ARTICLES

WHITENESS AS PROPERTY

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Issues regarding race and racial identity as well as questions pertaining to property rights and ownership have been prominent in much public discourse in the United States. In this article, Professor Harris contributes to this discussion by positing that racial identity and property are deeply interrelated concepts. Professor Harris examines how whiteness, initially constructed as a form of racial identity, evolved into a form of property, historically and presently acknowledged and protected in American law. Professor Harris traces the origins of whiteness as property in the parallel systems of domination of Black and Native American peoples out of which were created racially contingent forms of property and property rights. Following the period of slavery and conquest, whiteness became the basis of racialized privilege — a type of status in which white racial identity provided the basis for allocating societal benefits both private and public in character. These arrangements were ratified and legitimated in law as a type of status property. Even as legal segregation was overturned, whiteness as property continued to serve as a barrier to effective change as the system of racial classification operated to protect entrenched power.

Next, Professor Harris examines how the concept of whiteness as property persists in current perceptions of racial identity, in the law's misperception of group identity and in the Court's reasoning and decisions in the arena of affirmative action. Professor Harris concludes by arguing that distortions in affirmative action doctrine can only be addressed by confronting and exposing the property interest in whiteness and by acknowledging the distributive justification and function of affirmative action as central to that task.

she walked into forbidden worlds
impaled on the weapon of her own pale skin
she was a sentinel
at impromptu planning sessions
of her own destruction . . . .

Cheryl I. Harris, *poem for alma*[1]

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[1] Cheryl I. Harris, *poem for alma* (1990) (unpublished poem, on file at the Harvard Law School Library).

Moreover, as it emerged, the concept of whiteness was premised on white supremacy rather than mere difference. "White" was defined and constructed in ways that increased its value by reinforcing its exclusivity. Indeed, just as whiteness as property embraced the right to exclude, whiteness as a theoretical construct evolved for the very purpose of racial exclusion. Thus, the concept of whiteness is built on both exclusion and racial subjugation. This fact was particularly evident during the period of the most rigid racial exclusion, as whiteness signified racial privilege and took the form of status property.

At the individual level, recognizing oneself as "white" necessarily assumes premises based on white supremacy: It assumes that Black ancestry in any degree, extending to generations far removed, automatically disqualifies claims to white identity, thereby privileging "white" as unadulterated, exclusive, and rare. Inherent in the concept of "being white" was the right to own or hold whiteness to the exclusion and subordination of Blacks. Because "[i]dentity is . . . continuously being constituted through social interactions,"[127] the assigned political, economic, and social inferiority of Blacks necessarily shaped white identity. In the commonly held popular view, the presence of Black "blood" — including the infamous "one-drop"[128] — consigned a person to being "Black" and evoked the "metaphor . . . of purity and contamination" in which Black blood is a contaminant and white racial identity is pure.[129] Recognizing or identifying oneself as white is thus a claim of racial purity,[130] an assertion that one is free of any taint of Black blood. The law has played a critical role in legitimating this claim.

D. White Legal Identity: The Law's Acceptance and Legitimation of Whiteness as Property

The law assumed the crucial task of racial classification, and accepted and embraced the then-current theories of race as biological fact. This core precept of race as a physically defined reality allowed the law to fulfill an essential function — to "parcel out social standing according to race" and to facilitate systematic discrimination by articulating "seemingly precise definitions of racial group membership."[131] This allocation of race and rights continued a century after the abolition of slavery.[132]

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[127] Post, *supra* note 116, at 709.

[128] F. JAMES DAVIS, WHO IS BLACK? 5 (1991) (citations omitted).

[129] Gotanda, *supra* note 24, at 26.

[130] *See id.* at 27.

[131] Robert J. Cottrol, *The Historical Definition of Race Law*, 21 LAW & SOC'Y REV. 865, 865 (1988).

[132] *See id.*

The law relied on bounded, objective, and scientific definitions of race — what Neil Gotanda has called "historical race"[133] — to construct whiteness as not merely race, but race plus privilege. By making race determinant and the product of rationality and science, dominant and subordinate positions within the racial hierarchy were disguised as the product of natural law and biology[134] rather than as naked preferences.[135] Whiteness as racialized privilege was then legitimated by science and was embraced in legal doctrine as "objective fact."

Case law that attempted to define race frequently struggled over the precise fractional amount of Black "blood" — traceable Black ancestry — that would defeat a claim to whiteness.[136] Although the courts applied varying fractional formulas in different jurisdictions to define "Black" or, in the terms of the day, "Negro" or "colored," the law uniformly accepted the rule of hypodescent[137] — racial identity was governed by blood, and white was preferred.[138]

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[133] Gotanda defines "historical race" as socially constructed formal categories predicated on race subordination that included presumed substantive characteristics relating to "ability, disadvantage, or moral culpability." Gotanda, *supra* note 24, at 4.

[134] *See infra* note 139 and accompanying text.

[135] *See* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1693–94 (1989).

[136] See, for example, People v. Dean, 14 Mich. 406 (1866), in which the majority held that those with less than one-quarter Black blood were white within the meaning of the constitutional provision limiting the franchise to "white male citizens," *see id.* at 425. The dissent argued that a preponderance of white blood should be sufficient to accord the status of whiteness. *See id.* at 435, 438 (Martin, C.J., dissenting).

[137] "Hypodescent" is the term used by anthropologist Marvin Harris to describe the American system of racial classification in which the subordinate classification is assigned to the offspring if there is one "superordinate" and one "subordinate" parent. Under this system, the child of a Black parent and a white parent is Black. MARVIN HARRIS, PATTERNS OF RACE IN THE AMERICAS 37, 56 (1964).

[138] According to various court decisions of the nineteenth and early twentieth centuries, the term "negro" was construed to mean a person of mixed blood within three generations, *see* State v. Melton & Byrd, 44 N.C. (Busb.) 49, 51 (1852); a person having one-fourth or more of African blood, *see* Gentry v. McMinnis, 3 Dana (Ky.) 382, 385 (1835); Jones v. Commission, 80 Va. 538, 542 (1885); a person having one-sixteenth or more of African blood, *see* State v. Chavers, 50 N.C. 11, 14–15 (1857); State v. Watters, 25 N.C. (3 Ired.) 455, 457 (1843); a person having one-eighth or more of African blood, *see* Rice v. Gong Lum, 139 Miss. 760, 779 (1925); Marre v. Marre, 184 Mo. App. 198, 211 (1914); anyone with any trace of Negro blood, *see* State v. Montgomery County School Dist. No. 16, 242 S.W. 545, 546 (1922). The term "colored" too had a range of legal meanings. *See* 11 C.J. *Colored* 1224 (1917). For a review of court decisions and statutes of nineteenth and early twentieth centuries delineating who is a "Negro" or who is colored, see MANGUM, *supra* note 30, at 1–17.

An example of the complexity of defining these terms is revealed in State v. Treadaway, 52 So. 500 (La. 1910), in which the Louisiana state supreme court exhaustively reviewed the various meanings of the words "negro" and "colored" in considering whether an "octoroon" — a person of one-eighth Black blood — was a Negro within the meaning of a statute barring cohabitation between a person of the "white" race and a person of the "negro or black" race. *See id.* at 501–10. In examining the definitions propounded in various dictionaries, court

This legal assumption of race as blood-borne was predicated on the pseudo-sciences of eugenics and craniology that saw their major development during the eighteenth and nineteenth centuries.[139] The legal definition of race was the "objective" test propounded by racist theorists of the day who described race to be immutable, scientific, biologically determined — an unsullied fact of the blood rather than a volatile and violently imposed regime of racial hierarchy.

In adjudicating who was "white," courts sometimes noted that, by physical characteristics, the individual whose racial identity was at issue appeared to be white and, in fact, had been regarded as white in the community. Yet if an individual's blood was tainted, she could not claim to be "white" as the law understood, regardless of the fact that phenotypically she may have been completely indistinguishable from a white person, may have lived as a white person, and have descended from a family that lived as whites. Although socially accepted as white, she could not *legally* be white.[140] Blood as "objective

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decisions, and statutory law that used either term, the court concluded that "colored" denoted a person of mixed white and Black blood in any degree, and a "negro" was a "person of the African race, or possessing the black color and other characteristics of the African." *Id.* at 531. Because "there are no negroes who are not persons of color; but there are persons of color who are not negroes," *id.*, the court concluded that the statute did not include octoroons because they were not commonly considered "negroes," although they were persons of color, *see id.* at 537. The response of the Louisiana legislature was to reenact the statute with the identical language, except it substituted the word "colored" for the word "Negro." *See* MANGUM, *supra* note 30, at 5–6.

[139] For example, Samuel Morton, one of the principal architects of these theories, ascribed the basis of Black and non-white racial inferiority to differences in cranial capacity, which purportedly revealed that whites had larger heads. Notwithstanding the gross breaches of scientific method and manipulation of data evident in Morton's theory, *see* GOSSETT, *supra* note 20, at 73–74, his 1839 book, *Crania Americana*, was widely accepted as the scientific explanation of Blacks' inability to mature beyond childhood, *see* GOSSETT, *supra* note 20, at 58–59 (citing the remarks of Oliver Wendell Holmes, Sr., extolling Morton as a "leader" whose "severe and cautious . . . researches" would provide "permanent data for all future students of Ethology"); TAKAKI, *supra* note 16, at 113 (citing the remarks of an Indiana senator in 1850 who spoke of the diminished brain capacity of Blacks). These and other widely disseminated theories of Black inferiority provided the rationale for the political and popular discourse of the time that argued that Black equality and participation in the polity were impossible because Blacks lacked the capacity to develop rational decisionmaking. *See* REGINALD HORSMAN, RACE AND MANIFEST DESTINY 116–57 (describing the permeation of "scientific" bases for racial inferiority into every aspect of American thought).

[140] *See, e.g.*, Sunseri v. Cassagne, 185 So. 1, 4–5 (La. 1938). The case involved a suit by Sunseri to annul his marriage to Cassagne on the grounds that she had a trace of "negro blood." He contended that his wife's great-great-grandmother was a "full-blooded negress," and Cassagne herself asserted that she was Indian. *See id.* at 2. It was not disputed that all of Cassagne's paternal ancestors from her father to her great-great-grandfather were white men. *See id.* Moreover, Cassagne had been regarded as white in the community, as she and her mother had been christened in a white church, had attended white schools, were registered as white voters, were accepted as white in public facilities, and had exclusively associated with whites. *See id.* at 4–5. Nevertheless, because certificates and official records designated Cassagne and some of her relatives as "colored," the court concluded that she was not white and that thus there were

fact" dominated over appearance and social acceptance, which were socially fluid and subjective measures.

But, in fact, "blood" was no more objective than that which the law dismissed as subjective and unreliable. The acceptance of the fiction that the racial ancestry could be determined with the degree of precision called for by the relevant standards or definitions rested on false assumptions that racial categories of prior ancestors had been accurately reported, that those reporting in the past shared the definitions currently in use, and that racial purity actually existed in the United States.[141] Ignoring these considerations, the law established rules that extended equal treatment to those of the "same blood," albeit of different complexions, because it was acknowledged that, "[t]here are white men as dark as mulattoes, and there are pure-blooded albino Africans as white as the whitest Saxons."[142]

The standards were designed to accomplish what mere observation could not: "That even Blacks who did not look Black were kept in their place."[143] Although the line of demarcation between Black and white varied from rules that classified as Black a person containing "any drop of Black blood,"[144] to more liberal rules that defined persons with a preponderance of white blood to be white,[145] the courts universally accepted the notion that white status was something of value

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sufficient grounds to annul the marriage. *See* Sunseri v. Cassagne, 196 So. 7, 10 (La. 1940); *see also* Johnson v. Board of Educ. of Wilson County, 82 S.E. 832, 833–35 (1914) (refusing to allow the children of a "pure white" husband and a wife who was less than "one-eighth negro" to be admitted to white schools because of the presence of "negro blood in some degree," even assuming that the marriage was valid and not violative of the miscegenation statute).

[141] It is not at all clear that even the slaves imported from abroad represented "pure Negro races." As Gunner Myrdal noted, many of the tribes imported from Africa had intermingled with peoples of the Mediterranean, among them Portuguese slave traders. Other slaves brought to the United States came via the West Indies, where some Africans had been brought directly, but still others had been brought via Spain and Portugal, countries in which extensive interracial sexual relations had occurred. By the mid-nineteenth century it was, therefore, a virtual fiction to speak of "pure blood" as it relates to racial identification in the United States. *See* MYRDAL, *supra* note 4, at 123.

[142] People v. Dean, 14 Mich. 406, 422 (1866).

[143] Diamond & Cottrol, *supra* note 20, at 281.

[144] For a history of the "one-drop" rule, see DAVIS, cited above in note 128, at 5. According to Davis:

> The nation's answer to the question "Who is black?" has long been that a black is any person with any known African black ancestry. This definition reflects the long experience with slavery and later with Jim Crow segregation. In the South it became known as the "one-drop rule," meaning that a single drop of "black blood" makes a person black. It is also known as the . . . "traceable amount rule," and anthropologists call it the "hypo-descent rule," meaning that racially mixed persons are assigned the status of the subordinate group. This definition emerged from the American South to become the nation's definition, generally accepted by whites and blacks alike. Blacks had no other choice.

Id. (citations omitted).

[145] *See, e.g.*, Gray v. Ohio, 4 Ohio 353, 355 (1831).

that could be accorded only to those persons whose proofs established their whiteness as defined by the law.[146] Because legal recognition of a person as white carried material benefits, "false" or inadequately supported claims were denied like any other unsubstantiated claim to a property interest. Only those who could lay "legitimate" claims to whiteness could be legally recognized as "white," because allowing physical attributes, social acceptance, or self-identification to determine whiteness would diminish its value and destroy the underlying presumption of exclusivity. In effect, the courts erected legal "No Trespassing" signs.

In the realm of *social* relations, racial recognition in the United States is thus an act of race subordination. In the realm of *legal* relations, judicial definition of racial identity based on white supremacy reproduced that race subordination at the institutional level. In transforming white to whiteness, the law masked the ideological content of racial definition and the exercise of power required to maintain it: "It convert[ed] [an] abstract concept into [an] entity."[147]

1. Whiteness as Racialized Privilege. — The material benefits of racial exclusion and subjugation functioned, in the labor context, to stifle class tensions among whites. White workers perceived that they had more in common with the bourgeoisie than with fellow workers who were Black. Thus, W.E.B. Du Bois's classic historical study of race and class, *Black Reconstruction*,[148] noted that, for the evolving white working class, race identification became crucial to the ways that it thought of itself and conceived its interests. There were, he suggested, obvious material benefits, at least in the short term, to the decision of white workers to define themselves by their whiteness: their wages far exceeded those of Blacks and were high even in comparison with world standards.[149] Moreover, even when the white working class did not collect increased pay as part of white privilege, there were real advantages not paid in direct income: whiteness still yielded what Du Bois termed a "public and psychological wage" vital to white workers.[150] Thus, Du Bois noted:

> They [whites] were given public deference . . . because they were white. They were admitted freely with all classes of white people, to

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[146] The courts adopted this standard even as they critiqued the legitimacy of such rules and definitions. For example, in People v. Dean, 14 Mich. 406 (1886), the court, in interpreting the meaning of the word "white" for the purpose of determining whether the defendant had voted illegally, criticized as "absurd" the notion that "a preponderance of mixed blood, on one side or the other of any given standard, has the remotest bearing upon personal fitness or unfitness to possess political privileges," *id.* at 417, but held that the electorate that had voted for racial exclusion had the right to determine voting privileges, *see id.* at 416.

[147] STEPHEN J. GOULD, THE MISMEASURE OF MAN 24 (1981).

[148] W.E.B. DU BOIS, BLACK RECONSTRUCTION (photo. reprint 1976) (1935).

[149] *See id.* at 634.

[150] *Id.* at 700.

> public functions, to public parks . . . . The police were drawn from their ranks, and the courts, dependent on their votes, treated them with . . . leniency . . . . Their vote selected public officials, and while this had small effect upon the economic situation, it had great effect on their personal treatment . . . . White schoolhouses were the best in the community, and conspicuously placed, and they cost anywhere from twice to ten times as much per capita as the colored schools.[151]

The central feature of the convergence of "white" and "worker" lay in the fact that racial status and privilege could ameliorate and assist in "evad[ing] rather than confront[ing] [class] exploitation."[152] Although not accorded the privileges of the ruling class, in both the North and South, white workers could accept their lower class position in the hierarchy "by fashioning identities as 'not slaves' and as 'not Blacks.'"[153] Whiteness produced — and was reproduced by — the social advantage that accompanied it.

Whiteness was also central to national identity and to the republican project. The amalgamation of various European strains into an American identity was facilitated by an oppositional definition of Black as "other."[154] As Hacker suggests, fundamentally, the question was not so much "who is white," *but* "who may be considered white,"

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[151] *Id.* at 700–01.

[152] ROEDIGER, *supra* note 19, at 13. One of Roediger's principal themes is that whiteness was constructed both from the top down and from the bottom up. *See id.* at 8–11. His vigorous analysis of the role of racism in the construction of working class consciousness leads him to conclude that "the pleasures of whiteness could function as a [wage] for white workers . . . . [S]tatus and privilege conferred by race could be used to make up for alienating and exploitive class relationships." *Id.* at 13. Roediger further argues that the conjunction of "white" and "worker" came about in the nineteenth century at a time when the non-slave labor force came increasingly to depend on wage labor. The independence of this sector was then measured in relation to the dependency of Blacks as a subordinated people and class. *See id.* at 20. The involvement of all sectors, including the white working class, in the construction of whiteness aids in explaining the persistence of whiteness in the modern period. *See* discussion *infra* pp. 1758–77.

[153] ROEDIGER, *supra* note 19, at 13.

[154] "One of the surest ways to confirm an identity, for communities and individuals, is to find some way of measuring what one is *not*." KAI ERICKSON, WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE 64 (1966).

Toni Morrison's study of the Africanist presence in U.S. literature echoes the same theme of the reflexive construction of "American" identity:

> It is no accident and no mistake that immigrant populations (and much immigrant literature) understood their Americaness as an opposition to the resident black population. Race in fact now functions as a metaphor so necessary to the construction of Americaness that it rivals the old pseudo-scientific and class-informed racisms whose dynamics we are more used to deciphering . . . . Deep within the word "American" is its association with race. To identify someone as South African is to say very little; we need the adjective "white" or "black" or "colored" to make our meaning clear. In this country, it is quite the reverse. American means white . . . .

TONI MORRISON, PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION 46–47 (1992).

as the historical pattern was that various immigrant groups of different ethnic origins were accepted into a white identity shaped around Anglo-American norms.[155] Current members then "ponder[ed] whether they want[ed] or need[ed] new members as well as the proper pace of new admissions into this exclusive club."[156] Through minstrel shows in which white actors masquerading in blackface played out racist stereotypes, the popular culture put the Black at "'solo spot centerstage, providing a relational model in contrast to which masses of Americans could establish a positive and superior sense of identity[,]' . . . [an identity] . . . established by an infinitely manipulable negation comparing whites with a construct of a socially defenseless group."[157]

It is important to note the effect of this hypervaluation of whiteness. Owning white identity as property affirmed the self-identity and liberty[158] of whites and, conversely, denied the self-identity and liberty of Blacks.[159] The attempts to lay claim to whiteness through "passing" painfully illustrate the effects of the law's recognition of whiteness. The embrace of a lie, undertaken by my grandmother and the thousands like her, could occur only when oppression makes self-denial and the obliteration of identity rational and, in significant measure, beneficial.[160] The economic coercion of white supremacy on self-definition nullifies any suggestion that passing is a logical exercise of liberty or self-identity. The decision to pass as white was not a choice, if by that word one means voluntariness or lack of compulsion. The fact of race subordination was coercive and circumscribed the liberty

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[155] Andrew Hacker says that white became a "common front" established across ethnic origins, social class, and language. ANDREW HACKER, TWO NATIONS 12 (1992).

[156] *Id.* at 9.

[157] ROEDIGER, *supra* note 19, at 118 (quoting Alan W.C. Green, *"Jim Crow," "Zip Coon": The Northern Origin of Negro Minstrelsy*, 11 MASS. REV. 385, 395 (1970)).

[158] I do not attempt here to review or state a position with regard to the profusion of theories that describe the relationship between liberty and property; that is beyond the scope of this inquiry. Rather, I use liberty in the Hohfeldian sense as a privilege, "a legal liberty or freedom," not involving "a correlative duty but the absence of a right on someone else's part to interfere." MUNZER, *supra* note 58, at 18 (1990).

[159] In this respect, whiteness as property followed a familiar paradigm. Although the state can create new forms of property other than those existing at common law, "in each case that it creates new property rights, the state necessarily limits the common law liberty or property rights of other citizens, for conduct which was once legal now becomes an invasion or an infringement of the new set of rights that are established." Epstein, *No New Property*, *supra* note 68, at 754; *see* HIGGINBOTHAM, *supra* note 20, at 13 (noting that, when the law establishes a right for a person, group, or institution, it simultaneously constrains those whose "preferences impinge on the right established").

[160] This problem is at the center of one of the early classics of Black literature, *The Autobiography of an Ex-Coloured Man*, by James Weldon Johnson, the story of a Black man who "passes" for white, crossing between Black and white racial identities four times. *See* Henry L. Gates, Jr., *Introduction* to JAMES W. JOHNSON, THE AUTOBIOGRAPHY OF AN EX-COLOURED MAN vi (Vintage 1989) (1912).

to self-define. Self-determination of identity was not a right for all people, but a privilege accorded on the basis of race. The effect of protecting whiteness at law was to devalue those who were not white by coercing them to deny their identity in order to survive.[161]

2. Whiteness, Rights, and National Identity. — The concept of whiteness was carefully protected because so much was contingent upon it. Whiteness conferred on its owners aspects of citizenship that were all the more valued because they were denied to others. Indeed, the very fact of citizenship itself was linked to white racial identity. The Naturalization Act of 1790 restricted citizenship to persons who resided in the United States for two years, who could establish their good character in court, and who were "white."[162] Moreover, the trajectory of expanding democratic rights for whites was accompanied by the contraction of the rights of Blacks in an ever deepening cycle of oppression.[163] The franchise, for example, was broadened to extend voting rights to unpropertied white men at the same time that Black voters were specifically disenfranchised, arguably shifting the property required for voting from land to whiteness.[164] This racialized version of republicanism — this Herrenvolk[165] republicanism — constrained

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[161] I am indebted to Lisa Ikemoto for the insight regarding how whiteness as property interacts with liberty and self-identity.

[162] *See* Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103 (1790) (repealed 1795). As Takaki explains, this law "specified a complexion for the members of the new nation" and reflected the explicit merger of white national identity and republicanism. TAKAKI, *supra* note 16, at 15. It was also another arena in which the law promulgated racial definitions as part of its task of allocating rights of citizenship. These decisions further reinforced white hegemony by naturalizing white identity as objective when in fact it was a constructed and moving barrier. As noted in *Corpus Juris*, a white person

> constitutes a very indefinite description of a class of persons, where none can be said to be literally white; and it has been said that a construction of the term to mean Europeans and persons of European descent is ambiguous. "White person" has been held to include an Armenian born in Asiatic Turkey, a person of but one-sixteenth Indian blood, and a Syrian, but not to include Afghans, American Indians, Chinese, Filipinos, Hawaiians, Hindus, Japanese, Koreans, negroes; nor does white person include a person having one fourth of African blood, a person in whom Malay blood predominates, a person whose father was a German and whose mother was a Japanese, a person whose father was a white Canadian and whose mother was an Indian woman, or a person whose mother was a Chinese and whose father was the son of a Portuguese father and a Chinese mother.

68 C.J. *White* 258 (1934) (citations omitted).

[163] *See* Diamond & Cottrol, *supra* note 20, at 262.

[164] For an account of the linkage between expanding white voting rights and increased constraints on rights for Blacks, see ROEDIGER, *supra* note 19, in which he describes the experience in Pennsylvania, *see id.* at 59; *see also* Diamond & Cottrol, *supra* note 20, at 260–61 n.26 (summarizing the fate of free, enfranchised Blacks who were later disenfranchised in the face of rising racism at the same time that property requirements were abolished for white voters).

[165] Pierre van der Berghe uses this term to describe those societies in which dominant groups operate within democratic and egalitarian rules, and subordinate groups are subjected to undemocratic and tyrannical regulation. The classic contemporary example of this model is South

any vision of democracy from addressing the class hierarchies adverse to many who considered themselves white.

The inherent contradiction between the bondage of Blacks and republican rhetoric that championed the freedom of all men was resolved by positing that Blacks were different.[166] The laws did not mandate that Blacks be accorded equality under the law because nature — not man, not power, not violence — had determined their degraded status. Rights were for those who had the capacity to exercise them, a capacity denoted by racial identity. This conception of rights was contingent on race — on whether one could claim whiteness — a form of property. This articulation of rights that were contingent on property ownership was a familiar paradigm, as similar requirements had been imposed on the franchise in the early part of the republic.[167] For the first two hundred years of the country's existence, the system of racialized privilege in both the public and private spheres carried through this linkage of rights and inequality, and rights and property. Whiteness as property was the critical core of a system that affirmed the hierarchical relations between white and Black.

III. BOUND BY LAW: THE PROPERTY INTEREST IN WHITENESS AS LEGAL DOCTRINE IN *PLESSY* AND *BROWN*

Even after the period of conquest and colonization of the New World and the abolition of slavery, whiteness was the predicate for attaining a host of societal privileges, in both public and private spheres. Whiteness determined whether one could vote, travel freely, attend schools, obtain work, and indeed, defined the structure of social relations along the entire spectrum of interactions between the individual and society. Whiteness then became status, a form of racialized privilege ratified in law. Material privileges attendant to being white

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Africa. *See* PIERRE VAN DER BERGHE, RACE AND RACISM: A COMPARATIVE PERSPECTIVE 17–18 (1967).

166 *See* Diamond & Cottrol, *supra* note 20, at 262.

167 The organizing principle of the Federalist vision of the republic was that government must protect the rights of persons and the rights of property. *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 17 (1991). But if, as Madison stated, "'the first object of government is the protection of different and unequal faculties of acquiring property,'" *id.* at 17 (citation omitted), then an extension of the rights of suffrage to all would subject those with material property, always a minority, to the control of the propertyless, *see id.* at 18. The solution adopted by Madisonian republicanism limited the franchise and installed a system of freehold suffrage. *See id.* at 19. The result, according to Nedelsky, was a distortion of the republican vision as inequality was presumed and protected. *See id.* at 1. *But see* Book Note, *Private Property, Civic Republicanism and the Madisonian Constitution*, 104 HARV. L. REV. 961, 963–64 (1991) (arguing that Nedelsky mischaracterizes the Madisonian vision of property to be referring only to material property when in fact Madison's concept of property included everything to which one could claim a right).