

# Neo-Colonialism, Same Old Racism: A Critical Analysis of the United States' Shift toward Colorblindness as a Tool for the Protection of the American Colonial Empire and White Supremacy

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## INTRODUCTION

“But once we have taken note of the situation, once we have understood it, we consider the job done. How can we possibly not hear that voice again tumbling down the steps of History: It’s no longer a question of knowing the world, but of transforming it.”<sup>1</sup>

In the 1950s, Franz Fanon boldly asserted: “There is a fact: White men consider themselves superior to black men.”<sup>2</sup> Over five decades later, a majority of white Americans would deny this,<sup>3</sup> but such heartfelt denials are often betrayed by social realities.<sup>4</sup> The difficulties many African Americans

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1. FRANZ FANON, *BLACK SKIN, WHITE MASKS* 17 (Richard Philcox, trans., Grove Press, rev. ed. 2008) (1952).

2. FRANZ FANON, *BLACK SKIN, WHITE MASKS* 10 (1967) (Different editions of the book translate this proclamation from the French differently. For example, the 2008 translation by Richard Philcox reads as follows: “Fact: some Whites consider themselves superior to Blacks”).

3. EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* 25 (2003).

4. Eben Harrell, *Study: Racist Attitudes Are Still Ingrained*, TIME (Jan. 8, 2009), available at <http://www.time.com/time/health/article/0,8599,1870408,00.html>; CNN.com, Poll: Most Americans see lingering racism—in others, (Dec. 12, 2006), <http://www.cnn.com/2006/US/12/12/racism.poll/index.html>; see also Toby Harnden, *Racial Attacks Have Risen Since Election*, DAILY TELEGRAPH, (Nov. 18, 2008), available at

experience in their private lives because of their racial identities became a topic of public debate during the course of Barack Obama's historic candidacy for President of the United States. Then-Senator Obama was largely dismissive of the racism directed toward him during his campaign, and often refused to combat it in a straightforward manner.<sup>5</sup> Angela Harris noted, before President Obama's victory, that he was "able to appeal to both white and African-American audiences" on account of his racially ambiguous appearance.<sup>6</sup> Obama's transcendence of race was likely a key ingredient to his victory. While Senator Obama's successful candidacy demonstrates progress for African Americans in the United States, it is troubling that he had to become ambiguous in his stance on the racism he faced during his campaign in order to remain politically viable.<sup>7</sup>

Ironically, the election of a black President in the United States might suggest to some that America is beyond racism and might further remove racism from American discourse, even as there has been a dramatic racist backlash against the election of the nation's first black president.<sup>8</sup> According to Woody Doane, "claims that race is irrelevant in a 'united America' potentially make it unpatriotic or even subversive to raise questions of racial injustice."<sup>9</sup> Further, "[r]ace is defined as an illegitimate topic for conversation" under a color-blind order, and "those who are conscious of race or who inject racial issues into a debate may be accused of complaining, of seeking special treatment, or 'playing the race card,' or even of being racist."<sup>10</sup> President

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<http://www.telegraph.co.uk/news/worldnews/northamerica/usa/barackobama/3474135/Racial-incidents-sour-Barack-Obamas-victory.html> (detailing the rise in racist incidents since Obama's election).

5. Jennifer Parker, *Ferraro: Obama Where He Is Because He's Black: Clinton Backer Makes Racially Charged Remarks About Democratic Front-Runner*, ABCNEWS, (Mar. 11, 2008), <http://abcnews.go.com/Politics/Vote2008/Story?id=4428719&page=1> (Referring to Ferraro's comments, Obama responded, "They are divisive...they are patently absurd." Obama denounced Ferraro's statement but did not explicitly mention its racist nature); Michelle DeArmond, *GOP mailing depicts Obama on food stamp*, THE PRESS ENTERPRISE, (Oct. 16, 2008), [http://www.pe.com/localnews/inland/stories/PE\\_News\\_Local\\_S\\_webbuck1.e7982b.html](http://www.pe.com/localnews/inland/stories/PE_News_Local_S_webbuck1.e7982b.html) (the Obama campaign declined to comment).

6. Angela P. Harris, *From Color Line to Color Chart?: Racism and Colorism in the New Century*, 10 Berkeley J. Afr.-Am. L. & Pol'y 52, 53 (2008).

7. See Michael Powell, *With Genie Out of Bottle, Obama is Careful on Race*, NYTimes.com, (Aug. 2, 2008), <http://www.nytimes.com/2008/08/02/us/politics/02obama.html>.

8. Harnden, supra note 4.

9. Woody Doane, *Rethinking Whiteness Studies*, in WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM 14 (Ashley W. Doane and Eduardo Bonilla-Silva eds., 2003).

10. Doane, supra note 9, at 13 ("Color-blind racial ideology has combined with the transparency of white identity and white privilege to create a new set of racial understandings for white Americans. Within this new racial discourse, race no longer 'matters'...In this 'color-blind' society, the prescription for dealing with racial issues is not to 'see' race and to claim that 'everyone is the same.'). Doane's analysis of color-blind ideology is applicable to the way in which Obama's opponents and critics were able to make racist attacks against him while insulating themselves from accusations of racism; See also GOPBLOGGERS, *Barack Obama's Shameless Racism*, (Nov. 6, 2006), <http://www.gopbloggers.org/mt/archives/004414.html>

Obama's opposition found that "the 'denial' or 'strategic avoidance of race' was an effective political strategy for legitimizing the persistence of white hegemony" as they subjected him to racist stereotypes,<sup>11</sup> questioned his religious beliefs<sup>12</sup> and his wife's college thesis<sup>13</sup> while accusing Obama of playing the race card on the rare occasion that he addressed such attacks.<sup>14</sup> Colorblindness—removing race from public discourse while leaving racism intact—is the source of his dilemma.<sup>15</sup>

Patricia Williams illustrates the impact of colorblindness on a personal level, by sharing an experience she had while attempting to obtain a home loan.<sup>16</sup> When she was mistaken for a white person, her loan was approved with ease. However, when she sought to correct the mistake, she suddenly no longer qualified to receive the loan on its original terms— not because of race, but because of "increased risk."<sup>17</sup> In a style reminiscent of Césaire, Williams shares her frustration and, in so doing, further articulates the suffocating impact of colorblindness upon racial minorities:

"Typecasting!" I protest.

"Predictive indicator," assert the keepers of the gate.

"Prejudice!" I say.

"Precaution," they reply.<sup>18</sup>

This Note seeks to: (1) explain the shift in American law and politics towards colorblindness via definition and discussion of colonialism, and (2) acknowledge the United States' past and present identity as a racist colonial state.

Colonialism supposedly died during the mid-twentieth century, and

(depicting conservative accusations in 2006 that Obama had engaged in race-baiting by mentioning that he was the only black member of the Senate).

11. *Curious George' Obama Shirt Causes Uproar: Book's Publisher Threatens Lawsuit Over Georgia Bar Owner's T-Shirt Sale*, CBS NEWS, (May 15, 2008), <http://www.cbsnews.com/stories/2008/05/15/politics/main4098542.shtml>.

12. Jim Rutenberg, *The Man Behind the Whispers About Obama*, N.Y. TIMES, (Oct. 12, 2008), available at <http://www.nytimes.com/2008/10/13/us/politics/13martin.html>.

13. "McCain", *Michelle Obama's Early Militant Racism Revealed*, RIGHTPUNDITS.COM, Feb. 25, 2008, <http://www.rightpundits.com/?p=1182> (depicting conservative white disdain for Michelle Obama's race-consciousness, which they equate to anti-white racism); see also Jeffrey Rensner, *Michelle Obama thesis was on racial divide*, POLITICO.COM, (Feb. 22, 2008), [http://www.politico.com/news/stories/0208/8642\\_Page2.html](http://www.politico.com/news/stories/0208/8642_Page2.html) (discussing controversy concerning the thesis and offering insight into the topic and findings of the thesis).

14. Michael Cooper & Michael Powell, *McCain Camp Says Obama is Playing the 'Race Card'*, N.Y. TIMES, (Aug. 1, 2008), available at <http://www.nytimes.com/2008/08/01/us/politics/01campaign.html>.

15. See Doane, *supra* note 9, at 13; see also DAVID GOLDBERG, *THE RACIAL STATE* 221(2002) (describing colorblindness as "the neoliberal attempt to go beyond—without (fully) coming to terms with—racial histories and their accompanying racist inequities and iniquities...").

16. PATRICIA J. WILLIAMS, *SEEING A COLOR-BLIND FUTURE: THE PARADOX OF RACE* 38-45 (1997).

17. *Id.* at 40.

18. *Id.* at 45.

racism is supposedly also becoming obsolete. However, white supremacy and colonial empire exist in symbiosis: empire depends on the creation of race and maintenance of racial hierarchy, and to the extent that racism exists in the United States, colonialism is also present.

This Note will demonstrate that both have managed to veil and transform themselves, and continue to be fundamental to American liberal democracy. In the United States, colorblindness is becoming an increasingly effective tool, employed by those who have an (unconscious or conscious) interest in maintaining the white supremacist order upon which American liberal democracy has been established. Colorblindness pretends that race and racism do not exist, and removes them from the discourse, even as racism continues to flourish. In particular, the shift of the United States Supreme Court from anti-racism to colorblindness has created a legal order in which racism is increasingly difficult to prevent, prohibit, or prosecute.

The Note will begin with a discussion of colonialism, its roots in white supremacy, and its link to American liberal democracy. It will then analyze shifts in the American approach to racism by analyzing the decisions of the Supreme Court of the United States. The Note will examine decisions over the course of three time periods: the pre-civil rights era, the civil rights era, and the present post-civil rights, neo-conservative era. This discussion will capture the Courts' shifts as paradigms under which it managed America's colonial-inspired liberal democracy. The Note will illuminate the manner in which Supreme Court rulings reflect or catalyze shifts in theory and policy sustaining a white supremacist legal order. Finally, using France as an illustrative model, the Author recommends a move away from colorblindness and the present neo-colonial order in the United States towards an approach that is decidedly anti-racist and post-colonial.

## I. COLONIALISM, RACISM, AND AMERICAN LIBERAL DEMOCRACY

"The fact is, while colonialism in its formal sense might have been dismantled, the colonial state has not. Many of the problems of democracy are products of the old colonial state whose primary difference is presence of black faces."<sup>19</sup>

### *A. The Empire's New Clothes: Colonialism defined, Colonialism Refined, Colonialism Dead and Revived*

The current world order seems to be almost entirely a product of colonialism.<sup>20</sup> For example, even though African nations have achieved

19. Robin D.G. Kelley, *Preface* to AIMÉ CÉSAIRE, *DISCOURSE ON COLONIALISM* 27 (Joan Pinkham trans., Monthly Review 2d. ed. 2002).

20. See generally *id.* (stating that while the current world order might not be formally

independence from their colonial rulers, international law—*uti posseditis*<sup>21</sup>—requires that the colonial boundaries which created these nations still be respected. This should come as no surprise because the largest organ of international law—The United Nations—is a colonial creation. It is an entity in which the world’s former colonial powers and the United States wield much more influence than formerly colonized nations.<sup>22</sup>

Despite the end of formal colonialism throughout most of the world, colonial history is still celebrated worldwide. In Barcelona, at the city’s port, tourists take photos under the monumental statue of Christopher Columbus, erected to pay tribute to his “discovery” of America. In New York City, Columbus Circle is a city landmark, transportation hub and shopping complex. The landmark is complete, with statues of overweight, nude Native Americans and statues of Columbus himself. In the subway tunnels under Columbus Circle, murals created by New York City public school students celebrate the so-called discovery of America by Christopher Columbus. One mural stands out, a depiction of very sad Native Americans, for whom Columbus’ arrival was no cause for celebration.

A central feature of colonialism is its ability to hide. For colonialism of any form to be successful, and immune from the protests of the colonized, it must be an unmarked standard. Because colonialism creates power for the colonizer, it allows the colonizer to create knowledge.<sup>23</sup> The colonizer can

colonized, forms of colonialism still penetrate all areas of the world); See also Charles W. Mills, *White Supremacy as Sociopolitical System*, in *WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM* 37 (Ashley W. Doane and Eduardo Bonilla-Silva eds., 2003) (noting that colonialism has “foundationally shaped” the modern world).

21. See *In Re Frontier Dispute* (Burk. Faso v. Mali), 1986 I.C.J. 554 (Affirming *uti posseditis* as a general principle of international law. According to this principle, colonial borders must be respected, unless provided otherwise in a treaty, after the formal end of colonialism.).

22. See United Nations, Membership of the Security Council, <http://www.un.org/sc/members.asp> (hereinafter *Security Council Membership*) (last visited Feb. 7, 2009) (The Security Council, which acts as the executive branch of the United Nations, has five permanent member States: China, Russia, France, the United Kingdom and the United States. The only chance for smaller nations to sit on the council is on a non-permanent basis via election, but only the permanent members have veto powers.); See also International Monetary Fund, IMF Members’ Quotas and Voting Power, and IMF Board of Governors, <http://www.imf.org/external/np/sec/memdir/members.htm#3> (hereinafter *IMF Members’ Quota*) (last visited Feb. 7, 2009) (Voting power in the IMF, the international financial institution, is overwhelmingly consolidated among former colonial powers and neo-colonial powers such as the United States, which has approximately 17% of the total votes).

23. MICHEL FOUCAULT, *Lecture Two: 14 January 1976*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977* at 93 (Colin Gordon, Ed.) (1980) (stating “There can be no possible exercise of power without a certain economy of discourses of truth which operates through and on the basis of this association. We are subjected to the production of truth through power and we cannot exercise power except through the production of truth.”); EDWARD W. SAID, *CULTURE AND IMPERIALISM* xiii (1993) (“The power to narrate, or to block other narratives from forming and emerging, is very important to culture and imperialism, and constitutes one of the main connections between them.”); See also Doane, *supra* note 9, at 7 (discussing the ability of white Americans, as the dominant social group in the United States, to

therefore tell the colonized that it is, in fact, free, even as the colonized sits in shackles. For this reason, colonialism parades itself as the pinnacle of civilization despite the base, inhumane horrors with which it is naturally accompanied.<sup>24</sup> Even today, colonialism still has supporters such as Dinesh D'Souza, who maintain that colonialism "immeasurably enriched" the colonized, and their descendants.<sup>25</sup> D'Souza also argues that colonial oppression made it possible for colonized peoples to experience freedom by giving them something to fight against<sup>26</sup>—an argument that is unconvincing at best, but also itself fundamentally colonial. According to Ania Loomba, "By the 1930s, colonies and ex-colonies covered 84.6 percent of the land surface of the globe."<sup>27</sup> She defines modern, European colonialism as "the conquest and control of other people's land and goods"<sup>28</sup> and the "midwife that assisted at the birth of European capitalism."<sup>29</sup> Loomba also contends that the colonialism's "geographical sweep, and... heterogeneous practices and impact over the last four centuries" make it difficult to "theorise".<sup>30</sup> Loomba's definition is helpful, but only focuses on physical theft of property and resources. This Note focuses more broadly on power and domination, and therefore broadly conceptualizes colonialism as *an extension of a nation's sovereignty, and the maintenance thereof, which infringes on the sovereignty of other nations or peoples*. This extension can be one of territory or of sovereignty, and therefore includes imperialism and neo-colonialism.<sup>31</sup>

In order to clarify the connections between colonialism, racism, and the liberal democracy that are fundamental to this Note's central thesis, three models of colonialism are articulated as follows:

The first is formal colonialism—the classic, physical expansion by one

"shape the racial order and racial understandings of American society" and "appropriate the social and cultural 'mainstream' and make white understandings and practices normative". The author will argue that racism is a direct product of colonialism, and that the two are intertwined.)

24. See AIMÉ CÉSAIRE, DISCOURSE ON COLONIALISM 32 (Joan Pinkham trans., Monthly Review 2d. ed. 2002) (1955).

25. Dinesh D'Souza, *Two Cheers for Colonialism*, THE CHRON. REV., (May 10, 2002), available at <http://chronicle.com/free/v48/i35/35b00701.htm> (stating that "my life would have been much worse had the British never ruled India").

26. *Id.* ("That brings me to the greatest benefit that the British provided to the Indians: They taught them the language of freedom. Once again, it was not the objective of the colonial rulers to encourage rebellion. But by exposing Indians to the ideas of the West, they did... the champions of Indian independence acquired the principles, the language, and even the strategies of liberation from the civilization of their oppressors.")

27. ANIA LOOMBA, COLONIALISM/POSTCOLONIALISM 3 (2005).

28. *Id.* at 8.

29. *Id.* at 10.

30. *Id.* at 3.

31. See *Id.* at 12 (stating "Imperialism can function without formal colonies...but colonialism cannot". Loomba makes a distinction between imperialism and colonialism, though she notes on page 7 that the terms are used interchangeably. Loomba defines colonialism and neo-colonialism as consequences of imperial domination, while the Author of this Note equates modern imperialism with neo-colonialism.)

state and encroachment of that state onto another territory. The reasons for formal colonialism are economic and political, with the goals being attainment of wealth, territory and dominion. Formal colonialism thrives on theft of resources and labor exploitation of those who have been conquered. The traditional narrative of formal colonialism involves the colonization of Africa and Asia by Europeans. However, the “discovery” of the New World also involved European territorial expansion, and the conquest and near-destruction of indigenous peoples. Today, formal American colonialism is a reality, as the United States still controls populated territories including Guam, the U.S. Virgin Islands, American Samoa, Northern Mariana Islands, and Puerto Rico.

The second model is that of neo-colonialism, the foreign economic exploitation or coercive political domination of states by other states or world powers. The United States, along with other Western nations, currently wields its superpower status through neo-colonial foreign political and economic policy—such as the promotion of free trade and the forcible exportation of democracy throughout the world. As with formal colonialism, the core of neo-colonialism is infringement upon others’ sovereignty and self-determination. Further, neo-colonialism, like formal colonialism, involves the oppression of people, the exploitation of their labor and resources, and the acquisition of wealth and power by the colonizer (by rendering the colonized impoverished, powerless and dependent upon the colonizing forces). Additionally, justification for intervention and domination stem from a belief that the colonizers are superior to the colonized, and that the colonizers are altruistically bringing civilization—or in the neo-colonial model, capitalism, and democracy—to the colonized.

The third model of colonialism is internal colonialism, which Bonilla-Silva offers as a model of racism in the United States.<sup>32</sup> Under this model, non-whites are colonial subjects of whites.<sup>33</sup> This framework, which Bonilla-Silva uses to describe modern racism, is also effective in describing forms of colonialism, and thus, offers evidence of this Note’s central theses: white supremacy and colonial empire are intertwined, and exist in symbiosis; empire depends on the creation of race and maintenance of racial hierarchy; to the extent that racism exists in the United States, colonialism is also present.

Internal colonialism in the United States involves the exploitation and

32. EDUARDO BONILLA-SILVA, *WHITE SUPREMACY & RACISM IN THE POST CIVIL RIGHTS ERA 28-30* (2001) (discussing the internal colonialism perspective on racism and its perceived limitations).

33. LOOMBA, *supra* note 27, at 16 (“‘Colonialism’ is not just something that happens from outside a country or a people...but a version of it can be duplicated from within...It has been suggested that it is more helpful to think of postcolonialism not just as coming literally after colonialism and signifying its demise, but more flexibly as the contestation of colonial domination and the legacies of colonialism. Such a position would allow us to include people geographically displaced by colonialism such as African-Americans...as ‘postcolonial’ subjects although they live within metropolitan cultures.”).

oppression of peoples within American territory, with the same goals of formal colonialism: the maintenance of wealth, power, and dominion for the colonizers.<sup>34</sup> According to Bonilla-Silva, “[c]entral to the operation of such order is the maintenance of white privilege. Although the racial order and the particular form of racial oppression are viewed as changing throughout history, white privilege is considered a constant systemic fact.”<sup>35</sup> The African-American experience is perhaps the most prototypical example of internally colonized people within the Americas. While formal colonialism involved European settlement of Africa, internal colonialism involved the forced settlement and enslavement of Africans in what had become the European Americas (due to the conquest and earlier colonization of Native Americans).<sup>36</sup> Recent justifications for slavery, notably, have been nearly identical to those offered for formal and neo-colonialism—proposing that the white supremacist order and minority subjugation involved were beneficial to the enslaved or colonized.<sup>37</sup> The United States not only operates as a neo-colonial empire outside of its borders, but also currently operates an internal empire—based in white supremacy—in which twenty-first century liberal democracy flourishes.

So long as it is perceived to be dead and irrelevant, colonialism can transform itself, and continue to operate without obstruction. Like racism, colonialism depends on its death for its survival—this is its paradox. When formal colonialism was the acknowledged status quo, it was glorified. Today,

34. BONILLA-SILVA, *supra* note 32, at 28 (“Racism is institutionalized and based on a system in which the white majority ‘raises its social position by exploiting, controlling, and keeping down others who are categorized in racial or ethnic terms.’” (quoting ROBERT BLAUNER, *RACIAL OPPRESSION IN AMERICA* 22)). Bonilla also notes that under this model, individual prejudices and racial animus are not necessary for the racial order to operate; rather, racism is “rational (based on the interest of whites)”.

35. *Id.*

36. *Id.* (“After different third world peoples were forcefully moved to the United States, a racial order was established with its own dynamics”).

37. Some very conservative commentators have gone so far as to cast slavery of African Americans in a positive light, in an attempt to justify the nation’s internal colonial order. In the opinion of these commentators, the assumed superiority of Western civilization and perceived benefits of slavery to the United States outweighs or justifies the harm caused to African Americans. Compare Michael Medved, *Six Inconvenient Truths about the U.S. and slavery*, TOWNHALL.COM, (Sep. 26, 2007), [http://townhall.com/columnists/MichaelMedved/2007/09/26/six\\_inconvenient\\_truths\\_about\\_the\\_us\\_and\\_slavery](http://townhall.com/columnists/MichaelMedved/2007/09/26/six_inconvenient_truths_about_the_us_and_slavery) (stating “There is no reason to believe that today’s African-Americans [sic] would be better off if their ancestors had remained behind in Africa...In view of the last century of history in Nigeria or Ivory Coast or Sierra Leone or Zimbabwe, could any African American say with confidence that he or she would have fared better had some distant ancestor not been enslaved?”); and Casey Gane-McCalla, *Top 10 Racist Limbaugh Quotes*, NEWS ONE, (Oct. 20, 2009), <http://newsone.blackplanet.com/elections/top-10-racist-limbaugh-quotes/> (quoting radio personality Rush Limbaugh as saying “I mean, let’s face it, we didn’t have slavery in this country for over 100 years because it was a bad thing. Quite the opposite: slavery built the South. I’m not saying we should bring it back; I’m just saying it had its merits. For one thing, the streets were safer after dark.”), with D’Souza, *supra* notes 25-26 (detailing D’Souza’s belief that colonialism benefited the colonized, and the superiority of Western civilization).

international law has recognized the rights of nations to self-determination and the formal colonial era is decidedly over.<sup>38</sup> However, to label the present day as the post-colonial era can be misleading.<sup>39</sup> Outside of the context of formal colonialism, *neo-* would be a more appropriate prefix.<sup>40</sup> Ania Loomba makes the excellent observation that “a country may be both postcolonial (in the sense of being formally independent) and neo-colonial (in the sense of remaining economically and/or culturally dependent) at the same time.”<sup>41</sup>

A now-independent nation may be post-colonial in the formal sense even if it still struggles against foreign economic exploitation and political intervention. Indeed, as evidenced by the composition of the UN Security Council, and the balance of power in international financial institutions, the world’s great powers wield great economic and political influence over former colonies—now known as third world countries, and have constructed a complex system by which these former colonies remain subjects.<sup>42</sup> As Robin D. G. Kelley declares, “[t]he official apparatus might have been removed, but the political, economic, and cultural links established by colonial domination still remain with some alterations.”<sup>43</sup> This is the nature of colonialism. Colloquially speaking, it “fakes its own death” so that it can adopt a new identity and continue to shape social and legal order. The American empire wields its economic and political power in this way to advance its interests in the world, and the white American majority veils its complex racial order in the same way, internally, to protect its position of power and advance its interests within the nation.

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38. U.N. Charter art. 1, ¶ 2; International Covenant on Civil and Political Rights art. 1, ¶ 1, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, art. 1, ¶. 1, Dec. 16, 1966, 993 U.N.T.S. 3; Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. res. 51/141, 51 U.N. GAOR Supp. (No. 49) at 134, U.N. Doc. A/51/49 (Dec. 14, 1960). Notably, the U.S., the UK, South Africa, Portugal, France, Belgium, and Spain abstained from voting on this Declaration.

39. LOOMBA, *supra* note 27, at 12 (“It might seem that because the age of colonialism is over...the whole world is postcolonial. And yet the term is contested on many counts...if the inequities of colonial rule have not been erased, it is perhaps premature to proclaim the demise of colonialism.”); Kelley, *supra* note 19, at 27.

40. See LOOMBA, *supra* note 27, at 11-12.

41. *Id.* at 12.

42. *Id.* (“We cannot dismiss either the importance of formal decolonization or the fact that unequal relations of colonial rule are reinscribed in the contemporary imbalances between ‘first’ and ‘third’ world nations. The new global order does not depend upon direct rule. However, it does allow the economic, cultural and (to varying degrees) political penetration of some countries by others.”); See generally *Security Council Membership and IMF Members’ Quota*, *supra* note 22 (outlining the structure of the international legal and financial community,<sup>16</sup> and offering evidence that former colonial powers and the United States continue to hold the balance of economic and political power over developing nations, most of whom were colonized.).

43. Kelley, *supra* note 19, at 27.

*B. Racism, Colonialism, and the Protect/Protest Motif*

Despite the continued belief of some that European and Western colonization brings civilization and modernity to those colonized,<sup>44</sup> colonialism is in fact destructive of cultures, economies, and lives. During the formal colonial era, Césaire asked, "...what, fundamentally is colonization? To agree on what it is not: neither evangelization, nor a philanthropic enterprise, nor a desire to push back the frontiers of ignorance, nor a project undertaken for the greatness of God, nor an attempt to extend the rule of law."<sup>45</sup> Césaire continues in his indictment, concluding, "...between colonization and civilization there is an infinite distance..."<sup>46</sup> Yet, in order for colonizers to justify the horrors they wrought on the colonized, they convinced themselves that the colonized were barbaric, static and void of history or culture. They attached these imagined deficiencies to the colonized peoples' cultural and biological identities, which the colonizers used to establish and define race.

Ania Loomba poses the question: "Is racial difference produced by colonialist domination, or did colonialism generate racism?"<sup>47</sup> Race and racial hierarchy do not exist outside of a colonial paradigm.<sup>48</sup> Race, however, is a reality in our colonially-constructed world order. Woody Doane acknowledges that "there is a growing consensus among social scientists that 'race' has no scientific validity but that it is a socially constructed category based upon the arbitrary (and imprecise) evaluation of physical characteristics."<sup>49</sup> This does not mean, however, that race does not exist. Race is a "social fact"—that is to say, "...race can *both* be constructed and real in its consequences."<sup>50</sup> While differences between groups of peoples have always existed, colonial anthropologists, psychologists, philosophers, and missionaries used categories to create hegemony, and attached normative values to alleged differences in order to justify it.<sup>51</sup>

44. D'Souza, *supra* note 25.

45. CÉSAIRE, *supra* note 24, at 32.

46. *Id.* at 34.

47. LOOMBA, *supra* note 27, at 5.

48. See FANON, *supra* note 1, at 92-93 (noting that colonialism allows for, and creates white supremacy.); See also Mills, *supra* note 20, at 37 ("insofar as the modern world has been foundationally shaped by European colonialism, there is a sense in which white supremacy could be seen as transnational, global...").

49. Doane, *supra* note 9, at 8-9; See also Margaret L. Andersen, *Whitewashing Race, in WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM* 26-27 (Ashley W. Doane and Eduardo Bonilla-Silva eds., 2003) (discussing the argument that whiteness has constructed non-white "others", thereby defines itself in opposition to the "others"—as "not slaves", for example).

50. Andersen, *supra* note 49, at 33; See also BONILLA-SILVA, *supra* note 3, at 9 ("Race, as other social categories such as class and gender, is constructed but...has a social reality. This means that after race—or class or gender is created, it produces real effects on the actors racialized as 'black' or 'white'"); but see Harris, *supra* note 6, at 68-69 for another angle on this idea.<sup>50</sup> She discusses the idea that race is a social construction, but proposes a focus on how one is "racialized by others" via interpersonal interactions.

51. Sheldon Gellar, *The Colonial Era, in AFRICA* 140-41 (Phyllis M. Martin and Martin

Defining *racism* is a difficult, albeit necessary, task. This is due, in part, to the widespread existence and various expressions of racism, as well as changing understandings of race. Lay definitions of racism often include prejudice, bias, or discrimination based on perceptions of skin color, or nationality.<sup>52</sup> These definitions often focus on expressions of racial animus—feelings of hatred by one race towards another. While these conceptions of racism have salience in the real world, they are also simplistic, incomplete and misleading. A focus on skin color or racial hatred does not consider context, and makes all forms of racism (such as black distrust of whites because of a history of oppression and white oppression of blacks) appear equal. This understanding of racism leads to calls for colorblindness. Colorblindness, as employed in contemporary society, ignores race without first eradicating racism. While conservatives propose that ignoring race will eventually render race obsolete, colorblindness in fact renders racism indestructible.

Many scholars have offered progressive definitions of racism. Of these, David Goldberg's connection of race to the modern liberal state stands out as particularly convincing:

Charles Mills (1997) argues that the social contract establishing the basic of modern states really amounted to a racial contract...to exploit people of color to the material, mainly economic but also political, advantages of white people. The racial contract, in short, sustains the state of white supremacy. In so far as the racially exclusionary and exploitative contractual effects have been contractually endorsed for the benefit of and among white people, their legitimation is taken silently and invisibly—in a sense 'naturally'—to be part of the social fabric on contractarian terms.<sup>53</sup>

White supremacy is a key aspect of Goldberg's articulation. Goldberg articulates white supremacy as a desire, by Europeans, for exclusive political and economic power.<sup>54</sup> In the past, this desire was expressed through formal colonialism. Today it is expressed through the modern liberal state. White supremacy is justified, legitimized, and expressed by racism. Those whites

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O'Meara eds., 1995); see Makau wa Mutua, *The Ideology of Human Rights* 36 VA. J. INT'L L. 589, 592 (1996) ("Myths of racial superiority and other "justifications" for the repression of one group by another have often served as a pretext for the control of political power and resources. The White American "rationale" for the enslavement of Africans or the White South African construction of the concept and practice of apartheid—both steeped in religion and pseudo-science—enhanced White nationalism and the control by Whites of state power"); CÉSAIRE, *supra* note 24, at 55-64 (recounting writings of colonial apologists, which justify domination based on the supposed inferiority of the colonized).

52. BONILLA-SILVA, *supra* note 32, at 21-22.

53. GOLDBERG, *supra* note 15, at 36.

54. Mills, *supra* note 20, at 42 ("White supremacy should therefore be seen as a multidimensional system of domination not merely encompassing the 'formally' political that is limited to the juridico-political realm of official governing bodies and laws but...extending to white domination in economic, cultural, cognitive-evaluative, somatic, and in a sense even 'metaphysical' spheres.").

invested in maintaining white supremacy and power (also commonly understood as white privilege) convince themselves that the racial contract and racial hierarchy are part of the natural state of things in the liberal, Western state.

The idea of a “natural state of things” is also used as a justification for racism, as Eduardo Bonilla-Silva documents via interviews with various “colorblind” individuals.<sup>55</sup> Just as race was created in order to justify colonialism, socially constructed ideologies about identities based upon biology and phenotype are created to justify the establishment and maintenance of a racist status quo. As an example, one can consider the idea that race is “natural” or “biological.” According to common stereotypes, black men are imagined to be naturally suited for sports and crime, black women for domestic work, and Mexicans for manual labor. Similarly, East Asians are imagined to be naturally talented at math, and Jews to be naturally business-savvy. White men are imagined to be naturally suited for positions of leadership, in the political, economic, or social sectors. A white supremacist or white privilege status quo is maintained in the United States based on how these constructed and projected attributes are valued in society, and how they limit life options.

The Author considers bias, prejudice, and racial animus to be micro-level manifestations of individuals’ willingness to maintain the status-quo based upon their conscious or subconscious recognition of their position on the racial totem pole. Bonilla-Silva identifies this recognition as “a sense of group position” among whites, whose “prejudice is an ideology to defend white privilege.”<sup>56</sup> Racism exists where power is at stake, and therefore, racial animus exists as a pre-emptive or reactionary response to a threat to the power of society’s dominant group. The full citizens of the empire use race and racism to suppress the empire’s subjects and maintain colonial order.<sup>57</sup> While bias, prejudice, discrimination, racial animus, and stereotyping are all key ingredients in racism’s recipe, they are also merely symptoms and expressions of the greater phenomenon, which is racism itself. Racism is not simply bigotry, then, but is instead the lifeblood of the modern, liberal state, which thrives upon the existence of a dominant group and those who are dominated.<sup>58</sup>

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55. BONILLA SILVA, *supra* note 3, at 2 (“Whites rationalize minorities’ contemporary status as the product of market dynamics, naturally occurring phenomena, and blacks’ imputed cultural limitations. For instance, whites can attribute Latinos’ high poverty rate to a relaxed work ethic...or residential segregation as the result of natural tendencies among groups...”).

56. BONILLA-SILVA, *supra* note 3, at 7 (2003).

57. See BONILLA-SILVA, *supra* note 32, at 29 (“Racism, in Blauner’s view, has an objective reality ‘located in the actual existence of domination and hierarchy’...this tradition regards racism or racial-colonial oppression as systemic, comprehensive (all actors involved), and rational (based on the interests of whites)”).

58. See generally LOOMBA, *supra* note 27, at 10 (defining colonialism as the “midwife that assisted at the birth of European capitalism” and positing that without colonialism, capitalism would not have taken place in Europe. Insofar as capitalism is a defining feature of the modern liberal state, and racism and colonialism exist in symbiosis, racism and the modern liberal state are

It is *the systematic manipulation, exploitation and domination of a group (primarily nonwhites) by a dominant group (primarily whites), for the purpose of maintaining exclusive access to economic and political power—that is, supremacy—within the empire/modern liberal state.*

Racism exists to *protest and protect*.<sup>59</sup> As a particularly recent example of this, expressions of racial animus by whites against blacks skyrocketed in the days and weeks after Barack Obama won the 2008 presidential election.<sup>60</sup> The director of the Intelligence Project at the Southern Poverty Law Center, Mark Potok, has stated that the dramatic increase in hate crimes since the presidential election is the expression of anger by whites “who feel that they are losing everything they know, that the country their forefathers built has somehow been stolen from them.”<sup>61</sup>

Joe Feagin explains this desire of whites to protect the white supremacist order in the United States as follows: “Systemic racism is not just about the construction of racial images, attitudes, and identities. It is even more centrally about the creation, development and maintenance of white privilege, economic wealth, and sociopolitical power over nearly four centuries.”<sup>62</sup> For those white persons who recognize their position of dominance in society and would like to retain it, racism must survive in the modern Western world even if survival requires a faked death.

As purveyors of colonialism attempted to deflect attention away from colonialism’s destructive influence by declaring it dead or irrelevant, managers of oppressive racial hierarchies have announced the death and irrelevance of racism. Some have even declared that race itself does not exist, only nation.<sup>63</sup>

inevitably intertwined).

59. BONILLA-SILVA, *supra* note 3, at 9 (“Racial structures remain in place for the same reasons that other structures do. Since actors racialized as ‘white’—or as members of the dominant race—receive material benefits from the racial order, they struggle...to maintain their privileges...Therein lies the secret of racial structures and racial inequality the world over. They exist because they benefit members of the dominant race”); BONILLA-SILVA, *supra* note 32, at 11 (“Since the races in any racialized social system receive different social rewards (one receives benefits and the other disadvantages), they develop different material interests. Whereas the collective interests of the dominant race (whites in the contemporary United States) lie in preserving the racial status quo, the interests of the subordinate race or races (blacks and other minorities) lie in attempting to change their position in the system...”).

60. Harnden, *supra* note 4.

61. *Id.*; see also BONILLA-SILVA, *supra* note 32, at 103-11 (detailing white backlash against Civil Rights gains of blacks in the 1960s. This backlash was institutionalized, as police brutality and the expansion of the prison industry have operated to “keep blacks in their place”. The goal of such a backlash was to protest black gains and protect the racist societal order of the country.).

62. Andersen, *supra* note 49, at 29 (quoting JOE FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES AND FUTURE REPARATIONS* 21 (2000)).

63. PAUL GILROY, *THERE AIN’T NO BLACK IN THE UNION JACK: THE CULTURAL POLITICS OF RACE AND NATION* 57-58 (1987) (discussing the British Conservative Party’s suggestion that “blackness” and “British-ness” were mutually exclusive, and that blacks should choose to be British over being black); LA CONSTITUTION. 1958 CONST. art 1. (La France est une République

This declaration has sometimes come from minorities who desire to discard of their racial identities to escape racial discrimination and join the power structure. However, such a declaration from those persons only illuminates the extent to which race and racism are a reality. When the declaration comes from members of the dominant race—the descendants of the colonizers, it is often the result of a desire not to escape white supremacy or white privilege, but to conceal the existence of racism to prevent protests by the oppressed and redistribution of power to them.

Like colonialism, racism has the ability to transform itself, to conceal itself or adopt new identities when it becomes politically unpopular or illegal. Like colonialism, racism is a mechanism for creating and maintaining power. The similarities between racism and colonialism are not coincidental, as colonialism depends upon a belief in white supremacy for its survival. To the extent that colonialism still exists in the world, racism is also still operating. Thus, the notion that racism no longer exists in the United States—a neo-colonial nation—cannot be true.

### *C. Colonialism and the Paradox of American Liberal Democracy*

“And in the United States as in Europe, the exclusion of the majority of white men and all white women from the rights of citizenship and the classification of Native Americans and African Americans as subpersons accompanied the development of the new liberal nation-state.”<sup>64</sup>

“I know that some of you, disgusted with Europe, with all that hideous mess which you did not witness by choice, are turning—oh! in no great numbers—toward America and getting used to looking upon that country as a possible liberator...be careful!”<sup>65</sup>

There is no greater example of colonialism’s ability to transform and conceal itself than that provided by the United States of America. The prevailing narrative of the nation’s founding is one of rebellion against the tyranny of the British crown, in favor of liberty and justice for all. In this narrative, the European settlers were colonized subjects of King George. However, this narrative does not consider the fact that the settlers left one territory and invaded an inhabited one. The European settlers who sought refuge from the King believed that they, as other whites, were entitled to independence and sovereignty. Unfortunately, they achieved these things at the expense of the people they displaced, conquered, and oppressed in the New

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indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion.).

64. BONILLA-SILVA, *supra* note 3, at 27.

65. CÉSAIRE, *supra* note 24, at 76-77.

World. The United States was founded, and American liberal democracy established on the colonization of Native Americans and America's capitalist economy was dependent upon black slave labor.<sup>66</sup> The subjugation of nonwhites enabled whites to achieve equality with each other.<sup>67</sup> For whites to maintain such equality, the racist status quo of the new liberal state had to remain undisturbed.

The rhetoric of American liberal democracy is one of freedom, equal opportunity, and equality under the law for all. However, evidence exists of the nation's present dependence upon its heritage of colonial oppression. For example, during the 2009 United States presidential campaign, the Republican and Democratic contenders both expressed their belief that the United States of America was the "greatest country on earth."<sup>68</sup> This sort of rhetoric, which is reminiscent of colonial mandates, is often considered patriotic and taken for granted in American discourse.

Aside from openly racist organizations such as the Ku Klux Klan, most Americans would not openly express the idea that slavery or Jim Crow laws were virtues of democracy, even if they subscribe to racist views.<sup>69</sup> Others, like sociologist Gunnar Myrdal, consider racism in the United States to be a moral lag, which existed in betrayal of liberal democracy.<sup>70</sup> Under Myrdal's anomaly thesis, racism is a disease that can be eradicated by the panacea of enlightenment and progress.<sup>71</sup> Adherents to this theory believe that the United States will incrementally and ultimately evolve into a non-racist state. Under the anomaly thesis, liberal democracy remains an ideal form of government,

66. Mills, *supra* note 20, at 43 ("As one classic line puts it, white American wealth historically rests on red land and black labor").

67. JENNIFER HOCHSCHILD, *THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION* 6 (1984) (quoting James Henry Hammond, *Letter to an English Abolitionist*, in *THE IDEOLOGY OF SLAVERY* (Drew G. Faust ed., 1981) ("The existence of black slaves 'cause[s]...the perfect spirit of equality so prevalent among the whites of all the slaveholding states.")).

68. Senator Barack Obama, *The America We Love*, (declaring "As I got older, that gut instinct – that America is the greatest country on earth – would survive my growing awareness of our nation's imperfections"), (June 30, 2008), *available at* [http://www.barackobama.com/2008/06/30/remarks\\_of\\_senator\\_barack\\_obam\\_83.php](http://www.barackobama.com/2008/06/30/remarks_of_senator_barack_obam_83.php); Senator John McCain, *Republican National Convention Acceptance Speech*, (Sep. 5, 2008), *available at* <http://news.bbc.co.uk/2/hi/americas/7599422.stm> (stating "I'm going to fight to make sure every American has every reason to thank God, as I thank Him: that I'm an American, a proud citizen of the greatest country on earth").

69. *But see* Gane-McCalla, *supra* note 37.

70. HOCHSCHILD, *supra* note 67, at 4; *See also* Ian F. Haney López, *A Nation of Minorities: Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 998-1006 (2007) (stating "The core problem of race, Myrdal asserted, lay in misguided attitudes: the 'dilemma' to which his title pointed was the need for Americans to choose between their vaunted ideals and their embrace of irrational prejudice").

71. HOCHSCHILD, *supra* note 67, at 3-5 ("How, then, can racism coexist with liberal democracy...One response assumes that slavery, or more generally racial separatism, is a terrible and inexplicable anomaly stuck in the middle of our liberal democratic ethos.").

even though such ideals have not yet been achieved.

However, racism—both overt and covert—has been a constant throughout the history of the United States, even up to present day. Jennifer Hochschild presents her symbiosis theory, in contrast to Myrdal's "optimistic" view of liberal democracy's relationship to racism.<sup>72</sup> Under the symbiosis theory, racism and liberalism are intertwined, yet also antithetical as "racism shapes and energizes the liberal democratic body."<sup>73</sup> Hochschild details how important racism has been at every step of the United States' development as a nation. She notes, the Constitution "was shaped by disputes over whether slaves were persons or property."<sup>74</sup> Hochschild presents a strong argument in favor of her thesis, but like Myrdal, does not fully explain how, why, and the extent to which racism and liberal democracy coexist in the United States.

Like Gunnar Myrdal, Hochschild expresses a belief in liberal democracy. She posits that liberalism "...asserts the unique value of all persons, political equality of all citizens, liberty of all humans. It insists on natural rights, autonomy, opportunity, dignity." She also states, "racism...is profoundly anti-liberal and antidemocratic."<sup>75</sup> It might, therefore, be easy to accept America's liberal democracy as simply flawed, explaining the contradiction between the ideals of American democracy and the most obscene forms of racial oppression.

However, as Hochschild established, the racial order that currently exists in the United States has not only been long-standing, but fundamental to the creation, development, and maintenance of the nation. As such, it is difficult to maintain that racism and liberal democracy are antithetical, since racism has been and remains fundamental to democracy's existence.

First, it is helpful to ask: what is liberalism? In mainstream Western discourse, liberalism is linked to democracy and capitalism. However, democracy can exist without liberalism and liberalism without true democracy.<sup>76</sup> Bonilla-Silva turns to John Gray for a definition of liberalism that involves "'a set of distinctive features,' namely individualism, universalism, egalitarianism and meliorism."<sup>77</sup> He links these ideals directly to modernity,

72. *Id.* at 4 (Hochschild describes Myrdal as "optimistic. His optimism is a distinguishing feature of the anomaly thesis).

73. *Id.* at 1.

74. *Id.*

75. *Id.* at 2.

76. Fared Zakaria, *The Rise of Illiberal Democracy*, FAREEDZAKARIA.COM, (Nov. 1997), <http://www.fareedzakaria.com/ARTICLES/other/democracy.html> ("...for almost a century in the West, democracy has meant liberal democracy...As political scientist Philippe Schmitter has pointed out, 'Liberalism, either as a conception of political liberty, or as a doctrine about economic policy, may have coincided with democracy. But it has never been immutably or unambiguously linked to its practice.'")

77. BONILLA-SILVA, *supra* note 3, at 26; *See also* D'Souza, *supra* note 25 (Crediting colonialism with bringing Western civilization—science, democracy, and capitalism—to the colonies. D'Souza links democracy and capitalism to each other, before equating it with such

capitalism, and the white middle class, and notes “[a]ll these components were endorsed and placed at the core of the constitutions of emerging nation-states by...the bourgeoisies of early modern capitalism. When the bourgeoisie lauded freedom, they meant ‘free trade, free selling and buying’...”<sup>78</sup> However, at no point were the ideals of liberalism meant to apply to non-whites, as whites could only enjoy equality with each other, if they dominated another group of people.<sup>79</sup>

Bonilla-Silva points out that John Stuart Mill, the “father of modern liberalism” defended forms of colonialism and slavery, before concluding that “in the United States as in Europe, the exclusion of the majority of white men and all white women from the rights of citizenship and the classification of Native Americans and African Americans as subpersons accompanied the development of the new liberal state.”<sup>80</sup> Hochschild also acknowledges that “liberal norms themselves reinforce racism that is already in place, even if liberalism is antithetical to the establishment of racial separatism.”<sup>81</sup> However, overwhelming evidence exists to prove that liberalism is not antithetical to, but rather dependent upon racism. The theory of liberalism does not contradict its practice, but works for those for whom its ideals were intended, at the expense of other peoples.<sup>82</sup>

With this understanding, the apparent tension between racism and the United States’ liberal democracy can be further resolved by recognizing the long-standing role of colonial empire in American history.<sup>83</sup> This Note presents American liberal democracy as a natural product of colonialism,<sup>84</sup> both of which depend heavily on racism. According to Hochschild, “[s]ince the English settled Jamestown, our politics have simultaneously affirmed the natural rights of all persons and legitimated the oppression of non-

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liberal ideals as liberty, sovereignty and rights—ideals he claims that Western colonialism bestowed upon the colonies. D’Souza then argues that colonialism should have lasted longer in places such as sub-Saharan Africa, which are “insufficiently Westernized” and in need of “more Western influence, not less.”)

78. BONILLA-SILVA, *supra* note 3, at 26.

79. *Id.* at 27; HOCHSCHILD, *supra* note 67, at 6.

80. BONILLA-SILVA, *supra* note 3, at 27.

81. HOCHSCHILD, *supra* note 67, at 8.

82. Mills, *supra* note 20, at 43; HOCHSCHILD, *supra* note 67, at 6.

83. See CÉSAIRE, *supra* note 24, at 76 (recounting correspondence between Ambassador Page to President Woodrow Wilson in 1913: “The future of the world belongs to us...Now what are we going to do with the leadership of the world presently when it clearly falls into our hands?” And in 1914: “What are we going to do with this England and this Empire, presently, when economic forces unmistakably put the leadership of the race into our hands?”).

84. See generally Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT’L L. 589, 592-604 (Advancing the proposition that liberal democracy and current human rights order are virtually tautological, universalized versions of one another. He discusses the imposition of liberal values on the world under the pretext of human rights by neo-colonial organizations such as NATO and the World Bank, which protect the economic and political interests of liberal democracies such as the United States, and presumably, the most privileged citizens in those liberal states).

Caucasians.”<sup>85</sup> Based on mainstream historical accounts, it is undisputed that the English settled Jamestown—even though people the English considered to be primitive were already comfortably settled there. David Goldberg holds liberalism responsible for formations of racism, noting that slavery, segregation and colonialism have all sustained liberalism from the beginning of modernity to the present day.<sup>86</sup> After connecting colonialism to formations of racism, it becomes easier to recognize colonialism and liberalism as being expressions of each other, and existing symbiotically.

Bonilla-Silva’s definition of liberalism precedes an in-depth analysis on white Americans’ embrace of abstract liberal principles today as a way to express racist views and advocate for an era of colorblindness without appearing racist.<sup>87</sup> Myrdal’s belief that racism would eventually come to an end helped catalyze towards colorblindness—one which was progressive and anti-racist at one point, but was later adopted by judges who consistently ruled in favor of policies maintaining the liberal, colonial, and racist status quo.<sup>88</sup> White Americans that wish to maintain their social dominance and consider anti-racism to be an attack against white people, have begun to use the language of liberalism and colorblindness.<sup>89</sup> The embrace of liberalism by many white Americans in the twenty-first century emerged as a backlash against black Americans’ gains during the Civil Rights Movements.<sup>90</sup> On a rare occasion during the presidential campaign when then-Senator Obama gave a speech directly addressing American racism, he discussed white anger over policies such as welfare, busing and affirmative action.<sup>91</sup> While President Obama linked current white backlash to feelings among whites that they were somehow being punished for the sins of their ancestors,<sup>92</sup> others have linked it to a belief that the country built for them, as their dominion, is now being taken away from them.<sup>93</sup> White anger over the perceived threat to their dominion was demonstrated by widespread white backlash against President Obama’s election. This, too, is liberalism, a modern expression of the American project

85. HOCHSCHILD, *supra* note 67, at 1.

86. See GOLDBERG, *supra* note 15, at 5.

87. BONILLA-SILVA, *supra* note 3, at 30 (“Because of the curious way in which liberalism’s principles are used in the post-Civil Rights era, other analysts label modern racial ideology ‘laissez-faire racism’ or ‘competitive racism’ or argue that modern racism is essentially a combination of the ‘American Creed’ with anti-black resentment.”).

88. See Haney López, *supra* note 70, at 987-1001 (criticizing the Supreme Court’s embrace of conservative colorblindness and documenting Thurgood Marshall’s use of liberal ideals to fight school segregation).

89. BONILLA-SILVA, *supra* note 3, at 28-47.

90. BONILLA-SILVA, *supra* note 32, at 90, 103-11 (discussing the “new racism” which emerged after the Civil Rights Movement, which relies on colorblindness, liberal discourse and beliefs, and the use of the criminal justice system to “keep blacks in their place”).

91. Barack Obama, A More Perfect Union (March 18, 172008), <http://my.barackobama.com/page/content/hisownwords>.

92. *Id.*

93. Harnden, *supra* note 4.

in which white Americans experience freedom dependent upon the colonial exploitation of blacks and other nonwhites.<sup>94</sup> The extent to which white Americans still fight, violently at times, to protect their empire, demonstrates the extent to which that empire still exists.

White supremacy and colonialism not only depend upon each other, but also upon the presence of race and racism. Therefore, as Hochschild states, "...we must be willing and able to change the whole shape and ecology of the American landscape. Only then can the American dream blossom."<sup>95</sup> Hochschild asks whether the American landscape can be changed "without severe dislocation."<sup>96</sup> Since liberalism is central to American "moral, sociopolitical and jurisprudential sense,"<sup>97</sup> severe dislocation, or ideological, rhetorical, political, and legal transformations, will prove to be the only solutions to the problem of racism.

## II. COLONIAL LAW AND THE CODIFICATION OF WHITE SUPREMACY: A CRITICAL, TEMPORAL ANALYSIS OF SUPREME COURT JURISPRUDENCE

### *A. The Codification of American Colonialism and Racism*

Though the United States Constitution is widely revered, the document also has notable critics.<sup>98</sup> For example, Supreme Court Justice Thurgood Marshall expressed his belief that the Constitution was deeply flawed at a speech he gave during the commemoration of the United States' bicentennial:

Nor do I find the wisdom, foresight, and sense of justice exhibited by the Framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today.<sup>99</sup>

Marshall's statements reflect a belief in the potential of American democracy to evolve. Colonialism, the root of American democracy, however, does not evolve. In spite of surface transformations, colonialism's fundamental

94. See generally HOCHSCHILD, *supra* note 67, at 6 (establishing American democracy as a system that was based on the exploitation and domination of non-whites so that white Americans could live as equals among each other).

95. *Id.* at 8.

96. *Id.*

97. GOLDBERG, *supra* note 15, at 5.

98. See Larry Sabato, *We need a new Constitution: The Nation has changed since 1787. The founding document has to catch up*, L.A. TIMES, (Oct. 10, 2007), available at <http://articles.latimes.com/2007/oct/10/news/oe-sabato10> (discussing his view that a new Constitutional Convention is in order).

99. Thurgood Marshall, Remarks of Thurgood Marshall At The Annual Seminar of the San Francisco Patent and Trademark Law Association (May 6, 1987).

characteristics remain the same. Furthermore, though many noted scholars view the Constitution as a dynamic document, conservative legal scholars and judges focus heavily on the Founders' original intent when engaged in Constitutional interpretation. Considering the Founders' belief in white supremacy, they likely did not intend for non-whites to share power with whites on an equal basis. Thus, a Constitution that would eventually give equal rights to blacks could not have been in their plans. The amendments, war and social transformation to which Justice Marshall refers were opportunities for colonialism to merely stage death, while creating new mechanisms of anti-black backlash that would protect white supremacy and the empire.<sup>100</sup> Constitutional liberalism, with its "protection of basic liberties" is also fundamental to the Constitution,<sup>101</sup> and white supremacy has been deeply entrenched in its foundation. As this Note will demonstrate, the Supreme Court has used the Constitution to uphold liberalism and white supremacy since the inception of the nation, and continues to do so today. Justice Marshall's healthy skepticism is helpful, but still limited insofar as it does not acknowledge that liberal democracy is the current expression of American colonialism, permanently tied to fundamentally anti-democratic principles. The cases analyzed herein demonstrate that the white supremacist empire upon which the United States was founded has not been dismantled, and call into question the notion that it can ever be dismantled under a liberal democratic model that is now hiding the nation's worst traits behind the shield of colorblindness.

### *1. Johnson v. M'Intosh: The Fledgling Empire*

The history of the United States as colonial and racist is demonstrated by some of the nation's earliest case law. The Supreme Court's ruling in *Johnson v. M'Intosh*, codified colonialism in the United States and made it a legitimate standard to decide cases upon in the young nation. At issue was whether or not Native Americans could sell land to private individuals. The Court ruled that they could not, as they only had a right of occupancy to the land and were not legal owners.<sup>102</sup> The Court based its ruling upon its doctrine of discovery—establishing European conquest of North American land as creating free title for the conquerors. The Native Americans merely maintained a right to inhabit the land.

Chief Justice John Marshall's establishment of the doctrine of discovery undermines the sovereignty of the Native American people, by acknowledging that the European colonists had discovered already-occupied land but also

100. See BONILLA-SILVA, *supra* note 32, at 103-11.

101. See Zakaria, *supra* note 76.

102. *Johnson v. M'Intosh*, 21 U.S. 543, 568-70 (1823).

declaring that the Native Americans were never true owners of the land.<sup>103</sup> The doctrine of discovery renders the Native Americans' longstanding, autonomous, prior occupation of the land legally meaningless.

Chief Justice Marshall explicitly claims the superiority of the so-called discoverers over Native Americans.<sup>104</sup> He relies on liberalism and colonial theory in the development of his discovery doctrine and composition of the opinion. Notably, Chief Justice Marshall offers European Christianity and "civilization" as justification for forcible conquest of North American land. Christianity and civilization were given in exchange for the opportunity of enterprise and independence (only) for the European colonizers.<sup>105</sup> The Chief Justice declares the Native Americans to be "fierce savages," and, therefore, the opposite of the civilized Europeans.<sup>106</sup> "To leave them in possession of their country," says Marshall, "was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence."<sup>107</sup> The white settlers deemed their agriculturalist system superior to the hunting and gathering of the Native Americans and they used this form of "superiority" as another justification for the conquest of Native American land.<sup>108</sup> Justice Marshall mentions wars between the whites and the Native Americans, implicitly referencing the ideas of competition and opportunity.<sup>109</sup> Marshall asserts "the whites were not always the aggressors," and claims that the victories of the whites were due to "European policy, numbers and skill."<sup>110</sup>

As paradox is a key characteristic of colonialism, it is unsurprising that much of the rhetoric in the Court's opinion seems hypocritical. When the Chief Justice advances the argument that the Europeans were justified in their actions because the Native Americans would have left the country as an uncivilized wilderness, he refers to the land as "their" country (meaning belonging to the

103. *Id.* at 572-73 ("On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy"); *Id.* at 574 ("While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives.").

104. *Id.* at 573.

105. *Id.* ("The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.").

106. *Id.* at 590.

107. *Id.*

108. See THOMAS W. MERRILL AND HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES (2007).

109. BONILLA-SILVA, *supra* note 32, at 141.

110. *Id.*

Native Americans). This seems incompatible with the idea that the Native Americans were never the true owners of the land. The conquest and domination of the savages by the civilized Euro-Americans was considered to be inevitable and proper. Justified by logically flawed expressions of white supremacy, Euro-Americans became entitled to colonize, and Empire was reaffirmed as their destiny.

The Court's ruling is an explicit example of colonialism's central role in American law. With respect to the reasons he asserted for the propagation of colonial rule in North America, the Chief Justice declared: "The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles."<sup>111</sup> The right of the United States to extinguish the title of the Native Americans was not disputable. Rather, "the validity of the titles...has never been questioned in our Courts."<sup>112</sup> The Court was invested in affirming the dominion of the United States over the Native Americans, and establishing it as the unquestionable "law of the land."<sup>113</sup>

## 2. *Dred Scott v. Sanford*

In 1857, the Supreme Court ruled that black slaves and their descendants could never be American citizens, and that Congress had no authority to prohibit slavery in federal territories.

Chief Justice Taney wrote for the Court, which held that: (1) Blacks could not be citizens of the United States, whether they were free or enslaved; (2) slaves were private property; (3) the owners of such private property could not be denied that property without due process, and; (4) Congress did not possess the authority to abolish slavery in a federal territory.<sup>114</sup> David Goldberg noted "Taney concluded that black people were excluded intentionally from being considered citizens under the US Constitution, unprotected by constitutional rights, immunities, and privileges," and used the decision as an illustration of the explicitly exclusionary goals of the Framers of the Constitution.<sup>115</sup>

Taney looks to history, as well as to the intent of the drafters of the Constitution for guidance, and finds that they considered Blacks unfit to associate with Whites socially or politically, and so inferior to whites that they possessed no rights that whites were required to respect.<sup>116</sup> Chief Justice Taney then states that the founding fathers did not intend to include black persons in

111. *Id.* at 574.

112. *Id.* at 587-88.

113. *Id.* at 591.

114. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

115. GOLDBERG, *supra* note 15, at 76.

116. *Dred Scott*, 60 U.S. (19 How.) at 407 ("They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race<sup>177</sup> either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit.").

the protections of the Constitution:

It is too clear for dispute that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration, for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted...<sup>117</sup>

The Chief Justice adds his own support for the drafters' white supremacist views by expressing his fear that if Mr. Scott's petition for emancipation were granted, blacks would be able to travel freely throughout the United States, speak publicly and freely, participate in politics, and carry weapons.<sup>118</sup> These, of course, were rights guaranteed by the Constitution, but such rights did not extend to Dred Scott or other blacks in the United States. In the Chief Justice's view, black liberation would pose a threat to the internal white American empire, which he felt the Founders had carefully codified.<sup>119</sup>

### 3. *Tee-Hit-Ton Indians v. U.S. And Brown v. Board*

A year after *Brown v. Board of Education of Topeka*, the Court ruled that the Tee-Hit-Ton Native Americans were not entitled to compensation for the taking of timber from Alaskan lands, which the Native American group claimed belonged to them.<sup>120</sup> In the Court's opinion, Justice Reed affirms the holding of *Johnson v. M'Intosh*, that the Native Americans did not own their land, but were only occupants, at the will of the American Government. Such occupancy could be extinguished at Congress' discretion and without compensation. Relying on *Johnson v. M'Intosh*, Justice Reed declares: "This [right of occupancy] of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained."<sup>121</sup> The Justice continues, mentioning that "Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force..."<sup>122</sup>

*Tee-Hit-Ton v. U.S* is notable, not just for its affirmation of *Johnson v. M'Intosh* so many years later, but also because Justice Reed was convinced that the United States was invested in caring for Native Americans. He refers to United States policies concerning Native Americans as compassionate, referring to the practice of Congress to "grant payments from the public purse

117. *Id.* at 410.

118. *Id.* at 416-17.

119. *Id.* at 410, 417 (stating, "And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.")

120. *Id.*

121. *Id.* at 279.

122. *Id.* at 289.

to needy descendants of exploited Indians.”<sup>123</sup> However, the Court’s language of compassion stands in direct contradiction to the exclusion of Native Americans from the right of ownership of their ancestral lands.

Also notable is the fact that *Tee-Hit-Ton* was decided after the decision to desegregate schools in *Brown v. Board of Education*. The Court in *Brown* found that *Plessy v. Ferguson*’s “separate but equal” doctrine was unconstitutional based on the psychological harm that segregation was said to cause to black schoolchildren. Then a young lawyer, Thurgood Marshall utilized the liberal ideal of colorblindness in his arguments against segregated schools.<sup>124</sup> However, southern school districts also used colorblindness and liberalism as reasons to stall actual desegregation after the Court’s ruling.<sup>125</sup> The dissonance between the *Tee-Hit-Ton* and *Brown* rulings demonstrates that even in the face of an apparent victory of liberalism, well-rooted colonialism will continue to linger, and offers evidence that liberalism cannot be relied on for nonwhite liberation, as liberalism has often ultimately run contrary to antiracist interests.

### *B. Hiding the Empire: Neo-Liberalism and The Shift to a Colorblind Paradigm*

When Ronald Reagan assumed the presidency of the United States in 1980, he immediately ushered the country into an era of neo-liberalism. He exploited white backlash against black civil rights gains, and played on the racist views of Americans for votes – never explicitly mentioning race.<sup>126</sup> Under Reagan, the mandatory minimum sentences for drug convictions were established<sup>127</sup> and welfare was attacked.<sup>128</sup> Neo-liberalism not only proved devastating to civil rights gains for Black Americans,<sup>129</sup> but President Reagan also supported South African apartheid because he deemed the anti-Apartheid movement to be Communist (that is, anti-liberal) and against America’s political and financial interests.<sup>130</sup> The liberation of blacks in South Africa was a threat to the liberal American empire. According to Reagan’s view, the explicitly white supremacist order in South Africa had to be maintained.

123. *Id.* at 273-74.

124. Haney López, *supra* note 70, at 1000.

125. *Id.* at 1001-03.

126. Paul Krugman, *Republicans and Race*, N.Y. TIMES, (Nov. 19, 2007), available at <http://www.nytimes.com/2007/11/19/opinion/19krugman.html>; See also Obama, *supra* note 92 (discussing white backlash).

127. Anti Drug Abuse Act of 1986, Pub. L. 99-570, 100 Stat. 3207.

128. Krugman, *supra* note 126.

129. Frederic I. Salop, *Public Protest and Public Policy: The Anti-Apartheid Movement and Political Innovation*, 9 REV. POLICY RES. 307, 322 (1990).

130. *Id.*; Derrick Z. Jackson, *Reagan’s Heart of Darkness*, THE BOSTON GLOBE, (Jun. 9, 2004) available at [http://www.boston.com/news/nation/articles/2004/06/09/reagans\\_heart\\_of\\_darkness](http://www.boston.com/news/nation/articles/2004/06/09/reagans_heart_of_darkness); Democracy Now!, *Allied With Apartheid: Reagan Supported Racist South African Gov’t*, (Jun. 11, 2004), [http://www.democracynow.org/2004/6/11/allied\\_with\\_apartheid\\_reagan\\_supported\\_racist](http://www.democracynow.org/2004/6/11/allied_with_apartheid_reagan_supported_racist).

As the analysis of recent civil rights case law will demonstrate, persons invested in maintaining their privileged racialized positions since the Civil Rights Era have taken legal steps to ensure that the status quo was not destroyed and their privilege was not compromised. However, in order to avoid offending anti-racist sensibilities, those white Americans who feel threatened by minority progress have adopted new language as they express their opposition to black gains.<sup>131</sup> Eduardo Bonilla-Silva has identified the new rhetoric as a part of what he terms “reasonable racism”, which he defines as the abstract application of liberal principles in a way that helps people rationalize racial inequality as natural and unworthy of intervention.<sup>132</sup>

The law has not been immune to America’s adoption of colorblindness. Since the Civil Rights Era, the Supreme Court has increasingly embraced colorblindness,<sup>133</sup> confusing liberal ideals regarding what society should become with the best practices to achieve those ideals.<sup>134</sup> For example, though liberalism and colorblindness might facially comport with the Fifth and Fourteenth Amendments, their effect in the Court has been to re-consolidate exclusive power within the white community, thereby maintaining white supremacy.<sup>135</sup>

The Supreme Court’s increasing disapproval of affirmative action policies is a direct result of its embrace of abstract liberalism. The hallmark of the *Grutter v. Bollinger* opinion is the Sunset Clause—the durational requirement of twenty-five years that the Court places on the Law School’s admissions policy. In spite of Justice O’Connor’s recognition that race and institutional racism continue to be valid issues affecting the ability of minorities to be admitted into law school,<sup>136</sup> she writes that “[t]he Court expects that twenty-

131. BONILLA-SILVA, *supra* note 3, at 4.

132. BONILLA-SILVA, *supra* note 3, at 30-36 (defining reasonable racism as the rationalization of racial unfairness as legitimate via the application of liberal principles such as equal opportunity, meritocracy, non-intervention, individual choice, and naturalization); *See also* Eduardo Bonilla Silva, “New Racism, Color-Blind Racism, and the Future of Whiteness in America,” in *WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM* 276 (Ashley W. Doane and Eduardo Bonilla-Silva eds.) (defining reasonable racism as the application of liberalism to minorities “in an abstract and decontextualized manner...that ends up rationalizing racially unfair situations”).

133. Haney López, *supra* note 70, at 987.

134. *Id.* at 988; *See also* BONILLA-SILVA, *supra* note 32, at 141 (describing abstract liberalism as being decontextualized, allowing it to rationalize racism).

135. Mills, *supra* note 20, at 40-41 (“...the facile and illusory symmetry of an individualized ‘prejudice’ equally to be condemned wherever it is encountered, which opens the conceptual door to the later notion of ‘reverse discrimination; and the Supreme Court’s option for the ‘colorblind’ ‘perpetrator perspective,’ is revealed as a mystificatory obfuscation of the clearly asymmetrical and enduring system of white power itself”); *see also* BONILLA-SILVA, *supra* note 3, at 2-4 (“And the beauty of this new ideology is that it aids in the maintenance of white privilege without fanfare.”).

136. *Grutter v. Bollinger*, 539 U.S. 306, 338 (“By virtue of our Nation’s struggle with racial inequality, such students are both likely to have experiences of particular importance to the Law School’s mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences.”).

five years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”<sup>137</sup> She encourages the law school to find race-neutral admissions formulae, stating that “The Court takes the Law School at its word that it...will terminate its use of racial preferences as soon as is practicable.”<sup>138</sup>

The Court’s emphasis on removing the remedy for racism instead of the racism itself falls squarely into Goldberg’s indicting definition of colorblindness—the attempt to go beyond race without dealing with the context of racism and inequities.<sup>139</sup> Even Justice O’Connor acknowledges the importance of context when reviewing affirmative action programs.<sup>140</sup> However, like Gunnar Myrdal,<sup>141</sup> she seems to believe that racism will disappear over time—25 years, in her estimation, based on an expectation that, in that time, the number of minority applicants with high test scores and grades will rise.<sup>142</sup> Moreover, she is guilty of “the conflation of colorblindness as an ideal vision of a future society, and as a means to achieve this end.”<sup>143</sup> She does not elaborate as to how she imagines such a disappearance will occur, nor does she provide recommendations on how to eradicate racism. Instead, Justice O’Connor chooses to focus on eradicating the remedy for racism, with the neo-liberal goal of ensuring that all applicants will have to engage in free competition with each other.<sup>144</sup> The Court’s failure to recognize racism as a socio-political order as opposed to something that will simply fade away over time leads it to place on minorities the responsibility to play according to the rules of liberalism, although liberalism is the very system of exclusion that has prevented minorities from full and fair participation since the inception of the nation.

Despite Justice O’Connor’s moderate embrace of conservative colorblind ideology,<sup>145</sup> she realizes that race and racism still factor into the realities of American life. This is in direct contrast with the ideology of Justice Thomas.

137. *Id.* at 343.

138. *Id.*

139. GOLDBERG, *supra* note 15, at 221.

140. *Grutter*, 539 U.S. at 327 (“Context matters when reviewing race-based governmental action under the Equal Protection Clause... Not every decision influenced by race is equally objectionable”); Haney López, *supra* note 70, at 988.

141. Haney López, *supra* note 70, at 999.

142. *Grutter*, 539 U.S. at 343.

143. Haney López, *supra* note 70, at 988.

144. *See Grutter*, 539 U.S. at 318, 334 (stating that universities cannot isolate applicants from competition with other applicants and finding that the University of Michigan has not isolated minority applicants from competition—that is, it has not operated a system of quotas); *see also* BONILLA-SILVA, *supra* note 32, at 141 (stating that whites apply elements of economic liberalism to justify racism); *see also* BONILLA-SILVA, *supra* note 3, at 32-33 (explaining laissez-faire racism as a way of sustaining white privilege by ignoring institutional racism and forcing victims of institutional racism to compete with the privileged, based on the liberal principle of merit).

145. Haney López, *supra* note 70, at 987.

His “equation of laws designed to subjugate with those intended to foster equality,”<sup>146</sup> described by Haney López as “laughably absurd,”<sup>147</sup> is an example of how some African-Americans participate in the conservative colorblind project. For example, Bonilla-Silva noted that Justice Thomas, an “antiblack black,”<sup>148</sup> is part of a trend among whites of symbolically including blacks while using them to enforce liberalism and protect white supremacist order—an act that insulates them from claims of racism while allowing them to pursue a racist agenda.<sup>149</sup> Justice Thomas employs the same *modus operandi* in his partial dissent in *Grutter v. Bollinger*, citing Frederick Douglass, a noted black abolitionist, in support of his neo-liberal ideology. “Do nothing with us,” says Frederick Douglass. With regards to the black man Douglass notes “[a]nd if the negro cannot stand on his own legs, let him fall...[Your] interference is doing him positive injury.”<sup>150</sup> By citing Douglass, Thomas not only legitimates his stance on affirmative action using language from Douglass that appeals to liberal ideals of non-intervention,<sup>151</sup> he also provides white opponents of affirmative action with language from Douglass that they can employ to insulate themselves from claims of racism.

Justice Thomas claims that “[t]he Constitution does not...tolerate institutional devotion to the status quo in admissions policies when such devotion ripens into racial discrimination.”<sup>152</sup> Thomas advances the idea that minority applicants to law schools should be subject to pure competition and meritocracy, by claiming that minority law students find themselves unprepared for the “cauldron of competition” once they begin their courses.<sup>153</sup> However, he does not consider that the current meritocracy may be based upon the idea that whites are inherently more meritorious than other groups, nor does he consider that the current status quo may keep some minority students ineligible for admission to universities without intervention.<sup>154</sup> However, Thomas’ commitment to colorblind standards leads him to view all forms of race-based considerations to be equally problematic,<sup>155</sup> with no consideration of context.<sup>156</sup>

146. *Id.* at 987.

147. *Id.*

148. BONILLA-SILVA, *supra* note 32, at 102.

149. *Id.* at 101-02.

150. *Grutter*, 539 U.S. at 349-50 (Thomas, J., concurring in part and dissenting in part).

151. See BONILLA-SILVA, *supra* note 32, at 141 (citing “little government intervention” as an element of economic liberalism).

152. *Grutter*, 539 U.S. at 350.

153. See *id.* at 372 (“The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition.”).

154. See *Grutter*, 539 U.S. at 338 (Noting, by contrast, the Court’s recognition that intervention is necessary “by virtue of the Nation’s struggle with racial inequality.”).

155. Haney López, *supra* note 70, at 988 (“By reactionary colorblindness I mean an anti-classification understanding of the Equal Protection Clause that accords race-conscious remedies and racial subjugation the same level of constitutional hostility. I use this term to distinguish the current doctrine from colorblindness generally.”).

Based upon his citation of Frederick Douglas, Thomas seems prepared to allow all who do not compete well to fail, despite the lack of a level playing field.

Justice Scalia joins several parts of Thomas' opinion, but also writes a separate opinion, which Thomas joins. Haney López analyzed Justice Scalia's stance against affirmative action policies as the result of the Justice's neo-liberal notion that everyone is a minority, and that discrimination faced by blacks, for example, is no worse than that faced by whites.<sup>157</sup> He recounts an essay that the Justice writes about his father's experience as an Italian immigrant, a member of a group who faced discrimination from other whites.<sup>158</sup> This story-telling, which Charles Gallagher terms "playing the white ethnic card"<sup>159</sup> and Bonilla-Silva describes as an expression of colorblind racism,<sup>160</sup> informs Justice Scalia's view that nothing is owed to racism's victims, including the benefits of affirmative action. From Scalia's viewpoint, since everyone was a victim, no one was a victim, and every applicant to the University of Michigan Law School was in equal competition with the other members of the applicant pool.<sup>161</sup>

Further, Justice Scalia questions universities' claims of commitment to diversity. He attacks a lack of forced assimilation on university campuses as "tribalism" and "racial segregation" noting:

Still other suits may challenge the bona fides of the institution's expressed commitment to the educational benefits of diversity that immunize the discriminatory scheme in *Grutter*. (Tempting targets, one would suppose, will be those universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.)<sup>162</sup>

In Scalia's opinion, any form of color-consciousness, or cultural-consciousness is insidious because it is not colorblind. His reaction to the

156. See Mills, *supra* note 20, at 40-41 (discussing the "illusory symmetry of an individualized prejudice").

157. *Id.* at 1046 ("For Scalia, black exclusion paralleled the oppression of whites, a group he readily recast as the Irish, the Poles, the Jews, and most pointedly the Italians, ethnics all and all equally the victims of discrimination-including invidious discrimination in the form of affirmative action.").

158. *Id.*

159. Charles A. Gallagher, *Playing the White Ethnic Card*, in *WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM* 145-52 (Ashley W. Doane and Eduardo Bonilla-Silva eds., 2003).

160. BONILLA-SILVA, *supra* note 32, at 160-61 (describing how whites "us[e] the experiences of other ethnic groups as a counterpoint to explain blacks' status").

161. Haney López, *supra* note 70, at 1045-46 ("I owe no man anything, nor he me," Scalia wrote, 'because of the blood that flows in our veins. On the other hand, races-whether black or white-were in fact ethnicities, all in equal competition with each other.').

162. *Grutter*, 539 U.S. at 349.

perceived failure of racial minorities to assimilate provides a clear example of Kristen Myer's "white fright" theory—white resentment of blacks and other minorities acquiring their own separate spaces, without regard for white privilege and segregation. Bonilla-Silva also analyzes white projection of racism onto blacks—whites' belief that blacks segregate themselves and refuse to assimilate—as a form of "reasonable racism." Justice Scalia appears to exhibit this form of racism in his opinion. In his opinion, race only disappears if the person marked with a race allows the majority—which constructed the marker—to take the marker away at its convenience, if such a marker will serve as a challenge to the status quo of white supremacy.<sup>163</sup>

Under Scalia's vision, historically oppressed minorities who do not compete in a free socio-political market are the problem.<sup>164</sup> The possibility of the existence of large-scale racist structures does not factor into the Justice's reasoning. Under a colorblind order, being conscious of one's race as a minority is tantamount to "seeking special treatment... 'playing the race card,' or even being racist,"<sup>165</sup> and removes one's claim to participation in the American polity. For the minority person to become "All-American," however, he or she must suffer institutional as well as overt racism because of his or her race.

The Supreme Court's most recent blow to challenges to racism in education came in the 2007 rulings on the school desegregation cases of Seattle, Washington and Jefferson County, Kentucky. The author of the Court's opinion in *Community Schools v. Seattle* was the new Chief Justice John Roberts. The 2003 Michigan cases had already marked an imminent end to affirmative action programs, and the 2007 ruling by the Roberts Court seemed to be a death-knell for any other affirmative action cases.<sup>166</sup>

The Court holds, in a plurality decision, that the school desegregation plans violate the Equal Protection Clause and are, thus, unconstitutional. Using the language of reasonable racism and liberalism, Chief Justice Roberts rejects integration ("racial balancing", as he terms it) as a compelling state interest when segregation occurs *naturally*.<sup>167</sup> His use of *Brown* as support for his

163. Kristen Meyers, *White Fright: Reproducing White Supremacy*, in *WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM* 139 (Ashley W. Doane and Eduardo Bonilla-Silva eds., 2003) (discussing white fright—white fear that blacks are invading white-dominated spheres and spaces, such as "possessions, neighborhoods, safety, jobs, and their overall way of life" and resentment that minorities would acquire their own separate spaces).

164. See BONILLA-SILVA, *supra* note 3, at 66 ("Racial projections bring to mind the famous statement by DuBois in *The Souls of Black Folk*, 'How does it feel to be a problem?' Whites freely lash out at minorities (They self-segregate...) and seldom exhibit self-reflexivity; minorities are the problem, whites are not").

165. Doane, *supra* note 9, at 13.

166. See Haney López, *supra* note 70, at 988 ("As Winkler notes, though, over the last decade strict scrutiny "is apparently becoming *more fatal*," ... (emphasis added), a trend I expect will accelerate in race cases under the tutelage of the Roberts Court.").

167. *Community Schools v. Seattle*, 127 S.Ct. 2738 (2007) (noting that "...the Seattle public

ruling becomes another irony that exposes the double-edged sword of colorblindness. In *Brown*, the segregation was *de jure*, while Seattle's segregation was *de facto*.<sup>168</sup> He fails to consider that *de facto* segregation results from a colorblind desire of whites to live separately from blacks that is, in fact, racist.<sup>169</sup> Indeed, in the Seattle school district, Justice Roberts notes that three of the five oversubscribed, popular schools, were located in the predominantly white northern Seattle area. A fourth oversubscribed school was located in the center of the city. However, most nonwhites live in the southern part of the city, which only featured one oversubscribed school.<sup>170</sup> The petitioners in the case were parents of white students who wished to enroll in the oversubscribed schools in the predominantly white neighborhood.<sup>171</sup> The Chief Justice uses an approach that Haney Lopez terms "intellectually indefensible."<sup>172</sup> He employs the liberal language Robert Carter<sup>173</sup> used in *Brown* to formalistically equate the exclusion of black children from white schools with a system that guarantees racial integration<sup>174</sup>—integration that the petitioners found to be contrary to their children's interests in attending school in a predominantly white neighborhood. The Chief Justice fails to consider historical context, or the possibility that the present petitioners had race-based motives.<sup>175</sup>

Justice Stevens' dissent is particularly effective in exposing the Chief

schools have not shown that they were ever segregated by law, and were not subject to court-ordered desegregation decrees" and iterating that the Court does not consider *de facto* "racial imbalance in the schools" to violate the Constitution).

168. *Id.* at 5.

169. See BONILLA-SILVA, *supra* note 32, at 141-149 (2001) (discussing white defense of segregation as natural, and thereby implicitly lauding the ideal of non-intervention); see also Heather Beth Johnson & Thomas M. Shapiro, *Good Neighborhoods, Good Schools, in WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM* 180-183 (Ashley W. Doane and Eduardo Bonilla-Silva eds., 2003) (Discussing how whites defend racial segregation as natural or incidental, and how all-white neighborhoods and schools "just happen" to be "good", and therefore not worthy of forced integration. By naturalizing segregation, whites are allowed to defend their choices to live in segregated spaces without appearing to be racist).

170. *Community Schools*, 127 S.Ct. at 2747-48.

171. *Id.* at 2748.

172. Haney López, *supra* note 70, at 987.

173. Robert L. Carter was plaintiffs' counsel in *Brown*. Like Thurgood Marshall, he used colorblind language in the service of anti-racism. See Haney López, *supra* note 70, at 1000-01 (detailing Marshall's use of colorblindness).

174. *Community Schools*, 127 S. Ct. at 2767-68 ; Haney López, *supra* note 70, at 987 ("Under this approach, much criticized by legal scholars, the Fourteenth Amendment demands the highest level of justification whenever the state employs a racial distinction, irrespective of whether such race-conscious means are advanced to enforce or to ameliorate racial inequality. Contemporary constitutional law insists on a stark congruence between hostile racial practices on the one hand and efforts to respond to societal discrimination on the other").

175. See Johnson & Shapiro, *supra* note 169, at 185 ("Our interviews with white families tell us that race is a major factor, if not the major factor, in determining community and school choice...Race is a key dimension of how whites define "good" neighborhoods and "good" schools, and the two are so intricately intertwined that they cannot be seen as separate choices").

Justice's colorblind rhetoric and theories. He notes the "cruel" ironies of Roberts' use of *Brown* to support his colorblind theory.<sup>176</sup> He also notes that two prominent federal judges have rejected the "wooden reading" of the Equal Protection Clause employed by the Chief Justice, which equates remedial classifications with invidious classifications, without any historical context.<sup>177</sup> In regard to Chief Justice Robert's ode to *Brown*, Stevens boldly declares, "the Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, the Chief Justice rewrites the history of one of this Court's most important decisions."<sup>178</sup>

Justice Stevens also calls attention to the ideological shift of the Court over time, from anti-racism to colorblindness:

Perhaps the best example is provided by our approval of the decision of the Supreme Judicial Court of Massachusetts in 1967 upholding a state statute mandating racial integration in that State's school system...Rejecting arguments comparable to those that the plurality accepts today, that court noted: 'It would be the height of irony if the racial imbalance act, enacted as it was with the laudable purpose of achieving equal educational opportunities, should, by prescribing school pupil allocations based on race, founder on unsuspected shoals in the Fourteenth Amendment.'<sup>179</sup>

Stevens ends his dissent with an acknowledgment of the Court's move away from the precedent set in *Brown*, an implicit notation of the Court's move towards colorblindness, and an implicit notation of the bitter ironies of that shift. He concludes: "[T]he Court has changed significantly since it decided *School Comm. of Boston* in 1968. It was then more faithful to *Brown* and more respectful of our precedent than it is today. It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision."<sup>180</sup>

The Court's plurality decision in *Community Schools* was a nod to the preservation of oppressive, liberal societal status quos—in this case, *de facto* school segregation. Defenses of natural segregation allow whites to advocate for "good" all-white spaces<sup>181</sup> without appearing overtly racist. In this way, defenses of separate, superior spaces for whites can be successful under race-neutral laws, and racism is preserved without the identifiable presence of any

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176. *Community Schools*, 127 S.Ct. at 2797 (Stevens, J., dissenting).

177. *Id.* at 2798.

178. *Id.*

179. *Id.* at 2799.

180. *Id.* at 2800.

181. See Johnson & Shapiro, *supra* note 169, at 181-83 (recounting white persons' equations of white neighborhoods with goodness, and their expressed belief that the whiteness of good neighbors was simply happenstance or default, despite the fact that they decide how good a neighborhood is by how white it is).

racists.

### III. THE IMPACT OF COLORBLIND THEORY UPON REMEDIES FOR RACISM

With its officially color-blind Constitution and national policies, there is theoretically no race in France, only nation.<sup>182</sup> However, there is significant discourse about whether or not nonwhites in France can truly be French.<sup>183</sup> This issue, combined with France's xenophobia reflects the resistance of white inhabitants of the mother country to sharing their citizenship with those to whom they feel superior.

French color-blindness prohibits remedial measures against racism such as affirmative action programs,<sup>184</sup> although non-whites in France face continual, systematic racial discrimination<sup>185</sup> and a significant number of white French identify themselves as "'a bit' or 'somewhat' racist".<sup>186</sup> Despite the laws surrounding census taking, there are an estimated five million black residents of France.<sup>187</sup> According to a 2007 poll, sixty-one percent of blacks in France report having experienced at least one racist incident within the past year.<sup>188</sup> Blacks and Arabs face discrimination in job searches, so much so that some job candidates choose to change their names to those considered to be more French.<sup>189</sup> Furthermore, there are no Blacks or Arabs in the French parliament.<sup>190</sup>

Moreover, mainstream French commentary and discourse has become increasingly racist, as many white French citizens are increasingly open about their own racism.<sup>191</sup> French President, Nicolas Sarkozy, used racist slurs to

182. LA CONSTITUTION. 1958 CONST. art 1. The French Constitution states "La France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion." Under this article, it is illegal to make any racial distinctions or to account for race in censuses in France.

183. See DAVID BERISS, *BLACK SKINS, FRENCH VOICES: CARIBBEAN ETHNICITY AND ACTIVISM IN URBAN FRANCE* 5-8 (2004) (discussing the so-called "immigrant problem" in France, as nonwhite French are labeled immigrants and treated as foreigners in France, despite their citizenship).

184. Voice of America, *Survey: Blacks in France Say They Face Racial Discrimination*, (Feb. 5, 2007), available at <http://www.voanews.com/english/archive/2007-02/2007-02-05-voa27.cfm?CFID=212666078&CFTOKEN=44766909> ("France has long argued all of its citizens are equal under its revolutionary creed of liberty, equality and fraternity. For this reason, the government - and many French - are against affirmative action policies favoring minorities"); Bruce Crumley, *Racism Unfiltered in France*, TIME.COM, (Jan. 6, 2007), available at <http://www.time.com/time/world/article/0,8599,1574817,00.html> ("France rejects affirmative action as incompatible with its republican ideals of color-blind equality for all citizens.").

185. *Id.*

186. Voice of America, *supra* note 184.

187. *Id.*

188. *Id.*

189. Angelique Chrisafis, *The Crackdown*, GUARDIAN.CO.UK, (Oct. 3, 2007), available at <http://www.guardian.co.uk/world/2007/oct/03/france.angeliquechrisafis>.

190. Crumley, *supra* note 184.

191. *Id.*; VOICE OF AMERICA, *supra* note 184.

denounce male rioters in the banlieues during his presidential campaign.<sup>192</sup> Support for his candidacy increased after his use of the slurs,<sup>193</sup> and after winning the presidency, Sarkozy insulted Africans by giving a racist speech in Senegal.<sup>194</sup> Social commentator and television personality Pascal Sevran called for the sterilization of Africans in a recently published book, and again in a newspaper interview, without any significant punishment.<sup>195</sup>

Furthermore, “a population that is not counted does not count.”<sup>196</sup> David Beriss offers a depiction of what life in France is like for Antilleans who are “not counted” by their “color-blind” mayor.<sup>197</sup> At a performance by an Antillean theater troupe in the Parisian suburb Colombes, the town’s mayor opened the program with a speech. The constituents responded when the floor was opened for questions, using the opportunity to ask the mayor why they were kept from using Colombes’ public facilities. Perhaps, members of the audience stated, denial of access to municipal facilities stems from racism at city hall. To this the mayor responded vehemently, “You are all my constituents...but as Antilleans you cannot make special demands.” Then, “On the other hand,” the mayor added, “as a group you do cause specific problems with your habit of noisy parties and loud music in public housing. I realize...that you are fun loving and boisterous, but you must control yourselves better.”<sup>198</sup>

The mayor of Colombes demonstrated the fraudulence of colorblindness by using it to dismiss his residents’ complaints of racial discrimination in the town. Under his colorblind order, any protest of racism constituted a special demand.<sup>199</sup> The use of colorblind rhetoric was an effective tool of denial for the mayor, but did nothing to mitigate color-consciousness among Antilleans or those who were discriminating against them. Furthermore, the mayor revealed his own racist views by stereotyping his residents as “loud”, “fun-loving”, and “boisterous,” before implying that they were incapable of “controlling themselves.”<sup>200</sup>

192. Crumley, *supra* note 184.

193. *Id.* The increased support may or may not have been causally related to the slurs.

194. PRESIDENCE DE LA REPUBLIQUE, *Allocution de M. Nicolas SARKOZY, Président de la République, prononcée à l'Université de Dakar*, available at [http://www.elysee.fr/elysee/elysee.fr/francais/interventions/2007/juillet/allocution\\_a\\_1\\_universite\\_de\\_dakar.79184.html](http://www.elysee.fr/elysee/elysee.fr/francais/interventions/2007/juillet/allocution_a_1_universite_de_dakar.79184.html) (last visited Dec. 12, 2008); Africa Resource, *The Unofficial English Edition of Sarkozy's Speech*, available at <http://www.africaresource.com/content/view/437/68/> (last visited Feb. 10, 2008); GLOBAL VOICES ONLINE, *Senegal: Africa according to Nicolas Sarkozy*, available at <http://www.globalvoicesonline.org/2007/08/24/senegal-africa-according-to-nicolas-sarkozy> (Feb. 10, 2008).

195. Crumley, *supra* note 184.

196. Voice of America, *supra* note 184.

197. BERISS, *supra* note 183, at 16-17.

198. *Id.*

199. *See Id.*

200. *Id.*

Beriss asks whether “race is somehow hidden, but present all the same, in French culture...”<sup>201</sup> Valuing homogenous French-ness is distinctly rooted in the French colonial tradition of direct rule, whereby the French insisted upon assimilation of the colonized into French culture as a means of building a unified empire.<sup>202</sup> This creates an impossible double-bind for the “immigrants” in France, many of whom are actually French citizens. These “immigrants” are expected to somehow be totally French without being accepted by the white French as legitimate French citizens because of their races.<sup>203</sup> Yet, the French are able to deny their own racism by invoking the ideals of a colorblind society. Therefore, race becomes the “immigrants’ problem,” and the mere presence of the so-called immigrants becomes the “immigrant problem.”<sup>204</sup>

Colorblindness has been wholly ineffective in preventing or eradicating French racism. On the contrary, colorblind policies and a willful blindness to the presence of racism have shielded French racism from serious state-wide critique and review and thereby excluded non-white French from the privileges and rights of full French citizenship.<sup>205</sup> Colorblindness is the end result of perpetuating colonialism while denying its existence. Under a colorblind order, racism does not disappear. Rather, it is enhanced in an attempt to maintain imperial privilege, long after the empire supposedly perished. France’s ineffective and oppressive colorblind policies provide an example of the stifling impact such policies would have upon non-whites in the United States. The United States has not completely shifted towards a colorblind order, but conservative American ideologues are advocating tirelessly for colorblind policies with ever-increasing success. The move from anti-racism to colorblindness will have the intended effect of rendering victims of racial discrimination voiceless and powerless, like the silenced residents of Colombes. Just as colonialism can flourish when it is rendered invisible and elusive, so too can racism continue to operate, and white supremacy thrive, when they cannot be attacked.<sup>206</sup>

201. *Id.* at 7.

202. See Gellar, *supra* note 51, at 144 (describing direct rule, but also noting that the policy was not implemented totally uniformly).

203. *Id.*; see also BONILLA-SILVA, *supra* note 3, at 66 (discussing the quandary into which colorblindness places racial minorities—the majority excludes the minority and yet expects the minority to assimilate into the majority); but see Grutter, 539 U.S. at 349 (Scalia, J., dissenting) (Lamenting multiculturalism at American universities, and equating it to tribalism and racial segregation. In the world of colorblindness that Scalia advocates, minorities would face this same impossible dilemma of having to deny their identities in order to attempt assimilation while being prevented from assimilation on the basis of their identities.).

204. *Id.*

205. Crumley, *supra* note 184 (“France rejects affirmative action as incompatible with its republican ideals of color-blind equality for all citizens. Nice in theory, but that’s not working in practice: discrimination continues, inequality is rife, and notions of color-blindness don’t square with the rising chorus of racially loaded commentary. Color-blindness may also function to keep France blind to racial discrimination and inequality...”).

206. See *id.*

## IV. RECOMMENDATIONS

“For us the problem is not to make a utopian and sterile attempt to repeat the past, but to go beyond. It is not a dead society that we want to revive...Nor is it the present colonial society that we wish to prolong, the most putrid carrion that ever rotted under the sun...”<sup>207</sup>

“How do we rectify a system that so brilliantly serves its intended purpose?...We can expect that racial bias is inevitable as long as white supremacy reigns in the United States.”<sup>208</sup>

Colorblindness is not only ineffective in combating racism. It also renders recognition, prohibition or prosecution of unlawful acts of racial discrimination extremely difficult. It is utilized to maintain the nation’s racist structure, and to justify individual racist sentiments.<sup>209</sup> According to Haney Lopez, “[a]s it currently stands, constitutional race law is a disaster. It approaches the problem of race in our society exactly backwards, almost invariably striking down efforts to respond to racial hierarchy while insulating from more than cursory review state policies that disproportionately harm minorities.”<sup>210</sup> If the United States of America truly intends to achieve the ideals of equality under the law for all of its citizens, its legal system must abandon colorblind theory, and use the law to aggressively weed out all vestiges of white supremacy.

Racism involves much more than the prejudices or ignorance of individuals. Rather, it is a system whereby white Americans are able to dominate nonwhite Americans and restrict their full participation in the polity—a system that has been fundamental to the creation, development and maintenance of the United States.<sup>211</sup> Racism will not simply disappear over time in the United States because too many American citizens actively participate in the maintenance of the nation’s white supremacist structure. The eradication of racism in American society will require radical transformations of society itself.<sup>212</sup>

The Supreme Court in particular must re-embrace anti-racism—labeled derisively as liberal judicial activism—as the paradigm under which it handles

207. CÉSAIRE, *supra* note 24, at 51-52.

208. Dorothy Roberts, *Constructing A Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 265 (2007).

209. BONILLA-SILVA, *supra* note 32, at 90, 103-11 (discussing colorblind racism as a tool to maintain white dominance over blacks); *see also* BONILLA-SILVA, *supra* note 3, at 28-47 (defining colorblind racism and describing its characteristics and expressions).

210. Haney López, *supra* note 70, at 1061.

211. HOCHSCHILD, *supra* note 67, at 1.

212. Mills, *supra* note 20, at 36-37 (positing that “The merely formal rejection<sup>100</sup> of white supremacist principles will not suffice to transform the United States into a genuinely racially egalitarian structure, since the actual social values and enduring politico-economic structures will continue to reflect the history of white domination”).

cases of unconstitutional racial discrimination.<sup>213</sup> Several nations, all of which have colonial legacies, have turned to anti-racist laws and policies as the solution to racial discrimination. These nations have moved away from colorblind systems as well as overtly racist legal systems. Anti-racist laws alone, however, may only amount to pulling up individual weeds in the garden of American liberal democracy. At a minimum, an anti-racist legal system may retrospectively provide remedies for acts of racism. An anti-racist legal system may give racial minorities in the United States access to the power structure, and allow them to have increasing influence upon theory and policy. However, this access would only exist under the existing order. Under this order, even President Obama's election can harm repressed minorities in the long run, as the white power structure uses it as evidence that racism no longer exists, without taking steps to alter power structures that systematically repress non-white Americans.<sup>214</sup>

If the Courts are to be effectively equipped in a legal and judicial war against racism, constitutional reform is another option that should be given serious consideration.<sup>215</sup> The United States cannot expect a colonial constitution, no matter how dynamic, to be able to provide post-colonial law. Rather than relying upon the Equal Protection Clause and increasingly colorblind legal precedent to address all issues of discrimination, a new Constitution could express specific standards pertaining to equality in terms of race, gender, religion, etc. A new Constitution could also be free of the original Framers' white supremacist (sexist and classist) conceptions of the nation, and reflect previously excluded voices. Moreover, Constitutional reform would allow those previously excluded from the creation of the original document to participate in its re-creation.

This particular recommendation might be controversial in a country that has become accustomed to having a single Constitution. However, other nations have reformed their constitutions to bring their government in line with democratic ideals—France, Brazil and South Africa are among them.<sup>216</sup>

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213. See BONILLA-SILVA, *supra* note 3, at 15 (advocating a “personal and political movement” away from colorblindness); see also HOCHSCHILD, *supra* note 67, at 8 (recommending that “we bring ourselves to pull the weeds” of racism from “the American landscape”).

214. See GOLDBERG, *supra* note 15.

215. Sabato, *supra* note 98.

216. Assemblée Nationale, Constitution de la République Française, <http://www.assemblee-nationale.fr/connaissance/constitution.asp> [hereinafter *French Constitution*] (last visited Feb. 10, 2009); Brazil Information, Constitution of Brazil, <http://www.v-brazil.com/government/laws/constitution.html> [hereinafter *Brazilian Constitution*] (last visited Feb. 10, 2009); South African Government Information, Constitution of the Republic of South Africa, 1996, <http://www.info.gov.za/documents/constitution/index.htm> [hereinafter *South African Constitution*] (last visited Feb. 10, 2009); See also BBC NEWS, *France backs constitution reform: Parliamentarians in France have approved plans by President Nicolas Sarkozy to rewrite the constitution—by the slimmest of margins*, July 21, 2009,

Notably, South Africa created a progressive, anti-racist Constitution in 1996 after abandoning apartheid.<sup>217</sup> The French government is increasingly turning away from colorblind policies towards anti-racism. France has turned to Brazil, a “colorblind” nation where racism has been widespread<sup>218</sup> as an example.<sup>219</sup> In recent years, Brazil has taken steps to adopt anti-racism, such as introducing affirmative action policies for university admissions.<sup>220</sup> France’s prestigious Sorbonne is studying Brazilian affirmative action admissions policies and may adopt them.<sup>221</sup> These nations, who have been in denial about the presence of racism or even the existence of race are gradually making the transformations necessary for them to comport with the legal, social, and political ideals they espouse. For the United States to comport with the ideals of its creed, it must make a definitive break with colonialism, undertaking the severe dislocation of its liberal-but-undemocratic racial structure.<sup>222</sup>

## V. CONCLUSION

There are different reasons for the adoption of colorblind theory, rhetoric, and policy by the United States Supreme Court, elected officials, and the American masses. Some mistakenly believe that the way to destroy racism is to will away race. However, there are also those who would preserve America’s racist status quo, by concealing it with colorblind policies which actually sustain white supremacy. Colonialism, with all of its white supremacist faces and mechanisms, demands an aggressive response from all levels of American society, beginning with the courts.

True democracy, and equality for all, can be achieved through radical societal transformations, such as those recommended here. Radical change will always face some opposition, and those who seek to destroy the status quo may be labeled unpatriotic or worse. As Eduardo Bonilla-Silva cautions in encouragement to his readers, “The ride will be rough, but after your eyes have been opened, there is no point in standing still.”<sup>223</sup>

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<http://news.bbc.co.uk/2/hi/europe/7517505.stm> (detailing France’s current plan to amend the Constitution for the nineteenth time).

217. *South African Constitution*, *supra* note 216.

218. *See generally* Mills, *supra* note 20, at 37 (Noting, “An increasing body of work has dismantled the promulgated myths of color-blind racial democracy, pointing out that most Latin-American nations have historically stigmatized their Afro-Latin populations.”).

219. Italo Ramos, *Affirmative Action in Brazil: The Day of the Lambs*, THE BLACK COMMENTATOR, Feb. 23, 2006,

[http://www.blackcommentator.com/172/172\\_guest\\_ramos\\_brazil\\_affirmative\\_action.html](http://www.blackcommentator.com/172/172_guest_ramos_brazil_affirmative_action.html).

220. *Id.*

221. *Id.*

222. *See* HOCHSCHILD, *supra* note 67, at 8.

223. BONILLA-SILVA, *supra* note 3, at 15.