Post-Racialism

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ABSTRACT: Rather than treat post-racialism as a political trend or social fact, this Article argues that post-racialism in its current iteration is a twenty-first century ideology that reflects a belief that due to racial progress the state need not engage in race-based decision-making or adopt race-based remedies, and that civil society should eschew race as a central organizing principle of social action. Post-racial logic calls instead for a “retreat from race.” This retreat takes at least three forms: material, as the retreat from state-imposed remedies; sociocultural, as the retreat from white liberal/progressive deference to Black normativity on the meaning of racial equality and justice; and political, as the retreat from collective political entities organized along racial lines and agendas as a legitimate protest or reform vehicle. In this Article, I analyze postracialism as an ideology that both converges and departs from its predecessor “colorblindness,” identify four key features of the revamped ideology (racial progress or transcendence, race neutral universalism, moral equivalence, and political distancing), and map three of postracialism’s contemporary articulations in the legal, political and intellectual contexts. I conclude by offering some suggestions for how critical race and progressive scholars might approach their work to resist the new racial hegemony of postracial ideology.

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I. INTRODUCTION: THE PROBLEM

When Critical Race Theory burst upon the legal academic scene in the mid-to-late 1980s at the tail end of Ronald Reagan’s second term, it was at the sunset of the civil-rights era. During this Guns n’ Roses/Wall Street-inflected time, social conservatives began quietly but actively developing a cultural and legal movement to reverse the gains of the civil-rights movement. As a young attorney working in the Civil Rights Division of the United States Department of Justice, Lee Cokorinos detailed how the architects of the far right began a social, political, and financial network to pursue an audacious anti-civil-rights agenda.1 The simultaneous, if not homologous, generation of a race-conscious Critical Race Theory movement in legal academe, alongside a Racial Backlash movement carefully constructed by a confederation of inequality-activists, provides perspective to reflect on the successes and failures of Critical Race Theory twenty years later. It also sets the stage for the urgent challenges the twenty-first-century faces.2

The inherent tension between the Critical Race and Racial Backlash movements over the past two decades is also reflected in the disparate signifiers of racial equality presented by the historic election of Barack Obama as president. On the one hand, Obama, as the first African American head of the United States, represents to many commentators the personification of “We Shall Overcome.” On the other hand, his road to the White House was marked by contradiction—a rhetoric and campaign of “post-racial” universalism by Obama,3 contrasted with a campaign trail often racialized by the mainstream media and Republican challengers. Instances emerged throughout the 2008 presidential campaign, such as the racial/religious “othering” on the cover of The New Yorker, depicting a

2. Id. at 129 (arguing that America now needs to “recover its sense of fairness and justice . . . to turn the tide” toward social justice again).
3. Recall Obama’s 2004 Democratic National Convention speech that catapulted him to the presidential campaign with its post-racial language:

There’s not a black America and white America and Latino America and Asian America; there’s the United States of America. The pundits like to slice-and-dice our country into Red States and Blue States; Red States for Republicans, Blue States for Democrats. But I’ve got news for them, too. We worship an awesome God in the Blue States, and we don’t like federal agents poking around our libraries in the Red States. We coach Little League in the Blue States and have gay friends in the Red States. There are patriots who opposed the war in Iraq and patriots who supported it. We are one people, all of us pledging allegiance to the stars and stripes, all of us defending the United States of America.

terrorist fist-bump between Barack and Michelle, which was later defended as merely “satire” about bigots who view the Obamas in this way. The Republican challengers also racialized the campaign using a desperation strategy marking Obama as an outsider and terrorist-sympathizer in a way that drew upon his exoticized racial pedigree.

Despite the ironies of the racialized post-racial campaign, the fact that the Obama campaign relied upon a “post-racial” strategy that ultimately prevailed poses a unique crisis for critical-race theorists. The Critical Race Theory movement faces great danger if it fails to acknowledge that one of the great successes of the Racial Backlash movement is the promotion of a larger national and legal consensus that ignores the bulk of racial disparities, inequities, and imbalances in society, and pursues race-neutral remedies as a fundamental, a priori value. The movement also faces great danger if it fails to understand how forging a national consensus of race-neutral universalism is so effective that post-racialism has now become the presumed calling card of the first African American president. The movement faces further danger if it fails to recognize the proliferation of intellectuals, ranging from liberal to radical allies, who adopt post-racialism as a guiding theoretical framework and gestalt. It faces danger if it fails to recognize how the legal, political, and intellectual post-racialisms generated may form a type of cultural hegemony whose presentist, “yes we can” optimism—slouching towards solipsism—resonates widely with youth, including youth of color. Finally, the Critical Race Theory movement faces great danger if it fails to notice that the “new


5. This racialized “Hail Mary” strategy prompted McCain friend and congressional colleague, John Lewis, to denounce the McCain campaign for “sowing the seeds of hatred and division” by using toxic language that harkens back to “another destructive period in American history.” John Lewis stated:

   During another period, in the not too distant past, there was a governor of the state of Alabama named George Wallace who also became a presidential candidate.
   George Wallace never threw a bomb. He never fired a gun, but he created the climate and the conditions that encouraged vicious attacks against innocent Americans who were simply trying to exercise their constitutional rights. Because of this atmosphere of hate, four little girls were killed on Sunday morning when a church was bombed in Birmingham, Alabama.


Black leadership” in the “post-racial era,” which is touted by the mainstream press, ridicules collective political organization by people of color (as people of color) as hopelessly “old school.”

Although post-racialism has great appeal for a wide range of actors—mostly from the political center to the radical Left—this Article argues that even when practiced by progressives of color, it is a dangerous ideology. First, post-racialism obscures the centrality of race and racism in society. Second, it more effectively achieves what the Racial Backlash movement sought to do over two decades ago—forge a national consensus around the retreat from race-based remedies on the basis that the racial eras of the past have been and should be transcended. Third, post-racialism as an ideology serves to reinstate an unchallenged white normativity. Post-racialism is fast becoming the “race card” of whites, deployed with obligatory reference to Barack Obama’s presidency in an effort to trump the moral high ground held by survivors of racial discrimination in a country with centuries of racial injustice and inequality. Finally, post-racialism denigrates collective Black political organization.

To begin my argument, Part II of this Article provides a definition of post-racialism and discusses what “work” it does in contemporary political culture, its targeted audience, and its primary features. In Part III, I elaborate on the different contemporary articulations of post-racialism and provide an historical context explaining why post-racialism is a uniquely twenty-first-century “end of history” ideology. Finally, Part IV concludes with a discussion of possible avenues for resistance available to the next generation of Critical Race Theory scholars and activists.

II. DEFINITIONS

Given the proliferation of media coverage of Obama’s campaign and election as “post-racial,” one might wonder why the term has gotten so much traction. One might also reasonably ask: what is “post” about post-racial, and what is it replacing? How does post-racialism differ from colorblindness? Or, what “work” does post-racialism do ideologically, that colorblindness does not or cannot? Who is the intended audience for the post-racial message? Do conservatives, liberals, or progressives favor and/or deploy post-racialism

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7. Throughout this Article I use the term “Black” in a British sense, denoting those who are racialized as minority-outsiders in the United Kingdom.

8. Based on his 1989 essay, Francis Fukuyama authored the 1992 book, The End of History and the Last Man. In it he reinterpreted Hegel’s concept of universal history, arguing that the fall of global communism and its revelations represent an “end of history” insofar as there are no more viable competitors to free-market capitalism and liberal democracy. FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992). Post-racialism represents a similar “end of history” type of ideology in that it represents itself as the evolutionary ideal for a society that has transcended the pursuit of racial subordination and remedy by the state.
or post-racialist rhetoric? And what are the common characteristics of a post-racial/ideological move?

A. POST-RACIALISM’S WORK AND TARGET AUDIENCE

Rather than speak of post-racialism as merely a political trend or phenomenon or social fact, I argue that post-racialism in its current iteration is a twenty-first-century ideology that reflects a belief that due to the significant racial progress that has been made, the state need not engage in race-based decision-making or adopt race-based remedies, and that civil society should eschew race as a central organizing principle of social action. According to post-racial logic, the move is to effectuate a “retreat from race.” This retreat from race takes at least three forms: material, as the retreat from state-imposed remedies; sociocultural, as the retreat from white liberal/progressive deference to Black normativity on the meaning of racial equality and justice; and political, as the retreat from collective political entities organized along racial lines and agendas as a legitimate protest or reform vehicle.

Sociologists Michael Omi and Howard Winant describe a “racial project” as one that organizes the distribution of resources by the state according to racialized categories. As a material racial project, the discourse of post-racialism and its accompanying ideology provides a common-sense rhetoric and reasoning to fuel the state’s retreat from racial remedies. Race-based affirmative action, race-based admissions or districting in school-desegregation plans, and minority voting districts, as a few prominent examples, all come under scrutiny in a post-racial world.

In addition to the material retreat from race, post-racialism also levels the discursive playing field, allowing whites to oppose civil-rights remedies

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9. While this analysis and definition of post-racialism is based on the current articulation of post-racialism, it is certainly possible that future articulations may have more progressive content and potential. In order for a new articulation to emerge, I maintain that some acknowledgment of what we are “post” must be embedded within the understanding of the term, “post-racialism.” Compare, for example, political scientist Luke Charles Harris’ conceptualization of the term, “post-apartheid” America, with the “post” marking the normative turn away from apartheid in the 1954 Brown v. Board of Education decision. The descriptive turn away from apartheid, as he notes, is a work-in-progress. Luke Charles Harris, Notes of a Child of Apartheid (2008) (unpublished book proposal on file with author); see also Christopher J. Metzler, The Construction and Rearticulation of Race in a “Post-Racial America” (2008) (identifying “post-racial” as a “moniker that represents an articulated vision of race steeped in rigid ideology, constrained by denial of historical realities and undermined by a need to move forward without acknowledging racism, exclusion and oppression as continuing violations that impact all Americans, including whites”).


and advocate for race-neutral policies because society has transcended the racial moment, or civil-rights era. Under post-racialism, race does not matter, and should not be taken into account or even noticed. Thus, one who points out racial inequities risks being characterized as an obsessed-with-race racist who is unfairly and divisively "playing the race card"—one who occupies the same moral category as someone who consciously perpetrates racial inequities.  

Although sociocultural in form, the discursive retreat from race is connected to the other material and political forms of retreat by leveling the moral playing field between whites and groups of color. Centuries of racial apartheid and neo-apartheid are eclipsed by a symbolic “big event” signifying transcendent racial progress.  

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12. The term originates in its popular form in a New Yorker article that suggested that any reference to race or racism by the O.J. Simpson defense team would amount to playing the “race card” and improper jury nullification. Jeffrey Toobin, *An Incendiary Defense*, NEW YORKER, July 25, 1994, at 56, 59. However, law professor and legal commentator Peter Aranella takes issue with this broadly held view, asserting that race played a very complex role in the case, and should have, given the explicitly racist comments attributable to police officer Mark Fuhrman whom the prosecution unnecessarily tapped to testify. *Frontline, The O.J. Verdict, Interview: Peter Aranella* (Apr. 1, 2005), available at http://www.pbs.org/wgbh/pages/frontline/oj/interviews/arenella.html.  

13. For a sampling of the racial-transcendence narrative in mainstream media, see Stu Bykofsky, *My First Post-Racial Column: America Is on the Ascent*, PHILA. DAILY NEWS, Nov. 8, 2008, Local Section, at 7 (disclosing his initial plan for his first column entailed telling the "race merchants" who only see America’s warts "to sit down and shut up because a country—this one—that has just elected its first black president cannot fairly be accused of systemic racism"); Frank Harris, *Election’s a Sign of Progress For . . . Whites*, HARTFORD COURANT, Nov. 14, 2008, at A19 (extolling Obama’s election as “a glowing sign of white progress in living up the true meaning of this nation’s creed”); Editorial, *Obama and Affirmative Action*, BOSTON GLOBE, Nov. 15, 2008, at A10 (announcing that “the old common sense about race” died with Obama’s election, prompting a move away from the “stale notions of affirmative action”); Editorial, *Obama’s Historic Victory Reflects Nation’s Dynamism*, USA TODAY, June 4, 2008, at A10 (suggesting that “Obama’s success is a testament to the remarkable progress in American society since that Jim Crow era”); Editorial, *Our Moment of Unity: Let’s All Relish This Remarkable Progress Together*, DALLAS MORNING NEWS, Nov. 6, 2008, at A18 (observing that “it is impossible not to be proud that America has taken a giant leap forward away from our original sin—slavery—and toward redemption”); Peter Wallsten & David G. Savage, *Obama Win Used Against Rights Laws; Conservatives Say Black Victory Erases Need for Voting Act*, CHI. TRIB., Mar. 15, 2009, at C5 (reporting legal briefs filed by conservative legal foundations that argue that “Obama’s election heralds the emergence of a colorblind society in which special legal safeguards for minorities are no longer required”); Rachel L. Swarns, *Vaulting the Racial Divide: Obama Persuaded Americans to Follow*, N.Y. TIMES, Nov. 5, 2008, at 7 (reporting on the “immensity of the nation’s progress” reflected in Obama’s election); Joan Vennochi, Op-Ed., *Closing the Door on Victimhood*, BOSTON GLOBE, Nov. 6, 2008, at A25 (declaring that “Obama’s victory closes the curtain on the old civil rights movement” and shifts the dialogue away from victimhood). But see Editorial, *The Myth of Post-Racial America*, ST. LOUIS POST-DISPATCH, Jan. 22, 2009, at C8 (acknowledging Obama’s election and inauguration as milestones in the nation’s progress, but maintaining that the declaration of a "post-racial" era “is a bridge too far”); DeWayne Wickham, *Post-Racial Era? Go Tell Victims of Police Shootings*, USA TODAY, Jan. 13, 2009, at A11 (pointing out the obvious contradiction between a putative post-racial era and one in which a white transit cop executes with a shot to
radical whites who were formerly sympathetic to the plight of the racialized understrata and deferential (at least superficially) to the understrata’s normative definition of equality and discrimination, are now freed by “progress” to no longer subjugate the way that they see and live race. On this playing field, whites may pursue their group self-interest and participate in defining equality on their terms in the name of “unity.” In short, post-racialism insulates white normativity from criticism and opens the floodgates of white resentment when confronted with previously accepted and unquestioned civil rights inequalities.

Thus, the effect of post-racialism, whether intended or not, is the ultimate redemption of whiteness: a sociocultural process by which whiteness is restored to its full pre-civil-rights value. In the civil-rights era that ushered in egalitarian commitments, whiteness’ unjust enrichment from and complicity with white supremacy infringed upon the normative value of whiteness. The post-racial era effectuates the restoration of the full value of white normativity by disaggregating unjust enrichment and complicity from whiteness through the redemptive and symbolic “big event” of racial transcendence.

Post-racialism also represents a political retreat from race by redefining the terms for racial politics. Not only are racial remedies and racial discourse off the table, but so are acts of collective political organization and resistance by racialized individuals. The mainstream media’s heralding of “new Black leadership” that culminated in the election of Barack Obama as president conditions a new set of possibilities as it simultaneously circumscribes the old set of possibilities. Gone are the “old school” civil-rights leaders whose...
organizing toolkit included explicit racial discourse and analysis, race-based demands and remedies, and race-based political mobilization. As Glen Loury observed, “If [Obama] succeeds, there will be far fewer public megaphones for the Jesse Jacksons and Al Sharptons and Cornel Wests of this world, for sure.”

Instead, the organizing toolkit under post-racialism’s new possibilities include (false) universal discourse and analysis, “populist” demands and remedies, and “unifying,” issue-based political mobilizations and coalitions. Racial inequities that post-racialists admit still exist—if unaddressed by universal reforms—find remedy in self-help and self-discipline along the lines Bill Cosby urges. Like the model minority representations of Asian Americans around the 1970s–1980s, post-racial representations suppress and marginalize collective Black political action, and instead favor intra-communal social and moral reform.

Given the “work” that post-racialism does in its material, sociocultural, and political forms of retreat from race, how is post-racialism “new” or distinct from the ideology and racial project of “colorblindness,” and how do traditional political identities view post-racialism?

I argue that while the ideology of colorblindness shares many features and objectives with the ideology of post-racialism detailed below, post-racialism is yet distinct as a descriptive matter, in that it signals a racially transcendent event that affirmative action and diversity hiring and training as the solution to the problems of African Americans; Tom Moran, Tossing Out the Race Card, STAR-LEDGER (Newark), Jan. 11, 2008, at 1 (observing that there is a “new generation of politicians like Obama, the senator from Illinois, and Booker, the mayor of Newark” who “steer clear of ideological fights and confrontations” and instead “focus on solving problems”); Laura Washington, Obama Leaves Traditional Black Pols Behind, CHIL SUN-TIMES, Feb. 25, 2008, at 25 (deriding traditional Black politicians like Al Sharpton and Representative Sheila Lee as “America’s Crabs in a Barrel Society” and extolling the pragmatism of new Black leaders like Cory Booker and Deval Patrick who “know you don’t get a chance to govern unless you organize”); Editorial, What a Black President Will Mean for Race Relations, USA TODAY, Nov. 8, 2008, at A18 (predicting that some “old-school black politicians” will find Obama’s election frustrating insofar as they base their careers on the “polarizing politics of racial grievance” and “President Obama undermines their ability to blame discrimination for all the woes afflicting their community”); Joseph Williams, Changing of the Guard: New Generation Replaces Past Civil Rights Leaders, BOSTON GLOBE, Aug. 28, 2008, at A1 (commenting on the generational shift evident at the 2008 Democratic National Convention in which “black political leaders who fought for equal rights on the street and in the courtroom will yield to a generation that grew up well-educated and middle-class, enjoying the fruits of that struggle for equality”).


18. I thank Devon Carbado and Kimberlé Crenshaw for pushing me to elaborate the relationship between post-racialism and colorblindness and to consider how it maps onto the political spectrum.
authorizes the retreat from race. Colorblindness, in comparison, offers a largely normative claim for a retreat from race that is aspirational in nature.

In addition, colorblindness may represent “your father’s Oldsmobile” of racial ideologies, driven by neoconservative fundamentalists and Federalist jurists and hopelessly skewing to older white male demographics (despite the occasional Dinesh D’Souza or Abigail Thernstrom thrown into the mix). Colorblindness’s effectiveness as a racial project among youth of all colors may have been limited due to the “hipness factor,” or lack thereof. It may even be the case that two decades of critical-race scholarship have rendered colorblindness less effective as an ideological tool. Along these lines,

19. For a sampling of the critical-legal scholarship on colorblindness, see generally Alan David Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 29 (Kimberlé Crenshaw et al. eds., 1995) (distinguishing between victim and perpetrator perspectives in race-relations law); Devon W. Carbado and Cheryl I. Harris, The New Racial Preferences, 96 CAL. L. REV. 1139 (2008) (discussing the effects and implications of anti-affirmative action statutes in light of the personal statement in university applications); Henry Chambers, Colorblindness, Race Neutrality, and Voting Rights, 51 EMORY L.J. 1397 (2002) (suggesting a more prominent role for the Fifteenth Amendment’s interest in substantive equality—fighting the idea of colorblindness—instead of the more common Fourteenth Amendment’s interest in procedural equality); Guy-Uriel E. Charles, Affirmative Action and Colorblindness from the Original Position, 105 MICH. L. REV. FIRST IMPRESSIONS 123 (2007), http://www.michiganlawreview.org/firstimpressions/vol105/crenshaw.pdf (suggesting a restructuring of the argument supporting affirmative action, as a response to anti-affirmative action proponents who have framed “affirmative action” as a term signaling discrimination and resentment); Jerome McCristal Culp, Jr., Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims, 69 N.Y.U. L. REV. 162 (1994) (asserting that colorblindness is a policy-based argument, more than a moral imperative, that allows the legal infrastructure to retain and preserve its bias against racial minorities); Barbara J. Flegg, “Was Blind, But Now I See”: White Race Consciousness and the Requirement of Discriminatory Intent, 91 MICH. L. REV. 953 (1993) (arguing for the social utility of white consciousness, a white person’s awareness of the white race, in relation to law in general but tailored to the discriminatory-intent requirement in the Equal Protection clause); Neil Gotanda, A Critique of “Our Constitution Is Color-Blind,” 44 STAN. L. REV. 1 (1991) (analyzing a series of Supreme Court cases that are typical of modern constitutional colorblindness and showing how those conceptions further discriminatory bias rather than remedy the problem); Ian F. Haney López, “A Nation of Minorities”: Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985 (2007) (tracing the history of colorblindness from Reconstruction to the modern age as something legal scholars and judges have used to argue that race-conscious legislation is unconstitutional in both prejudiced and remedial forms); Darren Lenard Hutchinson, Progressive Race Blindness?: Individual Identity, Group Politics, and Reform, 49 UCLA L. REV. 1455 (2002) (criticizing the nascent scholarship from left-leaning advocates of progressive race-blindness and arguing for the utility of race-based self-identification); Matthew J. Lindsay, How Antidiscrimination Law Learned to Live with Racial Inequality, 75 U. CIN. L. REV. 87 (2006) (demonstrating how the Supreme Court, especially the Burger and Rehnquist Courts, used the concept of colorblindness to pervert the original goals of racial proportionality in antidiscrimination law); Gary Peller, Race Consciousness, 1990 DUKE L.J. 738 (focusing on the history of race consciousness, especially the ways white integrationist philosophy pitted itself against Black nationalist philosophy and then suggesting a more beneficial model of discourse based in
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colorblindness’s entanglement with the transparent racial-subordination agenda of Ward Connerly to legislate statewide retreats from race by populist ballot initiatives may have injured the brand, at least for moderate-to-liberal voters. Colorblindness advocates strained credulity by deploying the language of “civil rights” and colorblindness ideals to serve politically regressive ends (such as the banning of affirmative action), thereby fixing the concept’s reactionary ideological function. A new concept—like post-racialism—could do the ideological work of colorblindness without so much of its retro-regressive baggage and might be more likely to reach this key constituency of persuadables.

In light of the ways in which colorblindness and post-racialism converge (around the retreat from race imperative and shared features) and diverge (around racial transcendence as descriptive trigger and marketability or branding), it becomes clearer whom the target audience may be for the racial project organized around post-racialism. Conservatives generally remain loyal to colorblindness as a guiding ethic and ideal. They remain skeptical of the term “post-racialism,” sensing that it fraudulently stands in for colorblindness while sneaking in race-based performances, incentives, or remedies. Post-racialism’s target audience, then, may be the category of moderate-to-liberal whites who suffer from “racial exhaustion.” They desire an end to race-based grievances and remedies and the need to yield to Black normativity on the meaning of racial inequality instead of being able to speak candidly and freely on race. These exhausted whites certainly do not want to be included among conservative whites, and their illiberal views of race. But for racial remedies, however, their standing among liberals might be more solid, as reflected in the Op-Ed of one self-identified liberal:

general race consciousness); Cedric Merlin Powell, Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction, 51 U. MIAMI L. REV. 191 (1997) (contesting the Supreme Court’s recent arguments that the Fourteenth Amendment does not allow for positive law aimed at remedying racial injustice); Reva B. Siegel, Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification, 88 CAL. L. REV. 77 (2000) (arguing that a sociohistorical perspective to analysis of colorblind discourse, while not dispositive on all points, serves to illustrate the way colorblind discourse can deconstruct antidiscrimination law).


Liberalism, a movement in which I hold a conditional membership, would be wise to get wise to what has happened. Blatant affirmative action always entailed a disturbing and ex post facto changing of the rules—oops, you’re white. Sorry, not what we wanted. As a consequence, it was not racists who were punished, but all whites. There is no need to cling to such a remedy anymore. . . . [Affirmative action] remains noble in its ends, atrocious in its means and now provides Obama the chance to use his own family’s history—indeed his own history—to show why it ought to conclude.22

In addition to centrist-to-leftist whites, youth of all races may be another key audience for post-racialist rhetoric and ideology. As mentioned earlier as a “branding” problem of colorblindness, post-racialism is able to exploit a generational drift to attract youth who are already disaffected from “old school” civil-rights leadership and modes of protest, and, for the more privileged classes, those who have not yet seen how “race matters.”

Although persuadable whites and youth may be the key audiences for the racial project of post-racialism, that does not mean that individual conservatives have not or will not embrace post-racialist discourse. As many of the imperatives and features of post-racialism and colorblindness significantly overlap, conservatives may at times embrace post-racialist rhetoric as a type of “interest convergence.”23 It is too early to say how conservatives will respond, as a movement and as individuals, to the unfolding project of post-racialism. However, noting the key features of post-racialism may assist in determining when and where such adoption or cooption will take place.

B. POST-RACIALISM’S KEY FEATURES

Post-racialism as an ideology has four central features: (1) Racial Progress; (2) Race-Neutral Universalism; (3) Moral Equivalence; and (4) Distancing Move. Each of these features of course may overlap, but each retains its own distinctiveness. While all four features are not required to define an instance of post-racialism, they are central and common components of post-racialist ideology and discourse.


23. Critical-race theorist Derrick Bell forwarded the interest-convergence theory that civil-rights gains in the United States only occur when they also benefit or converge with the interests of powerful whites. Derrick A. Bell Jr., Brown v. Board of Education and The Interest Convergence Dilemma, 93 HARV. L. REV. 518 (1980). He cited the dominant white interest in prevailing in Cold War propaganda as the motivating imperative behind school desegregation. Id. at 524.
1. Racial Progress and Transcendence

First, post-racialism deploys the trope of *racial progress*, asserting that racial thinking and racial solutions are no longer needed because the nation has “made great strides,” achieved an historic accomplishment, or transcended racial divisions of past generations. The explosion of news items trumpeting the arrival of the post-racial era with Obama’s candidacy and election are underwritten by the historic achievement of the United States electing its first African American president.24 Racial progress is a central ideological building block for what follows—the elimination of race-based remedies in favor of more seemingly universal solutions.

Although racial progress is a recurring theme in post-racial representations, such representations do not require the implausible—to insist that racial discrimination no longer exists or that race no longer matters. Indeed, President Obama has gone on record stating to the contrary; that racial progress exists alongside ongoing discrimination and salience of race. However, those that fail to acknowledge racial progress in the United States risk suffering the fate of his former Reverend Wright—cast out of the circle of racial reason. Reverend Wright’s YouTube clips that saturated cable networks in March of 2008 serve to marginalize the preacher’s sermons as the outrageous rants of a hopelessly old and “angry Black man” unable to see past his blinding anger to arrive at a more balanced understanding and critique of United States society. As Obama put it in his “A More Perfect Union” speech:

The profound mistake of Reverend Wright’s sermons is not that he spoke about racism in our society. It’s that he spoke as if our society was static; as if no progress has been made; as if this country—a country that has made it possible for one of his own members to run for the highest office in the land and build a coalition of white and black; Latino and Asian, rich and poor, young and old—is still irrevocably bound to a tragic past.25

Those unable to avoid Reverend Wright’s “profound mistake”—the inability or unwillingness to decouple whiteness from its “tragic past” entanglement with white supremacy—will be relegated to the sidelines of contemporary politics and civil society in post-racial America.

2. Race-Neutral Universalism

Second, post-racialism poses *race-neutral universalism* as a normative ideal and political necessity. The key component here is that the post-racial norm.

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24. See supra note 13 and accompanying text.
must not advocate for race-based policies or remedies. Racial remedies in
the United States are cast as partial and divisive, and benefiting primarily
those with “special interests” versus all Americans. Thus, the universalism of
post-racialism derives from its race-neutral character. Although universalism
is touted, as critical-race-scholar john powell observes, such policies are too
often anything but universal. Rather, they target a predictably narrow
category of beneficiaries. The classic examples are the G.I. Bill, welfare, and
social security, which were all premised on a model recipient who was white,
able-bodied, and male. Despite the history of failed and “false
universalism,” the norm of superficial, discursive race-neutral universalism is
central to post-racial rhetoric and politics.

Post-racialists, for both theoretical and practical reasons, reject
strategies or remedies that rely upon racial identity. Theoretical post-
racialists reject race-based remedies because they believe that such remedies
obscure a more fundamental problem, typically one of class-based injuries.
Radical intellectuals often argue that race-based remedies obscure
capitalism. For liberal intellectuals, the fundamental concern is that race
talk obscures “the truly disadvantaged”; they prefer an inchoate analysis that
draws upon the class critique, although in a much more inert, but palatable,
manner. Practical post-racialists decry race-based remedies because they
pose a “zero-sum” game that injures whites in order to benefit people of
color. In order to achieve racial equality, these post-racialists fear that
“playing the race card” will ultimately destroy the willingness of whites to
pursue racial justice due to false accusations of racism. Such a destruction
of white goodwill is untenable both to post-racial politicians seeking elected
office in campaigns where people of color lack a voting majority and to
practical post-racialists seeking a particular end result in a white-normative,
or dominant, setting.

(2009).
27. Id. at 794–98. See generally IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN
UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA (2005) (describing
how the G.I. Bill, welfare, and social security were reforms that were hardly universal and
contained race, gender, and class exclusions).
28. john a. powell, supra note 26, at 791.
29. See e.g., ANTONIA DARDE & RODOLFO D. TORRES, AFTER RACE: RACISM AFTER
MULTICULTURALISM 15 (2004) (questioning why so many scholars and politicians speak of race
while class analysis and challenges to capitalism do not receive the same level of treatment and
regard as race).
30. See David Roediger, The Retreat from Race and Class, 58 MONTHLY REV., July–Aug. 2006,
at 40, 47 (describing the “raceless liberalism” of William Julius Wilson’s increasing-salience-of-
class/decreasing-salience-of-race analysis that “is about as distant from Marxism as is possible”).
31. See e.g., RICHARD THOMPSON FORD, THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES
RACE RELATIONS WORSE 339 (2008) [hereinafter FORD, THE RACE CARD] (warning that false
charges of racism may erode the antiracist goodwill to a pervasive attitude of cynical
indifference).
POST-RACIALISM

3. Moral Equivalence

Third, post-racialism draws a *moral equivalence* between “racialism” under Jim Crow which subordinated racial minorities, and the “racialism” of the civil-rights era, which sought to remedy minority subordination. “Racialism,” as used in this Article, refers to the belief that a state should undertake race-conscious decision-making. According to the logic of moral equivalence, racial profiling in traffic stops is analytically interchangeable with affirmative action. In order to understand the moral-equivalence draw, one must understand the historical context in which this ideology operates.

The “post” in post-racialism is an immediately preceding referent to “racialism.” There are two types of “racialism” that post-racialism transcends. First, post-racialism transcends the racialism of the Jim Crow era and white supremacy. As this Article details, post-racialism rejects the subordinationist ideology of the pre-civil-rights era in which African American men and women were second-class citizens, Latinos and Asians were second-class aliens, and indigenous Americans were third-class quasi-sovereigns. Second, post-racialism transcends the racialism of the civil-rights era and racial remediation. Post-racialism rejects the centrality of race as an organizing feature in American society and holds that policymakers formulate social and legal remedies best without any consideration of group identity, especially racial identity. Because post-racialism refers to the racialisms of the pre-civil-rights and civil-rights eras, it is a decidedly twenty-first-century ideology. Post-racialism views both the pre-civil-rights era (from European contact up to the mid-twentieth century) and the civil-rights era (from the mid- to late twentieth century) as racially polarizing. Instead, post-racialism idealizes a society in which race is no longer a basis for differential treatment, grievance, or remedy.

4. Distancing Move

The final feature of post-racialism is the *distancing move* its practitioners frequently undertake to distinguish themselves from civil-rights advocates and critical-race theorists. Such a move highlights the purported

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32. Michael Kinsley, *Racial Profiling at the Airport: Discrimination We’re Afraid to Be Against*, SLATE, Sept. 28, 2001, available at http://www.slate.com/?id=116347 (“Racial profiling and affirmative action are analytically the same thing. When the cops stop black drivers or companies make extra efforts to hire black employees, they are both giving certain individuals special treatment based on racial generalizations.”).

33. *See infra* Part III (discussing legal, political, and intellectual post-racialisms).

34. *Id.*

35. Mary Mitchell, *Both Hurt When Obama Turns His Back on Wright; in Trying to Transcend Race, Candidate Shuns Black Leaders*, CHI. TRIB., May 4, 2008, at A12 (observing the bitter irony evident in Obama’s renunciation of his former Reverend Jeremiah Wright, that in order “to transcend race, Obama has had to keep his distance from the same black leaders who fought the battles that made it possible for him to be where he is today”); Williams, *supra* note 15 (describing the new “racial pragmatism,” whereby “Obama eliminates any association with
distinctiveness and sophistication of post-racialism. The distancing move is important as a hegemonic device because the newness and attractiveness of post-racialism as an ideology lies with a release from the strictures of old-school racism, new-school or colorblind racism, and new-school political correctness and racial obsession. As a result, distancing moves by post-racialists often involve caricature-type attacks against the preceding racialisms, especially against advocates of race-conscious theories, race-based remedies, and race-based collective political action to achieve such remedies. Indeed, the distancing move inherently reflects the force of hegemony in which the critique of race-based remedies cannot stand on its own substantive merit. During World War II, non-Japanese Asians sported “I am Chinese” or “I am Filipino” or “I am Korean” buttons to distinguish themselves from their less-fortunate Asian brothers and sisters whom the United States government rounded up and sent to live in horse stalls posing as “relocation centers,” otherwise known as internment camps.36 The very need for such a renunciation illustrates the force of the prevailing racial hegemony of the time. Rather than speak out against the legacy of anti-Asian racism, many non-Japanese Asians in the United States opted to “consent” to anti-Asian subordination by distinguishing themselves from the particular target of the day. I argue that a similar sort of “Stockholm syndrome” bargaining enters into the calculus of many with respect to the appeals for post-racialism.37

III. POST-RACIALISMS

A wide range of actors engage in post-racialist rhetoric, from conservative Supreme Court Justices like Chief Justice John Roberts,38 to progressive politicians of color like President Barack Obama,39 to materialist and liberal intellectuals like Paul Gilroy, Antonia Darder and Rodolfo Torres, and Richard Ford.40 That is to say that people articulate leaders some whites might consider racial extremists” by keeping Jesse Jackson, Sr. and Al Sharpton at arm’s length).


37. “Stockholm syndrome” refers to a hostage situation in which the hostage begins to identify with the hostage-taker as a psychological survival mechanism. The syndrome refers to a state of mind in which a victim is more loyal and bound to one’s captors than one’s rescuers. The term was coined following a hostage incident in Sweden in August of 1973, in which the captives believed their captors were protecting them from the police seeking to free them, and the freed hostages continued to defend their captors. One hostage became engaged to her captor and another started a defense fund, despite the fact that the hostage takers bound the hostages with dynamite and mistreated them generally. M. Namnyak et al., “Stockholm Syndrome”: Psychiatric Diagnosis or Urban Myth?, 117:1 ACTA PSYCHIATRICA SCANDINAVICA 4, 4–5 (2007), available at http://www3.interscience.wiley.com/cgi-bin/fulltext/119385981/PDFSTART.

38. See infra Part III.A (discussing legal post-racialism).

39. See infra Part III.B (discussing political post-racialism).

40. See infra Part III.C (discussing intellectual post-racialism).
post-racialism in a variety of ways. For example, one can talk of legal post-racialism, intellectual post-racialism, political post-racialism, philanthropic post-racialism, or cultural post-racialism. This Part discusses three popular sites for post-racialist rhetoric: legal, political, and intellectual realms.

A. LEGAL POST-RACIALISM

Legal post-racialism must be understood in its historical context in which the post-racial era interacts with the “racial era,” including the era of racial dictatorship and the civil-rights era, both of which are perceived by post-racialists to be over-determined by race.

1. Historical Context

I classify the era that precedes the landmark Brown v. Board of Education decision in 1954 as the racial-dictatorship era.42 The civil-rights era began with Brown, which marked the entry of United States racial jurisprudence into a formal-equality stage, and continued through the installation of the Rehnquist Court in 1986. I define the period from 1986–2007 as the post-civil-rights era, which encompassed the Rehnquist and Roberts Courts. The “post-racial” era arguably begins in 2007 with the Roberts Court’s decision in the landmark case Parents Involved in Community Schools v. Seattle School District No. 1,43 and continues through the present time including the historic election of Barack Obama as president in 2008. This Article further identifies the dominant features of legal post-racialism and its departures from the civil-rights era.

a. The Pre-Civil Rights Era’s Jim Crow “Racialism”—Racial Dictatorship

Prior to the civil rights movement at the midpoint of last century, whiteness—as critical-race-scholar Cheryl Harris wrote—was a valuable form of property recognized and enshrined by law as a normative civic and legal ideal.44 Not possessing whiteness meant denial of the freedom to immigrate, naturalize, enjoy full citizenship, exercise the right to vote, choose one’s profession, or control one’s labor.45 Not having whiteness infringed upon one’s rights to buy, sell and enjoy property; to marry and form families; to

42. As with any classification of time periods, the attempt to define specific “eras” with dates is necessarily imprecise, as societal trends are fluid and overlapping. This Article uses dates that track the major shifts in the Supreme Court as they define the material interests of whiteness in relation to the law. It also uses dates to establish each era’s dominant “racial project.” OMI & WINANT, supra note 11, at 56 (defining a racial project as “simultaneously an interpretation, representation or explanation of racial dynamics, and an effort to reorganize and redistribute resources along particular racial lines”).
45. Id. at 1731–45.
give witness in a court of law and to maintain physical safety and bodily integrity.46 During this time, the United States was what sociologists Michael Omi and Howard Winant call a “racial dictatorship.”47 The passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, along with Reconstruction-era civil-rights statutes, provided a brief respite from the racial-dictatorship era following the Civil War. This respite, a result of an interest convergence48 in maintaining Republican Party influence in the South, was cut short by the Hayes–Tilden Compromise of 1877, which ushered in the post-Reconstruction era with a vengeance.49 The post-Reconstruction era, with its devolution of state-based federalism accompanied by the withdrawal of federal troops from the South, left no significant federal support in place to enforce the rights of formerly enslaved people.50 In Derrick Bell’s terms, the Hayes–Tilden Compromise represented the ultimate racial compromise: allowing disparate groups of whites to settle their political differences over the involuntary sacrifice of Blacks.51

In the racial-dictatorship era, unreconstructed white normativity52 prevailed and legislatures passed laws that were clearly “race-d” to disadvantage peoples of color under the auspice of “states-rights”-based federalism.53 The courts in the racial-dictatorship era provided little relief. Indeed, courts eviscerated the meaning of the Reconstruction Amendments and civil-rights statutes by using seemingly neutral strategies to disenfranchise peoples of color in lockstep with sociopolitical forces that sought to restore the South’s honor.

Courts promoted unreconstructed whiteness in three, often interlocking ways. First, courts offered up racially contingent legal rationales and

46. Id.
47. OMI & WINANT, supra note 11, at 65–66.
48. See DERRICK BELL, AND WE ARE NOT SAVED 51–74 (1987) (providing further examples of interest conversion in the area of civil-rights law).
50. See id. at 459 (1988) (“[T]he need for outside intervention was a humiliating confession of weakness for the Reconstruction regimes.”).
51. See DERRICK A. BELL, RACE, RACISM AND AMERICAN LAW 40–47 (5th ed. 2004) [hereinafter BELL, RACE, RACISM] (theorizing Racial Compromise as a process whereby disparate groups of whites resolve their differences through the involuntary sacrifice of African Americans).
52. For an elaboration of white normativity and its material significance when applied against socially unequal subjects, see Terry Smith, Speaking Against Norms: Public Discourse and the Economy of Racialization in the Workplace, 57 AM. U.L. REV. 523 (2008) (forwarding the example of workplace speech to illustrate how white normativity operates against employees of color who transgress dominant racial sensibilities or expectations).
53. FONER, supra note 49, at 199–200 (elaborating on the Black Codes that southern state legislatures enacted to coerce formerly enslaved Africans back to a state of unfree labor).
doctrines for then-existing forms of American apartheid—such as the refusal to establish concurrent federal jurisdiction with states over civil rights in the *Slaughter-House Cases.*

Rather than find that the federal government shared jurisdiction with states to pursue civil-rights violations, the *Slaughter-House* Court rejected concurrent jurisdiction in favor of state jurisdiction. Although such a determination appears race-neutral and is abstract-sounding, the concession of “home rule” to the Southern states as part of the Hayes–Tilden Compromise reveals the racialized historical context of the Court’s decision. Southern states sought to eliminate federal oversight of state affairs because they fiercely opposed the juridical equality suggested by the Thirteenth, Fourteenth, and Fifteenth Amendments and the Reconstruction Acts. Subsequent nineteenth-century Supreme Court decisions similarly announced neutral-sounding rationales such as “no private constitutional rights,” “no special rights,” and “equal application,” to defeat civil-rights legislation and newly enacted

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56. BELL, RACE, RACISM, supra note 51, at 37–39 (describing how Republicans compromised with Democrats to settle the contested 1876 presidential elections by offering to withdraw federal troops from the South, thereby establishing “home rule,” in exchange for elevating the Republican Hayes to the White House).

57. See James v. Bowman, 190 U.S. 127, 136 (1903) (denuding the Fifteenth Amendment of force by concluding that Section 5507 of the Revised Statutes was unconstitutional as the amendment does not contemplate “wrongful individual acts”); *Civil Rights Cases,* 109 U.S. 3, 24–35 (1883) (finding that the Civil Rights Act of 1875 has no authority in the Constitution insofar as “[t]he wrongful act of an individual, unsupported by any [state] authority, is simply a private wrong” and does not give rise to a civil rights violation); *United States v. Harris,* 106 U.S. 629, 640 (1883) (upholding a challenge by indicted white members of a lynch mob who beat four African American prisoners and killed one of them on the grounds that the Ku Klux Klan Act of 1871 “is directed exclusively against the action of private persons, without reference to the laws of the states” and is therefore unwarranted by the Fourteenth Amendment); Virginia v. Rives, 100 U.S. 313, 318 (1880) (ruling that exclusion of African Americans from juries does not violate the Fourteenth Amendment by construing such exclusion as the “action of private individuals” and not state action); *United States v. Cruikshank,* 92 U.S. 542, 554 (1875) (arresting judgment and dismissing charges against white defendants including state officials for the massacre of African Americans on the basis that the Fourteenth Amendment does not “add any thing [sic] to the rights which one citizen has under the Constitution against another”).

58. *See Civil Rights Cases,* 109 U.S. at 25 (arguing that “[w]hen a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men’s rights are protected”) (emphasis added).

59. *See Giles v. Harris,* 189 U.S. 475, 486–87 (1903) (rationalizing non-relief in a “grandfather clause” voting-rights case by stating that “[i]f a white man came here on the same
constitutional protections. These cases all involved African Americans, and the Court decided them in opposition to civil rights, as necessitated by the Hayes–Tilden Compromise.  

Second, courts concocted self-serving racially contingent legal distinctions to preserve racial hierarchy. Drawing upon the detailed Critical Legal Studies critique of binary oppositions in legal doctrine, pre-civil-rights-era courts relied on such distinctions to preserve racial hierarchy. Historically, civil rights had a very different meaning than they have today. Then, “civil rights” referred to the economic rights of a small-business owner, such as in *Yick Wo v. Hopkins*, more than they did to the constitutional right of equal access to public amenities. To the nineteenth-century judges hearing cases of African Americans who sought access to restaurants and theaters, neither constitutional amendments nor civil-rights statutes covered the rights of plaintiffs if they involved “social rights” rather than “civil rights.” Thus, judges evoked the social-versus-civil-rights distinction as a way to deny the reach of the post-Reconstruction amendments and legislation. In similar fashion, courts articulated public-private and make-find distinctions to perpetuate racial subordination.

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general allegations, admitting his sympathy with the plan, but alleging some special prejudice that had kept him off the list, we hardly should think it necessary to meet him with a reasoned answer”; *Williams v. Mississippi*, 170 U.S. 213, 222 (1898) (upholding state constitution and laws excluding African Americans from jury service through the use of criteria with a disparate racial impact on the basis that such exclusions “reach weak and vicious white men as well as weak and vicious black men”); *Pace v. Alabama*, 106 U.S. 583, 585 (1882) (finding no constitutional violation in antimiscegenation statute since “[t]he punishment of each offending person, whether white or black, is the same”).

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60. BELL, RACE, RACISM, supra note 51, at 40 (describing the principle of involuntary sacrifice of African Americans as ensuing as needed to facilitate disparate groups of whites to “settle a dispute” or “reestablish their relationship”).


63. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) (upholding a state segregation statute by arguing that the Fourteenth Amendment “could not have been intended to . . . enforce social, as distinguished from political [civil], equality, or a commingling of the two races upon terms unsatisfactory to either”); *Civil Rights Cases*, 109 U.S. at 25 (distinguishing between constitutional protection of the “essential [civil] rights of life, liberty, and property” compared to “merely [social] discriminations on account of race or color,” such as those discriminations in the “enjoyment of accommodations in inns, public conveyances, and places of amusement”); *Strauder v. West Virginia*, 100 U.S. 503, 506 (1879) (affirming the Fourteenth Amendment’s purpose as “securing to a race recently emancipated . . . all the civil rights that the superior race enjoy”); see also Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119–28 (1997) (detailing the pre-*Brown* history of the Supreme Court delineation between constitutionally protected “civil” and “political” rights versus unprotected “social” rights).

64. Once the Court established a “state action” prerequisite for Fourteenth Amendment claims in civil-rights cases, the “no private constitutional rights” doctrine discussed previously underwent the public-private distinction. For the public-private distinction cases, see supra note 57 and accompanying text. See also *Yick Wo*, 119 U.S. at 374 (holding that the state’s
Finally, courts developed the lofty but *racially contingent foundational legal principles* in a way that effectively solidified the stratification of racial castes. These foundational legal principles transcended legal rationales or distinctions, and asked the big questions of what it meant to be a nation, what the relationship was between state and federal governments, and how Americans defined private property. That these foundational legal principles are racially contingent and defined in the context of racial conflict is indicative of how race and law are mutually constitutive. National sovereignty,66 federalism,67 separation of powers,68 and plenary power69 are

administration of a facially neutral law in a racially discriminatory manner violated the Equal Protection clause).

65. See *Fong Yue Ting v. United States*, 149 U.S. 698, 731 (1893) (stating that the judicial branch has no power to judge the “wisdom, the policy or the justice of the measures enacted by Congress”); *Chae Chan Ping v. United States*, 130 U.S. 581, 692-03 (1889) (“When once it is established that Congress possesses the power to pass an act, our province ends with its construction, and its application to cases as they are presented for determination.”).

66. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17-18 (1831) (circumscribing indigenous sovereignty to the oxymoronic “domestic dependent nation” by rationalizing in part that “the habits and usages of the Indians” whose “appeal was to the tomahawk . . . [w]as well understood by the statesmen who framed the constitution of the United States, and might furnish some reason for omitting to enumerate them among the parties who might sue in the courts of the union”); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 585 (1823) (declaring contrary to the established understanding of the law of nations, that “discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise”) (emphasis added). Chief Justice Marshall later elaborated “the circumstances of the people” as “fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, 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.” Id. at 589. For a discussion of the Marshall Trilogy, Chinese immigration/deportation cases, and insular cases as they relate to the racial contingency of the foundational principles of sovereign powers, see Sumi Cho & Gil Gott, *The Racial Sovereign*, in SOVEREIGNTY, LEGALITY AND EMERGENCY (Austin Sarat, ed., forthcoming 2010) (detailing the racial contingency of such foundational legal principles of “sovereignty” and “national security”).

67. See *Giles v. Harris*, 189 U.S. 475, 488 (1903) (upholding state refusal to enroll onto voting lists prospective African American voters on the basis that such “relief from a great political wrong . . . by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States”); *Civil Rights Cases*, 109 U.S. at 11 (striking the Civil Rights Act of 1875 prohibiting segregation in public accommodations and conveyances on the basis that “legislative power conferred upon Congress . . . does not invest . . . power to legislate upon subjects which are within the domain of state legislation”); *Hall v. DeCuir*, 95 U.S. 485, 488 (1878) (striking as unconstitutional a state statute requiring equal rights and privileges on public conveyances on the grounds that such legislation “does encroach upon the exclusive power of Congress”); *Slaughter-House Cases*, 83 U. S. (1 Wall.) 36, 78 (1872) (arguing that recognition of the federal government’s concurrent jurisdiction for the “privileges and immunities of citizens” under the Fourteenth Amendment would “fetter and degrade the State governments by subjecting them to the control of Congress” as well as “radically change[] the whole theory of the relations of the State and Federal governments to each other”); *Blyew v. United States*, 80 U.S. (1 Wall.) 581 (1872)
all central legal principles on which the United States was founded. Each term embeds a racialized history in which race and law were mutually constructed.

To summarize, during the racial-dictatorship era, the John Jay and Vinson Courts (until 1954), rather than serving as a counter-majoritarian check and balance on the subordinating impulse of society, participated in a racist “call-and-response” with society. While the white militia clamored for the blood of African Americans during a contested election in Colfax, Louisiana, culminating in the slaughter of hundreds of African Americans,\(^70\) the Supreme Court overturned the few hard-won civil-rights convictions, rehearsing the now-familiar doctrines of “no private constitutional rights,” and a states-rights-oriented federalism. \(^71\) When Southern whites demanded that African Americans stay in their place (i.e., the segregated car on the train), the Court replied with the “civil vs. social rights distinction” and echoed the Sumnerian mantra, “stateways cannot change folkways.”\(^72\) When nativistic whites, many of whom had ironically just arrived themselves, called

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**Footnotes:**

68. See Fong Yue Ting, 149 U.S. at 731 (stating that the judicial branch has no power to judge the “wisdom, the policy or the justice of the measures enacted by Congress”); Chae Chan Ping, 130 U.S. at 602-03 (stating that the Court has no authority to pass judgment upon the morality of other branches of government).

69. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) (holding that Congress has always exercised plenary power over the Indian tribes); Chae Chan Ping, 130 U.S. at 606 (declaring Congress’ determination on immigration laws even where such laws explicitly discriminate by race as “conclusive upon the judiciary” insofar as Congress, not the Court, “considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security”); United States v. Kagama 118 U.S. 375, 384–85 (1886) (holding that the federal government alone has the power to enforce its laws upon the Indian tribes). See generally NATSU TAYLOR SAITO, FROM CHINESE EXCLUSION TO GUANTÁNAMO BAY: PLENARY POWER AND THE PREROGATIVE STATE (2007) (detailing the emergence of plenary power as a racially subordinating legal rationale that violates the rule of law, international law, and constitutional norms); see also Sarah H. Cleveland, Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs, 81 TEX. L. REV. 1, 278 (2002) (arguing that judicially recognized powers that inhere in sovereignty have origins in both international law and racist, illiberal ideology and continue to exert influence over judicial decision-making).


72. C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 103 (4th ed. 2002) (citing William Graham Sumner’s “stateways cannot change folkways” argument and how detrimental it was to pursuing the civil rights of formerly enslaved African Americans).
for immigration exclusion of heathen “others,” the Court relied on “separation of powers,” “plenary power,” and a justification that “[w]e don’t make, we just find the law.”

In this way, white power, white privilege, and white supremacy benefited from an incredibly efficient synergy between law and society. In the pre-civil-rights era, courts played a key role in enabling unreconstructed whiteness. They developed neutral-sounding legal doctrines to rationalize discrimination; created self-serving legal distinctions to enable limiting principles; and crafted lofty, but thoroughly racially contingent foundational principles to define the nation. Courts and the law itself proved to be anything but autonomous from society’s racial dictatorship.

b. The Civil Rights Era “Racialism”—Racial Remediation

Following World War II, the second reconstruction or mid-twentieth-century civil-rights movement ushered in liberal legal reforms designed to eradicate explicit discrimination imposed on racial grounds. In this civil-rights era, Congress, state legislatures, and the courts strove to enact “equality before the law,” through vehicles such as Brown v. Board of Education and its progeny (which struck down de jure segregation), the Civil Rights Act of 1964, the Civil Rights Act of 1965, and the Immigration Act of 1965. For all their forward advances, these reforms, enacted at the height of Cold War McCarthyism, provided only formal equality: process-based equality of opportunity, as opposed to a substantive definition of what equality requires in material terms.

Not only did Brown leave untouched everything other than formal inequality, but the Court’s colorblindness principle scrupulously failed to capture the law’s long-running complicity with white supremacy and equally failed to undo its effects. As established previously, the law’s complicity with

73. See Fong Yue Ting, 149 U.S. at 731 (stating that the judicial branch has no power to judge the “wisdom, the policy or the justice of the measures enacted by Congress”); Chae Chan Ping, 130 U.S. at 602 (“The question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts.”).
75. 42 U.S.C. § 21 (1964) (declaring that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”).
76. 42 U.S.C. § 1973 (1965) (prohibiting attempts “to deny or abridge the right of any citizen of the United States to vote on account of race or color”).
racism was sometimes of the obvious sort, but more often its complicity was doctrinally encoded in its self-serving legal rationales, distinctions, and foundational principles. In this sense, formal discrimination’s elimination failed to address the synergy between law and society that helped accumulate and compound centuries of white power and privilege using neutral means. It did not address the subtle, yet well understood, racially coded call-and-response interplay between the courts and the public. Elimination of formal inequalities primarily served to improve the courts’ and society’s own self-perceptions, and ironically, the value of whiteness—a whiteness redeemed by the enlightenment of formal equality.

In this sense, de jure equality served the aim of racial redemption, as this Article calls it. Here, redemption is used mainly in a property sense, while secondarily in a quasi-religious sense—a process through which whiteness is decoupled from its problematic association with white supremacy in the civil-rights era and beyond. Thus, in order to repair the damages to the reputational and property value of whiteness caused by complicity with racism, society and its institutions needed to redeem themselves from Jim Crow segregation, indigenous dispossession, racialized labor exploitation, and a centuries-long covenant with white supremacy. The Warren Court brilliantly effectuated the repudiatory aspect of racial redemption, in per curiam after per curiam order striking down segregation in various contexts without written opinion, much like Lady MacBeth in her futile attempts to wash the blood of complicity from her hands. In its desire to cater to white preferences for desegregation, courts merely invited the active resistance of the South—and later the North—to comply with Brown. Meanwhile, anti-desegregation courts and communities deployed massive resistance in the form of the Southern Manifesto, the Parker doctrine, pupil-placement programs, so-called freedom-of-choice plans, and other ingenious “neutral” tactics to preserve white supremacy’s old forms and habits.

78. See Dred Scott v. Sanford, 60 U.S. 393, 394 (1856) (stating that the framers never intended slaves to be citizens in the Constitution); supra note 66 and accompanying text (illustrating complicity with racism toward Indian tribes in the Marshall Trilogy).

79. For a more detailed description of racial redemption, see Cho, supra note 14, at 119–66.

80. Id. at 73–74 nn.1–2.

81. This is perhaps best reflected in society’s nonsanctioning of the South and establishment of the oxymoronic “all deliberate speed” pace of desegregation.

The elevation of Warren Burger to Chief Justice of the Supreme Court in 1969 furthered the racial-redemptive project and aided the transformation to a new form of white supremacy under formal equality. Despite the obvious four-hundred-year legacy of white supremacy which helped structure American society just as plainly as capitalism, gender-difference, or technology, the law during this time was primarily concerned with developing “limiting principles” in response to the genie of equality that had been let out of the bottle.

First, in the controversial Milliken v. Bradley decision, the Court applied “local control” as a variant of the nineteenth-century states-rights rationale in an attempt to explain why Brown permitted residential segregation, white flight, and monopolistic control of educational resources. Next, the Court in Washington v. Davis imposed an intent requirement upon plaintiffs who sought to claim racial discrimination using the Equal Protection Clause; a difficult requirement to prove in a world of multiple causation and implicit biases. The Court in Arlington Heights further complicated matters by requiring a showing of proximate cause to the intent doctrine in order for the plaintiff to prevail in an Equal Protection disparate-impact case. Finally, in Wygant v. Jackson Board of Education, the Court erected a firewall between legal and societal discrimination (de jure versus de facto) in this affirmative-action-in-employment case, ironically reminiscent of the social-versus-civil-rights distinction from Plessy (and accompanying rationale that “stateways cannot change folkways”). In Wygant, Justice Powell adjudged societal discrimination to be “too amorphous” to impose a race-conscious remedy.

Contrary to the grand narrative of legal liberalism that dominates United States imagination, the Warren and Burger Courts from 1953–1986 represented a “land bridge” (rather than representing a rupture, or marked departure, from an earlier era of racial dictatorship) over which the
Rehnquist Court could pass from a pre-civil-rights to a post-civil-rights era, while transforming and maintaining systematic racial power through the redemption of whiteness and the return to a state of racial innocence.

c. Post-Civil Rights—Getting Beyond Race to Colorblindness

William Rehnquist’s 1986 elevation to Chief Justice of the Supreme Court ushered in a new phase of post-civil-rights-era jurisprudence. Prior to his appointment to the highest court, Rehnquist pursued a career advocating segregation. The Reagan–Bush prioritization of civil rights as rights of white men injured by civil-rights legislation was aligned with the judicial retreat from and transformation of civil rights under Rehnquist. The Court ingeniously deployed the Warren-era principle of colorblindness to interpret white supremacy’s victims and beneficiaries. Using this approach, the Court’s 1989 cases heralded a new order. In City of Richmond v. J.A. Croson Co., the Court restated the de facto–de jure distinction as the societal-identifiable distinction. The 1989 term also saw the burden-shifting controversy in Price Waterhouse, the relaxation of the defendant’s evidentiary burdens in Wards Cove, and the re-emergence of the make-find distinction in the Patterson case which interpreted the “make and enforce contracts” language in section 1981 cases of the 1866 Civil Rights Act. Even though Congress rebuked the 1989 Court in the 1991 Civil Rights Act, Congress’s first repudiatory attempt, the Kennedy–Hawkins Civil Rights Act of 1990 failed. The Kennedy–Hawkins bill passed both the House and the Senate, but President George H.W. Bush vetoed it. The Senate’s veto override failed by just one vote. President Bush defended his veto by


89. GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 1 (1993) (noting that the Supreme Court of the early 1990s was “unreceptive to legal claims asserted by racial minorities”); OMI & WINANT, supra note 11, at 135.

90. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 497 (1989) (emphasizing the distinction between ‘societal discrimination,’ which is an inadequate basis for race-conscious classifications, and the type of identified discrimination that can support and define the scope of race-based relief’); see also Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2795 (2007) (Kennedy, J., concurring in part, dissenting in part) (describing O’Connor’s “inherently unmeasurable” “societal discrimination” emphasis in Croson as reinforcing the de facto vs. de jure discrimination difference).


asserting that hidden “quotas” in the bill would require firms to enact racial balancing to avoid claims of disparate-impact discrimination.\textsuperscript{96}

By the time of the 1995 \textit{Adarand Constructors v. Pena} case,\textsuperscript{97} the project of redeeming whiteness was so complete that mentioning “innocent white victims” as documented by Tom Ross’s analysis of affirmative-action jurisprudence,\textsuperscript{98}—was no longer necessary to justify striking an affirmative-action plan. Instead, the Court decided \textit{Adarand} in the race-neutral doctrinal terms of “skepticism,” “consistency,” and “congruence.”\textsuperscript{99} The Court declared all racial classifications suspect “irrespective of the race of the burdened or benefited group.”\textsuperscript{100} Thus, innocent whiteness operated as a background assumption, signaling a return to the full reputational value of whiteness that is able to stand in moral equivalency to blackness and other forms of colored other-ness. It was with this reformulation of the meaning of equality, victimhood, and discrimination that the Court transformed the Fourteenth Amendment’s understanding of equality from an anticastrate principle to an antidifferentiation principle.\textsuperscript{101} In the post-racial world of moral equivalence, racial classifications operate as racial discriminations. Johnnie Cochran, who “played the race card” in the O. J. Simpson trial, was as notorious and as morally culpable as the “n-word”-spouting police officer Mark Fuhrman.\textsuperscript{102} Affirmative action is the moral equivalent to Jim Crow segregation, and ballot initiatives to ban affirmative action are presented and passed as “civil rights initiatives” in states with an overwhelming white majority of registered voters.\textsuperscript{103} Barack Obama’s “dollar bill” comment is as morally culpable as Geraldine Ferraro’s diminishing comment that Obama’s rapid ascent was due only to his race.\textsuperscript{104} In the new era of post-racialism, any

\textsuperscript{96.} See Dowd, \textit{supra} note 94 (discussing the fear of racial balancing).
\textsuperscript{97.} \textit{Adarand Constructors, Inc. v. Pena}, 515 U.S. 200, 201–02 (1995).
\textsuperscript{99.} \textit{Adarand}, 515 U.S. at 223–24.
\textsuperscript{100.} \textit{Id.} at 227.
mention of race is taboo, and making a racist comment is rendered the equivalent to making a critique of racism.

We have arrived at the post-civil-rights era, where the idea of civil rights is turned on its head, where equality principles are rearticulated to exercise continued privilege—racial and otherwise—and where critiques of racism are rendered morally equivalent to racism itself. Privilege is again naturalized, asserted boldly as fact, with all of its social Darwinian overtones clearly ringing through.

2. The Post-Racial Court?: Racial Subordination = Racial Equality

The recent Supreme Court decision in the Parents Involved case reveals the newest judicial mechanisms created to preserve racial hierarchy while rearticulating subordination as equality, and deploying failure-of-proof rationales. Such failure-of-proof approaches by the Court focus on raising evidentiary burdens using enhanced causation and plaintiff-unfriendly burden shifting, thereby making it increasingly difficult and extremely rare for plaintiffs to prevail in discrimination lawsuits, while at the same time making it appear as though racial discrimination is either declining or that racial remedies to redress discrimination are unconstitutional. The Parents Involved case also sets forth familiar limiting principles for racial remedies: de facto versus de jure discrimination, “no private constitutional rights” revived, narrow tailoring and social justice efficiency arguments, and individual-group rights distinctions. Chief Justice Roberts’s plurality opinion in Parents Involved, joined by Justices Scalia, Thomas, and Alito,

attacks against him, Obama reportedly said, “what they’re going to try to do is make you scared of me . . . [scared that I don’t] look like all those other presidents on the dollar bills”); Katherine Q. Seelye & Julie Bosman, Ferraro’s Remarks Become Talk of the Campaign, N.Y. TIMES, Mar. 12, 2008, at A23 (noting Ms. Ferraro’s reported comment that, “If Obama was a white man, he would not be in this position. And if he was a woman of color, he would not be in this position. He happens to be very lucky to be who he is. And the country is caught up in the concept”).

105. See Girardeau A. Spann, The Conscience of a Court, 63 U. MIAMI L. REV. 431, 467–68 (2009) [hereinafter, Spann, The Conscience of a Court] (criticizing the Court’s doctrinal maneuvers to uphold school resegregation by diverting attention to the “standard-of-review debate; the nature of qualifying diversity; the nature of narrow tailoring; the relevance of racial balancing; the effect of societal discrimination; the distinction between de facto and de jure discrimination; and the relevance of colorblindness”).

106. Id. at 465–68 (discussing both the various judicial “waterboarding” techniques utilized to torture constitutional doctrine and foreclose greater racial equality in Parents Involved, as well as the “dog-whistle politics” used to assure white stakeholders that their racial privilege could be promoted in a way that would be consistent with the Equal Protection Clause and the Constitution).

illuminates the problem of industry capture of the judiciary. The Supreme Court’s racial jurisprudence would lead one to believe that racial classifications are so toxic that, like chemotherapy, they should be utilized only when absolutely necessary and, even then, must be used as sparingly as possible. Strict scrutiny’s imperative as applied to racial classifications is clearly reflected in the two-prong test: compelling interest and narrow tailoring. The compelling-interest prong seems to have gotten somewhat of a “pass” in recent litigation involving education, permitting “forward looking,” more indeterminate (and less coherent), interest-convergence majority-serving rationales for race-conscious remedies as seen in Grutter v. Bollinger. From Bakke to Grutter, the real focus in racial jurisprudence has been on “narrow tailoring”; both cultural and legal proscriptions of effective racial remedies are subject to the invocation of the limiting principle of “narrow tailoring.” Although understood as a win for affirmative-action proponents, Grutter achieved the unstated, forward-looking nongoal of “critical mass.” As long as racial balancing is not effective or explicit and diversity is pursued in a nonhistorically contingent manner, with a hegemonically supported postmodern view of what is diverse, the Court seems to suggest that it will hold its nose and permit diversity as a compelling interest.


109. Grutter v. Bollinger, 539 U.S. 306, 330–31 (2003) (acknowledging interest convergence rationales to uphold affirmative action). In her opinion for the Court, Justice O’Connor articulates two such interest convergences. The first is what I would call the “global capitalism” interest convergence in upholding civil rights and affirmative action: “[M]ajor American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” Id. at 330. The second interest convergence is what I would call the “global policeman” rationale: “[H]igh-ranking retired officers and civilian leaders of the United States military assert that, ‘[b]ased on [their] decades of experience,’ a ‘highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.’” Id. at 331. See also infra notes 111–14 and accompanying text.

In *Parents Involved*, the Court revealed the inherent contradiction between compelling interest and narrow tailoring. In order for the state to engage such a strategy, it must show that student racial diversity and race-conscious student assignment are compelling state interests. However, once a racial classification passes this compelling-interest test, it must then be narrowly tailored. Here lies the catch-22 of the Court’s framework for affirmative action: if a plan survives the compelling-interest test, then it must also be narrowly tailored—it must be only sparingly used, when absolutely necessary, as one factor among many—or as the *Parents Involved* Court put it, “the way in which [the district has] employed individual racial classifications is necessary to achieve [its] stated ends.” But in *Parents Involved*, Justice Roberts responded to the Seattle school district’s use of race-determinative student assignments, with the “gotcha” in his plurality opinion. Roberts said, “[t]he minimal effect these classifications have on student assignments. . . . suggests that other means would be effective.”

Seattle’s racial-tiebreaker system affected approximately 307 student assignments in 2000–2001. The district was able to track the enrollment status of 293 of these students, and it assigned 209 of these students to a school that represented one of their top choices. The district assigned eighty-four students to schools they did not list as one of their choices, and it

prohibits the only remedy that is likely to be effective in combating contemporary racial discrimination.

114. *See Grutter*, 539 U.S. at 327–33 (affirming Justice Powell’s diversity rationale announced in *Bakke* and the accompanying race-conscious student admission plan as a compelling state interest under strict scrutiny review).

115. *Grutter v. Bollinger* established that a public law school has a compelling state interest in attaining a diverse student body. *Id.* at 328. However, in *Parents Involved*, the Court distinguished the “holistic” diversity rationale used in graduate legal education from racial diversity alone utilized in *Parents Involved* for K–12 public education, thereby scrutinizing whether the Seattle and Louisville race-conscious student-assignment plans and diversity rationale comported with strict scrutiny review. *Parents Involved*, 127 S. Ct. at 2753–54. *See also Girardeau Spann, The Conscience of a Court,* supra note 105, at 449–50.

116. *Grutter*, 539 U.S. at 335 (describing the second “narrow tailoring” prong under strict scrutiny review as “[t]he means chosen to accomplish the [government’s] asserted purpose must be specifically and narrowly framed to accomplish that purpose”) (citation omitted).

117. *Id.* (describing the narrow tailoring requirement as the obligation to ensure that “the means chosen ‘fit’ th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype”) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)). But see generally, Ian Ayres & Sydney Foster, *Don’t Tell, Don’t Ask: Narrow Tailoring After Grutter and Gratz*, (2005), http://works.bepress.com/ian_ayres/10 (maintaining that the Supreme Court changed the meaning of narrow tailoring in the *Grutter* and *Gratz* cases from a “minimum necessary preference requirement” to an individualized-consideration requirement that amounts to a version of “don’t ask, don’t tell” scrutiny).


119. *Id.*

120. *Id.*

121. *Id.*
assigned twenty-nine of those students without using a racial tiebreaker. Of those twenty-nine, “3 were able to attend oversubscribed schools due to waitlist and capacity adjustments.” In the end, Roberts concluded:

In over one-third of the assignments affected by the racial tiebreaker, the use of race in the end made no difference, and the district could identify only fifty-two students who were ultimately affected adversely by the racial tiebreaker in that it resulted in assignment to a school they had not listed as a preference and to which they would not otherwise have been assigned. As the panel majority in Parents Involved IV concluded: The tiebreaker’s annual effect is thus merely to shuffle a few handfuls of different minority students between a few schools—about a dozen additional Latinos into Ballard, a dozen black students in Nathan Hale, perhaps two dozen Asians into Roosevelt, and so on. The District has not met its burden of proving these marginal changes . . . outweigh the cost of subjecting hundreds of students to disparate treatment based solely upon the color of their skin.

Similarly, Jefferson County stated that its racial guidelines only had minimal impact because their effect was subtle and indirect. Moreover, the school demonstrated that ninety-five percent of the time students in elementary school receive their first or second choice. The Court’s decision, based on narrow tailoring’s remedial inefficiency, represents a strict-scrutiny catch-22 where a narrowly tailored remedy is invalidated because compliance thereto will almost always fail to be the most effective remedy, while a failure to narrowly tailor is always invalidated. As if anticipating the criticism of this narrow-tailoring trap, the Court elaborated:

While we do not suggest that greater use of race would be preferable, the minimal impact of the districts’ racial classifications on school enrollment casts doubt on the necessity of using racial classifications. In Grutter, the consideration of race was viewed as indispensable in more than tripling minority representation at the law school—from 4 to 14.5 percent.

Justice Roberts further suggested that both school districts failed to consider non-racial methods to achieve their goals, giving rise to a narrow-tailoring problem, as well as the compelling interest/remedial inefficiency

122. Id.
123. Parents Involved, 127 S. Ct. at 2759.
124. Id. at 2760 (citing Parents Involved in Cnty. Schs. v. Seattle Sch. Dist. No. 1, 377 F.3d 984–85 (2004)).
125. Id.
126. Id.
127. Id.
problems. One can well imagine what the line of questioning will be in the next Supreme Court case if school districts take Justice Roberts’s admonition to heart to make narrowly tailored race-based admissions more determinative or effective in their districts: Whether such admissions are unnecessarily trammeling the rights of individuals—i.e., innocent white victims.

In contrast, compare Justice Stevens’s dissent in *Parents Involved*, in which he argues that the more compelling the interest, the less likely it can be narrowly tailored. He states:

Having looked at . . . 50 years of desegregation history in school districts across the Nation, I have discovered many examples of districts that sought integration through explicitly race-conscious methods, including mandatory busing. Yet, I have found no example or model that would permit this Court to say to Seattle and to Louisville: “Here is an instance of a desegregation plan that is likely to achieve your objectives and also makes less use of race-conscious criteria than your plans.” And if the plurality cannot suggest such a model—and it cannot—then it seeks to impose a “narrow tailoring” requirement that in practice would never be met.

The law’s post-racial rhetoric must be understood in its historical context, and with the consideration of the pre-civil rights and civil-rights “racial” eras that preceded it as detailed above. These preceding periods, especially the civil-rights era, do not reflect a break with the past or present, but rather a land bridge by which subordination-through-transformation is effected. The post-racial era no longer needs to rely upon the racialized language that was more evident prior to the Civil War. Instead, courts rely on race-neutral legal mechanisms, especially increased burdens of proof, and suggest a failure of proof on the part of race-discrimination plaintiffs. In the post-racial courts, the complex machinations of the courts’ evidentiary burden sleight-of-hand achieves the racial hegemony sought on matters of racial jurisprudence with far greater effectiveness. Chief Justice Roberts practiced his moral-equivalence soundbyte to perfection in his *Parents Involved* opinion comparing Jim Crow racialism with civil-rights racialism, writing “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”

After analyzing the recent *Parents Involved* case as an incident suggesting a post-racial turn in the Court, it is entirely too early to tell whether the Court will continue to deploy colorblindness in its post-civil rights rhetoric.

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129. *Id.* at 2827 (Stevens, J., dissenting).
130. *Id.* at 2768.
or shift towards post-racialism. Upcoming cases on both employment
discrimination and voting rights will provide a better database upon which
this question might be revisited. Although Justice Roberts seems quite
adept at the moral-equivalence soundbyte feature of post-racialism, such
statements are also consistent with colorblindness and may remain just that.
If future cases dealing with racial remediation effectuate a retreat from race,
invoking racial progress or transcendence, race-neutral universalisms, moral
equivalences, and distancing from standard civil-rights approaches, one
would be on firmer grounds to announce the emergence of a post-racial
Court.

B. POLITICAL POST-RACIALISM

Mr. Obama’s great political ingenuity was very simple: to trade moral
leverage for gratitude. Give up moral leverage over whites, refuse to shame
them with America’s racist past, and the gratitude they show you will
constitute a new form of black power. They will love you for the faith you
show in them.  

1. Obama’s Interest Convergence

Unlike legal post-racialism, political post-racialism may be a practical
necessity in electoral politics where white voters constitute a majority. As the
candidacies of Jesse Jackson and Al Sharpton illustrate, African American
candidates who adopt a strong civil-rights agenda become “defined and
confined” by race, and are viewed by white voters as representing special
interests—not their own, broader interests. To avoid this marginalized
fate, it may be understandable and reasonable for candidates of color to
adopt post-racial electoral strategies, even where a candidate seeks to
forward a civil-rights agenda. In this sense, an “interest convergence” operates to forward the civil-rights agenda of electing the first African
American president by appealing to the race-neutral policy prerogatives and
interests of whites. Consequently, however, the more effective the candidate
is in selling the post-racial message, the more difficult it may be to reverse
course once elected.

133. Thompson, supra note 6.
134. See supra note 23 (describing Derrick Bell’s interest-convergence theory).
135. Along these lines, Attorney General Eric Holder’s “A Nation of Cowards” speech is
most intriguing and could be interpreted as a politically savvy way for Obama to mediate his
official post-racial agenda by posing his Attorney General as the “bad cop” who will pursue
explicit race talk and push the racial envelope, while allowing the President to adhere to his
“good cop” strategy of cajoling the voting public to embrace progressive universal reforms. See
Eric Holder, Att’y Gen., Dept of Justice, Remarks as Prepared for Delivery by Attorney General
President Obama’s election popularized post-racialism. From its inception, his campaign adopted a form of electoral post-racialism that studiously avoided a civil-rights agenda.\footnote{Thompson, supra note 6 (reporting on Obama’s “swift and unequivocal” response that race would not be a defining feature in his candidacy at one of the first strategic meetings Obama held with advisors about a run for the presidency). For an example of electoral racialism (and a precursor to electoral post-racialism), see Russ Rymer, Op-Ed., The George Wallace We Forgot, N.Y. TIMES, Oct. 24, 2008, at A31 (describing the racialized interest convergence between George Wallace and the Ku Klux Klan in the Alabama Governor’s 1962 “segregation now, segregation forever” campaign strategy).} Obama boldly manifested his commitment to post-racialism in his avoidance of high-profile civil-rights events, such as the grassroots-organized protest of the Jena Six prosecutions in September of 2007 or the annual State of the Black Union gathering in February of 2008.\footnote{Thompson, supra note 6 (quoting an unidentified Obama adviser disclosing that Obama stayed away from the Jena protest and did not publicize visits to Black churches on his press schedule in order to appeal to white voters in the hotly contested, all-important Iowa primary).} Both absences subjected Obama to criticism by African American leaders, but like Bill Clinton’s choreographed rebuke of Sistah Souljah during his 1988 presidential bid, Obama’s absence solidified his standing as the candidate for all Americans, as a “uniter,” not a “divider.”\footnote{Sean Callest, Obama Takes Heat for Skipping State of the Black Union, CNN.COM, Feb. 23, 2008, http://www.cnn.com/2008/POLITICS/02/23/obama.sobu/index.html; Alexander Mooney, Jesse Jackson: Obama Needs to Bring More Attention to Jena 6, CNN.COM, Sept. 19, 2007, http://www.cnn.com/2007/POLITICS/09/19/jackson.jena6/index.html.} Obama’s absence at these high-profile civil-rights events was not merely a scheduling oversight. Rather, it was a decision made early in the campaign to pursue a post-racial strategy and to define himself as a unity candidate concerned with all Americans in pursuit of race-neutral issues like the economy and the war in Iraq.\footnote{Thompson, supra note 6 (referencing an interview with chief Obama strategist, David Axelrod, stating that the campaign had not mapped out a detailed strategy on race).} In this sense, Obama might be considered a “strategic universalist” pursuing universalist policies for tactical gain with an understanding of universalism’s promises and problems.

Following his presidential-campaign announcement, Barack Obama faced stiff criticism from civil-rights leaders and academics who bristled at both the race-neutral universalism of his campaign-kickoff speech and its calculated distancing move.\footnote{Id.} In response, Princeton scholar Cornel West urged Obama to speak forthrightly about the country’s legacy of racism, rather than pose the disproportionate ills and challenges confronting Black Americans as false universalism.\footnote{Id. (reporting on West’s admonition that Obama “should speak forcefully about the legacy of racism in the nation and not cast the problems that disproportionately affect blacks as social ills shared by many Americans”).} Professor West also acknowledged
Obama’s distancing tactics: “[Obama]’s got to speak [to white voters] in such a way that he holds us at arm’s length; enough to say he loves us, but not too close to scare them away.”142 Indeed, Obama’s cool stance towards both civil-rights issues and his distancing moves were apparent in his Father’s Day speech focusing on the personal responsibility of Black fathers.143 This proved too much for Jesse Jackson, Sr., prompting his inopportune “hot mic” moment, in which the senior civil-rights statesman made headlines by threatening in crude language to discipline Obama through castration.144

Despite Obama’s post-racial philosophy, his campaign found it more difficult to align theory with practice from the outset. In addition to the criticisms aimed at his absence at the Jena protest, the African American community raised questions early on about whether Obama was “Black enough” to represent it.145 Latinos also felt ignored by the Obama campaign, both in terms of substantive issues and policies, as well as paid-staffer positions to conduct effective outreach in Latino communities critical to a winning primary strategy in Nevada, California, and Texas.146

After a surprise loss in New Hampshire, Obama faced a dilemma in South Carolina—how could he shore up African American voters, especially African American female voters, from defecting to a resuscitated Hillary Clinton campaign without appealing to race?147 He resolved this by sending his wife Michelle to reach out to African American women voters by making explicit appeals to racial solidarity, urging South Carolinians to vote for her husband and to stand up to “the bitter legacy of racism.”148 Although his commitment to a post-racial campaign strategy posed a challenge for the candidate to perform as a “race man,” Obama’s wife, with her southside Chicago pedigree, performed admirably before African American female voters in South Carolina as a “race woman.” “Ask yourselves,” Michelle Obama implored the crowd, “who will fight to lift black men up so we don’t

142. Id.
146. Thompson, supra note 6.
147. Polling data underscored this dilemma when it reflected that three out of five African American voters in South Carolina were women, and they were torn between Clinton and Obama. Margaret Talev, Michelle Obama Stumps to Sway Black Women to Husband’s Campaign, MCCLATCHY NEWSPAPERS, Nov. 26, 2007, available at http://www.mcclatchydc.com/227/story/21909.html.
148. Id.
have to keep locking them up? Who will confront racial profiling? Voter disenfranchisement?149 Obama won South Carolina handily, capturing seventy-eight percent of the African American women’s vote, while Clinton took only twenty percent.150

2. Towards “A More Perfect Union”?

Michelle Obama’s performance in the South Carolina primary illustrates a contradiction for the post-racial Obama campaign (however, not so much if one views Barack Obama as a strategic universalist). It was neither the first nor the last of such a contradiction. From Day One, the campaign had racial disparities in its staff hierarchy, adding considerable tension to the negotiation of racial challenges and controversies during the campaign. Obama’s top circle of advisers were disproportionately white men when compared to his more racially diverse second tier of aides.151 While the early days of the campaign wrestled with the charge of Obama being “not Black enough,” the second half brought charges of being “too Black.”

When the Reverend Jeremiah Wright controversy became national news, Obama’s friendship with the Reverend made some people ask if Obama was too Black.152 In response, Obama devised a carefully crafted speech on race: A More Perfect Union.153 True to post-racial form, the speech hit its marks. Obama spoke eloquently and forthrightly, urging African Americans to connect communal grievances “to the larger aspirations of all Americans—the white woman struggling to break the glass ceiling, the white man who has been laid off, the immigrant trying to feed his family.”154 He urged a more universal framing of issues—”for better health care, and better schools, and better jobs.”155 He drew a moral equivalence analogizing Black anger towards racial discrimination to white resentment towards racial

149. Id.
151. Thompson, supra note 6 (describing “internal [Obama campaign] differences between the predominantly white team of top advisers and the mostly black tier of aides”).
154. Id.
155. Id.
remedies, and then offered each community an even-handed, approximately 700-word “to do” list of how to work towards “a more perfect union.” Obama decidedly distanced himself from not only his former

156. *Id.* On Black anger, Obama acknowledged:

But for all those who scratched and clawed their way to get a piece of the American Dream, there were many who didn’t make it—those who were ultimately defeated, in one way or another, by discrimination. That legacy of defeat was passed on to future generations—those young men and increasingly young women who we see standing on street corners or languishing in our prisons, without hope or prospects for the future. Even for those blacks who did make it, questions of race, and racism, continue to define their worldview in fundamental ways. For the men and women of Reverend Wright’s generation, the memories of humiliation and doubt and fear have not gone away; nor has the anger and the bitterness of those years.

*Id.* On white resentment, Obama analyzed:

In fact, a similar anger exists within segments of the white community. Most working- and middle-class white Americans don’t feel that they have been particularly privileged by their race. . . . They are anxious about their futures, and feel their dreams slipping away; in an era of stagnant wages and global competition, opportunity comes to be seen as a zero sum game, in which your dreams come at my expense. So when they are told to bus their children to a school across town; when they hear that an African American is getting an advantage in landing a good job or a spot in a good college because of an injustice that they themselves never committed; when they’re told that their fears about crime in urban neighborhoods are somehow prejudiced, resentment builds over time.


157. Obama’s “to do” list for African Americans:

For the African-American community, that path means embracing the burdens of our past without becoming victims of our past. It means continuing to insist on a full measure of justice in every aspect of American life. But it also means binding our particular grievances—for better health care, and better schools, and better jobs—to the larger aspirations of all Americans—the white woman struggling to break the glass ceiling, the white man whose been laid off, the immigrant trying to feed his family. And it means taking full responsibility for our own lives—by demanding more from our fathers, and spending more time with our children, and reading to them, and teaching them that while they may face challenges and discrimination in their own lives, they must never succumb to despair or cynicism; they must always believe that they can write their own destiny.

*Id.* Obama’s “to do” list for whites:

In the white community, the path to a more perfect union means acknowledging that what ails the African-American community does not just exist in the minds of black people; that the legacy of discrimination—and current incidents of discrimination, while less overt than in the past—are real and must be addressed. Not just with words, but with deeds—by investing in our schools and our communities; by enforcing our civil rights laws and ensuring fairness in our criminal justice system; by providing this generation with ladders of opportunity that were unavailable for previous generations. It requires all Americans to realize that your dreams do not have to come at the expense of my dreams; that investing in the health, welfare, and education of black and brown and white children will ultimately help all of America prosper.
pastor, but also from those with a “profoundly distorted view . . . that sees white racism as endemic,” a group that includes critical-race theorists. Indeed, as mentioned previously, Reverend Wright’s “profound mistake” was not speaking candidly or intemperately about his racial views, but rather, refusing to acknowledge the campaign’s optimistic, “Yes, we can!” narrative on racial progress that it had been so careful to nurture and disseminate.

From a Critical Race Theory perspective, the electoral necessities of appealing to a broad base—from Iowa to New Hampshire to Florida—make the best argument for the embrace of post-racialism, so long as the end of electing a progressive candidate of color justifies the means. Throughout his post-racial campaign, Obama had a difficult time in aligning the theory of post-racialism with the practice of post-racialism. This difficulty reveals the inherent contradictions of post-racialism and perhaps its ideological character, which serves the redemption of whiteness in exchange for acceptance and votes. While politicians may undertake the cost-benefit analysis of deploying a post-racial strategy, it bears mentioning that such a strategy has consequences for those beyond the individual candidate. Post-racialism, like pollution, is a negative externality, and the original engaging parties do not solely bear the full costs of it.

C. INTELLECTUAL POST-RACIALISM

Scholars across the political spectrum advocate for post-racialism. While intellectual post-racialists’ arguments exhibit the familiar features of race-neutral universalism, moral equivalence, and distancing moves with the ultimate effect of exonerating whiteness, their motives often differ. The most familiar arguments are those of conservative opponents of affirmative action whose appeals to post-racialism track with their arguments of colorblindness, which they use to oppose racial remedies. Stephan and Abigail Thernstrom, Dinesh D’Souza, and John McWhorter share not only conservative think-tank sponsorship, but also a commitment to colorblind analysis and policymaking, which counteracts civil-rights-era gains in education, voting rights, and employment. Conservative intellectuals

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158. Id.

159. Id. The Thernstroms and John McWhorter are currently affiliated with the right-wing Manhattan Institute, which also formerly sponsored Dinesh D’Souza (who also formerly affiliated with the American Enterprise Institute and the Hoover Institute).


perhaps do not belong in the category of post-racists because their turnback-the-clock, anti-civil-rights activism is more closely aligned with pre-civil-rights racialism. Similarly, in the legal and political realms, the Center for Individual Rights, the Pacific Legal Foundation, Ward Connerly’s anti-affirmative action “civil rights initiatives” and anti-census “racial privacy initiative,” all rearticulate the meaning of civil-rights colorblindness principles that ultimately serve segregationists. This argument is well-taken, and therefore this Part focuses on the radical and liberal forms of intellectual post-racialism.

1. Radical Critiques of Capitalism

David Roediger’s 2006 article *The Retreat from Race and Class*, published in the *Monthly Review*, provides a helpful overview of the twenty-first-century progressive and radical intellectuals who renounced race as a meaningful category of analysis. Professor Roediger frames the “raceless” literature in the tradition of the radical Left, in which labor-union leaders and intellectuals believed that the universalism of class struggle and solidarity should be “colorless.” Leading the charge is former critical heavyweight, Paul Gilroy, whose 1987 classic cultural-studies work, *Ain’t No Black in the Union Jack*, took on racially regressive intellectuals and politicians across the Atlantic Ocean in the mid-to-late twentieth century, as did his 1993 work, *The Black Atlantic: Modernity and Double Consciousness*. Given his central role in defining Critical Race Theory across the pond, Gilroy’s twenty-first-century turnabout in *Against Race: Imagining Political Culture Beyond the Color Line* is particularly notable.

In *Against Race*, Professor Gilroy defines and uses the term “raciology” to refer to the set of philosophical and scientific discourses that reify the concept of race to the detriment and dehumanization of raciology’s victims and benefactors. Gilroy seeks to de-naturalize and de-ontologize the notion of race to achieve a post-racial, radically reconfigured “planetary

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163. See COKORINOS, supra note 1, at 13 (explaining that sophisticated conservative private organizations mounted the attack against affirmative action).

164. David Roediger, supra note 30, at 40–45.

165. Id. at 40–42 (analogizing recent “retreat from race” literature as in keeping with the tradition announced by labor leader Eugene Victor Debs that class struggle be “colorless”).

166. PAUL GILROY, AIN’T NO BLACK IN THE UNION JACK (1987).


169. Id. at 11–53.
humanism.”

In making his argument, Gilroy clarifies the parallel that he sees between the racial thinking and solidarity that underwrote the fascism of German National Socialism, and that which underwrote the fascist nature of Black nationalism and Afrocentrism today. In Gilroy’s mind, the popular cultural technology and political spectacle evident in Leni Riefenstahl’s _Triumph of the Will_ informs contemporary cultural politics and the specularization of hip-hop’s “packaged pseudo-rebellion.” In both instances, race combines with ultra-nationalism—in conveying the most authentic Aryan and Black cultures—and militarism to promote a conservative agenda as revolutionary and transgressive. Gilroy criticizes groups of color for their fixation on race, racism, and racial remedies, and their seemingly “threadbare political strategies” rooted in “racial particularism.” He notes that African Americans are “typically identified as the most egregious offenders” of racial particularism and the most unwilling to transcend the pull toward racial-camp thinking. As sociologist Patricia Hill Collins observes, “Against Race should be very reassuring to American audiences imagining that race and racism are passé and that race-holding African Americans are the problem.”

If Professor Gilroy represents the neo-modernist Left pursuing a post-racial project, Antonia Darder and Rodolfo Torres represent the materialist, post-racial Left in _After Race: Racism After Multiculturalism_. In this 2004 work, they rework W.E.B. Du Bois’s famous admonition that the problem of the twentieth century is the problem of the color line, to instead forward the notion that the problem of the twenty-first-century is the problem of “race.” This argument is not new. In fact, much of late-twentieth-century critical theory developed in response to the class-versus-identity (or modernist versus postmodernist) opposition and the notion that all oppressions derive fundamentally from class oppression. Darder and Torres anticipate the criticism of “economic determinism,” and respond by claiming its mantle. They also identify the practical political objective of

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170. Id. at 17–18.
171. Id. at 207–37, 333.
172. See Thomas West, _Against Race: Imagining Political Culture Beyond the Color Line_, 22 JAC (2006), http://www.jacweb.org/Archived_volumes/Text_articles/V22_I1_Rev_West.htm (reviewing Paul Gilroy, _Against Race: Imagining Political Culture Beyond the Color Line_ (2000) and noting that black culture and “revolutionary conservatism,” most evident in rap and hip-hop, “illuminates just how complex racial cultural politics have become”).
173. Id.
174. Patricia Hill Collins, _A Tale of Two Titles_, in _2 Ethnicities_ 539, 541 (2002).
175. Id.
176. Id. at 543.
177. Darder & Torres, _supra_ note 29, at 1. They define race as “an ideology that has served well to successfully obscure and disguise class interests behind the smokescreen of multiculturalism, diversity, difference, and more recently, whiteness.” Id.
178. Id. at 22.
their economic determinism 2.0 version as “rescu[ing] the concept of power from its diffused and unmeasurable position, everywhere and nowhere, back to where it holds the promise of collective political action. That is to say, . . . centered in the external, material world, rather than simply in people’s heads.”

The authors take issue with Cornel West, bell hooks, Derrick Bell, Kimberlé Crenshaw, Richard Delgado, and critical-race theorists (including LatCrit scholars intoning the “mantra of intersectionality”) who forward race or white supremacy as a primary, autonomous category of analysis. It is insufficient that such critical-race scholars also acknowledge the salience of class or other related oppressions. As long as identity movements failed to prioritize properly, with the role of class analysis at the forefront, these movements were subject to criticism: “However politically progressive such a [non-class reductive] view might seem, its results were disastrous to the development of a truly expansive emancipatory movement and the forging of an economically democratic society.” Unless social movements were rooted in the “universal dimension” of class identity, all other identity-based movements are particularistic and short-sighted, and inevitably result in an “uncritical acceptance of capitalist expansion.”

Essentially, Professors Darder and Torres argue that critical-race theorists are guilty of possessing a false consciousness of sorts. By believing in and propagating popularized academic notions of race and white supremacy, race crits reify a “phantom objectivity” projecting an autonomy that conceals the source of its “fundamental [read: class-ed] nature.” Darder and Torres take particular exception to critical-race-theorist contentions that suggest racism is permanent and argue the implications of white supremacy. Indeed, the authors’ preference for and primacy of the “universal dimension” of class reveals why such a contention might be troubling. While they repeatedly claim to reject the idea of race but not racism, Darder and Torres make clear that a key criticism of critical-race theorists’ emphasis on white supremacy is the dichotomous category of “Blacks as victims, and Whites as perpetrators of racism,” absent sufficient

179. Id.
180. Id. at 97–117.
181. Id. at 99 (acknowledging that while critical race theorists and, “in particular, Latino critical race theorists” have referenced capitalism or class in their work, critical race theory overall “has done little to further our understanding of the political economy of racism and racialization”).
182. DARDER & TORRES, supra note 29, at 115.
183. Id.
184. Id. at 112.
185. Id. at 110–13.
186. Id. at 115.
attention paid to social class, gender, and ethnicity.\footnote{187} In this sense, material post-racialists appear to redeem whiteness by removing the presumption of privilege that critical-race theorists afford to whiteness.\footnote{188}

Had Darder and Torres merely argued for a recalibration of the salience or even primacy of class in contemporary race theorizing, their work would not fall into the category of post-racialism. Rather, what is most troubling is not simply their embrace of the “universal dimension” of class,\footnote{189} or Renato Rosaldo’s concept of “cultural citizenship,”\footnote{190} or the Enlightenment’s meta-narrative of “universal humanity,”\footnote{191} or their likening of identity-based social activists to benefactors of capitalism.\footnote{192} What is most disturbing (from a Critical Race Theory perspective) is the casting of African American race scholars as the ultimate culprits in their morality play on late-twentieth/early-twenty-first-century capitalist expansion.\footnote{193}

A careful reading of their work reveals that the authors’ criticism of the concept of race has perhaps as much to do with the “black–white” character and hegemony of race relations in the United States as it does with the primacy of class over race as a useful category of analysis. The authors seem centrally concerned with how the black–white dichotomies inherent in race relations “render the other racialized populations invisible.”\footnote{194} They further wonder whether the black–white paradigm will be able “to grasp the new patterns of conflict or racialized inequalities within a changing political economy.”\footnote{195} Anticipating that their criticism of the black–white dichotomy in United States racial discourse might be read as less than solidaristic, Darder and Torres provide a disclaimer:

The posing of these difficult questions should not be interpreted to mean that white-on-black racism is not a significant and necessary area of study. Rather, we believe that breaking with the black-white racism problematic can open up new research possibilities in comparative studies of racialized inequalities that could potentially reinvigorate our political efforts to ameliorate human suffering.\footnote{196}

\footnote{187} DARDER & TORRES, supra note 29, at 112.
\footnote{188} For example, Darder and Torres criticize the use of narrative in critical-race scholarship for three reasons: (1) the tendency to “romanticize” the experiences of people of color and marginalized groups; (2) the tendency to “overhomogenize” both ‘white’ people and ‘people of color’; and (3) the tendency toward chauvinistic “exaggerations, excesses, and ideological trends.” \textit{Id.} at 103–04.
\footnote{189} \textit{Id.} at 115.
\footnote{190} \textit{Id.} at 25–24.
\footnote{191} \textit{Id.} at 116.
\footnote{192} DARDER & TORRES, supra note 29, at 115.
\footnote{193} \textit{See infra} notes 196–216 and accompanying text.
\footnote{194} DARDER & TORRES, supra note 29, at 3.
\footnote{195} \textit{Id.}
\footnote{196} \textit{Id.}
The authors take pains to make clear that while they reject the “idea of race” and the “race relations problematique,” they “do not reject the concept of racism.”197 Despite this disclaimer, Professors Darder and Torres elaborate that they object to a concept of racism that poses “black” people as the exclusive victims.198 Similarly, they critique “institutional racism” for retaining the “black-white” dichotomy when identifying who is the beneficiary and who is the victim.199 Thus, they conclude, racism’s scope is “very narrowly defined,” in large part because the “black-white dichotomy” presumes that only “white” people can practice or benefit from racism and that only “black” people can be victimized by racism.200

There is no direct citation to the narrow definition of either racism or institutional racism employed by Darder and Torres, but the first scholar they discuss after this criticism is African American philosopher Cornel West.201 They acknowledge that West distanced himself from Black nationalists on the basis that the Black nationalists’ obsession with white racism obstructs the development of essential political alliances.202 Yet, Darder and Torres seek to trap West with his own critique of narrow racial nationalisms because “he seems reluctant to identify any form of racism other than white racism.”203 In other words, truly radical thinkers on race must discuss racism in an equal-opportunity way, one which references racism emanating from whites as judiciously as it references racism emanating from people of color. The authors seem to impose a sort of moral-equivalence requirement into the discussion of racism, which in turn seems bizarrely contradictory to the presumed commitment they have to historical materialism (which they signal when they prioritize their concerns for “the lives of those who have been enslaved, colonized, or marked for genocide in the course of world history”).204

Professor West comes under fire from Darder and Torres not only for failing to use the term racism in a more equal-opportunity way, but also because he did not sufficiently mention Latinos or Koreans in his book Race Matters in a given passage on the 1992 Los Angeles uprising following the Rodney King verdict.205 Instead, West referred to the “monumental upheaval” as a “multi-racial, trans-class, and largely male display of social

197. Id. at 34; see also id. at 114 (arguing that “denial of ‘races’ does not imply the denial of racism or racist ideologies”).
198. Id. at 35.
199. DARDER & TORRES, supra note 29, at 35.
200. Id.
201. Id. at 35–37. Indeed, the chapter that includes this discussion is entitled “Does ‘Race’ Matter?”—playing off of the title of Professor West’s 1994 best-selling book, RACE MATTERS.
202. Id. at 35.
203. Id. at 36.
204. DARDER & TORRES, supra note 29, at 2.
205. Id. at 43–44.
rage," concluding that “race was the visible catalyst,” but “not the underlying cause.”\footnote{Id. at 43 (citing CORNEL WEST, RACE MATTERS 3–4 (2001)).} On this basis, Darder and Torres suggest that West’s reference to the term “multi-racial” instead of Korean, Hispanic, or Latino, signifies an unease so deep that it reflects not only a firmly embedded commitment to the idea of race but also to “racism of another color,” as they subtitled the heading for this discussion.\footnote{Id. at 45.}

Professors Darder and Torres focus critical attention on the theoretical shortcomings of bell hooks in a similar fashion. They take her to task for a passage in \textit{Talking Back} in which hooks refers to the term “white supremacy” as an “ideology that most determines how white people in this society perceive and relate to black people and other people of color.”\footnote{Id. at 111 (citing BELL HOOKS, TALKING BACK, THINKING FEMINIST, THINKING BLACK 112–13 (1989)).} Despite her reference to people of color, Darder and Torres interpret her comments to reflect the “‘black–white’ dichotomy” of United States racial discourse that has “‘black’ people as its primary object.”\footnote{DARDER & TORRES, supra note 29, at 111.}

The authors also criticize the civil-rights and more radical race-based movements of the 1960s and 1970s. While acknowledging that such movements sought to redress material conditions and poverty among African Americans and other economically oppressed communities, “their emphasis on a liberal, rights-centered political agenda undermined the development of a coherent working-class movement in the United States.”\footnote{Id. at 108.}

Again, with no direct citation, it is difficult to take seriously the breadth and depth of their sweeping indictment. One wonders whether the authors are talking about the early days of Dr. King, or the pre-assassination Dr. King who sought to break the civil-rights movement’s silence over the war in Vietnam and to seek an economic bill of rights.\footnote{See generally MICHAEL ERIC DYSON, I MAY NOT GET THERE WITH YOU: THE TRUE MARTIN LUTHER KING, JR. (2001) (describing King’s career); Jeff Cohen & Norman Solomon, The Martin Luther King You Don’t See on TV, FAIR.ORG, Jan. 5, 1995, http://www.fair.org/index.php?page=2269 (recounting King’s admonishing of Congress for its demonstrated “hostility to the poor”—appropriating “military funds with alacrity and generosity,” but providing “poverty funds with miserliness”).} Similarly, one wonders whether the authors considered the Black Panthers’s Ten Point Program when dismissing the era’s movements as liberal, rights-centered agendas.\footnote{JUDITH CLAVIR ALBERT & STEWART EDWARD ALBERT, THE SIXTIES PAPERS: DOCUMENTS OF A REBELLIOUS DECADE 159–64 (1984), available at http://historymatters.gmu.edu/d/6445/ (last visited Mar. 31, 2009).}

Although Professors Darder and Torres articulate a theoretical basis for critiquing the “idea of race” and the shortcomings of race theorists to adequately ground their analysis in a more material understanding of the
world, their method belies an uncomfortable distancing, even targeting, of African American scholars for originating the “black-white dichotomy,” they criticize. In this way, it perhaps makes sense that Darder and Torres may claim that race functions “as the lynchpin of racism”—not of capitalism or white supremacy. Rather, (mostly) African American scholars or movements perceived to be invoking the idea of race and its accompanying black-white dichotomy are the true culprits for perpetuating racism, a conclusion shared by Paul Gilroy.

The works of Gilroy, and Darder and Torres, are two examples of the neo-modernist and materialist Left that seek to transcend race to access the post-racial future. Intellectual post-racialism deploys lofty, even esoteric universalisms—planetary humanism for Gilroy, and cultural citizenship or universal humanism for Darder and Torres. While Gilroy equates the fascism that underwrote German National Socialism with that which underwrites Afrocentrism, Darder and Torres believe that both the civil rights movement and the capitalist class operate to enhance capitalist expansion. Radical post-racialists consistently distance themselves from African American race scholars, whose attachments to race subject them to particular scorn and culpability for everything from “racial camp thinking” to “racial particularism” and racism itself.

2. Liberal Post-Racialists and the Critique of Racial Opportunism

Richard Ford seems to be developing a cottage industry taking on identity politics, particularly those focusing on race. In his 2005 Racial Culture: A Critique and his 2008 The Race Card: How Bluffing About Bias Makes Race Relations Worse, Professor Ford established his niche as a scholar who rebuffs the excesses of race men and women run amok, garnering praise

213. DARDER & TORRES, supra note 29, at 35, 111. See also Roediger, supra note 30, at 48 (noting the “consistent refrain” of Darder and Torres’ study is that “African Americans can practice ‘racism’” and that the authors “persistently lay[] all manner of mischief at the door of the civil rights and Black Power movements”).

214. Id. at 1.

215. GILROY, AGAINST RACE, supra note 168, at 42 (declaring that “[raciological] developments have been complemented by the appeal of articulate but brittle traveling nationalisms firmly rooted in African-American circumstances, as well as by cynicism and opportunism”); see also Molefi Kete Asante. Against Race, by Paul Gilroy, 31:6 J. BLACK STUD. 847 (2001) (book review). Asante notes that Gilroy’s work is not against all collective identities, as there is no critique of Jewish identity, French identity, or Chinese identity as collective historical realities. Rather, Gilroy sees “the principal culprits as African Americans who retain a complex love of African culture.” Id. at 848.

216. GILROY, AGAINST RACE, supra note 168, at 115.

217. Id. at 207-37, 333.

218. DARDER & TORRES, supra note 29, at 115.

219. See supra note 216 and accompanying text; Collins, supra note 174, at 177–79.
from Abigail Thernstrom and the National Review along the way.\footnote{Abigail Thernstrom, Getting Beyond Race: A Review of “The Race Card: How Bluffing About Bias Makes Race Relations Worse,” by Richard Thompson Ford; “Sellout: The Politics of Racial Betrayal,” by Randall Kennedy; and “A Bound Man: Why We Are Excited About Obama and Why He Can’t Win,” by Shelby Steele, CLAREMONT REV. OF BOOKS (Winter 2009), available at http://www.thernstrom.com/articles/reviews_winter_2009.html; Robert Verbruggen, Race Games, Old and New, NAT’L REV., Mar. 10, 2008, at 57.} In his “red-meat conservative title[d]”\footnote{Robert Verbruggen, supra note 220, at 57.} work, The Race Card, Ford ridicules those celebrities and public figures he deems to be “playing the race card,” which he considers to exist whenever racism is emphasized when it is either not really in play;\footnote{FORD, THE RACE CARD, supra note 31, at 6–8.} in play, but not provable as the sole or definitive cause;\footnote{According to Ford, there are the “easy cases of blatant animus” or “obviously irrational stereotyping” warranting antidiscrimination law’s intervention. \textit{Id.} at 265. However, subtler forms of racism “so well hidden that we must find its traces in offhand comments, aesthetic preferences, and the inadvertent effects of neutral policies” warrant a new approach. \textit{Id.} Ford proceeds in this chapter to forward his proposal for antidiscrimination law that avoids searching “all the more stubbornly for hidden bigots and incognito racists, applying more rarified and obscure definitions of racism with ever more shrill and anxious conviction, maybe we should look to new approaches to deal with racial injustices that don’t fit well in the civil rights framework.” \textit{Id.} at 265.} in play, but deriving from impersonal institutional or structural racism, not intentional bias;\footnote{\textit{Id.} at 54–59.} or in play, but not as compelling a case as when it happens to someone of less privilege or means.\footnote{See \textit{id.} at 22–24 (criticizing hip-hop artist Jay-Z’s boycott of Cristal champagne in light of “black unemployment, poverty, rates of incarceration, and life expectancy”); \textit{id.} at 72–87 (describing Oprah’s reported experiences being turned away from a Parisian boutique).} He also objects to identity groups inspired by the civil-rights movement who would use the movement’s principles of inclusion to serve their ends, such as gays and lesbians seeking same-sex marriage.\footnote{See \textit{id.} at 106–22 (pointing out the differences between the same-sex marriage movement and the civil-rights movement).} His critique of identity groups echoes the critiques directed at critical-race scholars by some critical-legal scholars in the late 1980s and early 1990s that suggested the emerging critical-race analysis was but a “false consciousness” that legitimated the cultural hegemony of law.\footnote{It is thus possible that Professor Ford’s main audience is not primarily white liberals, but rather, white radicals and critical-legal scholars at elite law schools. In this regard, his work on post-racialism represents a sort of “nuclear option”—an attempt to explode the heated “rights debate” between critical-legal and critical-race scholars in the late 1980s and early 1990s. For the history of the rights debate and how it tracked racially within the radical community of legal scholars, see Kimberlé Crenshaw, \textit{Introduction}, in \textit{CRITICAL RACE THEORY: KEY WRITINGS THAT FORMED THE MOVEMENT} xxii–xxvii (Kimberlé Crenshaw et. al. eds., 2001).}
traceable causation and borne by a non-elite, underprivileged victim pursuing relief from material disadvantage, political disenfranchisement, or violent repression.\(^{228}\) To “play the race card” in broader contexts would amount to a sort of “racial opportunism” that he sees as benefiting only the most privileged or disingenuous people of color (or of individuals belonging to groups making racism-by-analogy arguments), piggybacking illegitimately upon the backs of verifiable civil-rights-movement heroes and valid-versus-phony claimants of racial injury.\(^{229}\)

Professor Ford’s work fits within post-racialism in obvious and less-obvious ways. His circumscription of political claims of racial injustice to only those he deems truly worthy seems to track closely with the redemption of whiteness because under his definition there are virtually no racists. There are virtually no racists because in the circular prejudice/bias definition of racism that Ford employs, the era of outright bigots has been transcended:

In less than a generation, racial bias was demoted from legally enforced common sense to legally prohibited nonsense. Racism became unlawful, immoral, and, perhaps more important, déclassé.

\[\ldots\]  Today antiracism has been incorporated into the dominant institutions of society. . . . Race is not only unfair and irrational, it is unpatriotic and anti-American. And, according to the story, racism is also deviant: deviant in the literal sense that it is rare, and deviant in the colloquial and pejorative sense that it is twisted, sick, and repellent . . . . The racist is a fossil of an ancient regime of blood privilege and also a pathetic and potentially dangerous psychopath; a fetishist of skin, hair, and lips; a moral pervert.\(^{230}\)

In Professor Ford’s racial world, it seems that logic, reason, and the Enlightenment must always prevail, and racists (i.e., only those who express explicitly racist views) are relegated to the far sidelines of American

\(^{228}\) Ford implies that those who are truly worthy of laying claim to the civil rights tradition and deployment of the charge of racism are those who attack material disadvantage, confront political disenfranchisement, or face violent repression as opposed to those who pursue symbolic suffering or purely psychological injury:

Early social justice movements attacked material disadvantage, political disenfranchisement, and violent repression. But as the long, hot summers of the 1960s and 1970s passed into history and cliché, social movements for women, gays and lesbians, the disabled, and racial groups have become as likely to advance claims based on symbolic suffering and purely psychological injury.

\(^{229}\) Id. at 27–29, 338 (arguing that “[b]ecause working people like Rosa Parks risked all to stand up to unabashed bigots who were backed by social convention and the force of law, celebrities such as Oprah Winfrey and Jay-Z have the luxury of complaining of minor and ambiguous slights from professional snobs”).

\(^{230}\) Id. at 26–30.
society—deviant, twisted, sick, psychopathic, perverted, unpatriotic, anti-American, and déclassé. He takes pains to distance himself from today’s antiracists whom he views to be similarly déclassé, and whom he depicts as “racial demagogues,” “yahoos,” “opportunists,” “ideologues,” “gate-crashers,” and “charlatans” for overplaying the race card:

Racism persists, but contrary to the claims of some racial demagogues, it hasn’t simply changed form or become subtler. It is also not as prevalent or as severe as it was in the era of Jim Crow.

. . . Like patriotic movements generally, antiracism now attracts yahoos and opportunists . . . . In dealing with overt racism, the antiracist has the full coercive power of government and the weight of popular consensus behind her. This access to power and influence attracts the unscrupulous opportunist along with the sincere victim and honest petitioner. And as in any exclusive club, there’s not only the problem of gate-crashers, there’s also that of inappropriate demeanor. . . . But today’s antiracists often must defend, enforce, and strengthen dominant norms, using the influence of large and powerful bureaucracies and the coercive power of government. The fiery style of the revolutionary mixes badly with the cool professional technique of an authoritative bureaucracy. Speaking truth to power is an anachronism when the person speaking also has the power. So as charlatans cry “racism” to finagle undeserved advantages, the bad fit between rhetoric and reality, between adopted post and social position can make even sensible claims sound like grandstanding.

Ford acknowledges the existence of institutional racism (or “racism without racists”), but suggests that anyone who links an individual to such forms of racism is guilty of being a race-card-playing charlatan because of institutional racism’s “diffuse, ambiguous, and implicit” nature.

Professor Ford’s stated objective for such a blunt rebuke is to promote the goal of integration in the United States, a goal he believes will be difficult to achieve if whites are reluctant to engage and interact with people of color for fear of being called a racist. Insofar as integration is his
objective, he does not pursue a “race-neutral” universalism like most post-racialists. However, his strategic approach to achieve integration caters to white normativity and sets a high bar for determining actually-existing racists. This approach has the end effect of exonerating or redeeming whiteness, and therefore, is consistent with the end effect of post-racialism. His many examples caricaturing famous celebrities and powerful public figures for their indiscriminate use of the race card illustrates the moral-equivalence feature of post-racialism. Ford seeks to render as equally self-serving and opportunistic, the plausible albeit privileged racially-based injuries of liberal Hollywood celebrities like Oprah and Jay-Z with that of Supreme Court Justice Clarence Thomas, who tried to turn the tables on his accusers of sexual harassment with his “high-tech lynching” remark.

Professor Ford draws a less obvious moral equivalence which takes aim even-handedly at “both the right and left wing” that “conspire[] to attack this sensible [integrationist] approach to racial justice.” He identifies the right’s simplistic assault on “quotas” and the Left’s “romantic attachment to cultural difference and racial solidarity” as the reasons for integration’s popular decline. Revealing perhaps the true motivation for his book, he declares that right- and left-wing “ideologues” have “captured the conversation,” placing the onus upon “sensible people of conscience” to take back the conversation in order “to demand a serious discussion of racial justice.”

Despite his passing criticisms of right-wing ideologues, perhaps thrown in to claim the liberal center position, Ford’s overall racial project must be understood in consideration of his prior work, Racial Culture: A Critique. In it, he admits to being “corrosive in tone” during his lampooning of identity-based (racial, gender, and sexuality) advocates of difference. Professor Ford focuses his critique upon the identity movements on the Left—especially collective political action based on racial or sexual difference. For example, he states that his main concern about “difference discourse”
is that it threatens “to stall egalitarian and humanist reforms.” It also threatens to prevent society from pursuing the “more noble and more difficult ideal” expressed by his mentor and critical-race-theory critic, Randall Kennedy. Professor Kennedy forwards a “cosmopolitan ethos,” which would allow individuals to reject the “segregationist’s creed of intrinsic racial differences” as a factor in choosing “intimate affiliations.” In Racial Culture, Ford lays the groundwork for The Race Card by using moral-equivalence language to relate the Left’s “difference discourse” to that of the segregationist. But as the original working subtitle of the book—A Critique from the Left—suggests, his main target is the Left—primarily racial and social minorities who produce the difference discourse, not segregationists to whom difference advocates are likened. Ford discloses as much in the Preamble by noting that he had initially subtitled the book, “A Critique from the Left.” He proceeds to explain his reason for dropping the “from the Left” moniker—to allow him to adopt a more universalist approach and to “play the field” ideologically. Reflecting his commitment to his mentor’s cosmopolitanism to pursue intimate affiliations, Ford discloses, “[i]f someone has a good idea, I’ll climb into the back seat with her no matter which side of the tracks she’s from.”

As a critical-race theorist, it is difficult to ignore two glaring contradictions that mark Ford’s work. First, the slander against which he inveighs, especially when directed to undeserving whites facing down the race card, is meted out indiscriminately and in broad strokes to “antiracists” (particularly people of color), even when he readily acknowledges that claims of racism have force because of their plausibility. His caricature of selfish opportunists piggybacking off of Rosa Parks’s good name and his put-downs of such antiracist activists (including critical-race theorists) hardly seem consistent with his aim of promoting more open-minded, sympathetic, and intelligent conversations on race.

250. Id. at 211.
251. Id. at 212.
252. Id.; see also RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 35 (2003) (advocating for a “positive ideal” in the form of “a cosmopolitan ethos that welcomes the prospect of genuine, loving interracial intimacy”).
253. See FORD, RACIAL CULTURE, supra note 248, at 3 (observing that the celebratory discourse of group difference “employs precisely the same description of group difference that the bigots employ”).
254. Id. at 14 (disclosing his original subtitle, “A Critique from the Left”).
255. Id.
256. Id.
257. Id.
259. See supra notes 232–39 and accompanying text.
Professor Ford’s more troubling contradiction is revealed not in his book, but in a 2007 Op-Ed addressing the Jena Six protests. His excesses in rebuking charlatans and opportunists of color hailing from the privileged set might be forgivable (ironically and especially from a radical-materialist perspective like that of Darder and Torres) given his stated purpose of safeguarding claims of racial discrimination for the truly worthy (who like their heroic civil-rights-era ancestors, confront “material disadvantage, political disenfranchisement, and violent repression”). But it is hard to see which group of, say, African American, underclass youth, would fit Ford’s category of deserving victims. Looking at the case of the Jena Six, providing some of the more stunning insights into the ongoing nature of racial dictatorship in parts of the United States, Ford plays the role of the class racial scold, decrying the Jena Six as a symbol of racial vendetta and lawlessness. In Ford’s opinion, the Six are thus too unsympathetic to serve as poster children for what he sees as the twenty-first-century civil-rights movement.

The Jena Six case arose out of racial conflict at an integrated school in a mostly segregated, small Louisiana town. In response to one African American student asking school administrators if he could sit under the “white tree,” three white students hung nooses from the tree. The school principal recommended the expulsion of the three white students, but the white superintendent disregarded this recommendation in favor of a three-day suspension for what he termed a “youthful stunt.” Racial conflict, physical confrontations, and fights ensued over the next few weeks. A white student beat up an African American student who attended an otherwise all-white party. A white male pulled a shotgun on three African American students at a convenience store. Then, a group of African American students jumped a white student, knocking and kicking him unconscious. The white student allegedly was friends with the students who hung the nooses and had reportedly taunted African American students using the n-
The white victim’s injuries were not serious, and he was released after a few hours from the hospital and was seen at a school function that evening. The white district attorney, Reed Walters, charged the six African American students involved in the beating with attempted murder, for which they could face up to one hundred years in prison if convicted. All six African American students were expelled from school. The white student who beat up the African American student attending the all-white party was arrested and charged with a simple battery. The white male who pulled the shotgun on the African American students at the convenience store was not charged, but the African American students who successfully wrestled the shotgun away from the white male were charged with aggravated battery and theft.

Professor Ford’s negative response is curious, since the case was—at least superficially—all about his approved civil-rights objective: integration. The case was set at a school in the deep South of Louisiana where nooses marked the white space under a popular, shade-offering tree. Moreover, the six African American students around whom 10,000 supporters rallied at a September 21, 2007, march, were certainly not the opportunist, Cristal-swilling, Hermes-scarf-toting elite. Rather, they came from a hardscrabble, economically deprived, racially segregated community. Caseptla Bailey, the mother of one of the Jena Six, Robert Bailey, described her neighborhood in Jena, Ward 10, as one “where the majority of blacks live in trailers or wooden shacks.” Despite having a degree in business management and serving as an officer in the Air Force, Ms. Bailey could not get employment as a teller in the town of Jena, which is eighty-five percent white and twelve percent black. The Jena Six students still face significant political disenfranchisement from their initial attempted-murder charges, later reduced to aggravated battery before the local criminal-justice community. In Louisiana, aggravated battery requires a dangerous weapon. According to the prosecutor in Mychal Bell’s case—the first case

271. Mangold, supra note 265.
272. Witt, supra note 266.
273. Id.
274. Id.
275. Id.
276. Mangold, supra note 265.
277. Id.
278. Quigley, supra note 271.
279. Id.
to go to trial—the dangerous weapon was Bell’s tennis shoes, considered “dangerous” as used by “the gang of black boys.”

As respected legal scholar Bill Quigley described on the truthout blog:

[B]lacks in this area of Louisiana have little political power. The ten-person, all-male government of the parish has one African American member. The nine-member, all-male school board has one African American member. . . . There is one black police officer in Jena and two black public school teachers. . . . The white district attorney . . . came to Jena High with law-enforcement officers to address a school assembly [after black students organized a peaceful sit-in under the “white tree”]. According to testimony in a later motion in court, the DA reportedly threatened the black protesting students saying that if they didn’t stop making a fuss about this “innocent prank,” “I can be your best friend or your worst enemy. I can take away your lives with a stroke of my pen.” The school was put on lockdown for the rest of the week.

Besides the prosecutor’s explicit group-based threats, Jena’s African American students also faced violent repression, as suggested by the symbolic nooses hung on school grounds and physical confrontations that ensued for months leading up to the prosecutor’s overcharging of the six students.

It is difficult to anticipate any credible characterization of these facts as nonracial such that they would justify Ford’s dismissal of the Jena Six as worthy victims of racism. While he acknowledges that it is “plausible that racism was behind [the racially disproportionate prosecution],” none of the racial injustices he acknowledges—“racial segregation; racially disproportionate arrest, prosecution, and incarceration rates; and a pervasive societal racism that is passed from generation [to] generation . . . have a discrete cause.” As such, Professor Ford reasons in his Op-Ed, “the march on Jena was a bit unfocused.” He points out that “[t]hese young men weren’t exactly engaged in peaceful civil disobedience when they ran

280. Id.
281. Id.
282. Critical-race scholar Anthony Alfieri acknowledges that Jena District Attorney Walters might have a colorblind “alibi” for his seeming disparate treatment of white and Black youth. Anthony V. Alfieri, Prosecuting the Jena Six, 93 CORNELL L. REV. 1285, 1292 (2008). However, Alfieri connects this colorblind defense to identity-degrading and community-disempowering relationships between white prosecutors and black offenders in a segregated locale, noting that “longstanding prosecutorial norms and practice traditions permit[] the colorblind, and alternatively color-coded, tolerance of postbellum segregation to continue unabated.” Id. at 1296.
283. Ford, Poster Children, supra note 262.
284. Id.
afoul of the law." Additionally, Ford fails to mention the masterful broad-based, national grassroots campaign by Color of Change that went on to raise over $250,000 for the Jena Six legal-defense fund, and he suggests incorrectly that the protest was instead led by Reverend Al Sharpton. His distillation of the motives and objectives behind the Jena Six movement to a "racial vendetta" that is "diametrically opposed to the message of social justice and cross-racial understanding that underlies the civil rights movement of the last century" is startling for both its uncharitable characterization (contrary to his professed method for talking candidly and fairly about race), as well as for its opaqueness to the larger social critique that compelled the movement that inspired thousands of intergenerational African Americans to rally around the cause.

As Salim Muwakkil analyzed in his *Jena and the Post-Civil Rights Fallacy* article, civil-rights protest still remains in high regard in the African American community, despite the mainstream media’s constant touting of the “post-racial” cohort of new Black leadership to which the media says Barack Obama belongs. The mainstream media depicts this cohort—inevitably juxtaposed against “[r]ace-focused leadership” of the Reverends Jesse Jackson, Sr., and Al Sharpton—as significant because its members represent the “harbingers of a new America [that is] untroubled by the ogre of rank racism.” Muwakkil correctly calls out the ideological component of the media fascination and anointment of the new Black leadership:

> These ideas are part of a hardening notion that the protest mode is an ineffective way to redress the racial problems of the 21st

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285. *Id.* Initially, Rosa Parks seems distinct from the Jena Six because her opposition to subordination did not involve physical violence. However, the underlying and inescapable similarity between Parks and the Jena Six lies in the unequal treatment they received based solely on their race.

286. *Id.* For more information on the central role of Color of Change to the Jena Six protest, see Joe Garofoli, *Beating Case Galvanizes S.F. Online Activist Group*, S.F. CHRON., Sept. 22, 2007, at A6 (tracing the central role of Color of Change to the Jena Six protest movement, and, in turn, the centrality of the Jena Six to the development of a new media, race-based organizing movement).


289. *Id.*
century. Increasing numbers of commentators are stressing the need for African Americans to place more focus on internal social and moral reform than on external protests for civil rights. This is hardly a new debate. In fact, it was the core disagreement between W.E.B. Du Bois and Booker T. Washington at the beginning of the 20th century.290

But as Muwakkil observes, the Jena Six protest resonated across the country with African Americans young and old because it represented rank racism “in all its perverse glory.”291 As Jesse Jackson noted, Jena represents “just a DNA sample of what’s happening around the country” with respect to a biased and unfair criminal-justice system that disproportionately punishes people of color—especially African American males—through “the prison-industrial complex.”292 Muwakkil correctly observes “one of [the] most corrosive aspects” of this version of racial oppression is the “school-to-jail pipeline” that railroads Black youth into the penal system for infractions that draw minor or no sanctions if performed by whites, who deserve a second chance for their youthful stunts or pranks.293 For Ford to interpret the fundamental message of the Jena Six story as one reflecting the need for cross-racial understanding and integration best exemplified by the movement’s true legatees—the anonymous black students who defied informal segregation and sat under the “white tree”—suggests a tin ear for the new civil-rights priorities that transcend integration.294 In the alternative, his characterization of the Jena Six’s significance to the Black community may reflect a possible yearning for a return to the “politics of respectability,” where racial uplift is conditioned upon strict and ironic adherence to white, middle-class, pre-feminist values, where only perfect plaintiffs may serve as true movement legatees and poster children.295


291. Id.

292. Id. Muwakkil points out how African American males confront “a criminal justice system that incarcerates them more than eight times the rate of whites” in penal institutions that operate as “festering holding pens for black and Latino youth.” Id.

293. Muwakkil, supra note 289.


295. EVELYN BROOKS HIGGINBOTHAM, RIGHTEOUS DISCONTENT: THE WOMEN’S MOVEMENT IN THE BLACK BAPTIST CHURCH 1880–1920, at 185–230 (1993) (coining the term “politics of respectability” to refer to the constricted political strategies of Black Baptist women who sought racial uplift by adopting an ideology of The Cult of True Womanhood). Of course, Professor Ford’s preference for the “perfect plaintiff” tilts toward a more economically privileged and
The broad-brush caricature Ford paints of antiracist activists, combined with his obtuse and uncharitable portrayal of the Jena Six defendants and new civil-rights organizers, reflect two ironic contradictions to his work in *The Race Card*. Viewing Ford’s work through these two contradictions, one may conclude that Ford’s post-racialism seeks to curb not so much the excesses of Left and Right on race discourse, but rather, the influence of Black normativity on racial equality. My interpretation of Ford’s work, supported by its reception history, is that it repeats or revisits critical arguments against right-wing quota baiting, while placing heavy blame on critical-race theorists and race-based-movement activists, the same ones who ventured the critiques of racially reactionary policies in the first place. Herein is the troubling asymmetrical moral equivalence. By so doing, he expands—unwittingly or not—white normative influence on racial equality and racial discourse in general.

**IV. CONCLUSION: RESISTANCES**

In this Article I identified post-racialism as a twenty-first-century ideology that serves the “retreat from race” imperative in its material, sociocultural, and political forms. The material retreat underwritten by post-racialism involves the attempt to eliminate state intervention to address racial injustices through race-based remedies. The sociocultural retreat deploys post-racialist discourse to even the moral playing field between whites and groups of color so that white interests may be pursued. Post-racialism insulates white normativity from criticism and ultimately serves to redeem the full value of whiteness infringed from its negative associations with the pre-civil rights, Jim Crow era. The post-racial state disseminates a new set of “rules of the game” of who is a political actor, what is a political interest, and how political claims will be made and negotiated to achieve the political retreat from race. For example, in post-racial America, President Barack Obama is a political actor, and increasingly, Jesse Jackson, Sr., is not. Respectful individual questions at town hall meetings are appropriate, and increasingly, noisy collective protest by African Americans or Latinas/os is not.

Race neutrality and forms of colorblindness have been with us since the end of the Civil War after the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments that declared (but did not implement) an egalitarian norm into post-bellum society. In the post-Amendment, pre-civil-rights era of Jim Crow, state legislatures, local officials, and courts freely mixed race-neutral universalisms with explicit racial classifications designed to separate and subordinate peoples of color from whites. Likewise, in the second Reconstruction era of civil rights beginning with *Brown* in 1954, political and

socially respectable plaintiff, which, in contradictory fashion, runs the risk of incurring his “not truly worthy” critique.
judicial actors seeking to preserve Jim Crow and defy *Brown* initially invoked massive, open resistance to desegregation.

Later, however, these inequality activists wisened up and sought instead to resist desegregation with race-neutral policies in the form of the Parker doctrine,296 “freedom of choice” plans, one grade-per-year desegregation, or state “pupil placement laws,” all designed to subvert substantial compliance with *Brown*.297 So the resort to race-neutral subordination is not new. As Tali Mendelberg theorizes, under a dominant norm of egalitarianism, conservatives play the “race card” by relying upon implicit messages of racial subordination embedded into racially neutral sounding language.298

While race-neutral policies and rationales designed to camouflage the operation of racial subordination are at least as old as the post-bellum Amendments, what is new and distinct about post-racialism (as compared to say, colorblindness) is that the state’s retreat from race-based remedies is only possible in a society that is perceived as having made significant strides in racial equality, at least symbolically. The election of Barack Obama as president provides the watershed moment to allow the transition from the civil-rights era to the post-racial era. The narrative of transcendent racial progress is the descriptive fact that distinguishes post-racialism from colorblindness. The turn to post-racialism from colorblindness may also be explained by an understanding that colorblindness as a “brand” may have lost some of its luster in associating with old-school conservativism and the new-school hucksterism of Ward Connerly’s misleading and disingenuously named “civil rights initiatives” seeking to prohibit affirmative action. Post-racialism addresses the difficulty of reaching out to youth and moderate-to-progressive whites using colorblindness’s compromised frame.

I identified the four key features of post-racialism—namely the racial progress/transcendence narrative; the articulation of a race-neutral universalism to supplant “racialism” and the pursuit of race-conscious remedies; the deployment of moral equivalences between transcended racist regimes of thinking, often reflecting the progress made from the eras of Jim Crow and civil rights to the current post-racial era; and the undertaking of a “distancing move,” particularly one that juxtaposes the superiority of post-racialism with the purported racialist regressiveness of African Americans in particular.

I discussed post-racialism’s emergence in such various contexts as the legal, political, and intellectual realms. Motivations in the three contexts are

297. See *Bell, Race, Racism*, supra note 51, at 147–50 (discussing these efforts).
different at different times, like that of interest convergence, which is common to political post-racialism and in electoral campaigns where “strategic universalism” is a virtual necessity. Despite this acknowledgement, I still argue that although progressives of color may invoke post-racialism as a short-term strategic necessity, post-racialism is dangerous because its racially redemptive effects are long-term and widely diffused across many affected parties beyond those invoking and benefiting from the strategic necessity. Post-racialism’s redemptive effects limit the acceptable political discourse for racial equality, and therefore constrain the effectiveness of racial justice movements.

Post-racialism, like popular depictions of Asian Americans as a “model minority,” is an ideology and a racial project. Appearing in the mid-1960s, at a time of increasing political militance in African American politics, mass media conveyances of model minority mythology shared certain common features—alleging Asian American economic and educational successes, juxtaposing Asian Americans next to African Americans, and concluding that Asian cultural and educational investments are far more productive than African American investments in politics and their pursuit of civil rights.²⁹⁹ Both model minority and post-racial depictions are designed to suppress and marginalize collective Black political action, and to focus the community instead on “internal social and moral reform.”³⁰⁰ In light of the hegemonic force of both ideologies on communities of color, it is imperative to maintain and sharpen a focused, race-conscious critique among critical-race scholars.

This project is not merely intended to revolve around a description and analysis of a new and formidable type of racial project; I also seek to begin the conversation on the types of resistances critical-race scholars may undertake for the next twenty years. The stakes are enormous. Contrary to the efforts of post-racialists to render Critical Race Theory obsolete, the salience of critical-race scholars in the next two decades cannot be overstated. To illustrate, in the recent election there were five states targeted by Ward Connerly for anti-affirmative action ballot initiatives.³⁰¹ Passage would have meant that the state in question would adopt policies like those in California, Washington, and Michigan that would eliminate affirmative action in education and employment. Were it not for the African American

²⁹⁹. Osajima, supra note 17, at 167 (explaining that the idea of a model minority “was an image that carried political and ideological implications specific to the historical conditions of race relations”).

³⁰⁰. Muwakkil, supra note 289, at 15.

³⁰¹. The five states were Arizona, Colorado, Missouri, Nebraska, and Oklahoma. The anti-affirmative action initiative passed in Nebraska, but was rejected in Colorado and failed to make the ballot in Arizona, Missouri, and Oklahoma. Tyler Lewis, Victory on Equal Opportunity, Nov. 6, 2008, CIVILRIGHTS.ORG, http://www.civilrights.org/equal-opportunity/connerly/039-victory-on-equal-opportunity.html.
Policy Forum founded by critical-race scholars Kimberlé Crenshaw and Luke Harris, civil-rights defenders of affirmative action might have adopted a “race-neutral” strategy emphasizing the civil rights of white women and questioning even using the term “affirmative action.”

To assist with imagining such resistance, every critical-race scholar should be required to read Immanuel Wallerstein’s recent essay “Remembering Andre Gunder Frank While Thinking About the Future” in the Monthly Review. In this essay, Wallerstein perceptively acknowledges that many debates on the Left with regard to political strategy and agenda relate to differences in which a strategic time frame is adopted: short-, medium-, or long-term struggle. Wallerstein, famous for his world-systems theory, defines the long-term Left agenda briefly, as attaining a world-system that is “relatively democratic” and “relatively egalitarian,” at least more than the current and historic ones.

As for the short-term agenda (in which humans are concerned with the everyday tasks of surviving and pursuing meaning and joy), he argues that in a capitalist world economy, one must pursue a strategy of the lesser of two evils. Indeed, he argues, there is nothing but lesser-evils compromises in the short-run. It is in the medium run that one must eschew such trade-offs, and this is where the “significant action” lies for Left agendas. The medium run requires a militant, steadfast commitment to transformation of the system, even if immediate benefits are not evident. This medium-run agenda, for the next twenty-five years or so, consists of political education “prep work” and movement-building to sustain continuous pressure on power.

Professor Wallerstein identifies smaller-scaled social-movement building as a neglected essential element to achieve a relatively more democratic

302. See CTR. FOR SOCIAL INCLUSION, KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, THINKING CHANGE: RACE, FRAMING AND THE PUBLIC CONVERSATION ON DIVERSITY: WHAT SOCIAL SCIENCE TELLS ADVOCATES ABOUT WINNING SUPPORT FOR RACIAL JUSTICE POLICIES 10 (2005) (analyzing the various approaches employed by affirmative action advocates, ranging from “race-neutral” strategies that avoid mention of structural racism or affirmative action, to using the term affirmative action while educating the public about media frames that produce negative reactions to race-conscious remedies); Khaled Ali Beydoun, Without Color of Law: The Losing Race Against Colorblindness in Michigan, 12 MICH. J. RACE & L. 465, 495 (2007) (reporting that white focus groups polled about Michigan’s statewide initiative on affirmative action insisted that the term “affirmative action” not be used at all in messaging due to participants’ sense that the term “was irrevocably negative, unsalvageable and thus counterproductive” to defeating the anti-affirmative action initiative).

303. Immanuel Wallerstein, Remembering Andre Gunder Frank While Thinking About the Future, MONTHLY REV., June 2008, at 50.

304. Id. at 51.

305. Id. at 53.

306. Id.

307. Id. at 54.

308. Wallerstein, supra note 304, at 54.
society.\textsuperscript{309} By social movement building, he makes clear that the emphasis 
needs to be on organizing those who have been historically left out of the 
equation, especially “women, ethno-racial and religious understrata, sexual 
and age-based understrata, and indigenous people.”\textsuperscript{310} Only by empowering 
the various understrata may the existing undemocratic structures be 
weakened. Wallerstein does not fail to acknowledge the irony that 
expanding the majority for a democratic and egalitarian future requires 
defending the sociocultural autonomy of minorities.\textsuperscript{311} Greater social 
inclusion is necessary to expand the majority that can demand political and 
economic redistribution.\textsuperscript{312} Wallerstein calls for “pressure, more pressure, 
and uncompromising pressure” for theoretical rights not yet acquired.\textsuperscript{313} 
This pressure, linked to ever vigilant and increasing demands for 
redistribution of education, health care, and a decent lifelong income, 
constitute the relatively “egalitarian” part of the agenda.\textsuperscript{314} 

Heightening the contradictions between the rhetoric and reality of 
rights and demanding redistribution and structural transformation has been 
central to Critical Race Theory’s first two decades. Keeping one’s eyes on the 
prize of proliferating the consistent and insistent demand for greater 
democracy and equality should be the focal point to determine future 
organizational structures and normative commitments through which the 
critical-race agenda may be realized. Activist-scholars committed to Critical 
Race Theory in the future must persevere and thrive, by grounding their 
work in an unflinching, rigorous, and always-deepening racial critique that 
situates racial oppression and resistance thereto within the context of 
material conditions and allied social forces.

The medium-run vista of twenty-five years is well-suited for formulating 
one’s uncompromisingly transformative critical-race project—how best to 
capture the inherent contradictions in a constitutional democracy between 
the promise and delivery of rights and equality. By so doing, critical-race 
scholars contribute to the necessary ongoing political education efforts in 
the medium run. One key change in how one defines a research agenda 
might involve a more intersubjective, communally defined process, rather 
than one that is, by default, largely individualistic and career-oriented. 
Formations of progressive scholars (like critical-race-studies conferences or 
workshops) where committed and serious scholars gather to discuss and 
critique each other’s work and to define a medium-range political/research 
agenda, would provide an alternative to the tilt toward individualism and

\textsuperscript{309} Id. at 58. 
\textsuperscript{310} Id. 
\textsuperscript{311} Id. 
\textsuperscript{312} Id. at 58–60. 
\textsuperscript{313} Wallerstein, supra note 304, at 50. 
\textsuperscript{314} Id.
careerism. The goal might be to subject one’s theorizing and agenda-setting to a sort of “political impact statement,” akin to an “environmental impact statement,” to ascertain how well one’s projects and ideas align with the larger project and goals in the medium run and to anticipate hazards along the way.

The next generation of race crits would also do well to see the transformative critical-race project through Wallerstein’s imperative of building social movements among the understrata of those historically left out. Although this imperative may cause some initial discomfort among professionals in academe; I have no doubt, based on Critical Race Theory’s track record, that many will respond sincerely and effectively to reject the “politics of respectability” in legal academic circles that dictate an illusory divide or distancing between scholar and community, and to work towards empowering communities that have yet to embrace the “Audacity of Hope.”