Volume 5 | Issue 2

Fall 2002

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Michael K. Jordan

William Mitchell College of Law

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Recommended Citation

Michael K. Jordan, *Colored People and Affirmative Action: The Colored Man Standing by the Punch Bowl*, 5 N.Y. City L. Rev. 175 (2002).

Available at: 10.31641/clr050202

THE COLORED MAN STANDING BY THE PUNCH BOWL

*Prof. Michael K. Jordan**

Imagine attending a social gathering where there are a number of people who have never met. You are standing with a group of friends, one of whom is attempting to describe an individual standing across the room. Finally, your friend identifies the individual by saying the person he is talking about is the "colored man standing by the punch bowl." My guess is you would experience a significant level of discomfort. You might even wonder how any *friend of yours* could use that term. Certainly the individual standing by the punch bowl may be a *person of color*, but not a *colored person*. However, I am old enough to remember when I and people who looked like me were referred to as being colored, not of color, black or African American. As best I can remember, the white people who called me colored were not doing so in an intentionally malicious way, I was simply a colored boy.

Many years ago, Althea Gibson and Jackie Robinson broke the color barrier in tennis and baseball. She was a colored tennis player, he was a colored baseball player. I remember viewing in a theater Jackie's biography and everyone, including Jackie, referred to him as being colored. The application of the term colored to Jackie and Althea seemed as natural then as its use now feels awkward and embarrassing. For example, Tiger Woods is the number one golfer in the world and has achieved demigod status in the golfing world. The Williams sisters (Venus and Serena) are recognized as being top tennis professionals. Before them, Arthur Ashe enjoyed widespread success on the professional tennis circuit. Clearly Tiger, Arthur and the Williams sisters have broken color barriers in golf and tennis that were equally as daunting as those faced by Jackie Robinson and Althea Gibson. Has anyone thought of or referred to Woods or Ashe as being a colored golfer or tennis player? Similarly, has anyone referred to the benefits and disadvantages of affirmative action for *colored people*? Whatever strengths and weaknesses this social program may possess, they are either enjoyed

* Michael K. Jordan is a professor of law at William Mitchell College of Law in St. Paul, MN. Asst. Atty. Gen., Iowa Attny. Gen. Off., Des Moines, 1981-83; Spec. Asst. Atty. Gen., Minnesota Atty. Gen. Off., St. Paul, 1983-85; Labor Counsel, Northwest Airlines, St. Paul, 1985-88. J.D., 1980, Iowa. A.B., 1975, Bowdoin College.

or borne by black people or African Americans, not *colored people*. This avoidance of certain racial terms in particular socio/historical contexts is worthy of a great deal more thought than we give to it. Instead of identifying something extant in the real world, use of the term colored serves as a window through which others may peer into you. Just as we have all stared, out of curiosity, at someone wearing dated clothing at an important social event, using the term "colored" suggests something equally as peculiar about the user of the term.

Thinking of Tiger as a colored golfer or how affirmative action harms or benefits coloreds juxtaposes words and ideas that do not seem to mesh. There is a certain racial dissonance created when we think of a colored Tiger but not when we think about a colored Jackie. There is disharmony between the racial group designation (colored, black or African American) and the corresponding activity engaged in by the individual designated as colored. Quite simply, colored men and women cannot excel in golf today, but African Americans, black people or people of color can.

Racial dissonance exists in other contexts as well. Consider, for example, the concurring opinion of Justice Thomas in *Missouri v. Jenkins*.¹ At issue in *Jenkins* was the legitimacy of a broad remedial order issued in a school desegregation case. The Court held that the district court exceeded its remedial powers when it issued the order.² Justice Thomas, however, examined what he thought lay hidden beneath the order. The order was based upon tacit assumptions which were used by the district court when it assessed the quality of predominately black schools. Thomas believed the judge who issued the order assumed that a predominately black institution must be inferior to a racially integrated one.³ Students in predominately black schools simply could not obtain the same level of instructions and educational success as they would have if they were learning side-by-side with white students.⁴

¹ 515 U.S. 70(1995).

² *Id.* at 100-02.

³ *Jenkins*, 515 U.S. at 114.

⁴ *Id.* at 121-22. It was reported that during the Justices' conference at which *Jenkins* was discussed Justice Thomas made a highly personal appeal related to his experiences with segregated schools. In his experience the difficulty with segregation had nothing to do with the absence of white students sitting next to him in the classroom. The problem was that he and other students did not have equal facilities such as heating, books and chairs. See Eleanor Brown, *Black Like Me? "Gangsta" Culture, Clarence Thomas and Afrocentric Academies*, 75 N.Y.U. L. Rev. 308, 318 (2000). Justice Thomas expressed a similar sentiment in his concurring opinion in *Adarand Construction Inc. v. Peña*, 515 U.S. 200 (1995). *Adarand* involved a challenge to a federal highway con-

This unexamined assumption invariably led to broad and erroneous judicial remedies. The judge ignored the real issue in the case, which was what caused the segregated schools: intentional acts by the state or something else which would be beyond the reach of the Equal Protection Clause. Moreover, the judge could not consider any proposition that equated black schools with educational excellence. Thomas, however, was willing to entertain precisely the opposite view. Historically black middle and high schools as well as colleges have been symbols of excellence and are examples of institutions that "can function as the center and symbol of black communities, and provide examples of independent black leadership, success and achievement."⁵ Thomas was unrelenting in his challenge to what he characterized as demeaning assumptions about the ability of black students and a disregard of the historical evidence demonstrating that blacks were capable of educational success in predominately black schools. There is, however, another aspect to this debate that is frequently missed and illustrates how racial dissonance operates.

Prior to the Supreme Court's decision in *Brown v. Board of Education*⁶ the separation of the races was simply a social reality that did not necessarily "stamp the colored race with a badge of social inferiority."⁷ If the colored race is inferior it is not because of legislation, rather the legislation simply acknowledges preexisting circumstances. The two races could not live together until they developed a mutual appreciation of each other's qualities and chose to voluntarily live together. Legislation could not mandate this end.⁸ *Brown* gave us a new vision of the races and how they could or could not live together. Segregation was no longer in the

struction program that awarded contracts based in part upon the race of the subcontractor. The Court held that the federal program was subject to strict scrutiny analysis notwithstanding the fact that the program originated with Congress rather than the states. Justice Thomas characterized the program as involving racial paternalism. "So-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with whites 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 and its use of race." *Id.* at 241. One clearly senses Thomas' belief that the patronizing indulgence which produced the preference program in *Adarand* was operating the same way in *Jenkins* and led judges to believe that black students could not excel in school without the beneficial presence of whites. In both instances it elevated whites to a position of power over blacks and underestimated the power of blacks, given an equal opportunity, to fend for themselves.

⁵ *Jenkins*, 515 U.S. at 122.

⁶ 347 U.S. 483 (1954).

⁷ *Plessey v. Ferguson*, 163 U.S. 537, 551 (1896).

⁸ *Id.* at 551.

nature of things; an outgrowth of the lack of mutual appreciation of the qualities of each race. Instead, separation denoted a degraded state for blacks regardless of how objectively similar the circumstances may be for the two races.⁹

As with the difficulty of thinking about Tiger Woods as a colored golfer, it is equally as difficult, according to Justice Thomas, for judges to think of predominately black schools as being anything other than a badge of inferiority. Colored schools are to segregated schools as Jackie Robinson (a colored ballplayer) was to baseball. Both are rooted in a particular view of the races, their relationship with each other, and the social institutions created to accommodate this social reality. In a post-*Brown* world it is difficult to conceive of a predominately black school using pre-*Brown* cognitive imagery.

This essay will explore racial dissonance and how it affects our thinking about race relations and social policy in America. Why is it we simply cannot or simply choose not to think of Tiger Woods as a colored golfer or affirmative action as benefiting or harming colored people? The answer lies in our conception of race and how the meaning of that term changes. Moreover, no matter how much we may think we hold a particular view of what race means and how we apply that term in guiding us in our mundane activities, a deeper revelation about our views becomes possible only when we apply our concept of race to shape social policy. As will become clear, we often arrive at rational decisions about racial social policy that are chagrined by the extent to which our rational choices are at odds with other deeply held yet less conscious assumptions about race.

The first part of this essay will examine the concept of race. Though we often think of race as delineating real characteristics that exist objectively, race is actually a socially created abstraction. In addition, how this abstraction changes over time will also be explored. This is simply another way of saying that, in America, the term "colored people" has been replaced by the term "black people." The difference between the two terms raises important questions about social policy. For instance, to what extent does changing a racial term used to designate the same group of people reflect actual changes in the group itself or attitudes towards the group? If various terms represent specific attitudes it is a possibility that social policy may be altered to reflect changing attitudes about

⁹ *Brown*, 347 U.S. at 493-94.

the group. It is also possible that policy may be in conflict with the terms used to define the racial group.

These possibilities suggest that it is useful to explore the connection among racial terms, social change and social policy. I will, therefore, explore in broad terms what it means to be colored in America and how the Civil Rights Movement of the 50's and 60's replaced the term "colored" with the terms "African-American" and/or "Black." We know the two are different since a "colored man" can no longer stand by a punch bowl. The question is what is the difference and how does that difference shape race relations and social policy. Specifically, why is it difficult to formulate a social policy, such as affirmative action, and apply it to the needs of colored people, but less difficult if we apply it to black people?

RACE

There is a tendency to think of racial terms as having a permanent meaning. Race refers to a group of individuals who exist in the real world and possess certain attributes which determine how group members will interact among themselves and with members of different groups (races). Colored people is, therefore, a concept that has meaning because it accurately represents properties and relations existing objectively in the real world independently and beyond the control of the individual who uses the term. Since these concepts represent objective reality they are amenable to manipulation through our powers of reasoning. When we unleash our power of reasoning on racial terms we are engaging in the rule governed by manipulation of symbols or concepts to depict the proper (objective) relation between symbols and the objects these symbols represent. Moreover, by rationally manipulating these terms, we acquire a better understanding of the world.¹⁰ For similar reasons, the term racism acquires a fixed meaning. One can identify a racist by comparing his/her conduct and attitudes to a list of observable behaviors, patterns of thoughts and attitudes that have been objectively determined to represent racist attitudes or

¹⁰ This is similar to what the expression "thinking like a lawyer" means. "Thinking like a lawyer" includes a particular type of relationship between mind, language and reality. When one thinks like a lawyer, one is manipulating objective transcendent principles which are reflected in the law. This process is value-free and is not subservient to any particular political or social objective. See Michael Jordan, *Law Teachers And The Educational Continuum*, 5 S. Cal. Interdisc. L. J. 41, 52 (1996). Similarly, racial terms reflect reality in the same way that thinking like a lawyer reflects transcendent realities that are free of individual manipulation and control.

conduct.¹¹

Now recall the colored man at the punch bowl scenario. There are many of you who almost instinctively label the person using the term colored as being at best ignorant, at worst racist. This conclusion was arrived at by referring to a list of behaviors which identifies racist behavior. On that list was an item such as: *Referring to a member of a racial group, other than your own, in a derogatory fashion.* However, what was the derogatory term used? The statement described a visible characteristic which was useful in identifying the stranger, yet few would deny the unsettling affect that hearing the term colored man would have on the gathering. However, the term colored did not always have this negative affect on people. Who would question the long history of the NAACP's active leadership in the fight for civil rights. Yet, this is the National Association for the Advancement of *COLORED PEOPLE*.¹² Certainly this organization was not racist, therefore, the use of the term colored does not necessarily denote a racist attitude. It appears that despite our belief in the fixed objective reality that racial terms are presumed to represent, these terms are neither fixed nor firmly rooted in rationality.

What then is the real problem posed by the colored man at the punch bowl? That is, how is it that an objective term describing people and an attitude towards them can be both fixed and objective yet also seem to vary in meaning over time. Pursuit of the answer must begin with a willingness to lessen our hold on the notion that the concept of race and/or racism is rooted in a timeless and objective reality that exists apart from the social context in which these ideas are created and expressed. We make sense of the world by using culturally constructed and shared meanings about the world around us. These are not fixed ideas that remain constant over time. Instead, these are ideas that we assimilate and are often unaware of, yet they shape not only how we see the world but how we express our understanding of the world to each other.¹³ Race is

¹¹ See Michael Jordan, *The NLRB Discrimination Decisions, 1935-1964: The Empiric Process Of Administration And The Inner Eye Of Racism*, 24 Conn. L. Rev. 55, 67 (1991).

¹² The number of excellent studies on the history and protest activities of the NAACP are too numerous to list. See, e.g. HARRY ASHMORE, *CIVIL RIGHTS AND WRONGS* (1997); TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-1963* (1988); HAROLD CRUSE, *THE CRISIS OF THE NEGRO INTELLECTUAL A HISTORICAL ANALYSIS OF THE FAILURE OF BLACK LEADERSHIP*, (1967) [hereinafter Cruse, *The Crisis*]; DAVID J. GARROW, *BEARING THE CROSS MARTIN LUTHER KING JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* (1986).

¹³ See Steven L. Winter, *The Cognitive Dimension Of The Agon Between Legal Power And Narrative Meaning* 87 Mich. L. Rev. 2225, 2230-35 (1989) [hereinafter Winter] ("Cen-

a culturally shared concept used to explain observable differences between groups of people. Physical differences are imbued with cultural meanings, which are embraced as signifying objective reality apart from the very culture that created the meaning of the term. Race is, therefore, a "folk classification" in that it presents popularly held beliefs about human differences. It is generated by "the ideologies, distinctions, and selective perceptions that constitute a society's popular imagery and interpretations of the world."¹⁴ Folk classifications organize our experiences into a seamless coherent whole which explains and justifies social experiences and social policies.¹⁵

Science was also instrumental in shaping our erroneous view of race as being a natural phenomenon that exists in the real world. Scientific inquiry is nothing more than a way of knowing and understanding the world that excludes supernatural and mystical explanations. This type of understanding is based upon empirical knowledge objectively acquired through the human senses and mechanical techniques that enhance the senses. Inquiry is guided by uniform formal procedures that are free of individual manipulation or idiosyncratic standards of validity.¹⁶ Unfortunately, science was not always free of supernaturalistic or ideological influences.¹⁷ The study of race is an example of one of the less than successful attempts of science to free itself from the influence of supernaturalistic definitions and explanations of race. Science as well as the popular mind was held captive by folk classifications of race. Rather than subjecting popular conceptions of race to rigorous, uniform, and value-free analysis, science sought to justify them.¹⁸

tral to the intellectual process is the construction and sharing within a culture of *idealized cognitive models* . . . to structure and make meaningful regular aspects of our daily experience. These are like "stock stories" or "folk theories" by which humans in a given culture organize the diverse inputs of daily life into meaningful gestalts that relate that which is "relevant" and ignore that which is not."). See generally MARK JOHNSON, *THE BODY IN THE MIND THE BODILY BASIS OF MEANING, IMAGINATION, AND REASON* (1987); GEORGE LAKOFF and MARK JOHNSON, *METAPHORS WE LIVE BY* (1980) (discussing human meaning, understanding and rationality).

¹⁴ AUDREY SMEDLEY, *RACE IN NORTH AMERICA ORIGINS AND EVOLUTION OF A WORLDVIEW* 27 (1999) [hereinafter Smedley]. See generally THOMAS GOSSETT, *RACE THE HISTORY OF AN IDEA IN AMERICA* (1997); IVAN HANNAFORD, *RACE HISTORY OF AN IDEA IN THE WEST* (1996) (discussing the history of race).

¹⁵ *Id.* at 26-27.

¹⁶ *Id.* at 153.

¹⁷ *Id.* at 152-55.

¹⁸ Science filled the void left when the church and bible were no longer used as the authoritative sources to explain the world generally and race specifically. However, science did not totally reject the preexisting social and theologically based assumptions which helped to explain the world. "These assumptions related to the

Our thinking about race feels so natural and objective because of our belief that there is some measure of scientific validity which supports it. After all, we can observe differences between groups of people, so there must be some objective reason for these differences and rational inferences to be drawn from them.

In this regard, science became a form of storytelling; it recognized and responded to the behavior and feelings of individuals as they addressed problems posed by their culture. The appeal of science was its ability to provide culturally acceptable interpretations of seemingly natural phenomena. The scientific study of race is better understood as a mode of analysis more familiar to the humanities, involving metaphor and archetype.¹⁹ The goal was to provide scientific answers to social and moral questions such as how does one justify mistreating groups of people because of the color of their skin and texture of their hair.²⁰

Of course, culturally based explanations of the world change; race is not an exception to this principle. This does not mean that cultural creations, such as folk classifications, can change in virtually unlimited ways simply because they are not constrained by objective rules. Folk classifications – definitions of race – change but change is limited and shaped by the very culture that generated the concept.²¹ For example, we know that the term colored at one time

underlying cosmological and ideological themes of European cultures, specifically those values, beliefs, and “revealed” knowledge about God, nature, the world and humankind. In its early stages, the Judeo-Christian idea of a single creation and the Noachian explication of human diversity were some of the main survivals of Biblical thought in Science. Their persistence was based on unquestioning acceptance of the scriptural representation of human beginnings.” Smedley, *supra* note 14, at 153.

¹⁹ Metaphor and archetype are better understood as the tools of imaginative literature rather than rational scientific inquiry. These tools are used to describe the behavior and feelings of people as they live through and reflect on problems created by their cultures. In literature, unique interpretations are given to events and these interpretations are supported with evidence that cannot necessarily be proved or disproved. The appeal of the metaphor and archetype is found in their language, depth of interpretation and consistency with accepted morals and values. “There are no critical tests to confirm or falsify them. There are no natural laws from which they are derived. They are bound by time, by situation and above all by the cultural prejudices of the researcher or writer.” NEIL POSTMAN, *TECHNOPOLY: THE SURRENDER OF CULTURE TO TECHNOLOGY*, 154 (1993).

²⁰ *Id.* at 161-62.

²¹ See Winter *supra* note 13, at 2244-45. Many have noted the erroneously held assumption that racial classification and racism disappear when terms or ideas used to describe a race in an offensive and oppressive manner are no longer in use. For example, there are few who would attempt to justify the separation of the races based upon biological differences between the races. However, the abandonment of biological justifications does not necessarily signify the elimination of racism, but it does signal a change in the justification for discriminatory treatment. See, e.g., ROBERT L. ALLEN,

was an acceptable way to refer to a group of people but is now an inappropriate way to refer to the same group. This is an example of social change constrained by culturally based rather than objective rational rules. In the next section I will examine the different meanings associated with specific racial terms such as colored and black,²² but initially I will briefly focus on the process of social change.

When we think of social change as it relates to race relations, most of us will have visual images, at least those of us who were born in the late forties or early fifties. Fire hoses, marches and the "I Have A Dream" speech by Martin Luther King are the visual images that mark swift and dramatic change in race relations. If, however, we are to deepen our understanding of racial changes and what effect those changes have on social policy, we need to broaden our view of the forces of social change to include the less dramatic. Long before Rosa Parks refused to give up her seat to a white person on a bus in Montgomery Alabama, colored people were defiantly refusing to submit to the indignities visited upon them whenever they engaged in the simple activity of riding a public bus.²³ It is far easier to recognize change after the fact than when it is happening. The tendency is, therefore, to associate

RELUCTANT REFORMERS RACISM AND SOCIAL REFORM MOVEMENTS IN THE UNITED STATES 255-277 (1974); James M. Blaut, *The Theory Of Cultural Racism*, 23 *Antipode: A Radical Journal Of Geography* 289-99 (1992); Sharon Elizabeth Rush, *Sharing Space: Why Racial Goodwill Isn't Enough*, 32 *Conn. L. Rev.* 1, 12-20 (1999) [hereinafter Rush, *Racial Goodwill*].

²² The terms colored and black are being used to signify specific views about race, however, it is not being argued that these two terms are not connected to each other. As described earlier, race is a folk classification not a scientific one. It is a dynamic concept that is subject to fluctuations in its expression and interpretation. Contradictions and inconsistencies may exist at any given time and two different racial terms may not be mutually exclusive. See Smedley, *supra* note 14, at 27. One should not, therefore assume that my use of the terms colored and black signify two mutually exclusive racial views. They describe dominant characteristics found in the category that developed in response to prevailing social forces. Colored did not necessarily displace black. The process is better understood as one where additional ideas about race were added to our popular view of race. The two views may even blend were they are not inconsistent. Thus, it is possible for elements of black to exist in colored and elements of colored to exist in black. See also Robert Gordon *Critical Legal Histories* 36 *Stan. L. Rev.* 57, 116-18 (1984) (structures of thought do not necessarily prescribe particular social outcomes but do offer a range of meanings and interpretations to use in interpreting social events and explaining historical events).

²³ See ROBIN, D.G. KELLEY, *RACE REBELS: CULTURE, POLITICS AND THE BLACK WORKING CLASS* Chap. 3 (1994) [hereinafter Kelly, *Race Rebels*] (working class struggle against segregation in public spaces goes unnoticed because it was unorganized and represented individual acts of defiance against authority and a demand for dignity and respect).

change with certain easily recognized events. Every school child in America *knows* that the civil rights movement began with Rosa Parks. Unfortunately this tends to associate social change with the actions of specific groups engaged in consciously planned actions directed at specific social conditions.²⁴ We then assume there is a direct causal chain linking the deliberately organized action and the resulting change in the laws and racial attitudes.

While this is one way in which change occurs along the racial frontier, it is not the only method. This perspective on social order is a *top-down* view. Well organized, powerful social and political groups recognize a problem, respond with a rational social and/or political agenda and conditions and ideas change, more often than not, for the better.²⁵ There is another perspective: the *bottom-up* view. It starts within individuals and emanates out to interaction among individuals, small groups, communities then regions. This view is at least as valid as the top down approach and in many respects is a more accurate view of racial change in America.²⁶

²⁴ The civil rights movement is frequently associated with middle class blacks and their demand for equal opportunity. Few scholars recognized the spontaneous acts of resistance of the black working and lower classes because it was neither organized nor accepted as legitimate by black leaders. For these leaders, the role models for proper behavior were supplied by middle class blacks. *Id.* at 3-6 and Chap. 4. See also DAVID HALBERSTAM, *THE CHILDREN* 63-74 (1998) [hereinafter Halberstam, *Children*].

²⁵ In the civil rights movement this view is best represented by the NAACP. During the early part of the movement the NAACP was a well established bureaucratic organization that functioned on the basis of order and predictability. This strength was also a weakness in that it became difficult for the organization to respond to spontaneous grass roots mass action. The result was a conflict between local southern communities that wanted to plan and organize action locally and the centralized northern based leadership of the NAACP. See ALDON MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT BLACK COMMUNITIES ORGANIZING FOR CHANGE* xi-xii, Chap. 3 (1984) [hereinafter Morris, *Origins*]. In response to this conflict there was a tendency for locally based organizations to ignore the NAACP and focus upon the direct participatory action of members of the local black community. These organizations tended to rely on pre-existing local leadership and social institutions. See *id.*; Halberstam, *Children* *supra* note 24, at 215-19; RICHARD KING, *CIVIL RIGHTS AND THE IDEA OF FREEDOM* Chap. 6 (1992) [hereinafter King, *The Idea*].

²⁶ In retrospect there is a tendency to only examine the civil rights movement's affect on the legal and social order of America. What is forgotten is that the movement began with the transformation of individuals. The most basic element of the movement was a new sense of self development by black people. There was a demand for respect from whites and a feeling of empowerment based upon the overt demand and actions taken to enforce the demand. This is bottom up change because it began with a change in how blacks thought about themselves and interpreted social experiences. In fact, it can be argued that the entire history of the struggle for freedom by blacks has been one characterized by individual acts of resistance which were later followed by collective action. See VINCENT HARDING, *THERE IS A RIVER—THE BLACK STRUGGLE FOR FREEDOM IN AMERICA* Chap. 5 (1981) [hereinafter Harding, *The River*]. This is not to deny the significance of collective action. However, it underscores what

The distinction between the two approaches is significant because of the folk classification nature of race. Race is a deeply held cultural construct that is not necessarily subject to conscious rational control and manipulation. It is, therefore, possible for one to consciously act in a way that is consistent with rationally held beliefs, yet one's conscious actions and rational thoughts are at odds with one's deeply held cultural assumptions about race. This is why top-down views of social change fail to capture significant aspects of social change. Well organized group actions may be preceded by significant less visible, but no less significant, attacks upon the underlying culturally based conception of the problem. What we see are highly visible social policies and we assume these policies and their advocates must have caused the change. In fact, the policy is a manifestation, not cause, of the change. Conversely, a social policy or movement may fail because of its inability to consider the existing context in which it must be applied. It may make rational good sense, but is inconsistent with deeply held cultural perspectives about the nature of the issue being addressed by the policy.²⁷

This starts to sound similar to the reaction one has to hearing Tiger Woods referred to as a colored golfer or affirmative action working against the interests of colored people. It is dissonance, but now we can be a bit more specific about its source. It is the disjuncture between the way we consciously and rationally think about race and the deeply held beliefs about race which we hold and upon which we act. In the case of Tiger Woods we know rationally that he is a gifted athlete in a sport that excluded people with brown skin. These descriptive facts are inconsistent with referring to Tiger as colored. Colored signifies something beyond facts and rational discourse. Similarly, affirmative action is easily described

precedes collective organized action: individuals deciding to transform themselves then communicating these views and feelings to others in an effort to interpret their experiences and arrive at a common conception of self and the actions which need to be taken in response to these new conceptions. Moreover, I am not arguing that the two approaches are mutually exclusive. It is possible for the two types of change to support each other. See generally ANTHONY COOK, *THE LEAST OF THESE RACE, LAW, AND RELIGION IN AMERICAN CULTURE* Chap. 5 (1997) [hereinafter Cook, *The Least*]; Kelly, *Race Rebels* *supra* note 23, at 74-5, Chap. 4; King, *The Idea* *supra* note 25, at 4-9, Chaps. 2, 3; Francis Fukuyama, *The Great Disruption*, *The Atlantic Monthly* May 1999, at 55, 76-77.

²⁷ See generally Morris, *Origins* *supra* note 25, Chap. 11 (the success of the civil rights movement is found in its reliance upon traditions norms, institutions, and resources in the community rather than the rejection of these resources in favor of a spontaneous outpouring of emotion in a largely unplanned and irrational response to the social system).

in social and legal terms that do not seem to fit the deeply held conception of what colored means. A top-down policy, such as affirmative action, just does not mesh with the visceral response evoked by the term colored.

The next section will explore this conflict between rationally held beliefs about racial social and governmental policy and tenaciously held cultural constructions of race. Two folk constructions of race need to be explored: colored and black. Exactly what do these terms mean to us and why is it difficult, if not impossible, to use these terms interchangeably?

COLORED

Colored people were created in the post Civil War South. Former slaves faced legally sanctioned acts of discrimination and violence. In this context, colored people -former slaves-faced the daunting task of carving out a place for themselves in a society where many doubted their ability to be productive members of society. Colored, therefore, became a racial classification shaped by: the abolition of slavery; whites doubting the ability of the former slaves to function as self-sufficient rational human beings; and the desire of former slaves to demonstrate their ability to survive and flourish using their new found freedom.²⁸ It was presumed that former slaves were incapable of building communities and sustaining themselves in these communities without the helping hand of former slaveholders.²⁹ In effect, colored people carried the burden of proving their humanity by proof beyond a reasonable doubt.³⁰

Booker T. Washington epitomized what colored meant. As a

²⁸ See generally ERIC FONER, *RECONSTRUCTION AMERICA'S UNFINISHED REVOLUTION* 1863-77 Chap. 3 (1988) [hereinafter Foner, *Reconstruction*].

²⁹ See Harding, *The River* *supra* note 26, at 260, 297 and Chap. 14.

³⁰ This burden can be seen most clearly in the Black Codes which rigidly proscribed and prescribed certain behaviors for colored people. A failure to follow this regime could result in criminal sanctions. See Foner, *Reconstruction* *supra* note 28, 199-201, 208-9. The Codes, therefore, exemplify Justice Harlan's notion of the social disutility of erroneous outcomes. The standard of proof adopted in establishing the existence of particular facts will affect the frequency of erroneous factual findings and conclusions. Thus, the choice of the standard of proof reflects an assessment of the comparative social disutility of the outcome. In the criminal context, there is more disutility in convicting an innocent person than there is in letting a guilty person go free. See *In re Winship*, 397 U.S. 358, 370-72 (1970). In the post-Civil War South, placing a high burden of proof on former slaves was a clear indication of how dubious was the propositions that colored people were as human as whites and could be useful members of society. They had to be controlled in every aspect of their lives. The harmful consequences of mistakenly thinking otherwise posed unacceptably high risks for whites and society.

leader, his power lay in his ability to understand his own times and express the aspirations and dreams of those whom he led. His understanding of "colored" led him to endorse social policies and a code of individual behavior that was rooted in his and his followers' vision of how colored people could survive in America and meet their burden of proof.³¹ For Washington, the best way to meet this burden was with deeds. His vision of economic self sufficiency³² was a social and political agenda which directly responded to the conception of race held by white people. Economic self sufficiency proved the worth of colored people by transforming them through the creative activity of work. Through the acquisition of skills and material goods colored people would challenge whites' definition of them.

Washington's Atlanta Exposition speech, in September of 1895, is perhaps the most concise statement of the meaning of being colored in America.³³ He did not equate being colored with an acceptance of racial exclusion and oppression of colored people in the South. Instead, he addressed the burden of proof borne by colored people. For Washington, full citizenship was the ultimate goal of colored people but the road to it had many hurdles. Competency was proven by developing manual skills and a trade, rather than by holding a political office. By dutifully following a code of individual behavior rooted in hard work and capital accumulation, colored people believed they could demonstrate their ability to meet and exceed standards endorsed by whites. The focus of this approach was not on the fairness of the burden. Colored people were as certain of the injustice of the burden they bore as whites were of its validity. Instead, colored people turned their attention to developing what they viewed was necessary to satisfy their burden of proof: individual initiative, character and responsibility. An injustice committed against them because of their race became the backdrop against which individual fortitude and worth would be demonstrated. Moreover, social integration with whites was secondary to proving that one was worthy and competent: "[i]n all things that are purely social we can be as separate as the fingers, yet as the hand in all things essential to mutual progress."³⁴

³¹ See MANNING MARABLE, *BLACK LEADERSHIP FOUR GREAT LEADERS AND THE STRUGGLE FOR CIVIL RIGHTS* xi-xvii (1998) [hereinafter Marabel, *Black Leadership*].

³² See generally VICTOR ANDERSON, *BEYOND ONTOLOGICAL BLACKNESS* 66-70 (1995); FRANKLIN, *LIBERATING VISIONS* *supra* note 26, at Chap. 1; MARABLE, *BLACK LEADERSHIP* *supra* note 31, at Chap. 3.

³³ BOOKER T. WASHINGTON, *UP FROM SLAVERY: AN AUTOBIOGRAPHY* 143-46 (1999).

³⁴ *Id.* at 145.

Washington combined his understanding of colored with a prescription for social policy towards colored people. His now famous "cast down your bucket" metaphor was more than a colorful rhetorical device; it was a clever way of introducing a racial-preference policy. "To those of the white race who look to the incoming of those of foreign birth and strange tongue and habits for the prosperity of the South, were I permitted I would repeat what I say to my own race, 'Cast down your bucket where you are.'"³⁵ His plea was, however, an appeal to rational self interest rather than racial justice:

Cast down your bucket among those people who have, without strikes and labor wars, tilled your fields, cleared your forests build [sic] your railroads and cities. . . .Casting down your buckets among my people, helping and encouraging them as you are doing on these grounds. . . .you will find that they will buy your surplus land to make blossom the waste places in your fields. . . .While doing this, you can be sure in the future, as in the past, that you and your families will be surrounded by the most patient, faithful, law-abiding, and unresentful [sic] people that the world has seen.³⁶

Buckets were not cast down to cure current or past acts of racial discrimination;³⁷ rather, the act served the economic interests of whites. Colored people could be loyal employees or strike breakers: a guarantee that would not be given by immigrants. His posture on these issues also explained the avid support he received from white capitalists.³⁸ Washington's understanding of what it meant to be colored and the social policies he advocated, dovetailed into each other. Colored people sought to prove their worth through the following: adhering to a rigid code of personal discipline; living a life of exemplary rectitude; developing industrial skills; and capital accumulation. Whites would then have objective evidence of colored people's skill, loyalty and humanity. Affirmative action in this context amounted to nothing more than an opportunity to demonstrate competence and value to white people by adopting the values of the middle class and protecting white-industrial interest from the raising tide of labor unrest in the North and South.

³⁵ *Id.* at 144.

³⁶ *Id.*

³⁷ See *City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 498-507 (1989) (race may be used in governmental decision making when it remedies current or past acts of discrimination against the race favored by the decision).

³⁸ Marabel, *Black Leadership supra* note 31, at 32-33.

Washington recognized that if colored people were to be the beneficiaries of the largesse of whites, there had to be a shared definition of what colored meant which would then justify, perhaps compel, whites to address the social conditions of coloreds. The starting point for this definition was specifying characteristics of the group which defined the group and delineated the problems to be addressed. These characteristics may be cultural, behavioral and/or, as in the case of coloreds, racial in origin. Regardless of the characteristics' origin, resources are mobilized and allocated pursuant to a conscious and rational social or governmental policy to address the problem. The policy is held together by its presumed rationality and the worthiness of the subjects of the policy.³⁹ Moreover, a group, in this instance colored people, does not have to be powerful to be the subject of beneficial social programs. In other words, it does not have to coerce whites to act, but it must be willing to endorse to some degree the prevailing definition of the group's attributes which justify the social policy. For colored people the key attribute was an absence of abilities believed to be necessary for moral and economic development. The acceptance of the need to develop these abilities led to policies that focused on assisting this powerless group.⁴⁰ Hence, the power of the "cast

³⁹ Public policy is often viewed from the perspective of who wins and loses from the particular allocation of resources. What is frequently overlooked is the extent to which policy is shaped by the social construction of the population targeted by the policy. This construction represents the cultural characterizations or popular images of the persons or groups whose behavior or well-being is targeted by the policy. In its simplest form the targeted population is believed to have shared characteristics that distinguish it from other groups and these characteristics are believed to signify certain values or images. In essence these are stereotypes created by culture, politics and/or socialization. Moreover, both the nature of the construction and the policy implemented in response conveys messages to the targeted population. It informs them of their status and the types of behavior that is expected from the group. See Anne Schneider and Helen Ingram, *Social Construction Of Target Populations: Implications For Politics And Society*, 87 AMERICAN POLITICAL SCIENCE REVIEW 334, 335-41 (1993). See also LAURA DUDLEY JENKINS, *IDENTITY AND IDENTIFICATION: AFFIRMATIVE ACTION IN INDIA AND THE UNITED STATES* Ch. 1 (1998) (unpublished Ph.D. dissertation, University of Wisconsin, Madison) (on file with the William Mitchell College of Law Library).

⁴⁰ Schneider & Ingram, *supra* note 39, at 337-39. This is not meant to suggest that colored people "accepted" these definitions as being totally accurate. Some may very well have. However, the point here is to note the extent to which a policy was built upon a particular definition of what colored meant and the burden of proof which colored people carried. The issue here is not fairness, rather it is the extent to which these policies were rooted in particular views about colored people and the extent to which the policy encouraged and rewarded certain types of behavior. The reward was clearly intended to shape the view that colored people had of themselves. *Id.* at 340-41. The level of the influence is subject to debate, but that the policy did in fact have an effect is beyond debate. Cf. King, *supra* note 25, at 4-9 (the mass action civil rights

down your buckets" metaphor. Colored people accepted their need to develop the desired traits (thus acknowledging at some level that they were absent) and whites would offer a helping hand in providing the opportunity and material resources to assist coloreds in acquiring these traits.

This process also demonstrates the difference between top-down and bottom-up social change and how the two can be used in constructing social policy. Notice how Washington placed the burden upon colored people to transform themselves inwardly, as individuals, then outwardly to small groups within the colored community. Social change began with a code of personal moral and economic conduct. What followed was the social policy that recognized, supported and capitalized upon the personal metamorphosis. It all started though, with the individual and his willingness to bear up under the burden of accepting Washington's code of behavior. This is bottom-up social change.

While it is beyond the scope of this essay to engage in an in-depth comparison of the views of Washington and his contemporary W. E. B. DuBois, a brief word is in order because the two men presented opposing views of colored people. Dubois is commonly viewed as the more radical and prescient of the two leaders; he anticipated and laid the ideological groundwork for what we have come to know as the civil rights movement. Washington's racial conception is viewed as an aberration from Dubois' now widely endorsed positions on race and the struggle for racial equality. Unfortunately, this position is based upon 20/20 hindsight and, more importantly, overestimates Dubois' political power and misinterprets his relationship with colored people.

Washington wielded a great deal more political power than Dubois, and this difference can be traced to Washington's ability to control the patronage of industrial philanthropists. It was Washington who attended high profile meetings with national political leaders, not Dubois. His message of hard work was geared to the needs of the masses of colored people struggling to survive in the South.⁴¹ His concern was the immediate material needs of colored people and what colored meant to both colored and white people. He has been described as an intercessor between his group and whites: one who demanded less for colored people than whites had

movement created a new sense of self and personal responsibility which was contrary to the preexisting view of blacks as being powerless).

⁴¹ Marabel, *supra* note 31, at 23-33.

already conceded.⁴² One may argue over the effectiveness of this approach, but it undeniably represented an accurate understanding of what colored meant. Intercession accepts the power differential between colored and white people and limited colored people to petitioning for the opportunity to demonstrate competence. An intercessor passionately urges one to "cast down his buckets" and does not demand anything as a matter of right. The one who responds to the entreaty does so based upon the sincerity and moral force embodied by the plea, not its stridency. In effect, Washington was the personification of bottom-up change.

Dubois, on the other hand, was an intellectual. His view of what colored people needed extended well beyond the acquisition of political rights and material well-being. Colored people needed to search for their identity in their own cultural heritage. The arts and literature were tools to be used by colored people to free themselves from an identity created for them by white people.⁴³ Dubois assailed the meaning of colored as a cultural phenomenon and advocated for the redefinition of race based upon the experiences and culture of colored people. As an intellectual, his task was to develop and articulate the consciousness of so called colored people. Given this task he stood at the periphery of society and the masses of colored people.⁴⁴

Washington's power lay in his ability to articulate and reflect current racial definitions and respond with a social agenda that matched those definitions. It is his vision of colored that mirrored the contemporary cultural meaning of race. Dubois' vision of race

⁴² *Id.* at 35.

⁴³ *Id.* at 43-47. In this regard Dubois is atypical of black civil rights leaders who tend to view the race issue in economic and political terms. See Cruse, *supra* note 12, at 92 ("From the black point of view, the Negro intelligentsia does not comprehend the strategic importance of the cultural front in relation to the political and economic fronts. . . . They do not see that a truly pragmatic economic and political program cannot be put into motion in the United States unless it is simultaneously linked to the cultural front.").

⁴⁴ Dubois was not, therefore, what Antonio Gramsci would view as a traditional intellectual. Traditional intellectuals "are directly involved in the production and reproduction of ideological forms that reinforce domination by the classes that control political and economic power. Part of their responsibility is to socialize successive generations to accept the dominant ideology and power relations with the existing social order." Marabel, *supra* note 31, at 98. DuBois was an organic intellectual. "In contrast, organic intellectuals emerge from the most oppressed and exploited social classes and groups within society. They generally articulated the consciousness of their classes in politics, in social relations and within the economy. Because their connections with the elites who control the economy or dominated governmental institutions are tenuous or even nonexistent, their objective class position is implicitly or explicitly in direct conflict with the dominant powers." *Id.* at 99.

was that of a forward looking intellectual seeking to reshape the debate over the meaning of race and racial equality, based upon the social and cultural history of colored people. Perhaps the best way to understand the two men is not to focus on their differences, for in the final analysis they both aspired to achieve the same thing: the full participation of colored people in American social and political life. It was their immediate interests that were different. Washington committed himself to developing an immediate survival strategy while Dubois sought to create a new language for colored people to use in defining for themselves what colored should mean for themselves and whites.

BLACK

At some point during the mid-Twentieth century, colored people began to disappear and black people began to emerge. The difference between the two groups is best understood by examining the significance of the civil rights movement. The imagery of the movement is indelibly etched in our consciousness: the "I Have A Dream" speech, marches, bombings and civil rights legislation. The permanence of the images suggests to us that their resonance was uniformly and universally experienced by the nation. We forget, however, that our interpretation of the movement is influenced by our definition of race and the movement is, therefore, subject to various interpretations over time. Just as colored could not be understood apart from the post-Civil War experience of freed slaves, black cannot be comprehended apart from the social landscape that existed during the mid 50's to late 60's. The quest for racial equality and the meaning of race intertwined with other culturally based beliefs, one of which is the ideology of social progress. The transformation of America from a legally segregated society to an integrated one mirrors the presumed general movement of civilization in general, and America in particular, from belief in myth to enlightenment, ignorance to knowledge and superstition to reason. Race mirrors this transformation by having its meaning move from an archaic irrational (folk) definition, towards a rationally based one geared to the needs of an egalitarian society. This is progress engendered by conscious rational control of behavior. It has a momentum of its own which cannot be impeded by the idiosyncratic will of individuals.⁴⁵

⁴⁵ See Michael Jordan, *From The Constitutionality Of Juvenile Curfew Ordinances To A Children's Agenda For The 1990's: Is It Really A Simple Matter Of Supporting Family Values And Recognizing Fundamental Rights?*, 5 St. Thomas L. Rev. 389, 429 n.148 (1993) ("The

The dominant image of the Civil Rights Movement is that it responded to a higher calling. In the realm of the sacred, it represented individual transformations based upon the ideas of brotherhood and the Judeo-Christian heritage of love and human dignity.⁴⁶ The secular side of the movement represented another step in the inexorable evolutionary progression towards a society constrained by rationality and individual merit rather than irrational racial classification. What in fact occurred was not an elimination of irrational racial classification, rather the content of the classification changed. Initially, the essence of the Civil Rights Movement was a battle to rebut the idea that colored people were not fully human. This was accomplished through deeds which signified one's economic competence and moral rectitude. Black was rooted in precisely the opposite notion. There was a presumption of humanity and innate human equality. Black was a demand not an entreaty. It demanded that whites face their own moral failings and give way to the force of social progress and our Judeo/Christian heritage. Social reform in this instance gathered its strength from confidence in the power of the individual, morality and the inevitability of progress.

As with Washington's colored people, the early phase of the civil rights struggle was an example of bottom-up change: it reduced social change to an individual struggle. Adherence to a personal code of moral behavior was necessary to illuminate the dark side of America's moral duplicity, and as with Washington's approach, visible public action was necessary to signify the inner transformation that was occurring. The direct action movement illustrates this most clearly. The existence of organizations such as the Southern Christian Leadership Conference and the National Association for the Advancement of Colored People has led to the

meaning of race has been grafted onto other central cultural images of progress, so that the transition from segregation to integration and from race consciousness to race neutrality mirrors movements from myth to enlightenment, from ignorance to knowledge, from superstition to reason, from primitive to the civilized, from religion to secularism, and most importantly, the historical self-understanding of liberal society as representing the movement from status to individual liberty.”).

⁴⁶ See VINE DELORIA JR., *GOD IS RED A NATIVE VIEW OF RELIGION* 48 (1994) (“The Civil Rights movement was probably the last full-scale effort to realize the avowed goals of the Christian religion. For more than a century, the American political system proclaimed the brotherhood of man as seen politically in the concepts of equality of opportunity and justice equally administered under the law. Equality under the law, however, was a secularized and generalized interpretation of the Christian brotherhood of man, the universal appeal of individuals standing equally before God now seen as people standing equally before the law and secular institutions.”). See generally Cook, *supra* note 26, at Chap. 4.

mistaken belief that there existed a centralized command structure that dictated local strategy. In fact, the movement was indigenous and decentralized. Colored people were transformed into black people because of the institutions, customs and beliefs that existed in their communities and interpreted social reality. For blacks this meant the church and a history of interpreting the struggle for freedom as requiring individual action and responsibility.⁴⁷ Moreover, the response of whites was equally decentralized. Individual whites were confronted with the behavior of colored people that was inconsistent with how colored people were supposed to behave. There was no entreaty "to cast down buckets." Instead, there were the individual and group confrontations challenging the prevailing view of race. Blacks were not attempting to rebut the presumption of inhumanity which Washington focused on; they were telling whites that by creating and believing in the presumption whites were offering prima facie evidence of their own immorality.

Equal opportunity became the phrase that characterized this shift from colored to black. It captured the degree to which America had betrayed its core values of individualism and self determination. One's success or failure should reflect one's ability to compete for limited opportunities under conditions of fair competition. In this regard, the movement was built upon the cornerstone of modern liberalism. Its focus was not upon equality of results in the competition for limited resources; instead it focused upon the fairness of the process by which the results are derived.⁴⁸ Black people wanted nothing more than individuality. They wanted to be freed from a racial classification that ignored individual worth and uniqueness in favor of an all encompassing and oppressive definition of race. The movement, therefore, operated at two levels. For the individual it was a struggle for racial equality and a challenge to any notion that race imposed a burden on individuals to prove their moral worth. On a larger scale it was a step forward in the evolutionary process by which America evolved towards a more enlightened and rational society. Both levels began and ended with the individual and his determination to transform America through his life and actions.

This view changed dramatically. It became apparent that equality in competition would not remedy the unequal conditions

⁴⁷ See King, *supra* note 25, at 94-99; Morris, *supra* note 25, at 5-7.

⁴⁸ See Cook, *supra* note 26, at 6-8; JAMES S. FISHKIN, JUSTICE, EQUAL OPPORTUNITY, AND THE FAMILY 1-2 (1983) [hereinafter Fishkin, Equal Opportunity]; Vincene Verdun, *If The Shoe Fits, Wear It: An Analysis Of Reparations To African Americans*, 67 Tul. L. Rev. 597, 619-22 (1993).

that necessarily influenced the results of the competition. With the development of an individual identity came the burden of being held personally responsible if one did not succeed in competition with others. It was this difficulty that the civil rights movement and whites began to face. If one were committed to fair competition among equals it became increasingly difficult to ignore the effect that years of oppression had upon the ability of blacks to compete.⁴⁹ The result of this type of competition was predictable and presumably the prediction could be made based upon skin color. Affirmative action was born out of this realization. The focus was no longer on individuals and procedural fairness in competition. Outcomes became the touchstone by which we measured whether racial discrimination continued to exist.⁵⁰

AFFIRMATIVE ACTION

Much has been written about the legal, philosophical and social justifications of affirmative action. My focus is on where this essay began, the folk classification nature of race; the popular beliefs about and explanations of differences between people based upon race. With the advent of the civil rights movement and the disappearance of colored people it was tempting to believe that racial classifications had or were in the process of disappearing. This sanguine perspective is consistent with our belief that America is moving towards a more rational society that has eliminated social classifications rooted in ignorance. Unfortunately, the civil rights movement did not eliminate folk-based views of race; it simply added new images to the popular conception of it.

Recall the colored man at the punch bowl scenario. What is shocking, perhaps embarrassing is a better word, about the statement is its use of a term that seems inappropriate in the post civil rights movement era. "Colored" is associated with a time when colored people were presumed to be morally and socially incompetent, they had to prove their humanity and value to white Americans. Thus, by referring to a "colored" man in the room the person was invoking racial imagery that presumably did not survive the

⁴⁹ See Desiree Kennedy, *Radicalism, Racism And Affirmative Action: In Defense Of A Historical Approach*, 27 Cap. U. L. Rev. 61, 62-64 (1998); ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 184-191 (1992); Rush, *supra* note 21 at 21-24; Verdun, *supra* note 48 at 629-39; Leland Ware, *Turning Back The Clock: The Assault On Affirmative Action*, 54 Wash. U. J. Urb. & Contemp. L. 3, 5(1998).

⁵⁰ See Nathan Glazer, *WE ARE ALL MULTICULTURALISTS NOW* 11-13(1997) (explaining the difference between multiculturalism and affirmative action with its current emphasis on quotas and timetables rather than adding diversity in society).

Civil Rights Movement. The important point to remember is the discomfort caused by the use of an anachronistic term to describe race rather than the use of a racial term. A "colored" man at a punch bowl signifies both location in a room as well as the competency and character of the person. We do not refer to Tiger Woods as "colored" because "colored" carries the presumption that colored people do not possess the skill and intelligence necessary to play a white man's game. Jackie Robinson was a "colored" baseball player because he was in the process of challenging the presumption that was firmly entrenched and had yet to be rejected.

This does not mean, however, that racial folk classifications have ceased to exist; their content has simply expanded to include new images, ones that may be no more rational than those already included in our prior conception of race. We have not evolved to the point where race ceases to be a major tool in defining social reality in the popular mind. The existence of affirmative action programs is evidence that racial folk classifications are alive and well in America. Affirmative action is nothing more than a social program based upon a particular conception of race. It represents as much a social policy rooted in particular beliefs about race as Washington's call to "cast down buckets." The difference is that Washington's policy was accepted because it was consistent with the prevailing conception of race; by contrast, affirmative action is neither accepted nor consistent with our conception of race. It is a top-down policy solution to a problem that historically has been viewed as a bottom-up issue.

As explained earlier, social policies implemented for discrete groups of people are driven by specific conceptions of a group's characteristics and the problems created by those attributes. With colored people, the question was what policy was appropriate for a group of people who were presumed to be morally and socially inferior. For Booker T. Washington, the solution was for colored people to request a limited opportunity to overcome the presumption of inferiority through deeds and adherence to a rigid code of moral and capitalistic behavior. The policy matched the prevailing sentiment (folk classification) about the meaning and significance of race. However, affirmative action, is a policy that is not in step with the prevailing conception of race. The current view was shaped by the civil rights movement with its focus on the individuality of black people; the elimination of the burden of proof borne by colored people; and the obligation of whites to follow a political and spiritual higher calling. At the outset of the civil rights move-

ment colored people demanded justice based upon the argument that the moral and legal trajectory of America was towards a presumption of competence and the moral worth of all people, regardless of race.

Affirmative action reintroduces race but from a different direction. Compensatory action is now taken due to incompetence that is rooted not in genetic racial differences but socially imposed burdens. Being black became the factor which explains one's social circumstances and outlook in the same way that being colored had been indicative of one's incompetence and subhuman status: skin color continued to denote social status and explain one's social circumstances. What changed during the post-civil-rights era was the belief that we can rationally distinguish between the two definitions and uses of race. Colored was indicative of one's inhumanity only because of the ill-founded and unscientific views of whites. Now, however, we know that any negative aspects to being colored can be traced to the socio/cultural disadvantages resulting from discrimination. Unfortunately, what many fail to notice is that race is still being used in both instances to understand and explain the actions of individuals. For colored and black people there developed a consensus on race as a trait that identifies a group subject to corrective governmental policies. The group members have attributes which are in need of remedial action and the group is also deemed to be deserving of the necessary intervention.

It is easy to articulate rational distinctions between the different uses and meanings behind the terms "black" and "colored." Unfortunately, folk classifications are neither rationally based nor subject to logical control and modification. We may reason our way to a position where we comprehend the difference between disabilities imposed on a group because of race and disabilities caused by race, but it is too fine a line to be drawn in the realm of folk classification. The controversy over affirmative action is evidence that race-based thinking is alive and well and not as easily manipulated or eliminated as policy makers would have us believe. The emphasis is on which folk classification of race shall be used, not whether the use of any racial classification is appropriate. Thus, there is little reflection over the larger question of the extent to which any commonly used racial classification represents a social construction of reality, rather than an accurate, value-free objective depiction of reality. Black is as much a socially created concept which matches particular social policies as colored matched others. The former requires affirmative action the later the casting down of buckets.

There are additional dangers present. Colored people did not necessarily disappear with the appearance of black people. What occurred was that additional popular conceptions of race were added to our store of racial images and definitions used to explain the behavior and circumstances of groups. Colored people could surge once again to the forefront of the popular conception of race if they offered a better explanation of social conditions or policies implemented in response to current social issues.⁵¹ Both black and colored are concepts, not concrete things. They ebb and flow according to their ability to offer explanations for difficult issues that are not necessarily subject to rational control and explanation.

Finally, affirmative action is also a top-down policy, which rests upon our assumptions about the evolutionary process by which America is moving towards enlightenment and rational control of society and ourselves. Once the need for a policy such as affirmative action was logically assessed, it was imposed upon others based upon a loose consensus among policy makers and social activists. This was done because of their deeply held faith in their ability to control and predict the outcome and effects of remedial policies.⁵² Presumably, everyone would eventually comprehend the necessity and wisdom of the policy and those who did not were racists or unenlightened. In effect, those at the top were waiting for everyone else to become more rational and abandon primitive notions about race in favor of an enlightened and modern perspective about the needs and justified demands of black people.

This is not meant to suggest that anyone opposed to affirmative action is a primitive racist, or that a supporter of it is a progressive thinker. The point is that beneath the legal and social arguments garnered for or against the program are folk conceptions of race that are never fully acknowledged. It is difficult for us to think of a social program aimed at a particular racial group without also invoking the full panoply of popular conceptions of that group that have ever existed. Our current popular conception of race (black people) was drastically altered by the civil rights movement and subsequent events such as the black power movement with its emphasis on black nationalism and its justification of the use of violence.⁵³ As a result, affirmative action simply does not fit our current popular conception of race. It is no longer deemed

⁵¹ See Smedley, *supra*, note 14, at 27; Gordon, *supra* note 22, at 116-18, and *supra* note 22 accompanying text.

⁵² See generally THOMAS SOWELL, *PREFERENTIAL POLICIES AN INTERNATIONAL PERSPECTIVE* ch. 5 (1990).

⁵³ See generally STOKELY CARMICHAEL AND CHARLES HAMILTON, *BLACK POWER: THE*

fair to presume nonwhites are incompetent. White America is believed to have faced its betrayal of our liberal Judeo-Christian heritage by denying the humanity of colored people. America is believed to be moving through its evolutionary progression towards a more open and rational society. Colored people have disappeared. In their place, we have black people who do not need affirmative action because this program is inconsistent with a society that views itself as having achieved rationality and equal opportunity. Finally, blacks are more assertive, even strident, and America is not going to *give* anything to a strident race. Things are given ("buckets cast down") to those who are deemed humble and accepting of their inherently diminished status. If affirmative action does not fit our image of blackness, we may find ourselves resorting to former conceptions of race that offer a more satisfying interpretation of remedial programs such as affirmative action.

CONCLUSION

I recognize that my views are easy prey for the charge that I want blacks to return to the good old days when we were less demanding, passive and appreciative of what little favors whites would do for us in the name of charity. When I was a kid during the early 60's being colored was being an Uncle Tom. I am not an Uncle Tom. The issue is not whether I, or anyone else, has a particular view of race. We all do whether or not we are willing to admit it. What is important is that we should not deceive ourselves into thinking that anyone of us has a rational and objective view of race that exists outside of the social context in which we live. That is, we can simultaneously use race and transcend it so that we achieve a social condition where race represents an eternally accurate representation of reality. The last time this belief was held, it was called scientific, and later, discredited. Yet, we still believe that we now have a clearer understanding of race, since older scientific claims about race have been exposed, once and for all, to have been fraudulent. However, this view will invariably lead us to repeating previous errors. That is, after exposing the fallacy behind previous false and invidious conceptions and uses of race, we now have the true meaning of race at our disposal for use in constructing our social reality. In effect, we know now what race *really means* to us. We are now as certain about what black means as we previously were certain about what colored meant. With this certainty we are

ready to make the social world over in this new flawless racial image. This certainty, perhaps hubris is a better word, needs far more scrutiny than what has been applied to it.

We pose the greatest threat to ourselves when we believe that it is possible for a society to evolve to a point where it is capable of possessing a high degree of insight into social problems and with that insight construct solutions based upon value-free criteria. We know what is correct because of our belief that an objective view of history demonstrates certain values and views of race to be more enduring and beneficial. Social problems and the race issue are then reduced to technological rather than ideological issues. Affirmative action owes its origin, in part, to this view. After decades of racial conflict and debate, we believe we have a more insightful and less dangerous view of what race does and does not mean. It is now possible to think logically about it and derive policies free from older, less objective belief systems. The controversy over affirmative action demonstrates that, even assuming we can reach that point in America, we are not there now.

Affirmative action rests on two fallacies. First, it is believed that since America is moving along the path of progress and away from invidious biologically based views of race, it is now possible to have benign race-based programs. This would be a program based upon an accurate rational conception of what race *really* means. The problem is that there never has been a time when contemporary social thinkers and policy makers did not believe that they also had the *real* meaning of race, only to later discover that they were wrong or racist. That is why Booker T. Washington went from being a powerful leader to an Uncle Tom— from a paladin and leader of colored people, to a betrayer of black people. Race is, and always will be, a social construct, devoid of any inherent meaning and filled only with the significance that our culture and history ascribe to it. A value free racial category is an oxymoron.

The second fallacy is a corollary to the first. A social program based upon race can survive based simply upon our rational belief that it is a good thing even though the program is inconsistent with the very assumptions undergirding the program. No matter how much affirmative action may have been viewed as the right thing to do, it simply ran afoul of what "black," as opposed to "colored," means in America. Perhaps Justice Thomas is correct in being skeptical about race-based social policy. However, a better way of understanding his skepticism is to recognize that racial categories, when used for any purpose, call forth every popular conception of

race we have ever used in our culture. We have not evolved to the point of eliminating a particular view of race; we simply emphasize some aspects over others. Affirmative action calls forth former conceptions of colored people on the one hand, and on the other, the presumption of incompetence which they worked so arduously to rebut. This stock racial image was not eliminated, it was simply overshadowed by black people, their heroic struggle for individuality, and their demand for respect.

No matter how much affirmative action may make rational sense, it opens the door for the reintroduction of colored people, not through a conscious choice, but simply because these are the limited and crude tools at our disposal when we think about race. That is, the popular mind may believe that we need affirmative action because colored people really could not rebut the presumption that was placed on them. Conversely, black people may resent accepting popular definitions of race in a vein similar to that of how colored people accepted buckets that were cast down based upon dehumanizing assumptions held by whites. They may disagree with the popular assumptions justifying the policy but accept it to the extent necessary to keep the policy going and receive some measure of benefit from it. We are not moving towards transcending racial categories when we use affirmative action, we simply become more firmly mired in them. As long as we see a colored man, black man, or man of color standing by the punch bowl, we will carry race as a societal millstone which we will bear but cannot fully control or comprehend.