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PERSONAL REFLECTIONS ON ADARAND CONSTRUCTION CO. V. PENA

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Guardrails. They are an everyday part of the American landscape. They line our nation's highways and byways, standing as sentinels and guides to the roadside hazards of a country constantly on the move. Guardrails protect us from the sudden drop-offs at the road's edge and the jagged outcropping of mountain barriers leveled to form roadbeds of travel opportunities.

Adarand Constructors, Inc. v. Pena[2] is ultimately about who will have the opportunity to build our nation's guardrails. More fundamentally, it is about who will have the opportunity to fully travel all the roads of economic opportunity. It is about tearing down the economic and social barriers, barriers in part constructed on race, to build a future where all may drink freely from the rivers of life.[3]

The heart of this case is how the Central Federal Lands Highway of the United States Department of Transportation Division (hereinafter CFLHD) supplies funds to construct highways in Colorado. A prime contractor on a highway construction project could receive extra compensation if it subcontracted some of the work to a small business controlled by socially or economically disadvantaged individuals.[4] This is part of a national effort to encourage the development of small businesses.[5] Congress has declared that small businesses are a vital part of our economy. It has since 1942, encouraged small business participation in government contract work,[6] in an effort to keep economic power and opportunity from being amassed in a few mega-corporations.[7] The Court notes:

In furtherance of this policy, The Small Business Act:

> . . .establishes "[t]he Government-wide goal for participation by small business concerns owned by socially and economically disadvantaged individuals" at "not less than 5 percent of the total value of all prime contract and subcontract awards for each year." 15 U.S.C. §644(g)(1). It also requires the head of each Federal agency to set agency-specific goals for participation by businesses controlled by socially and economically disadvantaged individuals.[8]

Regulations were promulgated to determine which firms were socially and economically disadvantaged. If a firm was found not to be socially and economically disadvantaged, then it no longer qualified for this small business development program.[9] So even if a firm was

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[2] 115 S. Ct. 2097 (1995).

[3] This is part of a quote from Frederick Douglas for which I have long since forgotten the source.

[4] Adarand, 115 S.Ct at 2103-2104.

[5] The White House Conference on Small Business was held from June 11-15, 1995, to fulfill the mandate of *The White House Conference on Small Business Authorization Act of 1990.* The purpose of the conference was to:

> . . . increase public awareness of the essential contribution of small business; to identify the problems of small business; to examine the status of minorities and women as small-business owners; to assist small business owners in carrying out its role as the Nation's job creator; to assemble small businesses. . . to develop such specific and comprehensive recommendations for executive and legislative action as may be appropriate for maintaining and encouraging the economic viability of small business and, thereby, the Nation.

Pub.L. 101-409, 104 Stat. 885 as amended Pub.L. 103-81, §10, Aug. 13, 1993 107 Stat. 783.

For further information on the recommendations developed by The White House Conference on Small Business *see,* FOUNDATION FOR A NEW CENTURY: A REPORT TO THE PRESIDENT AND CONGRESS, (September 1995).

[6] Parren Mitchell, *Federal Affirmative Action For MBE's: An historical analysis,* 1 NATIONAL BAR ASSOCIATION MAGAZINE 46 (summer 1983). Former Congressman Parren Mitchell presents a concise history of government affirmative action in government contracting for small businesses, in general, and for minority business enterprises.

[7] Congressman Parren Mitchell notes:

> The early 1940's were wrought with complaints and allegations flooding into Washington that small business was being subjected to discrimination, that defense contracts were being given almost exclusively to the larger corporations, and that certain sections of the country were receiving a disproportionate share of defense work while other sections were neglected. Members of Congress feared that, unless steps were taken to include the small communities and the small businessmen in the defense production, the United States might be weakened on the home front in numerous ways. Not only was it thought that vast aggregate production power of small units might be lost, but also that if the country failed to keep many thousands of small businessmen functioning, the economy of the Nation would be harmed.

Id. at 47.

[8] Adarand, 115 S. Ct. at 2102.

[9] Justice Stevens makes this point in his dissent:

> The DBE program excludes members of minority races who are not , in fact, socially or economically disadvantaged [citations omitted]. The presumption of social disadvantage reflects the unfortunate fact that irrational racial prejudice - along with its lingering effects - still survives. The presumption of economic disadvantage embodies a recognition that success in the private sector of the economy is often at-

controlled by Black Americans, Asian-Pacific Americans, and other minorities, the presumption that they were disadvantaged could be rebutted.[10]

Adarand Contractors' complaint was not that there was a contracting goal of five percent for socially and economically disadvantaged firms. (One could contrast this to the 10% mandatory set-aside provision approved by the Court in *Fullilove*.)[11] Rather, Adarand Contractors claim that the presumption is impermissibly based on race and denies the corporation equal protection under the Fifth Amendment. The problem with this argument is that while minorities are presumed to be socially and economically disadvantaged, white sub-contractors can also qualify if they are shown to be socially and economically disadvantaged.[12] Accordingly, Adarand's inability to participate was not because it was a white-owned firm, but because it was not socially and economically disadvantaged.

Justice O'Connor ignores this classification and grants the corporation standing to seek declaratory relief because a white person or a white-controlled firm, may be denied a low bid contract in the future.[13] Thereupon, Justice O'Connor approaches the task as one about building judicial guardrails along the constitutional highway of Fifth and Fourteenth Amendment Equal Protection analysis.[14]

Upon my first reading of the Court's opinion, I was struck by the purity of Justice O'Connor's analysis. She sincerely attempts to articulate fundamental principles of racial discrimination jurisprudence. She is bent on getting everyone on the same narrow highway of color blind constitutional analysis in the equal protection context.[15] The fractured opinions of *Bakke*,[16] *Fullilove*, *Crosson*,[17] *Wygant*,[18] and *Metro Broadcasting*[19] (which is specifically overruled by *Adarand*) have left judges adrift with confusing and inconsistent constitutional tests.[20] Justice O'Connor's opinion on the other hand, valiantly lays out, once and for all time, a crystal clear method for assessing the constitutionality of state and federal governmental programs or actions which are in any way based on a consideration of race or racial remedies.[21]

Justice O'Connor's analysis is framed by three principles which a court must consider before applying strict scrutiny. First, the Court must be highly skeptical of any government classification based on race or ethnicity. Race and ethnicity and their proxies, economic and social dis-

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tributable, in part, to social skills and relationship. Unlike the 1977 set-asides [in *Fulliove*], the current preferences is designed to overcome the social and economic disadvantages that are often associated with racial characteristics. If, in a particular case, these disadvantages are not present, the presumptions can be rebutted.

Id. at 2129.

[10] *See Id.* at 2129 n.15 (J. Stevens citing Autek Systems Corp. v. United States, 835 F. Supp 13 (D.C. 1993).

[11] Fullilove v. Kutznick, 448 U.S. 448 (1980).

[12] Adarand, 115 S. Ct. at 2103.

[13] Justice O'Connor makes the following finding:

Because the evidence in this case indicates the CFLHD is likely to let contracts involving guardrail work that contain a subcontractor compensation clause at least once per year in Colorado, that Adarand is very likely to bid on each such contract, and that Adarand often must compete for such contracts against small disadvantaged businesses, we are satisfied that Adarand has standing to bring this lawsuit.

Id. at 2105.

[14] Justice O'Connor writes:

Adarand's claim arise under the Fifth Amendment to the Constitution, which provides that "No person shall. . . be deprived of life, liberty, or property, without due process of law." Although this court has always understood that Clause to provide some measure of protection against *arbitrary* treatment by the Federal Government, it is not as explicit a guarentee of *equal* treatment as the Fourteenth Amendment, which provides that "No *State* shall. . . deny to any person within its jurisdiction the equal protection of the laws." Our cases have accorded varying degrees of significance to the difference in the language of those two clauses. We think it necessary to revisit the issue here (emphasis in original).

Id. at 2105-2106.

[15] After exploring the judicial precedent on constitutional analysis of raced-based government action, Justice O'Connor concludes:

. . .There is nothing new about the notion that Congress, like the States, may treat people differently because of their race only for compelling reasons.

"The real problem," Justice Frankfurter explained, "is whether a principle shall prevail over its later misapplications." (citation omitted). *Metro Broadcasting's* untenable distinction between state and federal racial classifications lacks support in our precedent, and undermines the fundamental principle of equal protection as a personal right. In this case, as between that principle and "its later misapplications," the principle must prevail.

Id. at 2116-2117.

[16] Regents of Univ. Of California v. Bakke, 438 U.S. 265 (1978).

[17] Richmond v. J.A. Cronson Co., 488 U.S. 469 (1989).

[18] Wygant v. Jackson Board of Ed., 476 U.S. 267 (1986).

[19] Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990).

[20] Adarand, 115 S. Ct. at 2109-2112.

[21] Justice Souter urged that there is already a clear method of constitutional analysis, especially where it has been stipulated that the challenged statute meets the evidentiary requirement of prior judicial review of racial remedies:

The statutory scheme must be treated as constitutional if *Fulliove*, (citation ommitted) is applied, and petitioners did not identify any of the factual premises on which *Fulliove* rested as having disappeared since that case was decided.

. . . .

Since petitioner has not claimed the obsolescence of any particular fact on which the *Fullilove* Court upheld the statute, no issue has come up to us that might be resolved in a way that would render *Fullilove* inapposite.

Id. at 2131.

advantage, must always demand the Court's most searching and exacting scrutiny.[22] Justice Scalia would go even further in articulating this first principle. He writes, "[i]n the eyes of the government, we are just one race here. It is America."[23] Such is the hope of the American Dream, that we are indeed equal before the law.

Justice O'Connor's second principle, finds that the "Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."[24] The Court must apply the Constitution consistently without regard to color. Her third and final principle holds there must be analytical congruence between the equal protection standards applicable to the states under the Fourteenth Amendment and the federal government under the Fifth Amendment.[25] The federal government should not have an easier burden then the states in justifying its use of remedies for historic racism. The O'Connor bottom-line is:

> "A free people whose institutions are founded upon the doctrine of equality," should tolerate no retreat from the principle that government may not treat people differently because of their race only for the most compelling reasons. Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.[26]

Justice O'Connor does not tell us how to recognize a compelling government interest nor what constitutional cuts and stitches are required for narrow tailoring of remedies designed to overcome historic and systemic racism.[27] Significantly, as Justice Stevens convincingly demonstrates, no deference is to be paid to Congress utilizing its broad authority of Clause Five of the Fourteenth Amendment.[28] Nor does the Court consider the extensive factual predicate already existing in the record.[29] In severely restricting affirmative remedial measures, the Court has taken away the creative possibilities of correcting the noxious legacy of discrimination.[30] To correct discrimination now, one must find facts that demonstrate purposeful and invidious intent to discriminate on the basis of race.[31]

Before reading the full *Adarand* opinion, I feared that the dream of the sixties[32] was fast becoming the nightmare of the nineties. *Missouri v. Jenkins*[33] and *Miller v. Johnson*[34] amplified that fear. Justice Scalia's declaration of the dream's actual reality notwithstanding, America continues to be a nation deeply divided by race.[35] Justice Ginsburg reflected on the persistent negative effects of past discrimination. She states:

> Those effects, reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods. . . . Minority entrepreneurs sometimes fail to gain contracts though they are the low bidders, and they are sometimes refused work even after winning contracts. Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice.[36]

We argue over whether or not O. J. Simpson was guilty or was a pathetic victim of racists police officers.[37] Our popular literature explores the racial divisions which place some on the highway to opportunity and others on the road to despair.[38] Despite our best efforts, we sit

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[22] *Id.* at 2111.

[23] *Id.* at 2119.

[24] *Id.* at 2110 (quoting *Crosson*, 488 U.S. at 493-94).

[25] *Id.* at 2111.

[26] *Id.* at 2113 (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1940)).

[27] *See* Justice Ginsburg's opinion, *id.* at. 2136.

[28] *Id.* at 2124. *See also*, Justice Ginsburg's opinion at 2134.

[29] *Id.* at 2129-2130.

[30] Although Justice Ginsburg, *id.* at 2136, and Justice Souter, *id.*, 2133-2134, would find that the opinion does not bar affirmative action, Justice Stevens believes that the strict scrutiny analysis would be "strict in theory, but fatal in fact," notwithstanding Justice O'Connor's reassurances to the contrary. *Id.* at 2120-22.

[31] *See Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3rd Cir. 1977) (City of Philadelphia operated low income housing program in a manner that purposefully segregated residents by race).

[32] Although we always think of Dr. Martin Luther King, Jr.'s *I Have a Dream* speech as a clear articulation of the dream of freedom, others have also articulated the concept. In 1958, Paul Robeson stated:

> To be free - to walk the good American earth as equal citizens, to live without fear, to enjoy the fruits of our toil, to give our children every opportunity in life - that dream which we have held so long in our hearts is today the destiny that we hold in our hands. PAUL ROBESON, HERE I STAND 108 (1958).

[33] 115 S. Ct. 2038 (1995).

[34] 115 S. Ct. 2475 (1995).

[35] For a provocative discussion of this *see*, CORNEL WEST, RACE MATTERS (1993).

[36] *Adarand*, 115 S. Ct. at 2135.

[37] *See O.J. and the Issue of Race*, TIME, Oct. 9, 1995, at p. 28. In a series of articles, TIME explores the impact the Simpson trial had on America and how opinions on the verdict are split along racial lines.

[38] *See* Benjamin DeMott, *Put On a Happy Face: Masking the Difference Between Blacks and White*, HARPER'S MAGAZINE, vol. 291, p. 31, Sept. 1995. *See also*, THE NEW REPUBLIC, vol. 214, Jan. 1, 1996, which collects articles by Glenn Loury, Debra Dickerson, Randall Kennedy, and Hanna Rosen under the cover theme, *White Lies, Black Lives: Rethinking Race and Crime.*

in segregated houses of worship and live in racially defined communities.[39]

Reflecting on current times, I note remarkable similarities to the era of *Plessy v. Ferguson*,[40] one hundred years ago. The nineties of the nineteenth century clearly marked the official end of the nation's efforts to make President Lincoln's visionary strides toward one nation articulated at the Gettysburg memorial cemetery.[41] Although black codes and the overruling of the civil rights acts certainly had already sent equally clear signals that Jim Crow was to be the law of the land,[42] in the mid 1890's we witnessed a profound hardening of racism's place in our national law and consciousness. Yet, so too, was the hardening of the determination in the African American community to combat this trend and to find means and methods to pursue full and equal civil rights.

Clearly there was a need to reassess the efforts that had gone on before.[43] At the end of the Civil War, the bright dream of freedom was dismantled by the radical programs of Reconstruction.[44] Access to the ballot and to many privileges and opportunities of living in a free society, inspired hope.[45] All members of society, black and white at the time, would prosper. But it was the hope of a fool, as Albion Tourgee, the white entrepreneur, judge, author, and alleged carpet-bagger, was to say in a biographical novel of 1879. One of his major characters remarked:

> ...Reconstruction was a failure so far as it attempted to unify the nation, to make one people in fact of what had been one only in name before the convulsion of civil war. It was a failure, too, so far as it attempted to fix and secure the position and rights of the colored race. They were fixed, it is true, on paper, and security of a certain sort taken to prevent the abrogation of the formal declaration. No guaranty whatever was provided against their practical subversion, which was accomplished with an ease and impunity that amazed those who instituted the movement.[46]

In 1896, the Supreme Court in *Plessy* threw up its judicial hands and declared that social inequality was just one of those tough facts of life. Justice Brown observed:

> The Argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the Negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals.[47]

I find this language reminiscent of Chief Justice Taney's biting remarks in *Dred Scott v. Sanford*,[48] where he proclaimed that the black man had "no rights which the white man was bound to respect."[49] The two races were not to merge into one people under one supreme law of the land. The historian John Hope Franklin expressed the stark reality of race at that time in America in his perceptive essay *Land of Room Enough*.[50] He observed, "[i]nstead of emancipated blacks moving into a status of full equality at the close of the Civil War, they were consigned to a status where their color and previous condition of servitude were more important than

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[39] For a discussion of this phenomenon and a Christian response to it, *see* SPENCER PERKINS AND CHRIS RICE, MORE THAN EQUALS: RACIAL HEALING FOR THE SAKE OF THE GOSPEL (1993).

[40] 163 U.S. 537 (1896). *See also*, Johnny Parker, *When Johnny Came Marching Home Again: A Critical Review of Contemporary Equal Protection Interpretation*, 37 Howard L. J. 393 (1994) (comparing the era of *Plessy* to the contemporary era where civil rights precedents are being severely restricted).

[41] *See* GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA, 88-89 (1992).

[42] *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW, 3rd. rev. ed., 70-72 (1974).

[43] *See* VINCENT HARDING, THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA, (1983), noting that at the end of the Civil War, the former slaves had a grand vision of the possibilities of freedom in a democratic republic:

> By word, by deed, by the singing of children, the people who had been the slaves of American society were now engaged not only in creating the definitions of their own freedom but in suggesting the outlines of the new nation which would be necessary to contain them. As the tumultuous spring of 1865 ended, the initial word was there for all who had eyes and ears—and hearts. Black people were saying that freedom meant above all the right to participatein all political decision-making processes. From their petitions pouring into state and national legislatures, indeed, it was obvious that the black community was even proposing that yesterday's slaves must have the right to help define the means by which the former slaveholding states would be brought back into the Union. Thereby, they were claiming the right to participate in the re-creation of the United States. *Id.* at 296-97.

[44] *See generally* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863 - 1877, (1988); and ROBERT CRUDEN, THE NEGRO IN RECONSTRUCTION (1969).

[45] *See* C. VANN WOODWARD, *supra.* n.42, at 64-65.

[46] ALBION W. TOURGEE, A FOOL'S ERRAND, at 377 (photo. reprint 1961)(1879).

[47] Plessy, 163 U.S. at 551.

[48] 60 U.S. (19 How.) 393 (1857).

[49] *Id.* at 407.

[50] JOHN HOPE FRANKLIN, RACE AND HISTORY: SELECTED ESSAYS- 1938-1988, (1989).

their freedom in determining what they could not do."[51] There was not enough room on the highway of American Democracy for all peoples.

Ironically, Frederick Douglas, the nation's leading champion for justice and the true American Dream, passed from the scene a little more than a century ago, on February 20, 1895. At his funeral Susan B. Anthony, read a letter from Elizabeth Cady Stanton, expressing the hope that there would be a rededication to the struggle for justice and equal opportunity. In the letter, Stanton proclaimed that: "Frederick Douglas is not dead! His grand character will long be an object lesson in our national history; his lofty sentiments of liberty, justice, and equality, echoed on every platform over our broad land . . . . must influence and inspire many coming generations!"[52]

Booker T. Washington, founder of the National Negro Business League, filled the leadership void in the African American community left by Frederick Douglas's death.[53] Booker T. Washington, promoted self-reliance and industrial education and training at Tuskegee Institute.[54] In his speech before the 1895 Atlanta Exposition, he urged the nation to use the vast resources of black talent in building the economic fortunes of our nation. He utilized the image of a bucket drawing up fresh water to a nation thirsty for industrialization. He implored:

> Cast down your bucket among these people who have without strikes and labor wars tilled your fields, cleared your forests, builded your railroads and cities, brought forth treasures from the bowels of the earth, and helped make possible this magnificent representation of the progress of the South. Casting down your bucket among my people, helping and encouraging them as you are doing on these grounds, and, with education of head, hand, and heart, you will find that they will buy your surplus land, make blossom the waste places in your fields, and run your factories. . . . [S]o in the future, in our humble way, we shall stand by you with a devotion that no foreigner can approach, ready to lay down our lives, if need be, in defense of yours; interlacing our industrial, commercial, civil, and religious life with yours in a way that shall make the interests of both races one. In all things that are purely social we can be as separate as the fingers, yet one as the hand in all things essential to mutual progress.[55]

It appears one has to beg the white community to do business with people of color. Washington's speech was a fervent plea for economic cooperation and integration; an appeal to the self-interest of a white power structure bent on racial subordination. Yet his speech was also a pitiful recognition that white America would not yield its superior social position, and with it, the privilege of economic and political power.

William Edward Burghardt DuBois, with his newly minted, 1896 doctorate from Harvard, the first that august school awarded to an African American, strenuously opposed Washington's philosophy of commercial engagement and minimal social and political process.[56] DuBois was the consummate scholar, whose prolific writings form a vast reservoir of knowledge for anyone studying "the Negro problem," as he called it in the now classic book, THE SOULS OF BLACK FOLK.[57] DuBois characterized Washington's 1895 exposition speech as the "Atlanta Compromise," due to its conciliation to Southern white supremacy.[58] In 1905, DuBois organized a distinguished group of African American leaders to oppose Washington's minimal rights agenda in what was to become known as the Niagara Movement.[59] The Movement was purposely designed to symbolize and legitimatize the claim for equal opportunity and full citi-

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[51] *Id.* at 336-337 (1989).

[52] JAMES M. GREGORY, FREDERICK DOUGLAS, THE ORATOR, 251 (photo. reprint 1971)(1893).

[53] Booker T. Washington is best understood through his autobiographical words found in UP FROM SLAVERY. BOOKER T. WASHINGTON, UP FROM SLAVERY, (Magnum Books ed. 1968) (1901). For an extensive biography of Booker T. Washington, *see* LOUIS R. HARLAN, BOOKER T. WASHINGTON: THE WIZARD OF TUSKEGEE 1901-1915 (1983).

[54] From the very beginning, at Tuskegee, I was determined to have the students do not only the agricultural and domestic work, but to have them erect their own buildings. My plan was to have them, while performing this service, taught the latest and best methods of labour, so that the school would not only get the benefit of their efforts, but the students themselves would be taught to see not only utility in labour, but beauty and dignity, would be taught, in fact how to lift labour up from mere drudgery and toil, and would learn to love work for it own sake.
WASHINGTON, *supra* n.53 at 150.

[55] *Id.* at 220-21.

[56] For an examination of the work of W.E.B. DuBois, *see* JULIUS LESTER, ED., THE SEVENTH SON: THE THOUGHTS AND WRITINGS OF W.E.B. DUBOIS, vols. 1 & 2 (1971).

[57] W.E.B. DUBOIS, THE SOULS OF BLACK FOLKS, 52 (photo. reprint 1969 ed.)(1903).

[58] DuBois notes the significance of Washington's speech:
This "Atlanta Compromise" is by all odds the most notable thing in Mr. Washington's career. The South interpreted it in different ways: the radicals received it as a complete surrender on the demand for civil and political equality; the conservatives, as a generously conceived working basis for mutual understanding. So both approved it, and today its author is certainly the most distinguished Southerner since Jefferson Davis, and the one with the largest personal following.
Id. at 80.

[59] The group had its first meeting on the Canadian side of Niagara falls because of a denial of accommodation for these men of color in Buffalo, New York. The Movement's corpo-

zenship. The group held its second meeting in August 1906 at Harper's Ferry, West Virginia, in memory of John Brown on the hundredth anniversary of Brown's birth. A resolution issued on August 15, 1906, carried this statement of purpose:

> We will not be satisfied to take one jot or tittle less than our full manhood rights. We claim for ourselves every single right that belongs to a freeborn American, political, civil and social: and until we get these rights we will never cease to protest and assail the ears of America. The battle we wage is not for ourselves alone, but for all true Americans.[60]

Washington and DuBois, along with a vast cadre of Douglas's activist heirs, were instrumental in shaping the twentieth century's dialogue on race matters. Out of Washington's legacy of self-help came Marcus Garvey and the Universal Negro Improvement Association.[61] DuBois and his Niagara Movement colleagues formed the core of the National Association for the Advancement of Colored People and provided the intellectual and theoretical backbone of the civil rights movement.[62]

I come now to the twentieth century to examine the Civil Rights Movement, which forced the nation to fight a different civil war.[63] A struggle in the mode of Frederick Douglas, the battles of this movement were fought with the moral authority of the black church,[64] the civil disobedience of many citizens,[65] and the impassioned oratorical interventions of Martin Luther King, Jr., Fannie Lou Hamer, Malcolm X, and Dorothy Height.[66] However, it was the assassination of Dr. King that galvanized the national effort to once again try to make the Constitution a living document for all citizens. Once again the nation attempted to repair the "flaw," as Ralph Elision called it, that was built into the founding documents of our democratic dream.[67]

The "Second Reconstruction," with affirmative federal legislation and moral suasion, opened the halls of colleges and universities, the rolls of employment, the curtains of voting booths, and the doors of decent affordable housing. Oddly enough, some social progress had to be goosed along with mandates, set-asides and financial incentives. When it comes to the white community doing business with people of color, one has to bribe them with contract incentives.

The seventies and eighties have brought an increasingly vicious "backlash" to the nations efforts of social and racial progress. The opponents to affirmatively advancing the agenda of social, economic, and political equality, released a collective cry of protest: "We are tired of this mess!" It is indeed a fool's errand to envision a change in deep rooted social divisions with an eroding middle class and cold blooded, middle management layoffs. Working class malaise forces individuals to be more inward focused.[68] So-called "reverse discrimination," emanating from affirmative action is said to produce more racial strife than racial harmony. As Justice Thomas said in *Adarand*:

> These programs not only raise grave constitutional questions, they also undermine the moral basis of the equal protection principle. Purchased at the price of immeasurable human suffering, the equal protec-

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rate seal, first unveiled on May 31, 1897, was embossed with the image of Augustus Saint-Gauden's memorial sculpture commemorating Robert Gould Shaw and 54th Massachusetts Colored Regiment.

[60] HOWARD BROTZ, ED., NEGRO SOCIAL AND POLITICAL THOUGHT: 1850 -1920, REPRESENTATIVE TEXTS, 537, (1966) (citing W.E.B. DUBOIS, RESOLUTION OF THE NIAGARA MOVEMENT).

[61] JOHN HENRIK CLARKE AND AMY JACQUES GARVEY ED., MARCUS GARVEY AND THE VISION OF AFRICA, (1974). Garvey, who was born in Jamaica in 1887, was inspired by Booker T. Washington:

> I read of the conditions in America. I read *Up From Slavery*, by Booker T. Washington, and then my doom—if I may so call it—of being a race leader dawned upon me in London after I had traveled through almost half of Europe.
>
> I asked, "Where is the black man's Government?" "Where is his King and his kingdom?" "Where is his President, his country, and his ambassador, his army, his navy, his men of big affairs?" I could not find them, and then I declared, "I will help make them."

Id. at 73. *See also* EDMUND D. CRONON, BLACK MOSES: THE STORY OF MARCUS GARVEY AND THE UNIVERSAL NEGRO IMPROVEMENT ASSOCIATION, (1955); and ROBERT A. HILL, THE MARCUS GARVEY AND UNIVERSAL NEGRO IMPROVEMENT ASSOCIATION PAPERS, (1983).

[62] DAVID LEVERING LEWIS, W.E.B. DUBOIS: BIOGRAPHY OF A RACE- 1868-1919, 386-407 (1993).

[63] JOANNE GRANT ED., BLACK PROTEST: HISTORY DOCUMENTS AND ANALYSIS: 1619 TO THE PRESENT, (1968); and DONALD G. NIEMAN, PROMISES TO KEEP: AFRICAN-AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT, 148-188 (1991).

[64] *See generally* JAMES CONE, BLACK THEOLOGY A BLACK POWER, (1969).

[65] WHY WE CAN'T WAIT, 77-100 (1964) (citing MARTIN LUTHER KING, JR., LETTTER FROM A BIRMINGHAM JAIL).

[66] *See generally* TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-1963, (1988).

[67] *See*, RALPH ELLISON, GOING TO THE TERRITORY, 321-338 (1986). Ralph Ellison was describing Thomas Jefferson's slavery dilemma in drafting the Declaration of Independence. While he indicted King George, III, for carrying on the slave trade, he "...nowhere states that slavery is a disgrace to America, and should be abolished root and branch by Americans." *Id.* at 332. Ellison finds the founders incapable of pursuing true, universal equality and freedom. He notes, "[t]hus the edenic political scene incorporated a *flaw* similar to the crack that appeared in the Liberty Bell and embodied a serpent like malignancy that would tempt government and individual alike to a constantly recurring fall from democratic innocence." (Emphasis added) *Id.* (emphasis in original).

[68] *See* Walt Harrington, *Falling Out of the Middle Class*, WASHINGTON POST MAGAZINE, 11, April 23, 1995.

> tion principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society. Unquestionably, "[i]nvidious [racial] discrimination is an engine of oppression,"(citation omitted). It is also true that "[r]emedial" racial preferences may reflect "a desire to foster equality in society," (citation omitted). But there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences.[69]

Justice Thomas presents a mixed message where one must choose rugged individualism for success or be forever bound to racial paternalism and "victimology." This discourse, while it recognizes the need for individual responsibility for one's life, ignores the racial barriers which continue to plague our Nation.[70] A middle road between Justice Thomas's polar opposites can be constructed if we continue to rise to the challenge.

Again there is a leadership vacuum in the African American community. In steps Minister Louis Farrakan and the Million Man March of 1995. He preaches the message of self-reliance and personal responsibility. I find Minister Farrakan and many others to be direct intellectual descendants of Marcus Garvey's Universal Negro Improvement Association. But Minister Farrakan alone does not represent the African American community. Other voices are being heard as well; Colin Powell, Cornel West, Dennis Kimbro, Maya Angelou, Sarah Lawrence Lightfoot, and many more fresh voices are rising to wrestle with what DuBois called, "[t]he problem of the color line."[71] Their ideas and ideals will shape the dialogue of the Twenty-first century as we assess the impact of cases like *Adarand*.[72] It is out of this dialogue that we will find a way to permanently extend the "welcome mat" Justice Stevens talks about, in a manner in which all of our citizens will be able to travel as far as they can on the highway of opportunity.[73]

Herein lies the most disturbing aspect of cases like *Adarand*. Let us first assume that Justice Thomas, like Abraham Lincoln, has taken the Declaration of Independence and transformed it from a hypocritical document of a slave holder into a universal principle of true equality.[74] Clearly Justice Thomas like, Booker T. Washington and Marcus Garvey, advocate self-determination and self-help. Contrary to the subliminal voices of some critics of affirmative action, African Americans have not lacked heroic and trailblazing efforts. One only need read George Frazier's inspirational book, on effective networking in the African American community,[75] or Dennis Kimbro's book promoting black entrepreneurship,[76] to understand the stunning distance we have come as a race and a nation. Obviously, African Americans have always fought for and achieved at great struggle a portion of the American Dream.

Their stories provide ample evidence that affirmative action programs have not stamped minorities with a badge of inferiority. This summer I attended a family reunion organized largely by my cousin, Evelyn Sermons Field. One of the elders of my clan, cousin Evelyn is, herself, a pioneering educator for whom the library building of a local community college is named. She focused

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[69] *Adarand*, 115 U.S. at 2119 (1995).

[70] See Justice Ginsburg's statement, *supra*, n. 36.

[71] DuBois, *supra* n.57, at xi.

[72] This dialogue comes in many forms and mediums. Maya Angelou's poem, *On the Pulse of Morning*, read at the inauguration of President William Jefferson Clinton, is full of hope with the possibilities of a new day of racial harmony. She says in part:

> Here on the pulse of this new day
> You may have the grace to look up
> And out
> And into your sister's eyes, into
> Your brother's face, your country
> And say simply
> Very simply
> With hope
> Good morning.

MAYA ANGELOU, ON THE PULSE OF MRNING, 10 (1993).

[73] 115 S. Ct. at 2121.

[74] *Id.* at 2119.

[75] GEORGE C. FRAZIER, SUCCESS RUNS IN OUR RACE (1994). This work proclaims the vast possiblities of a community with significant economic power which can be harnessed to uplift the black community. Frazier writes:

> With this book, I am calling for the revival of that Afrocentric comunal spirit among the millions of black Americans who are seeking personal and professional success, as well as for those who have already achieved success and now wish to build upon it and to spread it to others of our race.
> *Id.* at 34.

[76] DENNIS KIMBRO AND NAPOLEON HILL, THINK AND GROW RICH: A BLACK CHOICE (1991). Kimbro examines the lives of dozens of African Americans who are role models of self-determination, including Madame C. J. Walker, who developed a hair care system for black women and built one of the first, multi-level, network, marketing firms; and Alonzo Herndon, who founded the Atlanta Life Insurance company, to name only two examples.

on the fact that at the beginning of the 20th century, our foremothers and forefathers left the deprivations of a segregated South and traveled the highways and byways to seek economic and social opportunity. It was a grand experiment in the American Dream. Cousin Evelyn sought to demonstrate the successes of that bold venture by showcasing the collection of doctors, lawyers, architects, financial managers, building supervisors, and computer specialists who sprang forth standing boldly on the shoulders of their forbearers. Even with great preparation and a legacy of self-determination, it took the power of the Civil Rights Movement to fully and affirmatively move us on to the broadest roads of opportunity. Justice O'Connor herself recognizes the need for continued struggle as she writes, "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.[77] Unfortunately, her test has become one of not just strict, but the strictest scrutiny.[78] So much so that even without awaiting the remand results, the federal government is bleaching its programs of racial justice. Unfortunately, the end of the Second Reconstruction is upon us. A rededication to the principles of justice and equality, like the one called for by Elizabeth Cady Stanton at Frederick Douglas's funeral is needed.[79]

One final reflection. My first job in education was with a federally sponsored early education program called "Project Let's Grow." I was a high school student and the only staff person of color.[80] I served as an administrative assistant to the program director, Lavinia B. Geyer. It was a "Head Start" type program for economically and socially disadvantaged elementary school children that met on Saturday mornings. The children included African Americans, poor white Americans and Italian-Americans whose families had recently immigrated. The program provided educational and cultural enrichment and served wonderfully nutritious meals. But more importantly, I think it fed the souls and minds of children hungry for a chance in this world. It affirmed their value as worthy human beings. And since the program brought together children from such diverse backgrounds, it taught them to recognize the beauty and humanity in each other. Today's affirmative action programs provide similar opportunities for understanding. However, government programs alone will never be enough. For example, it was the spirit and dedication of Lavinia Geyer that made "Project Let's Grow" function at its best. She believed that social justice and democratic equality required the affirmative response of government institutions (public agencies can make a difference), but she also possesed personal commitment and good will. Remembering her spirit makes it possible for me to keep the Dream in focus. We honor our past by working to make the future a better place for our children to travel any road of opportunity they choose.[81] So let's GROW!

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[77] *Adarand*, 115 U.S. at 2117 (1995).

[78] "[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the *strictest* judicial scrutiny." *Id.* at 2111 (emphasis added).

[79] *See* note 52, *supra*. *See also*, Steven H. Hobbs, *From the Shoulders of Houston: A vision for Social and Economic Justice*, 32 Howard L.J. 505 (1989), which examines the life of Charles Hamilton Houston, a civil rights lawyer and former dean and professor of Howard University School of Law, and how he trained lawyers, including Thurgood Marshall, to knock down the legal barriers to full citizenship.

[80] Imagine the puzzlement of the children in this program when I was choosen to be Santa Claus at a Christmas party.

[81] In her book, I'VE KNOWN RIVERS: LIFES OF LOSS AND LIBERATION (1994), Sarah Lawrence-Lightfoot studies the lives of six African-Americans who came of age during the 1960's and 1970's. From their lives she weaves stories of struggle and triumph, and piognancy and passion. All six of these thoughtful individuals are committed to the struggle for human rights in their own unique ways. She best summarizes their commitment by reflecting on a lesson from one of her subjects:

> Cherlye Wills often refers to the obligation and responsibility that come with having lived a life of privilege. The nourishment of a loving family and good friends "are gifts you can never give back... *all I can do is give forward*... I memoralize my forebears by giving of myself." (Emphasis added).

Id. at 587.