints to permit it to pursue the strategy of proportionality.

We live in a culture characterized by significant amounts of persistent racial injustice. Nothing illustrates that more clearly than the under-representation of racial minorities in the allocation of nearly all important societal resources—an allocation that has caused us to have a permanent racial underclass.[24] It is apparently not within our power to transcend the racial attitudes that have led us

22. For the basic arguments asserted by proponents of reparations see RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS (2000). For additional arguments see Adrienne D. Davis, *The Case for United States Reparations to African Americans* (2000), at http://www.unc.edu/~danielg/seminar_on_law/feb27_davis.doc.

23. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857) (protecting the institution of slavery and holding that blacks could not be citizens within the meaning of the United States Constitution, thereby precluding possibility of political solutions and ultimately leading to the Civil War); *see also* STONE ET AL., *supra* note 21, at 429-31(discussing way in which *Dred Scott* precluded further political compromise on issue of slavery).

24. Justice Ginsburg's dissenting opinion in *Gratz v. Bollinger* cites statistical data documenting the disadvantages that racial minorities continue to suffer in many areas of American life, including employment, poverty, health care, education, housing, and consumer transactions. *See* Gratz v. Bollinger, 539 U.S. 244, 298-301 (2003) (Ginsburg, J., dissenting). For additional data documenting racial disparities in the allocation of significant societal resources see Stephen Brobeck, *Black American Personal Wealth: Current Status* (2002), at http://www.americasaves.org/back_page/BlackWealthReport082902.doc (discussing personal wealth); Bureau of the Census, U.S. Dept. of Commerce, *Statistical Abstract of the United States—1996*, 413 (Table 644) (Unemployed Workers—Summary: 1980 to 1995); Bureau of the Census, U.S. Dept. of Commerce, *Statistical Abstract of the United States—1993*, 477 (Table 753) (families living below poverty level); *id*. at 93 (Table 127) (Infant Mortality Rates, by Race); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 4-5, 8 (1999) (treatment by criminal justice system); GERALD DAVID JAYNES & ROBIN M. WILLIAMS EDS., A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY, 274, 279 (1989) (discussing poverty rates); *id*. at 415, 419 (homicide rates); Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 751-55 (1996) (racially disparate treatment in Internal Revenue Code); Lu-in Wang, Symposium, *"Suitable Targets"? Parallels and Connections between "Hate" Crimes and "Driving While Black,"* 6 MICH. J. RACE & L. 209 (2001) (driving while black); *see also* Paul Butler, *(Color) Blind Faith: The Tragedy of Race, Crime and the Law*, 111 HARV. L. REV. 1270, 1286 (1998) (book review) (walking while black).

to that maldistribution of resources. But it is within our power to alter the distribution itself. Imagine what a culture would look like in which all important resources were allocated in a racially proportional manner. Doctors, lawyers, members of Congress, corporate executives, college students, movie heroes, movie villains, professional basketball players, custodial workers, and past Presidents of the United States would all reflect the racial composition of the Nation. Social roles would no longer be viewed even tacitly as stereotypical white roles, or black roles, or roles associated with other racial minority groups. The baseline assumptions of the culture would change. It would become a noteworthy event when the United States Senate ended up being all white, rather than being noteworthy when a single black was elected to the Senate.[25] Our expectation would be to see racial proportionality everywhere we looked, rather than to see white dominance everywhere we looked. We would think that something was wrong when whites possessed too much wealth or too much power, rather than viewing white power as evidence that everything was working according to plan. In short, we would come to assume that racial equality was the norm rather than the aberration. That such racial proportionality seems utopian simply illustrates how far we have diverged from the principle of racial equality that we formally espouse.

I anticipate two types of objections to my proportionality suggestion—the first conceptual, the second practical. The conceptual objections relate to abstract concerns about issues such as merit, seniority, and upsetting reliance on settled expectations. Those are the liberal objections that are typically offered to defeat disfavored redistributive programs, and they would certainly be offered as reasons to reject an extensive redistributive program whose goal was the racially proportional allocation of significant societal resources. However, those objections have always struck me as largely inapposite. Concerns about seniority and protecting settled expectations seem parasitic to the overriding concern about merit, and the concern about merit seems simply to be a red herring. If in fact differences in individual merit correlate with race—something that I would not lightly concede—it is only because racial discrimination operates somewhere in the cultural institutions that produce those racially correlated differences. If the training we provide to acquire merit, and the devices that we use to measure merit, operated in a racially nondiscriminatory manner, we would no longer expect to see racially correlated differences in the distribution of merit throughout the culture. We would continue to see those racially correlated differences only if racial minorities were somehow inherently inferior to whites in their ability to take advantage of the training and opportunities that the culture made available to them. That inherent inferiority assumption is not

25. Presently—and typically—the United States Senate contains no black members. There have been only two black members of the Senate since Reconstruction. Edward Brooke, a Republican from Massachusetts, served from 1976-79, and Carol Moseley-Braun, a democrat from Illinois, served from 1993-99. *See Narrative of the Fight for Freedom, Enfranchisement, and the Seating of the First Blacks in Congress*, at http://www.house.gov/ebjohnson/cbchistoryprerevels.htm.

one I am prepared to accept. However, I fear it may be the assumption driving the longstanding inability of liberal American culture to achieve racial justice.[26]

The practical objections to a racially proportional reallocation of resources relate to concrete concerns about issues such as identifying the racial minority groups that count for proportionality purposes, identifying the societal resources significant enough to require proportional allocation, and developing transitional strategies to achieve proportional representation in social roles for which minorities presently lack the requisite training. Certain legal issues would also have to be resolved concerning the source, nature, and enforcement of the proportionality requirement, and the roles the Supreme Court and the representative branches would each play with respect to proportionality. It is, of course, possible to work out solutions for the practical problems. Relying on the pluralist political process to resolve most of those problems would be preferable to relying on the Supreme Court because the representative branches have a better historical record than the Court in protecting racial minority interests.[27] For that reason, the operative legal source of the proportionality requirement might be more effective if it were rooted in statutes and administrative regulations than if it were rooted the Constitution. However, judicial enforcement of a constitutional provision requiring racial proportionality might have symbolic importance in reminding the culture that it had come to favor a commitment to the principle of operative, rather than rhetorical, racial equality. We would not even have to amend the Constitution to discover such a constitutional provision. We could simply call it the Equal Protection Clause.[28]

Obviously, none of those practical problems could be overcome unless the culture were first committed to the idea of racial proportionality. But if it were, the practical problems would become merely matters of detail. To the extent that one is inclined to believe that the culture could never overcome the practical obstacles to a racially determined allocation of significant societal resources, history suggests that concern is unfounded. As a *de facto* matter, societal resources have traditionally been allocated in a racially determined way. They have traditionally been allocated to whites.[29] We should simply change the particular races to which some of those resources will be directed in the future. To the extent one is inclined to argue that the Supreme Court would never tolerate the explicitly racial allocation of resources that proportionality demands, that argument is certainly sound regarding the present Supreme Court.[30] However, a Supreme Court that existed in a culture in which racial proportionality had become an accepted political priority would necessarily be a very different Court.

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26. *See* Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 HOW. L.J. 1, 90-94 (discussing the inherent inferiority assumption).

27. *See generally* SPANN, *supra* note 17 (discussing Supreme Court oppression of racial minorities).

28. *See* U.S. CONST. Amend XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

29. *See supra* note 24 (citing statistics concerning racially disparate allocation of desirable resources to whites).

30. *See generally* SPANN, *supra* note 17 (discussing Supreme Court oppression of racial minorities).

The idea of proportionality that I am advocating should not be confused with mere affirmative action. What I have in mind is quite different. The concept of affirmative action has been somewhat acceptable to liberal American culture precisely because it refuses to demand the one concession I view as crucial to the pursuit of meaningful racial justice. Affirmative action is an outgrowth of the prevailing liberal epistemology about race. It emanates from the belief that race is a social category whose relevance can be marginalized, and whose invidious influence can be contained by using remedial measures that make incremental changes to the status quo. As a result, affirmative action offers the hope of enticing a few, largely middle-class, minorities into positions of social, political or economic comfort. It does not, however, do anything to eliminate the permanent racial underclass that the culture perpetually disregards.[31]

My proportionality proposal emanates from the belief that race has always been one of the few things that really matter in America. As a result, the influence of race can never be contained, and mere incremental change serves primarily to distract us from the fact that we systematically discount the interests of our racial underclass. Proportionality seeks to change both the baseline concerning acceptable distributions of resources and the baseline concerning the social significance we attach to race. There may be cultures in which the concept of colorblind race neutrality is a coherent concept and in which modest redistribution can be meaningful in the quest for racial justice. But liberal American culture has never been one of those cultures. Because of its prevailing attitudes about racial inferiority and because of the protection that liberalism demands that we extend to those attitudes, American culture has always been incapable of achieving a meaningful level of racial equality. The best it can hope to do is approximate the distribution of resources that would exist in a culture that *had* achieved a meaningful level of racial equality. Perhaps in time American culture could actually evolve into that hypothetical culture. But that, of course, would require the culture to take the meaningful first step of actually desiring such an outcome.

CONCLUSION

So, things look pretty bleak. The United States is a liberal culture. And the tenets of liberalism preclude the meaningful pursuit of racial justice in a culture in which the only effective remedies for racial injustice entail overriding the private beliefs and associational preferences that liberalism protects. Because the appeal of liberalism continues to be strong enough to encompass both the progressive and conservative ends of the political spectrum, it appears that racial injustice will persist in the United States regardless of who is in power. I am not happy about that observation, although I am becoming increasingly resigned to it. We could go a long way toward solving the problem of racial injustice by

31. *See* ROBINSON, *supra* note 22, at 8-9 (discussing failure of affirmative action to address problems of black underclass).

simply insisting on a proportional allocation of societal resources. True, that would upset the sense of entitlement that is strongly felt by many members of the dominant white culture. But if we cared about racial justice, we would not let that stand in our way. We would just do it.