The Priority Paradigm: Private Choices and the Limits of Equality

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THE PRIORITY PARADIGM: PRIVATE CHOICES AND THE LIMITS OF EQUALITY

Dorothy E. Roberts*

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I. INTRODUCTION: RACIAL CONFLICT IN THE TWENTY-FIRST CENTURY

Three decades ago constitutional scholar Herbert Wechsler identified the crux of Brown v. Board of Education\(^1\) as a clash between black schoolchildren's freedom to attend white schools and white people's

* Professor, Rutgers University School of Law-Newark. I am grateful to Donna Jackson for her research assistance.
\(^1\) 347 U.S. 483 (1954).
freedom to refrain from associations they found unpleasant or repugnant. "Is this not the heart of the issue involved," Wechsler declared, "a conflict in human claims of high dimension, not unlike many others that involve the highest freedoms . . . ."2 This mighty contest animating American constitutional history pits black people's struggle for equality against white individuals' liberty from state intrusion. Wechsler's resolution of this conflict in favor of white people's preferences reflects its persistent outcome: individual liberty takes precedence over equality.3

This contest of human freedoms has recently intensified. On one day alone last summer, the United States Supreme Court decided two such disputes, resolving both in favor of white Americans' liberty. In Missouri v. Jenkins,4 the Court invalidated court orders in an eighteen-year-old school desegregation case that attempted to eliminate the vestiges of state-imposed segregation by improving the quality of a predominantly black magnet district and by reversing "white flight" to the suburbs. The district court devised a remedy involving capital improvements to the black schools' physical facilities which had "literally rotted," funding of quality education programs, and increases in teachers' salaries.5 The judge hoped that better magnet schools would not only redress the inferior education black students received, but also attract nonminority students from surrounding districts. A majority of the Justices found, however, that these improvements were insufficiently linked to past segregation and were therefore beyond the district court's remedial authority.6 Thus, the Court protected the liberty of white residents to flee the desegregated district, thereby avoiding the burden of paying to repair the black schools forsaken for more than a century.7

5. Id. at 2043-44.
6. Id. at 2055.
7. In his dissenting opinion, Justice Souter surmised that "white flight" from the Kansas City school district might have resulted from predictions of the cost that improving the black schools would entail: "Property tax-paying parents of white children, seeing the handwriting on the wall in 1985, could well have decided that the inevitable cost of clean-up would produce an
At stake in *Adarand Constructors, Inc. v. Pena* was the liberty of white businesses to compete for federal agency contracts without being disadvantaged by government affirmative action policies. A highway construction company claimed that the clause in federal contracts that gives a prime contractor a financial incentive to hire minority subcontractors violated its right to equal protection. The Court reinstated the company's claim, holding that strict scrutiny is the proper standard for evaluating all government racial classifications, whether imposed by a federal, state, or local actor. The Court thus extended to federal race-based programs its prior admonition that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to government discrimination."

These decisions seem routine in light of the constant bombardment of "reforms" aimed directly at black people's little stake in America—proposals for heartless restrictions on welfare eligibility designed to decimate the most needed public spending; the dismantling of affirmative action programs in government jobs, contracts, and universities; the imposition of tough criminal sentences, including the death penalty, for crimes that disproportionately imprison blacks; and the expulsion of dark-skinned immigrants from the community of citizens. Black Americans can only approach the twenty-first century feeling a profound sense of despair, apprehension, or rage.

What perverse paradigm of equality would justify Supreme Court decisions that drive back positive government efforts to achieve racial justice at a time when radical transformation is needed?

intolerable tax rate and could have moved to escape it." *Id.* at 2086 (Souter, J., dissenting).


9. *Id.* at 2101.

10. *Id.* at 2117.

11. *Id.* at 2109 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986)).


Progressive constitutional scholars have described profound defects in the Court's racial equality jurisprudence. A principal critique challenges the Court's assumption that racial equality requires "color blindness," or the nonrecognition of race. This approach identifies the primary threat to equality as the government's "failure to treat black people as individuals without regard to race." By requiring that government officials treat everyone the same, the Court's race-neutral stance makes classifications that burden whites seem equivalent to classifications that oppress blacks.

This color-blind approach to equality disregards preexisting discriminatory structures that disproportionately harm blacks even in the absence of official discriminatory motive and that may require race-conscious remedies. Color blindness permits racial subordination to continue by leaving intact institutions created by centuries of official and private oppression. Viewing all government recognition of race as equally pernicious manifests an incredible blindness to current arrangements of power. As Justice Stevens noted in his dissenting opinion in Adarand Constructors, Inc. v. Pena:

There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to "govern impartially" should ignore this distinction.

Some constitutional scholars have distinguished the Court's antidiscrimination approach to equality from an antisubordination approach

16. See, e.g., Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice (1987).

17. See, e.g., Bell, supra note 16; Neil Gotanda, A Critique of "Our Constitution is Color-Blind," 44 Stan. L. Rev. 1 (1991); see also Gary Peller, Race Consciousness, 1990 Duke L.J. 758, 845 (observing that America's integrationist ideology "has signified the broad cultural attempt not to think in terms of race at all").


19. See, e.g., Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) ("[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.").

that considers the concrete effects of government policy on the substantive condition of disempowered groups.21

More generally, critical thinkers have demonstrated that the liberal reliance on seemingly neutral principles to judge equality claims actually legitimates the interests and experiences of white people.22 The very language of neutrality used by judges is already weighted in favor of the status quo: "Long ago, empowered actors and speakers enshrined their meanings, preferences, and views of the world into the common culture and language. Now, deliberation within that language, purporting always to be neutral and fair, inexorably produces the results that reflect their interests."23 Government neutrality, exemplified by the doctrine of color blindness, conceals the racist origins of social practices that do not overtly discriminate on the basis of race.

This article focuses on another paradigm that reinforces the defects mentioned above. Herbert Wechsler's resolution of conflicting human claims reflects a central tenet of prevailing equality jurisprudence: human freedom requires that protection of private interests from government intrusion must supersede government promotion of equality. This prioritizing of individual liberty over equality (what I will call the "priority paradigm") serves to maintain white supremacy because it means that white people's private choices outweigh concern for black people's equal status.24


24. Some feminists have presented a similar critique of privacy doctrine that argues that government nonintervention into the private sphere permits women's subordination rather than promoting women's autonomy. See, e.g., Ruth Colker, Abortion and Dialogue: Pro-Choice and American Law 85 (1992); Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 93-102 (1987); Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. PA. L. Rev. 955, 1016-28 (1984); Elizabeth M. Schneider, The Violence of Privacy, 23 CONN. L. Rev. 973 (1991); see also Elizabeth Frazer & Nicola Lacey, The Politics of
In part II, I describe the priority paradigm and explain how liberal theory supports it. Part III provides examples of two particular arenas in which the priority paradigm operates to privilege white people’s choices—employment discrimination and housing segregation. Part IV explains why it is that prioritizing liberty favors white people’s choices: the seemingly neutral standard for judging choices actually values those associated with whites more than those associated with blacks. In part V, I challenge the presumption underlying the priority paradigm that private interests are separable from and untainted by social power. Part VI concludes by proposing that we replace the priority paradigm with a new conception of the relationship between liberty and equality.

II. The Priority Paradigm

A. Preferring Liberty to Equality

Consider the following proposition: “Efforts to achieve racial equality must be careful to accommodate individuals’ liberty.” The idea that racial equality cannot be achieved at the expense of individual liberty sounds perfectly natural and in line with prevailing constitutional theory. The reverse proposition, “Exercise of individual liberty must sometimes give way to concerns for racial equality,” on the other hand, is likely to get people up in arms. Preferring equality to individual liberty sounds blatantly unconstitutional, even totalitarian. Supporters of the priority paradigm are quick to denounce, as displaying a

COMMUNITY: A FEMINIST CRITIQUE OF THE LIBERAL-COMMUNITARIAN DEBATE (1993) (arguing that the liberal public/private distinction entrenches patriarchal practices). Fran Olsen’s summary of the feminist critique of privacy parallels my concerns about the priority paradigm:

[D]eeper political meanings are found behind the appeal of privacy. Notions of individualism, of choice and of desire, and the reasons why we value privacy are deeply related to the peculiar importance placed on the male/female distinction and to the subordination of women . . . Privacy is most enjoyed by those with power . . . [T]he standard situation in which one enjoys privacy and freedom is not a situation of equality but one of hierarchy.

We virtually never all enjoy privacy equally, and the pretense that equality is the norm, and situations of domination an exception, is simply another way of maintaining the status quo.


lack of true commitment to liberty, the suggestion that notions of individual autonomy should include social justice concerns.25

The preference for liberty over equality is ingrained in America's constitutional history. While the Constitution's framers protected their private property and personal expression from government power, they neglected to mention equality in the Constitution or the Bill of Rights.26 When the founding fathers were confronted with the contradiction of creating a new government dedicated to individual liberty that also permitted the enslavement of Africans, "they decided that protecting the property of slave owners must have priority over black freedom."27 The Constitution's guarantees of liberty existed alongside its recognition and protection of slavery for nearly a century.28

After a civil war and the Reconstruction amendments abolished slavery and its vestiges, white Americans relied on the Constitution's protection of their liberty to safeguard their position of power. The Supreme Court in Plessy v. Ferguson29 affirmed the state's power under the Constitution to make formal legal distinctions between the white and colored races. But it was Justice Harlan's dissenting opinion that set forth the protective principle that was to outlive the holding in Plessy:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I


29. 163 U.S. 537 (1896).
doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty.30

Although Plessy’s separate-but-equal doctrine was repudiated six decades later, the priority paradigm, which holds fast to liberty at the expense of racial equality, remains a principal means of realizing Justice Harlan’s prediction.

The priority paradigm also rests on the inherent assumption of liberal philosophy that privileging individual autonomy over social justice is essential to human freedom.31 The primacy of liberty, which shifts the burden of persuasion to those seeking to limit individual choice, does not allow for the possibility that other concerns might have equal constitutional or moral importance. Liberals require the state to remain neutral as to competing conceptions of value and human relationships so that each individual is free to choose her own moral understanding of justice.32 While government neutrality protects citizens against imposition of state orthodoxy, it also means that the definition of liberty must set aside certain claims to substantive equality.

This way of thinking separates social justice from the meaning and realization of individual liberty. Seeing individual liberty as competing against equality implies that they are independent values that may be counterbalanced. In his analysis of procreative liberty, for example, John Robertson views the question of the state’s obligation to alleviate social and economic circumstances that constrain reproductive decision making as a “separate issue of social justice.”33 While the state is obligated to protect procreative liberty as a matter of rights, Robertson argues, it remains free to decide whether or not to address economic and social inequities as a matter of social policy.34

The primacy of liberty paradigm, then, accepts the possibility that

30. Id. at 559 (Harlan, J., dissenting) (emphasis added).
31. My analysis of liberal philosophy benefited from an exchange with John Robertson in correspondence and in recent essays. See supra note 25.
34. See id. Patricia J. Williams attributes the conflict between private interests and group rights to a “contractarian” vision of constitutional jurisprudence that “fails to anticipate the situation in which an aggregate of private transactions in a society begins to conflict with express social guarantees.” Patricia J. Williams, Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times, 104 HARV. L. REV. 525, 540 (1990).
inequality may be inevitable in a liberal society. Although the pursuit
of equality, once liberty is ensured, is commendable, liberalism cannot
guarantee its realization. Inequality is the price we may have to pay for
freedom.\textsuperscript{35} Thus, adequate protection of individual liberty may simply
make substantive equality a pipe dream. For this reason, William Gal-
ston defends liberalism as the best accommodation of human differ-
ces we can hope for: “It is ‘repressive’ not in comparison with availa-
ble alternatives but only in relation to unattainable fantasies of perfect
liberation.”\textsuperscript{36} “Face it,” believers in the priority paradigm admonish,
“seriously protecting individual liberty means relinquishing the fantasy
of complete racial equality.”

\textbf{B. The Priority Paradigm and the Sufficiency of Racial Progress}

Because the priority paradigm assumes that actual equality be-
tween the races may be unattainable, its adherents consider racial
“progress” to be a sufficient goal. The title of a recent editorial in \textit{U.S.
News \& World Report} decried “Our Addiction to Bad News.”\textsuperscript{37} Pointing
out that “no other group in world history has ever made so much
economic progress so fast as American blacks have since World War
II,” the author criticized “race-and-gender spokespeople” for persist-
ently detecting “fresh evidence of oppression.”\textsuperscript{38} He blamed these ac-
tivists’ focus on illusory grievances, rather than on blacks’ progress, for
both whites’ and blacks’ frustration with the racial “impasse that
doesn’t really exist.”\textsuperscript{39}

The article failed to mention the appalling evidence of persistent
racial inequality. The unemployment rate among blacks has remained
about twice that among whites over the last thirty years,\textsuperscript{40} and blacks
are three times more likely than whites to be poor.\textsuperscript{41} Black mothers,
who typically are heads of households, are even more likely to be

\begin{footnotes}
\item[35] Matsuda, supra note 25, at 10.
\item[36] William A. Galston, \textit{Liberal Purposes: Goods, Virtues, and Diversity in the
20.
\item[38] Id.
\item[39] Id.
\item[40] Leroy D. Clark, \textit{The Law and Economics of Racial Discrimination in Employment by
David A. Strauss}, 79 GEO. L.J. 1695, 1701 (1991); Bureau of Labor Statistics, U.S. Dep’t of
\end{footnotes}
poor. As a result, half of black children are born into poverty. White men continue to dominate business ownership and corporate power. In 1991, thirteen percent of white households but only four percent of black households held a financial interest in a business or profession—and blacks' average stake was much less valuable. Blacks are still denied housing by the discriminatory practices of landlords, real estate agents, and mortgage lenders. Black infants die at a rate twice that of whites, and overall life expectancy is significantly lower for blacks than for whites. Even these stark numbers do not adequately convey the injury of cultural devaluation. The glorification of black progress in the face of these inequities seems to imply that blacks should be content with less inequality, rather than demanding complete equality.

Recent attention to claims about racial differences in intelligence also reflects the presumption of inequality. Last year I heard Charles Murray speak about his recently published book, *The Bell Curve*, at the Harvard Forum. The *Bell Curve* claims that intelligence levels differ among ethnic groups, that blacks are on average less intelligent than whites, and that lower group intelligence explains social problems, such as poverty, unemployment, and welfare dependency. Not surprisingly, the book's publication drew intense media attention and a furious denunciation of the authors' racism.

43. See id. at 143.
49. Herrnstein & Murray, supra note 47.
Murray nevertheless began his defense of his thesis by expressing dismay that it had caused such a commotion. After all, he pointed out, he did not claim that the intellect of all blacks was drastically inferior to that of all whites, but only that black intelligence was on average a few points below that of whites. Murray apparently would have understood the affront had he declared blacks to be very inferior to whites, but failed to see the harm in being called somewhat inferior. “Surely, no one believes that black people are perfectly equal to whites,” he seemed to implore.

In the view of these commentators, the possibility that black Americans might enjoy the same material and social status as whites is unthinkable. Like the unemployed surplus presumed by market economics, some degree of black inferiority is presumed by both popular and legal thinking about equality. Derrick Bell’s comprehensive study of institutionalized racism in America led him to conclude that “[b]lack people will never gain full equality in this country.” Racism does not continue despite constitutional paradigms of liberty and equality; rather, racism is deeply embedded in these paradigms themselves. As Rodrigo Crenshaw, Richard Delgado’s fictional confidant, wryly observed, these Enlightenment notions may be “the very means by which society constructs and justifies our subordination.”

Scholarship from the minority ranks of legal academia is increasingly tinged with what seems like unremitting despair. Perhaps we are now acquiring what James Baldwin saw as the American Negro’s “great advantage of having never believed the collection of myths to which white Americans cling.” The disenchanted intellectual recognizes not only the material persistence of racism in America, but also the way in which the law takes black subordination for granted.

C. The Priority Paradigm and Discriminatory Intent

The Supreme Court’s current understanding of the Equal Protec-
tion Clause is based on a very narrow version of color blindness. The Court confines unconstitutional discrimination to state conduct performed with an invidious intent, requiring proof that "officials were 'out to get' a person or group on account of race." The Court adopted the discriminatory intent rule primarily because of its fear of the remedies a discriminatory impact rule would entail.

The priority paradigm may at first appear to contradict the requirement that claimants prove discriminatory intent in order to establish racial discrimination. The priority paradigm hinders racial equality by protecting white individuals' personal preferences while the intent requirement hinders racial equality by punishing white individuals' personal preferences alone. Moreover, the intent requirement's harm comes from framing racial justice as an effort to weed out individual discriminatory decisions rather than transforming social arrangements. It might seem, then, that my focus on white people's personal choices, rather than on institutional structures, is just as misdirected.

The priority paradigm, however, complements the discriminatory intent standard. White people's motives are quite irrelevant to the paradigm's logic and operation. What gets protected under the priority paradigm are white people's choices, preferences, and interests. The priority paradigm protects these choices if, as black journalist Nathan McCall observed, "even the best-intentioned whites don't understand how they affect us, and how white society impacts upon minorities." Moreover, the priority paradigm, like the intent requirement, obscures the structural nature of racism by pretending that personal preferences are divorced from social power and that individual liberty can be separated from social justice. The priority paradigm rests on the


belief that individuals' choices are purely personal, in the sense that they reflect only individual desires, fulfill the individual's unique meaning of self, and benefit the individual alone. This view, however, masks how whites' personal choices often are connected to oppressive social structures and constitute an exercise of power.

Thus, liberalism's professed commitment to personal liberty turns out to safeguard massive institutional inequality. Richard Delgado observed that ideology, which appears to be neutral, permits "[t]hose in power [to] sleep well at night—their conduct does not seem to them like oppression." But the priority paradigm is even more insidious than this, for oppressors' conduct appears to them like the virtuous pursuit of liberty.

III. The Priority Paradigm in Operation

Under the priority paradigm, the law protects white people's choices even when they operate to hinder blacks' equal participation in society. For three centuries white Americans guaranteed their supremacy through the enforcement of explicitly race-based laws. The law continues to protect whites' privileged position by means of the priority paradigm: courts counterbalance blacks' claims for equality against whites' private interest in maintaining the current system. Two arenas where this contest is particularly vivid are employment discrimination and housing segregation.

A. Protecting White Employees' Vested Interests

Since emancipation freed blacks from bondage based on their status as chattel property, American law has worked to preserve white domination of employment opportunities and relations. State legislation passed immediately after emancipation ensured that freedmen remained the servants of their white masters. In 1865, for example, Mississippi enacted laws that permitted former masters to administer corporal punishment and that forfeited the wages of Negroes who left

61. For other critiques of the liberal concept of the autonomous individual, see Sandel, supra note 32; Robin West, Jurisprudence and Gender, 55 U. Chi. L. Rev. 1 (1988).
64. Greene, supra note 3, at 1526.
their jobs without good cause before the end of their contracts. Historian Eric Foner described the private terror white employers used to enforce these legal restrictions on freedmen’s contractual relationships:

Freedmen were assaulted and murdered for attempting to leave plantations, disputing contract settlements, not laboring in the manner desired by their employers, attempting to buy or rent land, and resisting whipping. One black who refused to be bound and whipped... was shot dead by his employer, a prominent Texas lawyer.

Reconstruction-era civil rights statutes abolished these formal racial codes, but failed to eliminate gross racial disparities in employment. In the 1960s, the War on Poverty initiated an effort to dismantle the racial barriers to equal employment opportunity and to integrate blacks into the national political economy. For example, the Office of Economic Opportunity used federal funds to empower community action groups run by local black activists; federal affirmative action and job training programs broke long-standing racial barriers to union jobs; and Housing and Urban Development gave housing subsidies to the poor. In her recent book The Color of Welfare, Jill Quadagno chronicles how racism undermined these programs. It was precisely these programs’ link to blacks’ civil rights that doomed them: whites opposed them as an infringement on their economic right to discriminate against blacks.

The Court’s equal protection and Title VII jurisprudence has increasingly protected the vested interests of white employees against government efforts to promote racial equality. Cheryl Harris has detailed the evolution of the concept of whiteness as a status that brings with it benefits and privileges that whites have come to expect, includ-

65. Id. at 1526-27 (citing 1866 Miss. Laws 826 and 1866 Miss. Laws 862).
68. Id. at 33-59.
69. Id. at 61-87.
70. Id. at 89-115.
71. Quadagno, supra note 67.
72. See id. at 6-7.
ing a superior right to a job. By ratifying these expectations, the law in effect recognizes a property interest in whiteness.

Sometimes court decisions quite directly protect employees' property interest in whiteness, as in Martin v. Wilks, and Wygant v. Jackson Board of Education. In Martin v. Wilks, the Court allowed a group of white firefighters collaterally to attack a consent decree that settled a Title VII action alleging that a city's employment policies discriminated against blacks. The Court upheld the white employees' right to intervene to protect their interest in promotions under a test that the city agreed perpetuated a racial hierarchy. Similarly, the Court in Wygant ordered the reinstatement of senior white teachers who were laid off before more junior black teachers in an effort to remedy a city's racially discriminatory history. Here the Court upheld the white employees' right to seniority preferences which they had acquired under a regime of discriminatory employment practices.

In both cases, the Court's concern for innocent whites' vested interest in a job ignored the history of past discrimination that placed white employees in a privileged position in the first place. As Harris points out, "[a]sserting the property interest in seniority rights against the background of structured privilege for whites and inequities for Blacks 'is to claim a property right in the benefits of being white.'" The Court's neglect of preexisting structural inequities permitted the triumph of white employees' property interest in whiteness over black employees' demands for equal employment opportunity.

B. Protecting Private Housing Decisions

In their provocative book, American Apartheid, Douglas S. Massey and Nancy A. Denton demonstrate that the existence of a black
"underclass," concentrated in urban centers, resulted from systemic racial discrimination in the public and private housing markets.\textsuperscript{83} Massey and Denton tie residential segregation to blacks' extreme economic, social, and political isolation from mainstream society and to the resulting persistence of black poverty. One of the authors' most striking observations is the unparalleled degree of blacks' exclusion from white America: "Ironically, within a large, diverse, and highly mobile post-industrial society such as the United States, blacks living in the heart of the ghetto are among the most isolated people on earth. No other group in the contemporary United States comes close to this level of isolation within urban society."\textsuperscript{84}

The authors disprove theories that color-blind economic forces are responsible for this concentrated black poverty, arguing instead that "race and class interact to undermine the social and economic well-being of black Americans."\textsuperscript{85} Massey and Denton also dispel the common perception that inner-city ghettos are a natural or inevitable part of American life. In fact, housing was not highly segregated in either Northern or Southern cities until the twentieth century migration of large numbers of blacks into urban areas.\textsuperscript{86} The impoverished ghettos that followed were consciously created by real estate brokers and banks, supported by antiblack violence and legal rules such as restrictive covenants.\textsuperscript{87} As Adolph Reed put it, "[t]he transformation of post-war industrial cities was driven not by some abstract historical force but by a combination of private investment decisions and state action."\textsuperscript{88}

To remedy this history of segregation, Massey and Denton advocate renewed attention to residential integration achieved through race-specific fair housing practices, including intensified enforcement of the Fair Housing Act. This proposal has been criticized for failing to confront the limits of integration strategies in combating structural inequities.\textsuperscript{89} I am concerned at this point in my argument not so much with


\textsuperscript{84} Id. at 77.

\textsuperscript{85} Id. at 220.

\textsuperscript{86} Id. at 18-32.

\textsuperscript{87} Id. at 33-42, 50-51.

\textsuperscript{88} Adolph Reed, Jr., The Liberal Technocrat, 246 Nation 167, 169 (1988) (reviewing William J. Wilson, The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy (1987)).

\textsuperscript{89} See, e.g., John O. Calmore, Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope from a Mountain of Despair," 143 U. Pa. L. Rev. 1233, 1252-54 (1995) [herein-
the remedy for residential segregation as with the way in which prevailing equality paradigms allowed this form of racial apartheid to take place. The priority paradigm protected residential segregation as the manifestation of white people’s personal preferences. The wholesale expulsion of the black urban poor escaped scrutiny because of its seemingly private pedigree, entitling it to constitutional protection.

The privileging of private choices accommodated not only business decisions, but also white residents’ preference to live apart from blacks. As Herbert Wechsler argued in his critique of the Brown decision, “[b]ut if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant.” This view holds that the liberty of white homeowners to maintain the homogeneity of their neighborhoods outweighs the damage caused by concentrating blacks in poor, isolated urban centers. Under the paradigm, white citizens’ personal revulsion of blackness attains the stature of a protected liberty interest that supersedes blacks’ interest in social and economic participation. For many, it would violate the most basic American freedoms to force a white homeowner to live next to black people.

The Supreme Court’s decision in City of Memphis v. Greene illustrates the privileging of white residents’ private preferences. In Greene, the Court upheld a municipal decision to erect a barrier between an all-white neighborhood and a predominantly black area that effectively blocked off the white neighborhood to black motorists. The Court concluded that the city’s decision, while conferring a benefit on white property owners, did not discriminate against blacks because it was motivated by an “interest in protecting the safety and tranquility of a residential neighborhood” and resulted from fair procedures.


90. See QUADAGNO, supra note 67, at 107-115.
91. Wechsler, supra note 2, at 34.
93. Id. at 102.
94. Id. at 119-20.
failure to prove racially discriminatory intent foreclosed the black citizens' equal protection claim.95

The Court rejected the plaintiffs' Thirteenth Amendment challenge as well by framing the contest as an ordinary conflict between private interests falling within the city's discretion:

Whether the individual privacy interests of the [white] residents . . . , coupled with the interest in safety, should be considered strong enough to overcome the more general interest in the use of West Drive as a thoroughfare is the type of question that a multitude of local governments must resolve every day. Because there is no basis for concluding that the interests favored by the city in its decision were contrived or pretextual, the District Court correctly concluded that it had no authority to review the wisdom of the city's policy decision.96

The Court discounted the barrier's "symbolic significance" by explaining the racial separation as an unavoidable consequence of the city's race-neutral obligation to protect the residents' private interests:

[T]he inconvenience of the [black] drivers is a function of where they live and where they regularly drive—not a function of their race . . . . Because urban neighborhoods are so frequently characterized by a common ethnic or racial heritage, a regulation's adverse impact on a particular neighborhood will often have a disparate effect on an identifiable ethnic or racial group. To regard an inevitable consequence of that kind as a form of stigma so severe as to violate the Thirteenth Amendment would trivialize the great purpose of that charter of freedom.97

The Court went on to reprimand the black complainants for seeking to take advantage of their race to impose upon the private interests of their white neighbors: "[p]roper respect for the dignity of the residents of any neighborhood requires that they accept the same burdens as well as the same benefits of citizenship regardless of their racial or ethnic origin."98 In the Court's view, the black citizens' equality demands showed their ignorance of the priority paradigm and their refusal to respect the liberty rights of property owners. Thus, the Court interpreted the Constitution to permit a city "to carve out racial enclaves"99 by transforming this imposition of power into protectable private interests.

95. Id.
96. Id. at 127.
97. Id. at 128.
98. Id.
99. Id. at 136 (Marshall, J., dissenting).
IV. The Value of White and Black Choices

Advocates of the priority paradigm might respond to this objection by pointing out that respecting liberty benefits everyone, both black and white, and therefore ultimately promotes racial justice. But, as the examples of employment and housing reflect, the priority paradigm benefits white people more. One reason for this advantage is that blacks in America still have less prestige, education, wealth, and power to protect from government interference. 100

Another, more subtle, reason why white people's preferences are privileged is because they seem neutral and normal, and not like racial preferences at all. Behaviors and characteristics associated with whites are perceived as composing a race-neutral cultural norm. 101 White people's choices that meet the norm are considered superior to black people's choices that fail to comply with the norm. In addition, whites' racial prejudices are often rendered benign by explaining them as acceptable personal or cultural preferences. 102 This background makes it seem fair when courts apply the priority paradigm, upholding white choices and rejecting black ones as a color-blind judgment.

An exchange I had at the American Association of Law Schools annual meeting last year illustrates this problem. A workshop on feminist approaches to new reproductive technologies centered on embryo donation, in which an embryo created by the egg and sperm of one couple using in vitro fertilization is donated to another couple or a single woman. 103 During the discussion, I argued that any evaluation of the ethics of embryo donation should take into account the way in which race affects the value we place on embryos and the choices made by the parties involved.

Another participant responded that he failed to see any problem since white couples could use embryos received from white donors and black couples could use embryos received from black donors. According to this view, protecting each individual's liberty to engage in embryo donation satisfies the goal of equal treatment as well. In my view, on

100. See supra notes 40-46 and accompanying text.
101. See generally Richard Delgado, Shadowboxing: An Essay on Power, 77 CORNELL L. REV. 813 (1992) (arguing that empowered parties often prefer objective rules because they have already inscribed their preferences in the culture so that they now appear objectively "true"); Matsuda, supra note 21, at 1329 (explaining how employers often judge employees' accents according to a biased cultural norm).
102. See WILLIAMS, supra note 22; Williams, supra note 34, at 544 (describing the "[q]uietly racist aesthetic in which the status quo is made natural").
103. See ROBERTSON, CHILDREN OF CHOICE, supra note 25, at 8-9.
the other hand, deeply embedded beliefs about black inferiority and white superiority are likely to have a detrimental impact on the marketing of genetic material. The market will privilege white preferences and products while discounting black ones, thereby reinforcing the preexisting racial hierarchy.

A. Neutralizing White Preferences

Barbara Flagg's work on "white transparency" helps to explain the neutralizing of white preferences. In a recent article, Flagg tells the story of two sisters, Yvonne and Keisha, who were both denied promotions on the basis of race. Yvonne, an accountant in a major firm, was the victim of relatively straightforward discrimination: her record-keeping practices were singled out for special scrutiny because she is black. Keisha's research firm, on the other hand, explained that Keisha's Afrocentric personal style made her culturally incompatible with the researchers she would supervise. Flagg characterizes Keisha's cultural disqualification as a form of racial discrimination that stems from the "transparency phenomenon":

White people externalize race. For most whites, most of the time, to think or speak about race is to think or speak about people of color, or perhaps, at times, to reflect on oneself (or other whites) in relation to people of color. But we tend not to think of ourselves or our racial cohort as racially distinctive. Whites' "consciousness" of whiteness is predominantly *unconsciousness* of whiteness. We perceive and interact with other whites as individuals who have no significant racial characteristics. In the same vein, the white person is unlikely to see or describe himself in racial terms, perhaps in part because his white peers do not regard him as racially distinctive. Whiteness is a transparent quality when whites interact with whites in the absence of people of color. Whiteness attains opacity, becomes apparent to the white mind, only in relation to, and in contrast with, the "color" of nonwhites.

Flagg points out that Keisha will have more difficulty than Yvonne even framing a disparate treatment claim under Title VII. Her firm's transparently white decision making does not fit as easily within the
Court’s interpretation of discriminatory intent.\textsuperscript{107} While Yvonne can argue that her employer treated her differently than similarly situated white employees, Keisha’s claim is that “though she was treated in the same manner as others, the standard applied to all employees is one that systematically advantages whites.”\textsuperscript{108} It is unlikely that courts reviewing Keisha’s complaint will see the whiteness of her employer’s decision.

The neutralizing of white preferences helps to maintain housing segregation as well. A recent study conducted by the Federal Reserve Bank of Chicago concluded that “[w]hite mortgage applicants with bad credit histories were only half as likely to be rejected for loans as black or Hispanic applicants with similar credit records.”\textsuperscript{109} The researchers found that, among applicants who were sixty or more days overdue on other debts, only nine percent of white applicants were disapproved, compared to eighteen percent of the black and Hispanic applicants.\textsuperscript{110} Despite this stark racial disparity, the study’s author, William C. Hunter, attributed the results to a “cultural gap” between white loan officers and minority applicants rather than racism.\textsuperscript{111} White loan officers are apparently more willing to give white applicants a break:

“It may be unconscious, they just may make an extra call; they know where the person works or where they live,” Mr. Hunter said. The same loan officer may not make this extra effort for a minority applicant, he added, possibly because a white loan officer might be less likely to know the neighbors or employers of black applicants.\textsuperscript{112}

The study’s conclusion echoed those remarks: “These findings are consistent with the existence of a cultural affinity between white lending officers and white applicants, and a cultural gap between white loan officers and marginal minority applicants.”\textsuperscript{113}

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\textsuperscript{107} Id. at 2014.
\textsuperscript{108} Id. at 2018. Flagg also demonstrates that technical barriers would also foreclose Keisha’s disparate impact claim. Id. at 2025-30.
\textsuperscript{109} Keith Bradsher, \textit{A Second Fed Bank Study Finds Disparities in Mortgage Lending}, \textit{N.Y. Times}, July 13, 1995, at D1; see also Peter J. Leahy, \textit{Are Racial Factors Important for the Allocation of Mortgage Money?}, 44 \textit{Am. J. Econ. & Soc.} 185, 193 (1985) (“[E]ven when neighborhoods appear to be similar on every major mortgage-lending criterion except race, mortgage-lending outcomes are still unequal.”).
\textsuperscript{110} Bradsher, \textit{supra} note 109, at D1.
\textsuperscript{111} Id. at D18.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\end{flushleft}
The study obscured the racism in loan officers' decisions by attributing them to culture. This repackaging of a significant economic harm to black applicants makes the discrimination seem less pernicious. This is particularly true in light of the broad societal preference for white culture. Seeing the denial of black applications as the product of cultural divergence, rather than racism, may make a difference in the ongoing congressional debate over Republican proposals to weaken federal laws prohibiting discriminatory lending. Unlike racism, "cultural affinity" does not appear to interfere with racial equality.

These examples illustrate how white people's personal preferences are privileged according to a norm that is tipped decidedly in their favor. These preferences do not seem to conflict with racial equality, even when they impede black people's economic welfare, because the norm is considered race-neutral. White people's discriminatory actions are presumed to be a product of individual choice or cultural affinity, rather than racial hierarchy, and therefore entitled to protection. By guarding their individual liberty, the law permits private employers, landlords, and lenders to exclude blacks from positions reserved for whites only.

B. Discounting Black Preferences

The priority paradigm benefits whites not only because white people's choices are privileged, but also because black people's choices are devalued.

1. Lacking Autonomy

Racist ideology once defined black people as "those who [have] no will." Nineteenth-century discourse portrayed blacks as incapable of choosing at all, or at least as incapable of choosing wisely. Predominant images of blacks as childlike, dependent, and irrational all concern their inability to make autonomous decisions. It is no accident that these racial stereotypes go hand in hand with the priority paradigm and its preference for white people's choices.

Even today, commentators defend legal rules that privilege whites'
individual liberty over blacks' social equality in paternalistic terms, arguing that the rule is for blacks' own good. Welfare reformers contend that cutting off benefits for children born to women on welfare is in black families' own interests because these tough measures are necessary to end their welfare dependency.\(^{116}\) Opponents of hate speech regulations claim that the free airing of racist remarks benefits blacks because hateful speech serves as a pressure valve for bigots, antiracism rules will be applied against minorities, and restrictions on speech hinder social reform efforts.\(^{117}\)

2. Failing to Conform

Contemporary society has largely abandoned the assumption that black people are entirely incapable of rational decision making.\(^{118}\) Rather, blacks are more likely to be blamed for the choices they make.\(^{119}\) Just as white choices are preferred according to a transparently white norm, black choices are rejected for failing to conform to the norm.\(^{120}\) Many whites explain blacks' persistent poverty and powerlessness as the result of black individuals' own choices rather than institutional inequities.\(^{121}\) They attribute black people's deprivation to cultural lifestyles that deviate from mainstream culture.\(^{122}\)

In 1965, Daniel Patrick Moynihan, for example, popularized the theory that the black family's divergence from the white model family was the fundamental cause of black people's predicament.\(^{123}\) According to Moynihan, "the Negro community has been forced into a matriarchal structure which, because it is so out of line with the rest of the American society, seriously retards the progress of the group as a whole."\(^{124}\)

During the Reagan era, Charles Murray argued in *Losing Ground* that black Americans' deviance stemmed from their own rational re-
responses to welfare incentives. Murray claimed that welfare programs such as Aid to Families with Dependent Children discouraged recipients from working and encouraged them to have babies out of wedlock. The view that economic disparities can be traced to deviant black culture and individuals' pathological lifestyles inspires current welfare reform proposals directed at changing welfare recipients' behavior instead of changing social and economic systems.

This belief in black responsibility for the effects of racism borrows from the long-standing ideology that blames the poor, because of their dependence mentality, deviant family structure, and other cultural depravities, for their poverty. The rhetoric describing the undeserving poor, although encoded in race-neutral language, is increasingly racialized. Americans conjure up the image of Willie Horton and black "welfare queens" when they discuss the "underclass," whose intractable poverty stems from their own deplorable behavior rather than societal conditions.

In employment discrimination cases, courts have refused to affirm black employees' personal choices that conflict with predominantly white workplace norms. Courts have frequently disregarded the racially disproportionate effect of employment practices if the disadvantaged employees could have chosen to abide by the rules. In Rogers v. American Airlines, for example, a black woman who wore her hair in cornrows challenged her employer's prohibition against wearing braids on the job based on the policy's racially disproportionate impact. The court rejected her claim because the an-

125. See Murray, supra note 116.
126. Id. at 228-33.
127. See Backer, supra note 12.
129. See Calmore, Racialized Space, supra note 89, at 1246-50.
130. See, e.g., Michael Keith & Malcolm Cross, Racism and the Postmodern City, in RACISM, THE CITY AND THE STATE I, 2 (Malcolm Cross & Michael Keith eds., 1993) (quoting a pamphlet written by Charles Murray that states "[w]hen I use the term 'underclass' I am indeed focussing on a certain type of poor person defined not by his condition . . . , but by his deplorable behavior in response to that condition")
132. Flagg, supra note 105, at 2028.
134. Id. at 231. The prohibition of cornrows in the workplace is widespread. Paulette M. Caldwell, A Hair Piece: Perspectives on the Intersection of Race and Gender, 1991 DUKE L.J.
tibraid policy applied equally to members of all races and did not concern an immutable feature.\(^{135}\) The court reasoned that Roger's dispute resulted from her own grooming choice: in contrast to a ban on Afro or "natural" hairstyles, the no-braid rule affected an "easily changed characteristic."\(^{136}\) The court pointed out that the airline even permitted Rogers to conform to its standards by hiding her braids with a hairpiece during working hours.\(^{137}\) Although it never reached the question, the court opined that the airline's objective to "project a conservative and business-like image" qualified as a bona fide business purpose.\(^{138}\)

The Rogers decision illustrates how courts require black employees to assimilate their choices to whites' cultural expectations in order to keep their jobs. Paulette Caldwell's reaction to reading about the decision emphasizes this denigration of black people's private choices and culture:

> Whether motivated by politics, ethnic pride, health, or vanity, I was outraged by the idea that an employer could regulate or force me to explain something as personal and private as the way that I groom my hair. I resented the implication that I could not be trusted to choose standards appropriate for the workplace and that my right to work could be conditioned on my disassociation with my race, gender, and culture. Mostly I marveled with sadness that something as simple as a black woman's hair continues to threaten the social, political, and economic fabric of American life.\(^{139}\)

The court did not question whether the airline's, as well as its own, conception of a "business-like image" is based on a white employee wearing a hairstyle derived from white culture.

Conservatives similarly explain residential segregation as white people's reasonable reaction to blacks' antisocial lifestyle and detrimental impact on property values. The solution to segregated housing, according to this view, is for black people to change their personal behavior.\(^{140}\) As Nathan Glazer recently commented in his critique of

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\(^{135}\) 527 F. Supp. at 231.
\(^{136}\) Id.
\(^{137}\) Id. at 233.
\(^{138}\) Id.
\(^{139}\) Caldwell, supra note 134, at 367.
\(^{140}\) Nathan Glazer, A Tale of Two Cities, NEW REPUBLIC, Aug. 2, 1993, at 40. See generally Calmore, Racialized Space, supra note 89, at 1240-43 (discussing conservative and liberal critiques of DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID (1993)).
American Apartheid, racial segregation will disappear when African Americans’ “behavior that induces [white] motives of resistance or avoidance is reduced.”141

Massey and Denton themselves display a similar belief in their explanation of the process that produced isolated and impoverished ghettos. They attribute the racialized concentration of poverty not only to blacks’ social, economic, and political dislocation, but to their cultural isolation as well.142 The authors claim that blacks’ spatial separation from whites has led to the development of a “culture of segregation”—an “alternative status system . . . that is defined in opposition to the basic ideals and values of American society.”143 This oppositional culture, they argue, is responsible for pathological ghetto behaviors, such as teenage pregnancy, crime, and drug abuse, that retard blacks’ progress.144

Massey and Denton attempt to distinguish their culture-of-segregation thesis from conservative explanations of ghetto pathologies, such as those positing an autonomous, self-perpetuating culture of poverty. Unlike the latter theory’s claim that poverty itself spawns the intergenerational transmission of damaging behavioral traits, Massey and Denton trace ghetto culture to residential segregation: “It is a culture that explains and legitimizes the social and economic shortcomings of ghetto blacks, which are built into their lives by segregation rather than by personal failings.”145

Yet the culture-of-segregation thesis shares with conservative alternatives the view that poor blacks’ deviant behavior is a rational adaptation to their harsh living conditions and that the failure to conform to the dominant culture is to blame for the ghetto’s deterioration.146 For Massey and Denton, blacks can escape the poverty stemming from their cultural isolation only by physical proximity to whites, permitting their assimilation to mainstream values.147

V. The Illusion of Private Choices

Separating liberty from equality pretends that private interests are

141. Glazer, supra note 140, at 40.
142. MASSEY & DENTON, supra note 83, at 165-181.
143. Id. at 167.
144. Id. at 167-68.
145. Id. at 167.
146. See Calmore, Racialized Space, supra note 89; Johnson, supra note 89.
147. See MASSEY & DENTON, supra note 83, at 184-85.
untainted by state and social power when, in fact, the two are quite related. Private choices are shaped and facilitated by social institutions and government action.

A. Private Choices and State Action

The process of counterbalancing white individuals' private interests against government programs that promote racial equality sets up a false dichotomy between private choices on the one hand and government action on the other. This aspect of the priority paradigm is part of another faulty legal paradigm that divides human relations into a public sphere of politics and state power and a private sphere of the market and individual liberty.\footnote{See generally Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy (1990); Symposium, The Public-Private Distinction, 130 U. Pa. L. Rev. 1289 (1982).} The state action doctrine, which holds that most of the Constitution's guarantees protect citizens only from government action and do not restrict private actors, follows from this public/private dichotomy.\footnote{See generally Symposium on the State Action Doctrine, 10 Const. Commentary 309 (1993).} Under the state action doctrine, private citizens may injure others in ways that would be unconstitutional if inflicted by the government.\footnote{See, e.g., DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989).} This limitation reflects the priority paradigm: it protects the personal liberty of private actors while restricting government action that might promote equality.

The public/private distinction has served as a principal device for exempting white people's racially discriminatory acts from constitutional scrutiny.\footnote{In a series of articles, Akhil Reed Amar advances an alternative to the state action doctrine based on the Thirteenth Amendment, which explicitly applies to private action. See generally Akhil R. Amar, Remember the Thirteen, 10 Const. Commentary 403 (1993); Akhil R. Amar & Daniel Widawsky, Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney, 105 Harv. L. Rev. 1339 (1992); Akhil R. Amar, The Case of the Missing Amendments: R.A.V. v. City of St. Paul, 106 Harv. L. Rev. 124 (1992); Akhil R. Amar, Forty Acres and a Mule: A Republican Theory of Minimal Entitlements, 13 Harv. J.L. & Pub. Pol'y 37 (1990).} White individuals' biased decisions fall within the private sphere, protected by the guarantee of liberty, and are therefore permissible. Under this dichotomy, people generally remain free to make racially based choices in their private social and business rela-

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149. See generally Symposium on the State Action Doctrine, 10 Const. Commentary 309 (1993). The prevailing conception of the Constitution, therefore, does not recognize any affirmative government obligation either to ensure the social conditions and resources necessary for individual liberty or to protect the individual from degradation inflicted by social forces other than the state. See, e.g., DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989).


151. See Gotanda, supra note 17, at 7-16.
tions without government interference.\textsuperscript{162} Claims for racial equality must restrict their focus to government action within the public sphere.

Government action to eliminate white domination is also disadvantaged relative to private choices that maintain it by courts' paradoxical treatment of race in the public and private spheres. While courts permit private actors to take race into account to preserve their status, they forbid government actors from taking race into account to dismantle racial hierarchy.\textsuperscript{163} Justice Potter Stewart succinctly stated this rule in his dissenting opinion in \textit{Minnick v. California Department of Corrections}: “So far as the Constitution goes, a private person may engage in any racial discrimination he wants, . . . but under the Equal Protection Clause of the Fourteenth Amendment a sovereign State may never do so.”\textsuperscript{164} The public and private realms are not subject to equal scrutiny to detect racial discrimination.

This separation of private choices from public power often fails to recognize the ways in which the government uses its authority to fortify private relationships of power. We only realize that laws facilitate private action, and therefore see them as “state action,” when they seem to depart from the way the world is supposed to be. Thus, “decisions that upset existing distributions are treated as ‘action’; decisions that do not are thought to stay close to nature and thus to amount to no action at all.”\textsuperscript{165} Laws that promote the injury of one person by another, such as acts of racial discrimination, often are treated as a “neutral background” and do not appear as instances of state action.\textsuperscript{166}

Scholarly criticism of the public/private dichotomy in First Amendment jurisprudence illuminates the problem with this distinction. Cass Sunstein, for example, has criticized courts’ failure in First Amendment cases to acknowledge that legal structures restricting speech are government creations.\textsuperscript{167} Although Sunstein agrees that the First Amendment concerns only the exercise of state power, he argues

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152. See \textit{id.} at 8-12.

153. See \textit{id.}


156. Olsen, supra note 24, at 324-25.

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that state infringements of speech are often mistaken as permissible private actions. The right of exclusive ownership in a television network, for example, is an exercise of public authority. Conversely, the constitutional constraints on the common law of libel can be seen as official sponsorship of speech, since they compel those who are defamed to subsidize speech through the loss of their own reputation.\textsuperscript{158}

There is often a more direct relationship between government and private infringement of free expression. As Mari Matsuda notes, "[w]hen the state acts to suppress speech, it often uses private actors as a cover."\textsuperscript{159} She gives several examples of private and public collusion to silence others—Ku Klux Klan and police cooperation in the post-Reconstruction south; private blacklisting at the behest of the FBI during the McCarthy era; official acquiescence in Pinkerton violence against striking workers.\textsuperscript{160} Thus, the government is often implicated in private silencing by its direct cooperation or by granting to private citizens the legal authority both to harm others through speech and to limit the speech of others.

Similarly, when courts protect white preferences as private choices, they often ignore how those choices are shaped, supported, and even mandated by state authority. By separating white private choices from government action, it appears that "discrimination . . . [flows] from doing what comes naturally."\textsuperscript{161} Thus, a judge attributed three centuries of elaborate state action enforcing a rule of racial purity, in

\textsuperscript{158} Sunstein, \textit{supra} note 157, at 274. These government-backed restrictions and promotions of private speech have tended to benefit white elites: "powerful actors like government agencies, the writers' lobby, industries, and so on have generally been quite successful at coining free speech 'exceptions' to suit their interest—libel, defamation, false advertising, copyright, plagiarism, words of threat, and words of monopoly, just to name a few." Richard Delgado & David Yun, \textit{The Neoconservative Case Against Hate-Speech Regulation—Lively, D'Souza, Gates, Carter, and the Toughlove Crowd}, 47 \textit{VAND. L. REV.} 1807, 1816 (1994); see also Norman L. Rosenberg, \textit{Protecting the Best Men: An Interpretive History of the Law of Libel} 11 (1986) (describing how the interests of elite whites have shaped defamation law); Delgado & Yun, \textit{supra} note 28, at 883 ("[T]he history of the First Amendment, as well as the current landscape of doctrinal exceptions, shows that it is far more valuable to the majority than to the minority . . . ."). Claims by less powerful groups for public funding or government protection against hate speech, on the other hand, have been rejected. See, e.g., \textit{R.A.V. v. City of St. Paul}, 505 U.S. 377 (1992); \textit{Rust v. Sullivan}, 500 U.S. 173 (1991); \textit{Doe v. University of Mich.}, 721 F. Supp. 852 (E.D. Mich. 1989).

\textsuperscript{159} Matsuda, \textit{supra} note 25, at 12.

\textsuperscript{160} \textit{Id.}

the form of antimiscegenation laws, statutory definitions of race, and other racial codes.\textsuperscript{162} to the “arrangement” of “Almighty God.”\textsuperscript{163}

The Supreme Court in \textit{Plessy v. Ferguson}\textsuperscript{164} validated a Louisiana law that required racially segregated railway cars by assigning legalized racial separation to the private realm. The Court dismissed Plessy’s equal protection claim because “[i]n the nature of things [the Fourteenth Amendment] could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.”\textsuperscript{165} The Court went on to distinguish between “laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theaters, and railway carriages,” as well as laws excluding blacks from juries.\textsuperscript{166}

The Court categorized racial segregation as a social convention, when in fact the practice was required by law and subsidized by the state. After all, the case arose because Plessy had been arrested and imprisoned for violating a state statute when he sat in a coach reserved for whites. The law was enforced not only against blacks like Plessy, but also against white railway officials, “many of whom were displeased with the separate car law due to the increased expense of operation.”\textsuperscript{167} Moreover, Plessy, described as “of mixed descent, in the proportion of seven-eighths Caucasian and one-eighth African blood,”\textsuperscript{168} was nevertheless assigned to the colored coach pursuant to Louisiana’s statutory definition of membership in the white race.\textsuperscript{169}

As Neil Gotanda points out, the Court in earlier opinions “could have justified a decision requiring public accommodations to serve Blacks” by applying the existing common law duty to serve the public imposed on innkeepers, transportation providers, and places of public amusement.\textsuperscript{170} Instead of extending this common law rule to benefit black customers, however, “the Court created a protected private

\begin{footnotes}
\item[164.] 163 U.S. 537 (1896).
\item[165.] \textit{Id.} at 544.
\item[166.] \textit{Id.} at 545.
\item[167.] Harris, \textit{supra} note 73, at 1747.
\item[168.] 163 U.S. at 538.
\item[169.] \textit{Id.} Plessy claimed that the refusal to seat him in a white car, despite his white appearance, deprived him of his property interest in the reputation of being white without due process of law. Harris, \textit{supra} note 73, at 1747-50; see 163 U.S. at 548.
\item[170.] Gotanda, \textit{supra} note 17, at 13 (discussing the \textit{Civil Rights Cases}, 109 U.S. 3 (1883)).
\end{footnotes}
sphere, placed innkeepers and guests within it, and thereby made available a right to discriminate. 171 By labeling innkeepers' decisions private, the Court ignored its own action of restricting the common law's reach to exclude blacks. This invisible state action then served as the backdrop for the subsequent Plessy decision holding that segregated facilities were a social convention, rather than political repression. 172

Similarly, in their study of residential segregation in America, Massey and Denton describe how the federal government assisted private brokers and bankers in creating urban ghettos. 173 Residential segregation was no more a natural part of the American way of life before 1900 than were segregated public accommodations. 174 By World War II, however, there was widespread agreement among white residents to keep blacks out of their neighborhoods through harassment, terror, collusion with real estate brokers, and, if these tactics failed, flight to the suburbs. 175 Federal housing policy ratified this private racial discrimination by excluding blacks from mortgage programs; the government instituted "redlining" procedures that were also adopted by private banks. 176 During the 1950s and 1960s, urban renewal razed slums that were adjacent to white neighborhoods and relegated poor blacks to high-density housing projects concentrated in isolated ghettos. 177 Thus, by 1970, "blacks in all northern cities were more likely to live with other African Americans than with whites." 178

At the same time, local land use regulations made it physically and economically impossible to provide low-income housing in white areas. Southern Burlington NAACP v. Township of Mount Laurel, 179 for example, involved a challenge to a municipality's regulatory scheme that excluded certain types of dwellings and limited lot and building size, effectively preventing poor blacks and Hispanics from living in the

171. Id.
172. My understanding of the Court's justification of segregated facilities benefited from a conversation with Professor Joseph Singer, Harvard Law School. On the debate over the impact of Plessy, see Charles A. Lofgren, The Plessy Case: A Legal-Historical Interpretation (1987) (arguing that Plessy affirmed the already existing separate but equal doctrine, scientific theories of racial difference, and notions of equality).
175. Id. at 49-50.
176. Id. at 51-55.
177. Id at 55-57.
178. Id. at 48.
Conspiracy theorizing may be ordinary black people's way of explaining the relationship between seemingly objective macroeconomic forces, major institutions, and social structures and the private concerns of white somebodies. The Constitution safeguards the private market interests of elite businesses and property owners from public encroachment, yet the market itself "is not a freestanding, natural phenomenon, but consists

180. See Southern Burlington City NAACP v. Township of Mt. Laurel, 456 A.2d 390 (N.J. 1983); Anthony DePalma, Mount Laurel: Slow, Painful Progress, N.Y. Times, May 1, 1988, Section 10, at 1; see also David L. Kirp et al., Our Town: Race, Housing, and the Soul of Suburbia (1995).
181. Austin, supra note 60, at 1033.
182. Id. at 1034.
of rules defined by law and backed by the power of the state." Recognizing this relationship should make us less concerned with whether or not discriminatory actions are private, and more interested in the effect of calling them private. Fran Olsen’s criticism of the public/private dichotomy helps to explain why it is to whites’ advantage to characterize their choices as private.

“Private” is not a natural attribute nor descriptive in a factual sense, but rather is a political and contestable designation. Thus, for me, the topic [of the symposium, “Private Power and the Constitution”] suggests such questions as, “What does the person who wields power gain by successfully characterizing his power as ‘private’?” and “What role does our written Constitution play in that advantage?”

One of the main things a power-holder gains from successfully characterizing his power as “private” is a degree of legitimacy and immunity from attack.185

Finding that “private” is a disputable label changes the constitutional inquiry. Our task should not be to calibrate the degree of private or state participation in acts of power, but to examine how acts of power promote or impede citizens’ freedom.186 In addition to Olsen’s questions, we should ask: Is the state perpetuating existing hierarchies of power? Does the government’s policy further alienate historically dispossessed groups from society’s privileges? Asking such questions severely weakens the primacy of private choices and the priority paradigm begins to crumble.

B. Private Choices and Social Power

Counterbalancing whites’ private choices against black equality also presumes that these choices may be isolated from unjust social

186. See Robin West, Progressive and Conservative Constitutionalism, 88 MICH. L. REV. 641, 693 (1990) (“The targeted evil is not irrational state action, but state action or inaction, rational or not . . . that perpetuates the damaging social, economic, domestic, or private domination of some groups by others.”).
structures. One problem with this view is its faulty understanding of the individual. Individuals are not atomistic beings who create their identities apart from their social context. We form our personalities, interests, and opinions—our sense of self—only in interaction with the community to which we belong.\(^{187}\)

Moreover, the individual's ability to make autonomous decisions is circumscribed by the material conditions of her life, including her community.\(^{188}\) The interests of individuals in dominant groups include their stake in their privileged group status.\(^{189}\) For members of subordinated groups, protecting individual liberty necessarily involves the struggle for group liberation.\(^{190}\)

Kathryn Abrams sees the false separation of private choices from social power in courts' application of the disparate treatment standards in Title VII cases.

Under the equality theory that informs disparate treatment law, individuals are formed prior to social interaction. If these individuals are perpetrators of discrimination, they assume discriminatory attitudes through ignorance, irrationality, or conscious choice; if they are victims, they encounter these attitudes as impediments to their at least partially autonomous progress through the workplace. In neither case do these attitudes, in any important sense, constitute the self-conception or subjectivity of those who hold them. Judges and advocates who embrace this view make no effort to link discriminatory judgments in the workplace to those that operate outside, beyond observing that they may be animated by similar ignorance or prejudiced irrationality.\(^{191}\)

The priority paradigm's assumption that liberty may be pitted against equality, as if they were two isolated values, ignores the relationship between individual choice and social power.

C. Preferring Private Remedies to Social Responsibility

Separating private choices from social power also affects the way we understand social problems and their solutions. This mode of thinking supports the view that each individual is responsible for her own situation and not for that of others. It therefore prefers private remedies for individuals' problems to collective responsibility for social conditions.

\(^{187}\) See Sandel, supra note 32; West, supra note 61.

\(^{188}\) See Roberts, supra note 24, at 1480.

\(^{189}\) See Harris, supra note 73.

\(^{190}\) See Roberts, supra note 24, at 1480.

\(^{191}\) Kathryn Abrams, Title VII and the Complex Female Subject, 92 Mich. L. Rev. 2479, 2523-24 (1994) (citation omitted).
This privatizing of remedies for social problems is reflected in the family's political role. Our view of social relations designates the private family as the exclusive setting for caring relations between people. We look to the family alone to provide our economic as well as emotional needs. The private family also serves a more symbolic function. According to sociologist Stephanie Coontz, society's empathy extends only to people "whom we can imagine as potential lovers or family members." American society's embrace of the private family as its model for social accountability is particularly devastating for black people. America's legacy of racial separation makes it especially difficult—if not impossible—for most white Americans to imagine blacks as part of their family. As a result, the United States stands out among industrialized nations for its refusal to provide generous public support for families with children. And welfare reform proposals increasingly resort to private measures such as work requirements, collection of child support, and insurance models to solve the problem of poverty.

This privatization of social concern adds to the intractability of the inner city's plight. Because urban centers are filled with black people and secluded from white communities, white Americans can simply write them off. As Margaret Weir explained, "This geographic separation of blacks has important political consequences: it transforms the problems of living in cities into 'black' problems, making it easier for politicians to solve urban problems at the expense of poor black residents." Whites find it difficult to see the fate of the cities as a shared

194. Fineman, supra note 192, at 161-93 (criticizing the private nuclear family norm for masking the inevitable dependency of children).
195. Coontz, supra note 192, at 115.
interest because improving the lives of thousands of black urban poor does not seem to be in their private interest.\footnote{199} Separating private choices from social power thus facilitates the view of blacks as an expendable population.\footnote{200}

The priority paradigm, then, sustains what Derrick Bell calls black Americans' "at risk" status, a predicament created by our society's willingness to "sacrifice black rights, black interests, and even black lives to enhance the status, further the profits, and settle differences among whites."\footnote{201} According to Bell, all civil rights gains have been animated by the principle of "interest convergence," which posits that "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."\footnote{202} He points out, for example, that elementary school desegregation in the 1950s and more recent admission of minorities in higher education occurred only when these efforts became advantageous for whites and did not threaten white supremacy.\footnote{203}

Conversely, white Americans have been unwilling to pay for subsidies and to engage in other social reforms perceived to benefit primarily blacks.\footnote{204} Six decades ago, W.E.B. Du Bois explained that white workers resisted labor reform during Reconstruction because, "while they received a low wage, [they] were compensated in part by a sort of public and psychological wage."\footnote{205} More recently, Jill Quadagno described how a white backlash dismantled the 1960s War on Poverty programs.\footnote{206} Bell concludes that many whites in America believe that they gain from continued social and economic disparities that leave blacks at the bottom: "Even those whites who lack wealth and power are sus-

\begin{itemize}
\item \footnote{199}{\textit{Id.}}
\item \footnote{200}{\textit{Young, supra note 23, at 53 (observing that U.S. racial oppression increasingly occurs in the form of marginalization: "A whole category of people is expelled from useful participation in social life and thus potentially subjected to severe material deprivation and even extermination."))}}
\item \footnote{201}{\textit{Bell, supra note 27, at 1179 (1995).}}
\item \footnote{202}{\textit{Derrick A. Bell, Jr., Brown v. Board of Education and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 523 (1980).}}
\item \footnote{203}{\textit{See id. at 524-33; Derrick A. Bell, Jr., Bakke, Minority Admissions, and the Usual Price of Racial Remedies, 67 Cal. L. Rev. 3, 14-16 (1979); see also Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 Stan. L. Rev. 61, 62-63 (1988) (confirming Bell's hypothesis by demonstrating how desegregation during the Cold War aided the United States in its competition with the Soviet Union over the Third World).}}
\item \footnote{205}{\textit{W.E.B. Du Bois, Black Reconstruction 700 (1976).}}
\item \footnote{206}{\textit{See Quadagno, supra note 67.}}
\end{itemize}
tained in their sense of racial superiority by policy decisions that sacrifice black rights.\textsuperscript{207}

Like the way privileging private choices over equality ignores how power shapes and fortifies these choices, privileging private measures over collective ones ignores how power constrains ideas about membership in the community. Separating privacy from equality disregards the role that the unequal social structure plays in the formation of citizens' private interests and their vision of the collective.

VI. CHANGING THE PARADIGM

A. Abandoning the Pursuit of White Metamorphosis

Because the priority paradigm has required racial justice efforts to accommodate white preferences, civil rights advocates have traditionally directed much of their attention to changing white people's attitudes about blacks.\textsuperscript{208} Disenchanted black intellectuals and activists increasingly are abandoning the pursuit of white metamorphosis.\textsuperscript{209}

This strategic reassessment is reinforced by contemporary economic conditions. The technological transformation of America's businesses and massive exportation of manufacturing jobs overseas have plunged America into economic crisis.\textsuperscript{210} The disappearance of jobs, leading to increasing disparities in income and wealth, threatens the livelihood of black and white workers alike.\textsuperscript{211} Integrationist remedies are simply incapable of providing the economic resources necessary to improve the material conditions of the poorest blacks. As Regina Austin astutely notes, "[a]ffirmative action does little good if there are no jobs to allocate."\textsuperscript{212} Black Americans' situation in both constitutional theorizing and economic reality counsels against placing our hopes in white America's change of heart.

Despite its integrationist approach, Massey and Denton's own

\textsuperscript{207} Derrick Bell, \textit{After We're Gone: Prudent Speculations on America in a Post-Racial Epoch}, 34 St. Louis U. L.J. 393, 402 (1990).
\textsuperscript{208} See Peller, \textit{supra} note 17, at 767-71.
\textsuperscript{209} For recent critical race scholarship displaying a cultural-nationalist perspective, see Richard Delgado & Jean Stefancic, \textit{Critical Race Theory: An Annotated Bibliography}, 79 Va. L. Rev. 461, 463 (1993). Of course, nationalism is not new to black progressive thought. See generally Peller, \textit{supra} note 17 (describing the tension between nationalist and integrationist approaches to racial justice).
\textsuperscript{211} See Bell, \textit{supra} note 27, at 1186-87.
\textsuperscript{212} Regina Austin, \textit{Commentary: Concerns of Our Own}, 24 Rutgers L.J. 731, 734 (1993).
study reveals that "the only urban areas where significant desegregation occurred during the 1970s were those where the black population was so small that integration could take place without threatening white preferences for limited contact with blacks."213 Paradoxically, then, housing mobility programs that move inner-city blacks into white neighborhoods must remain tokenistic in order to work; they must limit their goals to "just enough diversity so that white residents do not feel unduly threatened."214 No matter how strenuously the Fair Housing Act is enforced, it will not be able to prevent the problem of resegregation and "white flight."

Moreover, the integrationist approach, with its focus on inclusion in white institutions, discounts the value of independent black institutions, ethics, and culture.215 The priority paradigm leads to an assimilationist approach to equality, requiring resemblance to the dominant group in order to be treated equally.216 Why not operate under the possibility that black people might autonomously create a way of life that will benefit all of society?217 Thus, adopting community-oriented strategies need not be an entirely defensive move. Forsaking integration is not the despairing search for a second-best alternative; it evokes the hope for something better than the dominant structures and values that have produced so much misery and alienation.

Recent scholarship on inner-city economic and political development provides an example of this redirection. In response to the romantic integrationist remedy for residential segregation, John Calmore proposes that we "focus on the community within, not as a site of the

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214. Johnson, supra note 89, at 81; see Robert W. Lake, Unresolved Themes in the Evolution of Fair Housing, in Housing Desegregation and Federal Policy 313, 323 (John M. Goering ed., 1986) ("Paradoxically, the very requirements for successful stable integration directly obviate such access for more than an extremely limited number of black households.").


216. See Gotanda, supra note 17, at 60 ("However utopian it appears, the color-blind assimilationist program implies the hegemony of white culture."); MacKinnon, supra note 26, at 1288.

217. See Austin, supra note 60, at 1043 ("Black folks can compete like anyone else and should operate under the influence of the conceit that their vision of the good life for themselves is broad enough to encompass a good life for others.").
culture of segregation, but as the insurgent culture of resistance.”  
Calmore finds hope in community-based organizations such as the Multi-Cultural Collaborative (“MCC”) that arose from the ashes of the 1992 Los Angeles uprising. MCC is a multicultural and multiethnic umbrella group of organizations working to reduce conflict among communities of color, facilitate neighborhood economic development, and improve access to the media.

Regina Austin advocates that blacks focus their efforts on developing the black public sphere, which she describes as “a space in which blacks generate and consolidate wealth through the production of goods and services and the creation of markets and audiences that fully utilize their labor power and creativity.” Rather than attempting to change whites’ perception of their self-interest, fostering the black public sphere enables blacks to pursue collectively their own self-interest.

Although blacks must resist white supremacy at every turn, blacks should also recognize the inadequacy of the concessions white supremacy is likely to accord them and proceed on the assumption that they must generate and sustain a black public sphere, that is, a space in which they can pursue the good life both in spite of white people and without regard to them.

Unlike constitutional theorizing that petitions concessions from high places, cultivating the black public sphere posits an active role for ordinary people in the struggle for racial justice and equality.

Although Austin notes that redirecting our attention to “the details of economic life at the micro-organizational level . . . may not generate sweeping constitutional reforms or high-profile elitist advocacy,” her focus dramatically challenges the priority paradigm. Indeed, it defies the Constitution’s protection of white private preferences to a greater degree than does the integrationist approach to racial equality. Austin recognizes that promoting the black public sphere will require disputing, if not breaking, economic laws. These are precisely

218. Calmore, Racialized Space, supra note 89, at 1254.
219. Id. at 1256-57.
220. Id.
221. Austin, supra note 60, at 1043; see also Regina Austin, “An Honest Living”: Street Vendors, Municipal Regulation, and the Black Public Sphere, 103 YALE L.J. 2119, 2120 (1994).
222. Austin, supra note 60, at 1042-43.
223. See Austin, supra note 212.
224. Id. at 735.
225. Id.; see also Regina Austin, “The Black Community,” Its Law-breakers, and a Politics of Identification, 65 S. CAL. L. REV. 1769, 1799-814 (1992); Austin, supra note 221, at 2119.
the sort of laws that have guarded white people’s property interests behind the shield of liberty. As Austin elaborates:

For example, residential squatting, sidewalk vending, and clandestine “off the books” service businesses like hairdressing, child care, and cab driving challenge our conceptions of private property, legitimate business practices, and blacks’ lack of entrepreneurial zeal and ability. Even the illicit sampling or borrowing of musical passages and phrases in rap music [flouts] the copyright laws. There must be a full-scale assault on the economic regulations and business practices that prevent blacks from developing their own real concerns.226

There is no reason to believe that white resistance to this economic assault, buttressed by the priority paradigm, will be any less ferocious than the opposition to fair housing, school desegregation, or affirmative action. Thus, the shift in strategies for racial justice, from an integrationist to self-determining perspective, will not overcome the priority paradigm. Rather, it will likely provide the grounds for renewed allegiance to the priority paradigm’s defense of individual liberty. We need a new legal paradigm that reconfigures the relationship between liberty and equality.

B. Reconciling Liberty and Equality

Displacing the priority paradigm does not involve striking a new balance between the competing values of liberty and equality. Our goal should not be to seek a new racial equilibrium by permitting white Americans a little less liberty so that black Americans may enjoy a little more equality—for example, constructing a doctrine that encourages poor blacks to move out of the inner city while allowing white homeowners some liberty to preserve the character of their neighborhoods.

Nor does the task involve choosing now to prefer equality instead of liberty. I do not propose abandoning liberty for the sake of equality, although it will seem so to priority paradigm adherents. It would be a mistake to renounce the important values of autonomy and self-determination, associated with liberty, in the process of promoting equality.227

These alternatives are unworkable because liberty and equality are

226. Austin, supra note 212, at 735.
227. Cf. Roberts, supra note 24, at 1470-71, 1476-81 (discussing the benefits of privacy for women of color and proposing a new privacy jurisprudence); Nedelsky, supra note 184 (proposing a feminist conception of autonomy).
not two discrete values that can be picked or balanced, "like Smith's desire to have a twelve-foot fence against Jones' desire to have more sunlight in his living room." What needs to be fixed is the priority paradigm's conception of the relationship between liberty and equality, and therefore its vision of the limits of black liberation. Despite America's seemingly intractable racial conflict, we should pursue a vision of justice that includes the protection of all citizens' interest in both liberty and equality.

A critical aspect of this vision is an understanding of liberty and equality that accounts for group oppression. Once we understand liberty as requiring the eradication of oppressive structures rather than opposing these changes, it makes no sense to prioritize liberty over equality. In an earlier article challenging the constitutionality of prosecutions of black women who used crack during pregnancy, I started to outline an affirmative view of liberty that recognizes the relationship between liberty and racial equality.

The government's duty to guarantee personhood and autonomy stems not only from the needs of the individual, but also from the needs of the entire community. The harm caused by the prosecution of crack-addicted mothers is not simply the incursion on each individual crack addict's decisionmaking; it is the perpetuation of a degraded image that affects the status of an entire race. The devaluation of a poor Black addict's decision to bear a child is tied to the dominant society's disregard for the motherhood of all Black women. The diminished value placed on Black motherhood, in turn, is a badge of racial inferiority worn by all Black people. The affirmative view of privacy recognizes the connection between the dehumanization of the individual and the subordination of the group.

Thus, the reason that legislatures should reject laws that punish Black women's reproductive choices is not an absolute and isolated notion of individual autonomy. Rather, legislatures should reject these laws as a critical step towards eradicating a racial hierarchy that has historically demeaned Black motherhood. Respecting Black women's decision to bear children is a necessary ingredient of a community that affirms the personhood of all of its members. The right to reproductive autonomy is in this way linked to the goal of racial equality and the broader pursuit of a just society. This broader dimension of privacy's guarantees provides a stronger claim to government's affirmative responsibilities.

228. Delgado & Stefancic, supra note 23, at 857 (making the point about balancing speech against equal-protection values). Delgado and Stefancic similarly argue that the "precarious interdependence" of speech and equal-protection values makes it difficult to balance the interests of the two sides in the hate speech controversy. Id. at 856.

229. As I wrote this sentence it occurred to me how the word "liberation" connotes both liberty and equality.

230. See generally Young, supra note 23.

231. Roberts, supra note 24, at 1480.
This approach would validate government programs that appear under the priority paradigm to be unjustified restrictions on liberty, such as government limitations on the marketing of genetic material or strong affirmative action programs that interfere with whites' settled expectations. It would also require government programs that appear to be unwarranted expansions of liberty, such as public support of poor women's reproductive decisions. By refuting the conflict between liberty and equality, this approach opens up, as well, the possibility of multiracial coalitions engaged in struggles for broad institutional change.232

In short, the racial critique of the priority paradigm does not require abandoning liberty for the sake of equality. Rather, it calls for a reconstruction of our notions of both liberty and equality.233

232. See generally Frances L. Ansley, Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship, 74 CORNELL L. REV. 993 (1989) (proposing that civil rights scholars develop theories and strategies that account for both race and class).

233. Angela Harris makes a similar point about critical race scholars' resolution of the tension between modernism and postmodernism. Rather than choose between the two, Harris proposes we transform political modernism through a commitment to postmodernist critique, developing "a jurisprudence of reconstruction—the attempt to reconstruct political modernism itself in light of the difference 'race' makes." Harris, supra note 56, at 760.