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Racial Exhaustion

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RACIAL EXHAUSTION

DARREN LENARD HUTCHINSON*

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I. INTRODUCTION: TWO LOUISIANA STORIES—RACE, INEQUALITY, AND RHETORIC

The televised images of the plight of Hurricane Katrina survivors sparked a national conversation concerning the salience of race in contemporary United States social policy and group experience. Given the anticipated ferocity of the storm, commentators debated why local and national governmental officials failed adequately to evacuate the city's most vulnerable citizens.[1] The public discourse surrounding Hurricane Katrina exposed a deep perceptual gap regarding the relevance of race among blacks and whites. Opinion data, for example, demonstrate that blacks and whites disagree on whether racial insensitivity impacted President Bush's inadequate response to the plight of the survivors.[2] While

1. PEW RESEARCH CTR., HUGE RACIAL DIVIDE OVER KATRINA AND ITS CONSEQUENCES: TWO-IN-THREE CRITICAL OF BUSH'S RELIEF EFFORTS 2 (2005) [hereinafter HUGE RACIAL DIVIDE] (reporting findings of opinion poll showing that a majority of Americans believe federal and local officials responded inadequately to the storm); Scott Shane, *After Failures, Government Officials Play Blame Game*, N.Y. TIMES, Sept. 9, 2004, at A2.

2. *See generally* HUGE RACIAL DIVIDE, *supra* note 1; Lydia Saad, *Blacks Blast Bush for Katrina Response: Most Believe Racism Was Responsible for Delays in Providing Relief*, GALLUP NEWS SERVICE, Sept. 14, 2005, *available at* http://www.gallup.com/poll/18526/Blacks-Blast-Bush-Katrina-Response.aspx [hereinafter *Blacks Blast Bush*].

blacks attributed the treatment and vulnerability of Katrina victims to their race, whites commonly dismissed racial explanations.[3] This division over the significance of race did not originate with Hurricane Katrina. Instead, an abundance of statistical data consistently demonstrates that persons of color tend to believe that racism remains a substantial barrier to their social and economic advancement, while whites tend to dismiss racial status as a contemporary marker of disadvantage and privilege.[4] These data suggest that whites have, in fact, grown frustrated with ongoing claims of racial injustice. Whites are more likely to believe that the United States has transcended racism, and they often endeavor to explain racially identifiable inequity as a product of nonracial variables such as class inequality, a culture of poverty, or lack of initiative.[5] Persons of color, by contrast, attribute social and economic disparities that correlate with race to past and ongoing injustice.[6]

In the public debates surrounding Hurricane Katrina, two individuals became popular icons of these binary views on the salience of race. Kanye West, a popular music vocalist, advocated a "racial" explanation when, during a televised fundraiser for Hurricane Katrina survivors, he nervously proclaimed that "George Bush doesn't care about black people."[7] Defending her husband and promoting the deracialized viewpoint, Laura Bush dismissed racial explanations for the federal response as "disgusting" and assured the public that President Bush "cares about everyone in our country."[8] Although she discounted race as a variable shaping the vulnerability of Hurricane Katrina survivors, Laura Bush embraced other

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3. *See* HUGE RACIAL DIVIDE, *supra* note 1, at 3 (reporting dramatic differences in opinion among whites and blacks regarding the centrality of race in the plight of Katrina victims); Saad, *supra* note 2, at 1–3 (same).

4. *See, e.g.*, PEW RESEARCH CTR., OPTIMISM ABOUT BLACK PROGRESS DECLINES: BLACKS SEE GROWING VALUES GAP BETWEEN POOR AND MIDDLE CLASS 8 (2007) [hereinafter OPTIMISM ABOUT BLACK PROGRESS] (reporting dramatic disparities among whites and blacks concerning the existence of racism in the United States); Jeffrey M. Jones, *Whites, Blacks, Hispanics Disagree About Way Minority Groups Treated*, GALLUP NEWS SERVICE, July 11, 2006, *available at* http://www.gallup.com/poll/23629/Whites-Blacks-Hispanics-Disagree-About-Way-Minority-Groups-Treated.aspx (reporting dramatic disparities among whites, blacks, Asian Americans and Latinos concerning the perceived mistreatment of persons of color); *Poll: Most Americans See Lingering Racism—In Others*, Dec. 12, 2006, CNN, http://www.cnn.com/2006/US/12/12/racism.poll/index.html (reporting dramatic disparities among whites and blacks concerning the existence of racism in the United States).

5. *See* OPTIMISM ABOUT BLACK PROGRESS, *supra* note 4, at 8 (reporting that whites are more likely than blacks or Latinos to blame blacks for their unequal status).

6. *Id.*

7. John M. Broder, *Amid Criticism of Federal Efforts, Charges of Racism Are Lodged*, N.Y. TIMES, Sept. 5, 2005, at A10.

8. Peter Baker, *FEMA Director Replaced as Head of Relief Effort*, WASH. POST, Sept. 10, 2005, at A17.

structural reasons for their condition, including poverty: "I do think . . . that poor people were more vulnerable. They live in poor neighborhoods; their neighborhoods were the ones that were more likely to flood . . . . Their housing was more vulnerable, and that's what we saw and that's what we want to address in our country."[9] Other commentators contributed to both sides of the explosive public discourse. Conservative commentator Bill O'Reilly blamed the people of New Orleans for the situation using racially and class-tinged language. He observed that "if you become addicted, if you live a gangsta-life, you will be poor and powerless just like many of those in New Orleans."[10] Echoing this sentiment, Pat Buchanan decried, "the character and conduct" of Hurricane Katrina survivors, who "waited for the government to come save them" and "screamed into the cameras for help."[11] O'Reilly and Buchanan rejected racial inequality or class vulnerability as possible factors explaining the status of Hurricane Katrina victims and instead asserted that their own pathological behavior created their harm.[12] Antiracists, however, maintained that conjoined racism and poverty made New Orleans's blacks more susceptible to the hurricane and that these factors also shaped the inadequate governmental preparation for and responsiveness to the dire situation.[13]

More than a century before Hurricane Katrina, blacks in Louisiana occupied the center of another destructive storm that similarly captured media attention and provoked a national debate concerning racial justice. The Colfax Massacre occurred in 1873 after heavily contested state and local elections that pitted black and white Republicans against an entirely white and anti-Reconstruction Democratic party.[14] The Colfax Massacre represents an extreme version of the racial terrorism blacks faced as they attempted to exercise newly obtained political rights. After the Republican governor dispatched a "black unit" of the state militia to prevent white Democrats from forcibly taking control of the Colfax local government, a large group of heavily armed whites stormed the town and slaughtered 280

9. *First Lady: Charges That Racism Slowed Aid 'Disgusting*,' CNN, Sept. 8, 2005, http://www.cnn.com/2005/POLITICS/09/08/katrina.laurabush/index.html.

10. Bill O'Reilly, *Government Can't Protect Us: Part Two*, FOX NEWS, Sept. 8, 2005, http://www.foxnews.com/story/0,2933,168777,00.html.

11. Patrick J. Buchanan, *Failure of an Idea . . . and a People*, WORLD NET DAILY, Sept. 14, 2005, http://www.wnd.com/index.php?fa=PAGE.view&pageId=32332.

12. *See* Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413, 462–69 (2006) (discussing public discourse that blamed Katrina victims for their plight).

13. *Id.* at 451–53 (discussing class and race status of Katrina victims).

14. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED RESOLUTION 437 (1988).

blacks.[15] During the violence, whites chased blacks into the county courthouse, set it afire, and shot those who attempted to escape.[16] Fifty individuals emerged from the building displaying a white flag, and the crowd executed them.[17]

The Justice Department responded to the situation and secured indictments for ninety-seven individuals; only three were convicted.[18] In *United States v. Cruikshank*,[19] a case that many commentators argue helped solidify the demise of Congress's power over Reconstruction,[20] the Supreme Court reversed the convictions.[21] Although the historical context of the bloodshed and criminal complaint's description of the racial identity of the victims and the assailants clearly demonstrate the operative value of race to the conflict, the Supreme Court nevertheless dismissed several counts against the defendants on multiple grounds, including the fact that the prosecutors failed to explicitly allege that defendants acted out of racial hostility, which the opinion construed as a necessary element of the crime of conspiring to deprive blacks of the right to vote.[22] The Court was unwilling to see race despite the centrality of race in Southern election-related violence during and after Reconstruction, and the factual allegations in the criminal complaint that supported a finding of race-based hostility.[23] Despite this racialized historical setting, the Court held that "it does not appear in these counts that the intent of the defendants was to prevent these parties from exercising their right to vote on account of their race . . . . *We may suspect that race was the cause of the hostility;*

15. *Id.*

16. *Id.*

17. *Id.*

18. *See* ROBERT KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866–1876, at 176–78 (1985).

19. 92 U.S. 542 (1876).

20. *See* Benno C. Schmidt, *Principle and Prejudice: The Supreme Court and Race in the Progressive Era*, 82 COLUM. L. REV. 835, 840 (1982) (arguing that *Cruikshank* "left the right to vote in state elections in the grip of terror, at least so far as federal law was concerned"); *see also* Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2350 n.54 (2003) (listing an abundance of scholarship that stands for the proposition that *Cruikshank* and other case law "thwarted federal power to protect the southern black population and facilitated the end of Reconstruction").

21. *Cruikshank*, 92 U.S. at 542.

22. *Id.* at 556.

23. *See* Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2155 n.168 (1993) (arguing that "the racial basis for the actions taken by the *Cruikshank* defendants could hardly have been clearer."); *see also* I. Bennett Capers, *On Justitia, Race, Gender and Blindness*, 12 MICH. J. RACE & L. 203, 226 n.110 (2006) (arguing that in *Cruikshank*, the Court "reversed the[] conviction[s] on a variety of grounds, including the technicality that the indictment, though describing the racial identities of the parties involved, had failed to explicitly allege that the violence was motivated by race").

but it is not so averred."[24] Through "sterile formalism,"[25] the Justices obfuscated the salience of race in one of the most graphically racist set of facts ever to reach the Court.[26] As early as Reconstruction, the Court callously denied blacks' racial injuries. This decision, along with a series of rulings from the Court, would severely undermine federal enforcement of political and social equality for emancipated blacks.[27]

Following the demise of Reconstruction, the Court would formalize its disdain for antiracist legislation. In the *Civil Rights Cases*,[28] which invalidated a Reconstruction-era federal law that prohibited racial discrimination in places of public accommodation, the Court opined that the time had now come for blacks, who had "shaken off" the impact of slavery, to become "mere citizen[s]," rather than "special favorite[s] of the law."[29] Less than two decades after the ratification of the Thirteenth Amendment, when blacks exercised constitutional liberties under the threat of extreme violence, the Court believed that Congress had provided excessive remedies for racial injustice. The Court, echoing popular opinion, had reached a point of *racial exhaustion*.

This Article examines historical and contemporary race discourse contained in political and juridical sources in order to illustrate how opponents to racial egalitarian measures have frequently contested such policies on the grounds that they are redundant, unnecessary, or too burdensome or taxing. Racial exhaustion rhetoric has operated as a persistent discursive instrument utilized to contest claims of racial injustice and to resist the enactment of racial egalitarian legislation. Racial exhaustion rhetoric has enjoyed particular force during and immediately following periods of mass political mobilization by antiracist social movements and institutional political actors, and it retains potency in contemporary racial discourse. Although this Article conducts a cross-historical analysis of debates over racial justice policy, it does not rest on

24. *Cruikshank*, 92 U.S. at 556 (emphasis added).

25. *See* DeShaney v. Dep't of Soc. Servs., 489 U.S. 189, 212 (1989) (Blackmun, J., dissenting).

26. *See* TED TUNNELL, THE CRUCIBLE OF RECONSTRUCTION: WAR, RADICALISM, AND RACE IN LOUISIANA 1862–1877, at 192 (1984) ("The massacre at Colfax courthouse ranks as the worst single day of carnage in the history of Reconstruction . . . ."); Lawrence, *supra* note 23, at 2155 n.168; David Dante Troutt, *Screws, Koons, and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions*, 74 N.Y.U. L. REV. 18, 58 n.123 (1999) (arguing that *Cruikshank*'s "blindness to factual context is alarming"); Note, *Congressional Power Under the Civil War Amendments*, 1969 DUKE L.J. 1247, 1258 (observing that in *Cruikshank*, the indictment failed for a specific allegation of racial intent based on "race even though the facts of the case revealed a most heinous racial crime").

27. *See* Katz, *supra* note 20, at 2350 n.54 (citing numerous sources that support this proposition).

28. 109 U.S. 3 (1883).

29. *Id.* at 25.

the idea that racial discourse has retained a static quality over time.[30] Indeed, innumerable historical factors have contributed both to the evolution of racial status and to the content of race-equality discourse. Despite the contingent nature of language and identity, however, opponents to racial equality measures have historically discounted the ongoing relevance of race and have depicted demands for civil rights remedies as vexatious and injurious to whites. The pervasive deployment of this narrative has important implications for participants in antiracist social movements, civil rights scholars and attorneys, and judicial scholars who wish to understand the impact of political rhetoric upon doctrine.

This Article proceeds in three principle parts. Part II explains the role of rhetoric and narratives in shaping commonly held societal beliefs and argues that racial exhaustion discourse functions as a social script that seeks to portray the United States as a post-racist society. Part II then summarizes the basic content of racial exhaustion rhetoric and identifies five common arguments that have endured across historical contexts, which depict race-based remedies as redundant, taxing, injurious to whites, special handouts to blacks, and futile because law cannot alter racial inequality. Next, Part II examines the political rhetoric employed by nineteenth-century Congressional opponents to Reconstruction and by the Supreme Court in order to illustrate the usage of racial exhaustion discourse as an early rhetorical instrument to contest race-based remedies and claims of racial injustice. Part III analyzes domestic and international factors that created political opportunities for the successful advocacy of progressive racial policies after World War I, during World War II, and in the subsequent Cold War era. Part III then demonstrates that, despite the changing political conditions that promoted progress in United States race relations, opponents of racial egalitarianism during these historical moments dismissed race-based remedies as excessive and unfair. Finally, Part III examines the deployment of racial exhaustion rhetoric in contemporary political and juridical discourse in order to situate current usage of this rhetoric within a broader historical context. Part IV considers how racial exhaustion rhetoric hinders political opportunities for antiracist social movements. Given the pervasive and persistent belief that the United States has transcended racial inequality, antiracist social

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30. Stephen M. Feldman, *The Persistence of Power and the Struggle for Dialogic Standards in Postmodern Constitutional Jurisprudence: Michelman, Habermas, and Civic Republicanism*, 81 GEO. L.J. 2243, 2277 (1993) ("Postmodern theorists realize that our forms of thought and action are historically and culturally contingent and that those forms constantly regenerate themselves through our own words, thoughts, and actions.").

movements may have to reframe some of their agendas in race-neutral terms, including the advocacy of class-based remedies. Such a decision risks artificially conflating the experiences of poor persons across racial and gender lines, and it could generate political opposition which depicts antipoverty policies as special handouts to undeserving individuals, in particular persons of color. Nevertheless, successful antiracist political mobilization and legal arguments might require that social movements contest the premises of racial exhaustion rhetoric while simultaneously laboring within its confines.

II. NINETEENTH-CENTURY RACIAL DISCOURSE

A. *Racial Exhaustion: An American Narrative*

1. *Narratives and Society*

Social narratives seek to cohere sequences of important cultural and political events.[31] They perform a vital function because they permit societies to make sense of and to convey understanding about contemporary and historical experiences.[32] As such, narratives serve a macro-social role: they allow groups of individuals to unify around a set of shared experience and beliefs.[33] To accept the premise of a "collective narrative," the listener must believe that the story accurately conveys information concerning the broader social landscape in which the individual exists.[34]

Sociologists who study language and narrative theory have analyzed narratives constructed by dominant social groups.[35] Dominant group narratives, like all collective narratives, attempt to explain social events and conditions. With respect to power-based inequity, sociologists have observed that dominant group members often legitimize inequality by attributing group disparities to individual shortcomings instead of

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31. Larry J. Griffin, *Narrative, Event-Structure Analysis, and Causal Interpretation in Historical Sociology*, 98 AM. J. SOC. 1094, 1097 (1993).

32. *Id.* at 1099 ("Narrative therefore permits a form of sequential causation that allows for twisting, varied, and heterogeneous time paths to a particular outcome.").

33. *See* Eduardo Bonilla-Silva, Amanda Lewis & David G. Embrick, *"I Did Not Get That Job Because of a Black Man . . .": The Story Lines and Testimonies of Color-Blind Racism*, 19 SOC. FORUM 555, 556 (2004) ("Stories are not only central to narrating our individual lives but to social relations.").

34. *Id.* at 575.

35. *Id.* at 556 ("Storytelling most often reproduces power relations, as the specific stories we tell tend to reinforce the social order.") (citation omitted).

domination or bias.[36] As such, dominant narratives concerning social relations attempt to "naturalize" uneven distributions of economic and political power.[37]

Social movements,[38] like individuals and groups, also rely on rhetoric and narratives to articulate shared social and political perspectives. Social movement "frames" organize the movement's objectives and activities around an articulable political message.[39] As social movement theorists have observed: "[F]rames are constructed . . . as movement adherents negotiate a shared understanding of some problematic condition or situation they define as in need of change, make attributions regarding who or what is to blame, articulate an alternative set of arrangements, and urge others to act in concert to affect change."[40] Similarly, by engaging social movement actors and the electorate, politicians utilize framing to present policy initiatives in a manner that generates political support.[41]

2. Social Narratives on Race

The concept of social or collective narratives provides a useful lens for examining racial equality discourse because social movements, political actors, and social groups shape public policy, public opinion, and Supreme Court doctrine surrounding race and racial justice.[42] Although many

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36. *See* Lawrence D. Bobo, *Prejudice as a Group Position: Microfoundations of a Sociological Approach to Racism and Race Relations*, 55 J. SOC. ISSUES 445, 464 (1999) (discussing current racist ideology which "involves persistent negative stereotyping of Black Americans, a tendency to blame Blacks themselves for the Black-White gap in socioeconomic standing, and resistance to meaningful policy efforts to ameliorate America's racist social conditions and practices.").

37. *See* Eduardo Bonilla-Silva, *Racial Attitudes or Racial Ideology? An Alternative Paradigm for Examining Actors' Racial Views*, 8 J. POL. IDEOLOGIES 63, 70 (2003) (discussing "whites' naturalization of race-related matters" or the effort to "normalize events or actions that could otherwise be interpreted as racist").

38. Sociologists and political scientists define a "social movement" as "a purposive and collective attempt of a number of people to change individuals or societal institutions and structures." Mayer N. Zald & Roberta Ash, *Social Movement Organizations: Growth, Decay and Change*, 44 SOC. FORCES 327, 329 (1965).

39. Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611, 615 (2000).

40. *Id.*

41. *See* William G. Jacoby, *Issue Framing and Public Opinion on Government Spending*, 44 AM. J. POL. SCI. 750 (2000) (observing that "politicians will attempt to define, or 'frame,' issues in ways that maximize support for their own positions").

42. *See* William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 424–59 (2001) (discussing the role of law in fortifying social movement activity in antiracist, feminist, and gay, lesbian, bisexual, and transgender contexts); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 300–01 (2001) (discussing social movement, public opinion, and coordinate branch influence on constitutional law).

historians rightfully caution against essentializing the meaning of language and political rhetoric employed across historical moments,[43] opponents to racial justice measures have frequently contested such policies with a strikingly consistent discourse that depicts racial remedies as redundant, unnecessary, vexatious, futile, and unfair to whites. This rhetoric of racial exhaustion contends that persons of color (most often blacks) have benefitted from a protracted and costly social project that has defeated and adequately remedied racism. Accordingly, any lingering social and economic inequality that corresponds with racial status results from nonracial factors such as poverty, individual pathology, or lack of merit. Racial exhaustion rhetoric depicts the United States as a post-racist society that rationally views claims of racial injustice and demands for remedial state action with suspicion.[44]

3. Particulars of Racial Exhaustion

Opponents of racial egalitarian initiatives have portrayed such policies as redundant and overly burdensome by relying upon a series of distinct, yet related, claims about the status of United States race relations. Collectively, these arguments seek to disprove the necessity, fairness or efficacy of policies designed to ameliorate racial inequity. Historically, the following assertions have often framed political resistance to racially egalitarian legal enactments:

- The United States has already waged a sustained, taxing, and successful battle against racism, thus obviating the need for remedial state action;

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43. On the debates among historians concerning the relevance of language, history and postmodernism, see Neville Kirk, *History, Language, Ideas and Post-modernism: A Materialist View*, 19 SOC. HIST. 221 (1994).

44. Other scholars have considered this argument from a contemporary perspective and have argued that a new racism exists, which, unlike Jim Crow and slavery, does not rest on blatant and overt white supremacist notions, but upon the belief that persons of color have equal opportunity and simply lack initiative and that lawmakers need not implement racially egalitarian remedies. *See, e.g.*, Colin Wayne Leach, *Against the Notion of a "New Racism*,*"* 15 J. COMMUNITY & APPLIED SOC. PSYCHOL. 432, 439 (2005) (discussing "new racism" theories). Other scholars have made similar claims using different terminology. *See* Bobo, *supra* note 36, at 464 (analyzing "laissez-faire racism"); Bonilla-Silva, *supra* note 37, at 68 (discussing "colour blind racism"). This Article, however, complicates the claim that white depictions of the United States as post-racial is a new development. Instead, this argument has arisen in debates over racial justice as early as Reconstruction. *See infra* text accompanying notes 48–130. *Cf.* Leach, *supra*, at 434 (complicating notion that "'new racism'" is "new").

- State actors should avoid excessive, burdensome, or redundant attention to race by placing rigid time or substantive limitations around remedies for racial inequality;
- State actors should decline to address racial inequality because the law cannot alter race relations, and efforts to utilize law in this fashion would waste societal resources;
- Because race no longer remains a significant barrier to economic advancement, any ongoing material inequality between whites and persons of color results from nonracial factors, such as poverty or individual merit; and
- Race-based remedies harm and alienate innocent whites and give blacks a special or preferential status.[45]

Opponents to racial egalitarianism have frequently utilized these arguments in order to portray the United States as a post-racist society, resist race-based remedies as taxing or futile, and portray claims of racial injustice as false and opportunistic. Some contemporary sociologists have analyzed similar dominant claims concerning the status of domestic race relations, but have concluded that depictions of the United States as a post-racist society only emerged following the Civil Rights Movement as a result of a concerted political effort to resist the implementation of policies such as affirmative action and the formal dismantling of Jim Crow.[46] This "new racism" approach severely distorts the historical content of racial discourse and undervalues the endurance of racial exhaustion discourse in arguments contesting racial progress.[47] These scholars' failure to conduct a more comprehensive and historical analysis of racial discourse, as set forth in this Article, prevents them from uncovering the pervasive and consistent deployment of racial exhaustion rhetoric and its prominent role in contesting racial egalitarianism and shaping public opinion concerning the appropriateness of such measures.

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45. This list does not exhaust the rhetorical claims of countermovements to racial justice. In fact, other categories of arguments have persisted historically as well. *See* Christopher A. Bracey, *The Cul de Sac of Race Preference Discourse*, 79 S. CAL. L. REV. 1231, 1241 (2006) (discussing "innocence," "merit," "stigma" and "domestic tranquility" as common themes in arguments contesting race-based remedies).

46. *See supra* note 44.

47. Leach, *supra* note 44, at 434 (complicating notion that "new racism" is "new").

B. Low Stamina: Racial Exhaustion in the Reconstruction Era

1. From Abolition to Freedom

Following the Civil War, the nation would vigorously debate the meaning of freedom for blacks. Echoing the contours of contemporary equality debates, political progressives and conservatives would clash over whether freedom and equality meant emancipation in strict formal terms, or whether it also involved the extension of political, civil, or social equality to blacks.[48] Certainly, many former slaves hoped that freedom would imply more than formal emancipation. Instead, freedom should include economic independence, reparations, and political and civil equality.[49] Blacks wanted to negotiate their economic lives as free laborers and to participate in the political life of the nation on terms equal to whites.[50] They also saw education as a critical dimension of their development into a free and self-sufficient community.[51] The thick version of equality imagined by blacks meant, as Frederick Douglas observed, that "the work does not end with the abolition of slavery, but only begins."[52]

2. Political Resistance to Racial Equality: Opposition to the Freedmen's Bureau

a. Congressional Opposition

Blacks would find varying degrees of support for racial remedies among congressional Republicans. The most radical of the Republicans wanted to distribute confiscated plantations to the former slaves.[53] Generally, Republicans believed the national government should provide economic assistance and physical protection to the former slaves.[54] In 1865, Congress created the Freedmen's Bureau to deliver essential goods

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48. *See generally* Pamela Brandwein, *Slavery as an Interpretive Issue in the Reconstruction Congresses*, 34 LAW & SOC'Y REV. 315 (2000) (arguing that differing conceptions of freedom and equality explain the policy preferences of the Republicans and Democrats in the Reconstruction Congress).

49. FONER, *supra* note 14, at 110–19 (discussing early political activities in the emancipation period).

50. *Id.* at 78 ("[U]nderpinning the specific aspirations [of the freed slaves] lay a broader theme: a desire for independence from white control, for autonomy both as individuals and as members of a community itself being transformed as a result of emancipation.").

51. *Id.*

52. *Id.* at 76.

53. *Id.* at 68.

54. *Id.*

and services to the newly freed slaves.[55] Initially an agency in the War Department, the Freedmen's Bureau provided extensive services to the former slaves despite a political culture that disfavored extensive aid to the poor, especially as a federal imperative. The Bureau would ultimately facilitate the development of over 3000 schools for black children in the South; establish tribunals to entertain complaints of whites' maltreatment of blacks; attend to the urgent health crisis among the former slave population by giving them care in military hospitals and federally established civilian health clinics; monitor court proceedings involving blacks in the South; represent blacks in lawsuits against whites; and distribute confiscated lands to former slaves (a controversial policy that Congress eventually abandoned).[56]

A complicated mixture of overt racial prejudice, free market theories, and appeals to federalism framed political opposition to the Bureau. Congressional opponents also invoked an early narrative of racial exhaustion in their arguments contesting the agency's appropriateness. Specifically, opponents argued that the Bureau (1) was excessive in terms of its substantive scope and duration; (2) discriminated against and infringed the liberty of whites and gave blacks a special status;[57] (3) was a redundant and wasteful undertaking because the Civil War and the subsequent ratification of the Thirteenth Amendment had already secured the freedom and well-being of blacks; (4) was unnecessary because individual shortcomings, rather than racial oppression, explained the vulnerability of blacks; and (5) wasted resources because the law could not alter race relations. Many of the opponents subscribed to blatantly racist ideologies; yet, they also framed their arguments in terms of racial exhaustion.

Members of Congress challenged the Bureau by repeatedly characterizing it as an excessive and boundless undertaking. Senator Guthrie of Kentucky, for example, stated that he was "astonished at the extreme measures" proposed in the legislation.[58] After discussing the cost of operating the agency, Senator Saulsbury of Delaware described the proposed legislation as a "bill" of "magnificent" proportions.[59] Senator

55. *Id.*

56. *See id.* at 142–70 (discussing Bureau activities).

57. Other scholars have examined the rhetoric of opponents to the Bureau as resting on charges of reverse discrimination. *See* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 755–75 (1985) (discussing debates over various versions of Bureau legislation).

58. CONG. GLOBE, 39th Cong., 1st Sess. 346 (1866).

59. *Id.* at 362.

Davis of Kentucky argued that the bill was a "bold, reckless, and unconstitutional system of measures."[60] After President Johnson vetoed the legislation,[61] Senator Davis contested Republican efforts to override the veto by reiterating his observation that the Bureau was excessive:

> This is a synopsis of the act. It organizes the largest and most expensive eleemosynary institution that ever existed, and adopts all the Negro population of the United States, numbering about four and an half millions [sic], as their wards; and it provides that the support of any of them may, as a large portion of them necessarily must, become a charge upon it.[62]

Lawmakers also objected to efforts to make the Bureau a "permanent" federal agency.[63] Mirroring arguments in contemporary affirmative action discourse,[64] opponents questioned the open-ended nature of the legislation. Senator Hendricks of Indiana, for example, argued that:

> [T]his bill proposes that the bureau shall be permanent. I ask Senators, in the first place, if they are now, with the most satisfactory information that is before the body, willing to do that which they refused to do at the last session of Congress. We refused to pass the law when it proposed to establish a permanent department . . . . [I]s the Senate now . . . willing to make this a permanent bureau and department of the government?[65]

The opposition viewed with suspicion the continuation of the agency, now that "peace and quiet . . . prevail[ed] over the country."[66] At the infancy of national efforts to disestablish the substantive impact of slavery, opponents of race-based remedies demanded strict time limits around such policies.

When viewed in an historical context, the objecting Senators' arguments reflect a political culture in which massive relief to poor people was unprecedented, particularly as a function of the federal government.[67]

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60. *Id*. at 402.
61. *See infra* text accompanying notes 94–95.
62. CONG. GLOBE, 39th Cong., 1st Sess. 933 (1866).
63. *Id.* at 315.
64. *See infra* text accompanying notes 236–54.
65. CONG. GLOBE, 39th Cong., 1st Sess. 315 (1866).
66. *Id.*
67. JAMES MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 842 (1988) ("[T]he Freedmen's Bureau represented an unprecedented extension of the federal government into matters of social welfare and labor relations."); Michele Landis Dauber, *The Sympathetic State*, 23 LAW & HIST. REV. 387, 408–19 (2005) (discussing Bureau as "innovation" leading to wider federal role in relief to

But the Bureau's congressional opponents also depicted the agency as excessive by portraying the South as racially benevolent, and asserting that preexisting measures already secured blacks' well-being. Senator Hendricks, for example, proclaimed that:

> The President of the United States informs us that the southern States themselves are adopting measures with a view to the protection and prosperity of the colored people, and this within so short a period after the close of the war, when we could scarcely have expected that the reorganization of the southern States would have gone so far, when we could scarcely have expected that the prejudices engendered by the war would have passed away to such an extent as that the southern States themselves would have taken this very important and desirable step.[68]

Hendricks observed further that the Thirteenth Amendment made the former slaves "as free as any Senator upon this floor."[69] Senator Guthrie added that the Thirteenth Amendment effected the "complete freedom of every individual"[70] and that it "[broke] down every provision in the Constitution and laws of the United States and of the several States which prevents the enjoyment of that freedom."[71] Senator Cowan of Pennsylvania made a similar assertion, observing that "there is ample remedy now" for any injustice done to blacks.[72] The Thirteenth Amendment obviated the need for antiracist legislation.

Dissenting members of Congress also argued that the Bureau encouraged idleness among blacks, discriminated against whites, and gave blacks special benefits. These nineteenth-century arguments correlate strongly with contemporary political and juridical debates contesting the propriety of race-based remedies, such as affirmative action.[73] The debates surrounding the Bureau demonstrate that public frustration with legal efforts to alleviate the substantive effects of racial injustice did not recently emerge as the inevitable consequence of protracted legal efforts to

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the poor); Eric A. Posner & Adrian Vermeule, *Emergencies and Political Change: A Reply to Tushnet*, 56 STAN. L. REV. 1593, 1594 (2004) (describing the Bureau as among "the first glimmer of federally operated social welfare agencies"); W. Sherman Rogers, *The Quest for Black Economic Liberty: Legal, Historical, and Related Considerations*, 48 HOW. L.J. 1, 40 (2004) ("The Freedmen's Bureau was the first federal welfare agency.").

68. CONG. GLOBE, 39th Cong., 1st Sess. 315 (1866).

69. *Id*. at 317.

70. *Id.* at 335.

71. *Id.*

72. *Id*. at 340.

73. *See infra* text accompanying notes 221–54.

dismantle racism. Instead, the rhetoric of racial exhaustion challenged even the earliest national policies designed to remedy racial subjugation. Contesting the proposed legislation, Senator Saulsbury complained that:

> [H]undreds and thousands of the negro race have been supported out of the Treasury of the United States, and you and I and the white people of this country are taxed to pay that expense. For the first time in the history of this country has the thing occurred, that the great mass of the people have been taxed to support in idleness a class who are too lazy or too worthless to support themselves.[74]

Challenging the proposed distribution of land to the former slaves, Salisbury further argued that:

> No land is to be provided for the poor white men of this country, not even poor land; but when it comes to the negro race three million acres must be set apart, and it must be "good land" at that. I know that the bill provides that this land shall be rented to the negro; but those of you who have observed the thriftiness and skill with which the negro population manage their agricultural operations, will find that when Sambo comes to pay his rent[,] his rent will be pretty much like the rent of the individual who, when his landlord called upon him for his one third of the produce of the farm, said, "Sir, I did not produce a third." He will raise nothing to pay the rent.[75]

Echoing Saulsbury's observations, Senator Davis criticized the legislation for distinguishing among "paupers"; he argued that "[i]f there is an obligation or a duty or a power to take care of the negro paupers, there is, I suppose, an equal obligation to take care of the white paupers of different States."[76] Senator Johnson of Maryland opined that remedying social vulnerability must take place in a color-blind fashion:

> If there is an authority in the Constitution to provide for the black citizen, it cannot be because he is black; it must be because he is a citizen; and that reason being equally applicable to the white man as to the black man, it would follow that we have the authority to clothe and educate and provide for all citizens of the United States who may need education and providing for.[77]

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74. CONG. GLOBE, 39th Cong., 1st Sess. 362 (1866).
75. *Id.*
76. *Id.* at 370.
77. *Id.* at 372.

For Senator Johnson, however, a general authority to provide relief to poor persons would exceed the scope of congressional power.[78]

Having construed the proposed legislation as an excessive, unnecessary, and discriminatory intervention, the objecting senators concluded that it would give "special rights" to blacks. Special rights discourse has retained an important presence in contemporary civil rights discourse, even outside of the context of race.[79] Deploying this theme during Reconstruction, Senator McDougall of California argued that: "Everything that is proposed to be done is inviting [blacks] to think that they are not only quite as good as, but a little better than . . . the white races."[80] He further observed that the Bureau would make blacks "superior" to whites,[81] give them "favors that the poor white boy in the North cannot get,"[82] and treat blacks more positively than "the Indian, whom I hold to be a nobler and far superior race."[83] Senator Hendricks echoed the special rights theme, observing that:

> I have not heard since Congress met that any colored man has done a wrong in this country for very many years; and I have scarcely heard that any white man coming in contact with colored people has done right for a number of years. Everybody is expected to take sides for the colored man against the white man. If I have to take sides, it will be with the men of my own color and my own race; but I do not wish to do that.[84]

Even as he condemned the proposed legislation as constituting reverse discrimination, Senator Hendricks expressed a commitment to white supremacy.

Members of the Reconstruction Congress also argued that the Bureau infringed the liberty of whites. Senator Hendricks, for example, asserted that the Bureau was "more dangerous to the liberties of the people than

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78. *Id.* at 372–73 (disputing Congress' authority to provide welfare relief). *See also* John M. Bickers, *The Power to Do What Manifestly Must Be Done: Congress, the Freedmen's Bureau, and Constitutional Imagination*, 12 ROGER WILLIAMS U. L. REV. 70, 102 (2006) (observing that Senator Johnson believed that equal application of the Bureau's activities would imply boundless Congressional power).

79. *See* Jeffrey R. Dudas, *In the Name of Equal Rights: "Special" Rights and the Politics of Resentment in Post-Civil Rights America*, 39 LAW & SOC'Y REV. 723, 724–25, 730–31 (2005) (discussing disparagement of equality measures as "special rights" in contemporary political discourse).

80. CONG. GLOBE, 39th Cong., 1st Sess. 401 (1866).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 319.

that against which our forefathers fought in the Revolution."[85] Similarly, Senator Davis contended that the legislation would cause the "grinding oppression of eight million white people"[86] and would "reenslave the freedmen and . . . reduce the white race of the southern States to a slavery even lower than that of the blacks."[87]

Finally, members of Congress opposed the legislation on the grounds that law could not improve race relations. Despite the fact that many of these same individuals argued that existing laws provided sufficient protection for blacks against maltreatment by whites, Bureau opponents asserted that racial transformation could only take place through mutual assent of the races. Senator Davis, for example, insisted that:

> The late owners and their slaves know, or would soon learn and recognize the fact, that mutual confidence and good will are essential to the welfare of both races. The white man would be taught that he could win these from the black man only by justice, kindness, and respectful treatment; and the latter would not be slow in understanding that a diligent and faithful performance of his duties to his employer, and an obliging disposition toward him and his family, would not only secure his rights, but also a generous sympathy.[88]

Davis concluded that "[i]f Congress would refrain from all intermeddling with these matters . . . they would soon be adjusted upon a basis combining justice, humanity, and the soundest policy."[89]

During one of the earliest periods of sustained national attention to racial inequality, members of Congress portrayed the United States as having moved beyond racial abuses, and they depicted racial egalitarianism as excessive, futile, injurious to whites, and as providing special benefits to blacks. The comments of Senator Cowan provide a striking example of the deployment of racial exhaustion rhetoric in Reconstruction-era race equality debates. An exasperated Cowan wondered "where these [racial] difficulties are to end."[90] He complained that:

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85. *Id.*
86. *Id*. at 936.
87. *Id*. at 935.
88. *Id*.
89. *Id.*
90. *Id*. at 343.

> We have made the negro free. . . . But what next? After the negro is free we are told that he cannot protect himself; we must do something for him. Well, what more must we do? We must give him a vote. What good will that do him? It will only multiply the chances of his having his head broken at the polls in contact with a much stronger race than he is. . . . [A]nd if we give him a vote tomorrow, what then? . . . What more must you do for him? You must allow him to hold office. A vote, of course is a mere induction to the exercise of power. . . . Then the negro must hold office; and is he any better after that?[91]

Cowan also stated that he "should like to know where this is going to end—this insane crusade to try to do something which is not in the nature of things to do?"[92] Members of the House of Representatives made similar claims about the legislation.[93]

b. Presidential Opposition

Although Congress voted to extend the Bureau, President Johnson vetoed the legislation. President Johnson's veto message restates many of the arguments made by congressional opponents of the Bureau. Johnson argued that the Bureau was wasteful and redundant due to the elimination of slavery:

> The institution of slavery . . . has been already effectually and finally abrogated throughout the whole country by an amendment of the Constitution of the United States, and practically its eradication has received the assent and concurrence of most of those States in which it at any time had an existence. I am not, therefore, able to discern, in the condition of the country, anything to justify an apprehension that the powers and agencies of the Freedmen's Bureau, which were effective for the protection of freedmen and refugees during the actual continuance of hostilities and of African servitude, will now, in a time of peace and after the abolition of slavery, prove inadequate to the same proper ends.[94]

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91. *Id.*
92. *Id.*
93. *See* Schnapper, *supra* note 57, at 756–57 (discussing legislative debates concerning various versions of the Bureau legislation).
94. CONG. GLOBE, 39th Cong., 1st Sess. 916 (1866).

Johnson articulated additional reasons for vetoing the legislation, and these arguments also construct a narrative of racial exhaustion. Like the objecting members of Congress, Johnson viewed race-based remedies as unfair and detrimental to whites. Responding to portions of the bill providing for the construction of schools for blacks and for the provision of shelter to the former slaves, Johnson argues that:

> [Congress] has never founded schools for any class of *our own people*, not even for the orphans of those who have fallen in the defense of the Union, but has left the care of education to the much more competent and efficient control of the States, of communities, of private associations, and of individuals. It has never deemed itself authorized to expend the public money for the rent or purchase of homes for the thousands, not to say millions, of the *white race* who are honestly toiling from day to day for their subsistence. A system for the support of indigent persons in the United States was never contemplated by the authors of the Constitution, nor can any good reason be advanced why, as a permanent establishment, it should be founded *for one class or color of our people* more than another.[95]

Explicitly excluding blacks from his vision of "our" people, Johnson nonetheless appealed to equality principles in order to challenge remedies for the former slaves. Johnson's arguments also express a commitment to states' rights and a hostility to governmental support for poor people regardless of race, illustrating the historical enmeshment of racist ideology with principled arguments concerning the appropriate function of the State.[96] Furthermore, Johnson, like the objecting Senators, appealed to class distinctions and, more specifically, to a pervasive belief that Congress should not provide relief to poor people regardless of race.

Johnson also disagreed with the continuation of the Bureau on the grounds that blacks had sufficient opportunities for subsistence, and that governmental assistance would therefore stigmatize them: "The idea on which the slaves were assisted to freedom was that, on becoming free, they would be a self-sustaining population. Any legislation that shall imply that they are not expected to attain a self-sustaining condition *must have a tendency injurious alike to their character and their prospects.*"[97] Johnson's arguments track modern discourse disfavoring race-based

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95. *Id.* (emphasis added).
96. *See infra* text accompanying notes 311–15.
97. CONG. GLOBE, 39th Cong., 1st Sess. 916 (1866) (emphasis added).

remedies. He views racial redress as a handout to blacks, unfair to whites, unnecessary given the progress the country had already made, and excessive in terms of substantive scope and duration.[98]

3. Reconstruction-Era Jurisprudence

The Reconstruction-era Court generally embraced conservative sentiment and, in a series of cases, invalidated important civil rights legislation and restrained the ability of federal authorities to protect blacks from subjugation. The factual context of the first Court decision involving a claim under the Civil War Amendments did not concern race. In the *Slaughter-House Cases*,[99] the Court rejected a challenge to a Louisiana law that removed slaughtering companies from New Orleans, forced them to locate at a site outside of the city, and required that they pay a fee to transact business.[100] Although the state justified the law on public-health grounds,[101] the plaintiffs argued that the law deprived them of equal protection, a privilege or immunity of citizens of the United States, and "property" without due process of law; they also argued that the law interfered with their ability to control their own labor, which allegedly violated the Thirteenth Amendment.[102] Much of the scholarship analyzing this decision focuses on the Court's narrow reading of the privileges and immunities clause and its constrained view of national power.[103] But many scholars have linked this case with judicial intolerance of Reconstruction, despite the pronounced absence of race in the immediate factual context of the litigation.[104]

On the surface, *Slaughter-House* is deceptively antiracist. The case, in very powerful language, holds that the Civil War Amendments were designed to ensure the freedom of the slaves and to protect them from

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98. *Cf.* FONER, *supra* note 14, at 248 ("Johnson voiced themes that to this day have sustained opposition to federal intervention on behalf of blacks.").

99. 83 U.S. (16 Wall.) 36 (1872).

100. *Id.* at 59–60.

101. *Id*. at 64.

102. *Id.* at 66.

103. *See, e.g.*, Michael G. Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1547 (1983) ("[T]he most common criticism of *Slaughter-House* is that it rendered the privileges or immunities clause superfluous."); Michael J. Gerhardt, *The Ripple Effects of* Slaughter-House*: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 417 (1990) ("[T]he radical change in federalism the *Slaughter-House* Court rejected was precisely what the Republican drafters and supporters of the fourteenth amendment intended.").

104. *See, e.g.*, Rogers M. Smith, *Legitimating Reconstruction! The Limits on Legalism*, 108 YALE L.J. 2039, 2072 (1999) (linking *Slaughter-House* with "judicial retreat from using the reconstruction amendments to protect blacks").

enduring oppression by whites.[105] The economic discrimination claim of the white business owners fell beyond the scope of the "pervading purpose" of the Amendments.[106] The Court's narrow construction of federal authority, however, had substantial implications for the ability of Congress to elaborate racial equality and disestablish slavery.[107] *Slaughter-House* viewed the creation and enforcement of rights and liberties primarily as a function of states, although the historical record provided little evidence for general optimism that state governments would effectively protect blacks from racial domination.[108] Despite this reality, the Court feared that congressional elaboration and enforcement of rights secured by the Civil War Amendments would "fetter and degrade" state governments,[109] and it ruled that federal judicial remedies would make the Court a "perpetual censor" of state legislation.[110] Although the case involved nonracial claims, the Court's ruling nonetheless implied judicial intolerance with Congress' Reconstruction agenda.[111] Before any black

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105. The Court holds that:

> We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

Slaughter-House, 83 U.S. at 71–72.

106. *Id.* at 71.

107. Smith, *supra* note 104, at 2072 (arguing that the Court chose *Slaughter-House* as the "first Fourteenth Amendment case to launch a judicial retreat from using the Reconstruction amendments to protect blacks" and that the "retreat would . . . only increase for the remainder of the century").

108. As *Slaughter-House* itself acknowledges, states across the South had enacted repressive Black Codes which effectively placed many of the former slaves back on plantations and mandated discrimination and mistreatment against them in a host of settings. *See Slaughter-House*, 83 U.S. at 70.

109. *Id.* at 78. The Court held that:

> [W]hen, as in the case before us, these consequences are *so serious, so far-reaching and pervading*, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

Id. at 78 (emphasis added).

110. *Id.*

111. PHILIP A. KLINKNER & ROGERS M. SMITH, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA 85 (1999) ("[T]he justices must have known that this reasoning

litigant could assert a claim under the Reconstruction Amendments before the Court, the Justices placed strict boundaries around federal enforcement of civil rights. On its own terms, the Court acted to avoid perpetual involvement by the national government in the affairs of the states. Following *Slaughter-House*, a number of other decisions by the Court greatly undermined Congressional authority to protect blacks from oppression.[112]

C. The End of Reconstruction

During Reconstruction and after its end, blacks suffered increasing racial terror. Much of the violence directed towards blacks sought to police their exercise of political liberties.[113] The situation became extremely graphic during the 1870s. Although President Grant won the election in 1872, national public opinion became increasingly intolerant of Reconstruction and federal intervention in racial conflicts.[114] The Colfax Massacre of 1873[115] and other violent eruptions would test national resolve for federal protection of southern blacks.[116] In 1874 another violent election took place in Louisiana, and the Republican governor requested that President Grant eject white Democrats from the state legislature.[117] Federal troops removed the individuals, sparking a controversy that further eroded public support for Reconstruction.[118] One newspaper declared that "People are *becoming tired* of . . . abstract questions, in which the overwhelming majority of them have no direct interest. The negro

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also prevented the federal judicial protection of African American citizens against the growing number of 'Redeemed' southern state governments, governments that were being recaptured by whites virulently opposed to racial equality.").

112. Gautham Rao, *The Federal* Posse Comitatus *Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America*, 26 LAW & HIST. REV. 1, 51 (2008) (discussing a "string of decisions," including *Slaughter-House*, "that effectively removed the foundational rationale for Reconstruction" and which made "Reconstruction laws . . . all but dead letters").

113. WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION: 1869–1879, at 27–46 (1979) (discussing violence against southern blacks during 1870s and 1880s); Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 683, 700 (2004) ("Although the Fourteenth Amendment abolished the black codes and blacks achieved admirable political gains in the South during Reconstruction, the withdrawal of federal troops triggered a determined movement by whites to disenfranchise blacks through violence, intimidation, and a variety of voting 'qualifications' designed and administered to prevent blacks from voting.").

114. KLINKNER & SMITH, *supra* note 111, at 80.

115. *See supra* text accompanying notes 14–17.

116. *See* KLINKNER & SMITH, *supra* note 111, at 85 (arguing that in the mid-1870s, "the Grant administration lost most of its waning energy for restraining southern whites" and that "[i]t was clear that such efforts would get little support in court or at the polls").

117. FONER, *supra* note 14, at 551.

118. *Id.*

question, with all its complications, and the reconstruction of the Southern States, with all its interminable embroilments, have lost much of the power they once wielded."[119] Or as one Republican politician would state: "our people are *tired out* with this worn out cry of Southern outrages."[120]

The Supreme Court would echo the public's frustration in case law limiting the ability of Congress to protect black voters from organized violence by whites.[121] Furthermore, after Democrats won control of the House of Representatives in 1874, "congressional" reconstruction effectively ended, in spite of the passage of the Civil Rights Act of 1875 (which the Court eventually felt unconstitutional).[122] Furthermore, in 1875, Adelbert Ames, the Republican governor of Mississippi, requested that the federal government respond to violent intimidation of black and white Republican voters.[123] President Grant's advisors, however, persuaded him not to intervene because federal involvement could jeopardize Republican candidates in close election contests in Ohio.[124] Accordingly, Grant declined Ames's request and explained that: "The whole public are *tired out* with these annual autumnal outbreaks in the South, and the great majority are now ready to condemn any interference on part of the government."[125] Whites' weariness with Reconstruction, along with economic depression and political scandals, would tarnish the Republican party.[126] Republicans, however, would maintain control of the White House after the heavily contested, divisive, and (in key southern states) violent presidential election of 1876.[127] Rutherford B. Hayes assumed office, embraced a conciliatory posture with the South,[128] and began removing the remaining troops from the southern states.[129] The South was

119. JAMES M. MCPHERSON, ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION 581 (1992) (emphasis added).

120. *Id*.

121. *See supra* text accompanying notes 99–112.

122. KLINKNER & SMITH, *supra* note 111, at 85–86.

123. *Id.* at 87.

124. *Id.*

125. *Id.* (emphasis added).

126. *Id.* at 85–89.

127. *Id.* at 89 (discussing election of 1876).

128. Historians have long argued whether this position of conciliation was negotiated to end the election stalemate. *See id.* at 89 ("Historians have long debated whether white Southerners acquiesced in this result because Hayes had, as was then charged, made an 'infamous bargain' to end Reconstruction in return for possession of the White House.").

129. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 120 (1996) (Souter, J., dissenting) ("The turning point in the States' favor came with the Compromise of 1877, when the Republican Party agreed effectively to end Reconstruction and to withdraw federal troops from the South in return for Southern acquiescence in the decision of the Electoral Commission that awarded the disputed 1876 presidential election to Rutherford B. Hayes.").

officially "redeemed,"[130] and Reconstruction dwindled to an end. After only ten years, concentrated legal efforts to disestablish slavery and to respond to white supremacist violence had become too taxing for the nation to sustain.

D. Judicial Validation of Jim Crow

1. "Getting Over Slavery"

In 2007, the State of Virginia passed a resolution apologizing for its role in slavery and Jim Crow. Although state lawmakers unanimously approved the resolution, legislative debates sparked a controversy when state senator Frank Hargrove opined that "I personally think that our black citizens should get over [slavery]. . . . By golly, we're living in 2007."[131] Attitudes like Hargrove's have often colored United States racial discourse. Opposition to race-based civil rights measures, even an innocuous and belated apology for slavery, has often rested on the notion that slavery no longer affects the status of blacks.[132] But, as congressional debates over Reconstruction legislation demonstrate, this assumption framed racial discourse at the earliest moments subsequent to abolition.[133]

Arguments that seek to detach prior acts of racism from the present-day status of persons of color employ racial exhaustion rhetoric because they attempt to depict the United States as post-racist. Court rulings immunizing Jim Crow from federal invalidation illustrate how racial exhaustion rhetoric has justified judicial opposition to antiracist initiatives and claims of racial injustice. In the *Civil Rights Cases*,[134] the Court invalidated the Civil Rights Act of 1875, which banned racial discrimination in places of public accommodation.[135] The Court held that Congress lacked the authority to regulate "private" conduct under its Section Five power.[136] While the Court ruled that Congress could regulate private behavior under Section Two of the Thirteenth Amendment, it concluded that nineteenth-century racial segregation in places of public

130. FONER, *supra* note 14, 587–601 (discussing final stages of southern "redemption").

131. Bob Gibson, *Slavery Apology Measure Ignites Legislative Debate*, DAILY PROGRESS (Charlottesville, Va.), Jan. 16, 2007. Criticizing the reach of the apology, Hargrove also pondered whether "we [are] going to force the Jews to apologize for killing Christ." *Id.*

132. EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS 79 (2006) (discussing portrayal of slavery as representing remote and as a vehicle for denying its present-day effects).

133. *See supra* text accompanying notes 68–72.

134. 109 U.S. 3 (1883).

135. *Id.* at 9–10.

136. *Id*. at 11.

accommodation did not relate to slavery and was thus beyond the scope of congressional invalidation.[137] Near the end of the decision, the Court essentially advised blacks to get over slavery:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws . . . .[138]

The Court's dicta contain many elements of racial exhaustion rhetoric. Following the logic of President Johnson and the members of Congress who opposed the Freedmen's Bureau, the Court found that blacks have in fact "emerged" from slavery.[139] Although the legal institution of slavery had been formally abolished, blacks experienced violent subjugation, segregation, economic vulnerability, and disenfranchisement, which the Court's ruling strains to bifurcate from slavery.

2. Plessy *and Racial Exhaustion*

After the *Civil Rights Cases*, the Court ruled that the Fourteenth Amendment did not bar states from mandating racial segregation. In *Plessy v. Ferguson*,[140] the Court sustained a Louisiana statute requiring racial segregation in state railroad carriers.[141] Together, *Plessy* and the *Civil Rights Cases* provided constitutional legitimacy for Jim Crow and rendered it impermeable to federal invalidation.[142]

Plessy infamously held that blacks themselves chose to believe that segregation codified white supremacy.[143] The Court also ruled that law

137. *Id.* at 21–25.
138. *Id.* at 25.
139. *Id.*
140. 163 U.S. 537 (1896).
141. *Id.* at 552.
142. *See* Francisco M. Ugarte, *Reconstruction Redux: Rehnquist, Morrison, and the Civil Rights Cases*, 41 HARV. C.R.-C.L. L. REV. 481, 484 (2006) ("Considered in tandem, [*Plessy* and the *Civil Rights Cases*] were instrumental in the creation of a new legal regime that, as part of its essential character, established and perpetuated racial subordination throughout nearly all elements of American society.").
143. *See Plessy*, 163 U.S. at 551.

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

Id.

could not eradicate racism. Instead, the Constitution could only secure formal racial equality (limited to civil and political rights) and "equal opportunities for improvement and progress."[144] *Plessy* does not deny the existence of racial discrimination as such, but it fails to accept that racial distinctions implied or constructed racial hierarchy or that the law could otherwise eradicate racial inequality. The Court treated Jim Crow as a form of benign discrimination. *Plessy* also reflected the general consensus among whites at the time.[145]

The analysis in *Plessy* resembles modern racial exhaustion discourse which questions and distrusts blacks' claims of racial injustice and which asserts that to the extent discrimination exists, the law lacks the competence to regulate it. After *Plessy* and through the early 1900s, the Court did very little to enforce the substantive rights of blacks.[146] Indeed, during the early 1900s, the status of race relations and public support for substantive racial justice was at a "nadir," and southern blacks experienced racial terror, disenfranchisement, and discrimination in virtually every aspect of their lives.[147] While the Court did issue some rulings invalidating racially discriminatory state action, many of these cases secured minimal procedural justice and protected blacks from only the most extreme unfairness, such as the effective reinstatement of slavery through a system of peonage and blatant violations of the Fifteenth Amendment through enactments such as "grandfather clauses."[148] As Michael Klarman's extensive review of case law and historical data during this era suggests, these decisions, though favorable to blacks, had very little immediate material impact upon the subordinate status of blacks, although they were central in the formation of social movement lawyering on questions of

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144. *Id.* ("When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed.") (citing People *ex rel.* King v. Gallagher, 93 N.Y. 438, 448 (1883)). *Gallagher* upheld segregated public schools in the State of New York, using the same arguments made in *Plessy*. *Gallagher*, 93 N.Y. at 438.

145. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 48 (arguing that in the "1890s, most southern whites strongly favored segregation" and that "[n]orthern whites were increasingly inclined to accommodate the racial preferences of white southerners").

146. *Id.* at 47 ("Except for a few insignificant jury discrimination cases, the Court during the *Plessy* era rejected all civil rights claims.").

147. RAYFORD W. LOGAN, THE NEGRO IN AMERICAN LIFE AND THOUGHT: THE NADIR 1877–1901 (1954); *see also* KLARMAN, *supra* note 145, at 63; Mark V. Tushnet, *Progressive Era Race Relations Cases in Their "Traditional" Context*, 51 VAND. L. REV. 993, 993 (1998).

148. KLARMAN, *supra* note 145, at 70 (describing the grandfather clause matter as an "easy" issue "for justices committed to at least minimalist constitutionalism").

racial inequality.[149] Peonage relationships continued throughout the South, and while the Court invalidated grandfather clauses, it legitimated or did not entertain challenges to other common restraints on black political participation, including literacy or knowledge tests.[150] The southern states continued to prevent blacks from voting through violence, intimidation, and a variety of legislative schemes clearly designed to evade the Fifteenth Amendment.[151] Several important domestic and international events, however, coalesced and created political opportunities for advancements in racial justice.[152] These advancements, like the structural changes that took place during Reconstruction, provoked political opposition. Opponents to twentieth-century racial egalitarian measures often expressed their discontent by employing racial exhaustion rhetoric.

III. AN ONGOING NARRATIVE OF RACIAL EXHAUSTION: RACIAL DISCOURSE IN THE TWENTIETH CENTURY AND BEYOND

A. *Twentieth-Century Evolution in Racial Attitudes*

1. *War and Race*

Following the Progressive Era, which was a time of immense racial injustice, several factors led to moderation in the nation's attitudes towards race. Many historians cite the following developments as affecting early twentieth-century evolution in racial discourse. First, industrialization and labor shortages during World War I gave rise to economic opportunities for blacks in northern and midwestern states.[153] Subsequently, large numbers of blacks migrated from the South to northern cities.[154] Blacks' political power increased substantially due to the Great Migration, because northern states, unlike the South, did not engage in systematic disenfranchisement of blacks, even as they embraced residential and other forms of discrimination.[155] Collective black voting power would soon

149. *Id.* at 61–97.

150. *Id.* at 95–96.

151. William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2078 (2002). Even if these cases did not have great material impact upon the status of blacks, they nevertheless augmented the role of black attorneys pressing civil rights claims and the pursuit of litigation as social movement mobilization. *See* Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910–1920)*, 20 LAW & HIST. REV. 97, 128 (2002) (linking Progressive Era precedent with growth of NAACP).

152. *See infra* text accompanying notes 153–81.

153. *See* KLARMAN, *supra* note 145, at 100 (discussing "Great Migration").

154. *Id.*

155. *Id.*

affect local and national politics, which rekindled public debates about racial injustice.[156]

War rhetoric also enhanced political opportunities for antiracist mobilization. The country framed its participation in World War I as an effort to protect "democracy."[157] Although many blacks refrained from civil rights activism to show unity during the war, some black political leaders, nevertheless, invoked the "democracy" rhetoric to challenge domestic racial subjugation.[158] Decades later, World War II caused similar, even more potent, disruptions in race politics.[159]

The New Deal period also enhanced the visibility of race and black political power.[160] The Great Depression had exacerbated the already vulnerable economic status of blacks.[161] Although blacks did not support Roosevelt in the 1932 presidential election,[162] his liberal economic policies created a massive reallocation of political power: blacks flocked to the Democratic Party in the 1936 presidential election (and have virtually remained aligned with the Democrats since that time).[163] Roosevelt won seventy-six percent of black votes,[164] and political parties began to recognize blacks as an important voting bloc, which planted the seeds for racial patronage and moderation.[165]

Racial egalitarianism, however, remained slight. Many of the New Deal programs were administered in a discriminatory fashion.[166] Some, like Aid to Dependent Children, for example, gave states discretion to determine assistance levels (and southern states routinely disfavored blacks).[167] Other programs discriminated at the national level, such as the

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156. *Id.*

157. *Id*. at 104; KLINKNER & SMITH, *supra* note 111, at 111.

158. KLARMAN, *supra* note 145, at 104; KLINKNER & SMITH, *supra* note 111, at 114.

159. *See* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 7 (2000) ("While World War I influenced civil rights activists' critique of American racism, it did not lead to extensive social change. The moment for broader change came after World War II, a war against a racist regime carried on by a nation with segregated military forces.").

160. KLARMAN, *supra* note 145, at 110 (arguing that "the New Deal proved a turning point in American race relations").

161. *Id*. at 108.

162. Roosevelt's record on race troubled blacks. KLINKNER & SMITH, *supra* note 111, at 126.

163. KLARMAN, *supra* note 145, at 111; KLINKNER & SMITH, *supra* note 111, at 126.

164. KLINKNER & SMITH, *supra* note 111, at 126.

165. *See* CAROL HORTON, RACE AND THE MAKING OF AMERICAN LIBERALISM 123 (2005) ("As the two major parties consequently began to compete for this suddenly important bloc of support, the political climate became more receptive to ideas of racially equalitarian reform.") (citing HARVARD SITKOFF, A NEW DEAL FOR BLACKS, THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE: THE DEPRESSION DECADE 95–101 (1978)).

166. *See id.* at 126–29.

167. KLINKNER & SMITH, *supra* note 111, at 128.

Federal Housing Administration's refusal to lend money to blacks who desired to move into predominately white neighborhoods.[168] And despite the importance of black voters, Roosevelt took conservative positions on race in order to appease southern Democrats. He declined, for example, to support anti-lynching legislation, fearing that doing so would alienate and anger southerners in Congress and provoke opposition to his New Deal policies.[169] And during World War II, Roosevelt ordered the internment of Japanese Americans.[170]

As Mary Dudziak's extensive research has documented, World War II and the subsequent Cold War period provided very potent political opportunities for racial advancement.[171] The United States justified its involvement in the war as a moral crusade against Fascism and Nazism.[172] The genocidal practices of the Hitler regime, furthermore, led to reexamination of racial supremacy.[173] Consequently, intellectual support for eugenics waned, and biological notions of race rapidly lost scientific credibility.[174] These factors permitted evolution in the nation's racial ideology. Blacks protested the inherent contradiction in waging a war against Nazism abroad while supporting or failing to counter domestic white supremacy.[175] Blacks also criticized military policies of segregating troops and military bases, discriminating in the administration of the Selective Service, and permitting discrimination in defense industries.[176] The need for black participation in the military provided a mutuality of interest that facilitated racial advancement.[177] As a result of political activism by blacks, the release of government data indicating extremely low support for the war among blacks, and racial violence at military bases, Roosevelt issued executive orders during the war that ended all of the discriminatory policies of the military—except for troop segregation.[178] By the end of the war, opinion polls indicated sharp movement toward racial egalitarian ideology among whites.[179] Also, black

168. *Id.* at 132–33.

169. *Id*. at 129.

170. *See* Korematsu v. United States, 323 U.S. 214, 223–24 (1944) (upholding legality of military orders interning individuals of Japanese descent during World War II).

171. DUDZIAK, *supra* note 159, at 7.

172. KLARMAN, *supra* note 145, at 174–75.

173. *Id*. at 175.

174. KLINKNER & SMITH, *supra* note 111, at 148.

175. *Id*. at 161–202 (discussing black antiracist mobilization and white resistance during World War II).

176. *Id.*

177. *Id.* at 187.

178. KLARMAN, *supra* note 145, at 179–80.

179. KLINKNER & SMITH, *supra* note 111, at 201.

political power and economic status had increased substantially.[180] These conditions allowed for significant changes in the legal status of blacks during the war and post-war period. New indications of racial egalitarianism in the post-war period would emerge at the state and national level.

2. *Prelude to the Second Reconstruction: State Civil Rights Legislation*

It was within this context of shifting domestic and international relations that New York enacted the Ives-Quinn Act—the first state statute that prohibited racial discrimination in employment.[181] Although the New York legislature overwhelmingly supported the antidiscrimination measure, a vocal opposition contested its enactment.[182] Anthony Chen's research on the political debates surrounding Ives-Quinn permits an examination of the role of racial exhaustion rhetoric in post–World War II civil rights discourse.[183]

The principle opposition to Ives-Quinn came from business and corporate legal communities and from rural and suburban whites and their legislative representatives (all of whom were conservative Republicans).[184] Opponents of Ives-Quinn questioned the law's necessity by arguing that racial discrimination no longer existed and that the denial of employment to blacks resulted from their own shortcomings. One industry representative who argued against the proposal stated that he could not "conceive of any man discriminating against a Negro if he is skilled."[185] Another industry leader disclaimed any personal knowledge of discrimination and insisted that the war had created racial egalitarianism, thus obviating the need for the legislation.[186] Following a line of reasoning similar to *Plessy*,[187] one employer claimed that law was incompetent to address racial discrimination and that "the only effective . . . method of

180. *Id.*; *see also* KLARMAN, *supra* note 145, at 179.

181. *See* Anthony S. Chen, *"The Hitlerian Rule of Quotas": Racial Conservatism and the Politics of Fair Employment Legislation in New York State, 1941–1945*, 92 J. AM. HIST. 1238 (2006) (discussing legislative debates and social historical context surrounding Ives-Quinn).

182. *See generally id.*

183. *Id.*

184. *Id.* at 1240.

185. *Id.* at 1245.

186. *Id.* at 1246 ("I personally know of no discrimination . . . and I do know that the spirit of tolerance that was spoken of so frequently at Albany does exist in a larger measure than it ever existed before. We have moved ahead since this war began, and I believe the effects will be lasting.").

187. *See supra* notes 140–46.

combating this evil is through persuasion, education, and good example."[188] The *Wall Street Journal* expressed a similar viewpoint and disagreed with the assumption that "the evil to which this bill addresses . . . can be effectively dealt with by any kind of statute."[189]

In addition, white suburbanites testified that the proposed legislation privileged persons of color to the detriment of whites, that individual deficiencies and pathologies explained racial inequality, and that the infrequency or nonexistence of racial discrimination obviated the need for protective legal measures. One New York voter, for example, complained that:

> [A] lot of us Americans were not lucky enough to be born a member of one of these minority groups, who high pressure you into putting over the Ives bill while our sons were away! These people were only interested in putting themselves in a favored position via kangaroo courts, Soviet style, regardless of their habits or behavior as individuals! There has been less general discrimination here than any place else in the world, the Ives Bill is an insult to all Tolerant Americans the state over![190]

The close correlation between the conservative debate over Ives-Quinn and contemporary racial exhaustion rhetoric, however, lies in the characterization of legislation as discriminating against whites and as leading inevitably to racial quotas. An upstate Republican lawmaker, for example, portrayed the proposed legislation as discriminatory, a viewpoint that well predates the reverse discrimination discourse surrounding contemporary challenges to affirmative action.[191] Opponents also invoked the language of quotas in order to frame the proposed legislation in a most unfavorable light. The New York park commissioner testified that:

> The most vicious feature of this proposal is that it will inevitably lead to the establishment of what in European universities and institutions, from the Middle ages to World War II, was known as the "numerous clauses," that is, the quota system under which Jews and other minorities were permitted only up to a fixed number proportionate to their percentage of the population.[192]

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188. Chen, *supra* note 181, at 1246.
189. *Id.* at 1251.
190. *Id.* at 1253.
191. *Id.* at 1252.
192. *Id.* at 1256 (quoting New York park commissioner).

Whereas quotas historically harmed "Jews and other minorities," Ives-Quinn would unfairly invert this hierarchy in favor of vulnerable groups.[193] As Anthony Chen has observed, the opponents to Ives-Quinn invoked the word "quota" for historically contingent purposes. They tried to link antidiscrimination with a recent history of anti-Jewish quotas in the United States and to draw parallels between Ives-Quinn and Nazism.[194] One journalist, who commented on the legislation, for example, explicitly tied civil rights and Nazism, asserting that the law would lead to the "Hitlerian rule of quotas."[195] Although many scholars trace the rhetorical linkage of civil rights and quotas to political debates during the 1960s, the history surrounding Ives-Quinn reveals that this element of racial discourse appeared much earlier.[196]

C. From World War II to the Civil Rights Movement

Dramatic changes in the landscape of racial discourse and legal policies towards racial inequality would take place at the national level after World War II. These shifts in the nation's racial attitudes occurred in a transnational context.[197] Cold War politics greatly impacted United States racial discourse. The United States justified its involvement in the Cold War as a battle to protect the world against the spread of communism.[198] The United States, according to this narrative, policed the world in order to preserve democracy and prevent totalitarianism.[199] Internationally, the image of racial segregation and injustice impeded the persuasiveness of this narrative.[200] Soviet and Chinese propaganda often exploited United States racism in order to undermine the moral narrative that framed the United States' foreign relations.[201] Domestically, civil rights groups and black activists would also stress the detrimental impact of racial injustice upon the nation's international image in their advocacy for racial egalitarian policies.[202] Some domestic civil rights groups filed petitions before the United Nations seeking to document before an international

193. *Id.*
194. *Id.* at 1256–57.
195. *Id.* at 1257.
196. This same rhetoric emerged in other states considering employment discrimination laws. *See id.* at 1261 (discussing quota rhetoric invoked in Minnesota, Ohio, and Pennsylvania).
197. *See generally* DUDZIAK, *supra* note 159.
198. *Id.* at 27.
199. *Id.*
200. *See, e.g.*, *id.* at 27–46.
201. *Id.*
202. *Id.* at 43–44.

audience the ways in which race subordinated persons of color in the United States.[203]

While southerners would resist evolving racial norms through racial violence, overtly racist argumentation, and appeals to federalism and states rights, opponents to racial egalitarianism would often construct their arguments using racial exhaustion rhetoric. The same arguments that shaped debates during Reconstruction would also frame national race policy in the 1960s, or the Second Reconstruction. Congressional debates over the Civil Rights Act of 1964 demonstrate the persistence of racial exhaustion discourse as an instrument of countermovements to racial justice. Lawmakers who challenged the implementation of the legislation argued that (1) further statutory prohibitions of racial discrimination were unnecessary, given the efficacy of pre-existing legislation and the waning or nonexistence of racism; (2) the proposed legislation would overwhelm the national and state governments and cause excessive and unprecedented changes in the nation's legal culture; (3) blacks suffer discrimination due to nonracial factors, such as slothfulness or lack of merit; (4) the legislation would harm whites because it constituted reverse discrimination, would lead to the implementation of racial quotas favoring persons of color, would deprive whites of liberty interests, and would give blacks a special status under the law; and (5) that the law as a general matter could not effectuate changes in race relations.

Opponents of the Civil Rights Act of 1964 frequently challenged the necessity of civil rights legislation. With respect to Title VII, for example, they argued that racial discrimination among employers had dissipated to the point of nonexistence, rendering the proposed legislation unjustifiable and excessive:

> Nondiscrimination in employment is generally accepted and practiced by both employers and unions. It would be both unfortunate and unwise if through our pronouncements it is implied, or could be assumed, that discrimination in employment is the general rule rather than the exception. It would also be a cruel disservice to the many dedicated citizens, government officials, union leaders, and employers who have worked tirelessly in this area and who, through their combined efforts, have effected on a voluntary basis great and lasting progress.[204]

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203. *Id*. at 43–44, 63.

204. H.R. REP. NO. 87-1370, at 18 (1962); *see also id.* at 21 ("Very real progress is being made in the field of discrimination. Religious prejudices have largely disappeared. Ethnic origin discrimination

Opponents made similar arguments to contest provisions in the proposed legislation that regulated participation in federal elections. They asserted that pre-existing legislation provided "more than ample authority . . . for all reasonable purposes in the enforcement of the rights of those who wish to vote in Federal elections"[205] and that "[t]here is no need for this legislation . . . ."[206]

Lawmakers also resisted the proposed legislation on the grounds that its magnitude would overwhelm federal and state governments. The dissenting members of Congress claimed that:

> The depth, the revolutionary meaning of this act, is almost beyond description. It cannot be circumscribed, it cannot be said that it goes this far and no farther. The language written into this bill is not of that sort. It has open-end [sic] provisions that give it whatever depth and intensity one desires to read into it. . . . [It] vests . . . almost unlimited authority by the President and his appointees to do whatever they desire.
>
> It is, in the most literal sense, revolutionary, destructive of the very essence of life as it has been lived in this country since the adoption of our Constitution . . . .[207]

Lawmakers also alleged that blacks suffer discrimination due to factors other than race, including their own lack of merit or initiative. In some of these arguments, however, the dissenting members of Congress seem to conflate race and merit. For example, the opposition observed that:

> If this bill is enacted the farmer . . . would be required to hire people of all races, without preference for any race. If experience has taught the farmer that a member of one race is less reliable than a member of another race, does less for his pay, he will no longer be allowed to hire those he prefers for this reason. If he is of the belief that members of one race are more prone to accident, less trustworthy, more neglectful of duties, are, in short, less desirable employees than those of another race, he will no longer be allowed to exercise his independent judgment. Under the power conferred by this bill, *he may be forced to hire according to race*, to "racially

is no longer existent. Race prejudice is rapidly being stamped out.").

205. H.R. REP. NO. 88-914, MINORITY REPORT ON PROPOSED CIVIL RIGHTS ACT OF 1963 (1963), *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2458.

206. *Id.*

207. *Id.* at 2437.

> balance" those who work for him in *every job classification* or be in violation of Federal law.[208]

The opponents concluded that "[n]either competence nor experience is the key for employment under this bill. Race is the principal, first, criterion."[209] The lawmakers also argued that the proposed legislation would threaten homeowners and proprietors of places of public accommodation who discriminate on the basis of nonracial factors.[210]

The civil rights opposition also asserted that the proposed legislation would compel companies to abandon merit-based hiring practices and instead select employees based on racial quotas: "[An employer] must employ the person of that race which, by ratio, is next up, even though he is certain in his own mind that the [candidate] he is not allowed to employ would be a superior employee."[211] They observed, moreover, that "contractors could be forced to actively recruit employees of a specified race and upgrade them into skilled classifications, although this would displace union members in the skilled trades."[212] The statute, in other words, would mandate "racism-in-reverse."[213] The opponents also argued that the legislation sacrificed the rights of whites in order to elevate persons of color: "[T]he bill, under the cloak of protecting the civil rights of certain minorities, will destroy civil rights of *all* citizens of the United States who fall within its scope."[214] As such, the law would give victims of discrimination "special" benefits; specifically, it would "place[] civil rights litigants . . . in a special category with preferences and advantages not afforded parties in any other form of litigation."[215]

Finally, lawmakers contested the proposed legislation on the grounds that law was incapable of improving race relations. The southern lawmakers asserted that "[e]xperience has proven that a state of mind or a

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208. *Id.* at 2438.

209. *Id.* at 2440.

210. *See id.* at 2438 ("What if the person who seeks to rent a room, lease or buy a home, is not, in the eyes of the homeowner, trustworthy or desirable? If race, color, or national origin is involved—and, by the nature of things, these *must* be involved—the Federal inspector . . . makes the decision."); *id.* at 2441 ("[I]f a customer proves objectionable, the owner can have him removed from his premises only at peril of being in violation of the race laws.").

211. *Id.* at 2441.

212. *Id*. at 2440–41.

213. *Id.* at 2441.

214. *Id*. at 2433. *See also id.* at 2430 ("I believe it is also my responsibility in seeking lawful rights for any minority group in America to also respect the lawful rights of others." (statement of Representative Carleton J. King)).

215. *Id.* at 2434.

matter of conscience cannot be successfully legislated"[216] and that enforcement of the terms of the legislation would amount to "sociological manipulation."[217]

Conservatives outside of Congress made similar arguments. George Wallace, for example, claimed that the legislation would "*enslave* our nation."[218] Wallace also asserted that the legislation "empower[ed] the United States government" to impose racial "quotas" upon employers, that it was "an act of tyranny," and that it deprived whites of "human and property rights."[219]

D. A Chronic Fatigue Syndrome: Racial Exhaustion in Contemporary Civil Rights Discourse

1. The End of the Second Reconstruction and Opposition to Affirmative Action

Historically, opponents to racial egalitarian measures have portrayed such policies as redundant given prior legislation and societal commitments to antiracism, too extreme and overwhelming in terms of substance and duration; harmful to whites because they discriminate in reverse, invade whites' individual rights, and make persons of color special favorites of the law; futile because they attempt to legislate matters beyond the law's competence; and unnecessary because persons of color have ample opportunity to advance without additional legal protection and any barriers they face come from nonracial sources, such as poverty or lack of merit. These same rhetorical strategies have framed contemporary opposition to race-based remedies among lawmakers, the Supreme Court, countermovements to antiracism, and individual whites.

After the passage of the Civil Rights Act of 1964, racial equality activists advocated for the enactment of affirmative measures designed to remedy the conditions of racial inequality.[220] Opponents to affirmative action have often contested such measures in the same language used to oppose Reconstruction and 1960s civil rights measures. Supreme Court

216. *Id.* at 2173.

217. *Id.* at 2434.

218. George C. Wallace, The Civil Rights Movement: Fraud, Sham and Hoax (July 4, 1964), *available at* http://www.fordham.edu/halsall/mod/1964WALLACE.html (emphasis added).

219. *Id.*

220. Dennis Deslippe, *"Do Whites Have Rights?": White Detroit Policemen and "Reverse Discrimination" Protests in the 1970s*, 91 J. AM. HIST. 932 (2004); *see also* Laura Kalman, Right Star Rising: American Politics and the Limits of Leadership in the Seventies, 1974–79 (on file with author).

jurisprudence has often mirrored public attitudes that resist affirmative action and that view such polices as unfair and unnecessary. Accordingly, this case law helps to document the persistence of racial exhaustion sentiment in contemporary race discourse and the role of the Court in enforcing dominant public opinion regarding race.

In its affirmative action jurisprudence, the Court has expressed hostility and skepticism towards remedial race discrimination in cases challenging affirmative action.[221] Court rulings have invalidated affirmative action policies after finding them excessive with respect to scope and duration.[222] The application of strict scrutiny to affirmative action provides a doctrinal framework for questioning the magnitude of affirmative action policies. By applying strict scrutiny, the Court considers whether the policies are narrowly tailored. Under this standard, the Court has demanded temporal and substantive constraints and has encouraged lawmakers to pursue remedies that distribute resources on grounds other than race.[223] And while the Court has held that state actors can use race-based policies to remedy their own discrimination, Equal Protection jurisprudence prohibits race-conscious policies designed to ameliorate the effects of private, or "societal discrimination."[224] Court doctrine views societal discrimination as "too vague, speculative, and potentially far-reaching to justify race conscious action."[225] The Court first expressed this view in *Regents of the University of California v. Bakke*, which invalidated defendant's usage of

221. *See* Girardeau A. Spann, *Affirmative Inaction*, 50 HOW. L.J. 611, 664 (2007) (discussing Court's "hostility" to affirmative action).

222. Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1244–45 (2002) ("The Court has sometimes struck down affirmative action plans because their use of race to identify beneficiaries is overinclusive."); *id.* at 1251 (discussing Court's discomfort with open-ended affirmative action plans); Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1786 (1996) ("In considering the validity of affirmative action remedies for past discrimination, the Supreme Court's primary concern has been overinclusion; that is, giving affirmative action preferences to people who were not affected by past discrimination"); Joel K. Goldstein, *Justice O'Connor's Twenty-Five Year Expectation: The Legitimacy of Durational Limits in* Grutter, 67 OHIO ST. L.J. 83, 113–23 (2006) (discussing court's discomfort with open-ended affirmative action plans).

223. *See* sources cited *supra* note 222 (discussing durational and substantive limits); *see also* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1326 n.325 (2007) ("The necessity or narrow tailoring requirement may explain why the Supreme Court has demanded that a government body explore race-neutral alternatives before implementing an affirmative action plan.").

224. Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 2013 (2000) ("The Court has been adamant, for example, that the remedy of mere 'societal discrimination' is not a compelling state interest that justifies voluntary affirmative action programs."); James Boyd White, *What's Wrong With Our Talk About Race? On History, Particularity, and Affirmative Action*, 100 MICH. L. REV. 1927, 1943 (2002) (discussing doctrinal prohibition of affirmative action to remedy societal discrimination).

225. *See* Harris, *supra* note 224, at 2013.

a racial quota to admit students.[226] The Court held that remedies for societal discrimination are insufficiently "specific" or "focused" as a matter of constitutional law.[227] Subsequently, in *Wygant v. Jackson Board of Education*, the Court invalidated an affirmative action policy that sought to preserve the number of teachers of color by insulating them from layoffs.[228] The defendant justified the policy as remedying societal discrimination and providing role models for students of color.[229] The Court rejected this justification, holding that:

> [A]s the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over-expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.[230]

Furthermore, in *City of Richmond v. J.A. Croson Co.*,[231] the Court reiterated its position that remedying societal discrimination would constitute an over-remedy:

> To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.[232]

Recent case law reiterates the Court's discomfort with the ongoing usage of race-based affirmative action. In *Grutter v. Bollinger*, for example, the Court upheld the University of Michigan Law School's consideration of race in its admissions policy in order to facilitate academic diversity.[233] Although the diversity rationale has enjoyed much more success than the

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226. 438 U.S. 265 (1978).
227. *Id.* at 307 ("In the school [desegregation] cases, the States were required by court order to redress the wrongs worked by specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past.").
228. 476 U.S. 267 (1986).
229. *See id.* at 274.
230. *Id.* at 276.
231. 488 U.S. 469 (1989).
232. *Id.* at 505–06.
233. 539 U.S. 306 (2003).

remedial justification for affirmative action,[234] *Grutter* nevertheless reaffirmed the Court's skeptical stance towards affirmative action. In dicta concluding the majority opinion, the Court expressed a hope that affirmative action will soon cease to exist:

> It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.[235]

Mirroring dominant public opinion, the Court also treats affirmative action as invidious "reverse discrimination" that harms whites.[236] For example, in *Parents Involved in Community Schools v. Seattle School District No. 1*,[237] the Court's most recent affirmative action ruling, the plurality equated the remedial usage of race with support for Jim Crow.[238] The application of strict scrutiny alone demonstrates the Court's perception of affirmative action as an improper burden on whites, rather than a legal remedy for societal wrongs.[239] Applying strict scrutiny in a symmetrical fashion implies that racism and affirmative action lack a moral or legal distinction.[240] The Court's ruling in *Adarand Constructors, Inc. v. Pena*,[241] for example, resolves prior debate on this issue and finds that "'*Any* preference based on racial or ethnic criteria must necessarily

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234. Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677, 677 (2004) ("Today . . . affirmative action is increasingly being justified not as a remedy to historical discrimination and inequality, but as an instrumentally rational strategy used to achieve the positive effects of racial and gender diversity in modern society.").

235. *Grutter*, 539 U.S. at 343.

236. Spann, *supra* note 221, at 646 ("[T]he Supreme Court has taught us that resistance to affirmative action is rooted in the need to prevent a new form of racial discrimination—the reverse discrimination that occurs when racial minorities abuse their subordinate social status to take advantage of innocent Whites.").

237. 127 S. Ct. 2738 (2007).

238. *See id.* at 2767–68 (comparing ruling with the plaintiffs' contention in *Brown* and disparaging race-based remedies as racial discrimination); *see also id.* at 2782–88 (Thomas, J., concurring).

239. *See* Linda L. Holdeman, *Civil Rights in Employment: The New Generation*, 67 DENV. U. L. REV. 1, 47 (1990) ("The decision to apply strict scrutiny to remedial racial classification implicitly regards the past twenty-five years of affirmative action as similarly invidious and effectively equates the efforts of states to achieve racial equality with Jim Crow laws.").

240. *See* Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 HOW. L.J. 1, 65 (1995) ("The Supreme Court has declined to treat motive as relevant in its affirmative action cases, thereby disregarding the only distinction that exists between affirmative action and discrimination.").

241. 515 U.S. 200 (1995).

receive a most searching examination.'"[242] The Court's doctrine treats racially explicit state action with "consistency" and "skepticism" regardless of the purpose behind the policy.[243]

Court doctrine absolutely prohibits racial quotas and other forms of affirmative action based on numerical assignment of benefits.[244] The *Bakke* decision turned on the fact that the defendant utilized a quota system to admit students of color,[245] and the Court derided the set-aside in *Croson*.[246] Also, while *Grutte*r validated the qualitative affirmative action plan the University of Michigan Law School utilized to admit students,[247] *Gratz v. Bollinger*[248] struck down the undergraduate plan because it assigned a fixed number of points to students based on racial background.[249] According to the Court, this scheme overemphasized race.[250]

The Court's affirmative action jurisprudence has also viewed with skepticism claims of racial injustice towards persons of color. In *Croson*, for example, the Court dismissed as "sheer speculation" the city's claim that minority-owned businesses suffered from racial discrimination, thus warranting corrective measures.[251] Richmond justified its affirmative plan with the following evidence: (1) minority-owned businesses received just .67% of prime contracts although blacks comprised 50% of the city's population; (2) a congressional study found that racism impeded minority participation in the construction industry nationally; (3) municipal lawmakers attested to racial discrimination in the local contracting

242. *Id.* at 223 (emphasis added) (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986) (plurality opinion)).

243. *Id.* at 223–24.

244. *See* Neal Devins, *Explaining* Grutter v. Bollinger, 152 U. PA. L. REV. 346, 376 (2003) (arguing that a majority of the Court has held that "quotas and mechanical formulas that award a certain number of points to all minority students are unconstitutional").

245. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978) ("It may be assumed that the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups would contribute to the attainment of considerable ethnic diversity in the student body. But petitioner's argument that this is the only effective means of serving the interest of diversity is seriously flawed.").

246. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989) (holding that "the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing").

247. *See* Grutter v. Bollinger, 539 U.S. 306 (2003).

248. 539 U.S. 244 (2003).

249. *Id.* at 270 ("We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity . . . .").

250. *Id.*

251. *Croson*, 488 U.S. at 499.

industry; and (4) minority-owned businesses did not widely participate in state and local trade associations.[252] In *Bakke*, the Court portrays societal discrimination as an "amorphous concept of injury" that seemingly does not injure persons of color in any concrete or measurable way.[253] Consequently, Court doctrine has attempted to discount invidious explanations for racially disparate state action. In *Croson*, for example, the Court held that "[m]any of the barriers to minority participation in the construction industry relied upon by the city to justify a racial classification appear to be race neutral."[254] The Court's reluctance to view race as a contemporary barrier to economic opportunity mirrors majoritarian public opinion; it also follows the same historical logic that opponents to racial egalitarianism have consistently advanced to contest and dismiss the importance of race-based remedies.

2. *Requiring "Discriminatory Intent"*

The discriminatory intent rule, a highly criticized doctrine, requires equal protection plaintiffs to demonstrate that the governmental defendant engaged in purposeful discrimination.[255] To satisfy this standard, plaintiffs typically must provide direct evidence of defendants' intent, and the Court has declined to find discrimination even in circumstances where facially neutral state action leads to highly disparate effects burdening women and persons of color.[256] The intent rule, like the affirmative action doctrine, treats racism as aberrational or nonexistent, and the Court strives to rebut invidious explanations for racially disparate state action.

In *Washington v. Davis*, for example, the Court refused to treat the police department's aptitude test, which disparately excluded black applicants, as racially discriminatory.[257] Instead, the Court suggested that the applicants' own lack of merit, rather than race, excluded them from the force: "[I]t is untenable that the Constitution prevents the Government from seeking modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special ability to

252. *See id.* at 499–500.

253. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978).

254. *Croson*, 488 U.S. at 507.

255. *See* Darren Lenard Hutchinson, *"Unexplainable on Grounds Other Than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 662–68 (discussing precedent and scholarship related to the intent rule).

256. *See id.*

257. 426 U.S. 229 (1976).

communicate orally and in writing."[258] But the Court never scrutinizes whether the test modestly improved the police force and instead defers to the defendant's assertion.[259] The Court also declines to consider whether the police department could have used less discriminatory means to improve the force.[260] More importantly,[261] *Davis* announces an intent standard for Equal Protection litigation that has imposed extraordinary burdens for plaintiffs attempting to prove racial and gender discrimination.[262]

Similarly, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Court declined to find that racial discrimination led an almost all-white Chicago suburb to deny a zoning variance to a builder of low income housing.[263] The Court held that the city merely discriminated on the basis of the type of housing petitioner wanted to build, rather than the race of the builder's potential tenants.[264] Despite finding that the debates over the project included vocal discussion of "the desirability or undesirability of introducing . . . in Arlington Heights low- and moderate-income housing . . . *that would probably be racially integrated*,"[265] the Court found that the ultimate denial of the variance lacked racist motivation.[266]

Moreover, in *McCleskey v. Kemp*, the Court sustained the Georgia death penalty, despite the fact that an extensive study suggested that race determined whether prosecutors and jurors favored the imposition of capital punishment.[267] Although the Court described the study as "sophisticated,"[268] McCleskey was unsuccessful because he failed to offer

258. *Id*. at 245–46.

259. *Id.* at 237–39 (declining to scrutinize the validity of the test as an indicator of employee fitness).

260. *See* Barbara J. Flagg, *"Was Blind But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 999–1000 (1993) (advocating reforming Equal Protection doctrine to allow plaintiffs to propose less discriminatory means to pursue legitimate state objectives).

261. Many progressive scholars concede that *Davis* is a difficult case. *See, e.g.*, *id.* at 1001 (describing *Davis* as "challenging" even under the author's flexible standard).

262. *See* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1113 (1989) ("Given this standard of specific intent, evidence of disparate effect proves of little help to plaintiffs."); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1135 (1997) (arguing that the Court has "defined discriminatory purpose in terms that are extraordinarily difficult to prove").

263. 429 U.S. 252 (1977).

264. *Id*. at 269–70.

265. *Id.* at 257–58 (emphasis added).

266. *Id*. at 270–71.

267. 481 U.S. 279 (1987).

268. *Id*. at 286.

"evidence specific to his own case that would support an inference that racial considerations played a part in his sentence."[269] Having dismissed the operation of race in McCleskey's sentence, the Court held that penalty rested on a "legitimate and unchallenged explanation . . . : [he] committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty."[270] But this fact cannot substantiate unequal and racially discriminatory application of the death penalty statute.[271]

The intent rule tracks racial exhaustion in yet another way: this doctrine treats racial remedies as excessive and burdensome. The Court often justifies the requirement of discriminatory intent using slippery slope arguments. If the Court were to credit impact data as probative of intent, its doctrine would imperil a host of facially neutral laws that disadvantage persons of color. Judicial invalidation of racially disparate laws, in the absence of smoking-gun evidence of racially discriminatory motivation, would therefore constitute an over-remedy and would unduly burden the operation of governments. In *Davis*, for example, the Court held that

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.[272]

And in *McCleskey*, the Court held that flexibility in its application of the intent rule would have a catastrophic impact on criminal law enforcement. The Court favored a more limited approach because:

> [T]aken to its logical conclusion, [McCleskey's claim] throws into serious question the principles that underlie our entire criminal justice system. . . . [I]f we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we

269. *Id.* at 292–93.

270. *Id.* at 297.

271. *See id.* at 348 (Blackmun, J., dissenting) ("The Court on numerous occasions during the past century has recognized that an otherwise legitimate basis for a conviction does not outweigh an equal protection violation. In cases where racial discrimination in the administration of the criminal justice system is established, it has held that setting aside the conviction is the appropriate remedy."). *Cf.* Whren v. United States, 517 U.S. 806, 813 (1996) ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race.").

272. Washington v. Davis, 426 U.S. 229, 248 (1976).

> could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender. Similarly, since McCleskey's claim relates to the race of his victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys or judges. Also, there is no logical reason that such a claim need be limited to racial or sexual bias. . . . [S]uch a claim could—at least in theory—be based upon any arbitrary variable, such as the defendant's facial characteristics, or the physical attractiveness of the defendant or the victim, that some statistical study indicates may be influential in jury decisionmaking. As these examples illustrate, there is no limiting principle to the type of challenge brought by McCleskey. The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment.[273]

Accepting arbitrariness in the enforcement of criminal law as inevitable, the Court characterized potential remedies for such discrimination as threatening to the "entire criminal justice system."[274] The prospect of remedying racial disparities seems to overwhelm the Court; or as Justice Brennan states in his dissent, the Court's logic "seems to suggest a fear of too much justice."[275]

The Court has also justified adherence to a rigid intent standard on the grounds that a more flexible rule could lead to quotas or reverse discrimination against whites. Accordingly, Court doctrine in this context mirrors majoritarian distrust of civil rights remedies and claims of injustice. In early Title VII cases, for example, the Court treated disparate impact evidence as probative of unlawful discrimination.[276] The conservative Rehnquist Court, however, would later abandon this approach and toughen the evidentiary burden required of plaintiffs. The Court announced its more exacting standard in *Wards Cove Packing Co. v.*

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273. *McCleskey*, 481 U.S. at 314–19 (citations omitted) (footnotes omitted).

274. *See id.* at 315.

275. *Id.* at 339 (Brennan, J., dissenting).

276. *See* Griggs v. Duke Power Co., 401 U.S. 424, 427–28, 436 (1971) (invalidating facially neutral employment requirements, implemented after the passage of federal civil rights legislation, that operated to exclude blacks from employment).

Atonio.[277] The Court concluded that a flexible rule would cause employers to adopt hiring quotas, thus discriminating against whites:

> The Court of Appeals' theory, at the very least, would mean that any employer who had a segment of his work force that was—for some reason—racially imbalanced, could be hauled into court and forced to engage in the expensive and time-consuming task of defending the "business necessity" of the methods used to select the other members of his work force. The only practicable option for many employers would be to adopt racial quotas, insuring that no portion of their work forces deviated in racial composition from the other portions thereof. . . . The Court of Appeals' theory would "leave the employer little choice . . . but to engage in a subjective quota system of employment selection."[278]

Following criticism from civil rights advocates, Congress overruled *Wards Cove* in 1991,[279] but only after President Bush vetoed and characterized a prior version as a "quota bill."[280] The conservative opposition to this legislation provides another example of the way in which political rhetoric frames civil rights measures as invidious discrimination.

3. *Contemporary Civil Rights Legislative Debates and Racial Exhaustion*

a. *Civil Rights Act of 1990*

Racial exhaustion has also framed contemporary legislative debates over racial justice initiatives. Members of Congress and the President have characterized antidiscrimination measures as redundant and unfair to whites. In 1990, for example, Congress drafted legislation that would have reversed Court doctrine that civil rights advocates widely viewed as impeding the ability of Title VII plaintiffs to prove cases of discrimination.[281] President Bush fulfilled a promise to veto the legislation,

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277. 490 U.S. 642 (1989).

278. *Id.* at 652 (quoting Albermarle Paper Co. v. Moody, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring)).

279. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

280. *See* Steven A. Holmes, *Vowing to Veto Rights Bill, President Offers Alternative*, N.Y. TIMES, Oct. 21, 1990, § 1, at 22.

281. *See* Linda Greenhouse, *A Changed Court Revises Rules on Civil Rights*, N.Y. TIMES, June 18, 1989, at E1 ("Lawyers representing blacks and women in job discrimination suits said the Wards Cove decision gave plaintiffs an onerous burden, while employer groups greeted the result as overdue relief from a set of rules that they viewed as stacked against them.").

and his veto message invoked the language of racial quotas.[282] He argued that the proposed legislation would lead to quotas, despite the fact that in anticipation of his veto, the bill's proponents inserted language stating that the legislation would not mandate the implementation of quotas.[283] Nonetheless, Bush employed the same logic applied in the Court decision that the Congress sought to overturn. Bush argued that the legislation:

> [C]reates powerful incentives for employers to adopt hiring and promotion quotas. These incentives are created by the bill's new and very technical rules of litigation, which will make it difficult for employers to defend legitimate employment practices. In many cases, a defense against unfounded allegations will be impossible. Among other problems, the plaintiff often need not even show that any of the employer's practices caused a significant statistical disparity. . . . [U]nable to defend legitimate practices in court, employers will be driven to adopt quotas in order to avoid liability.[284]

Members of Congress made similar arguments. Senator Dole declared that the bill would result in "quotas, quotas and more employment quotas."[285] And Senator Seymour argued that the legislation would have led to "people being hired and promoted primarily on ethnic group membership, not individual merit."[286]

Opponents also asserted that the legislation created special privileges for persons of color. Senator Helms, for example, argued that the pending legislation rests on a "vision . . . of . . . America stratified by racial and ethnic quotas—an America whose law codifies the system where benefits and advantages are doled out according to group identity rather than on merit and the content of character."[287] Senator Helms' assertions, along with the quota language of the other opponents, track the rhetorical opposition to the Civil Rights Act of 1964 and the project of

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282. 136 CONG. REC. S31827–28 (1990) (veto statement).

283. *Id.*

284. *Id.* at S31828.

285. Neil Lewis, *President's Veto of Rights Measure Survives by 1 Vote*, N.Y. TIMES, Oct. 25, 1990, at A1.

286. 137 CONG. REC. 28,718 (1991) (statement of Sen. Seymour); *see also* 136 CONG. REC. H6798 (daily ed. Aug. 2, 1990) (statement of Rep. Bartlett); 136 CONG. REC. S9817 (daily ed. July 17, 1990) (statement of Sen. Coats); 136 CONG. REC. S9339–40 (daily ed. July 10, 1990) (statement of Sen. Thurmond); 136 CONG. REC. S3144 (daily ed. Mar. 26, 1990) (statement of Sen. Hatch).

287. 136 CONG. REC. S16562 (daily ed. Oct. 2, 1990) (statement of Sen. Helms).

Reconstruction.[288] Racial exhaustion remains a rhetorical tool of opponents to racial egalitarianism.

b. Voting Rights Act Reauthorization

Another recent legislative debate that generated arguments over racial egalitarian remedies concerned the appropriateness of reauthorizing Section Five of the Voting Rights Act of 1965.[289] Section Five requires that several states, listed in the statute, with a long history of voter disenfranchisement, must have any changes in their state election and voting laws precleared by the Department of Justice or by the United States District Court for the District of Columbia.[290] The preclearance process seeks to ensure that the proposed changes would not abridge the rights of voters of color.[291]

Voting rights advocates have heralded the preclearance provision as one of the most effective tools of civil rights enforcement and racial egalitarianism, and they also view it as the first substantial legislative effort to enforce constitutionally protected voting rights of persons of color.[292] Although blacks could minimally exercise their right to vote in parts of the South during Reconstruction (and this still brought about much violence), after the end of Reconstruction and the removal of troops from the South, blacks subsequently lost their ability to vote.[293] Between 1872 and 1965, virtually all southern blacks were disenfranchised.[294]

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288. *See supra* text accompanying notes 73–87, 190–219.

289. 42 U.S.C. § 1973c (2000).

290. *See id.*

291. *Id.*

292. *See* Hugh Davis Graham, *Voting Rights and the American Regulatory State*, *in* CONTROVERSIES IN MINORITY VOTING 177, 177 (Bernard Grofman & Chandler Davidson eds., 1992) (characterizing the Voting Rights Act as "one of the most effective instruments of social legislation in the modern era of American reform"); Adam Cox & Thomas Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 2 (2008) ("The Voting Rights Act has dramatically reshaped the political landscape of the United States. In the four decades since its enactment, it has helped substantially expand political opportunities for minority voters and has contributed to the radical realignment of southern politics."); Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. 785, 785 (2006) ("There can be no question that the Voting Rights Act of 1965 . . . has been extremely effective in removing barriers to participation in the democratic process by people of color. It is also clear that aggressive enforcement of the [statute] has increased the number of racial minorities elected to office, integrating legislative bodies that were formerly all White.").

293. *See* Tokaji, *supra* note 292, at 790–91 (observing that "[b]y the turn of the 20th Century, virtually all African Americans in the South were denied the right to vote" and that their disenfranchisement persisted "throughout the deep South until the enactment of the VRA in 1965").

294. *Id.* at 791.

Prior to the enactment of the Voting Rights Act, southern states routinely excluded blacks from exercising the franchise through a host of practices including outright physical intimidation and racial terror, literacy and knowledge tests, discretionary character assessments, and poll taxes.[295] The Voting Rights Act eliminated these practices and provided that preclearance requirement would remain effective for a five-year period.[296] After successive intervening renewals, Section Five would have expired in 2007 absent congressional reauthorization.[297] The renewal of Section Five sparked heated discourse concerning the vulnerability of persons of color to disenfranchisement and the need for remedial measures.

Historically, lawmakers and scholars have widely supported renewals to the statute. The 2007 discussion, however, split commentators.[298] Many of the arguments used by opponents of reauthorization employ the themes of racial exhaustion that this Article has detailed. Some members of Congress, for example, argued that preclearance had outlived its usefulness because the southern states no longer intend to disenfranchise blacks.[299] Additionally, some lawmakers expressed concerns about the prospective durational scope of the legislation.[300]

Outside of Congress, conservative political commentators Abigail Thernstrom and Edward Blum urged Congress to "do the right thing" and let Section Five expire.[301] Thernstrom and her husband, Stephan

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295. *See* Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1711 (2004) ("Beginning in the period of 'Redemption' at the end of the 19th century, literacy tests, poll taxes, restricted access to registration, and other such mechanisms had been the hallmarks of the disenfranchisement of the post-Civil War South's black population."); Tokaji, *supra* note 292, at 790 ("In the 1870s . . . the number of Blacks declined dramatically, and in subsequent decades Blacks throughout the South were denied the right to vote through a variety of exclusionary measures including literacy tests, property qualifications, criminal disenfranchisement, and White primaries."); *see also* South Carolina v. Katzenbach, 383 U.S. 301, 310–11 (1966) (rejecting constitutional challenge to Voting Rights Act of 1965 and detailing list of southern practices designed to prevent blacks from voting).

296. *See* John Michael Elden, Note, *The Case for Reauthorizing Section Five of the Voting Rights Act*, 55 DUKE L.J. 1183, 1183–84 (2006).

297. *Id.*

298. Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708, 709 (2006) ("After a long period of relative unanimity, the academics who study the Act and the lawyers who enforce it are at an impasse . . . .").

299. Carl Hulse, *Rebellion Stalls Extension of Voting Rights Act*, N.Y. TIMES, June 22, 2006, at A3.

300. "I continue to have some serious concerns with several aspects of it' including its 'extension for an *extraordinary* 25 years.'" Charles Babington, *Voting Rights Act Extension Passes in Senate, 98 to 0*, WASH. POST, July 21, 2006, at A01 (quoting Sen. Chambliss) (emphasis added).

301. Abigail Thernstrom & Edward Blum, *Do the Right Thing*, WALL ST. J., July 15, 2005, at A10.

Thernstrom, have spent a lot of intellectual energy attempting to disprove the existence of racism in contemporary United States society.[302] Thernstrom joins Blum to contest reauthorization, and their arguments rely heavily on racial exhaustion rhetoric. First, Thernstrom and Blum argue that the provision is unnecessary because "[t]imes have changed."[303] They argue that blacks are no longer endangered by southern racism because the Voting Rights Act has been "amazingly effective."[304] They also assert that Section Five is too burdensome a remedy. They describe the remedial provision as a "Draconian federal intrusion into local elections" and a "radical penalty" for "wrongs" of the past.[305] Doubting the continued vulnerability of southern black voters to invidious state action, the authors advocate an alternative approach that would require individual voters to prove on a case-by-case basis how a proposed modification in state election law would harm minority voters.[306] This logic echoes the Court's affirmative action jurisprudence which permits race-based remedies only upon a showing of discrete and particularized acts of injustice.[307] Finally, Thernstrom and Blum depict the civil rights remedy as a special handout and favor to blacks and other persons of color. They assert that Congress capitulated to "Jesse Jackson and other activists eager to wave the racism flag" and that congressional Republicans are "terrified by . . . the NAACP, the Lawyers Committee on Civil Rights, and other advocacy groups."[308] Although scholars have raised some legitimate concerns regarding the potentially partisan nature of preclearance and the constitutionality of the provision in light of recent Supreme Court rulings,[309] many of the arguments nonetheless rest on the unsubstantiated and historically persistent notion that racism no longer exists and are thus part of a broader social narrative that disputes the ongoing relevance of race.[310] Some voting rights scholars made similar arguments.[311]

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302. *See, e.g.*, STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE (1999) (exhaustive analysis of improvements in race relation that obviate need for race-based remedies).

303. Thernstrom & Blum, *supra* note 301.

304. *Id.*

305. *Id.*

306. *Id.* (favoring an approach where "the burden of proof is on the plaintiffs").

307. *See supra* text accompanying notes 224–32.

308. Thernstrom & Blum, *supra* note 301.

309. *See* Tokaji, *supra* note 292, at 785–89 (listing legal and political controversies surrounding preclearance).

310. Recently, the Thernstroms wrote an essay which argues that Barack Obama's success in generating support among white Democrats proves that "[w]hites refusing to vote for black candidates has finally gone the way of segregated water fountains. Or so we hope." *See* Abigail Thernstrom & Stephan Thernstrom, *Taking Race Out of the Race*, L.A. TIMES, Mar. 2, 2008, at M5. Over the course

IV. ADVOCATING RACIAL INEQUALITY IN A RACIALLY EXHAUSTED SOCIETY

An historical review of race equality discourse reveals a set of arguments employed trans-historically to contest racial egalitarian legal proposals as unnecessary or inappropriate, given an exacting, yet successful, societal effort to root out and repair the conditions of racial inequality; too expansive in substantive scope or duration of the measures; futile, in light of the inability of law to alter social relations; misguided because racially identifiable inequality results from pathological behavior or class barriers; and unfair because they constitute a special handout to people of color or otherwise injure whites. This rhetoric has framed opposition to racial redress as early as Reconstruction, and it has maintained a role in legal and political debates over race through the middle-twentieth century and in contemporary United States politics. The remainder of this Article discusses (1) why this rhetoric has a persistent role in racial debates; (2) how recognition of the historical use of this rhetoric to contest racial justice might impact the way social movement actors frame their political agendas and construct their engagement with countermovements; and (3) how the research presented in this Article could provide alternative approaches to contemporary racial equality doctrine.

A. Longevity of Racial Exhaustion

There are at least two general reasons for the persistence of racial exhaustion rhetoric.

1. Exhaustion Rhetoric Often Raises Legitimate Policy Questions

Exhaustion rhetoric exists pervasively because many of the themes in this discourse relate to legitimate policy questions. It is not unreasonable for policymakers and the public to question the factual basis for legislation or try to preserve resources by placing time and substantive limits around

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of nine days after this essay was published, Obama lost three primaries and won two; three of those contests—Texas, Ohio, and Mississippi—revealed extremely sharp racial divisions among voters. *See* Alan Fram, *Poll: Whites Back Clinton in TX, OH*, WASH. POST, Mar. 5, 2008, at A1; Robert D. Novack, *How Race Divides the Democrats*, WASH. POST, Mar. 17, 2008, at A17 (discussing racial polarization among Democrats).

311. *See, e.g.*, Issacharoff, *supra* note 295 (arguing against reauthorization on the grounds that blacks no longer face substantial obstacles to voting, the process burdens states, other parts of the statute effectively protect blacks, and the Department of Justice can engage in partisan preclearance).

regulatory measures. Also, questioning whether a proposed policy or doctrinal approach is redundant or ineffective seems well within the range of reasoned discourse. In addition, considering whether a proposed measure will create unforeseen externalities could also fairly influence legal debates. Finally, if a law represents a naked preference or political patronage, then public opinion could have a legitimate role in determining its desirability. For all of these reasons, many of the issues raised by racial exhaustion rhetoric seem justifiable as rational elements of policy discourse.[312]

That many of these themes are common to policy debates does not make studying their advancement in racial discourse unhelpful. First, taken together, these arguments do more than raise reasonable policy concerns. Instead, they portray a social narrative that disputes the existence of racism and substantial racial barriers—even at a period in United States history when racial justice efforts were embryonic and the status of persons of color extremely vulnerable. Questioning the existence of racism is a valid inquiry, but assuming its nonexistence across generations suggests disingenuousness or lack of social knowledge among some opponents to civil rights. Accordingly, while this set of arguments might raise valid concerns, they have helped advance a discourse that denies the oppression of persons of color and legitimates material inequality that corresponds with race.[313] Also, many of these policy arguments can mask biases or otherwise help to facilitate subjugation. In the context of racial justice, for example, southern states have historically advanced states' rights arguments in political debates, including their defense of slavery and their resistance to legal and political efforts to dismantle Jim Crow.[314] Thus, in terms of impact, racial exhaustion rhetoric has been an instrument used to resist racial progress, rather than simply map out the reasonable contours of social policy.

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312. This probably explains in large part the persistence of racial exhaustion rhetoric and the difficulty of moving beyond it.

313. *See generally* ALBERT O. HIRSCHMAN, THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY (1991) (discussing repetitive arguments that seek to legitimate social disadvantage).

314. Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1306–07 (1999) ("Federalism's role in American history as a stalking horse for racism is infamous. Southern states invoked states' rights in an effort to preserve first slavery and then segregation."); Paul Finkelman, *Exploring Southern Legal History*, 64 N.C. L. REV. 77, 99 (1985) ("Slavery and racial segregation . . . were the chief motivations for the doctrines of states' rights and state sovereignty . . . .").

2. *Inter-Group Struggle*

Psychologists have also examined the extent to which "principled" opposition to antiegalitarian social policy arises from an effort to justify and preserve group dominance.[315] In societies with "group-based hierarchies" politics can represent "intergroup competition over scarce material and symbolic resources."[316] In such societies, political ideology provides a rhetorical frame to "legitimize each group's claims" for these social resources.[317] During Reconstruction, many of the members of Congress who opposed racial redress actually mixed their race-neutral arguments concerning the role of the national government and the appropriateness of aid to the poor with blatant appeals to group domination and to white supremacy.[318] Over time, blatantly racist elements of political discourse resisting egalitarianism have subsided, likely because a majority of the public now staunchly disapproves of expressions of white supremacist ideology.[319] Nevertheless, opponents to race equality measures continue to cast such initiatives in terms of group impact, particularly when they argue that civil rights measures privilege persons of color and harm whites.[320] Indeed, some contemporary psychological studies have found that individual opposition to race-based remedies, such as affirmative action, often correlates strongly with "classical racism" (or a belief in the superiority of whites) and a desire for in-group dominance.[321]

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315. *See, e.g.*, Lawrence Bobo, Felicia Pratto & Jim Sidanius, *Racism, Conservatism, Affirmative Action, and Intellectual Sophistication: A Matter of Principled Conservatism or Group Dominance?*, 70 J. PERSONALITY & SOC. PSYCHOL. 476 (1996).

316. *Id.* at 477.

317. *Id.*

318. *See supra* text accompanying notes 53–93.

319. Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1169 (1991) ("Where discrimination is illegal or socially disapproved, social scientists predict that it will be practiced only when it is possible to do so covertly and indirectly."); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322–23 (1987) ("[T]he human mind defends itself against the discomfort of guilt by denying or refusing to recognize those ideas, wishes, and beliefs that conflict with what the individual has learned is good or right. While our historical experience has made racism an integral part of our culture, our society has more recently embraced an ideal that rejects racism as immoral. When an individual experiences conflict between racist ideas and the societal ethic that condemns those ideas, the mind excludes his racism from consciousness.").

320. *See* text accompanying *supra* notes 279–88 (discussing argument that civil rights harms whites).

321. Bobo, Pratto & Sidanius, *supra* note 315, at 488 ("Classical racism and [desire for group dominance] were strongly related to affirmative action attitudes . . . ."); Lawrence Bobo & James Kluegel, *Opposition to Race-Targeting: Self-Interest, Stratification Ideology, or Racial Attitudes*, 58 AM. SOC. REV. 443, 446 (1993) ("Available survey data show that whites with negative attitudes toward blacks are also less likely to support race-targeted policies."); Bonilla-Silva, *supra* note 37, at

Viewed in the context of this psychological literature, racial exhaustion rhetoric can be seen as permitting whites to protect group interests, legitimate the material conditions of racial inequality, and resolve deep contradictions between social norms favoring equal opportunity and justice and the vastly unequal social and economic status between persons of color and whites.[322]

B. Implications for Social Movement Actors

Countermovements to racial justice have effectively narrated a portrait of the United States as post-racist and egalitarian. They have also persuasively described racially egalitarian measures as unfair to whites. This political rhetoric has colored judicial opinions as well. Typically, antiracist social movement actors respond to these claims by arguing that effects of prior injustice shape inequality today, that racism still exists, and that these factors warrant corrective measures.[323] These are logical responses. Yet, social movement actors might want to consider two other potential framing techniques: (1) they could demonstrate how arguments asserting the eradication of racism have been deployed throughout United States history in order to resist racial progress; and (2) given the potency of exhaustion rhetoric, they could strategically frame race issues in an alternative language, such as class or human rights, in order to engender broader public support.

1. Protracted Resistance

Social movement actors could contest the assumption that the United States has engaged in a sustained effort to eradicate racial injustice. An historical analysis of debates concerning racial justice reveals that opponents to racial justice have resisted racial progress using arguments that mirror those of opponents to racial egalitarianism today. Because many political variables will determine the successfulness of social movement strategy, using historical rhetoric to confront the premise of

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80 (arguing that "whites' opposition to race-based policy . . . is fundamentally a way of opposing racial progress and defending their racial interests").

322. *See* Bonilla-Silva, Lewis & Embrick, *supra* note 33, at 560 ("[T]oday few whites subscribe to the classical ideas of Jim Crowism . . . . [But] . . . these changes do not signify the 'end of racism'. . . . Instead . . . racial prejudice . . . is expressed in a 'subtle,' modern,' or 'symbolic' way . . . .").

323. *See* Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1455–57 (2005) (discussing "distributive justice" defense of affirmative action); Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707, 1782–84 (1993) (same).

racial exhaustion rhetoric might not necessarily benefit antiracist social movements. Nevertheless, the historical research contained in this Article could provide the basis for rethinking and reforming social movement frames that promote racial egalitarian measures. And given the persistence of racial exhaustion rhetoric, attention to this particular frame seems reasonable.

2. From Race to Class: Strategic Racial Exhaustion

Given the popularity of the belief that the racial inequality results from nonracial factors, social movement actors could consider strategically framing their advocacy around class-based remedies. Indeed, many commentators have advocated this approach. Many scholars have advocated class-based agendas, on the grounds that they more directly address material inequity, present fewer problems politically given the opposition to race-conscious state action, and would likely survive judicial review because economic discrimination receives only rational basis review.[324] Because successful social movements must take political opportunities into account as they tailor their advocacy,[325] the rhetoric of racial exhaustion might compel them to reformulate their agendas on nonracial grounds. Nevertheless, this approach has two potential problems. First, sociological research has cautioned against efforts to extricate race and poverty. Although poor people have very similar experiences with social inequality, poor people of color tend to live in racially segregated areas of concentrated poverty, which tends to present unique problems, including remote isolation from quality schools and access to jobs.[326] The intersection of race and poverty might require remedies that class-based agendas cannot effectuate. Also, pursuing antipoverty agendas can often provoke public hostility and countermovements can reframe these policies as handouts to persons of color. For example, opponents to welfare programs have often depicted welfare recipients in sexist and racist language in order to advocate the repeal or dramatic limitation of these

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324. *See* Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913, 1914 (1996); Tanya K. Hernandez, *An Exploration of the Efficacy of Class-Based Approaches to Racial Justice: The Cuban Context*, 33 U.C. DAVIS L. REV. 1135 (2000); Richard D. Kahlenberg, *Getting Beyond Racial Preferences: The Class-Based Compromise*, 45 AM. U. L. REV. 721 (1996).

325. *See* Darren Lenard Hutchinson, *The* Majoritarian *Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. 1, 74–75 (2005).

326. *See* WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR (1997).

policies (in terms of substance and duration).[327] Furthermore, many scholars have cautioned that the Court might treat as invidious discrimination race-neutral policies that disparately benefit persons of color and which were clearly designed to evade application of strict judicial scrutiny.[328] Finally, public opinion disfavors antipoverty policies which many people view as handouts to persons who lack initiative.[329] Accordingly, pursuing nonracial agendas could also only generate minimal success for antiracist social movements and provide limited benefits.

C. Implications for Equality Doctrine

This research could also provide the basis for contesting the Court's equality doctrine. As political science scholarship would predict, the Court's jurisprudence mirrors a public script that depicts the United States as a post-racist society and which views with suspicion governmental efforts to remedy racial inequality. As a result, the Court treats patterns of racial discrimination caused by facially neutral policies as presumptively constitutional and requires governmental entities to produce exacting evidence of *their own* discrimination before implementing race-based remedial measures.

The Court's equality doctrine deploys all of the elements of racial exhaustion rhetoric. But the historical persistence of this rhetoric should lead the Court to approach race-based remedies with greater flexibility and to take a tougher stance toward facially neutral state action that disparately harms persons of color. In its affirmative action jurisprudence, the Court justifies applying strict scrutiny to invidious and remedial usages of race on the grounds that the long history of racism warrants an invasive analysis to "'smoke out'" impermissible purposes.[330] The Court's doctrine, however, rests on an incomplete portrait of history. The United States undeniably has a long history of racial subjugation, but during that history, opponents to racial egalitarianism have contested the existence of racism

327. *See, e.g.*, Dorothy Roberts, *Irrationality and Sacrifice in the Welfare Reform Consensus*, 81 VA. L. REV. 2607, 2621 (1995) (arguing that support for antipoverty programs declined as "the public association of welfare with single black mothers converged with already-existing stereotypes about black people's laziness, fecundity and irresponsibility").

328. *See* Hutchinson, *supra* note 325, at 88–89 (discussing related scholarship).

329. *See, e.g.*, NAT'L PUB. RADIO, KAISER FAMILY FOUNDATION & HARVARD UNIVERSITY KENNEDY SCHOOL, POLL ON POVERTY IN AMERICA 2001 (2001) (reporting that 50% of Americans believe that lack of initiative is principal cause of poverty).

330. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion). *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

and the need for remedial measures. The historical denial of racism is just as traditional as racism itself. Court doctrine, however, aligns itself with a tradition that doubts racial injustice. By effectively immunizing from judicial invalidation facially neutral state action that harms persons of color, the Court assumes that racism does not generally explain pervasive disparities that correlate with race. Similarly, by resisting the usage of race-based policies to remedy measurable inequality, the Court again situates itself within a rhetorical opposition to racial justice, which, from Reconstruction to the present, has contested racial remedies on the grounds that they are unnecessary, excessive, burdensome, futile, and unfair to whites. If the Court structures its equality doctrine to avoid abuses of the past, then it should reconsider its skepticism concerning the permissibility of policies that seek to ameliorate the conditions of racial inequality. Otherwise the Court risks taking an active role in legitimizing racial subordination and constraining remedies for racial injustice. Because the Court tends to reflect public opinion in its rulings,[331] it is unlikely that it will dramatically alter its equality jurisprudence in the absence of a broad shift in dominant popular opinion which views racial egalitarian policies as unjust and unwarranted.

V. CONCLUSION

Concerted political and legal efforts to remedy the impact of slavery for free persons began shortly after emancipation. During the earliest debates over racial equality, opponents challenged racial egalitarian legal measures using a collection of arguments that have endured throughout United States history and that remain a central way in which countermovements, institutional political actors, and the Court contest racial remedies today. Specifically, the opposition to Reconstruction argued that various legal protections for blacks were unnecessary because preexisting measures had cured their vulnerability; the proposed measures were excessive in terms of substantive scope or duration; the laws made blacks special favorites and treated whites unfairly; racial inequality results from nondiscriminatory variables such as individual ineptness or class barriers; and that the laws could not remedy racial inequality. As domestic and international events would later provide political opportunities for progressive evolution in racial ideology, these arguments would continue to frame resistance to racial egalitarianism, particularly

331. *See* Hutchinson, *supra* note 325, at 16–17 (discussing numerous political science sources linking doctrine and public opinion).

following World War II, during the 1960s, and in the late twentieth century when contentious debates over affirmative action erupted. Today, these arguments narrate a dominant vision about the status of race relations. While a substantial majority of persons of color believe that race and racism remain relevant forces in shaping their social and economic status, whites tend to view race as an insignificant barrier to equal opportunity and attribute racial inequality to nonracial factors, like individual merit or poverty. As a large body of political science and constitutional law scholarship predicts, the Supreme Court's racial equality jurisprudence has persistently mirrored white social opinion with respect to race. The Court stood in the way of Reconstruction, failed to remedy many of the most severe limits on black voting rights during the Progressive Era, and has constrained the impact of 1960s activism for racial justice by immunizing racially disparate, but facially neutral, state action from constitutional invalidation and by simultaneously subjecting race-based equality measures to the highest level of judicial scrutiny, questioning their necessity, and depicting them as injurious to whites. Far from acting as a countermajoritarian protector of subjugated minority interests, the Court enforces majoritarian viewpoints by dismissing racism as an insignificant social impediment.

Social movements could use this research and respond to racial exhaustion rhetoric by showing its historical usage as an instrument of racial domination. Nevertheless, given the potency of this discourse, antiracist activists should consider reframing their advocacy in nonracial terms. This research also implicates Court doctrine, and it could help delegitimize the discriminatory intent and colorblindness rules. Although the Court justifies applying strict scrutiny to all race-conscious policies with references to the horrible history of racial subjugation, it fails to appreciate the equally long history of denying the existence of racial injustice and resisting racial egalitarian measures, which its jurisprudence perpetuates. Deconstructing and responding to racial exhaustion rhetoric could ultimately form the basis for modified social movement activity and interaction with institutional political actors and the courts.