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Protecting Them from Themselves: The Persistence of Mutual Benefits Arguments for Sex and Race Inequality

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PROTECTING THEM FROM THEMSELVES: THE PERSISTENCE OF MUTUAL BENEFITS ARGUMENTS FOR SEX AND RACE INEQUALITY

JILL ELAINE HASDAY*

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INTRODUCTION

Defenders of sex and race inequality often contend that women and people of color are better off with fewer rights and opportunities. This claim straddles substantive debates that are rarely considered together, linking such seemingly disparate disputes as the struggles over race-based affirmative action, antiabortion laws, and marital rape exemptions. The argument posits that women and people of color attempting to secure expanded rights and opportunities do not understand their own best interests and do not realize that they benefit from

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limits on their prerogatives and choices. Indeed, proponents of this argument insist that restricting the rights and opportunities available to women and people of color helps everyone: the people misguidedly seeking more rights and opportunities, the people opposing those claims, and society as a whole. The beguiling conclusion is that the law need not decide between conflicting demands because all parties share aligned interests. I call this effort to assert social solidarity in the face of social conflict the “mutual benefits” argument.

This Article reveals and analyzes the mutual benefits argument to make three points. First, judges, legislators, and commentators defending contemporary laws and policies frequently claim that restricting rights and opportunities protects women and people of color. The claims appear across a range of contexts, but their common structure has remained hidden from view and critical scrutiny. Second, modern mutual benefits discourse has deep historical roots in widely repudiated forms of discrimination, including slavery, racial segregation, and women’s legalized inequality. Third, the historical deployment of mutual benefits arguments to defend pernicious discrimination creates reason for caution in considering contemporary mutual benefits claims that are now accepted quickly with little evidence, investigation, or debate. Mutual benefits discourse historically operated to rationalize and reinforce discriminatory practices that the nation has since disavowed. Modern mutual benefits arguments must be evaluated carefully or they risk shielding subordination once again.

Parts I and II examine contemporary mutual benefits discourse. Part I explores how arguments contending that restrictions on women’s legal rights promote women’s welfare have flourished in the modern era, building on the assumption that women’s true interests and ultimate obligations center on marriage and family life. At least twenty-four states, for instance, retain some form of a marital rape exemption. These states criminalize fewer offenses if committed within marriage, punish more leniently the marital rape they do recognize, and/or impose additional procedural barriers to marital rape prosecutions.¹ Legislators, courts, and commentators have explained since the last quarter of the twentieth century that granting wives an unhindered right to pursue marital rape charges would allow women to shatter their marital harmony, destroy their marital privacy, and make marital reconciliation much more difficult. This argument maintains that both husbands and wives are better off if the law limits the criminality of marital rape, although the benefits to men and women differ. Marital rape exemptions protect husbands from prosecution

¹ See *infra* notes 17–19 and accompanying text.

and wives from damage to their marital relationship assertedly more harmful to them than the marital rape itself.²

Similar arguments that limiting women's rights serves women's best interests have increasingly come to shape antiabortion legislation and the Supreme Court's abortion jurisprudence. *Roe v. Wade* (1973)³ stressed the need to mediate between competing rights and interests: a woman's right to have an abortion versus a state's interest in protecting women's health and the potential life of the fetus. Since *Roe*, however, the antiabortion movement has recognized in increasingly explicit terms that many Americans are unwilling to criminalize abortion if doing so will harm women. The movement and its government allies have turned more and more to the language of aligned interests rather than competing rights, insisting that both women seeking abortions and people opposed to abortion are better off if the law restricts or prohibits abortion. This argument contends that antiabortion laws protect women from the psychological harm that abortion would inflict upon them and the regret they would and should experience after abortion. The argument visibly influenced the Court's plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992),⁴ which upheld mandatory waiting periods before abortion and "informed consent" laws designed to persuade women not to have abortions. The Court explicitly endorsed the assumption of regret in *Gonzales v. Carhart* (2007)⁵ with little discussion or explanation. *Carhart* upheld the federal prohibition of an abortion procedure—even where that procedure is the safest method of abortion—on the premise that some women will, and perhaps all women should, come to regret having abortions.⁶

Part II considers modern mutual benefits discourse in the racial context. Arguments that whites and people of color have aligned interests in defeating civil rights initiatives have become increasingly prominent in recent years. For example, the Supreme Court's initial decisions restricting race-based government affirmative action programs and early academic criticism emphasized the conflicting interests of whites and people of color, and the burdens that affirmative action imposed on whites. But the Court and academic critics abruptly switched focus within just a few years and a few opinions. More recent opposition to affirmative action has stressed that affirmative action policies must be severely restricted in scope and duration

² See *infra* Part I.A.

³ 410 U.S. 113 (1973).

⁴ 505 U.S. 833 (1992).

⁵ 550 U.S. 124 (2007).

⁶ See *infra* Part I.B.

because otherwise these policies will harm people of color. This account contends that legal decisionmakers need not choose between competing sides because the people participating in affirmative action programs and the people opposed to those programs have shared interests. People of every race and with every view on affirmative action all purportedly benefit in their own way if affirmative action is first limited and then eliminated.⁷

Parts III and IV uncover the genealogy of mutual benefits claims, analyzing historical manifestations of mutual benefits discourse. The mutual benefits argument is not a recent innovation devised to respond to the demands of the contemporary civil rights era.⁸ It is a long established claim that defenders of unequal status relations have repeatedly deployed, relying on the argument's familiarity to bolster its plausibility. The contention that more rights would harm the rights holders appeared prominently in defenses of slavery,⁹ racial segregation,¹⁰ married women's subordination to their husbands at common law,¹¹ and legislation restricting women's rights to negotiate about market work.¹² Mutual benefits arguments for sex and race inequality especially proliferated in eras, like our own, when reform movements

⁷ See *infra* Part II.

⁸ For analyses of how status regimes can maintain themselves in times of contestation by rearticulating their justifications in new language that resonates with contemporaries, see William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2071 (2002) (“[Identity-based social movements] inevitably triggered a politics of preservation. There, a countermovement would reassert traditional normative and legal baselines and the inferiority of the minority group. Such a politics might ease up if the minority gained acceptance within the nation’s social and political pluralist system; although extremists would still insist on traditional baselines and the minority’s inferiority, moderates in the countermovement would concede toleration of the minority, but with social and legally protected space for traditional ingroup members to retain their dominance.” (emphasis omitted)); Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996) (“When the legitimacy of a status regime is successfully contested, lawmakers and jurists will both cede and defend status privileges—gradually relinquishing the original rules and justificatory rhetoric of the contested regime and finding new rules and reasons to protect such status privileges as they choose to defend. Thus, civil rights reform can breathe new life into a body of status law, by pressuring legal elites to translate it into a more contemporary, and less controversial, social idiom.”); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 775, 778 (2002) (“I retell the history of the gay rights movement as a history of the increasingly attenuated assimilationist demands placed on gays by mainstream society, in both nonlegal and legal contexts. I show that as the gay rights movement has become stronger, the assimilationist demands made on gays have become weaker, shifting in emphasis from conversion, to passing, to covering. . . . Any real engagement with gay history, however, shows that in some instances, the shift from conversion to passing or covering can be experienced by gays as no shift at all.”).

⁹ See *infra* Part IV.A.

¹⁰ See *infra* Part IV.B.

¹¹ See *infra* Part III.A.

¹² See *infra* Part III.B.

were vigorously working to improve the status of women and people of color. The reform efforts presumably undermined claims that the law should favor men over women, or whites over people of color.¹³ Historical mutual benefits arguments were nominally committed to helping women and people of color. But they consistently and explicitly assumed that women and people of color were unusually poor decisionmakers unable to assess their own interests, that women's true concerns were confined to domesticity, and that people of color were better off the less they challenged and disturbed white people and white-dominated institutions. Connections between the defenses of slavery, segregation, and women's legal inequality have rarely been noticed. Highlighting them uncovers important precursors to modern civil rights discourse.

Part V argues that the extensive use of mutual benefits claims to support now-rejected forms of discrimination should affect how we assess modern mutual benefits arguments. The fact that historical versions of the mutual benefits claim are no longer convincing does not necessarily mean that current or future expressions of the claim cannot be appropriate. Mutual benefits arguments may sometimes be reasonable and cogent. But the role that mutual benefits arguments played in defending pernicious forms of inequality creates grounds for caution in considering contemporary assertions that women and people of color are better off with limited rights and opportunities. Courts, legislators, and commentators may be predisposed to endorse these assertions quickly with little support, deliberation, or debate because the assertions resonate with a long history of mutual benefits arguments and invoke shared cultural memories of prior mutual benefits claims. The antecedent life of mutual benefits discourse can give

¹³ Legal decisionmakers and advocates have also relied on mutual benefits discourse to defend limits on gay people's rights and opportunities. For instance, military and political leaders advanced mutual benefits claims in successfully rebuffing efforts in the 1990s to permit openly gay people to serve in the military. These leaders argued, suggested, or implied that excluding openly gay people from military service left gay people better off by protecting them from the violence that heterosexual soldiers would otherwise inflict upon them. See *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the S. Comm. on Armed Servs.*, 103d Cong. 596 (1994) (statement of General H. Norman Schwarzkopf, USA (Ret.)); *id.* at 602, 615 (statement of Colonel Frederick C. Peck, USMC); *id.* at 643 (statement of Senator John Warner); *Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the H. Comm. on Armed Servs.*, 103d Cong. 170–71 (1993) (statement of Master Chief Petty Officer Chuck Jackson, USN (Ret.), Non-Commissioned Officers Association); *id.* at 171–73 (statement of Colonel John Ripley, USMC, Retired, The Retired Officers Association). The history of mutual benefits discourse for sex and race inequality suggests that mutual benefits arguments supporting restrictions on gay people's rights and opportunities will become more prominent over time as the accelerating success of the gay rights movement undermines claims that the law should disfavor homosexuals and privilege heterosexuals.

modern mutual benefits arguments an inordinate power to persuade that makes explanation and elaboration seem unnecessary. Yet mutual benefits arguments were historically employed to support practices that are now repudiated, and they drew on ways of thinking about women and people of color that are now suspect. Whatever one's views on the merits of legal paternalism as a general matter,¹⁴ there is reason to be cautious about contentions that all parties benefit when the law denies rights and opportunities to women and people of color.

Part V concludes by seeking to stimulate greater conversation about mutual benefits claims that are often accepted too easily. I use the reasons why historical mutual benefits arguments are unconvincing to formulate four practical criteria that judges, legislators, and commentators should apply in evaluating contemporary mutual benefits discourse. These criteria ask whether advocates asserting that rights and opportunities will injure women or people of color are consistent in their arguments, whether they present evidence of harm, whether they rely on narrow assumptions about how women or people of color should behave, and whether they engage with counterarguments and opposing viewpoints. I employ these criteria to assess several modern mutual benefits arguments.

Contemporary claims that women or people of color benefit from limited rights and opportunities have many of the same weaknesses as their historical precursors. First, judges, legislators, and commentators have been very selective in contending that people seeking rights and opportunities can be safely ignored because they fundamentally misunderstand their own interests. The law does not usually assume that people are radically mistaken about how to improve their lives and need to be protected from themselves. But claims that women or people of color will be worse off with more rights and choices are common. Second, the evidence that rights and opportunities harm women or people of color is sometimes questionably reliable, and sometimes simply nonexistent. Third, mutual benefits claims frequently depend on and enforce rigid, historically embedded assumptions about how women and people of color should think, act, and live. Modern mutual benefits arguments, like their historical predecessors, typically take for granted that women should orient their lives toward domesticity instead of male-dominated spheres such as the

¹⁴ I take no position on the merits of legal paternalism as a general matter. In fact, I doubt whether legal paternalism can be evaluated in categorical terms rather than in particular contexts. To that end, this Article examines and critiques a specific strain of paternalist argument, which claims that women and people of color are better off with limited rights and opportunities.

market. Similarly, contemporary mutual benefits arguments track historical patterns in presuming that people of color are better off the more they accommodate and the less they demand from white society. Finally, modern arguments about mutual benefits to women and men, or to people of color and whites, often avoid acknowledging any possible costs associated with restricting the rights and opportunities open to women and people of color.¹⁵

History richly documents how mutual benefits claims have long served to rationalize and perpetuate legal hierarchies based on sex and race. This history also suggests criteria that legal authorities and advocates should employ in evaluating modern manifestations of mutual benefits discourse that are now accepted too readily. Applying these criteria can help assess arguments that risk reinforcing some of the nation's most entrenched and intransigent forms of status inequality.

I

MODERN MUTUAL BENEFITS ARGUMENTS FOR LIMITING WOMEN'S RIGHTS

Lawmakers, jurists, and advocates frequently contend that limits on women's legal rights advance the shared interests of women and men by preventing women from making poor choices contrary to their own best interests and their appropriate domestic roles. This Part explores two contemporary examples of mutual benefits discourse spanning the last quarter of the twentieth century to the present day. The first considers how legislators, courts, and commentators employed mutual benefits arguments to explain, support, and defend marital rape exemptions in response to the reform initiatives of the modern feminist movement at the end of the twentieth century. The second considers how legislators, courts, and commentators have used mutual benefits arguments to counter abortion rights efforts, and explain, support, and defend antiabortion laws, in the late twentieth and early twenty-first centuries.

A. *Marital Rape Exemptions*

At common law, a husband was absolutely exempt from prosecution for raping his wife. Courts and treatises throughout the nineteenth century routinely endorsed the marital rape exemption. They acknowledged that unwanted sex harmed wives. But they reasoned that protecting husbands from liability for marital rape fit smoothly

¹⁵ See *infra* Part V.

within the rest of the common law, which legally subordinated wives to their husbands and stripped married women of the right to make many enforceable decisions.¹⁶

Although historical arguments for the marital rape exemption no longer sound convincing, at least twenty-four states retain some form of an exemption. These states criminalize a narrower range of offenses if committed within marriage,¹⁷ subject the marital rape they recognize to less severe sanctions,¹⁸ and/or create special procedural obstacles to marital rape prosecutions.¹⁹

Defending contemporary marital rape exemptions as consistent with women's interests might seem nearly impossible. Modern exemptions are written in facially sex-neutral language regulating one "spouse's" rape of the other.²⁰ But all available evidence indicates that husbands are almost always the perpetrators of marital rape and wives the victims.²¹ Moreover, the best available empirical studies report that marital rape is both widespread²² and extremely damaging,

¹⁶ See Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1392–406, 1464–74, 1504 (2000).

¹⁷ See, e.g., ALASKA STAT. § 11.41.432 (2008); ARIZ. REV. STAT. ANN. § 13-1407(D) (Supp. 2008); CAL. PENAL CODE §§ 261–262 (West 2008); CONN. GEN. STAT. ANN. §§ 53a-65(2)–(3), 53a-70b(b) (West 2007); IDAHO CODE ANN. § 18-6107 (2004); IOWA CODE ANN. § 709.4(1)–(2) (West 2003); KAN. STAT. ANN. § 21-3517(a) (2007); KY. REV. STAT. ANN. § 510.035 (LexisNexis 2008); LA. REV. STAT. ANN. § 14:93.5 (2004); MD. CODE ANN., CRIM. LAW § 3-318 (LexisNexis Supp. 2008); MICH. COMP. LAWS ANN. § 750.520l (West 2004); MINN. STAT. § 609.349 (2008); MISS. CODE ANN. § 97-3-99 (2006); NEV. REV. STAT. ANN. § 200.373 (LexisNexis 2006); N.H. REV. STAT. ANN. § 632-A:2 (LexisNexis Supp. 2008); OHIO REV. CODE ANN. §§ 2907.01(L), 2907.02 (LexisNexis Supp. 2009); OKLA. STAT. ANN. tit. 21, § 1111 (West Supp. 2009); R.I. GEN. LAWS §§ 11-37-1(9), 11-37-2 (2002); S.C. CODE ANN. § 16-3-658 (2003); S.D. CODIFIED LAWS §§ 22-22-7.2, 22-22-7.4 (2006); WASH. REV. CODE ANN. §§ 9A.44.010(3), 9A.44.050, 9A.44.060, 9A.44.100 (West 2009); W. VA. CODE ANN. § 61-8B-1(6) (LexisNexis Supp. 2008); WYO. STAT. ANN. § 6-2-307(a) (2009).

¹⁸ See, e.g., VA. CODE ANN. §§ 18.2-61(C), 18.2-67.1(C), 18.2-67.2(C) (2009) (permitting court, if victim and state prosecutor agree, to place marital rapist "on probation pending completion of counseling or therapy" and providing that once counseling or therapy is completed, "court may discharge the defendant and dismiss the proceedings against him if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and be in the best interest of the complaining witness").

¹⁹ See, e.g., S.C. CODE ANN. § 16-3-658 (thirty-day reporting requirement).

²⁰ See statutes cited *supra* notes 17–19.

²¹ See Hasday, *supra* note 16, at 1494–96 & nn.444–46.

²² See DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES 6–7 (1985) ("Ten percent of the married or previously married women in our sample [of 323 Boston-area women] said that their husbands had 'used physical force or threat to try to have sex with them.'"); DIANA E.H. RUSSELL, RAPE IN MARRIAGE 1–2 (rev. ed. 1990) ("The study I undertook . . . is the only study of wife rape in the United States to be based on interviews with a random sample of women. Fourteen percent (14%) of the 930

frequently causing even more trauma than rape outside of marriage.²³ Modern feminists, like their nineteenth-century predecessors,²⁴ have repeatedly condemned marital rape exemptions as central to women's legal subordination.²⁵

However, many legal actors evince a powerful tendency to understand limits on women's rights as advancing the shared interests of women and men, often by preserving women's roles within marriage and constraining women's independent decisionmaking. The two most prominent arguments that courts, legislators, and commentators have put forward since the last quarter of the twentieth century to defend marital rape exemptions against the modern feminist movement's calls for reform are that the exemptions protect marital privacy and promote marital reconciliation. These arguments do not explain why the benefits that marital rape exemptions bestow on husbands, or on society at large, justify the harms that limited remediation for marital rape inflicts on wives. Indeed, the arguments do not mention the possibility that marital rape or marital rape exemptions might cause women any injury. Instead, exemption supporters have contended that marital rape exemptions further the mutual interests of husbands and wives by keeping women within intact marriages, suggested that if women were to seek prosecutions of their husbands for marital rape they would rue the consequences, and concluded that the appropriate legal solution is to deny wives the right to pursue such charges.

The claim that marital rape exemptions preserve marital privacy treats marital rape prosecutions as if they imposed parallel risks and inflicted parallel injuries on husbands and wives, violating the privacy of each. Exemption defenders invoke the image of the state invading and desecrating the intimacy of marital bedrooms, to the shared detriment of both spouses. For example, a California state senator and

women interviewed who had ever been married had been raped by a husband or ex-husband.”).

²³ See, e.g., RAQUEL KENNEDY BERGEN, *WIFE RAPE: UNDERSTANDING THE RESPONSE OF SURVIVORS AND SERVICE PROVIDERS* 59–61 (1996); FINKELHOR & YLLO, *supra* note 22, at 117–38; RUSSELL, *supra* note 22, at 190–205; David Finkelhor & Kersti Yllo, *Rape in Marriage: A Sociological View*, in *THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH* 119, 126–27 (David Finkelhor et al. eds., 1983); Patricia Mahoney, *High Rape Chronicity and Low Rates of Help-Seeking Among Wife Rape Survivors in a Nonclinical Sample: Implications for Research and Practice*, 5 *VIOLENCE AGAINST WOMEN* 993, 993–94 (1999); Mark A. Whatley, *For Better or Worse: The Case of Marital Rape*, 8 *VIOLENCE & VICTIMS* 29, 33–34 (1993).

²⁴ See Hasday, *supra* note 16, at 1413–42.

²⁵ See, e.g., Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 *FLA. L. REV.* 45, 45–46 (1990); Note, *To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 *HARV. L. REV.* 1255, 1255 (1986).

former Los Angeles police chief insisted that criminalizing marital rape means that “‘Big Brother [has] intruded himself into the bedroom, piercing the sanctity of marriage.’”²⁶ A Kentucky state representative declared that laws penalizing marital rape “‘are going into people’s bedrooms, and that’s overstepping our bounds.’”²⁷ A Pennsylvania court interpreted a legislative modification of the state’s marital rape exemption narrowly in order to prevent “courts and juries” from peering “into the privacy of the marital bedroom for the purpose of supervising the manner in which marital relationships are consummated.”²⁸

Arguments that marital rape exemptions protect marital privacy stress a husband and wife’s joint interest in their shared relationship, rather than considering how the interests of a wife seeking prosecution for marital rape and a husband seeking to avoid such prosecution might diverge. A Florida state representative reported that a marital rape exemption keeps the state from “invading the sanctity and the intimacy of a husband and wife sexual relationship.”²⁹ A Colorado state representative reasoned that allowing marital rape prosecutions would “‘take[] another chink out of the sanctity of marriage. . . . There are some areas the state just doesn’t belong in. . . . These are personal things.’”³⁰ The Model Penal Code, which endorses an absolute marital rape exemption,³¹ observes that the exemption “avoids [an] unwarranted intrusion of the penal law into the life of the

²⁶ Kathleen Grubb, *Senate OKs Tougher Law on Spousal Rape*, DAILY NEWS (San Fernando Valley), Aug. 15, 1992, at News-5 (quoting California State Senator Ed Davis).

²⁷ Chad Carlton, *Sponsor: Marital Rape Bill Could Win OK This Session*, LEXINGTON HERALD-LEADER, Feb. 19, 1990, at A1 (quoting Kentucky State Representative June Lyne); see also Chuck Ervin, *Senate Approves Measure on Spousal Rape: Bill Would Make It Easier To File Charge Against a Husband*, TULSA WORLD, Apr. 7, 1993, at A13 (“Sen. Don Rubottom, R-Tulsa, said the proposal was an unwarr[an]ted intrusion by government. In such cases, the alleged victim and the alleged perpetrator share the same bed, he said. ‘Don’t vote for this as an act of cowardice or to be politically correct,’ he urged.”).

²⁸ *Commonwealth v. Mlinarich*, 498 A.2d 395, 403 (Pa. Super. Ct. 1985).

²⁹ Florida House of Representatives, Floor Debate (May 29, 1980) (statement of Representative Tom Bush) (on file with author and the *New York University Law Review*; State Archives of Florida); see also *id.* (“[T]he Bible doesn’t give the state permission anywhere in that book, for the state to be in your bedroom and that’s exactly what this bill has gone to. It’s meddling in your bedroom, the state of Florida as an entity deciding what you can do and what you can’t do. . . . [W]e don’t need to go to meddlin’ in the marriage bedroom.”) (statement of Representative John Mica).

³⁰ Natalie Phillips, *Marital-Rape Bill Clears House; Tebedo Votes ‘No,’* COLO. SPRINGS GAZETTE TELEGRAPH, Jan. 27, 1988, at B1 (quoting Colorado State Representative Mary Anne Tebedo).

³¹ See MODEL PENAL CODE AND COMMENTARIES § 213.1, at 274–75 (Official Draft and Revised Comments 1980).

family.”³² These accounts posit that marital intimacy can survive marital rape, but not marital rape prosecutions. Exemption supporters insist that marital rape exemptions serve the aligned interests of wives and husbands by protecting marriages from outside scrutiny.

The second prominent defense of marital rape exemptions that legal authorities and advocates deployed in response to modern feminist reform efforts contends that such exemptions promote marital reconciliation. This claim acknowledges that wives might want to seek prosecution for marital rape, but identifies that decision as a massive mistake. The argument maintains that pursuing marital rape charges would halt a process of private reconciliation that would leave both husbands and wives better off than either would be if marital rape were fully criminalized. One commentator, an assistant district attorney in New York,³³ explained that allowing marital rape prosecutions “will discourage resolution by the spouses and will make their ultimate reconciliation more difficult.” A marital rape exemption “requires the spouses to resolve their problems and differences on their own,” and “[w]hen two people are able, on their own, to compromise differences and resolve problems, a greater mutual respect and bond might be expected to result than if the couple had to resort to the legal system for resolution.”³⁴ In fact, the Colorado Supreme Court insisted that a married couple is able to reconcile so thoroughly after marital rape that the couple’s relationship is indistinguishable from any other marriage. The court stated that “the marital exception may remove a substantial obstacle to the resumption of *normal* marital relations.”³⁵ The Model Penal Code similarly stresses the normality of the reconciliation process after marital rape, reasoning that

³² *Id.* § 213.1 cmt. 8(c), at 345; see also Michael Gary Hilf, *Marital Privacy and Spousal Rape*, 16 *NEW ENG. L. REV.* 31, 43–44 (1980) (“[P]roviding a party with immunity in cases of simple spousal rape can be justified by the state’s interest in respecting marital privacy . . .”).

³³ See Hilf, *supra* note 32, at 31 n.*.

³⁴ *Id.* at 34; see also *id.* at 34 n.15 (“There are two possible problems that can arise when marital disputes become involved with the legal system. First, knowledge by the spouses that the law can step in may pose impediments to direct resolution of disagreements by the spouses. . . . The second problem is that interspousal efforts at reconciliation may well be frustrated by a rape prosecution.”); Ralph Slovenko, *Rape of a Wife by Her Husband*, *MED. ASPECTS HUM. SEXUALITY*, July 1974, at 65, 66 (“[I]t would not help the marital situation to send the husband off to prison.”); Kenneth A. Cobb & Nancy R. Schauer, Legislative Note, *Michigan’s Criminal Sexual Assault Law*, 8 *U. MICH. J.L. REFORM* 217, 233 (1974) (“[Permitting marital rape prosecutions where the couple lived together at the time of the rape] might act as an obstacle to reconciliation.”); Comment, *Rape and Battery Between Husband and Wife*, 6 *STAN. L. REV.* 719, 725 (1954) (“If reconciliation between married persons is to be encouraged, it would appear best to allow a husband to be prosecuted for rape only after absolute and final divorce.”).

³⁵ *People v. Brown*, 632 P.2d 1025, 1027 (Colo. 1981) (en banc) (emphasis added).

“[t]he problem with abandoning the [marital] immunity in many such situations [‘of rape by force or threat’] is that the law of rape, if applied to spouses, would thrust the prospect of criminal sanctions into the *ongoing process of adjustment* in the marital relationship.”³⁶ These arguments assume that avoiding marital conflict makes both husbands and wives better off, even if wives are left without the full protection of the criminal law from rape. The arguments contend that the insuperable obstacle to marital reconciliation and harmony is not marital rape itself, but a wife’s decision to pursue a marital rape prosecution, which creates an unbridgeable divide in a marriage that operates against the true interests of both spouses. The purported solution is to prevent a wife from making such a mistake by denying her the right to choose it.

There is also a less prominent defense of modern marital rape exemptions, which I call the vindictive wife argument. This argument asserts that states should maintain marital rape exemptions to prevent vengeful wives from falsely charging their husbands with marital rape, especially during divorce proceedings.³⁷

The vindictive wife argument insists yet more bluntly than the claims from marital privacy or marital reconciliation that women are poor decisionmakers whose judgments and statements cannot be

³⁶ MODEL PENAL CODE AND COMMENTARIES, *supra* note 31, at § 213.1 cmt. 8(c), at 345 (emphasis added).

³⁷ See, e.g., Hilf, *supra* note 32, at 42 (“[Spousal rape] laws may exacerbate existing marital problems by providing another level of escalation for marital disputes with a concomitant danger of false accusations.”); *Criminal Law—Rape—Husband Cannot Be Guilty of Raping His Wife*, 82 DICK. L. REV. 608, 613 n.39 (1977–1978) (“The drastic penalty attached to rape, in comparison with the penalty for assault or fraud, would significantly alter the bargaining power of the wife. The seriousness of the charge increases its effectiveness as a threat (hence, as a weapon of vengeance), particularly if chances of success are essentially comparable.”); Francis Baumli, *The Matriarchy’s Arsenal: A Pessimistic Appraisal*, TRANSITIONS, May/June 2004, at 1, 5 (“[T]he new nuclear bomb of the divorce wars . . . was a false allegation of spousal rape. . . . This weapon would prevail against even the most honorable of men since it would be the man’s word against the woman’s, and our society always believes the woman over the man.”); David Margolick, *Rape in a Marriage Is No Longer Within Law*, N.Y. TIMES, Dec. 23, 1984, at 6E (“In a nasty custody fight, where a husband and wife are really playing hardball, a woman could threaten that unless her husband became more reasonable, she would charge him with a rape she says he committed six months earlier,” [Professor Yale Kamisar of the University of Michigan Law School] said. ‘Given how embarrassing it might be to have to face these charges, they could become a very powerful weapon.’ To offset such possibilities, he suggested that the Legislature require married women to bring rape charges within a fixed period of time”); George F. Will, *When Custom Doesn’t Work Anymore*, WASH. POST, Dec. 28, 1978, at A23 (“[I]t is a grave business when the law empowers one partner to charge the other with a felony punishable by 20 years in prison. The problems of proof relating to the charge of rape in marriage are obvious, as is the potential for abuse of the charge in divorce proceedings. It is less obvious that there are fully compensating social benefits from a law distinguishing from others this particular category of assault.”).

trusted. The argument can cite no actual evidence indicating that wives are likely to file false charges of marital rape. To the contrary, the available data suggests that the incidents of marital rape that women report to law enforcement authorities tend to be extremely brutal and relatively easy to prove.³⁸ But the vindictive wife argument fits within a long legal tradition contending that women are particularly unreliable when reporting rape.³⁹

The vindictive wife argument concedes that marital conflict is possible, while asserting that the sources of such conflict are women's bad decisions, rather than men's. The argument focuses on the marital discord that would be created and the injury that would be sustained if a wife falsely accused her husband of marital rape. It does not acknowledge the marital discord created or the injury sustained when a wife is subject to actual acts of marital rape that marital rape exemptions leave legalized. For instance, an Arizona state representative defending his state's marital rape exemption invoked the specter of a wife falsely charging rape, explaining that "if one person decides for whatever reason that they would like to attack the other person, this is a very serious way to get it done."⁴⁰ A Connecticut state legislator concluded that "since society is already burdened with these kinds of women ['vengeful wives'], . . . the *last* thing we need is a law making it illegal for a husband to sexually assault his wife."⁴¹ An Iowa state senator observed that "[t]here are certain people who are always wanting to get even," and insisted that "there are other remedies, rather than going after something that is natural and making that a criminal offense."⁴² A Colorado state representative predicted that criminalizing marital rape would mean that "[a]ll of a sudden [a wife] gets tired of [her husband] and she yells 'Rape!'"⁴³ A Virginia state legislator justified his support for a marital rape exemption by insisting that when a couple is divorcing "[t]here is no lie too outra-

³⁸ See Hasday, *supra* note 16, at 1489 & n.423.

³⁹ See, e.g., 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635 (Philadelphia, Robert H. Small 1st Am. ed. 1847) (1736) ("[Rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.").

⁴⁰ Howard Fischer, *Spousal Rape Bill Is Tossed by Panel*, ARIZ. DAILY STAR, Mar. 11, 2005, at A4 (quoting Arizona State Representative Mark Anderson).

⁴¹ Dick Polman, *Sexual Assault in the Home: Is Marriage a License To Rape?*, HARTFORD ADVOC., Feb. 18, 1981, at 2 (reporting comments of Connecticut General Assemblyman Alfred Onorato, who previously spent eleven years as a state prosecutor).

⁴² *Iowa 'Marital Rape' Measure Is Moving*, OMAHA WORLD-HERALD, Mar. 24, 1989, at 16 (quoting Iowa State Senator Joe Coleman).

⁴³ Phillips, *supra* note 30, at B1 (quoting Colorado State Representative Mary Anne Tebedo).

geous.’”⁴⁴ Here again, defenders of marital rape exemptions maintain that the exemptions serve the shared interests of husbands and wives, or at least their shared *legitimate* interests. The vindictive wife argument asserts that marital rape exemptions cost wives nothing of real value because the exemptions prevent women only from taking actions against their husbands that no one would defend.

The contention that limiting women’s rights to pursue marital rape charges leaves both husbands and wives better off has allowed exemption supporters confronted with the reform efforts of the modern feminist movement to avoid explaining why the law should favor the interests of husbands who commit marital rape at the expense of wives who are subject to marital rape. But the contemporary defense of marital rape exemptions inflicts at least two distinct injuries on women. First, and most notably, this defense has succeeded in substantially limiting the legal remediation available for marital rape. Second, this defense denies that marital rape and marital rape exemptions cause real harm to women. Modern arguments for marital rape exemptions insist that the exemptions protect marital intimacy and harmony, and maintain that women seeking prosecution for marital rape are poor decisionmakers who are mistaken about their own best interests or vindictive. Exemption supporters have assumed that women’s desire for prosecution is irrelevant because securing the right to be fully protected from marital rape would purportedly leave women worse off.

The overwhelming evidence of marital rape’s harmfulness makes it remarkable that marital rape exemptions have remained so persistent. But as we will see, the arguments deployed to defend marital rape exemptions in the last years of the twentieth century are part of a long tradition contending that women benefit from restrictions on their rights and opportunities. These arguments draw on suspicions about women’s decisionmaking and commitments to women’s domesticity that have deep roots and vibrant life within the legal regulation of women’s status.

Similar reasoning about women is evident in the legislation and jurisprudence enacting and defending limits on women’s right to abortion.

⁴⁴ *Marital Rape Bill Advances in House: Delegates Give Preliminary OK*, DAILY PRESS (Hampton-Newport News, Va.), Feb. 8, 2002, at C4 (quoting Virginia State Delegate Kenneth Melvin).

B. *Antiabortion Legislation and Jurisprudence*

Abortion regulation strikingly illustrates how claims that limiting women's rights serves women's own interests have expanded their scope in recent years to shape more aspects of women's legal status. In *Roe v. Wade* (1973),⁴⁵ the Supreme Court understood abortion regulation as a problem of conflicting rights and interests: a woman's (qualified) right to an abortion versus a state's interest in protecting the woman's health and the potential life of the fetus.⁴⁶ *Roe* attempted to balance those rights and interests through a framework that gave women access to abortion in the first trimester of pregnancy, permitted states to regulate abortion after the first trimester "in ways . . . reasonably related to maternal health," and allowed states to prohibit abortion after fetal viability, except where abortion was necessary to preserve the woman's life or health.⁴⁷ *Roe*'s articulation of the abortion right suggested some doubts about women's decision-making capacity. The Court's opinion notoriously insisted that the first-trimester "abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's *attending physician*," rather than stating that this decision was to be left to a woman's own judgment.⁴⁸ But *Roe* never claimed that women could not make reasonable decisions to have abortions, or that women seeking abortions and states attempting to enforce antiabortion laws had aligned interests best served by denying women abortion rights.

As early as the 1980s, however, antiabortion activists began to more systematically develop the argument that women who wanted abortions were poor decisionmakers who would regret their abortions if they managed to obtain them. This contention, which recalled themes from the nineteenth-century antiabortion movement,⁴⁹ also shared fundamental continuities with the modern defense of marital rape exemptions. Antiabortion advocates assumed that women's true responsibilities and ultimate roles were familial, and that women's

⁴⁵ 410 U.S. 113 (1973).

⁴⁶ *See id.* at 154, 162.

⁴⁷ *Id.* at 164–65.

⁴⁸ *Id.* at 164 (emphasis added).

⁴⁹ *See, e.g.*, HORATIO ROBINSON STORER, *WHY NOT?: A BOOK FOR EVERY WOMAN* 14 (Boston, Lee & Shepard 1866) ("[C]ases of insanity in women from the physical shock of an induced abortion, or from subsequent remorse, are not uncommon."); *id.* at 79 ("We have now seen that the induction of a forced abortion is, in reality, a crime against the infant, its mother, the family circle, and society; that it is attended with extreme danger, whether immediate or remote, to the mother's happiness, to her health, mental and physical, and to her life . . ."); JOHN TODD, *SERPENTS IN THE DOVES' NEST* 10 (Boston, Lee & Shepard 1867) ("[I]f any one thinks she can do [abortion] without the guilt of murder, she is greatly mistaken. The very remembrance of this guilt has often upset the reason, and by remorse turned the doer into madness.").

efforts to evade or delay domesticity were inherently suspect. They insisted that women, men, and society as a whole would be better off if women could be prevented from opting out of motherhood.

In 1982, Nancyjo Mann founded Women Exploited by Abortion (WEBA) to promote the proposition that legal access to abortion was not a “‘right’” for women to pursue and demand, but “a trap” for women to avoid and resist.⁵⁰ By 1986, WEBA had over one hundred local chapters throughout the country.⁵¹ Mann insisted that abortion was “dangerous to both the physical and mental health of women.”⁵² She discounted the possibility of differences between women and particularly stressed the psychological risks of abortion, contending that “almost all” women who have abortions “suffer from emotional or psychological aftershocks.”⁵³

David Reardon’s *Aborted Women: Silent No More* (1987) used a survey of 252 WEBA members as the basis for one of the most developed expressions of the argument that prohibiting abortion, except when needed to save the pregnant woman’s life, would serve the aligned interests of unborn children, society, and the pregnant women who would be unable to obtain abortions if abortion were criminalized.⁵⁴ Reardon began from the premise that women’s decisions to have abortions were not to be trusted. He posited “that the only time women seek abortion is when they are experiencing psychic distress.”⁵⁵ Even if women sincerely thought they wanted to abort, “almost all” women who had abortions would experience “psychological problems” because of them.⁵⁶ Reardon stressed women’s fundamental similarity. The only women possibly able to escape psychological injury after abortion were flawed, unnatural women who were “aggressive rather than nurturing”⁵⁷ and “addicted to the pseudo-happiness of their own plans, careers, and possessions.”⁵⁸ Indeed, “[t]he more difficult the circumstances prompting abortion, the more likely it [was] that the woman [would] suffer severe” psychological injury after abortion.⁵⁹ In measuring this injury, moreover, it was appropriate to ignore women’s own perceptions of their exper-

⁵⁰ Nancyjo Mann, *Foreword* to DAVID C. REARDON, *ABORTED WOMEN: SILENT NO MORE*, at ix, xxii–xxiii (1987).

⁵¹ *See id.* at xxiii.

⁵² *Id.* at x–xi (emphasis omitted).

⁵³ *Id.* at xi.

⁵⁴ *See* REARDON, *supra* note 50, at 4, 320.

⁵⁵ *Id.* at 167.

⁵⁶ *Id.* at 21.

⁵⁷ *Id.* at 138.

⁵⁸ *Id.* at 140.

⁵⁹ *Id.* at 163 (emphasis omitted).

iences and state of mind. Reardon explained that many of the women psychologically damaged by abortion denied or did not realize that they had been harmed.⁶⁰

By July 1987, the argument that abortion harms women was influential enough within the antiabortion movement, and the antiabortion movement was influential enough within the White House, that President Ronald Reagan directed his ardently antiabortion Surgeon General, C. Everett Koop,⁶¹ “to issue a comprehensive medical report on the health effects, physical and emotional, of abortion on women.”⁶² According to Koop, the idea for this report originated with “one of the neophyte right-wingers on the White House staff” who believed that a study from the Surgeon General finding that abortion impaired women’s mental health could be used to reverse *Roe*.⁶³ The House Committee on Government Operations later identified that staffer as Dinesh D’Souza,⁶⁴ who would go on to become a prominent conservative writer.⁶⁵ In fact, Koop ultimately refused to write the report that Reagan ordered, finding in January 1989 that the existing scientific literature did not provide conclusive evidence about whether abortion “cause[s] or contribute[s] to psychological problems.”⁶⁶

In the years since Koop’s refusal to write Reagan’s desired report, many additional scientific and medical studies have challenged the empirical claim that most women who have abortions come to regret their decisions and to suffer psychological injury because of abortion.⁶⁷ These studies consistently find that women’s distress tends to

⁶⁰ See *id.* at 21, 142.

⁶¹ For an example of Koop’s antiabortion advocacy, see C. Everett Koop, *The Right To Live*, HUM. LIFE REV., Fall 1975, at 65, 87 (“It takes almost nothing to move from abortion which is killing of an unborn baby in the uterus to the killing of the retarded, the crippled, the sick, the elderly.”).

⁶² Ronald Reagan, Remarks at a White House Briefing for Right to Life Activists, 2 PUB. PAPERS 895, 898 (July 30, 1987).

⁶³ C. EVERETT KOOP, KOOP: THE MEMOIRS OF AMERICA’S FAMILY DOCTOR 274 (1991); see also *Medical and Psychological Impact of Abortion: Hearing Before the Subcomm. on Human Resources and Intergovernmental Relations of the H. Comm. on Government Operations*, 101st Cong. 247 (1989) (statement of C. Everett Koop, Surgeon General of the United States); Letter from C. Everett Koop, Surgeon Gen., to Ronald Reagan, President of the U.S. 2 (Jan. 9, 1989) (on file with author and the *New York University Law Review*; C. Everett Koop Papers, History of Medicine Division, National Library of Medicine).

⁶⁴ See H.R. REP. NO. 101-392, at 3 (1989).

⁶⁵ See, e.g., DINESH D’SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS (1991).

⁶⁶ Letter from C. Everett Koop to Ronald Reagan, *supra* note 63, at 2; see also *id.* at 4.

⁶⁷ See, e.g., Nancy Felipe Russo & Jean E. Denious, *Controlling Birth: Science, Politics, and Public Policy*, 61 J. SOC. ISSUES 181, 185 (2005) (“There is no scientific basis for constructing abortion as a severe physical or mental health threat.” (citations omitted)); Nada

be greatest before abortion rather than after it and that the incidence of negative reactions to abortion is low.⁶⁸

Yet this scientific and medical literature has not halted the growing prevalence and influence of the argument that abortion psychologically injures women and leaves them regretting their decision to abort. The contention that abortion harms women may be empirically unsupported, but it draws on deep wells of understanding about women's nature, roles, and capacities, and resonates with a long tradition of mutual benefits discourse defending limits on women's rights. Moreover, leaders of the antiabortion movement have become even more convinced of their argument's political power. By the mid-1990s, they were explaining in increasingly explicit terms that if abortion restrictions served the shared interests of pregnant women, fetuses, abortion opponents, and society as a whole, then people concerned about women's rights and status might be persuaded to support antiabortion laws on the ground that the laws would leave everyone better off, including women denied abortions. The claim that abortion harms women could be the antiabortion movement's response to feminist contentions that women's equality depends on access to legal abortion.⁶⁹

David Reardon's *Making Abortion Rare: A Healing Strategy for a Divided Nation* (1996) stressed more openly than his earlier work that focusing on fetal welfare would be insufficient to win the legal prohibition of abortion because "the middle majority of Americans" was too concerned about the welfare and autonomy of pregnant women seeking abortions.⁷⁰ Reardon argued that the antiabortion movement needed to "tap into our society's hypersensitivity to women's rights" in order to develop an "unbeatable" case for abor-

L. Stotland, *The Myth of the Abortion Trauma Syndrome*, 268 JAMA 2078, 2078 (1992) ("This is an article about a medical syndrome that does not exist.").

⁶⁸ See, e.g., Nancy E. Adler et al., *Psychological Responses After Abortion*, 248 SCIENCE 41, 41-43 (1990); Paul K.B. Dagg, *The Psychological Sequelae of Therapeutic Abortion—Denied and Completed*, 148 AM. J. PSYCHIATRY 578, 578, 583 (1991); Brenda Major et al., *Personal Resilience, Cognitive Appraisals, and Coping: An Integrative Model of Adjustment to Abortion*, 74 J. PERSONALITY & SOC. PSYCHOL. 735, 741 (1998); Jo Ann Rosenfeld, *Emotional Responses to Therapeutic Abortion*, 45 AM. FAM. PHYSICIAN 137, 137 (1992).

⁶⁹ For examples of sex equality arguments for abortion rights, see Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 382-86 (1985); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1016-28 (1984); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1308-24 (1991); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 351-80 (1992).

⁷⁰ DAVID C. REARDON, *MAKING ABORTION RARE: A HEALING STRATEGY FOR A DIVIDED NATION*, at ix-x (1996); see also *id.* at 25-26.

tion prohibition.⁷¹ By emphasizing “that every abortion hurts a woman, as well as her child, we can defend every unborn child by defending the best interests of the mother, knowing that her best interests are never served by abortion.”⁷² Reardon’s conviction “that abortion is inherently harmful to women” reflected his assessment of every woman’s true nature and ultimate responsibility: “It is simply impossible to rip a child from the womb of a mother without tearing out a part of the woman herself—a part of her heart, a part of her joy, a part of her maternity.”⁷³ Women who thought abortion would serve their interests were terrible decisionmakers, reaching “a hasty, rash, ill-informed, or even dangerous decision” “[o]ut of ignorance or despair.”⁷⁴

John and Barbara Willke’s *Why Not Love Them Both?: Questions & Answers About Abortion* (1997) similarly focused on how the antiabortion movement could appeal “to those in the middle” by stressing that abortion prohibitions served the aligned interests of unborn children, women seeking abortions, and abortion opponents.⁷⁵ The Willkes, like many other antiabortion writers, contended that women who have abortions experience a “Post Abortion Syndrome,”⁷⁶ in which “[g]uilt is ever-present in many guises, along with regret, remorse, shame, lowered self-esteem, insomnia, dreams and nightmares, flash backs, anniversary reactions.”⁷⁷ The ubiquity of this syndrome, which purportedly resembled the post-traumatic stress that many Vietnam veterans described,⁷⁸ meant that abortion was not in a woman’s interest, even if she thought it was at the time. Where pro-choice advocates insisted that “‘a woman has the right to choose,’” the Willkes advised that “[t]he pro-life one-liner should be ‘why not love them both?’”⁷⁹

The antiabortion movement has not succeeded so far in securing the legal prohibition of abortion, but advocates, courts, and legislatures have already utilized the argument that abortion harms women to establish important limitations on women’s abortion rights. Consider the contrast between the Supreme Court’s abortion jurispru-

⁷¹ *Id.* at 132, xi.

⁷² *Id.* at 13.

⁷³ *Id.* at 5.

⁷⁴ *Id.* at 41, 13.

⁷⁵ JOHN C. WILLKE & BARBARA H. WILLKE, *WHY NOT LOVE THEM BOTH?: QUESTIONS & ANSWERS ABOUT ABORTION* 6 (1997).

⁷⁶ *Id.* at 46.

⁷⁷ *Id.* at 47.

⁷⁸ *See id.* at 46–47.

⁷⁹ *Id.* at 17.

dence from a quarter century ago and the Court's two most important recent decisions on abortion.

In *City of Akron v. Akron Center for Reproductive Health, Inc.* (1983),⁸⁰ the Court appeared wary of claims that abortion harms women and confident about women's decisionmaking capacities. *Akron* struck down a municipal "informed consent" ordinance providing that a woman could not obtain an abortion unless her physician first informed her of, among other things, "the physical and emotional complications that may result from an abortion."⁸¹ The Court found "that much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether."⁸² For instance, the ordinance's description of "numerous possible physical and psychological complications of abortion, [was] a 'parade of horrors' intended to suggest that abortion is a particularly dangerous procedure."⁸³ *Akron* held that informed consent requirements for abortion were unconstitutional if "designed to influence the woman's informed choice between abortion or childbirth."⁸⁴ The Court also struck down a municipal requirement that delayed the availability of abortion until twenty-four hours after the pregnant woman had signed her consent form,⁸⁵ explaining that "if a woman, after appropriate counseling, is prepared to give her written informed consent and proceed with the abortion, a State may not demand that she delay the effectuation of that decision."⁸⁶

In contrast, the Court expressed more concern about the purported psychological consequences of abortion, and more doubts about the decisionmaking capacities of women seeking abortions, in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992).⁸⁷ By this time, antiabortion advocacy contending that abortion injures women psychologically had become much more developed and reached the amicus briefs submitted to the Court.⁸⁸ The *Casey* plurality held that states could constitutionally enforce "informed consent" laws designed "to persuade the woman to choose childbirth over

⁸⁰ 462 U.S. 416 (1983).

⁸¹ *Id.* at 442.

⁸² *Id.* at 444.

⁸³ *Id.* at 444-45 (footnote omitted).

⁸⁴ *Id.* at 444.

⁸⁵ *See id.* at 449-50.

⁸⁶ *Id.* at 450-51.

⁸⁷ 505 U.S. 833 (1992).

⁸⁸ *See* Brief of Feminists for Life of America et al. as Amici Curiae in Support of Respondents & Cross Petitioners at 8, *Casey*, 505 U.S. 833 (Nos. 91-744 & 91-902) ("In addition to the obvious physical complications, abortion has a profound psychological impact upon many women that can be found in the testimonies of women who have undergone abortion." (footnote omitted)).

abortion.”⁸⁹ The plurality also held that states could impose twenty-four hour waiting periods before abortion.⁹⁰

The *Casey* plurality’s explanation of its holdings emphasized risks associated with abortion, rather than risks associated with limiting women’s access to abortion. Where the *Akron* Court had implied that the contention that abortion was associated with serious psychological complications was simply a stratagem to discourage abortion, the *Casey* plurality stressed that the state had “a substantial government interest” in requiring that women be informed “of the health risks of abortion” and noted that “[i]t cannot be questioned that psychological well-being is a facet of health.” The psychological risk that the *Casey* plurality was particularly concerned about was the risk that a woman would later come to regret her abortion because of her faulty decisionmaking at the time: “In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.”⁹¹

The *Casey* plurality proceeded to reject the notion “that there is a constitutional right to *abortion on demand*.”⁹² This phrase, a staple of antiabortion literature before much of that literature adopted the language of women’s welfare,⁹³ insisted that the fact that a woman had decided to have an abortion for her own reasons was insufficient to give her a right to have the abortion, even in the first trimester of pregnancy. The *Casey* plurality agreed that a state need not trust women’s decisionmaking capacity to that extent. For instance, a twenty-four hour waiting period before abortion might impose additional obstacles, delays, and expense.⁹⁴ But it was constitutional for a state to mandate “some period of reflection”⁹⁵ in order to “facilitate[]

⁸⁹ *Casey*, 505 U.S. at 878 (opinion of O’Connor, Kennedy, Souter, JJ.).

⁹⁰ *See id.* at 885–87.

⁹¹ *Id.* at 882.

⁹² *Id.* at 887 (emphasis added).

⁹³ *See, e.g.*, Ronald Reagan, *Abortion and the Conscience of the Nation*, HUM. LIFE REV., Spring 1983, at 7, 7 (“Our nationwide policy of abortion-on-demand through all nine months of pregnancy was neither voted for by our people nor enacted by our legislators—not a single state had such unrestricted abortion before the Supreme Court decreed it to be national policy in 1973.”); Patrick J. Buchanan, Editorial, *GOP Must Stand Firm on Abortion*, SAN JOSE MERCURY NEWS, Oct. 25, 1989, at 7B (“Abortion on demand is the great evil of our time, the ultimate act of selfishness and cruelty, the defining statement of the Me Generation in the Now Decade.”).

⁹⁴ *See Casey*, 505 U.S. at 885–86 (opinion of O’Connor, Kennedy, Souter, JJ.).

⁹⁵ *Id.* at 885.

the wise exercise of” the abortion right,⁹⁶ “to ensure that this choice is thoughtful and informed.”⁹⁷

The argument that women’s abortion rights should be limited because abortion harms women reached its highest peak to date in *Gonzales v. Carhart* (2007).⁹⁸ *Carhart* upheld the Partial-Birth Abortion Ban Act of 2003,⁹⁹ which prohibited a procedure for performing abortion even when that procedure would be the safest method of abortion.¹⁰⁰ In upholding the statute, the Court steadfastly avoided recognizing the conflicting interests and competing claims at stake in abortion regulation. As an initial matter, the Court did not focus on the conflict between a woman’s right to abortion and a state’s interest in the potential life of a fetus. This silence was perhaps understandable because the statute at issue would not prevent any abortions and thus could not be justified as a means of protecting fetuses. But the Court also did not focus on a conflict that the statute directly presented: The Act prioritized Congress’s expressive interests in banning an abortion procedure over women’s health and safety interests in having access to the safest abortion procedure possible. Indeed, the Act prioritized Congress’s expressive interests in honoring life even in circumstances where a woman wanted access to a safer abortion procedure in order to protect her capacity to bear children in the future. The Court did not explain why Congress’s expressive concerns appropriately outweighed women’s health and safety. Instead, the Court insisted with little discussion or elaboration that the Act served everyone’s aligned interests and had only benefits, rather than costs. In doing so, *Carhart* explicitly endorsed the claim that women’s abortion rights should be restricted because women regret their abortions. *Carhart* was not quite willing to echo the antiabortion literature’s contention that regret plagues all or almost all women who have abortions,¹⁰¹ but the Court came close. The Court assumed that some women will regret having an abortion and used that assumption as a reason to ban all women from undergoing a type of abortion procedure.

In *Carhart*, as in the antiabortion literature, the argument that antiabortion laws protect women from regret had two central premises. The first premise was that women’s fundamental nature was maternal. *Carhart*’s only evidence that some women will regret their

⁹⁶ *Id.* at 887.

⁹⁷ *Id.* at 872.

⁹⁸ 550 U.S. 124 (2007).

⁹⁹ *See id.* at 132–33.

¹⁰⁰ *See id.* at 141–43.

¹⁰¹ *See supra* text accompanying notes 50–60, 70–79.

abortions was the assertion of an antiabortion amicus brief collecting affidavits from women who claimed their abortions harmed them and the Court's own commonsense intuition, grounded in its understanding of women's true nature as mothers. As the Court explained:

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.¹⁰²

The Court went on to identify women who regretted their abortions as “mother[s].”¹⁰³

Carhart's second premise was that women were poor decisionmakers whose judgments could not be trusted, especially if they led women away from their family responsibilities. The Court assumed that women had undergone the abortion procedure now statutorily prohibited without understanding what the procedure entailed. *Carhart* took it to be “self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event,” the abortion procedure's exact form.¹⁰⁴ In the Court's view, however, the appropriate legal solution to this purported problem was not to require that women be given more information before abortion. Women's judgment could not be relied on to that degree. The solution was to strip every woman of the possibility of choosing the prohibited method of abortion.

The contention that limiting women's rights to pursue alternatives to domesticity leaves everyone better off, including women themselves, retains persistent appeal. The claim resonates with powerful convictions about the primacy of women's maternal responsibilities and deep-seated doubts about the decisionmaking capacities of women seeking other choices, in ways that prompt legal authorities and advocates to dismiss further explanation or elaboration as unnecessary.

¹⁰² *Carhart*, 550 U.S. at 159 (citing *Casey*, 505 U.S. at 852–53; Brief of Sandra Cano et al. as Amici Curiae in Support of Petitioner at 22–24, *Carhart*, 550 U.S. 124 (No. 05-380)); see also Brief of Sandra Cano et al. as Amici Curiae in Support of Petitioner, *supra*, at app. 11–106 (quoting “Relevant Portion of 178 Sworn Affidavits of Post Abortive Women of the approximately 2,000 on file with The Justice Foundation”).

¹⁰³ *Carhart*, 550 U.S. at 159.

¹⁰⁴ *Id.* at 159–60.

II

MUTUAL BENEFITS ARGUMENTS AGAINST AFFIRMATIVE ACTION

Compared to the law governing women's legal status, the law of race relations is more often described in terms emphasizing conflict rather than consensus. But the premise that both whites and people of color benefit from restrictions on people of color's rights and opportunities has prominently shaped race regulation in the United States. Indeed, arguments contending that whites and people of color have aligned interests in defeating civil rights initiatives have expanded their reach in recent years.

The jurisprudence and literature on affirmative action strikingly illustrate the resurgence of mutual benefits arguments for rejecting civil rights efforts. The Supreme Court's first opinions considering the constitutionality of race-based government affirmative action programs stressed the conflicting interests of racial groups and explained that the Constitution required limits on affirmative action in order to minimize the harms to whites. The Court's early focus on the injuries that affirmative action could impose on whites mirrored the dominant concerns in early academic criticism of affirmative action.¹⁰⁵ Within just a few years and a few opinions, however, the Court and opponents of affirmative action off the bench increasingly began defending constitutional restrictions on permissible affirmative action policies in the language of mutuality, insisting that limits on affirmative action serve the shared interests of all races and protect people of color from the injuries that affirmative action would otherwise inflict upon them.

¹⁰⁵ See NATHAN GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* 201 (1975) ("[White immigrants] came to a country which provided them with less benefits than it now provides the protected groups. There is little reason for them to feel they should bear the burden of the redress of a past in which they had no or little part, or to assist those who presently receive more assistance than they did. We are indeed a nation of minorities; to enshrine some minorities as deserving of special benefits means not to defend minority rights against a discriminating majority but to favor some of these minorities over others."); Lino A. Graglia, *Special Admission of the "Culturally Deprived" to Law School*, 119 U. PA. L. REV. 351, 352 (1970) ("Discrimination in favor of some racial or ethnic groups necessarily is or appears to be discrimination against others. . . . [D]iscrimination in favor of particular racial or ethnic groups is largely or entirely unnecessary to achieve true equality in educational opportunity and is unjust to those who have been denied such opportunity on other grounds."); Antonin Scalia, *The Disease as Cure: "In Order To Get Beyond Racism, We Must First Take Account of Race."*, 1979 WASH. U. L.Q. 147, 153-54 ("I am not willing to prefer the son of a prosperous and well-educated black doctor or lawyer—solely because of his race—to the son of a recent refugee from Eastern Europe who is working as a manual laborer to get his family ahead."); William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 801 (1979) ("The 'brunt' of the [affirmative action] plan [in *Bakke*] was borne by individuals like Allan Bakke—white applicants with reasonably good application portfolios, but not among the very best portfolios.").

Regents of the University of California v. Bakke (1978)¹⁰⁶ exemplifies the Court's initial approach to affirmative action. *Bakke* struck down a state medical school admissions program that reserved sixteen spaces for people of color in an entering class of one hundred students.¹⁰⁷ Justice Lewis Powell's controlling opinion in *Bakke* explaining why this program was unconstitutional focused on the competing interests of whites and people of color, and the harms that affirmative action programs caused whites. Powell began from the premise that the history of race relations in the United States, unlike the history of relations between men and women, was riven with conflict and oppression. He explained that "the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share."¹⁰⁸ With that premise in place, Powell stressed that the medical school's affirmative action program would exacerbate racial animosity and conflict. This account adopted the perspective of white applicants to the medical school, who Powell assumed bore "no responsibility for" societal patterns of racial discrimination.¹⁰⁹ Powell emphasized that the medical school's affirmative action program imposed enormous burdens on these "innocent"¹¹⁰ white applicants by "totally foreclos[ing]" them "from competition for the 16 special admissions seats in every Medical School class."¹¹¹ The result, Powell warned, would be white "outrage" and "deep resentment."¹¹²

Powell's discussion of affirmative action programs that could survive constitutional review also emphasized the conflicting interests of whites and people of color. Powell identified "the attainment of a diverse student body" as "a constitutionally permissible goal for an institution of higher education."¹¹³ He argued that schools seeking diversity could use "race or ethnic background" as "a 'plus'" in an applicant's favor, where that plus did "not insulate the individual from comparison with all other candidates for the available seats."¹¹⁴ In Powell's view, this form of affirmative action was constitutionally

¹⁰⁶ 438 U.S. 265 (1978).

¹⁰⁷ See *id.* at 269–71, 289 (opinion of Powell, J.).

¹⁰⁸ *Id.* at 303.

¹⁰⁹ *Id.* at 310.

¹¹⁰ *Id.* at 307.

¹¹¹ *Id.* at 305.

¹¹² *Id.* at 294 n.34. Powell also briefly made an argument that would come to dominate the Court's later affirmative action cases, contending that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." *Id.* at 298.

¹¹³ *Id.* at 311–12.

¹¹⁴ *Id.* at 317.

acceptable precisely because it minimized the harm that affirmative action programs inflicted on whites. Powell's preferred form of affirmative action kept every admissions slot open to competition from applicants of every race and provided that white applicants could also benefit from a school's focus on diversity where they had qualities "likely to promote beneficial educational pluralism."¹¹⁵ Powell contended that this type of affirmative action weighed a white applicant's qualifications "fairly and competitively," and gave the white applicant "no basis to complain of unequal treatment under the Fourteenth Amendment."¹¹⁶

Eight years later, *Wygant v. Jackson Board of Education*¹¹⁷ similarly stressed the conflicting interests of whites and people of color. *Wygant* struck down a school board decision to grant some teachers preferential protection against layoffs because of their race or national origin.¹¹⁸ Justice Powell's plurality opinion recognized that the layoff plan benefited people of color and had been intended to help achieve "racial equality." But the plurality held that the layoff plan was not a constitutionally permissible means of accomplishing even legitimate affirmative action goals because the "burden" that layoffs imposed on "innocent" whites was "too intrusive."¹¹⁹ Justice Sandra Day O'Connor's concurring opinion likewise insisted that affirmative action plans could "not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan's racial preference."¹²⁰

In more recent years, however, the Court has abruptly turned from its early focus on the burdens that affirmative action imposes on whites, perhaps because this initial approach proved insufficiently effective at countering arguments for affirmative action that were grounded in commitments to improving the status of people of color. Without explaining its quick switch in focus, the Court now emphasizes with the certainty of common sense that affirmative action programs must be restricted in scope and duration in order to protect people of color from the injuries that affirmative action would otherwise inflict upon them. This account maintains that limiting and eventually eliminating affirmative action serves the aligned interests of whites, people of color, people opposed to affirmative action programs, and people seeking to participate in those programs. The

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 318.

¹¹⁷ 476 U.S. 267 (1986).

¹¹⁸ *See id.* at 269–70, 282–84 (plurality opinion).

¹¹⁹ *Id.* at 282–83.

¹²⁰ *Id.* at 287 (O'Connor, J., concurring in part and concurring in the judgment).

Court purportedly does not need to choose between conflicting interests and competing sides, and explain why the harms that affirmative action causes whites have more constitutional weight than the benefits that affirmative action confers on people of color. Instead, the Court's opinions insist that people of all races and with every view on affirmative action will all be better off in their own way if people of color do not have access to affirmative action programs. This shift in judicial emphasis has drawn on contemporaneous trends in the literature criticizing affirmative action, which has also increasingly focused on the injuries that affirmative action programs assertedly inflict on people of color.¹²¹

The Court's shift to a mutual benefits argument against affirmative action was perhaps first visible in *City of Richmond v. J.A. Croson Co.* (1989),¹²² a transitional opinion between the Court's initial approach to affirmative action and its more recent one. *Croson* struck down an affirmative action plan in Richmond, Virginia, that required white-owned contracting businesses receiving city construction contracts to subcontract at least thirty percent of the monetary amount of the contracts to minority-owned businesses.¹²³ In detailing the plan's unconstitutionality, the *Croson* plurality discussed the harm the plan inflicted on whites who were denied "the opportunity to compete for a fixed percentage of public contracts based solely upon their race."¹²⁴

¹²¹ See STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 233 (1991) ("The likely demise, or severe restriction, of racial preferences . . . is our chance to make ourselves free of the assumptions that too often underlie affirmative action, assumptions about our intellectual incapacity and other competitive deficiencies."); SHELBY STEELE, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA 120 (1990) ("Racial preferences implicitly mark whites with an exaggerated superiority just as they mark blacks with an exaggerated inferiority. They not only reinforce America's oldest racial myth but, for blacks, they have the effect of stigmatizing the already stigmatized."); Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1903 (1996) ("Because it must resort to a separate and unequal scheme of dual evaluative standards, race-based affirmative action stamps even its worthiest beneficiaries with an indelible stigma."); Carl Cohen, *Why Race Preference Is Wrong and Bad*, in CARL COHEN & JAMES P. STERBA, AFFIRMATIVE ACTION AND RACIAL PREFERENCE: A DEBATE 3, 110 (2003) ("[Affirmative action's] worst consequences . . . are the injuries it inflicts upon the racial minorities preferred, creating widespread resentment, reinforcing stereotypes, and humiliating its purported beneficiaries in the eyes of their classmates, colleagues, workmates, teachers—and even in their own eyes. Race preference has been an utter catastrophe for the ethnic minorities it was intended to benefit."); Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want To Be a Role Model?*, 89 MICH. L. REV. 1222, 1226 n.20 (1991) ("Affirmative action is soothing, limiting, and therapeutic for whites but psychologically and materially injurious to populations of color.").

¹²² 488 U.S. 469 (1989).

¹²³ See *id.* at 477–78, 485–86.

¹²⁴ *Id.* at 493 (plurality opinion).

But the plurality's emphasis was turning to an account of the different kinds of harm that affirmative action imposed on people of color.

The plurality identified three injuries that people of color, who had not brought the *Croson* suit,¹²⁵ would purportedly experience if they were permitted access to the affirmative action plan that the majority-black Richmond City Council had adopted.¹²⁶ First, the plurality contended that the affirmative action plan "carr[ie]d] a danger of stigmatic harm" and could "promote notions of racial inferiority" on the theory that people of color needed affirmative action because of their lesser competence.¹²⁷ The plurality presented no evidence that any people of color agreed that Richmond's affirmative action plan was stigmatizing or thought that potential stigma was a good reason to strike down the plan. But the plurality stressed the risk of stigma nonetheless. Second, the plurality argued that the affirmative action plan could leave people of color worse off because it might "lead to a politics of racial hostility."¹²⁸ The danger of racial animosity and the advantages of avoiding racial conflict had been a central concern of Powell's *Bakke* opinion, but the *Croson* plurality appeared to identify affirmative action programs that might cause whites to resent people of color, rather than past and present race discrimination that might cause people of color to resent whites, as the primary source of modern racial animosity. The argument that Richmond's affirmative action plan could *lead* to racial animosity seemed to assume that societal practices of racial discrimination had not already created such animosity. Third, affirmative action programs like Richmond's plan, which were intended to counter "past societal discrimination," would actually harm people of color by preventing the development of "a society where race is irrelevant to personal opportunity and achievement."¹²⁹

Adarand Constructors, Inc. v. Peña (1995)¹³⁰ reiterated *Croson*'s insistence that affirmative action injures people of color. *Adarand* held that the Court would apply strict scrutiny to all race-based government affirmative action.¹³¹ *Adarand*'s explanation of the need for strict scrutiny recounted the litany of harms to people of color that *Croson* had identified: Affirmative action assertedly stigmatized people of color, aggravated racial animosity, and fostered racial

¹²⁵ See *id.* at 481–83 (majority opinion).

¹²⁶ See *id.* at 495 (plurality opinion).

¹²⁷ *Id.* at 493.

¹²⁸ *Id.*

¹²⁹ *Id.* at 505–06 (majority opinion).

¹³⁰ 515 U.S. 200 (1995).

¹³¹ See *id.* at 235.

prejudice. The Court reported that affirmative action “‘inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race. Because that perception—especially when fostered by the Congress of the United States—can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor.’”¹³²

Justice Clarence Thomas, appointed to the Court in 1991, devoted his entire concurring opinion in *Adarand* to the premise that affirmative action harms racial minorities. Thomas contended that affirmative action programs taught “many” whites “that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence.” Affirmative action programs thus “[i]nevitably” “engender[ed] attitudes of superiority” on the part of whites or made whites “resent[ful]” of racial minorities, while “stamp[ing] minorities with a badge of inferiority” and potentially “caus[ing] them to develop dependencies or to adopt an attitude that they are ‘entitled’ to preferences.” Thomas castigated affirmative action as a form of “racial paternalism.”¹³³

Justice Thomas’s opinion built on and elaborated the shift in emphasis within the Court’s affirmative action jurisprudence, but there was considerable irony in Thomas’s condemnation of “paternalism.” Although Thomas purported to identify the interests of people of color as a class, many people of color supported the affirmative action programs that Thomas vilified and believed they benefited from those programs. For instance, Justice John Paul Stevens’s dissent in *Adarand* noted that “[n]o beneficiaries of the specific program under attack today have challenged its constitutionality—perhaps because they do not find the preferences stigmatizing, or perhaps because their ability to opt out of the program provides them all the relief they would need.”¹³⁴ Thomas’s argument assumed that he and similarly-minded Justices knew better than these people of color what was best for them. Like the *Adarand* majority, Thomas maintained that both people of color and whites benefited if people of color were denied access to affirmative action programs they advocated and sought to use.

Thus far, proponents of the argument that affirmative action harms even its supposed beneficiaries have not succeeded in establishing the unconstitutionality of all forms of race-based government

¹³² *Id.* at 229 (emphasis omitted) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting)).

¹³³ *Id.* at 241 (Thomas, J., concurring in part and concurring in the judgment).

¹³⁴ *Id.* at 247 n.5 (Stevens, J., dissenting).

affirmative action. *Grutter v. Bollinger* (2003)¹³⁵ upheld the University of Michigan Law School's affirmative action program,¹³⁶ endorsing Justice Powell's argument from *Bakke* "that student body diversity is a compelling state interest that can justify the use of race in university admissions."¹³⁷

But *Grutter* affirmed severe limits on the constitutionality of race-based government affirmative action. State universities may consider an applicant's race or ethnicity only "flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant," and every admissions slot must remain open to competition from applicants of all races.¹³⁸ *Grutter* also held that "race-conscious admissions policies must be limited in time."¹³⁹ It endorsed a twenty-five year lifespan for the constitutionality of race-based affirmative action plans designed "to further an interest in student body diversity in the context of public higher education," stating that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."¹⁴⁰

Even with these restrictions in place, moreover, *Grutter's* decision to uphold an affirmative action program provoked sharp criticism within the Court. Justice Thomas's separate opinion in *Grutter*, for instance, presented a yet more elaborate account of the harm that affirmative action assertedly causes people of color. Thomas repeated the charges in his *Adarand* concurrence, adding that "no social science has disproved" these charges.¹⁴¹ The addition implicitly acknowledged that Thomas and his compatriots had presented no empirical evidence to substantiate the claim that affirmative action leaves people of color worse off, but contended that the burden of proof rests with affirmative action supporters. Justice Thomas proceeded to identify still more harms that affirmative action programs purportedly inflict on people of color. He contended that affirmative action programs injure their direct participants by diminishing the participants' incentives to study hard,¹⁴² and then placing them in schools and jobs where they are not prepared to succeed.¹⁴³ He reported that affirmative action programs harm people of color who would have won admission without affirmative action because they are "tarred as

¹³⁵ 539 U.S. 306 (2003).

¹³⁶ *See id.* at 343.

¹³⁷ *Id.* at 325.

¹³⁸ *Id.* at 334.

¹³⁹ *Id.* at 342.

¹⁴⁰ *Id.* at 343.

¹⁴¹ *Id.* at 373 (Thomas, J., concurring in part and dissenting in part).

¹⁴² *See id.* at 377.

¹⁴³ *See id.* at 372.

undeserving” by the very existence of affirmative action.¹⁴⁴ Thomas also appeared to criticize affirmative action plans for not going far enough. Michigan’s admissions policy, for example, left black men underrepresented at the law school,¹⁴⁵ and did “nothing for those too poor or uneducated to participate in elite higher education.”¹⁴⁶ Justice Thomas assumed throughout his opinion that the people creating and supporting affirmative action programs were white “know-it-all elites”¹⁴⁷ who were conducting “their social experiments on other people’s children.”¹⁴⁸ The assumption ignored the people of color who had participated in the advocacy, creation, and implementation of affirmative action programs,¹⁴⁹ and the people of color who had voluntarily availed themselves of such programs.¹⁵⁰ But the assumption allowed Thomas to avoid explaining why this support and participation persists, if affirmative action inflicts so much damage on people of color.

The *Grutter* precedent’s future prospects have already become uncertain. In *Parents Involved in Community Schools v. Seattle School District No. 1* (2007),¹⁵¹ the Court returned to its emphasis on the harm that affirmative action programs assertedly inflict on people of color. *Parents Involved* struck down student assignment plans in Seattle, Washington, and Jefferson County, Kentucky, that sometimes used race to allocate students between public schools.¹⁵² The plans were intended to counter patterns of racial segregation in public education,¹⁵³ a project that would appear to benefit students of all races. In addition, it was difficult to argue that the plans could stigmatize anyone as less qualified because the school districts assigning children to public elementary and high schools were not judging any student’s relative qualifications or likelihood of academic success.¹⁵⁴ But the *Parents Involved* plurality nonetheless maintained that the student assignment plans inflicted a now-familiar litany of harms on people of

¹⁴⁴ *Id.* at 373.

¹⁴⁵ *See id.* at 372 n.11.

¹⁴⁶ *Id.* at 354 n.3.

¹⁴⁷ *Id.* at 373 n.11.

¹⁴⁸ *Id.* at 372.

¹⁴⁹ *See, e.g., supra* text accompanying note 126.

¹⁵⁰ *See, e.g.,* Brief of the University of Michigan Asian Pacific American Law Students Ass’n et al. as Amici Curiae in Support of Respondents at 20, *Grutter*, 539 U.S. 306 (No. 02-241) (“This Court should not require a system whereby the most selective law schools – the schools that open the door widest to the most prestigious jobs, professorships and judicial clerkships – effectively shut their doors to qualified minority students.”).

¹⁵¹ 551 U.S. 701 (2007).

¹⁵² *See id.* at 709–13, 716–17.

¹⁵³ *See id.*

¹⁵⁴ *See id.*

color: They “promote ‘notions of racial inferiority and lead to a politics of racial hostility,’ ‘reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin,’ and ‘endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict.’”¹⁵⁵ Here too, the plurality contended that it need not choose between competing sides or explain why the costs of affirmative action outweigh the benefits. The plurality insisted that both whites and people of color would be better off without affirmative action, no matter what the supporters of affirmative action programs and the people seeking to participate within those programs might think. The Justices purported to know better that people of color would come to rue the consequences if the Court did not severely restrict the scope and duration of affirmative action.

Mutual benefits arguments for limiting the rights and opportunities available to women and people of color remain prominent and practically effective, constituting a deep-seated structural similarity that connects such seemingly disparate contemporary debates as the contests over marital rape exemptions, antiabortion laws, and race-based affirmative action. As Parts III and IV will explore, modern mutual benefits discourse draws on longstanding ways of reasoning about women and people of color, and a lengthy history of arguments contending that both groups are better off with fewer rights and opportunities. Mutual benefits arguments have long been particularly prominent in eras, like our own, when reform movements strive to improve the status of women and people of color. The reform activity presumably undercuts claims that the legal system should privilege men over women, or whites over people of color.

The extensive record of mutual benefits discourse may help explain why courts, legislators, and commentators continue to take mutual benefits arguments to be matters of common sense requiring little elaboration, support, questioning, or investigation. Modern mutual benefits claims resonate with and invoke a long tradition of mutual benefits arguments in ways that may give this discourse a special power to persuade, too quickly with too little evidence. But historical mutual benefits arguments explicitly assumed that women and people of color were unusually poor decisionmakers unable to understand their own best interests, insisting that women prioritize domesticity above all else and that people of color were better off making

¹⁵⁵ *Id.* at 746 (plurality opinion) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion); *Shaw v. Reno*, 509 U.S. 630, 657 (1993); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting)).

fewer claims and demands on white society. Many of the practices that legal authorities and advocates once promoted as mutual benefits are now widely repudiated as pernicious inequality.

III

A LEGAL HISTORY OF PROTECTING WOMEN FROM THEMSELVES

Defenders of women's inequality have reported throughout American history that women's unequal status serves the joint interests of women and men. One of the most common justifications that lawmakers, jurists, and advocates have offered for limitations on women's legal rights has been that those limitations protect women from themselves and the self-defeating decisions they would make if given more freedom. Legal authorities and commentators have repeatedly explained that women are much better off with circumscribed legal rights that leave women securely tied to their family obligations, instead of unmoored from their domestic roles and vulnerable to the consequences of their own bad judgment. Indeed, the historical prominence of mutual benefits arguments in defending now-rejected practices of sex inequality is so striking that the Supreme Court pointed to the perniciousness of historical mutual benefits claims in creating its modern constitutional jurisprudence on sex discrimination. A plurality of the Court explained in 1973 that America's "long and unfortunate history of sex discrimination. . . . was rationalized" as serving women's own interests, and concluded that this "attitude of 'romantic paternalism' . . . in practical effect, put women, not on a pedestal, but in a cage."¹⁵⁶

Unsurprisingly, mutual benefits discourse has consistently tended to be most visible during periods in which limits on women's rights are under systematic attack. This Part focuses on two historical examples. The first explores how courts and treatises defended the common law's subordination of married women in the nineteenth century, an era in which a burgeoning woman's rights movement challenged the common law regime with a wide-ranging reform agenda seeking women's legal equality. The second explores how legal decisionmakers and commentators defended women-only protective labor laws in the early twentieth century after the Supreme Court struck down protective labor legislation that applied to male workers and

¹⁵⁶ *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion); *see also* *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529, 541 (Cal. 1971) (in bank) ("Laws which disable women from full participation in the political, business and economic arenas are often characterized as 'protective' and beneficial. . . . The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage.").

many feminists began arguing that the legal status of protective labor laws should be the same for men and women.

A. *The Common Law of Marriage*

Nineteenth-century courts and treatises championing married women's subordinated status at common law often explained that restricting wives' legal rights furthered the aligned interests of women and men because wives released from common law constraints would make choices, exercise privileges, and take actions that would prove disastrous for themselves and their families alike. This argument became especially prevalent after the emergence of the woman's rights movement in the middle of the century made the common law look like it required more defending than ever before.

Under common law coverture, a wife's legal identity was almost entirely subsumed, or covered, by her husband's. Married women could not sue, be sued, make contracts, own property, or keep their own earnings. Husbands had legal custody and control over a married couple's children.¹⁵⁷

Courts and treatises consistently stressed that the legal restraints coverture placed on married women promoted the shared interests of husbands and wives. Indeed, they claimed that if one spouse enjoyed any advantage, it was the wife rather than the husband. William Blackstone, whose *Commentaries on the Laws of England* provided what became the classic and most influential definition of coverture in the United States, explained that the common law safely ensconced a wife under her husband's "wing, protection, and cover."¹⁵⁸ He went on to "observe, that even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England."¹⁵⁹ Following in Blackstone's wake, American courts and treatises routinely insisted that coverture was designed for "[t]he protection of the wife,"¹⁶⁰ "for her good and for that of offspring."¹⁶¹

¹⁵⁷ See NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* 17, 51-55 (1982); MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 25 (1985); ELIZABETH BOWLES WARBASE, *THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN, 1800-1861*, at 7-24 (1987).

¹⁵⁸ WILLIAM BLACKSTONE, 1 *COMMENTARIES* *430.

¹⁵⁹ *Id.* at *433.

¹⁶⁰ *Short v. Battle*, 52 Ala. 456, 459 (1875).

¹⁶¹ EDWARD W. SPENCER, *A TREATISE ON THE LAW OF DOMESTIC RELATIONS* 101 (1911); see also OCIE SPEER, *A TREATISE ON THE LAW OF MARRIED WOMEN IN TEXAS* 24 (1901) ("[A wife's] separate existence and identity as a distinct person was suspended during coverture, or incorporated in that of her husband under whose protection she per-

The contention that coverture served women's and men's aligned interests—or favored women—might seem puzzling given the severe restrictions imposed on women's legal capacities and the mounting protests of the woman's rights movement. Modern legal authorities and commentators have denounced coverture's subordination of women. For instance, the Supreme Court in 1980 celebrated coverture's demise, reporting that a woman is no longer “regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being.”¹⁶² In the nineteenth century, woman's rights advocates directly contested the premise that women's legal inequality advanced the shared interests of women and men. The Declaration of Sentiments, adopted at the 1848 Seneca Falls convention that sparked the organization of the woman's rights movement,¹⁶³ condemned common law rules that made a woman “if married, in the eye of the law, civilly dead.” The Declaration described “[t]he history of mankind” as “a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her.”¹⁶⁴ Elizabeth Cady Stanton, who would become a leading woman's rights advocate and the movement's most creative intellectual force, explained at Seneca Falls that the “care and protection” men supposedly offered women was “such as the wolf gives the lamb—such as the eagle the hare he carries to his eyrie!!”¹⁶⁵

However, nineteenth-century courts and treatises expounding and enforcing coverture principles reasoned from a particular understanding of women's nature. They argued in favor of coverture even more vigorously in the face of challenges from the woman's rights movement.

formed everything.”); HENRY H. SPRAGUE, *WOMEN UNDER THE LAW OF MASSACHUSETTS* 26–27 (Boston, W.B. Clarke & Carruth 1884) (“Yet the very disabilities which the common law laid upon the wife were, for the most part, intended, says Blackstone again, in his Commentaries, for her protection and benefit, ‘so great a favorite is the female sex of the laws of England!’”).

¹⁶² *Trammel v. United States*, 445 U.S. 40, 52 (1980).

¹⁶³ See 1 *HISTORY OF WOMAN SUFFRAGE* 67–74 (Elizabeth Cady Stanton et al. eds., Ayer Co. 1985) (1881).

¹⁶⁴ Declaration of Sentiments (1848), *reprinted in id.* at 70, 70.

¹⁶⁵ ADDRESS OF MRS. ELIZABETH CADY STANTON, DELIVERED AT SENECA FALLS & ROCHESTER, N.Y.[.] JULY 19TH & AUGUST 2D, 1848, at 12 (New York, Robert J. Johnston 1870); see also SARAH M. GRIMKE, *LETTERS ON THE EQUALITY OF THE SEXES, AND THE CONDITION OF WOMAN* 10 (Boston, Isaac Knapp 1838) (“I ask no favors for my sex. I surrender not our claim to equality. All I ask of our brethren is, that they will take their feet from off our necks, and permit us to stand upright on that ground which God designed us to occupy.”).

Coverture's defenders maintained that women's appropriate sphere was limited to their family roles as wives and mothers, so coverture kept women exactly where they belonged. Treatises reported that women were "delicate, affectionate, confiding, dependent," while men were "capable of planning, providing, and protecting."¹⁶⁶ A husband's role was "to get, to travel abroad, and to defend." A wife's role was "to save, to stay at home, and to distribute that which is gotten, for the nurture of the children and family."¹⁶⁷ Supreme Court Justice Joseph Bradley, explaining in 1873 why states could constitutionally exclude women from the legal profession, similarly reasoned that "[t]he harmony . . . of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband." "The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother."¹⁶⁸

Coverture's advocates also insisted that women were dreadful decisionmakers. Common law treatises repeatedly contended that women with the freedom to structure their lives as they saw fit would make choices that would leave them worse off. For instance, treatises were certain that if married women had the right to enter into contracts, the agreements they reached would be disastrous for the women themselves. The first American family law treatise, published in 1816, anticipated that a married woman with the right to "bind herself by her contracts . . . would be liable to be arrested [perhaps for unpaid debts], taken in execution, and confined in a prison."¹⁶⁹ Forty-five years later, another treatise reported that married women's contract rights were still limited to protect women "against *their own* improvidence."¹⁷⁰ A 1900 treatise similarly declared that "feminine

¹⁶⁶ SPEER, *supra* note 161, at 23–24; see also EPAPHRODITUS PECK, *THE LAW OF PERSONS OR DOMESTIC RELATIONS* 26 (1913) (stressing "the greater strength and activity of the man, the greater gentleness and especially the maternal function of the woman").

¹⁶⁷ PEREGRINE BINGHAM, *THE LAW OF INFANCY AND COVERTURE* 184 (Exeter, George Lamson 1st Am. ed. 1824) (quoting THOMAS SMITH, *THE COMMONWEALTH OF ENGLAND*); see also JAMES SCHOULER, *A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS* 52–53 (Boston, Little, Brown, & Co. 1870) (same).

¹⁶⁸ *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring); see also *In re Goodell*, 39 Wis. 232, 245 (1875) ("The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. And all life-long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of the law, are departures from the order of nature; and when voluntary, treason against it.").

¹⁶⁹ TAPPING REEVE, *THE LAW OF BARON AND FEMME* 98 (New Haven, Oliver Steele 1816).

¹⁷⁰ WILLIAM H. CORD, *A TREATISE ON THE LEGAL AND EQUITABLE RIGHTS OF MARRIED WOMEN* 207 (Philadelphia, Kay & Bro. 1861).

weakness” was “the determining factor” accounting for continued restrictions on married women’s rights to contract. “The inexperience of the woman and the probability that her confidence, which she so freely accords, may be taken advantage of, are the chief considerations at the basis of such provisions.”¹⁷¹

More generally, defenders of the common law of marriage explained that coverture promoted marital harmony and aided both husbands and wives by facilitating the swift resolution of marital conflicts and discouraging wifely dissent. Placing decisionmaking authority with one spouse was “essential to family peace” “[i]n case of differences between husband and wife as to the management of the household.”¹⁷² Moreover, coverture gave a married woman—who was, “legally speaking, at her husband’s mercy”—an enormous incentive to stay in her husband’s good graces and avoid entering into marital disagreements. This obviously benefited husbands, but treatises assured their readers that “her constant study to please has kept him generally merciful,” leaving wives “on the whole as well protected, as well advanced” as men.¹⁷³

In contrast, treatise writers predicted that if the woman’s rights movement won more freedom for married women to make enforceable decisions contrary to their husbands’ wishes, wives would destroy their marital harmony, arouse the fierce (and potentially violent) opposition of their husbands, and undermine their own welfare. This argument contended that expanding married women’s formal legal rights would mean that wives would exercise even less practical power, largely because of what we would now characterize as the malevolence of their husbands. Peregrine Bingham explained that “[t]hey who, from some ill-defined notion of justice or generosity, would extend to women an absolute equality, only hold out to them a dangerous snare.”¹⁷⁴ If “the law by conferring equality on wives, . . . release[d] them from that necessity of pleasing which is at present

¹⁷¹ ISIDOR LOEB, *THE LEGAL PROPERTY RELATIONS OF MARRIED PARTIES* 34 (1900).

¹⁷² JOSEPH R. LONG, *A TREATISE ON THE LAW OF DOMESTIC RELATIONS* 119 (1905); *see also* BINGHAM, *supra* note 167, at 182 (“[I]t is absolutely necessary for the preservation of peace, that where two or more persons are destined to pass their lives together, one should be endued with such a pre-eminence as may prevent or terminate all contestation.”); W.C. RODGERS, *A TREATISE ON THE LAW OF DOMESTIC RELATIONS* 107 (Chicago, T.H. Flood & Co. 1899) (“Both cannot be paramount, and it is clear that if the authority of each be the same much friction might follow. The wife might insist on living in one place, the husband in another.”).

¹⁷³ JAMES SCHOUER, *A TREATISE ON THE LAW OF HUSBAND AND WIFE* 4 (Boston, Little, Brown, & Co. 1882); *see also* 1 WILLIAM H. CORD, *A TREATISE ON THE LEGAL AND EQUITABLE RIGHTS OF MARRIED WOMEN* 13 (Philadelphia, Kay & Bro. 2d ed. 1885) (same).

¹⁷⁴ BINGHAM, *supra* note 167, at 182–83.

imposed upon them,” “it would in fact, instead of strengthening, only subvert the empire they now enjoy.” A husband “forgets his self-love while secure of his prerogative, and derives enjoyment even from concession.” But if a wife acquired “rival power” with her husband, “the continually wounded pride of the stronger party would soon rouse up in him a dangerous antagonist for the weaker.” Husbands “would turn all [their] efforts to the forcible establishment of that prerogative which is now subdued by the dominion of female influence.”¹⁷⁵ James Schouler agreed that “[w]oman’s weakness has been her strongest weapon.”¹⁷⁶ He warned women against their efforts “to make the marriage terms equal,” reporting that legal equality or even expanding wives’ rights would unleash “the violence of man’s unbridled appetite.”¹⁷⁷ History demonstrated that women and marriage were both better off under laws “degrading to woman” than under laws “elevating her independence to the utmost.”¹⁷⁸

In sum, the common law of marriage and its defenders sought to render wives doubly voiceless. First, coverture denied married women almost all aspects of a separate legal identity, pervasively subordinating wives to their husbands’ authority. Second, coverture’s advocates insisted that the mounting reform efforts of the woman’s rights movement should be ignored because women had no legitimate cause for complaint. Coverture purportedly served the convergent interests of men and women, granting husbands control, wives protection, and both domestic peace. Women freed from common law strictures would make decisions and suffer consequences counter to their true interests and their proper roles as wives and mothers.

B. Women-Only Protective Labor Legislation

The premise that women would harm themselves if they had the autonomy associated with legal equality and the freedom to distance themselves from domesticity remained a powerful rationale for limiting women’s rights in the early twentieth-century debate over women-only protective labor legislation. The Supreme Court in *Lochner v. New York* (1905)¹⁷⁹ struck down protective labor legislation that applied to male workers. After *Lochner*, courts and commentators successfully employed rhetorical structures familiar from the nineteenth-century defense of common law coverture to establish that protective labor legislation, such as maximum hours laws or

¹⁷⁵ *Id.* at 183.

¹⁷⁶ SCHOULER, *supra* note 173, at 4; *see also* CORD, *supra* note 173, at 13 (same).

¹⁷⁷ SCHOULER, *supra* note 173, at 15.

¹⁷⁸ *Id.* at 4.

¹⁷⁹ 198 U.S. 45 (1905).

prohibitions on working in certain occupations or at night, could still be constitutional when applied exclusively to female workers.

The *Lochner* Court, like lower courts before it, believed that protective labor legislation regulating male workers failed to recognize men's full citizenship and to respect men's constitutional right to freedom of contract. Men with little functional bargaining power in the marketplace may have practically experienced their "freedom" from some protective labor laws as more of a burden than a boon. But *Lochner* reasoned that statutes "limiting the hours in which grown and intelligent men may labor to earn their living" were "meddlesome interferences with the rights of the individual."¹⁸⁰ Male workers were "able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action."¹⁸¹ The Pennsylvania Supreme Court had similarly explained in 1886 that applying protective labor legislation to a male worker was "an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States."¹⁸²

Advocates of women-only protective labor legislation successfully defended the statutes after *Lochner* by contending that restrictions on freedom of contract—when applied to women, but not men—served the aligned interests of the restricted workers and society as a whole. *Muller v. Oregon* (1908),¹⁸³ in which the Supreme Court upheld women-only protective labor legislation "without questioning in any respect the decision in *Lochner*,"¹⁸⁴ reflected the mindset. The *Muller* Court recognized that women might not have initially agreed to a legal regime that accorded women fewer rights than men. Man, the Court reported, "established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present."¹⁸⁵ But like nineteenth-century judges and treatises, the *Muller* Court was confident that the system of women's legal subordination, once established, operated in women's interest and protected them. Despite the changes the woman's rights movement had wrought, *Muller* explained, woman "still looks to her brother and depends upon him." In the Court's view, women-only protective labor legislation fit smoothly within the

¹⁸⁰ *Id.* at 61.

¹⁸¹ *Id.* at 57.

¹⁸² *Godcharles v. Wigeman*, 6 A. 354, 356 (Pa. 1886).

¹⁸³ 208 U.S. 412 (1908).

¹⁸⁴ *Id.* at 423.

¹⁸⁵ *Id.* at 421.

common law framework. Protective labor laws also operated to both women's "benefit" and "for the benefit of all."¹⁸⁶

Of course, there were obstacles to describing women-only protective labor legislation as advancing women's interests. Many women's advocates, who did not look fondly upon common law coverture, vigorously opposed such legislation. These feminists rejected mutual benefits arguments for limiting women's rights as "nothing but the familiar attitude of the common law brought back for a second blooming."¹⁸⁷ They explained that women-only protective labor legislation "purports to protect" women, but actually "protects men workers from feminine competition."¹⁸⁸ "[T]his latter-day 'protection' is not very different from the method of the common law, which gave a woman's property to her husband in order to protect her."¹⁸⁹

Feminist critics argued after *Lochner* that if protective labor statutes were unconstitutional for men, they were also unconstitutional for women because women were equal citizens before the law and under the Constitution. Feminists acknowledged that the "regard of discriminations as 'protection' is traditional" where women's legal status is concerned, but they insisted that "[t]he modern demand of the modern woman is away with protection, and on with equality."¹⁹⁰ They sought to make women "equals of men" and urged women to pursue the same strategies for improving working conditions that were available to male workers, such as unionization.¹⁹¹

In addition to feminist opposition, it was also unclear how many female workers supported women-only protective labor laws or complied with them. While women-only protective labor laws may have helped some women in some situations, these laws limited women's choices and employment opportunities, especially because they applied only to women and subjected them to unwaivable restrictions on hours, working conditions, and occupations that did not bind men. Indeed, the modern Supreme Court would ultimately stress the unequal constraint on women's employment prospects and employment decisions in explaining why women-only protective labor laws are inconsistent with sex equality. More than eight decades after its *Muller* decision, the Court noted that "[c]oncern for a woman's

¹⁸⁶ *Id.* at 422.

¹⁸⁷ Blanche Crozier, Note, *Constitutional Law—Regulation of Conditions of Employment of Women. A Critique of Muller v. Oregon*, 13 B.U. L. REV. 276, 291 (1933).

¹⁸⁸ *Id.* at 287.

¹⁸⁹ *Id.* at 291.

¹⁹⁰ Burnita Shelton Matthews, *Women Should Have Equal Rights with Men: A Reply*, 12 A.B.A. J. 117, 120 (1926).

¹⁹¹ *Working Women and the Laws, LADIES' GARMENT WORKER*, Nov. 1912, at 11, 11.

existing or potential offspring historically has been the excuse for denying women equal employment opportunities” and declared that “[i]t is no more appropriate for the courts than it is for individual employers to decide whether a woman’s reproductive role is more important to herself and her family than her economic role.”¹⁹²

Nonetheless, defenders of women-only protective labor legislation in the early twentieth century effectively built their case on the understanding of women’s nature embedded in common law opinions and treatises.¹⁹³ They explained that women’s true responsibilities and greatest triumphs were domestic, and that the country would thrive when its women focused on bearing and rearing healthy and vigorous young citizens. *Muller* reasoned that women-only protective labor laws served the joint interests of women and society because the laws preserved a woman’s capacity for the “proper discharge of her maternal functions,” protecting both “her own health” and “the well-being of the race.”¹⁹⁴ Lawyers successfully defending another women-only protective labor law before the Court seven years later stressed the aligned interests of native-born white women and the nation that would benefit from their increased reproductive efforts. The advocates explained that “[t]he limitation of the number of hours of woman’s labor in gainful occupations to not over a half of her waking time may check the rapid decline in reproduction of the older American stocks and in any event leaves her free for the development of mind and body for wifehood and motherhood.”¹⁹⁵

State courts upholding women-only protective labor legislation similarly contended that such laws left both women and society better off by respecting women’s reproductive capacities and obligations. Courts explained that “weakly and sickly women cannot be the mothers of vigorous children.” Women-only protective labor legislation safeguarded both female workers and “the health, morals, and general welfare of the public”¹⁹⁶ because these statutes “preserve[d] the health, strength, and vigor of women,”¹⁹⁷ “insure[d] the produc-

¹⁹² *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991) (citing *Muller v. Oregon*, 208 U.S. 412 (1908)).

¹⁹³ Joan Zimmerman has argued that some advocates of women-only protective labor legislation hoped that the success of these laws would eventually pave the way for protective labor legislation that applied to male workers as well. See Joan G. Zimmerman, *The Jurisprudence of Equality: The Women’s Minimum Wage, the First Equal Rights Amendment, and Adkins v. Children’s Hospital, 1905–1923*, 78 J. AM. HIST. 188, 199 & n.15 (1991). However, the arguments that advocates advanced for women-only protective labor legislation stressed women’s differences from men.

¹⁹⁴ *Muller*, 208 U.S. at 422.

¹⁹⁵ *Miller v. Wilson*, 236 U.S. 373, 377–78 (1915); see also *id.* at 384 (upholding statute).

¹⁹⁶ *W.C. Ritchie & Co. v. Wayman*, 91 N.E. 695, 697 (Ill. 1910).

¹⁹⁷ *People v. Elerding*, 98 N.E. 982, 984 (Ill. 1912).

tion of vigorous offspring by them,”¹⁹⁸ left women with “the vitality necessary to the proper discharge of their maternal functions, the rearing and education of children, and the maintenance of the home,”¹⁹⁹ and protected “the ultimate strength and virility of the race.”²⁰⁰

Advocates of women-only protective labor legislation insisted that women’s fundamental roles and interests were domestic, and proceeded to explain that women—especially “the great, inarticulate body of working women”²⁰¹—were poor decisionmakers with respect to judgments about whether, when, and how to work outside the home. There was considerable irony in this argument because some of the most prominent proponents of women-only protective labor legislation after *Lochner* made sex-neutral laws impossible were themselves professional women who had greatly benefited from their own increased access to the marketplace. But supporters of women-only protective labor legislation nevertheless maintained that women left to their own devices made unwise choices about market work that were contrary to their best interests. Limiting women’s rights to negotiate the terms of their paid employment purportedly protected women from themselves.

Some government advocates for women-only protective labor laws explained that poor female workers, especially those caring for children, lacked the opportunity for sound decisionmaking and were too overtaxed to negotiate reasonable labor arrangements. Mary Anderson, chief of the Women’s Bureau in the Department of Labor,²⁰² reported that “[w]omen who are wage-earners with one job in the factory and another in the home have little time and energy left to carry on the fight to better their economic status. They need the help of other women, and they need labor laws.”²⁰³

Other official advocates of women-only protective labor legislation went further, suggesting that female factory workers had little inherent capacity to make judgments about work outside the home that merited legislative respect. The New York State Factory Investigating Commission, created to investigate women’s factory work at night, successfully recommended that the state legislature prohibit

¹⁹⁸ *W.C. Ritchie & Co.*, 91 N.E. at 697.

¹⁹⁹ *Elerding*, 98 N.E. at 984.

²⁰⁰ *Commonwealth v. Riley*, 97 N.E. 367, 369 (Mass. 1912), *aff’d*, 232 U.S. 671 (1914).

²⁰¹ Alice Hamilton, *Protection for Women Workers*, 72 FORUM 152, 160 (1924).

²⁰² See Mary Anderson, *Should There Be Labor Laws for Women? Yes*, GOOD HOUSEKEEPING, Sept. 1925, at 53, 53.

²⁰³ *Id.* at 180.

such work.²⁰⁴ Its 1913 report explained that “[i]gnorant women can scarcely be expected to realize the dangers not only to their own health but to that of the next generation from such inhuman usage. But it is precisely to prevent such conditions of toil as threaten the welfare of society that labor laws are designed.”²⁰⁵

Whatever the cause, though, advocates of women-only protective labor legislation agreed that poor working women were untrustworthy decisionmakers who should not be permitted to make choices that impaired their ability to bear and raise children. Sophonisba Breckinridge, a social reformer and professor,²⁰⁶ freely admitted that women-only protective labor laws could severely limit women’s employment prospects: “For example, the prohibition against work in mines or against night work may very well so limit the opportunities of women to find employment as to result in increased congestion and decreased wages in such other occupations as are open to them.”²⁰⁷ But Breckinridge explained that the state could nonetheless not respect individual judgments about paid labor from “improvident, unworkmanlike, unorganized women, who are yet the mothers, actual or prospective, of the coming generation.”²⁰⁸ Women-only protective labor laws recognized what was best for these women, even if the women themselves did not. The legislators enacting these statutes understood “that no group of . . . women workers should be allowed to unfit themselves by excessive hours of work, by standing, or other physical strain, for the burden of motherhood which each of them should be able to assume.”²⁰⁹

Secretary of Labor James J. Davis similarly reasoned that the law could not abide by women’s decisions to “invade the more rough and tumble activities of men” because these choices would leave women “[p]hysiologically . . . hurt,” jeopardizing women, society, and “humanity itself.” Davis supported women-only protective labor legislation because he was “forever and unalterably opposed to the employment of women in any such manner as will destroy or even

²⁰⁴ See *People v. Charles Schweinler Press*, 108 N.E. 639, 640 (N.Y. 1915).

²⁰⁵ REPORT OF THE NEW YORK STATE FACTORY INVESTIGATING COMMISSION 240 (1913).

²⁰⁶ See, e.g., ELLEN FITZPATRICK, *ENDLESS CRUSADE: WOMEN SOCIAL SCIENTISTS AND PROGRESSIVE REFORM* 176–95, 209–12, 214 (1990).

²⁰⁷ S.P. Breckinridge, *Legislative Control of Women’s Work*, 14 J. POL. ECON. 107, 108 (1906).

²⁰⁸ *Id.* at 109.

²⁰⁹ *Id.* at 107.

endanger their future motherhood. Wherever we see women at work we must think of them in terms of motherhood.”²¹⁰

Courts reviewing women-only protective labor laws agreed that women’s capacity to make decisions about market work was suspect, threatening everyone’s welfare. As a Pennsylvania court upholding a maximum hours law for female workers explained,²¹¹ the state legislature was better able to identify women’s real interests and needs than women themselves:

The state at large is more interested than either employer or employee in preserving that normal physical condition which assures to the individual the most of health and happiness and is least likely to transmit physical, mental or moral defects to succeeding generations. The legislature has adjudged that the health of adult females is imperiled by being employed at labor in the establishments named for a longer time than stated in the act. The adult females, or even the employer, may think otherwise, but self-interest from a financial standpoint is often an unsafe guide.²¹²

Here too, jurists, lawmakers, and advocates defended limits on women’s legal rights on the ground that the limits operated to the mutual benefit of women and society. Women were meant to devote themselves to childbearing and childrearing. If women secured equal freedom with men, they would make decisions about work outside the home that would leave them and everyone else worse off.

IV

A LEGAL HISTORY OF MUTUAL BENEFITS ARGUMENTS FOR RACIAL INEQUALITY

Arguments that people of color were better off with fewer rights and opportunities also undergirded historical debates about racial inequality. Courts, legislators, and commentators asserted that people of color were naturally suited for subordinate societal roles and maintained that racial harmony aiding all races was best achieved when people of color accommodated themselves to whites, severely limiting the claims they made on white people and white-dominated institutions.

This Part explores two striking historical examples of the contention that legalized white supremacy and African American subordina-

²¹⁰ Address of Hon. James J. Davis, Secretary of Labor, Before Second Women’s Industrial Conference, Washington 6 (Jan. 18, 1926) (on file with author and the *New York University Law Review*; Mary van Kleeck Papers, Sophia Smith Collection, Smith College).

²¹¹ See *Commonwealth v. Beatty*, 15 Pa. Super. 5, 12–13, 20 (1900).

²¹² *Id.* at 16–17.

tion benefited blacks and whites alike.²¹³ The first example focuses on the defense of slavery that lawmakers and commentators advanced from the nation's earliest days and elaborated as the abolitionist movement grew stronger in the decades preceding the Civil War. The second focuses on the defense of racial segregation that legal authorities and advocates initiated before the Civil War and then intensified in the century after the war as the civil rights movement mounted an escalating challenge to Jim Crow.

A. Slavery

Defenders of the American system of chattel slavery commonly explained that bondage furthered the mutual interests of African American slaves and white masters. Senators reported that slavery “has been a great blessing to both of the races—the European and African”²¹⁴ and was “indispensable to the peace and happiness of both.”²¹⁵ Judges stressed that slavery “subverses the best interests of

²¹³ Mutual benefits arguments for racial inequality also appeared in discussions of Native Americans. Presidents and other federal officials in the 1820s and 1830s explained that removing Native Americans from eastern states helped both whites and Native Americans. The advantages to whites were obvious: Removal permitted whites to take over the Native Americans' land. See Andrew Jackson, Second Annual Message (Dec. 6, 1830), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1908, at 500, 519–20 (James D. Richardson ed., 1909) (“[A] speedy removal . . . will place a dense and civilized population in large tracts of country now occupied by a few savage hunters.”). However, advocates contended that removal would also leave Native Americans better off by shielding them from conflict with whites and (somehow) encouraging Native Americans to adopt white customs and traditions. See *id.* at 520 (“[Removal] will separate the Indians from immediate contact with settlements of whites; free them from the power of the States; enable them to pursue happiness in their own way and under their own rude institutions; will retard the progress of decay, which is lessening their numbers, and perhaps cause them gradually, under the protection of the Government and through the influence of good counsels, to cast off their savage habits and become an interesting, civilized, and Christian community.”); Elbert Herring, *Report from the Office of Indian Affairs*, in H.R. DOC. NO. 22-2, at 159, 160 (1832) (“[Removal constitutes] the sole chance of averting Indian annihilation. Founded in pure and disinterested motives, may it meet the approval of heaven, by the complete attainment of its beneficent ends!”); Letter from James Barbour, Dep't of War, to William McLean, Chairman, House Comm. of Indian Affairs (Apr. 29, 1828), reprinted in 4 REG. DEB. 2750 (1828) (“[T]he plan of collocating the Indians on suitable lands West of the Mississippi, contains the elements of their preservation; and will tend, if faithfully carried into effect, to produce the happiest benefits upon the Indian race.”); James Monroe, To the Senate and House of Representatives of the United States (Jan. 27, 1825), in A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1908, *supra*, at 280, 281 (“[T]he removal of the tribes from the territory which they now inhabit . . . would not only shield them from impending ruin, but promote their welfare and happiness.”).

²¹⁴ CONG. GLOBE, 25th Cong., 3d Sess. 177 (1839) (statement of Senator John Calhoun).

²¹⁵ John C. Calhoun, Speech on the Reception of Abolition Petitions, Delivered in the Senate, February 6th, 1837, in 2 REPORTS AND PUBLIC LETTERS OF JOHN C. CALHOUN 625, 630 (Richard K. Crallé ed., New York, D. Appleton & Co. 1855).

both races.”²¹⁶ Writers declared that slavery was structured “so as best to promote [the slave’s] own good and that of society.”²¹⁷

In fact, many of the most prominent proslavery advocates went further than these claims of mutual benefit to master and slave. Where abolitionists condemned slavery as an “abyss of misery,”²¹⁸ slavery defenders insisted that America’s slaves were living in “Eden.”²¹⁹ Slaves in the United States were “the happiest three millions of human beings on whom the sun shines,”²²⁰ “the happiest portion of our society,”²²¹ “the happiest of the human race,”²²² “the happiest, and, in some sense, the freest people in the world.”²²³ “There [was] not upon the face of the earth, any class of people, high or low, so perfectly free from care and anxiety.”²²⁴ Slavery was “the most perfect system of social and political happiness, that ever has existed.”²²⁵ If slavery disadvantaged anyone according to proslavery accounts, it was the master whose “labors commence[d] just when the slave’s end.”²²⁶ Unlike the joyous and carefree slave, “[t]he owner of

²¹⁶ Jos. H. Lumpkin, *Judge Lumpkin’s Report on Law Reform*, U.S. MONTHLY L. MAG., Jan. 1850, at 68, 78.

²¹⁷ GEORGE FITZHUGH, CANNIBALS ALL! OR, SLAVES WITHOUT MASTERS 116 (Richmond, A. Morris 1857).

²¹⁸ GEORGE BUCHANAN, AN ORATION UPON THE MORAL AND POLITICAL EVIL OF SLAVERY 11 (Baltimore, Philip Edwards 1793); see also Speech of Mr. James A. Thome (May 6, 1834), in DEBATE AT THE LANE SEMINARY, CINCINNATI 7, 8 (Boston, Garrison & Knapp 1834) (“[I]s it not unquestionable that slavery is the parent of more suffering than has flowed from any one source since the date of its existence?”).

²¹⁹ J.H. HAMMOND, TWO LETTERS ON SLAVERY IN THE UNITED STATES, ADDRESSED TO THOMAS CLARKSON, ESQ. 25 (Columbia, Allen, McCarter, & Co. 1845); see also George M’Duffie, Governor’s Message, in JOURNAL OF THE GENERAL ASSEMBLY, OF THE STATE OF SOUTH CAROLINA, FOR THE YEAR 1835, at 3, 7 (“In a word, our slaves are cheerful, contented and happy, much beyond the general condition of the human race, except where those foreign intruders and fatal ministers of mischief, the emancipationists, like their arch-prototype in the Garden of Eden, and actuated by no less envy, have tempted them to aspire above the condition to which they have been assigned in the order of Providence.”).

²²⁰ HAMMOND, *supra* note 219, at 25.

²²¹ THOMAS R. DEW, REVIEW OF THE DEBATE IN THE VIRGINIA LEGISLATURE OF 1831 AND 1832, at 111 (Richmond, T.W. White 1832); *Abolition of Negro Slavery*, 12 AM. Q. REV. 189, 252 (1832) (same).

²²² DEW, *supra* note 221, at 100; *Abolition of Negro Slavery*, *supra* note 221, at 241 (same).

²²³ FITZHUGH, *supra* note 217, at 29.

²²⁴ M’Duffie, *supra* note 219, at 7.

²²⁵ *Id.*; see also J.P. KENNEDY, SWALLOW BARN, OR A SOJOURN IN THE OLD DOMINION 455 (New York, G.P. Putnam & Co. rev. ed. 1853) (“Having but few and simple wants, they seem to me to be provided with every comfort which falls within the ordinary compass of their wishes; and, I might say, that they find even more enjoyment,—as that word may be applied to express positive pleasures scattered through the course of daily occupation—than any other laboring people I am acquainted with.”).

²²⁶ FITZHUGH, *supra* note 217, at 26.

slaves” was “usually condemned to a constant, permanent and anxious burthen of care and expenditure.”²²⁷

This rosy view of slavery, which nineteenth-century abolitionists²²⁸ and twentieth-century civil rights advocates²²⁹ denounced and debunked, rested on the premise that African Americans were inherently unable to manage their own lives or to function successfully outside of bondage. Slavery’s supporters maintained that America’s slaves were “incapable of taking part with [whites], in the exercise of self-government.”²³⁰ More than that, they were “incapable of self-preservation.”²³¹ “A negro” had “the power of thought and volition, and [was] capable of ministering to the cravings of his appetite, and providing for their gratification, but [did] not generally have judgment to direct him in what is proper for him, or prudence and self-denial to restrain him from the use of what is injurious.”²³² “[T]he negro” was “in his moral constitution, a dependant upon the white race; dependant for guidance and direction even to the procurement of his most indispensable necessaries. Apart from this protection he ha[d] the helplessness of a child,—without foresight, without faculty of contrivance, without thrift of any kind.”²³³

²²⁷ *Peter v. Hargrave*, 46 Va. (5 Gratt.) 12, 19 (1848).

²²⁸ See CONG. GLOBE, 31st Cong., 1st Sess. app. at 767 (1850) (statement of Representative Thaddeus Stevens) (“[G]entlemen on this floor, and in the Senate, had repeatedly, during this discussion, asserted that slavery was a moral, political, and personal blessing; that the slave was free from care, contented, happy, fat, and sleek. Comparisons have been instituted between slaves and laboring freemen, much to the advantage of the condition of slavery. Instances are cited where the slave, after having tried freedom, had voluntarily returned to resume his yoke. Well, if this be so, let us give all a chance to enjoy this blessing. Let the slaves, who choose, go free; and the free, who choose, become slaves.”); FREDERICK DOUGLASS, *MY BONDAGE AND MY FREEDOM* 99 (New York & Auburn, Miller, Orton & Co. 1857) (“The remark is not unfrequently made, that slaves are the most contented and happy laborers in the world. They dance and sing, and make all manner of joyful noises—so they do; but it is a great mistake to suppose them happy because they sing. The songs of the slave represent the sorrows, rather than the joys, of his heart; and he is relieved by them, only as an aching heart is relieved by its tears.”).

²²⁹ See Sterling A. Brown, *Negro Character as Seen by White Authors*, 2 J. NEGRO EDUC. 179, 186 (1933) (“Designed originally to defend slavery, [the contented slave stereotype] is now a convenient argument for those wishing to keep ‘the Negro in his place’—out of great love for him, naturally—believing that he will be happier so.”).

²³⁰ *Vance v. Crawford*, 4 Ga. 445, 459 (1848); see also *M’Duffie*, *supra* note 219, at 6 (“[T]hey are yet wholly unprepared for any thing like a rational system of self-government.”); GEORGE FITZHUGH, *SOCIOLOGY FOR THE SOUTH, OR THE FAILURE OF FREE SOCIETY* 83 (Richmond, A. Morris 1854) (“[I]t is clear the Athenian democracy would not suit a negro nation, nor will the government of mere law suffice for the individual negro. He is but a grown up child, and must be governed as a child . . .”).

²³¹ *Gorman v. Campbell*, 14 Ga. 137, 143 (1853).

²³² *Collins v. Hutchins*, 21 Ga. 270, 274 (1857).

²³³ KENNEDY, *supra* note 225, at 453; see also Editorial, *DAILY DISPATCH* (Richmond), Aug. 7, 1852, at 1 (“‘Africa, Hayti, and Jamaica, prove that Cuffee cannot get along

Slavery's advocates combined their self-serving account of the nature and capacities of slaves with an extremely partial version of how American slavery was practiced that ignored the "cruelties"²³⁴ and "barbarous inhumanity"²³⁵ that abolitionists described. In the proslavery vision, African Americans were naturally suited for slavery and America's slaveholders had created a benign structure to provide it. One United States congressman from Maryland²³⁶ called American slavery a "mild and beneficent guardianship," "secure from harm."²³⁷ The Georgia Supreme Court described "the relation of master and slave in Georgia" as "an institution subject to the law of kindness to as great an extent as any institution springing out of the relation of employer and employed, any where existing amongst men."²³⁸

Proslavery voices routinely insisted that slaves performed less work, with more security and comfort, than the white working class in the areas where most abolitionists lived, Europe and the northern United States. Compared to the American slaveholding South, "few countries" left "so much" "to the share of the laborer" and "exact[ed]" "so little," or paid "more kind attention" "in sickness or infirmities of age."²³⁹ In practice, "[t]he free laborer" was "more of a slave than the negro, because he works longer and harder for less allowance than the slave, and has no holiday, because the cares of life with him begin when its labors end."²⁴⁰ For instance, "in Great Britain the poor and laboring classes" were "more miserable and degraded, morally and physically, than [America's] slaves; to be elevated to the actual condition of whom, would be . . . a most glorious act of *emancipation*."²⁴¹ In one proslavery poet's verse, the American slave was:

without a master. Left to himself, he rapidly deteriorates back again to the savage cannibal." (quoting the New York Herald)).

²³⁴ WILLIAM GOODELL, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE* 224 (New York, Am. & Foreign Anti-Slavery Soc'y 3d ed. 1853).

²³⁵ *AMERICAN SLAVERY AS IT IS: TESTIMONY OF A THOUSAND WITNESSES* 9 (New York, Am. Anti-Slavery Soc'y 1839).

²³⁶ See CHARLES H. BOHNER, *JOHN PENDLETON KENNEDY: GENTLEMAN FROM BALTIMORE* 124–26 (1961).

²³⁷ KENNEDY, *supra* note 225, at 453.

²³⁸ *Neal v. Farmer*, 9 Ga. 555, 582 (1851).

²³⁹ Calhoun, *supra* note 215, at 631.

²⁴⁰ FITZHUGH, *supra* note 217, at 30.

²⁴¹ HAMMOND, *supra* note 219, at 26.

Guarded from want, from beggary secure,
He never feels what hireling crowds endure,
Nor knows, like them, in hopeless want to crave,
For wife and child, the comforts of the slave.²⁴²

Indeed, many of slavery's defenders maintained that the master-slave relationship was too close, intimate, caring, and generous to even resemble employment in the industrial economy. They stressed that slavery was best understood as a domestic relation, whose hierarchical bonds of reciprocal obligation, mutual affection, and common concern mirrored the relationship between husband and wife or parent and child. Advocates explained that "besides wife and children, brothers and sisters, dogs, horses, birds and flowers—slaves, also, belong to the family circle."²⁴³ "[T]he interests of master and slave are bound up together, and each in his appropriate sphere naturally endeavors to promote the happiness of the other."²⁴⁴ They reported "that there is nothing but the mere relations of husband and wife, parent and child, brother and sister, which produce a closer tie, than the relation of master and servant." "[T]he slaves of a good master, are his warmest, most constant, and most devoted friends; they have been accustomed to look up to him as their supporter, director and defender."²⁴⁵

Where proslavery advocates described slavery as a shared blessing for master and slave, they warned that emancipation would be a mutual disaster with each race suffering terribly in its own way. Emancipation could "easily be shown to be utterly subversive of the interests, security, and happiness, of both the blacks and whites."²⁴⁶

Whites would be devastated economically. "[T]he African race, notoriously idle and improvident," would leave whites' plantations untended. "Few, very few" would be willing "to do a stroke of work, none to labor continuously."²⁴⁷ The production of cotton would plummet, the commodity's price would skyrocket, and it would not be "extravagant to say, that for little more than two millions of negro slaves, cut loose from their tranquil moorings, and set adrift upon the untried ocean, of at least a doubtful experiment, ten millions of poor

²⁴² WILLIAM J. GRAYSON, *THE HIRELING AND THE SLAVE, CHICORA, AND OTHER POEMS* 44 (Charleston, McCarter & Co. 1856).

²⁴³ FITZHUGH, *supra* note 217, at 301.

²⁴⁴ *Id.* at 302.

²⁴⁵ DEW, *supra* note 221, at 109–10; *Abolition of Negro Slavery*, *supra* note 221, at 251 (similar).

²⁴⁶ DEW, *supra* note 221, at 8; *Abolition of Negro Slavery*, *supra* note 221, at 193 (similar).

²⁴⁷ HAMMOND, *supra* note 219, at 34.

white people would be reduced to destitution, pauperism and starvation.”²⁴⁸

The former slaves would suffer even more from emancipation—“a positive curse, depriving them of a guardianship essential to their happiness.”²⁴⁹ Slavery’s defenders anticipated that emancipation would leave blacks morally adrift, vulnerable to their own worst instincts, and subject to potentially genocidal retribution. Freed slaves, unable or unwilling to support themselves through work, would turn to “self-destruction,” “debaucheries,”²⁵⁰ “murder,” and “every species of crime.”²⁵¹ “It was well known that they were an indolent people, improvident, averse to labor: when emancipated, they would either starve or plunder.”²⁵² A former slave’s “idleness [would] produce want and worthlessness, and his very worthlessness and degradation [would] stimulate him to deeds of rapine and vengeance.” “[T]he provoked whites,” in turn, would respond with violence of their own.²⁵³ Proslavery advocates were quick to assert that white violence against freedmen would be justified, but the threat of white malevolence palpably remained. Many predicted that the ultimate result of emancipation would be the “drenching” of “the country in blood” and even the annihilation of black people in America.²⁵⁴ “‘Ere many moons went by,’ the African race would be exterminated, or reduced again to slavery, their ranks recruited . . . by fresh ‘Emigrants’ from their father land.”²⁵⁵

The American regime of chattel slavery favored the interests of slaveholders over slaves pervasively, overwhelmingly, and systematically. But lawmakers and commentators adopted a convenient appraisal of the limited capacities of African Americans and an elaborately sanitized account of the practice of slavery in the United States. Thus armed, they insisted that slavery served the aligned interests of slaves and masters, and warned that emancipation would be calamitous for both groups. This pattern of championing the legalized enforcement of white supremacy and African American subordination

²⁴⁸ M’Duffie, *supra* note 219, at 10.

²⁴⁹ *Id.* at 6.

²⁵⁰ Thomas Ruffin, Address of Thomas Ruffin Delivered Before the State Agricultural Society of North Carolina, October 18th, 1855, in 4 *THE PAPERS OF THOMAS RUFFIN* 323, 330 (J.G. de Roulhac Hamilton ed., 1920).

²⁵¹ 10 *ANNALS OF CONG.* 235 (1800) (statement of Representative James Jones).

²⁵² 2 *ANNALS OF CONG.* 1455 (1790) (statement of Representative William Smith).

²⁵³ DEW, *supra* note 221, at 101; *Abolition of Negro Slavery*, *supra* note 221, at 242 (same).

²⁵⁴ Calhoun, *supra* note 215, at 630.

²⁵⁵ HAMMOND, *supra* note 219, at 34; *see also* GRAYSON, *supra* note 242, at 68–69 (“If slavery guard his subject race no more, . . . war’s swift sword, or peace, with slow decay, Must, like the Indian, sweep his race away.”).

as a mutual benefit to whites and blacks persisted after slavery's abolition in the defense of racial segregation.

B. Racial Segregation

Even before slavery's end, many whites were eager to find additional ways to express, enforce, and maintain their hierarchical position over African Americans. Racial segregation laws, in place in some contexts before emancipation, became a central vehicle for perpetuating legalized racial inequality in the century after the Civil War. Yet much like slavery's supporters, segregationists routinely contended that segregation furthered the shared interests of blacks and whites, asserted that African Americans opposing segregation did not understand their own best interests, and warned that integration would leave both blacks and whites much worse off.

This mutual benefits argument for segregation was visible as early as the 1840s. In 1846, African Americans in Boston petitioned the city's Primary School Committee seeking the desegregation of city schools.²⁵⁶ The committee rejected the petition,²⁵⁷ insisting that racial segregation helped both whites and blacks. As a subcommittee explained, interracial contact was inherently harmful to all concerned. "[T]he less the colored and white people become intermingled, the better it will be for both races." "We maintain, that the true interests of both races require, that they should be kept distinct. Amalgamation is degradation."²⁵⁸

The subcommittee proceeded to report that racial integration would impair the educational opportunities of whites and blacks alike. The subcommittee assumed that integrating primary schools would not reduce racial prejudice, warned that white children "would vex and insult" their African American classmates,²⁵⁹ and predicted "that the attendance of the colored children would, in the aggregate, be seriously diminished."²⁶⁰ White children, for their part, would desert integrated public schools in droves, either because "[m]any parents would not allow their children to associate with colored children" or because of the "discord" that racial integration would create.²⁶¹

²⁵⁶ See CITY DOCUMENT NO. 23, REPORT TO THE PRIMARY SCHOOL COMMITTEE, JUNE 15, 1846, ON THE PETITION OF SUNDRY COLORED PERSONS, FOR THE ABOLITION OF THE SCHOOLS FOR COLORED CHILDREN. WITH THE CITY SOLICITOR'S OPINION 2 (Boston, J.H. Eastburn 1846).

²⁵⁷ See *id.* at 2, 30.

²⁵⁸ *Id.* at 13.

²⁵⁹ *Id.* at 14.

²⁶⁰ *Id.* at 13–14.

²⁶¹ *Id.* at 14. Boston's Grammar School Board rejected more integration petitions in 1849. See REPORT OF A SPECIAL COMMITTEE OF THE GRAMMAR SCHOOL BOARD,

When African Americans in Boston turned to litigation,²⁶² the Massachusetts Supreme Judicial Court accepted the contention that racial segregation was in the best interests of both whites and blacks. The court explained in 1850 that Boston school authorities, “apparently upon great deliberation, have come to the conclusion, that the good of both classes of schools will be best promoted, by maintaining the separate primary schools for colored and for white children, and we can perceive no ground to doubt, that this is the honest result of their experience and judgment.”²⁶³

The Massachusetts legislature prohibited racial segregation in the state’s public schools in 1855.²⁶⁴ But the claim that segregation was a shared benefit for blacks and whites, and that integration would harm both, persisted for over a century.

Southern states advanced mutual benefits arguments in establishing and maintaining racially segregated public schools after the Civil War. The North Carolina constitutional convention of 1868 resolved that “the interests and happiness of the two races would be best promoted by the establishment of separate schools.”²⁶⁵ The New Orleans school board took a similar approach in 1877. It explained that “its paramount duty” was “to give the best education possible with the means at its disposal to the whole population, without regard to race, color or previous condition” and contended “that this end can be best attained by educating the different races in separate schools.”²⁶⁶ The United States Circuit Court in Louisiana, which

PRESENTED AUGUST 29, 1849, ON THE PETITION OF SUNDRY COLORED PERSONS, PRAYING FOR THE ABOLITION OF THE SMITH SCHOOL: WITH AN APPENDIX 3–7 (Boston, J.H. Eastburn 1849). The board endorsed a subcommittee report that stressed its “tender regard to the best interests” of the city’s African American population, *id.* at 42–43, and warned that African American students in racially integrated schools would face both social ostracism and insurmountable academic competition. Black children could not “hope to escape the ‘cold shoulder,’ the petty tyrannies, the slights, rebuffs and insults from the unfeeling and rude of a different complexion.” Even if “free fellowship” did improbably emerge between white and black students, “a poor colored boy” would be unable to contend academically with “a white lad,—some rich man’s son,” and would suffer “repinings and chafings and discontents.” African American parents seeking to integrate Boston’s schools were simply mistaken about their families’ best interests. “[S]elf-respect” should “restrain them from forcing their children where they would not be welcomed” and where they could not succeed. *Id.* at 54.

²⁶² See *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 204–05 (1850).

²⁶³ *Id.* at 209.

²⁶⁴ See Act of Apr. 28, 1855, ch. 256, § 1, 1855 Mass. Acts 674, 674.

²⁶⁵ CONSTITUTION OF THE STATE OF NORTH-CAROLINA, TOGETHER WITH THE ORDINANCES AND RESOLUTIONS OF THE CONSTITUTIONAL CONVENTION, ASSEMBLED IN THE CITY OF RALEIGH, JAN. 14TH, 1868, at 122 (Raleigh, Joseph W. Holden 1868).

²⁶⁶ Orleans Parish School Board Meeting Minutes 63–64 (July 3, 1877) (on file with author and the *New York University Law Review*; University of New Orleans Library).

upheld the segregation of New Orleans public schools in 1878,²⁶⁷ endorsed the same line of argument. Judge William B. Woods, who would join the United States Supreme Court in 1880,²⁶⁸ insisted that “[t]he state, while conceding equal privileges and advantages to both races, has the right to manage its schools in the manner which, in its judgment, will best promote the interest of all.”²⁶⁹

The argument that segregation was a mutual benefit to blacks and whites expanded its reach in the twentieth century. In the 1910s, a wave of cities and towns in southern and border states enacted ordinances requiring residential racial segregation,²⁷⁰ and Virginia passed legislation expressly authorizing any city or town in that state to do the same.²⁷¹ Some of these segregation ordinances focused on maintaining the uniform racial character of blocks occupied exclusively by whites or African Americans.²⁷² Other ordinances regulated racially integrated blocks as well, prohibiting African Americans and whites from moving onto blocks where members of the other race occupied the majority of the houses.²⁷³

²⁶⁷ See *Bertonneau v. Bd. of Dirs. of City Sch.*, 3 F. Cas. 294, 296 (C.C.D. La. 1878) (No. 1361).

²⁶⁸ See A.H.T., *William Burnham Woods*, in 10 *DICTIONARY OF AMERICAN BIOGRAPHY* 505, 506 (Dumas Malone ed., 1936).

²⁶⁹ *Bertonneau*, 3 F. Cas. at 296; see also *Lehew v. Brummell*, 15 S.W. 765, 766 (Mo. 1891) (“If we cast aside chimerical theories and look to practical results, it seems to us it must be conceded that separate schools for colored children is a regulation to their great advantage.”).

²⁷⁰ See *infra* notes 272–73 and accompanying text.

²⁷¹ See Act of Mar. 12, 1912, ch. 157, 1912 Va. Acts 330.

²⁷² See, e.g., Dallas, Tex., Ordinance 195, §§ 1–2 (Aug. 8, 1916) (on file with author and the *New York University Law Review*; Dallas Municipal Archives); Okla. City, Okla., Ordinance 1825, §§ 1–2 (Mar. 29, 1916) (on file with author and the *New York University Law Review*; City of Oklahoma City); St. Louis, Mo., Ordinance 28,545, §§ 1–2 (Mar. 3, 1916) (on file with author and the *New York University Law Review*; St. Louis Public Library); Atlanta, Ga., An Ordinance for preserving peace, preventing conflict and ill feeling between the white and colored races and promoting the general welfare of the City by providing for the use of separate blocks by white and colored people for residences and for other purposes §§ 1–2 (June 17, 1913) (on file with author and the *New York University Law Review*; Atlanta History Center); GREENVILLE, S.C., CODE §§ 570A–570B (1912); BALT., MD., ORDINANCES 654, §§ 1–2 (1911); see also *id.* Ordinance 692 (repealing and reenacting Ordinance 654 to remedy technical problem with enactment). An earlier Baltimore ordinance also covered racially integrated blocks. See *id.* Ordinance 610, §§ 1–2. But a Baltimore court struck down this ordinance within a month of its enactment as “inaccurately drawn.” W. Ashbie Hawkins, *A Year of Segregation in Baltimore*, *CRISIS*, Nov. 1911, at 27, 29.

²⁷³ See, e.g., Louisville, Ky., An Ordinance to Prevent Conflict and Ill-Feeling Between the White and Colored Races in the City of Louisville and to Preserve the Public Peace and Promote the General Welfare by Making Reasonable Provisions Requiring, as Far as Practicable, the Use of Separate Blocks for Residences, Places of Abode and Places of Assembly by White and Colored People Respectively §§ 1–2 (May 11, 1914) (on file with author and the *New York University Law Review*; Louisville City Archives) (capitalization

Lawmakers consistently justified the residential segregation ordinances, often in their very titles, as advancing the mutual interests of whites and blacks alike. Baltimore (in 1911),²⁷⁴ Greenville (1912),²⁷⁵ Atlanta (1913),²⁷⁶ Louisville (1914),²⁷⁷ St. Louis (1916),²⁷⁸ Oklahoma

omitted); Ashland, Va., An Ordinance To Secure for White and Colored People, respectively, the Separate Location of Residences for each Race §§ 1–2 (Sept. 12, 1911) (on file with author and the *New York University Law Review*; Town of Ashland) (capitalization omitted); Clifton Forge, Va., Ordinance §§ 1–2 (June 28, 1911) (on file with author and the *New York University Law Review*; Town of Clifton Forge); Richmond, Va., An Ordinance To secure for white and colored people, respectively, the separate location of residences for each race §§ 1–2 (Apr. 19, 1911) (on file with author and the *New York University Law Review*; University of Virginia Library) (capitalization omitted). Residential segregation ordinances in Oklahoma City and St. Louis prohibited African Americans and whites from moving onto blocks where members of the other race occupied at least seventy-five percent of the houses. See Okla. City, Okla., Ordinance 1824, §§ 1–2 (Mar. 29, 1916) (on file with author and the *New York University Law Review*; City of Oklahoma City); St. Louis, Mo., Ordinance 28,546, §§ 1–2 (Mar. 3, 1916) (on file with author and the *New York University Law Review*; St. Louis Public Library).

²⁷⁴ BALT., MD., ORDINANCES 654 (“An ordinance for preserving peace, preventing conflict and ill-feeling between the white and colored races in Baltimore city, and promoting the general welfare of the city by providing, so far as practicable, for the use of separate blocks by white and colored people for residences, churches and schools.”); see also *id.* Ordinance 692 (similar); *id.* Ordinance 610 (“An ordinance for preserving order, securing property values and promoting the great interests and insuring the good government of Baltimore city.”).

²⁷⁵ GREENVILLE, S.C., CODE §§ 570A–570B (“An Ordinance for Preserving Peace, Preventing Conflict and Ill Feeling between the White and Colored Races in the City of Greenville, and Promoting the General Welfare of the City by Providing, so far as Practicable for the Use of Separate Blocks for Residences, Churches, Schools, Hotels, Boarding Houses, Restaurants, Places of Public Amusement, Stores and Places of Business of all kinds.” (emphasis omitted)).

²⁷⁶ Atlanta, Ga., An Ordinance for preserving peace, preventing conflict and ill feeling between the white and colored races and promoting the general welfare of the City by providing for the use of separate blocks by white and colored people for residences and for other purposes.

²⁷⁷ Louisville, Ky., An Ordinance to Prevent Conflict and Ill-Feeling Between the White and Colored Races in the City of Louisville and to Preserve the Public Peace and Promote the General Welfare by Making Reasonable Provisions Requiring, as Far as Practicable, the Use of Separate Blocks for Residences, Places of Abode and Places of Assembly by White and Colored People Respectively.

²⁷⁸ St. Louis, Mo., Ordinance 28,546 (“An ordinance to prevent ill feeling, conflict and collisions between the white and colored races in the City of St. Louis, in the city blocks occupied by both races, and to preserve the public peace, and promote the general welfare, by making reasonable provisions whereby gradually such blocks may become in time occupied wholly by either white or colored people, thereby promoting the general welfare of white and colored people, respectively.”); St. Louis, Mo., Ordinance 28,545 (Mar. 3, 1916) (on file with author and the *New York University Law Review*; St. Louis Public Library) (“An ordinance to prevent ill feeling, conflict and collisions between the white and colored races in the City of St. Louis, and to preserve the public peace and promote the general welfare by making reasonable provisions requiring the use of separate blocks for residence by white and colored people respectively.”).

City (1916),²⁷⁹ and Dallas (1916)²⁸⁰ described their ordinances as measures for preserving “peace,” preventing “conflict and ill-feeling” between whites and African Americans, and promoting “the general welfare.” Virginia’s 1912 statute authorizing residential segregation ordinances was similarly for “the preservation of the public morals, public health and public order.”²⁸¹

Advocates explained that the ordinances were needed because of “the ill-effect of a too close commingling of the two races, which is of ill effect to both, and which seriously interferes with the efforts of civic and moral uplift and betterment.”²⁸² Requiring residential racial segregation helped both whites and blacks by “furnish[ing] an additional safeguard to the community from lawlessness and breaches of the peace, which are the inevitable result of too intimate contact between the white and negro races.”²⁸³ It was “expedient for the best interest of both races that they shall live in distinct sections of the cities where such ordinances have been enacted.”²⁸⁴

Indeed, defenders of residential segregation ordinances insisted that if the ordinances disproportionately burdened any group, it was whites, who were more likely to own houses and thus more likely to have their property rights limited by legal restrictions on occupancy.²⁸⁵ In contrast, blacks purportedly benefited most from these

²⁷⁹ Okla. City, Okla., Ordinance 1825 (Mar. 29, 1916) (on file with author and the *New York University Law Review*; City of Oklahoma City) (“An ordinance to prevent ill feeling, conflict and collisions between the white and colored races in the city of Oklahoma City, Okla. and to preserve the public peace and promote the general welfare by making reasonable provisions requiring the use of separate blocks for residence by white and colored people respectively, and declaring an emergency.” (capitalization omitted)); Okla. City, Okla., Ordinance 1824 (Mar. 29, 1916) (on file with author and the *New York University Law Review*; City of Oklahoma City) (“An ordinance to prevent ill feeling, conflict and collisions between the white and colored races in the city of Oklahoma City, Okla., in the city blocks occupied by both races and to preserve the public peace, and promote the general welfare, by making reasonable provisions whereby gradually such blocks may become in time occupied wholly by either white or colored people, thereby promoting the general welfare of white and colored people, respectively, and declaring an emergency.” (capitalization omitted)).

²⁸⁰ Dallas, Tex., Ordinance 195 (Aug. 8, 1916) (on file with author and the *New York University Law Review*; Dallas Municipal Archives) (“An ordinance for preserving peace, preventing conflict and ill feeling between the white and colored races by providing for the use of separate blocks by white and colored people for residences and for other purposes, prescribing a penalty and declaring an emergency.” (capitalization omitted)).

²⁸¹ Act of Mar. 12, 1912, ch. 157, 1912 Va. Acts 330, 330.

²⁸² T.B. Benson, *Segregation Ordinances*, 1 VA. L. REG. (n.s.) 330, 330 (1915).

²⁸³ Brief for Defendant in Error at 22–23, *Buchanan v. Warley*, 245 U.S. 60 (1917) (No. 33).

²⁸⁴ James F. Minor, *Constitutionality of Segregation Ordinances*, 18 VA. L. REG. 561, 561 (1912).

²⁸⁵ See *State v. Gurry*, 88 A. 546, 551 (Md. 1913); Benson, *supra* note 282, at 335; see also Minor, *supra* note 284, at 574–75.

ordinances because they would supposedly suffer most if residential segregation were not legally mandated. This argument drew on the strength of racial prejudice as a reason to accommodate and legalize that prejudice. For instance, Louisville contended that “[t]he alternative to” the type of ordinance it enacted “seems unfortunately to be those extra-legal or positively illegal methods which only too many communities, North and South, have employed to prevent the negro from living among them, and where, instead of giving him a fair and equal chance, have forced the negro at the point of a shotgun to move on.”²⁸⁶

African Americans and their advocates vigorously contested the claim that residential segregation ordinances benefited whites and blacks alike, or even favored blacks. They condemned the ordinances as blatant efforts to enforce white supremacy. African American opponents of St. Louis’s ordinances, which were enacted by popular vote,²⁸⁷ distributed pamphlets entitled *Negro Segregation: A Measure To Assassinate a Race*²⁸⁸ and cartoons captioned “‘Back to slavery’” that depicted a white man whipping a black man.²⁸⁹ The NAACP, which sued challenging Louisville’s ordinance,²⁹⁰ noted that “[n]o one

²⁸⁶ Brief for Defendant in Error, *supra* note 283, at 119.

²⁸⁷ See Roger N. Baldwin, *Negro Segregation by Initiative Election in St. Louis*, 14 AM. CITY 356, 356 (1916) (“The first popular vote by use of the initiative under the new St. Louis city charter, and the first popular vote in the United States on negro segregation, resulted in adopting the segregation ordinance by a three-to-one vote on February 29. Seventy thousand voters, one-half of the total registered, cast their ballots. Of the eighteen thousand votes cast against segregation, about nine thousand were those of negroes. The only white wards which voted against it were two in the downtown district inhabited by citizens of foreign birth.”).

²⁸⁸ GEO. E. STEVENS, *NEGRO SEGREGATION: A MEASURE TO ASSASSINATE A RACE IN ST. LOUIS, MO. (FALL OF 1915) A STATEMENT OF PRINCIPLES A REVIEW OF RACE RELATIONS AND A PROTEST (1915)*; see also *id.* at 1 (“This statement of principles was adopted and ordered published Aug. 2, 1915, by the Antioch Baptist Association, of St. Louis, Mo., representing ten thousand Negro citizens.”).

²⁸⁹ *Negro-Segregation in St. Louis*, LITERARY DIG., Mar. 18, 1916, at 702, 702.

²⁹⁰ *Buchanan v. Warley*, 245 U.S. 60 (1917), was a test case that the NAACP arranged and litigated. Six months after Louisville enacted its residential segregation ordinance, William Warley, the African American president of the NAACP’s Louisville branch, contracted to buy a plot of land from Charles Buchanan, a white real estate agent who had agreed to cooperate with the NAACP. See C.H. PARRISH ET AL., *LEGAL COMM., N.A.A.C.P., THE HISTORY OF LOUISVILLE SEGREGATION CASE AND THE DECISION OF THE SUPREME COURT* 3 (n.d.); C.B. Blakey, *History by Attorney Blakey*, in *id.* at 10, 10–11; Roger L. Rice, *Residential Segregation by Law, 1910–1917*, 34 J.S. HIST. 179, 185–86 (1968). The land was on a block in Louisville where whites occupied most of the houses, and the contract specified that Warley did not have to go through with the purchase agreement if the laws of Kentucky and Louisville prohibited him from occupying a house on the land. Buchanan tendered the deed, and Warley refused to accept it or to pay for the land on the ground that Louisville’s residential segregation ordinance barred him from moving onto the block. Buchanan then sued to challenge the constitutionality of Louisville’s ordinance. See Brief for the Plaintiff in Error on Rehearing at 1–2, 7, *Buchanan*, 245 U.S. 60

outside a court room would imagine for an instant that the predominant purpose of this ordinance was not to prevent the negro citizens of Louisville, however industrious, thrifty and well-educated they might be, from approaching that condition vaguely described as 'social equality.'"²⁹¹

However, several state courts in the 1910s insisted that African Americans opposing residential segregation ordinances misunderstood their own best interests. These courts endorsed the claim that residential segregation operated to the mutual benefit of blacks and whites. Their opinions dismissed the notion that segregation ordinances promoted racial conflict by enforcing racial subordination. Instead, courts asserted that residential segregation avoided racial conflict through racial separation, and maintained that both blacks and whites would benefit from the resulting racial peace. The Kentucky Court of Appeals, which upheld Louisville's ordinance,²⁹² denied that legally required racial segregation imposed any "stigma." To the contrary, legalized racial segregation, including Louisville's ordinance, was enacted "in order to prevent such conflicts as are shown by this record to have resulted in Louisville from the racial discord consequent upon the close association of the races, and in order that the solidarity of the races may be preserved, and, finally, that in a spirit of mutual helpfulness and racial friendship each race may attain those heights of human development which are its to be won, and may aid in bringing to this state and nation of ours all that the undreamed future has in store for us."²⁹³ The Georgia Supreme

(No. 33); Brief for the Plaintiff in Error at 1-2, 7, *Buchanan*, 245 U.S. 60 (No. 33). Buchanan's lawyers included Moorfield Storey, the NAACP's first president. See Brief for the Plaintiff in Error on Rehearing, *supra*, at 47; Brief for the Plaintiff in Error, *supra*, at 33; WILLIAM B. HIXSON, JR., MOORFIELD STOREY AND THE ABOLITIONIST TRADITION 98-99, 139-42 (1972). Warley invited Louisville's city attorneys to represent him so that they could defend the city's ordinance. See Brief for Defendant in Error, *supra* note 283, at 1.

²⁹¹ Brief for the Plaintiff in Error on Rehearing, *supra* note 290, at 17; see also Brief for the Plaintiff in Error, *supra* note 290, at 32 (similar). "The ordinance was manifestly drawn with great ingenuity in order to place the negro citizens of Louisville in as inferior a position as possible with respect to their right of residence and to violate the spirit of the Fourteenth Amendment without transgressing the letter. If one of those who enacted the ordinance were defending his course before his constituents, he would ask their approval just because he had succeeded so well in establishing a permanent superiority for the white race." Brief for the Plaintiff in Error on Rehearing, *supra* note 290, at 23; see also Brief for the Plaintiff in Error, *supra* note 290, at 33 (similar).

²⁹² See *Harris v. City of Louisville*, 177 S.W. 472, 477 (Ky. 1915), *rev'd sub nom. Buchanan*, 245 U.S. 60.

²⁹³ *Id.*

Court, which upheld an Atlanta segregation ordinance,²⁹⁴ similarly contended that “[s]egregation is not imposed as a stigma upon either race, but in order to uphold the integrity of each race and to prevent conflicts between them resulting from close association.”²⁹⁵

Ultimately, the United States Supreme Court rejected the mutual benefits argument as a justification for legally required residential racial segregation. In 1917, the Court struck down Louisville’s segregation ordinance.²⁹⁶ The Court agreed that “the preservation of the public peace” was “important” and “[d]esirable,” but explained that “this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.”²⁹⁷ Nonetheless, the contention that racial segregation was a mutual benefit to whites and blacks, and that racial integration would be a shared calamity, remained vibrant. Segregationists emphasized mutual benefits discourse over the next decades when African Americans and their allies attempted to secure new forms of racial equality.²⁹⁸

²⁹⁴ See *Harden v. City of Atlanta*, 93 S.E. 401, 403 (Ga. 1917), *overruled by* *Glover v. City of Atlanta*, 96 S.E. 562, 562–63 (Ga. 1918) (per curiam) (striking down Atlanta ordinance after United States Supreme Court’s *Buchanan* decision).

²⁹⁵ *Id.* at 402–03. The Virginia Supreme Court of Appeals upheld residential segregation ordinances from Richmond and Ashland, Virginia. See *Hopkins v. City of Richmond*, 86 S.E. 139, 141 (Va. 1915) (per curiam), *overruled by* *Irvine v. City of Clifton Forge*, 97 S.E. 310, 310 (Va. 1918) (relying on *Buchanan*). The court explained that the ordinances were designed “to prevent too close association of the races, which association results, or tends to result, in breaches of peace, immorality, and danger to the health.” *Id.* at 144 (quoting *Town of Ashland v. Coleman*, 19 VA. L. REG. 427, 437 (Cir. Ct. Hanover County 1913)). The Maryland Court of Appeals struck down Baltimore’s segregation ordinance because it applied retrospectively as well as prospectively: People who owned homes at the time of the ordinance’s enactment could be barred from occupying them under the ordinance’s rules. See *State v. Gurry*, 88 A. 546, 552–53 (Md. 1913). But the court noted that “[n]o intelligent observer in communities where there are many colored people can fail to notice that there are sometimes exhibitions of feelings between members of the two races which are likely to, and occasionally do, result in outbreaks of violence and disorder.” “[I]f a segregation of the races to such extent as may be permissible under the Constitution and laws of the land will have a tendency, not only to avoid disorder and violence, but to make a better feeling between the races, every one having the interests of the colored people as well as of the white people at heart ought to encourage rather than oppose it.” *Id.* at 551. The court decided *Gurry* on October 7, 1913. See *id.* at 546. On September 25, 1913, Baltimore had enacted a new residential segregation ordinance that applied prospectively only. See *BALT., MD., ORDINANCES 339, § 1* (1914) (“An ordinance to prevent conflict and ill-feeling between the white and colored races in Baltimore City, and to preserve the public peace and promote the general welfare by making reasonable provisions requiring the use of separate blocks for residences by white and colored people, respectively.”). The Maryland Court of Appeals struck this ordinance down in 1918. See *Jackson v. State*, 103 A. 910, 910–11 (Md. 1918) (relying on *Buchanan*).

²⁹⁶ See *Buchanan*, 245 U.S. at 81–82.

²⁹⁷ *Id.* at 81.

²⁹⁸ For instance, Supreme Court Justice James McReynolds, who opposed integrating the University of Missouri School of Law, warned in 1938 that “break[ing] down the set-

The claim that legalized racial segregation operated to the mutual advantage of whites and blacks reached a fever pitch in the defense of racially segregated public education that southern states mounted in the consolidated cases that became *Brown v. Board of Education* (1954).²⁹⁹ With civil rights arguments ascendant and Jim Crow's future at stake, South Carolina insisted that it was intent on producing "equality for all of its children of whatever race or color" and "convinced that the happiness, the progress and the welfare of these children [was] best promoted in segregated schools."³⁰⁰ Virginia contended that its eighty years of racial segregation in public education had caused "no hurt or harm to either race."³⁰¹ Instead, the state asserted, "segregation by race in Virginia's public schools . . . not only does not offend the Constitution of the United States but serves to provide a better education for living for the children of both races."³⁰²

tled practice concerning separate schools" would "thereby, as indicated by experience, damnify both races." *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 353 (1938) (McReynolds, J., dissenting). The Alabama legislature passed a joint resolution in 1943 urging Alabama's United States Senators to oppose a federal bill abolishing poll taxes. See S.J. Res. 42, No. 154, 1943 Ala. Laws 139, 139-40. The resolution identified the proposed federal legislation, rather than the virtually complete disenfranchisement of African Americans in the South, as the source of racial conflict. It explained that "throughout the years since Reconstruction there has been an amicable and friendly relationship between the two races in the South, and the continuous agitation from outside sources is creating bitterness and hostility, greatly to the detriment of our people, both white and black, . . . and is preventing the orderly solution of our problems in a manner assuring lasting justice to both races." *Id.* at 139. Kansas City, Missouri, contended in 1952 that segregation of the city's public swimming pools "preserve[d] peace and order in the community for the protection and welfare of both races," *Williams v. Kansas City, Mo.*, 104 F. Supp. 848, 852 (W.D. Mo. 1952), *aff'd*, 205 F.2d 47 (8th Cir. 1953), and warned that integrating the pools "would produce a condition detrimental to the best interests of both races," *id.* at 853.

²⁹⁹ 347 U.S. 483 (1954).

³⁰⁰ Transcript of Oral Reargument in *Briggs v. Elliott* and *Davis v. County School Board* (Dec. 7, 1953), in 49A LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 447, 492 (Philip B. Kurland & Gerhard Casper eds., 1975) (argument of John W. Davis on behalf of appellees).

³⁰¹ Transcript of Oral Argument in *Davis v. County School Board* (Dec. 10, 1952), in 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW, *supra* note 300, at 347, 367 (argument of T. Justin Moore on behalf of appellees).

³⁰² Brief for Appellees on Reargument at 82-83, *Davis v. County School Board*, 347 U.S. 483 (1954) (No. 4). Virginia did not have much evidence from African Americans to support this proposition, but it included the testimony of the state's white superintendent of public instruction, who reported "that the customs and the habits and the traditions of Virginia citizens are such that they believe for the best interests of both the white and the Negro that the separate school is best." *Id.* at 70 (quoting Dowell Howard, Virginia Superintendent of Public Instruction). Colgate Darden, president of the University of Virginia and former Virginia governor, added that "'the races separated, if given a fairly good opportunity, are better off.'" *Id.* (quoting Colgate Darden). In the companion case to *Brown* that challenged segregation in Washington, D.C.'s public schools, see *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954), the city similarly maintained that integrated classrooms

The civil rights movement that developed over the course of the twentieth century directly countered these mutual benefits arguments. Civil rights advocates repeatedly emphasized how racial segregation harmed African Americans, reflecting and reinforcing their confinement to a subordinated position in American society. As early as 1935, Chas. H. Thompson, Professor of Education at Howard University, condemned as “sheer sophistry” the argument “that Negroes are no more stigmatized by the separate school than white people who are also segregated.” “For we all know that segregation is practically always initiated by the whites, and initiated on the basis that Negroes are inferior and undesirable.”³⁰³ Thurgood Marshall, the plaintiffs’ lead lawyer in *Brown*, argued before the Court that the white South’s defense of racially segregated public education reduced to two points: “one, that they got together and decided that it is best for the races to be separated, and, two, that it has existed for over a century. Neither argument, to my mind, is any good.”³⁰⁴ Other civil rights supporters similarly attacked the claim “that segregation is ‘better’ for the Negroes, is not intended to hurt them,” explaining that “a little probing would demonstrate that what is meant is that it is better for the Negroes to accept a position of inferiority, at least for the indefinite future.”³⁰⁵

The Supreme Court in *Brown* soundly rejected arguments that legalized racial segregation advanced the mutual interests of blacks and whites. *Brown* held that racially segregated public education could never be constitutional,³⁰⁶ in an opinion that detailed the harms that segregation inflicted on African American children. The Court explained that “[t]o separate [African American children] from others

were likely to foster a “hostile atmosphere” that would “harm the ability to learn of both the races,” Transcript of Oral Argument in *Bolling v. Sharpe* (Dec. 10, 1952), in 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW, *supra* note 300, at 395, 429 (argument of Milton D. Korman on behalf of respondents). The city contended that white and African American children were both better off with “completely adequate, separate, full educational opportunities on both sides, where they will be instructed on the white side by white teachers, who are sympathetic to them, and on the colored side by colored teachers, who are sympathetic to them, and where they will receive from the lips of their own people education in colored folklore, which is important to a people.” *Id.* at 429–30.

³⁰³ Chas. H. Thompson, *Court Action the Only Reasonable Alternative To Remedy Immediate Abuses of the Negro Separate School*, 4 J. NEGRO EDUC. 419, 433 (1935).

³⁰⁴ Transcript of Oral Reargument in *Briggs v. Elliott* and *Davis v. County School Board* (Dec. 8, 1953), in 49A LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW, *supra* note 300, at 501, 516 (rebuttal argument of Thurgood Marshall on behalf of appellants).

³⁰⁵ Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960).

³⁰⁶ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”³⁰⁷

But even after *Brown*, legal advocates and authorities commonly contended that public institutions should not integrate because racial segregation benefited both blacks and whites. This argument still convinced segregationists, or they still thought that the claim resonated with constituencies outside the Supreme Court, or both. When segregationists needed to present their last, best case for preserving Jim Crow despite the mounting successes of the civil rights movement, they turned to mutual benefits arguments.

James Eastland, a United States senator from Mississippi, declared in the days after the Court’s decision that “the vast majority of the members of both of the races in the South” supported segregation because it “promotes racial harmony” and “permits each race to follow its own pursuits, to develop its own culture, its own institutions, and its own civilization.”³⁰⁸ “Everyone knows,” Eastland asserted, “that the school atmosphere, the tension, and frictions generated in interracial schools will have a detrimental effect upon the children of both races, will lessen their ability to learn, and will retard the progress of education.”³⁰⁹ “[W]ithout the intervention of northern meddlers, segregated schools would continue by mutual agreement of the leaders of both races.”³¹⁰

A few months after *Brown*, Virginia Governor Thomas Stanley appointed thirty-two members of the Virginia General Assembly to a commission charged with recommending how the state should

³⁰⁷ *Id.* at 494.

³⁰⁸ 100 CONG. REC. 7255 (1954) (statement of Senator James Eastland).

³⁰⁹ *Id.* at 7252.

³¹⁰ *Id.* at 7257; see also TOM P. BRADY, BLACK MONDAY 65 (1955) (“[Segregation is] the greatest factor for peace and harmony between the races.”); Hazel Brannon Smith, *Through Hazel Eyes*, LEXINGTON ADVERTISER (Lexington, Miss.), May 20, 1954, at 1 (“We know that it is to the best interest of both races that segregation be maintained in theory and in fact—and that where it isn’t maintained trouble results.”); *We Are Not Acquiescent*, JACKSON DAILY NEWS (Jackson, Miss.), May 23, 1954, at 10 (“One deplorable result of the [*Brown*] decision is that it will halt the steady improvement in educational facilities under way in all Southern states and thus the Negro race will suffer, instead of benefitting, from the court ruling. It inevitably means a lessening of friendly interest in Negro education among school officials and the public generally. The decree is a blow instead of a benefit to the Negro race.”); *id.* (“[T]he thinking people of neither race want the abandonment of segregation[.] Radicals and rabble-rousers and race agitators are in great glee of course but all persons in both races who use their heads for something other than loafing places for hair well realize the gravity of the situation and the tragic consequences to which it may lead.”).

respond to the Supreme Court decision.³¹¹ The commission concluded in 1955 “that separate facilities in our public schools are in the best interest of both races, educationally and otherwise, and that compulsory integration should be resisted by all proper means in our power.”³¹² Governor Stanley agreed “that the best interest of both white and Negro races will be served by continued separation in the public schools.”³¹³ He proposed legislation in August 1956 to enforce and perpetuate the segregation of Virginia’s public schools,³¹⁴ explaining that the legislation was “designed to promote the best interests of all Virginians, white and Negro, and especially the welfare of the greatest asset of any people, the boys and girls who constitute our future citizenship.”³¹⁵ One month later, the Virginia “General Assembly, for the purpose of protecting the health and welfare of the people and in order to preserve and maintain an efficient system of public elementary and secondary schools,”³¹⁶ enacted a statute that cut off state funding for all public elementary schools in a county, city, or town if any of the locality’s public elementary schools integrated and that cut off state funding for all public secondary schools in a county, city, or town if any of the locality’s public secondary schools integrated.³¹⁷

Jackson, Mississippi, Mayor Allen Thompson, testifying in 1961 to defend the segregation of the city’s public transportation facilities,³¹⁸ explained that Jackson’s policy of racial segregation had “‘worked

³¹¹ See PUBLIC EDUCATION: REPORT OF THE COMMISSION TO THE GOVERNOR OF VIRGINIA, S. DOC. NO. 1, at 5 (1955); Thos. B. Stanley, Address of Thos. B. Stanley Governor to the General Assembly Extra Session Monday, August 27, 1956, in COMMONWEALTH OF VIRGINIA: INAUGURAL ADDRESS AND ADDRESSES DELIVERED TO THE GENERAL ASSEMBLY OF VIRGINIA BY THOS. B. STANLEY 1954–1958, at 3, 3.

³¹² PUBLIC EDUCATION: REPORT OF THE COMMISSION TO THE GOVERNOR OF VIRGINIA, *supra* note 311, at 7.

³¹³ Stanley, *supra* note 311, at 4.

³¹⁴ See *id.* at 5–7.

³¹⁵ *Id.* at 8.

³¹⁶ Act of Sept. 29, 1956, ch. 71, § 1, 1956 Extra Sess. Va. Acts 78, 106 (emphasis omitted).

³¹⁷ See *id.* at 107. For a Virginia school district that anticipated the legislature’s language, see *Surry Officials Strongly Favor Present County School System*, SUSSEX-SURRY DISPATCH (Waverly, Va.), July 1, 1954, at 1 (“[T]he Board of Supervisors of Surry County and the County School Board on [June 30 resolved] . . . ‘That it is our considered judgment that the best interest of public education for both the White and Negro children in Surry County, and the only way to maintain an efficient system of public education as required by the Constitution of Virginia, is through the continuation of a segregated school system; and to that end we express our unalterable opposition to integration of the races in the public schools to any degree, now or at any time in the future, and pledge to the people of this County our best efforts to continue our present educational system.’”).

³¹⁸ See *Bailey v. Patterson*, 199 F. Supp. 595, 610–11 (S.D. Miss. 1961) (Rives, J., dissenting), *vacated and remanded*, 369 U.S. 31 (1962) (per curiam).

over the last hundred years to bring happiness and peace and prosperity to everyone within our city.’” Thompson insisted that segregation was “‘agreeable to both the white and the colored.’” It “‘maintain[ed] happiness and contentment between the races, within the law, and at the same time [gave] the benefit of the great advantage over the years of living together in peace and quiet.’”³¹⁹ Thompson and W.D. Rayfield, Jackson’s chief of police, contended in a 1963 suit that the city posted “racial signs” outside rail and bus “terminals because ‘it is for the best interest of all of the citizens of the City of Jackson that the races be encouraged to separate voluntarily in order to promote the peace, harmony and health of all the citizens of Jackson.’”³²⁰

More strikingly, some lower courts continued to accept claims that racial segregation benefited both blacks and whites as adequate justification for maintaining segregation notwithstanding *Brown*. These courts insisted that African Americans seeking to enforce *Brown*’s mandates misunderstood their own best interests. Judge Frank Scarlett of the United States District Court for the Southern District of Georgia held in 1963 that Savannah-Chatham County did not have to desegregate its public schools because “pupils of both races in Savannah-Chatham County are entitled to the best education available and on the unassailable facts that education is best given in separate schools adapted to their varying abilities.”³²¹ This argument drew on the long white supremacist tradition asserting the innate intellectual superiority of whites over blacks. The court found that “differences in test results between the white and Negro students” were “attributable in large part to hereditary factors, predictably resulting from a difference in the physiological and psychological characteristics of the two races.” “Substantially all the difference between these two groups of children” was “inherent.”³²² The court concluded that integrating African American and white children into the same classrooms “would seriously injure both white and Negro

³¹⁹ *Id.* at 611 (quoting Allen Thompson, mayor of Jackson, Mississippi).

³²⁰ *United States v. City of Jackson, Miss.*, 318 F.2d 1, 6 n.9 (5th Cir. 1963) (quoting “affidavits of both Mayor Thompson and Chief of Police Rayfield”). Clarendon County, South Carolina, advanced a mutual benefits argument in 1965 to explain why the county had yet to integrate its public schools, despite having been one of the losing defendants in *Brown*. See *Brunson v. Bd. of Trs. of Sch. Dist. No. 1*, 244 F. Supp. 859, 859–60 & n.2 (E.D.S.C. 1965). Clarendon “contend[ed] that the maintenance of segregated public schools is in the best interest of pupils of both races,” *id.* at 862, and “assert[ed] that such a system is maintained in accordance with the wishes and desires of the great majority of parents of both races living within the District,” *id.* at 860.

³²¹ *Stell v. Savannah-Chatham County Bd. of Educ.*, 220 F. Supp. 667, 682 (S.D. Ga. 1963), *rev’d*, 333 F.2d 55 (5th Cir. 1964).

³²² *Id.* at 683.

students in the Savannah-Chatham County schools and adversely affect the educational standards and accomplishments of the public school system.”³²³ “White students in such a class” would “lose any challenge to further academic accomplishment.” “Failure to attain the existing white standards would create serious psychological problems of frustration on the part of the Negro child, which would require compensation by attention-creating antisocial behavior.”³²⁴

The Fifth Circuit reversed Judge Scarlett in June 1964. The appellate court cited the controlling *Brown* precedent,³²⁵ and disputed the contention that white and black students were both better off in segregated schools because of supposed intellectual differences between the two groups.³²⁶

Nonetheless, just a few weeks after this Fifth Circuit decision, Judge Sidney Mize of the United States District Court for the Southern District of Mississippi found that Jackson, Mississippi, had proven its contention that its segregated public schools operated “for the benefit and best interest of all pupils of the District.”³²⁷ Here again, the district court maintained that African Americans seeking integration misunderstood their own interests. The court’s argument started from the premise “that white and Negro pupils of public school age have substantially different educational aptitudes and learning patterns which are innate in character.”³²⁸ On this theory, segregated schools were needed “if equal educational opportunity [was] to be made available to the children of both races.”³²⁹ “[S]eparate classes allow[ed] greater adaptation to the differing educational traits of Negro and white pupils, and actually result[ed] in

³²³ *Id.* at 684.

³²⁴ *Id.* at 683.

³²⁵ *See Stell*, 333 F.2d at 61 (“We reiterate that no inferior federal court may refrain from acting as required by [*Brown*] even if such a court should conclude that the Supreme Court erred either as to its facts or as to the law.”).

³²⁶ The Fifth Circuit explained that “[t]he real fallacy, Constitution-wise, of the classification theory is that many of the Negro pupils overlap many of the white pupils in achievement and aptitude but are nevertheless to be segregated on the basis of race. They are to be separated, regardless of how great their ability as individuals, into schools with members of their own race because of the differences in test averages as between the races. Therein is the discrimination. The individual Negro student is not to be treated as an individual and allowed to proceed along with other individuals on the basis of ability alone without regard to race.” *Id.* at 62.

³²⁷ *Evers v. Jackson Mun. Separate Sch. Dist.*, 232 F. Supp. 241, 242 (S.D. Miss. 1964).

³²⁸ *Id.* at 248; *see also id.* at 251 (“[P]laintiffs have conceded, by their unwillingness or inability to contest the issues of which they had been seasonably informed, . . . that differences between Caucasians and Negroes are genetically determined and cannot be changed materially by environment . . .”).

³²⁹ *Id.* at 248.

greater scholastic accomplishments for both.”³³⁰ Judge Mize warned that integration would be disastrous for white and black students alike, “substantially destroy[ing] the present levels of academic achievement in the school district.”³³¹ Moreover, Mize contended that the harm would fall hardest on African Americans, who “would be driven to compensate for their comparative shortcomings” in integrated classrooms “either by rationalization in the form of discrediting educational values and dropping out of school, or by substitution of diversionary, attention-seeking delinquent behavior.”³³² Mize ultimately conceded that “the obvious holding of the United States Court of Appeals for the Fifth Circuit” required him to obey *Brown*. But Mize stressed that “the facts in this case point up a most serious situation, and, indeed, ‘cry out’ for a reappraisal and complete reconsideration of the findings and conclusions of the United States Supreme Court in the *Brown* decision, as interpreted by the United States Court of Appeals for the Fifth Circuit.”³³³

Legalized racial segregation was a pivotal means of maintaining, promoting, and enforcing white supremacy in the wake of slavery’s abolition. But for over a century before *Brown*, and a decade after, legal authorities and advocates commonly contended that racial segregation benefited blacks and whites alike, warned that racial integration would be disastrous for both, and insisted that African Americans challenging segregation did not recognize their own best interests.

V

EVALUATING MUTUAL BENEFITS ARGUMENTS

As we have seen, mutual benefits arguments have been remarkably resilient across substantive contexts and over time. These arguments insist that women and people of color seeking greater rights and opportunities misunderstand their own interests and fail to realize that more prerogatives and choices will harm them or have harmed them already. Proponents contend that limiting the rights and opportunities available to women and people of color helps everyone. Mutual benefits discourse offers the tempting promise that legal decisionmakers do not have to choose between conflicting views and opposing sides because all parties share aligned interests.

The record this Article presents richly illustrates how mutual benefits claims have historically operated to rationalize, reinforce, and

³³⁰ *Id.* at 249.

³³¹ *Id.* at 252.

³³² *Id.* at 249.

³³³ *Id.* at 255.

perpetuate inequalities based on sex and race that are now widely denounced. Arguments that rights and opportunities would harm their supposed beneficiaries were central to the defenses of slavery, racial segregation, common law coverture, and legal restraints on women's ability to participate in market work.

The fact that historical expressions of mutual benefits discourse are no longer convincing does not necessarily mean that modern examples of this discourse are also unconvincing. But the prominent place that mutual benefits arguments assumed in supporting now-repudiated manifestations of sex and race inequality creates reason for caution in evaluating contemporary mutual benefits claims. Modern mutual benefits arguments invoke deep-seated ways of reasoning about women and people of color, and an established tradition of arguments asserting that both groups are better off with fewer rights and opportunities. The long record and historical resonance of mutual benefits discourse may explain why courts, legislatures, and commentators are primed to accept mutual benefits claims with so little debate, deliberation, evidence, or investigation. Yet mutual benefits arguments, for all their cultural familiarity, were historically deployed in support of practices that virtually no one would still defend.

I would like to encourage more careful examination of arguments too quickly accepted as persuasive or even commonsensical. This Part draws on the reasons why historical mutual benefits arguments are unconvincing to propose four practical criteria that legal authorities and commentators should use in assessing contemporary mutual benefits discourse. These criteria consider whether advocates advancing a mutual benefits argument are consistent in their claims, whether they present evidence that rights and opportunities will harm or have harmed their intended beneficiaries, whether they depend upon narrow assumptions about how women and people of color should act, and whether they respond to counterarguments and opposing perspectives.

I apply the criteria to several concrete contexts—marital rape, abortion, and affirmative action—in which judges, legislators, and commentators are contending that women and people of color are better off without rights and opportunities. The criteria offer useful guidance in evaluating arguments that risk shielding sex and race inequality. As this Part demonstrates, mutual benefits arguments tend to share a constellation of common flaws.

The first criteria concerns consistency. It asks whether decisionmakers and advocates insisting that rights and opportunities will harm women or people of color express similar misgivings about com-

parable rights and opportunities for other groups, or assume instead that women and people of color are unusually poor decisionmakers. There is good cause to be wary of arguments that people pursuing rights and opportunities misunderstand their own interests when those arguments are applied disproportionately to groups long without equal status, or any status, in the legal system and long assumed to have lesser reasoning capacity simply by virtue of their status. As we have seen, the law has long presumed that women are inherently incompetent decisionmakers. Coverture's defenders insisted that women were unable to make choices in their best interests,³³⁴ while empowering men to manage everyone's affairs.³³⁵ Supporters of women-only protective labor legislation stressed that women could not reach reasonable judgments about working outside the home,³³⁶ at the same time that *Lochner* constitutionalized a presumption of male autonomy and self-sufficiency.³³⁷ A similarly lengthy legal tradition contended that African Americans were innately inferior to whites intellectually or even (in the antebellum version of this argument) entirely incapable of self-government. This account presupposed white competence, while maintaining that blacks were unable to assess their own best interests in deciding where to work, live, or send their children to school.³³⁸

Contemporary judges, legislators, and commentators have also been extremely selective in contending that denying rights and opportunities benefits everyone, including the people seeking rights and opportunities. Lawmakers and advocates frequently rely on the proposition that limits on women's rights advance women's own interests by preventing women from making the self-defeating choices they would pursue with more freedom. This claim, which was central to the historical defenses of common law coverture and women-only protective labor legislation,³³⁹ remains pivotal in contemporary arguments for marital rape exemptions and antiabortion laws.³⁴⁰ But authorities and advocates do not generally cite the concern that rights will leave the rights holders worse off as a reason to deny equal treatment under the law (coverture and women-only protective labor legislation), or full protection from behavior that is usually criminalized

³³⁴ See *supra* text accompanying notes 169–71.

³³⁵ See *supra* text accompanying note 157.

³³⁶ See *supra* text accompanying notes 201–12.

³³⁷ See *supra* text accompanying notes 179–81.

³³⁸ See *supra* text accompanying notes 230–33, 321–33.

³³⁹ See *supra* Part III.

³⁴⁰ See *supra* Part I.

(marital rape exemptions), or access to the safest medical procedures (the Partial-Birth Abortion Ban Act).

Similarly, the Supreme Court has increasingly embraced the argument that race-based affirmative action programs must be constitutionally limited and then eliminated in order to protect people of color from the injuries that affirmative action would otherwise inflict upon them.³⁴¹ Yet the legal system does not usually assume that people attempting to improve their opportunities are fundamentally confused about how to advance their interests, will be harmed if they establish their claims, and need to be protected from themselves. For instance, lawmakers do not reason in those terms in making judgments about what are probably the most important and far-reaching affirmative action programs in the United States, the employment preferences that the federal government and almost all the states grant to veterans,³⁴² who are overwhelmingly male and also largely white.³⁴³ To my knowledge, there is no suggestion in the legislation creating these preferences, or in the judicial opinions upholding them, that veterans' preferences should be restricted or eradicated in order to protect veterans from harm. Instead, legislators and judges assume that veterans can assess their own interests, and accept veterans' statements that they will benefit from these preferences.³⁴⁴

The second criteria focuses on evidence of harm. It asks whether arguments asserting that women and people of color will be better off with fewer rights and opportunities present evidence that a right or opportunity will harm women or people of color, or has harmed them already. If such evidence exists, moreover, how reliable is it? Warnings of injury are far less convincing when they do not have data, or dependable data, behind them. For example, the historical defenders of women's legalized inequality, slavery, and segregation were full of

³⁴¹ See *supra* Part II.

³⁴² See, e.g., 38 U.S.C. § 4214(a)(1) (2006) ("It is . . . the policy of the United States and the purpose of this section to promote the maximum of employment and job advancement opportunities within the Federal Government for qualified covered veterans . . . who are qualified for such employment and advancement."); *Pers. Adm'r v. Feeney*, 442 U.S. 256, 261 & nn.6-7 (1979); U.S. OFFICE OF PERS. MGMT., REPORT TO THE CONGRESS: THE EMPLOYMENT OF VETERANS IN THE FEDERAL GOVERNMENT FISCAL YEAR 2007, at 6 & tbl.1 (2008) (reporting that veterans entitled to veterans' preferences constituted 22.9% of the federal non-postal workforce in fiscal year 2007).

³⁴³ See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2009, at 333 tbl.504 (2008) (reporting that 92.99% of veterans were male and 84.66% of veterans were white in 2006).

³⁴⁴ See, e.g., *Feeney*, 442 U.S. at 265 (veterans' preferences "reward veterans for the sacrifice of military service," "ease the transition from military to civilian life," "encourage patriotic service," and "attract loyal and well-disciplined people to civil service occupations"); *id.* at 277 (veterans' preferences give veterans "a competitive headstart").

dire predictions about the consequences of granting women and people of color more rights and opportunities, but extremely short on reliable evidence to back their claims. They offered little more than assumptions and assertions to support their warnings that married women empowered to contract would enter ruinous bargains;³⁴⁵ or that emancipation would leave African Americans indolent, criminally inclined, and vulnerable to violent retribution;³⁴⁶ or that black children would not be able to learn effectively in racially integrated schools.³⁴⁷

The evidence of harm supporting contemporary mutual benefits arguments is sometimes questionably reliable, and sometimes simply nonexistent. By far the largest body of evidence exists in the abortion context. The antiabortion movement has collected and disseminated thousands of affidavits from women reporting that their abortions injured them psychologically and that they regret having abortions. For instance, an antiabortion group included some of these affidavits in an amicus brief that the *Carhart* Court cited to support its decision upholding the prohibition of an abortion procedure.³⁴⁸ There is no reason to doubt that some women do regret their abortions and suffer psychologically after them. But there is reason to be wary of evidence that advocacy groups have compiled in the interest of affecting litigation and legislation. In fact, scientific and medical studies consistently find that women tend to be in more distress before abortion rather than after it, and that women have a low rate of negative reactions to abortion.³⁴⁹ The evidence that limiting or eliminating women's abortion rights will leave women better off is questionable at best.

Critics of race-based affirmative action have failed to assemble systematic evidence supporting their claims that affirmative action leaves people of color worse off.³⁵⁰ Some people of color have

³⁴⁵ See *supra* text accompanying notes 169–71.

³⁴⁶ See *supra* text accompanying notes 246–55.

³⁴⁷ See *supra* text accompanying notes 256–69, 299–302, 308–17, 321–33.

³⁴⁸ See *supra* note 102 and accompanying text.

³⁴⁹ See *supra* notes 67–68 and accompanying text.

³⁵⁰ See *supra* text accompanying note 141. Richard Sander recently noted the dearth of evidence supporting claims that affirmative action leaves people of color worse off. See Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 368 (2004) (“[T]here has never been a comprehensive attempt to assess the relative costs and benefits of racial preferences in any field of higher education.”). Sander attempted to fill this gap with a study that purportedly demonstrated that “blacks are the victims of law school programs of affirmative action, not the beneficiaries. The programs set blacks up for failure in school, aggravate attrition rates, turn the bar exam into a major hurdle, disadvantage most blacks in the job market, and depress the overall production of black lawyers.” *Id.* at 481. However, many scholars have uncovered flaws in Sander’s methodology and disputed his conclusions. See, e.g., Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN.

opposed race-based affirmative action programs on the ground that

L. REV. 1807, 1809 (2005) (“[T]his response refutes the claim that affirmative action has reduced the number of black lawyers. We find no persuasive evidence that current levels of affirmative action have reduced the probability that black law students will become lawyers. We estimate that the elimination of affirmative action would reduce the number of lawyers.”); Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?*, 101 NW. U. L. REV. 1759, 1800 (2007) (“The results presented here are not definitive because they suffer from the same data limitations as the studies of Sander and his critics, but they provide strong evidence that affirmative action has significant benefits and that the evidence of negative consequences Sander provides is highly suspect.”); David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander’s Study*, 57 STAN. L. REV. 1855, 1898 (2005) (“His conclusions are simple, neat, and wrong. As we have demonstrated here, they rest on a seriously flawed appraisal of the current evidence. We believe that, using the same evidence, we have demonstrated just the opposite: that, without affirmative action, both the enrollment of African American law students (particularly at the fifty or eighty most selective schools) and the production of African American lawyers would significantly decline.”); Michele Landis Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899, 1903 (2005) (“He concludes that blacks would obtain better and higher-paying jobs if not for affirmative action. In what follows, I show that Sander has no evidence whatever for this finding due to elementary methodological errors in his modeling of the labor market.”); Beverly I. Moran, *The Case for Black Inferiority? What Must Be True If Professor Sander Is Right: A Response to A Systemic Analysis of Affirmative Action in American Law Schools*, 5 CONN. PUB. INT. L.J. 41, 58 (2005) (“Professor Sander’s arguments fail on their methodology, their logic, and their real-world application.”); Jesse Rothstein & Albert H. Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?*, 75 U. CHI. L. REV. 649, 712 (2008) (“There is no plausible interpretation of the data under which the elimination of affirmative action would increase the number of black lawyers, or even decrease it by a small amount. Rather, a shift to race-blind admissions would have reduced the number of blacks from the cohort studied here who became lawyers by over 50 percent.” (footnotes omitted)); David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915, 1960–61 (2005) (“Affirmative action in law school admissions has played a crucial role in transforming a once exclusionary and insular profession into one that is at least tolerably diverse. Notwithstanding the difficulties Sander documents, the black lawyers who have been at the forefront of this transformation have for the most part done remarkably well Any claim that most, or even a significant percentage, of these integration warriors would have been better off under a regime where law schools treated *Bakke* as an indication that affirmative efforts were no longer necessary or desirable is simply not supported by the evidence.”); Daniel E. Ho, Scholarship Comment, *Why Affirmative Action Does Not Cause Black Students To Fail the Bar*, 114 YALE L.J. 1997, 1997 (2005) (“[T]he article misapplies basic principles of causal inference, which enjoy virtually universal acceptance in the scientific community. As a result, the study draws internally inconsistent and empirically invalid conclusions about the effects of affirmative action. Correcting the assumptions and testing the hypothesis directly shows that for similarly qualified black students, attending a higher-tier law school has no detectable effect on bar passage rates.” (footnote omitted)). See also WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 276 (1998) (“On inspection, many of the arguments against considering race in admissions—such as allegations of unintended harm to the intended beneficiaries and enhanced racial tensions on campus—seem to us to lack substance. More generally, our data show that the overall record of accomplishment by black students after

they harm their supposed beneficiaries,³⁵¹ but the overall number of people of color who claim that affirmative action has left them worse off remains small. The Supreme Court, in turn, has emphatically insisted that affirmative action injures people of color, but it has not been able to cite any person of color who actually challenged any of the programs that the Court reviewed.³⁵² White individuals or white-owned businesses brought the lawsuits the Court decided, and the plaintiffs' essential claim was that affirmative action programs unfairly advantaged, rather than harmed, people of color.³⁵³

There is even less evidence that protection from marital rape injures women. I have been unable to locate any evidence that women in states that fully criminalize marital rape regret pursuing marital rape prosecutions rather than reconciling with their husbands or believe that they would be better off without the full protection of the criminal law from marital rape. There is also no available evidence that women in states that retain some form of a marital rape exemption are more likely to stay with their husbands after marital rape or to be satisfied with their marriages.

The third criteria for evaluating mutual benefits arguments asks whether claims that women or people of color will be better off without a right or opportunity turn on narrow, historically embedded assumptions about how group members should think, act, and live.

graduation has been impressive.”); Richard O. Lempert et al., *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 *LAW & SOC. INQUIRY* 395, 496–97 (2000) (“Perhaps the core finding of our study is that Michigan’s minority alumni . . . appear highly successful—fully as successful as Michigan’s white alumni—when success is measured by self-reported career satisfaction or contributions to the community. Controlling for gender and career length, they are also as successful when success is measured by income.”).

³⁵¹ See *supra* notes 121, 133–34, 141–48 and accompanying text.

³⁵² See *supra* text accompanying notes 127, 134.

³⁵³ See *Grutter v. Bollinger*, 539 U.S. 306, 316–17 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 204–06 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 481–83 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 272–73 (1986) (plurality opinion); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 276–78 (1978) (opinion of Powell, J.). *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), did not directly identify any plaintiff’s race. See *id.* at 728 (plurality opinion) (“Joshua McDonald’s requested transfer was denied because his race was listed as ‘other’ rather than black . . .”). For more information about the *Parents Involved* plaintiffs, see Thomas C. Tobin, *Court Axes Efforts at Desegregation*, *ST. PETERSBURG TIMES*, June 29, 2007, at 1A (“In 2002, Crystal Meredith’s 5-year-old son, Joshua McDonald, was denied a transfer to another school because he is white. . . . White students [in Seattle] were shut out of a newly rebuilt high school in their area when nonwhite students were admitted as part of the district’s racial balancing plan. Some white families did not get any of their other top choices in the city’s ‘open choice’ program. A group called Parents Involved in Community Schools was formed to challenge the School Board. It sued in July 2000.”).

As we have seen, arguments that women benefited from common law coverture and women-only protective labor laws were grounded on the premise that women's ultimate responsibilities and preeminent roles were domestic. Courts, legislatures, and commentators knew that coverture and women-only protective labor laws helped women precisely because these legal regimes kept women closely tied to their homes and families—where they belonged and could thrive—and constrained in their ability to participate in the market or other aspects of public life—where women's involvement would be disastrous for everyone, including women themselves.³⁵⁴ Arguments that African Americans benefited from slavery and racial segregation rested on the assumptions that African Americans were innately suited for subordinate societal roles and better off the fewer claims and demands they made on white people and white-dominated institutions.³⁵⁵ None of these arguments inquired into what individual women or African Americans thought, believed, or wanted, or allowed for the possibility of variance within those groups. Instead, these arguments assumed that women and African Americans should think, act, and live in ways compatible with existing social structures placing men over women, and whites over blacks, and strove to enforce those assumptions by denying rights and opportunities that might have permitted some women or people of color to deviate from dominant expectations.

Contemporary proponents of marital rape exemptions or antiabortion laws do not endorse common law coverture or laws constraining women's rights to negotiate about market work. But the argument that marital rape exemptions protect women is focused on keeping women within marriage and confident that women's welfare is maximized there, even after marital rape. This argument contends that women whose husbands have raped them are better off without the right to pursue prosecution because then they will not be able to take steps that would ruin their marital privacy, end their marital harmony, and make marital reconciliation much less likely.³⁵⁶ The argument that limiting or eliminating abortion rights protects women assumes yet more explicitly that women's greatest responsibilities, true interests, and ultimate satisfactions are domestic. Indeed, antiabortion advocates asserting that abortion harms virtually all, or all, women explicitly rest their case on the propositions that women

³⁵⁴ See *supra* text accompanying notes 166–68, 194–200.

³⁵⁵ See *supra* Part IV.

³⁵⁶ See *supra* text accompanying notes 26–36.

are naturally maternal and that abortion is therefore an unnatural, psychologically damaging act by definition.³⁵⁷

Modern critics of affirmative action emphatically repudiate both slavery and racial segregation. Indeed, almost all contemporary Americans, inside the legal system and out, would reject the notion that slavery and segregation benefited blacks along with whites. They would similarly condemn proslavery and segregationist arguments that blacks were intellectually inferior and innately suited for subordinate societal roles.

But the defenses of slavery and segregation also rested on the premise that racial harmony benefiting all races was best accomplished when African Americans accommodated themselves to whites, rather than when the accommodation ran in the other direction or both directions at once. Proslavery advocates argued that the way to maintain racial peace was to keep blacks in bondage and thereby avoid the ferocious racial conflict that emancipation would assertedly create.³⁵⁸ These advocates did not consider the possibility that abolishing slavery might reduce racial tensions between whites and blacks by ending a tremendous source of racial injustice. Segregationists similarly warned of the racial antagonism, hostility, and violence that would follow integration, and maintained that blacks should accordingly accept segregation.³⁵⁹ Jim Crow's supporters did not express concern about the racial conflict and tension that the inequalities of segregation created or suggest that whites should mitigate this tension by responding to the needs and demands of African Americans.

There are echoes of this asymmetry in the Supreme Court's contention that race-based affirmative action programs should be limited or eliminated because otherwise they might lead to racial hostility.³⁶⁰ The contention seems to assume that the racial inequalities that affirmative action programs are meant to redress have not already created racial hostility. Instead, what might generate racial hostility are programs designed to help people of color at the potential expense of whites. And the best way to promote racial harmony is to eliminate affirmative action programs, although maintaining these programs could reduce inequalities between whites and people of color. Here again, the claim is that people of color will advance their own interests if they abandon important demands they have made on white-dominated institutions.

³⁵⁷ See *supra* text accompanying notes 56–58, 72–73, 102–03.

³⁵⁸ See *supra* text accompanying notes 249–55.

³⁵⁹ See *supra* Part IV.B.

³⁶⁰ See *supra* text accompanying notes 128, 155.

The fourth criteria for evaluating arguments that women or people of color are better off without a right or opportunity asks whether the arguments acknowledge any possible benefits associated with the right or opportunity and any possible costs associated with denying it. Mutual benefits discourse is less plausible if it has no engagement with counterarguments and no account of why a rational person might seek the right or opportunity in question. For instance, defenders of common law coverture, slavery, and racial segregation had no real explanation for why women or African Americans would challenge those regimes, except to maintain that the people who did so misconstrued their own best interests.³⁶¹

Contemporary judges, legislators, and commentators advancing mutual benefits arguments in support of marital rape exemptions, antiabortion laws, or restrictions on race-based affirmative action also routinely fail to acknowledge that their positions impose any costs or that the denied rights and opportunities would confer any advantages. Modern defenders of marital rape exemptions typically limit themselves to arguments about how criminalizing marital rape supposedly harms women, along with their husbands and society as a whole.³⁶² Exemption supporters do not concede that marital rape or marital rape exemptions might cause women any injury, although the tremendous harm that marital rape inflicts is well-documented.³⁶³ Their only explanations for why women would seek their husbands' prosecution for marital rape contend that such women either misunderstand their own interests or have illegitimate interests in vindictively pursuing false charges.³⁶⁴

Antiabortion advocates, in turn, focus on detailing the injuries that abortion assertedly inflicts on women.³⁶⁵ They do not discuss the harms that women would experience if their access to legal abortion were reduced or eliminated, or even acknowledge that a woman unable to secure a legal abortion has experienced an injury. Yet criminalizing abortion would do nothing to address the conditions and circumstances that lead women to seek abortions and nothing to help women perform the work associated with motherhood.

Similarly, critics of affirmative action repeatedly emphasize the injuries that affirmative action programs purportedly inflict on people of color. These critics routinely fail to explain why many people of color support and participate in affirmative action programs, to dis-

³⁶¹ See *supra* Parts III.A, IV.

³⁶² See *supra* text accompanying notes 26–44.

³⁶³ See *supra* note 23 and accompanying text.

³⁶⁴ See *supra* text accompanying notes 26–44.

³⁶⁵ See *supra* text accompanying notes 50–60, 70–79.

cuss the harms and inequities that motivated the establishment of affirmative action, or to consider the injuries and injustices that people of color might experience without affirmative action.³⁶⁶

As we have seen, mutual benefits arguments tend to have a pattern of common flaws. Contemporary claims that women are protected when marital rape is legalized and abortion rights are narrowed or abolished, or that people of color are protected when race-based affirmative action programs are restricted or eliminated, abundantly display the recurring weaknesses of mutual benefits discourse.

CONCLUSION

Mutual benefits arguments for restricting the rights and opportunities open to women and people of color remain potent and popular, transcending substantive categories to link apparently disparate debates that are rarely considered together. These arguments are already prominent in contests over race-based affirmative action, antiabortion laws, and marital rape exemptions, and they are likely to pervade even more disputes over time. Mutual benefits claims have long flourished in periods when reform movements targeting sex and race inequality helped undermine contentions that the law should simply disfavor women and people of color.

The historical role that mutual benefits discourse assumed in defending pernicious sex and race discrimination creates grounds for caution in considering contemporary mutual benefits claims. The long tradition and cultural resonance of mutual benefits arguments may give these arguments an outsized power to persuade with too little elaboration, examination, investigation, or deliberation. Mutual benefits claims track deep-seated ways of thinking about women and people of color, and build on entrenched justifications for limiting their rights and opportunities. But historical mutual benefits arguments presumed that women and people of color were especially poor decisionmakers unable to act in their own best interests, demanding that women prioritize domesticity above anything else and that people of color accommodate themselves to whites and accept subordinate societal roles. Contentions that women and people of color benefit from restricted rights and opportunities have historically operated to rationalize, perpetuate, and enforce legalized discriminations that are now widely condemned, including slavery, racial segregation, and women's legalized inequality.

Legal authorities and advocates can use the reasons why historical versions of mutual benefits discourse are unconvincing to assess

³⁶⁶ See *supra* text accompanying notes 121–55.

modern claims that all parties are better off when the law limits the rights and opportunities available to women and people of color. Judges, legislators, and commentators need to evaluate contemporary mutual benefits arguments carefully or they will risk reinforcing some of America's oldest and most persistent status inequalities.