

LOOKING BACK AT LAW'S CENTURY

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Racial Justice

MORAL OR POLITICAL?

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In the present century, black people are believed to be totally different from whites in race and origin, yet totally equal to them with regard to human rights. In the sixteenth century, when blacks were thought to come from the same roots and to be of the same family as whites, it was held . . . that with regards to rights blacks were by nature and Divine Will greatly inferior to us. In both centuries, blacks have been bought and sold and made to work in chains under the whip. Such is ethics; and such is the extent to which moral beliefs have anything to do with actions.

—Giacomo Leopardi

INTRODUCTION

NEARLY ONE HUNDRED years ago, W.E.B. DuBois predicted that the problem of the twentieth century would be the problem of the color line (DuBois 1986, 372). Were he writing today, DuBois might well conclude that in the United States, the problem of the coming century will be the problem of the *color-bind* (Chávez 1998). Although Americans arguably remain "the most 'race-conscious' people on earth" (Marable 1995, 185), our national conversation about "race" now stands at an impasse. Our ways of talking, or refusing to talk, about race increasingly speak past the racialized dilemmas of educational equity, affirmative action, poverty, welfare reform, housing, lending, labor and employment discrimination, health and medical care access, environmental justice, immigration and asylum, or crime, policing, and punishment. The current deadlock in U.S. public discourse on racial justice reveals itself not only the arena of power politics; our predicament can

also be seen in the creeping "paralysis of perspective" (Mamdani 1996, 3) that threatens to devitalize serious critical reflection on race and racism at the threshold of the twenty-first century.

Nonetheless, the broad sweep of our history and our present plight both suggest that "racialization" (Small 1999) continues to be a central fact of American life. Obviously, the claim that race remains a structuring principle in U.S. institutions and social relations need in no way assume an unbroken, unmodified continuity in the content or meanings of "racial formation in the United States" (Omi and Winant 1986). DuBois's time is not our own. We can admit the complex, changing, and contested character of contemporary racial formations and still recognize that race will likely figure in U.S. law and policy for many decades to come. Acknowledging the continuing relevance of race, in this chapter I ask whether the governing grammar of contemporary American debates about the content of racial justice will be adequate to the pressing tasks of the new century. Taking my point of reference from the ongoing controversy over the place of "color-blindness" and "race-consciousness" in U.S. constitutional discourse, I argue that it is not. The reasons behind this state of affairs, however, have less to do with the concept of race than with its specific discursive deployments.

I begin with a short and selective survey of the terminological terrain on which struggles over racial justice have been waged in American constitutional law. I then describe and discuss the limits of the normative vision that underwrites the dominant discourse on racial justice in our constitutional jurisprudence. Even in writings whose claimed concerns are much broader, the normative horizons of racial justice are more often than not drawn in and confined to moral terms. I criticize the dominant debate's almost obsessive focus on the *morality* of race, race-consciousness, and racial identification, and I sketch an alternative to the language of racial moralism. This competing account finds its conceptual center of gravity in the distinctively *political* dimensions of racial claims-making. Taking an example from the contentious dispute over race, criminal law, and black civic publics, I end by indicating more precisely how a political conception of racial justice can provide a conceptual vocabulary for thinking American constitutionalism out of its current color-bind.¹

RACE AND RECOGNITION: THE "COLOR-BLINDNESS"/ "RACE-CONSCIOUSNESS" DEBATE

In the last quarter century, mainstream discussion of the forms of racial justice has increasingly come to revolve around a single normative question: is the use of race in public policy making defensible in our constitutional order? Broadly speaking, opinion on this issue has divided into two main camps. On

one side are those who contend that race should never be used as a ground for imposing burdens or allocating benefits: ours is, or should be, a "color-blind" society whose public policy should impute no special significance to race. On the other side are those who argue that American constitutional norms do not categorically foreclose race-conscious decision making. While proponents of race-consciousness may disagree about the conditions under which reliance on race is legitimate, they reject the principle that race-based distinctions can never be condoned in our constitutional order.

The textual lodestar of the color-blindness principle in U.S. Supreme Court case law is the famous language from the first Justice Harlan's dissenting opinion in *Plessy v. Ferguson* (1896): "Our Constitution is color blind, and neither knows nor tolerates classes among citizens" (*Plessy*, 559).² On the current Court, this commitment to color-blindness has found its most passionate proponents in Justices Antonin Scalia and Clarence Thomas. In a series of increasingly strident pronouncements on the meaning of the Equal Protection Clause, Justice Scalia has denounced the use of race as a criterion in public decision making, even for putatively benign purposes. Scalia would forbid even those policies that are designed "to 'make up' for past discrimination"; concurring in *Adarand Constructors, Inc. v. Peña* (1995), Justice Scalia maintained that even putatively "benign" uses of race "reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred" (239). In the same case, Justice Thomas acidly dismissed the notion that one could distinguish between "benign" and "malicious" uses of race; for Thomas, there is no constitutional difference between the two. "In each instance," he writes, race-conscious decision making "is race discrimination, plain and simple" (241).

Similar defenses of the color-blindness principle abound in the scholarly literature. The case for color-blindness has perhaps found its sharpest statement in critical discussions regarding the constitutionality of affirmative action. Writing more than twenty-five years ago (before the Supreme Court first squarely addressed the issue), the late Alexander Bickel argued that the unconstitutionality of race-consciousness was axiomatic:

If the Constitution prohibits exclusion of blacks and other minorities on racial grounds, it cannot permit the exclusion of whites on similar grounds; for it must be the exclusion on racial grounds which offends the Constitution, and not the particular skin color of the person excluded. (Bickel 1975, 132-33)

For Bickel, the "lesson of the great decisions of the Supreme Court" and of "contemporary history" is that "discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society" (133). In a roughly contemporaneous intervention, Richard Posner

advanced a similar thesis. Posner maintained that the "proper constitutional principle" for assessing policies that accord "preferential treatment" to racial minorities was not "no 'invidious' racial or ethnic discrimination, but *no* use of racial or ethnic criteria to determine the distribution of government benefits and burdens" (Posner 1974, 25-26, emphasis added).

More recently, Abigail and Stephan Thernstrom contend in their *America in Black and White* that "[r]ace conscious policies make for more race-consciousness; they carry society backward. We have a simple rule of thumb: that which brings the races together is good; that which divides us is bad" (Thernstrom and Thernstrom 1997, 539). Although the Thernstroms concede that deep disagreement exists about "which policies have what effect," they leave little doubt regarding their own views. On the Thernstroms' account, race-consciousness is always and everywhere "bad": "[We] hold to Justice Harlan's belief that 'our Constitution is color-blind, and neither knows nor tolerates classes among citizens'" (ibid., quoting *Plessy*, 559).

Rejecting the demand for the immediate and categorical deracialization of public discourse, proponents of race-conscious decision making argue that the only way to transcend the American racial dilemma is precisely to take race into account. In one of the earliest constitutional defenses of race-conscious remedies, Justice Brennan counseled caution toward "[c]laims that law must be 'color-blind' or that the datum of race is no longer relevant to public policy" (*Regents of the University of California v. Bakke* (1978), 327). On Brennan's account, the color-blindness principle must instead "be seen as aspiration rather than as description of reality" (327). A rule of racial non-recognition would only "[mask] the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens" (327). More recently, Justice Stevens rejected the claim of Justices Scalia and Thomas in *Adarand* that "benign" and "invidious" race-based policies must be viewed in the same constitutional light: "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" (*Adarand*, 243). For Stevens, the constitutional consistency toward race-conscious policies demanded by the *Adarand* majority would effectively "disregard the difference between a 'No Trespassing' sign and a welcome mat" (245).

In the contemporary scholarly literature, the constitutional defense of race-conscious policy making has received extended and sophisticated elaboration by a number of writers. I shall concentrate here on the work of Ronald Dworkin and Amy Gutmann, who have authored two of the most sustained recent reflections (from either side of the debate) on the moral case for and against color-blind constitutionalism.

Dworkin announces his project in the subtitle of *Freedom's Law*—he aims to defend "the moral reading of the American Constitution." As Dworkin de-

scribes it, the moral reading approaches the abstract clauses of the U.S. Constitution “on the understanding that they invoke moral principles about political decency and justice” (Dworkin 1996, 2). The equality principle of the Fourteenth Amendment figures centrally in Dworkin’s defense of the moral reading. For Dworkin, the U.S. Supreme Court’s decision in the famous *Brown v. Board of Education* (1954) case offers an exemplary instance of the moral reading on the ground. Dworkin argues that the outcome in *Brown* was “plainly required by the moral reading, because it is obvious now that official school segregation is not consistent with equal status and equal concern for all races” (Dworkin 1996, 13). Dworkin recognizes that his proffered moral reading of the words “equal protection of the laws” goes far beyond the interpretive tenets of originalism. As a practical matter, the men who wrote and ratified the Equal Protection Clause aimed for much less on the ground than “equal status and equal concern for all races”: no one can doubt their commitment (or acquiescence) to continuing racial inequality. However, the moral reading asks “what the framers intended to say” in writing the Fourteenth Amendment, not “what they expected their language to do” (1996, 13). In Dworkin’s account, the moral method of constitution reading not only permits but requires reparation of the framers’ earlier interpretive error. Dworkin maintains that the *Brown* court properly corrected the mistake in understanding that led the framers of the Fourteenth Amendment to uphold race-based school segregation: “The moral reading insists that they misunderstood the moral principle that they themselves enacted into law” (1996, 13).³ For Dworkin, *Brown* and its progeny restored racial equality jurisprudence to its proper moral basis: the principle of equal status and equal concern for every racial group.

Another thoughtful effort to establish the moral foundations of racial justice is undertaken in Amy Gutmann’s “Responding to Racial Injustice” (Appiah and Gutmann 1996, 109). As it’s the essay’s title suggests, the question Gutmann poses and seeks to answer is how we should respond to the continuing problem of racial injustice in America. Although she takes the persistence of racial injustice in the contemporary United States as a factual premise, Gutmann does not dispute the notion that, as a normative matter, “color blindness is the ideal morality (for an ideal society)” (1996, 109). What Gutmann does deny is the claim that color-blindness represents *the* fundamental principle of justice against which any response to racial justice must be measured, even when it can be shown that color-blind policies maintain institutional patterns of racialized discrimination. For Gutmann, the principle that should inform our response to racial injustice is the norm of justice as fairness. Taking this principle of justice as her regulative ideal, Gutmann contends that one can offer a “color-blind” argument in favor of “color consciousness” in public policy making. Gutmann undertakes to advance a “moral case against racial injustice” (1996, 114) that recognizes the dangers of “race consciousness”

without discounting the claims of what she calls “color consciousness.” Gutmann endorses the social constructionist understanding that race is a “fiction” (1996, 113). As such, it ought to have no “morally relevant implications for public policy” (1996, 112). The same cannot be said for the notion of “color consciousness”: “If we need not be color blind, we can be color conscious” (1996, 132). Gutmann maintains that the idea of “color consciousness” avoids the potential injustice of essentialist racial categories while recognizing “the ways in which skin color and other superficial features of individuals adversely and unfairly affect their life chances” (1996, 112). Taking employment, university admissions, and electoral redistricting as her examples, Gutmann seeks to show that color-conscious principles and policy are consistent with her preferred model of justice as fairness, as well as with the ideal (which she embraces) of a color-blind American future. Building on the moral principle of justice as fairness, Gutmann endorses “those (and only those) color conscious policies” that are “instrumentally valuable in overcoming racial injustice and consistent with counting all persons, whatever their skin color or ancestry, as civic equals” (1996, 177).

RACE, JUSTICE, AND THE LIMITS OF MORALISM

What interests me about the dispute between the advocates of color-blindness and the proponents of color-consciousness is not so much the language of the debate as the normative vision that undergirds it. One of the most fascinating aspects of the debate I’ve been discussing is the reliance by both sides on a fundamentally moral conception of race and its relevance for public policy. To be sure, these defenses of racial moralism are not always fully theorized; more often than not, they are couched in the language of moral intuition or an asserted moral consensus.⁴ Nonetheless, the felt necessity to defend or attack color-blindness and color-consciousness in terms of the morality of race has become one of the more striking features of the dominant discourse.

In our legal doctrine, this moral idea of racial justice informs Justice O’Connor’s concern in *City of Richmond v. J.A. Croson* (1989) with the “‘personal rights’ [of the *Croson* plaintiffs] to be treated with equal dignity and respect” by public decision makers (493). Similarly, a stated fidelity to “the moral basis of the equal protection principle” (*Adarand*, 240) animates Justice Thomas’s insistence that racial classifications always “have a destructive impact on the individual and our society” (240): “I believe that there is a ‘moral [and] constitutional equivalence’ . . . between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality” (240, citations omitted).

Versions of the “moralizing style” are mobilized, as well, in the theoretical literature on the constitution of racial justice. We have seen that for Gutmann

the morality in question has to do with the rights of individual moral personhood. Gutmann's moral conception of racial justice starts from the premise that "all human beings regardless of their color should be treated as free and equal beings, worthy of the same set of basic liberties" (Appiah and Gutmann 1996, 112-13).⁵ Similarly, in Dworkin's "moral reading" of the Constitution, the "abstract moral principle" of racial justice to which the Equal Protection Clause gives expression is a larger, group-sensitive recognition of "equal status and equal concern for all races" (Dworkin 1996, 13).⁶ Despite their differing views about the claims of color-blindness and color-consciousness, writers I have discussed share a reading of the Fourteenth Amendment as a constitutional statement about the morality or immorality of discrimination. They share the belief that questions of racial justice under our Constitution are properly approached from the moral point of view,⁷ and they draw on the resources of racial moralism to defend their respective positions.

In my view, this "moral constriction"⁸ of the public debate over racial justice fails to capture the distinctive and constitutive role of the political in racial claims-making. At its core, the moral vision that underwrites the dominant constitutional discourse on race provides a contemporary case study in the "displacement of politics" as we know it (Honig 1993). The moral concept of racial justice tries to capture and control the explosive, agonistic conflicts that characterize American racial politics. If it cannot altogether remove questions of racial power politics from its agenda, the racial moralism model can aspire to confine them within the dispassionate discursive boundaries of juridical settlement, bureaucratic administration, and deliberative legislation. If contemporary history teaches us anything about our racial dilemma, it is that conflicts over the forms and substance of racial injustice have been primarily contests about access to the means of political power, about social relations of domination, subordination, and resistance. These distinctively political dimensions of race in America resist the normative logic of the moral view that continues to predominate in public debates about racial justice.

This is not to say that the moral conception of racial justice has succeeded entirely in excluding politics from its discursive domain. We need only consider in this connection the terms of the Supreme Court's opinion in *Brown*, which Dworkin holds up as a shining example of the moral reading at its best. As I have noted, Dworkin interprets the Court's judgment as a ringing repudiation of the erroneous moral principle that had sanctioned state-imposed racial segregation in public education throughout most of the previous century. For Dworkin, the *Brown* Court took the Fourteenth Amendment as a textual marker for the moral precept that all racial groups have a claim to equal status and concern within our constitutional order. Dworkin's moral reading of *Brown* comports with the standard account of the case, which holds that the Court's chief constitutional concern was how enforced racial segregation made black schoolchildren *feel*.⁹ Racially segregated public

schools generated a "feeling of inferiority" among black students about "status in the community that may affect their hearts and minds in a way unlikely ever to be undone" (*Brown*, 494). On this account, the heart of the harm addressed in *Brown* was, at base, a moral harm. In responding to that harm, the Court drew on the "abstract moral principles" of the Fourteenth Amendment. I am not claiming the moral reading of *Brown* finds no basis in the text of the opinion. My point, rather, is that proponents of racial moralism have not paid sufficient attention to the fact that the *Brown* Court's defense of the equality principle sought support in another, very different justification:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. (*Brown*, 493).

As this language suggests, the moral account of racial justice offers at best a partial explanation of the *Brown* opinion. The *Brown* Court explicitly stresses the political meaning and significance of public education for American life in the middle of the twentieth century. From this perspective, the exclusionary practices struck down in *Brown* threatened the "very foundation of good citizenship" in our constitutional democracy. Put another way, the racial segregation of public schools denied African Americans equal access to the means of civic or political *formation* necessary for "performance of our most basic public responsibilities." As a constitutional matter, then, *Brown* can be read not only or even primarily as a statement about moral personhood and rights in a moral community;¹⁰ on this interpretation, the decision is equally a vindication of political citizenship and right to political society.¹¹

To my mind, *Brown* is a specific (though incompletely theorized) instance of a broader principle of racial citizenship. The defense of that principle derives from an openly political understanding and a political reading of our racial Constitution. The moral conception of racial justice highlights the immorality of discrimination, whose incidence and effects it tries to control through ethical norms such as those that command "equal concern and respect" or obedience to the notion of "justice as fairness." The political conception of racial justice focuses squarely on the illegitimacy of a regime of civic subjugation that the Court, in the decade after *Brown*, labeled "White Supremacy" (*Loving v. Virginia* [1967], 11). The moral defense of racial justice seeks to "annihilate the political" (Schmitt 1976, 71) dangers of race by submitting disputes about racialized privilege and subordination to a "rational process of negotiation" (Mouffe 1993b, 49) and the ethical constraints of

"agreed-upon, neutral rules" (48). The moral model thus seeks to build a normative firewall between racial justice-seeking and racial politics, toward which its basic attitude is one of anxious distrust. By contrast, the political account of racial justice starts from a candid recognition that the power and persistence of racial hierarchy warrant a sober (and sobering) "racial realism" (Bell 1995) about the limits of "moral politics" (Lakoff 1996). While it acknowledges the influence and achievements of the racial egalitarian ideal, the political account also insists that democracy in America remains a *racial* democracy. Because American political society is still in salient and significant ways a "racial polity" (Mills 1999, 17), a democratic conception of racial justice faces a double challenge: to review the problem of justice in light of the problem of politics, and at the same time to "rethink the political around the axis of race" (17).

The moral model concerns itself with the intersection of justice and virtue.¹² The political conception directs its concerns to the intersection of race and power. Unlike the moral conception of racial justice, the political perspective on racial justice-seeking refuses to deny the constitutive value and affirmative role that power, antagonism, and interest play in the life of racialized politics. It understands that racial justice-seeking in the late modern state takes place in a field of ongoing political conflict and contest, a domain in which we "cannot hope to achieve moral consensus" (MacIntyre 1981, 234) on questions of race. The political model thus attends to the agonistic dimensions of racial justice-seeking. Its normative account of justice and racial politics places full accent and emphasis on the power relations that subtend disputes and decision making about the distribution of burdens and benefits across racial publics. For the political conception of racial justice, the effort to translate the deep agreements of racial politics into the depoliticized language of rational morality cannot possibly achieve what we hope from it. The attempted moral mastery of racial politics does not make its "conflicts, antagonisms, relations of power, forms of subordination and repression simply disappear" (Mouffe 1993b, 49). The political conception of racial justice recognizes that because "[m]oral discourse is personal dialogue" (Pitkin 1972, 216), its decision rules embody a model of judgment that simply fails to wrestle with the large public questions of group privilege, inequality, and power that an adequate account of race, racism, and racial justice-seeking must engage.

I hope by now to have said enough to convey a sense of the normative boundaries that inform a properly political conception of racial justice. I turn now to a brief description of what I take to be the rudiments of its basic structure. In broad terms, the political conception of racial justice is a species of "democratic justice" (Shapiro 1999). A state committed to democratic justice in the "racial polity" must undertake at least three key tasks, the performance of which determines its political legitimacy. The first task is to secure and maintain for vulnerable racial publics equal and meaningful access to the

processes of self-governance through which democratic political identities are formed and given expression. I have in mind here such formal rights as the right to vote and to run for elective office. The second task of constitutional democracy is to insure that the voices and interests of vulnerable racial publics are not excluded from the state institutions in which binding collective choices are discussed and made. For the political conception of democratic justice requires that the representation rights of vulnerable racial publics must not simply be given formal voice; they must be accorded real weight and value. From this perspective, legal and policy outcomes matter. This is not to say that vulnerable racial publics would necessarily win each and every dispute over the content of race-relevant law and policy. What the right of racial representation would require is an understanding that the process and product of state policy making cannot claim political legitimacy if the governing decision rules entrench racially segmented hierarchy and racialized democratic domination.

The third element of a political conception of racial justice is perhaps more controversial. A democratic understanding of racial justice-seeking would demand an ongoing effort to facilitate what Jane Mansbridge calls "enclaves of resistance" (Mansbridge 1996, 58) within vulnerable racial publics, a protected space for developing oppositional ideas about racial justice and its opposite. Mansbridge rightly argues that since "no democracy ever reaches the point at which justice is simply done, democracies need to recognize and foster enclaves of resistance" (58). Nancy Fraser aptly terms these venues for oppositional discussion and deliberation "subaltern counterpublics" (Fraser 1997, 81).

The goals of these counterpublics include understanding themselves better, forging bonds of solidarity, preserving the memories of past injustices, interpreting and reinterpreting the meanings of those injustices, working out alternative conceptions of self, of community, of justice, and of universality, trying to make sense of both the privileges they wield and the oppressions they face, understanding the strategic configurations for and against their desired ends, deciding what alliances to make both emotionally and strategically, deliberating on ends and means, and deciding how to act, individually and collectively. (Mansbridge 1996, 58)

Like the relations of power they challenge, these subaltern counterpublics emerge and flourish beyond the formal boundaries of statist politics. Nonetheless, they play a decisive role in both validating and contesting the claim of the state to democratic legitimacy.

Ian Shapiro has identified at least four levels on which institutionalized oppositional counterpublics are a "defining criterion of democracy" (Shapiro 1996, 234). First, because periodic transfers of power are a necessary if not

sufficient condition of democratic governance, oppositional political enclaves provide a site for potential alternative leaderships to organize and equip themselves to assume the reigns of democratic state power. Second, oppositional counterpublics help legitimate democratic politics by "attracting social dissent toward antigovernment forces within the regime rather than directing it at the regime's foundations." In this way, anger and alienation among civic counterpublics can be directed at particular power holders without resort to oppositional strategies that permanently or fundamentally threaten the broader culture of democratic politics. Third, institutionalized opposition advances the wider public interest by ensuring that there will always be members of the political society who stand ready to "ask awkward questions, shine light in dark corners, and expose abuses of power." Fourth and finally, the presence of effective oppositional counterpublics creates a space within democratic political culture that gives subordinated groups some reason to believe they are not doomed to suffocate under the weight of inherited injustices and "can challenge prevailing norms and rules with the realistic hope of altering them" (1996, 234-35).

Taken together, these elements of a political conception of racial justice create the conditions for polity in which democratic citizenship and racial citizenship are mutually constitutive and mutually transformative, in ways that might be positive for both.¹³ I recognize that the conception of racial justice I have sketched here will be a source of deep political discomfort, particularly in its suggestion that vulnerable racial publics should be accorded a species of democratic "destabilization rights" (Unger 1997, 387-91). In theory (if not in actual practice), the modern American constitutional order is premised on the notion that democratic politics and racial politics are hostile at all points. The conception of racial justice-seeking elaborated here collides fundamentally with a vision of American political identity and American political ideas whose sheer taken-for-grantedness has made it almost impossible to question, much less dislodge. Nonetheless, I am persuaded that the political conception of racial justice I am defending is both a valid and a viable alternative to the magical thinking that characterizes the regnant status quo. Abandoning the idea that we can or must achieve a moral consensus for adjudicating disputes about race and power, the political conception proceeds from the belief that "there is no criterion for justice that is anterior to what democracy generates" (Shapiro 1996, 237-38). The political conception of racial justice thus enjoins us to look for democratic solutions to the problems of racialized hierarchy, privilege, and disadvantage in the domain of democracy itself. One possible point of entry here is by way of the concept of *democratic racial citizenship* and its normative commitment to the right of vulnerable racial publics "to survive and participate" (Shapiro 1999, 236) fully in the institutions of American constitutional democracy.

TAKING RACIAL CITIZENSHIP SERIOUSLY

I have said that the political conception of justice asks us to take the idea of democratic, race-conscious citizenship seriously. However, any effort to place the idea of citizenship at the center of political and legal discourse on race must acknowledge a threshold difficulty. For most of its history, American political culture has treated the concept of citizenship with indifference, if not outright contempt. This has been particularly true with respect to questions of racial justice. A 1973 article by the late Alexander Bickel illustrates my point. In "Citizenship in the American Constitution," Bickel deployed his formidable analytic and rhetorical skills to show that "the concept of citizenship plays only the most minimal role in the American constitutional scheme" (Bickel 1973, 369). For Bickel, this is part of the genius of our constitutional democracy. Bickel begins by noting that "the original constitution presented the edifying picture of a government that bestowed rights on people and persons, and held itself out as bound by certain standards of conduct in its relation with people and persons, not with some legal construct called citizen" (1973, 370). Bickel then turns his attention to the language of citizenship in the Civil Rights Act of 1866 and the Reconstruction Amendments. Bickel concedes that these two texts represented the first attempt in our constitutional history at "an authoritative definition of citizenship in American law" (372). On his account, however, these codifications of citizenship rights sought only to dispel Chief Justice Taney's mischievous linkage of rights and citizenship status in the *Dred Scott v. Sandford* (1857) case, whose constitutional vision had been repudiated with the Union victory in the Civil War.

In addition to his argument from the constitutional text, Bickel drew more broadly on normative political philosophy:

Emphasis on citizenship as the tie that binds the individual to government and as the source of his rights leads to metaphysical thinking about politics and law, and more particularly to symmetrical thinking, to a search for reciprocity and symmetry and clarity of uncompromised rights and obligations, rationally ranged one next and against the other. Such thinking bodes ill for the endurance of free, flexible, responsive and stable institutions, and of a balance between order and liberty. . . . It is gratifying, therefore, that we live under a Constitution to which the concept of citizenship matters very little indeed. (Bickel 1973, 387)

Having surveyed the claims of citizenship theory in American constitutional practice, Bickel concludes that "[c]itizenship is at best a simple idea for a simple government" (387).

In the decade after Bickel celebrated its irrelevance for American constitutional law, the citizenship idea would become an object of renewed interest in normative political and legal theory. In the law schools, scholars such as Cass Sunstein and Frank Michelman explored the implications of the revival of civic republican thought for American constitutionalism. However, the call for the rehabilitation of the republican tradition met with some resistance among scholars of race and constitutional law. In a critical reply to Sunstein and Michelman, Preeta Bansal and Derrick Bell urge "skepticism" as "the necessary response" for people of color toward the urged revival of republican ideas of citizenship (Bansal and Bell 1988, 1609). Bansal and Bell argued that the civic republican faith "in the existence of shared values and the possibility of the common good" assumes "that a social consensus will emerge from 'reasoned' deliberation by individuals who think 'rationally' and who are capable of abstracting from their private experiences" (1610). In their view, "blacks have served as the group whose experiences and private needs have been suppressed in order to promote the 'common good' of whites" (1611). Accordingly, Bansal and Bell found little in the republican vision of citizenship that spoke to the dynamics of American racial politics. "What parts of the republican vision," they queried, "are capable of combating and subduing the by-now familiar priorities for whites in racial policymaking, priorities that have preserved for whites their perpetual power?" (1613).

The question Bansal and Bell raise here about the political use and abuse of the citizenship idea warrants an answer. Briefly stated, I believe that the beginnings of a response to their concerns can be found in the work of scholars who have rethought and reconstructed the narrative of republican citizenship in order to put it to new uses within a vision of multicultural justice and a democratic politics of difference. Theorists such as Iris Marion Young (Young 1990) have argued persuasively that there is no necessary conceptual connection between the idea of citizenship and the ideology of classical republicanism. The concept of citizenship, Young contends, can serve as a crucial tool in building a democratic political conception of racial justice for our contemporary multicultural polity. Properly understood, the citizenship idea places the very questions of racialized power relations that concern Bansal and Bell at the center of its normative concerns. In this respect, the language of citizenship can provide a grammar for racial claims-making that speaks directly to our own moment, when it is not so much the moral personhood or status but the political identity and station of racial minority publics whose future is in doubt.¹⁴

It should be noted in this connection that the citizenship idea figures prominently in those provisions of our Constitution around which so much of the U.S. debate over racial justice has revolved. As T. Alexander Aleinikoff demonstrates, the concept of citizenship was a crucial element in the architecture of the Reconstruction Amendments, whose terms continue to inform the project of racial claims-making in contemporary American political culture. In

a careful contrarian reading of the dissent in *Plessy*, Aleinikoff argues that the ideal of color-blindness was not the primary source of the first Justice Harlan's constitutional objections to the segregation statute upheld by the *Plessy* majority. Harlan's target was not "racial classifications" but the "ideology of white supremacy" (Aleinikoff 1992, 961). Moreover, the *Plessy* dissent must be read as "a discourse on the fundamental rights of citizenship, not the equal protection of the laws" (964). Harlan "painted a far grander picture than equal treatment; [he], in effect, portrayed the recent amendments as declaiming that the blessings of citizenship are to be respected in every jurisdiction of the United States" (964). For Aleinikoff, the *Plessy* dissent offers a "unifying account of the Civil War Amendments" as a whole. "[T]he 'freedom' guaranteed by the Thirteenth Amendment is linked to the fundamental-rights-protecting 'liberty' of the Fourteenth Amendment; the opposite of the slavery prohibited by the Thirteenth Amendment is the citizenship guaranteed by the Fourteenth Amendment" (974). Although he does not explicitly frame his argument in these terms, Aleinikoff makes a compelling case for a normative reorientation from a moral to a political reading of the Reconstruction Amendments and of the vision of justice as political freedom to which they give expression.¹⁵ In this respect, Aleinikoff's reinterpretation of the *Plessy* dissent as a judicial defense of the "freedom of citizens" (*Plessy*, 557) and the "blessings of citizenship" (Aleinikoff 1992, 964) offers an insightful constitutional genealogy of the political conception of racial justice urged here.

The problem, as Aleinikoff himself admits, is that Harlan's idea of the "personal liberty of citizens" is too elusive to do the work that a political conception of racial justice would demand of it: "simply invoking 'liberty' is not enough" (1992, 976).¹⁶ The challenge, then, is to specify precisely what an adequate *grundnorm* for a political conception of racial justice would look like. Taking my example from the vexed debate over racial disparities in the criminal law, I suggest that the "political freedom of vulnerable racial publics" might generate a useful normative framework for thinking about claims of racial injustice.

RACE, CRIME, AND POLITICAL JUSTICE: AN ANALYTIC EXPLORATION

In recent years, black conservative and neoliberal scholars have challenged the claim that racially disparate effects in the system of American criminal justice should be viewed as a problem of unlawful racial discrimination. To take one example, in *Race, Crime, and the Law*, Randall Kennedy contends that we ought not conclude that racial disparities in criminal law are racist without first determining whether the law harms black communities. Thus Kennedy asks, is "the black population hurt when traffickers in crack cocaine suffer

longer prison sentences than those who deal in powdered cocaine or helped by incarcerating for longer periods those who use and sell a drug that has had an especially devastating effect on African-American communities?" (Kennedy 1998, 10).¹⁷ Kennedy applies a utilitarian moral theory to determine when and how racial disparities in criminal law might raise a problem from the perspective of the antidiscrimination principle—in effect endorsing an essentially moral conception of racial justice.

The moral calculus that underwrites Kennedy's analysis of racially disparate treatment within the criminal justice system revolves around his twin notions of "racial reputation" and the "politics of respectability." For Kennedy, the "historically besmirched reputation" (1998, 13) of African Americans is one of the central reasons behind the nation's "indifference to their plight" (21). Kennedy writes:

In American political culture, the reputation of groups, be they religious denominations, labor unions, or racial groups, matters greatly. For that reason alone, those dedicated to advancing the interests of African-Americans ought to urge them to conduct themselves in a fashion that, without sacrificing rights or dignity, elicits respect and sympathy rather than fear and anger from colleagues of other races. (21)

Kennedy argues that black Americans must make a renewed commitment to the "politics of respectability"¹⁸:

The principle tenet of the politics of respectability is that, freed of crippling, invidious discriminations, blacks are capable of meeting the established moral standards of white middle-class Americans. Proponents of the politics of respectability exhort blacks to accept and meet these standards, even while they are being discriminated against wrongly (in hypocritical violation of these standards). They maintain that while some blacks succeed even in the teeth of discouraging racial oppression, many more would succeed in the absence of racial restrictions. Insistence that blacks are worthy of respect is the central belief animating the politics of respectability. One of its strategies is to distance as many blacks as far as possible from negative stereotypes used to justify racial discrimination against all Negroes. (17)¹⁹

Building on these two moral tenets, Kennedy goes on to examine such policies as the racially disparate effect of federal sentencing guidelines for crack cocaine and powder cocaine possession.²⁰ The governing statute imposes much harsher prison terms on crack cocaine offenders than it does on those convicted of powder cocaine offenses (the sentencing disparity is 100:1 for crack and powder cocaine violations respectively). For Kennedy, this "dra-

matic difference" (364) in sentencing does not necessarily run afoul of the antidiscrimination principle embodied in the Equal Protection Clause.

In defending this assertion, *Race, Crime, and the Law* offers a number of arguments against the "racial critique" of the crack-powder disparity. Most pertinent to our purpose, however, are those Kennedy develops in response to the claim (made by federal district court Judge Clyde Cahill) that the more severe punishment of crack offenders imposes "an increased burden on blacks as a class" (375). Kennedy questions the grounds on which this assumption rests. It might be that the longer incarceration of black crack offenders confers benefits on the largely African-American communities from which they are sent to prison. Imprisonment, in short, is both a burden and a benefit, writes Kennedy: "a benefit for those imprisoned and a good for those whose lives are bettered by the confinement of criminals who might otherwise prey on them" (375). Kennedy also challenges the notion that the crack-powder sentencing differential imposes a *racially discriminatory* burden. He notes that the challenged statute applies to anyone who violates its crack cocaine provisions without regard to race. Kennedy argues that Judge Cahill apparently believes that "black crack convicts represent blacks as a whole. They do not" (375-76). On Kennedy's analysis, the crack cocaine differential would only be racially discriminatory if it fell on the entire black population, as opposed to those "bad Negroes" (18) who actually break the law (376). Since it does not, it cannot properly be called racist, not least because it "could be" (376) that the enhanced sentencing of black crack addicts and dealers "helps" the vast majority of "good" African Americans, who not only gain "security [as] law-abiding blacks vis-à-vis criminals," but share the enhanced "reputation of blacks as a collectivity in the eyes of whites" (17).

Kennedy is careful to note that he is not endorsing the sentencing distinction between crack and powder cocaine. The differential, he concedes, may well be a policy mistake. His is a rather different claim, which answers the charge that the sentencing differential is racist. Kennedy concludes that "even if these policies are misguided, being mistaken is different from being racist, and the difference is one that greatly matters" (386). Curiously, Kennedy's concluding remarks fail to highlight a second, crucial legal difference between "mistaken" and "racist" drug policies: under current Supreme Court doctrine, the latter are clearly unconstitutional, while the former are not. Despite its racially disparate effects, a successful claim that the crack-powder sentencing distinction was "racist" in constitutional terms would have to prove that it had been adopted *intentionally* in order to imprison black convicts for a longer term than whites.²¹

The case Kennedy chooses to illustrate that point is the Supreme Court's decision in *Hunter v. Underwood* (1985). In *Underwood*, a unanimous Court voided a provision of the Alabama state constitution that disfranchised any person who was convicted of a crime of moral turpitude. The Court found

that when it was enacted in 1901, the provision was aimed at removing black Alabamians from the state's voting rolls. Kennedy writes approvingly of the decision and argues that the Supreme Court was right to strike down Alabama's law, because "unjustified racial considerations" (Kennedy 1998, 376) had driven its initial adoption. Kennedy contends that little evidence exists to support a similar conclusion with respect to the crack-powder sentencing differential; it may be fairly inferred that he accordingly believes the distinction is constitutional, notwithstanding its differential racial impact.

However, it is not Kennedy's account and endorsement of the purpose requirement that makes his discussion of *Underwood* so intriguing in the instant context. I am rather more interested in the way Kennedy's preoccupation with the moral economy of racial reputation and respectability blinds him to a problem that lies right on the surface of the *Underwood* case. That problem has to do the political economy of racially disparate sentencing. Let me explain what I mean.

In the decade and a half since the Supreme Court rendered its judgment in *Underwood*, American society has witnessed an explosion in prison incarceration. From 1980 to 1994, the population of the United States grew by 9.8 percent (Golenpaul 1997, 829). During the same period, the number of men and women in jail or prison increased an astronomical 195.6 percent (Cole 1999, 148). Much of the growth in America's imprisoned population during these years was a result of the so-called "war on drugs." The number of drug offenders incarcerated for drug offenses in federal prisons increased nearly tenfold from 1980 to 1993, accounting for almost three-quarters of the overall increase in federal prisoners (1999, 145). The number of state prisoners incarcerated for drug offenses during the period under consideration grew at a similar rate (145).

The most striking aspect of this burgeoning incarceration rate is its racial cast. In 1992, the U.S. Public Health Service reported that 76 percent of the nation's self-reported illicit drug users were white, 14 percent were black, and 8 percent were Hispanic (Miller 1996, 81). Although the percentage of illegal drug users from each group roughly corresponded to their proportions in the general population, the incarceration rates tell an altogether different story. Between 1986 and 1991, the number of white drug offenders in state prisons increased by 110 percent, but the number of black drug offenders rose by 465 percent (Mauer 1997, 10). African Americans constitute 74 percent of those who are serving time for drug-related crimes (Huling and Mauer 1995, 12). If our current rates of incarceration remain stable, 28.5 percent of African-American men will do jail or prison time at least once during their lifetimes (Fellner and Mauer 1998, 13). A disproportionate number of these men will be casualties of the "war on drugs." As that war has been prosecuted, the crack-powder cocaine sentencing differential has effectively drawn a color line between the white crack-cocaine-using majority and the black offenders who make up the majority of Americans imprisoned for crack-related crimes.

In passing judgment on the racial demographics of drug-related incarceration, Kennedy would pose the following moral question: do the longer prison sentences meted out to African Americans who sell and use crack cocaine *help* or *hurt* the nation's black population? In Kennedy's moral conception of racial justice, this assessment would depend in significant measure on whether racially disparate prison terms for black crack offenders enhance the racial reputation of law-abiding African Americans in the eyes of whites. If the crack-powder cocaine sentencing differential in fact has led white middle-class Americans to believe that blacks have the capacity to "meet the established moral standards" to which they themselves subscribe, Kennedy would presumably conclude that the differential does not present a case of racial injustice, at least in the absence of evidence that it was intended to punish black crack offenders more harshly than their white powder-using counterparts.

My main concern here is not to stake out a substantive position in the debate over the crack cocaine-powder cocaine sentencing differential; I want, instead, to contest Kennedy's view of the normative terms on which that debate should proceed. As a normative matter, the political conception of racial justice advanced in this essay would approach the problem from another direction. The political model is not indifferent to the relative costs and benefits of racially disparate drug sentencing laws; it shares that much with the analysis offered in *Race, Crime, and the Law*. Aside from this, however, Kennedy's racial moralism and the political account of racial justice could not be more divergent. The political conception of racial justice would undertake a very different normative accounting of the costs and benefits racially disparate sentencing entails. The central task of the political conception of racial justice is not to determine how the disparate sentencing regime affects the racial reputation and standing of black "communities"; rather, it seeks to assess the impact of these laws on the political power of black civic publics.

The political conception of racial justice would thus pose a number of questions Kennedy's argument from racial moralism fails to ask, much less answer: Do these sentencing differentials increase or diminish African-American access to the means and modes of collective political action? Does the longer incarceration of blacks who are convicted of these crimes strengthen or weaken the political integrity and effectiveness of African-American civic publics? Do such laws enhance or undermine the institutions and practices through which black political identity and opinion are shaped and mobilized? What are the burdens and benefits of these policies in sustaining the social and cultural conditions of African-American citizenship?

In exploring these questions, one of the first issues on which the political conception of racial justice would focus is the impact on black civic publics of America's felony disfranchisement laws. A recent study of the subject commissioned by The Sentencing Commission and Human Rights Watch is instructive in this regard. The authors report that nearly four million Americans cannot vote because of felony convictions (Fellner and Mauer 1998, 7). Of that

number, 1.4 million are black men (8). Viewed on a state-by-state basis, the picture is even more grim. 31 percent of the black men who live in Alabama and Florida are permanently disenfranchised. In Iowa, Mississippi, New Mexico, Virginia, and Wyoming, one in four black men are permanently excluded from the vote. In Washington State, one in four black men are currently or permanently disenfranchised. In Delaware and Texas a full 20 percent of black male citizens are either permanently or currently barred from the franchise. In four other states, 16–18 percent of voting-age black men are currently disenfranchised. In nine states, the figure stands between 10 and 15 percent (Fellner and Mauer 1998, 8–11). The authors estimate that if current incarceration rates remain stable, 28.5 percent of black men will do prison time at least once in their lifetime—a figure six times greater than that for white men (1998, 13). Since felony disenfranchisement policies apply as well to defendants who are convicted but not sentenced to prison, the report predicts that among the next generation of black American men, some 40 percent will probably lose the right to vote for life (13).²²

These facts should give us pause.²³ The story they tell is only in part about the current and future evisceration of the black vote. I do not mean to suggest that when nearly a third of the black men who live in some states are barred from the franchise, we need not be concerned about the effects of their exclusion on black electoral power as a whole.²⁴ However, more is at stake here than formal access to the ballot box.²⁵ As I see it, for African Americans, franchise rights have never been purely or primarily instrumental. Those rights are also, and perhaps more fundamentally, *constitutive* of black political culture in positive and affirmative ways. The history of black civic publics in the United States suggests that participation in formal electoral “politics” has enabled African Americans to contest and redraw the very boundaries of what the dominant discourse has defined as “political.”²⁶ Specifically, the African-American struggle for and exercise of voting rights have been important experiential building blocks for the construction of an alternative, oppositional black public sphere. The existence of a black “subaltern counterpublic” (Fraser 1997) has made it possible for this subordinated social group to create “parallel discursive arenas” and “invent and circulate *counterdiscourses*” that challenge the dominant discourse on race and empower African Americans to “formulate oppositional interpretations of their identities, interests and needs” (1997, 81). Over time, the participation of African Americans in this counterpublic sphere has given rise to a civic activist consciousness whose emergence has produced “a devastating critique of American political institutions and values as well as suggestions about theoretical and institutional alternatives” (Dawson 1994, 201). Black American engagement in mainstream “franchise politics” has been indispensable in creating a subaltern site for, and a subaltern set of institutions for facilitating, deliberation and discussion of a whole range of subjects that racialized stratification would otherwise shield from interrogation and contestation (Gregory 1994, 159).

In this post-civil rights era, some have doubted whether a black public sphere can even be said to exist in contemporary America (Dawson 1994, 197). Although reports of its death may be premature, the impact of ex-felon disenfranchisement laws on the political life of the black civic sphere should command the concern of democratic constitutionalists. As my colleague George Fletcher has noted, the basic question “is whether categorical divestment of voting rights introduces an impermissible element of caste into the American political system” (Fletcher 1999, 1895), in which African Americans increasingly constitute a discrete class of “abjected citizens” (Daniel 2000, 68). I seek to show that for African-American citizens, meaningful action in that system not only involves engagement in traditional, franchise-based politics; it also includes participation in the subaltern enclaves of oppositional discourse that permit members of the black public sphere to define and understand political issues, test political options, and organize effective political intervention. Felony disenfranchisement regimes quite literally block increasing numbers of African Americans from access to a political institution that has been crucial in creating and sustaining black civic activism and consciousness. From this perspective, we may rightly ask whether the vulnerable racial publics to which these men and women belong can perdure in the face of their prolonged, sometimes permanent exclusion from the voting booth.²⁷ Even if they do, there is sufficient reason to believe that the comparative strength and status of the black political sphere will be compromised for many decades to come. Again, what is at stake here is not a moral, but a political issue.

I have argued here for a political conception of racial justice that seeks a greater democratization of the power relations among racial publics in this country. Specifically, this democratic vision of racial justice defends the right of vulnerable racial publics to full and effective political participation in the institutions of American democracy. Further, it robustly supports and promotes the coalescence of organized enclaves of opposition that empower subaltern racial publics to criticize and contest the reigning understandings and practices of democracy. Can a constitutional democracy that takes these commitments seriously permit felony disenfranchisement to become a permanent part of its basic political structure or practices?

One might insist, with Randall Kennedy and others, that absent evidence of biased decision making, the disparate racial impact of these laws raises no problem under our current constitutional regime. This objection, however, misses the point. The critical position advanced here stands on a political norm of legitimacy, not the narrower norm of constitutionality. To take this normative shift and ask the properly *political* question about these laws is to answer it: viewed through a normative lens of political legitimacy, felony disenfranchisement laws are unjust because they deprive the African-American civic public of full and free access to one of the minimum conditions of collective democratic action. Moreover, this state of affairs harms “blacks as a col-

lectivity" (Kennedy 1998, 376): on my account, the regime of voting rights divestment adversely affects the political possibilities of *all* African Americans,²⁸ including those "good" Negro citizens who meet "the established moral standards of white middle-class Americans" (1998, 17) and, as a formal matter, retain the right to vote.

A political analysis of the connections among the crack cocaine–power cocaine sentencing differential, felony disenfranchisement laws, and the structural debilitation of the black public sphere thus reveals the limits of racial moralism. In the final instance, racial moralism produces too narrow a vision of racial injustice and its remediation. The "politics" (such as it is) of "racial reputation" cannot possibly achieve the justice its advocates so desperately want from it: recognition of the equal moral personhood of black Americans provides no protection against the harm of unequal political citizenship.²⁹ As Leopardi once aptly put it, "[s]uch is ethics; and such is the extent to which moral beliefs have anything to do with actions" (Gilroy 2000, 54).

CONCLUSION

For much of the last century, the debate between the proponents of color-blindness and the defenders of race-consciousness has stood at the center of American public discourse on the question of racial justice. My effort in these pages has been to show that the underlying normative framework of this debate—what I have called racial moralism—may have reached the end of its term of service. Whatever one may think about its value in decades past, the language of racial moralism offers too limited a grammar for addressing the challenges of our racial future. Contesting this constricted moral vision, I have advanced a political understanding of racial justice whose conceptual resources more fully comport with the realities of racialized hierarchy and subordination in our own time.

More than a few readers may dispute the conception of race and racial politics defended here, not only in its particulars, but in its enabling premises. To them I can only say that I do not take such challenges as a threat to the political conception of racial justice-seeking. To the contrary, they are themselves a potential instance of the democratic politics I would endorse. A properly political vision of racial justice not only requires, but invites its own contestation. Finally, since the substance of the political conception of racial justice-seeking can only emerge in and through the actual practices of democracy, this essay has not attempted a detailed map of its institutional architecture. Rather, and more modestly, my purpose here has been to explore and defend a few elements of its basic design. In doing so, I hope to have shown how the twin notions of racial citizenship and racial civic publics might be used as a compass for steering our national conversation on race, politics, and justice

beyond the boundaries of racial moralism, toward the more open frontier of multiracial democracy.

NOTES

1 Although this exploration of the political conception of racial justice is informed by the particular case of Americans of African descent, I do not mean to suggest that it has no application to other publics of color. I limit my discussion to African Americans for two reasons. First, considerations of space will not permit the careful comparative analysis that expansion of the argument beyond the African-American case would demand. Second, in many salient ways, the African-American experience has determined the structure and substance of racial formation in the United States. As Joe Feagin (Feagin 2000, 3) notes, "[n]o other racially oppressed group has been so central to the internal economic, political, and cultural structure and evolution of American society—or to the often obsessively racist ideology developed by white Americans over many generations."

2 T. Alexander Aleinikoff has argued that the contemporary proponents of color-blindness have taken this sentence out of context. Aleinikoff contends that, taken as a whole, the dissent from which this language has been wrenched is an attack not "on the use of racial classifications, but on a social system based on an ideology of white supremacy" (Aleinikoff 1992, 961).

3 Although Dworkin does not affirmatively develop the argument, the moral reading urged in *Freedom's Law* would appear to support the constitutionality of race-based affirmative action. However, one must infer this from Dworkin's argument, since his discussion of affirmative action focuses in the main on a critical discussion of the failure of one of its prominent critics (former Solicitor General Charles Fried) to produce a unifying moral principle that would establish the constitutional case against it. His other work suggests Dworkin would anchor the constitutional defense of race-based affirmative action in the moral norm of equal status and concern for all races. See his *A Matter of Principle* (Dworkin 1985, 293–315).

4 Lest I be misunderstood, I should perhaps make it clear that I do not view the terms "normative" and "moral" as synonyms. As I use it here, the moral conception is merely one form of normative argument regarding race, racism, and justice; it does not exhaust the field of normative thinking about racial justice-seeking. Indeed, my purpose in these pages is to recommend a political alternative to the moral conception that, on my account, provides a more precise and productive normative perspective for engaging questions of justice in our multiracial democracy. A thoughtful critical exploration of the distinction in another context is Waldron 2000.

5 It bears remarking that in this respect, the moral conception views justice as a problem of fair (racial) distribution. For criticisms of this distributive paradigm of justice see Young (1990, 15–38) and Shapiro (1999, 232).

6 As he has made clear elsewhere, Dworkin does not understand the norms of equal status and equal concern to mean that all racial groups are entitled to *equal treatment* under the law. Dworkin argues that the moral principles of equal status and equal concern embodied in the Fourteenth Amendment guarantee the right to "treatment as an equal," but not to "equal treatment" (Dworkin 1977, 227).

7 Readers of Dworkin and Gutmann may object to my description of these two scholars as moralists on questions of racial justice. Both, it might be said, take care to highlight the fact that the moral framework that informs their conception of racial justice is a "political" morality (see Dworkin 1996, 2; Appiah and Gutmann 1996, 107). The objection mistakes the thrust of my claims about Dworkin and Gutmann, which look beneath the precise language they use to uncover what I see as the basal logic that drives their argument. While I do not deny that the chief theoretical preoccupation of these two scholars is the public (and thus, in this limited sense, political) practice and justification of racial claims-making, I would still want to insist that Gutmann's

model of "fairness" and Dworkin's conception of "equal status and equal concern" both rest their principle of racial justice on moral foundations. Unlike the concept of "morality," Dworkin's and Gutmann's use of the term "political" is curiously elusive, without fixed propositional content. Very little in their argument appears to turn on its deployment; moreover, when the word is used, it has nothing at all to do with questions of power *as such*, and thus never goes (as it were) *all the way down*. Normatively, the defense Dworkin and Gutmann offer of race-conscious policy remains an essentially moral argument. Readers who doubt my characterization of Dworkin and Gutmann should note how quickly after its initial introduction "political morality" becomes simply "morality" (see, e.g., Dworkin 1996, 2; Appiah and Gutmann 1996, 108). To my mind, this casual, unreflective semantic slippage further supports my view that the normative fulcrum on which their arguments turn is moral rather than political in any complex sense.

8 I borrow this image from Jürgen Habermas's critique of the "ethical constriction of political discourse" (Habermas 1996, 23).

9 In discussing the *Brown* Court's attention to "the hurt of exclusion," Kenneth Karst emphasizes the fact that Chief Justice Warren, the author of the opinion, had regularly engaged his former driver in conversations about the latter's life as a black schoolchild in the South. Quoting Warren's onetime employee, Karst reports that these talks with his driver about "how the black man felt, how the black kid felt" were in great measure responsible for the opinion's focus on the "deep psychic harm" of racial segregation (Karst 1989, 18–19).

10 It bears remarking that the *Brown* Court remarks on the political functions of public school education even before it formally states the constitutional issue to be decided; the "psychic harms" theory on which the decision has traditionally been deemed to rest is introduced much later in the Court's opinion.

11 For an argument along similar lines (but with a different trajectory) see Aleinikoff (1992, 974).

12 For an extended normative defense of this connection see O'Neill (1996).

13 In this regard, I disagree with Charles Mills's implicit assertion that "racial polity" in the United States must always and only be a "white supremacist polity" (Mills 1999, 17, 31). That the two ideas have been closely identified in American political life ought not obscure the fact that these connections are historical, not inherent. As such, they are subject to change. Although it may be difficult for us to imagine such a future, a democratization of the relations among this country's diverse racial publics might well create the conditions for transforming the inherited meanings of race and forging a political society in which racial difference need not be or become a technology of racial domination. For a thoughtful defense of a democratic politics of difference see Kerchis and Young (1995). See also Gotanda (1995, 273).

14 Although I can only remark it here, one important historical example of the use of the citizenship idea to constitute a black civic public can be found in the Montgomery bus boycott. The Montgomery boycott is widely regarded as an inaugural moment in the consolidation of the modern African-American civil rights movement. Most accounts of the event (and the movement as a whole) have emphasized the moral language in which the boycott's leaders defended the campaign. However, in a famous speech at the Holt Street Baptist Church during the early days of the boycott, it was a political conception of African-American citizenship to which Martin Luther King Jr. appealed as the predicate ground of the assault on Montgomery's segregated bus system. King began his speech by noting that the boycott was anchored "first and foremost" in the fact that "we are American citizens—and we are determined to apply our citizenship—to the fullest of its means" (Branch 1988, 138–39). Needless to say, in calling attention to the role the language of citizenship played in the black civil rights movement, I do not mean to minimize the importance of moral language in mobilizing African Americans and their allies in the struggle against *de jure* segregation. For an account of how the civil rights movement staged "the conflict over segregation as a moral drama" see *Self-Rule: A Cultural History of American Democracy* (Wiebe 1995, 234).

15 Aleinikoff's stated project is to argue the thesis that "liberty" rather than "equality" is the central value defended in Harlan's dissent and, more fundamentally, in the Reconstruction Amendments as a whole (see Aleinikoff 1992, 963–64).

16 Aleinikoff concedes earlier that "liberty is a capacious term open to any number of interpretations that support very different kinds of civil rights policies" (1992, 976).

17 Similarly, Kennedy wonders whether black communities are "hurt by prosecutions of pregnant women for using illicit drugs harmful to their unborn babies or helped by interventions which may at least plausibly deter conduct that will put black children at risk" (Kennedy 1998, 10)?

18 Kennedy borrows this term from Evelyn Brooks Higginbotham (1993). It bears remarking that for Kennedy, the "politics of respectability" is a normative ideal. By contrast, Higginbotham uses the concept critically and as an interpretive construct for understanding the history of the women's movement in the black Baptist Church in the late nineteenth and early twentieth centuries.

19 Strangely, Kennedy never tells us what it is that makes his urged campaign to garner racial respectability "political," even in the narrow sense of formal engagement with the state. Indeed, an interest in the state is nowhere to be found in his account of the "politics" of respectability. In this respect, Kennedy's proposal is the academic version of the spirit that animated the Million-Man March. Indeed, Kennedy describes the text of the pledge prepared for that gathering as a model effort to "uplift the racial reputation of African-American men" (1997, 18). For a historical account and critique of the "racial uplift" ideology Kennedy endorses, see Kevin Gaines's *Uplift the Race: Black Leadership, Politics, and Culture in the Twentieth Century* (Gaines 1996).

20 Kennedy notes that nationally, 92.6 percent of those sentenced for federal crack cocaine-related offenses in 1992 were African-American; a mere 4.7 percent of convicted crack cocaine offenders were white. By contrast, that same year, 45.2 percent of defendants convicted under the federal laws punishing powder cocaine-related crimes were white; 20.7 percent of those sentenced were African-American (Kennedy 1998, 364–65).

21 See generally *Washington v. Davis* (1976). Kennedy has elsewhere offered a more extended defense of this interpretation of the Equal Protection Clause (see Kennedy 1994).

22 The report offers comparably dire projections for black women. In the ten years from 1985 to 1995, the rate of female incarceration rose by 182 percent (as compared to an increase of 103 percent for men). Because black women are sentenced to jail and prison at a rate eight times higher than their white counterparts, the effects of increased incarceration on black women are obviously magnified (Fellner and Mauer 1998, 13).

23 One objection to the line of argument advanced here would deny that there are any relevant connections between the powder cocaine-crack cocaine sentencing differential on the one hand and felony disenfranchisement laws on the other. The factual premise of the objection is that the predicate of felony disenfranchisement laws is conviction, not length of imprisonment. However, this premise holds true only for jurisdictions that bar ex-felons from voting for life. The sentencing differential is far from irrelevant in states whose disenfranchisement laws are time-bound. Equalization of the prison terms for crack and powder cocaine would shorten the period during which offenders of color would be excluded from the franchise. Moreover, we should not underestimate the impact of the felon disenfranchisement regime on voting and vote-eligible members of racial civic publics, on whom it is not unreasonable to believe these laws have a dispiriting effect, contributing as they do to what I call the "political disorganization" of the oppositional counterpublics from which these offenders come, and to which the majority return. For a thoughtful critical account of how drug law enforcement contributes to the "social disorganization" of black and Latino communities see Meares 1998; see also Butler 1995.

24 Indeed, our concern should be heightened when the higher percentage of black ex-felons provides a pretext for surreptitiously purging duly registered African-American voters from voter registration rolls, as occurred in Florida during the last presidential election. See Herbert 2000.

25 This of course is not to say that the effects of ex-felon disenfranchisement may not pose serious problems under contemporary voting-rights jurisprudence. A discussion of these problems can be found in Harvey 1994.

26 For a discussion of the distinction between "politics" (*la politique*) and the "political" (*le politique*) see Claude Lefort's *Democracy and Political Theory* (Lefort 1988, 10–11, 216–18).

27 This is not to suggest that African-American convict-citizens have not created their own venues for political education and critical opinion formation within U.S. jails and prisons. They have done so, however, against enormous odds, and often in the face of systematic opposition by politicians and brutal repression by penal officials. It may well be that the repeal of felony disenfranchisement laws would enhance the prospects for more fully integrating black prisoners' developing critical perspective on race and the politics of incarceration into the deliberative discourses of the broader black public sphere.

28 Let me make plain what I am not claiming. Nothing in my description and defense of an African-American public sphere assumes a unitary black consciousness. I do not believe that all black citizens think or act alike, or that "simply being black or claiming African descent has been enough to produce racial unity through shared identity" (Outlaw 1995, 47–48). To the contrary, my use of the term "black civic publics" not only recognizes, but affirms disagreement and dissent as crucial, constructive features of African-American political life. Indeed, my pluralized conception of black political society would accord its members rights of partial or permanent exit. In this respect, I fully agree with Jane Mansbridge that the viability of "enclaves of resistance" is not undermined but enhanced when "some individuals immerse themselves in enclave life and thought while others span the spectrum between the enclave and the outside world" (Mansbridge 1996, 58). However, these exit rights necessarily presuppose the existence of a public sphere from which racial dissidents might exit.

Moreover, as I understand it, the notion of a "black civic public" denotes a common "political culture," not a common "racial culture" (Ford 2000). By way of a concrete example, consider the dynamics of black civic public life in the city in which I live, New York. Black people from the U.S. South, the Caribbean, Central and South America, Europe, and Africa have mobilized around an alternative, activist vision of racial justice in the urban polity. These black counterpublics have addressed issues from police brutality to environmental justice to the politics of race and representation in the city's cultural institutions. An oppositional black public presence in New York City has not required suppression of the myriad cultural (or class) differences among its constituent groups. This is because the political identity of these black urban counterpublics in no way entails the claim of a singular cultural identity. Rather, collective political action by black civic publics in New York City has stemmed from the recognition of a common location in the network of the city's racialized power relations.

29 A historical illustration of the point can be found in the disjunction between moral and political discourses that has characterized U.S. debates over the civic status of women. As Judith Shklar has noted, "[h]istorically the trouble has not been that Americans claimed that one had to be morally good to be a citizen. On the contrary, women particularly were said to be good more frequently than men, but they were not fit to be citizens" (Shklar 1991, 7).

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