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2019

# States of Continuity Or State of Exception: Race, Law and Politics in the Age of Trump Symposium: Constitutional Law in the Trump Era

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### Recommended Citation

Carbado, Devon W., "States of Continuity Or State of Exception: Race, Law and Politics in the Age of Trump Symposium: Constitutional Law in the Trump Era" (2019). *Constitutional Commentary*. 1164.  
<https://scholarship.law.umn.edu/concomm/1164>

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## STATES OF CONTINUITY OR STATE OF EXCEPTION? RACE, LAW AND POLITICS IN THE AGE OF TRUMP

*Devon W. Carbado\**

This Essay introduces the concept of “states of continuity” to caution against an uncritical framing of constitutional law and political developments in the age of Trump/Trumpism as a “state of exception.”<sup>1</sup> I invoke the expression state of exception to stand in for the argument on the left that the Trump era will produce a set of constitutional and political arrangements that materially depart from the constitutional and political frameworks that preceded it. Students of Agamben will note one difficulty with this claim: As a general matter, proponents of Trumpism do not justify their policy initiatives solely on the ground that we exist in a state of exception. They frame those initiatives, instead, as part of a broader project to “Make America Great Again.”<sup>2</sup> To put all of this another way, whereas Agamben conceived of the state of exception as a moment in which the sovereign naturalizes extraordinary measures that subsequently become ordinary features of governance,<sup>3</sup> political actors in the Trump era achieve their social and political goals often (though certainly not always)

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\* For comments on or conversations about this Essay, I thank Tendayi Achiume, Asli Bâli, Kimberlé Crenshaw, Cheryl Harris, Luke Harris, Daniel HoSang, George Lipsitz, Joseph Lowndes, K-Sue Park, Christopher Petrella, and Jothie Rajah. Alison Korgan provided terrific research assistance. All errors are my own.

1. For a particular framing of the state of exception, see generally GIORGIO AGAMBEN, *STATE OF EXCEPTION* (Kevin Attell trans., 2005).

2. See *About the 45th President of the United States Donald J. Trump*, DONALDJTRUMP.COM, <http://www.donaldjtrump.com/about/>, (last visited November 18, 2018) (quoting President Trump and his campaign promise, “We will make America strong again. We will make America proud again. We will make America safe again. And we will Make America Great Again!”); See also, Lynn Vavreck, *Trump’s Approach Is More Like Reagan’s Than You Might Think*, N.Y. TIMES (Sep. 16, 2015), <https://perma.cc/B73C-VUZF>; Nell Irvin Painter, Opinion, *What Whiteness Means in the Trump Era*, N.Y. TIMES, Nov. 12, 2016, at SR4.

3. See AGAMBEN, *STATE OF EXCEPTION*, *supra* note 1, at 16.

2                    *CONSTITUTIONAL COMMENTARY*                    [Vol. 34:1

through a disavowal of the exceptionality of their measures.<sup>4</sup> The end result is that while in the world Agamben describes the state of exception is legitimized through recourse to a discourse of exigency, in the world of Trump/Trumpism the interventions are legitimized through recourse to discourses of ordinariness and return.

Though it might be fair to say that Agamben's account of the "state of exception" obscures the degree to which there are always already people for whom the state of exception is an "ordinary" feature of social life, it strikes me as both important and productive to conceptualize and articulate Trump/Trumpism through the prism of exceptionalism.<sup>5</sup> At the same time, I worry that the exceptionalism frame has the potential to effectuate too sharp a rupture between a "then"—the political and constitutional moment before Donald J. Trump became President of the United States—and a "now"—the current Trump/Trumpism moment in which we find ourselves. This Essay elaborates on what I mean, drawing on the concept of "states of continuity" to do so.

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My starting point is to note that a state of exception understanding of Trump/Trumpism can easily elide the various

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4. See Erica L. Green, Matt Apuzzo, & Katie Benner, *Trump Officials Reverse Obama's Policy on Affirmative Action in Schools*, N.Y. TIMES, July 3, 2018, at A1 (recounting members of the Trump administration's response to the reversal of Obama-era affirmative action policies. A joint letter between the Education and the Justice Departments denounced the Obama-era policies as "beyond the requirements of the Constitution." Secretary of Education DeVos wrote, "The Supreme Court has determined what affirmative action policies are constitutional, and the court's written decisions are the best guide for navigating this complex issue." And a senior Justice Department official further emphasized that "they were... hewing the department closer to the letter of the law"); See also Jaweed Kaleem, *Trump Administration Rescinds Obama-Era Policies Encouraging Affirmative Action and Backs Race-Neutral School Admissions*, L.A. TIMES, (July 3, 2018, 5:05 PM), <https://www.latimes.com/nation/la-na-affirmative-action-20180703-story.html>.

5. Walter Benjamin might have been getting at something like the foregoing idea when he suggested that "the state of emergency" that historically has frightened the metropole has been the normal state of existence for much of the world. See WALTER BENJAMIN, *ON THE CONCEPT OF HISTORY* (1942); Giorgio Agamben, *The State of Emergency*, in CENTRE ROLAND-BARTHES (2002). Aimé Césaire advanced a similar observation, noting that while Europe was surprised by Hitler, Asia, Africa, and Latin America were not. See AIMÉ CÉSAIRE, *DISCOURSE ON COLONIALISM* (Joan Pinkham trans., 2001).

conservative projects, and centrist ideological commitments, that created conditions of possibility for Trump/Trumpism. Indeed, to some extent, Trump/Trumpism is the conservative and middle-of-the-road liberal chicken coming home to roost. This is certainly true with respect to what one might broadly call the constitutional law of race.

Critical Race Theorists in particular have long demonstrated the multiple ways in which the Supreme Court has, for some time, effectively constitutionalized racial inequality.<sup>6</sup> That things could get worse—and a lot worse—under Trump/Trumpism should not obscure the edifice of constitutional law that preceded the Trump regime. This body of law all but ensures the continued marginalization of people of color. I am thinking here about everything from employment discrimination,<sup>7</sup> to voting rights,<sup>8</sup> to policing,<sup>9</sup> to the war on terrorism,<sup>10</sup> to access to the courts,<sup>11</sup> to immigration regulation and enforcement,<sup>12</sup> to affirmative action,<sup>13</sup> to mass incarceration and the death penalty.<sup>14</sup> Across the foregoing domains of constitutional law, the Supreme Court has narrowed the scope of constitutional rights, increased the barriers to litigating those rights, and diminished the penalties and remedies when government officials violate them.<sup>15</sup> Thus, even

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6. See Elise Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235 (2016); Robin Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803 (2004); Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Neil Gotanda, *A Critique Of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991); Ian Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012); Cheryl Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753 (2001); Cheryl Harris, *Limiting Equality: The Divergence and Convergence of Title VII and Equal Protection*, 2014 U. CHI. LEGAL F. 95 (2014); Darren Hutchinson, *Critical Race Histories: In and Out*, 53 AM. U. L. REV. 1187 (2004); Devon W. Carbado, *Constitutionalizing Inequality* (draft on file with author).

7. See *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Washington v. Davis*, 426 U.S. 229 (1976).

8. See, e.g., *Shelby County v. Holder*, 570 U.S. 529 (2013).

9. See, e.g., *Whren v. United States*, 517 U.S. 806 (1996).

10. See *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); Amna Akbar, *National Security's Broken Windows*, 62 UCLA L. REV. 833 (2015); Amna Akbar, *Policing Radicalization*, 3 UC IRVINE L. REV. 809 (2013); Khaled Beydoun, *America, Islam, and Constitutionalism: Muslim American Poverty and the Mounting Police State*, 31 J. L. & RELIGION 279 (2017).

11. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

12. See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

13. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

14. See *McClesky v. Kemp*, 481 U.S. 279 (1987).

15. See generally ERWIN CHEMERINSKY, *CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE* (2017).

4                    *CONSTITUTIONAL COMMENTARY*                    [Vol. 34:1

were the Supreme Court never to decide another case, the scales of constitutional law are already tipped heavily in favor of maintaining and entrenching rather than ameliorating and disrupting racial inequality. Am I suggesting, therefore, that nothing is at stake in this moment? No. I am simply urging that we ought to take care to note what I will call “states of continuity.”

By “states of continuity” I mean instances in which systems and technologies of power—ideologies, discursive frames, and practices—are continuous across, for example, different historical periods, different national and geographic boundaries, different public and private spaces, different legal and political contexts, different political parties, and different social categories.<sup>16</sup> When Michelle Alexander speaks of the “New Jim Crow,” something akin to states of continuity (vis-à-vis the “Old Jim Crow”) is plausibly implicated.<sup>17</sup> Douglas Blackmon’s account of how slavery functioned “by another name” after the formal abolition of the institution is arguably an example of states of continuity.<sup>18</sup> Cheryl Harris’s contention that whiteness has functioned “as property” across different doctrinal regimes in the United States could be framed as a story about states of continuity.<sup>19</sup> States of continuity might also be at play in Edward Said’s conception of Orientalism, a phenomenon that according to Said travels across different articulations and instantiations of the “European Western Experience.”<sup>20</sup> Malcolm X’s suggestion that “racism is like a Cadillac, they bring out a new model every year”<sup>21</sup> is simpatico with what I am calling states of continuity. Similarly, Achille Mbembe’s observation that the violence and death of Nazism was “the extension to the ‘civilized’ peoples of Europe methods previously reserved for ‘savages’”<sup>22</sup> could be understood as a claim about states of continuity. When Kimberlé Crenshaw

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16. The foregoing is not intended as an exhaustive list.

17. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

18. DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLS WAR II* (1998).

19. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

20. EDWARD SAID, *ORIENTALISM: WESTERN CONCEPTIONS OF THE ORIENT* (1997).

21. Malcolm X, who worked for a short time as an assembly-line worker in a truck factory in Detroit, would articulate that line to his followers. See GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS* 183 (2006).

22. Achille Mbembe, *Necropolitics*, 15 PUBLIC CULTURE 11 (2003).

2019]

## STATES OF CONTINUITY

5

asserts that a reform/retrenchment dialectic has marked the trajectory of black civil rights,<sup>23</sup> she is arguably foregrounding an example of states of continuity. Finally, K-Sue Park's argument that the United States has long been a "self-deportation" nation in which the government has employed "one common logic" to facilitate a range of self-deportation strategies to control and discipline "the migration of undesired populations" reflects precisely the kind of engagements and contestations—within and across the boundaries of history, legal frameworks, political parties, and social categories—that enables one to see the various mechanisms through and on which states of continuity are potentially effectuated.<sup>24</sup>

To describe states of continuity in the way that I have is to suggest neither the precise and inevitable reproduction of that which has come before nor the exact manifestation of particular systems or technologies of power across two or more domains.<sup>25</sup> I am not speaking here of uniformity or something analogous to "perfect continuity." Context—in its most capacious sense—will always matter and shape where and how power travels and expresses itself. Accordingly, I should be clear to note that the concept of states of continuity I have in mind presupposes moments of rupture and divergence, or what we might think of as "states of discontinuity."

Nor am I arguing that there is a totalizing way in which states of continuity function. The kinds of continuities one might analyze across political party affiliation, social categories, and geography will not necessarily map onto the kinds of continuities one might analyze across time and institutions. Undoubtedly, there are (and will always be) important differences with respect to how states of continuity operate, the precise contours of which cannot be expressed through the level of abstraction at which I

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23. Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988)

24. K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. (forthcoming 2019).

25. To say, for example, that racism is a continuous phenomenon is to say neither that its impacts are the same across racial groups nor that each of the racial groups is equally positioned to mobilize the various technologies through which racism is expressed. In this respect, my conception of states of continuity reflects the kind of political and intellectual sensibility that underwrites Joe Lowndes's and Daniel HoSang's notion of "racial transposition," a theory that seeks to map how race and racial meanings travel and circulate. See generally DANIEL HOSANG & JOSEPH LOWNDES, PRODUCERS, PARASITES AND PATRIOTS: RACE AND THE NEW RIGHT-WING POLITICS OF PRECARIETY (forthcoming 2019).

6                    *CONSTITUTIONAL COMMENTARY*                    [Vol. 34:1

have introduced the theory.<sup>26</sup> At bottom, I am trying to engender a sensibility—a way of thinking and seeing—that presses up against and resists acquiescing to the boundaries of various forms of compartmentalism—the public/private; the past/present; the Republican/Democrat; the national/global, and so on. Finally, I should stress again my view that the theory of states of continuity I am propounding is not a wholesale repudiation of the theory of the state of exception Agamben seemed to have in mind.<sup>27</sup> I offer states of continuity as a provisional concept to put into sharp relief what claims about the state of exception sometimes elide—the continuous nature of regimes and technologies of power. In at least one sense, the elision of this dynamic of continuity in arguments about the state of exception is curious: Agamben’s articulation of the state of exception is itself an example of states of continuity—that is to say, an example of the degree to which across time, national boundaries, political parties, and ideological commitments the availability and mobilization of the state of exception has functioned as a crucial technology of power through which people are reduced to “bare life.”

To return more specifically to Trump/Trumpism: To say that there are continuous dimensions to Trump/Trumpism is not to turn a blind eye to the exceptional features of this political moment. One might reasonably argue that the expansive view of the Executive under Trump/Trumpism, the warehousing of children in cages in detention centers, and the proliferation of tent camps along the border are salient markers of the state of exception at work. I do not mean to quarrel with those accounts. My modest intervention is to suggest that those arguments should not overdetermine how we think about Trump/Trumpism lest we lose sight of the “normal” and more “respectable” conservative

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26. I leave to others the challenge of articulating what those differences might look like.

27. There are other reasons one might challenge various articulations of the state of exception, including the extent to which scholars sometimes mobilize the theory without attending to race, class, sexuality, and other socially marginalized subject positions (for example, one’s position as an immigrant or as an incarcerated person). For critiques of Agamben’s work along these lines, see Mark Rifkin, *Indigenizing Agamben: Rethinking Sovereignty in Light of the “Peculiar” Status of Native Peoples*, 73 *CULTURAL CRITIQUE* 88 (2009); FALGUNI SHETH, *TOWARDS A POLITICAL PHILOSOPHY OF RACE* (2009); Ladelle McWhorther, *Post-Structuralism and Race: Giorgio Agamben and Michel Foucault*, in *THE OXFORD COMPANION TO PHILOSOPHY OF RACE* 113 (Taylor et al ed.itors).

2019]

## STATES OF CONTINUITY

7

projects through and on which (even the most exceptional dimensions of) Trump/Trumpism came into being.

Though my view is that the racial dimensions of Trump/Trumpism have their predicate precisely in those more “normal” and “respectable” articulations of conservative politics—and in centrist formulations of liberal racial commitments—it is beyond the scope of this Essay to articulate the full contours of those continuities. But a brief discussion of a particular left/right state of continuity might be helpful. The example I have in mind has, for over forty years, functioned as one of the most hotly contested social policy questions in the United States—affirmative action.

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Notwithstanding ongoing controversies over affirmative action, the policy, paradoxically, has been an arena in which not only pre-Trump and post-Trump conservatives ideologically converge but also where many liberals and conservatives ideologically converge. Across the ideological spectrum, people conceptualize affirmative action as a racial preference that we should treat suspiciously and rarely, if ever, use. Indeed, as Kimberlé Crenshaw has noted, for the most part, the difference between liberal and conservative views on affirmative action is that while liberals think the preference is justified because the policy advances diversity, conservatives think the policy is never justified because it instantiates reverse discrimination.<sup>28</sup> This state of continuity between the left and the right on affirmative action provides at least a partial explanation for why Californians—who so ardently position themselves against Donald Trump—passed Proposition 209, an anti-affirmative action measure that traded on the idea that affirmative action undermines core American values (like merit and hard work) and harms innocent whites.<sup>29</sup>

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28. See Kimberlé Crenshaw, *Introduction to CRITICAL RACE THEORY* (1995); Kimberlé Crenshaw, *Framing Affirmative Action*, 105 MICH. L. REV. FIRST IMPRESSIONS 123 (2007); Kimberlé Crenshaw, *Playing Race Cards: Constructing a Pro-Active Defense of Affirmative Action*, 16 NAT'L BLACK L.J. 196 (2000).

29. See CAL. CONST. ART. I, § 31, reprinted in APPENDIX A. The initiative is also known as Proposition 209, or the “California Civil Rights Initiative (CCRI).” For an analysis of the liberal roots of all of California’s racialized ballot measures dating back to the 1940s, see DANIEL HO SANG, RACIAL PROPOSITIONS: BALLOT INITIATIVES AND THE MAKING OF POSTWAR CALIFORNIA (2010).



Political scientist Luke Harris and philosopher Uma Narayan have provided perhaps the most compelling account of the degree to which liberals have acquiesced in the preference framing of affirmative action.<sup>30</sup> That acquiescence is precisely what marks the state of continuity about which I have been speaking. It is not my aim in this Essay to explain why conservatives and liberals align on the preference framing of affirmative action. I am interested, instead, in encouraging liberals to opt out of that state of continuity.

That I employ the language of opting out does not rest on the view that states of continuity can always be escaped. In some instances, the relevant system or technology of power might be, to borrow from Daria Roithmayr, fundamentally “locked in.”<sup>31</sup> Think, for example, about racism and American democracy. One could argue that the state of continuity of racism across different moments in American history is an essential feature of American democracy. Under this view, while it is absolutely true to say that American democracy has, in some moments, evidenced an oppositional relationship to racism, it is true as well that American democracy has also (and perhaps always) been a vehicle through which racism has been expressed.<sup>32</sup> Understood in this way, it might make little sense to speak in terms of ending or escaping the state of continuity between American democracy and racism (since the latter has been a core and foundational feature of the former) and speak instead in terms of mitigating that relationship.

With respect to affirmative action, this Essay presses the language of elimination, not mitigation, at least as a thought experiment. My view is that liberals can effectuate a rupture between themselves and conservatives by articulating affirmative action as a countermeasure rather than a preference. This

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30. See Luke Charles Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 HARV. BLACKLETTER L.J. (1994).

31. See DARIA ROITHMAYR, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE* (2014); Daria Roithmayr, *Locked in Inequality: The Persistence of Discrimination*, 9 MICH. J. RACE & L. 31 (2003).

32. Thus, for example, Derrick Bell’s claim that racism is endemic to American society. See generally DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1993). That argument is one of the central claims in Critical Race Theory. See Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593 (2011).

possibility exists because, as I have explained elsewhere,<sup>33</sup> the preference framing of affirmative action trades on several normatively and empirically contingent assumptions.<sup>34</sup> Suppose, for example, that one thought that conventional admissions practices reflect a simplistic understanding of race and racism and failed to grapple with not only radical conceptions of racial inequality—such as racial capitalism<sup>35</sup>—but relatively modest ones, like implicit biases and stereotype threat. From that vantage point, one is more likely to view affirmative action as a countermeasure that offsets racial disadvantages than as a social policy that produces them.<sup>36</sup>

Disrupting the state of continuity between liberals and conservatives on the issue of affirmative action is important for a number of reasons. First, immediately after the election, some liberals (and not just conservatives) began circulating essentially a blame-the-victim narrative to explain Donald Trump's presidential win: identity politics.<sup>37</sup> Their claim, more precisely, is that the Democratic Party's over investment in identity politics, particularly race, caused the Democrats to lose the election.<sup>38</sup> This

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33. See Devon Carbado et al., *Privileged or Mismatched: The Lose-Lose Position of African Americans in the Affirmative Action Debate*, 64 UCLA L. REV. DISC. 174 (2016). See also Devon W. Carbado, *Footnote 43: Recovering Justice Powell's Anti-Preference Framing of Affirmative*, U.C. DAVIS L.REV. (forthcoming 2019).

34. Still, I recognize that one could argue that the perception that *any* racial remediation for African Americans is a preference might be so baked into our national consciousness that black assertions of civil rights claims will almost always be framed as "special rights." See Mario Barnes et al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967 (2010) (discussing the extent to the Supreme Court viewed in the late 1800s viewed civil rights legislations as "special rights").

35. BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION. (London: Zed Books, 1983) [Republished by UNC Press, 2000, with a new preface and a foreword by Robin D.G. Kelley].

36. Carbado et al., *supra* note 34 (discussing these concepts).

37. See, e.g., Mark Lilla, Opinion, *The End of Identity Liberalism*, N.Y. TIMES, Nov. 18, 2016, at SR1; Adam Gopnik, *The Democrats and the Seesaw of Identity Politics*, NEW YORKER (Dec. 2, 2016), <https://www.newyorker.com/news/daily-comment/the-democrats-and-the-seesaw-of-identity-politics>.

38. See Steve Koppman, Opinion, *How Identity Politics Hurts Democrats' National Hopes*, MERCURY NEWS (March 10, 2018, 8:45 AM), <https://www.mercurynews.com/2018/03/10/opinion-how-identity-politics-hurts-democrats-national-hopes/>; Jason L. Riley, *A Critique of Identity Politics—From Obama*, WALL ST. J. (July 24, 2018, 7:07 PM), <https://www.wsj.com/articles/a-critique-of-identity-politics-from-obama-1532473677>; Ed Rogers, Opinion, *The Democrats' Use of the Race Card Does Real Harm*, WASH. POST (Nov. 1, 2017), [https://www.washingtonpost.com/blogs/post-partisan/wp/2017/11/01/the-democrats-use-of-the-race-card-does-real-harm/?utm\\_term=.14268a3f7dd2](https://www.washingtonpost.com/blogs/post-partisan/wp/2017/11/01/the-democrats-use-of-the-race-card-does-real-harm/?utm_term=.14268a3f7dd2). But see Ian Haney Lopez and Anat Shenker-Orsorio, *The Answer to GOP Dog Whistles? Democrats Should Talk More About Race, Not Less*,

racially specific diagnosis of the outcome of the election carried with it a racially specific “colorblind”<sup>39</sup> prescription: Going forward, Democrats should talk less about race and race conscious policies, particularly affirmative action, and talk more about class and economic anxieties, particularly with reference to the white working class.<sup>40</sup>

Two points bear emphasis. First, the liberal “colorblind” injunction to the left aligns almost perfectly with the normative terms on which conservatives contest affirmative action—namely, that the policy is divisive and undermines the principle of

WASH. POST (Aug. 22, 2018), [https://www.washingtonpost.com/outlook/the-answer-to-gop-dog-whistles-democrats-should-talk-more-about-race-not-less/2018/08/22/7cfa4d3a-a184-11e8-8e87-c869fe70a721\\_story.html?utm\\_term=.a663054378f1](https://www.washingtonpost.com/outlook/the-answer-to-gop-dog-whistles-democrats-should-talk-more-about-race-not-less/2018/08/22/7cfa4d3a-a184-11e8-8e87-c869fe70a721_story.html?utm_term=.a663054378f1). To some extent, the focus on identity politics in the elections is a part of a broader claim scholars sometimes advance about backlash politics. See JOSEPH LOWNDES, *FROM THE NEW DEAL TO THE NEW RIGHT: RACE AND THE SOUTHERN ORIGINS OF MODERN CONSERVATISM* (2008).

39. See Devon W. Carbado, *Why We Should Always Put “Colorblind” in Scare Quotes* (draft on file with author).

40. See David Atkins, *It Was Prejudice. It Was Economics. It Was Both*, THE AMERICAN PROSPECT (July 7, 2017), <http://prospect.org/article/it-was-prejudice-it-was-economics-it-was-both>; *Democrats Will Struggle to Win Back Obama-Trump Voters*, THE ECONOMIST (Nov. 2, 2017), <https://www.economist.com/united-states/2017/11/02/democrats-will-struggle-to-win-back-obama-trump-voters>; Ruy Teixeira, *The Math Is Clear: Democrats Need to Win More Working-Class White Votes*, VOX (Jan. 29, 2019 11:20 AM), <https://www.vox.com/the-big-idea/2018/1/29/16945106/democrats-white-working-class-demographics-alabama-clinton-obama-base>. What’s particularly frustrating about the thesis that white working class resentment at identity politics propelled white working class people to vote for Donald Trump is that it obscures a point about race and voting that reveals a white racial advantage. There has been no voter suppression or gerrymandering efforts to dilute the white working class vote. Nor has felony disenfranchisement been deployed as mechanism to diminish the voting opportunities of white working class Americans. I am not saying that white working class Americans are unaffected by voter suppression regimes and felony disenfranchisement. The point is rather that the white working class are not the intended targets of those policies. The end result is that working class whites get to vote—and vote their racial resentment—while African-American access to the franchise continues to be racially circumscribed. For a discussion of the extent of the voter suppression problem and the range of tactics that were employed, see ARI BERMAN, *GIVE US THE BALLOT* (2016). A final point worth mentioning about the white working class is whether it is fair to attribute the outcome of the election to that group. More white women, for example, voted for Donald Trump than voted for Hilary Clinton. See Katie Rogers, *White Women Helped Elect Donald Trump*, N.Y. TIMES (Nov. 9, 2016), <https://www.nytimes.com/2016/12/01/us/politics/white-women-helped-elect-donald-trump.html>. More white men voted for Donald Trump than for Hilary Clinton; in short, more white people voted for Donald Trump than they did for Hilary Clinton. See Alec Tyson & Shiva Maniam, *Behind Trump’s Victory: Divisions by Race, Gender, Education*, PEW RES. CTR (Nov. 9, 2016), <http://www.pewresearch.org/fact-tank/2016/11/09/behind-trumps-victory-divisions-by-race-gender-education/>. To frame the outcome of the election in terms of white working class Americans—rather than white Americans writ large—is to obscure the role that whiteness qua whiteness continues to play in our electoral politics.

colorblindness. Second, while the intra-left critique of the elections fashions itself as a race neutral alternative to left-oriented identity politics, the solution the critique proffers expressly calls for Democrats to pay attention to a particular racial group: white working-class Americans. In this regard, the proposed solution is a striking example of how the racial consciousness of a policy or political strategy can be disappeared when its intended beneficiaries are white.<sup>41</sup> Re-described, the anti-identity injunction of some liberals is less a call for Democrats to avoid race and more a call that they racially target and engage a subgroup of white Americans (again, the white working class) via a form of identity politics that we might call white identity politics.<sup>42</sup> Cheryl Harris refers to racial strategies of this sort—the simultaneous reliance and disavowal of identity—as “anti-identity identity” politics.<sup>43</sup>

The liberal move to rely on and disavow race in the context of making sense of the elections produced both race and class effects. More precisely, the move naturalized whiteness as the identity through which working class status acquires social intelligibility and naturalized blackness and non-whiteness more generally as racial identities through which working class status is refused. Put differently, the liberal identity-based explanations for the elections denaturalized whiteness as a potential predicate for identity politics and denaturalized blackness as a racial identity through which working class experiences are lived. Noah Zatz’s compelling race and class analysis of the elections articulates a version of this point:

[D]rawing conclusions about class from data about white people ignores working class people of color and consigns them to pure “race” voters. It reproduces a racially unmarked but implicitly white concept of the working class, one that is especially problematic against the backdrop of racially

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41. Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CAL. L. REV. 1139 (2008) (discussing the ways in which anti-affirmative action initiatives function as racial preferences).

42. A political iteration of Cheryl I. Harris’s theory of whiteness as property and George Lipsitz’s theory of a possessive investment in whiteness are at play here. See GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS* (2006); Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

43. See Cheryl I. Harris, *Doubting Thomas and the Anti-Identity Identity* (unpublished manuscript on file with author) (describing Justice Clarence Thomas’s jurisprudence as a n example of anti-identity politics).

stratified stereotypes of who is and is not “hard working.” Using, as has become common, the racially qualified term “white working class” is an improvement, but too often it goes without an accompanying analysis of how whiteness shapes class among white people nor how class matters to people of color.<sup>44</sup>

The problem here, then, is not only that the category “white working class” has representative currency both in the particular (as *white* working class) and in the general (as working class per se), but that that currency is achieved by displacing non-white working class identities and by positioning whiteness outside of and beyond identity politics.

Which brings me to another reason the anti-identity explanation for Trump’s victory is troubling. It ignores more obvious causal candidates for Trump’s ascendancy to the White House and affirms a standard conservative line about race. These other candidates include race-baiting and xenophobia, sexism and misogyny, voter suppression, electoral meddling, and a compromised Democratic candidate.<sup>45</sup> In downplaying these

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44. Noah Zatz, *Thinking Intersectionally About Race and Class in the Trump Era*, L. & POL. ECON. (Nov. 13, 2017), lpeblog.org.

45. See OFF. OF THE DIR. OF NAT’L INTELLIGENCE, ICA 2017-01D, ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS (Jan. 6, 2017); G. Reginald Daniel & Jasmine Kelekay, *Seeking Justice Through Love and Relationships: From Loving v. Virginia to Barack Obama: The Symbolic Tie That Binds*, 50 CREIGHTON L. REV. 641 (2017); Richard L. Hasen, *The 2016 U.S. Voting Wars: From Bad to Worse*, 26 WM. & MARY BILL OF RTS. J. 629 (2018); Gary C. Jacobson, *Polarization, Gridlock, and Presidential Campaign Politics in 2016*, 667 ANNALS 226 (2016); Erin A. Penrod, *Disenfranchisement 2.0: Recent Voter ID Laws and the Implications Thereof*, 14 U. ST. THOMAS L.J. 207 (2018); Abigail Perdue, *Man Up or Go Home: Exploring Perceptions of Women in Leadership*, 100 MARQ. L. REV. 1233 (2017); Juan F. Perea, *Making Room For More: Echoes of Slavery II: How Slavery’s Legacy Distorts Democracy*, 51 U.C. DAVIS L. REV. 1081 (2018); Lindsay Perez Huber, “Make America Great Again!”: Donald Trump, Racist Nativism and the Virulent Adherence to White Supremacy Amid U.S. Demographic Change, 10 CHARLESTON L. REV. 215 (2016); Michael N. Schmitt, “Virtual” Disenfranchisement: Cyber Election Meddling in the Grey Zones of International Law, 19 CHI. J. INT’L L. 30 (2018); Terry Smith, *White Backlash in a Brown Country*, 50 VAL. L. REV. 89 (2015); Alice Woolley & Elysa Darling, *Nasty Women and the Rule of Law*, 51 S. FLA. L. REV. 507 (2017); Nina Burleigh, *The Presidential Election Was a Referendum on Gender and Women Lost*, NEWSWEEK (Nov. 14, 2016 8:00AM), <http://www.newsweek.com/2016/11/18/hillary-clinton-presidential-election-voter-gender-gap-520579.html>; Chris Cillizza, *Hillary Clinton Has a Baggage Problem*, WASHINGTON POST (April 23, 2015), [https://www.washingtonpost.com/news/the-fix/wp/2015/04/23/hillary-clintons-baggage-problem/?utm\\_term=.733ab28e42f2](https://www.washingtonpost.com/news/the-fix/wp/2015/04/23/hillary-clintons-baggage-problem/?utm_term=.733ab28e42f2); Andy Greenberg, *Everything We Know About Russia’s Election-Hacking Playbook*, WIRED (June 9, 2017), [perma.cc/UU3W-NUGV](http://perma.cc/UU3W-NUGV); Jonathan Mahler, *Donald Trump’s Message Resonates with White Supremacists*, N.Y. TIMES (Feb. 29, 2016), <https://www.nytimes.com/2016/03/01/us/politics/donald-trump->

explanations and highlighting identity politics, liberals are endorsing a version of the conservative argument that engaging race in the political or legal arena—for whatever reason—is pernicious, dangerous, and balkanizing.<sup>46</sup>

Let's now focus on a second set of concerns that reveal why exposing and contesting the state of continuity between liberals and conservatives with respect to their views on affirmative action is important. We are at the beginning of another wave of affirmative action litigation. Both Harvard and the University of North Carolina are being sued.<sup>47</sup> While the formal constitutional terms on which this litigation will be staged is largely set,<sup>48</sup> the public discourse terms are not carved in stone. This gives liberals some space to engage in efforts to reframe affirmative action. I am not saying this would be an easy task. On the contrary, any attempt at reframing would undoubtedly be an uphill battle. But that battle could start ideologically at home, among and between

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supremacists.html; Rex Murphy, *It Wasn't Misogyny that Caused Clinton's Downfall, It Was All the Baggage She Dragged Around*, NAT'L POST (Nov. 11, 2016), <http://news.nationalpost.com/full-comment/rex-murphy-fear-and-loathing-on-the-campaign-trail-16>; Vann R. Newkirk II, *How Voter ID Laws Discriminate*, ATLANTIC (Feb. 18, 2017), <https://www.theatlantic.com/politics/archive/2017/02/how-voter-id-laws-discriminate-study/517218/>; David Remnick, *Hillary Clinton Looks Back in Anger*, NEW YORKER (Sept. 25, 2017), <https://www.newyorker.com/magazine/2017/09/25/hillary-clinton-looks-back-in-anger>; Press Release, White House, Statement by the President on Actions in Response to Russian Malicious Cyber Activity and Harassment (Dec. 29, 2016), <https://perma.cc/3XXD-8K5C>.

46. Scholars have described this ideology as it is manifested in Supreme Court decision-making as the anti-balkanization thesis. See Darren Leonard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL'Y & L. 1 (2015); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2010).

47. See Katie Benner, *Justice Dept. Backs Suit Accusing Harvard of Discriminating Against Asian-American Applicants*, N.Y. TIMES (Aug. 30, 2018), <https://www.nytimes.com/2018/08/30/us/politics/asian-students-affirmative-action-harvard.html>; Carolyn Ebeling, *Lawsuit Calls UNC Admission Practices Unfair*, THE DAILY TAR HEEL (Nov. 18, 2014), <https://www.dailytarheel.com/article/2014/11/lawsuit-calls-unc-admissions-practices-unfair>; Jane Stancill, *UNC Has Spent \$16.8 Million on Affirmative Action Lawsuit*, NEWS & OBSERVER (Aug. 10, 2018), <https://www.newsobserver.com/news/local/article216485240.html>. Moreover, the Department of Justice is investigating Yale. See Brett Samuels, *DOJ, Education Dept Launch Investigation into Yale over alleged admissions discrimination*, HILL (Sept. 26, 2018 1:26 PM), <https://thehill.com/regulation/408540-doj-education-dept-launch-investigation-into-yale-over-alleged-admissions>. There is every reason to believe that other lawsuits will be forthcoming.

48. The constitutional question will be whether affirmative action survives “strict scrutiny.” See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Univ. of Texas*, 136 S. Ct. 2198 (2016).

liberals. And, that minimalist step could mark the beginning of the end of this left/right state of continuity, the beginning of the end of the convergence between the liberal tepid support of affirmative action (“we support affirmative action *notwithstanding* that it is a racial preference because we believe in diversity”) and the conservative vigorous repudiation of the policy (“we oppose the affirmative action *because* it is a racial preference that is divisive and harms innocent whites”).

The third reason disrupting the state of continuity between liberals and conservatives on affirmative action is important is that “affirmative action is a harbinger for racial remediation writ large.”<sup>49</sup> Stated differently, what happens to affirmative action happens to other forms of racial remediation. This is because “the Supreme Court works out its ideological and normative views about race in the affirmative action context and then exports those ideas to other domains of constitutional law.”<sup>50</sup> Scholars have paid scant attention to this “miner’s canary” dimension of affirmative action jurisprudence.<sup>51</sup> Thus, they have not considered how “affirmative action functions as a kind of diagnostic tool or predictive index for the trajectory of racial remediation more generally.”<sup>52</sup> Nor have scholars noted the degree to which “the conservative logics of affirmative action cases have metastasized across multiple areas of constitutional law to limit and undermine various forms of racial remediation.”<sup>53</sup> As it turns out, it is not just the rationales underlying the affirmative cases that travel but the cases themselves. One sees, for example, the Court citing to affirmative action jurisprudence in cases that implicate voting rights, employment discrimination claims,<sup>54</sup> and K-12 desegregation.<sup>55</sup>

I reference the preceding citational practices not just as a push-back against liberals who grudgingly defend affirmative

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49. See Devon W. Carbado, *States of Continuity II: How The Supreme Court Deploys Affirmative Action to Limit Other Forms of Racial Remediation* (draft on file with author)

50. *Id.*

51. For an argument about how race can function as a miner canary for other forms of social inequality, see LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY* (2003).

52. See Carbado, *supra* note 49.

53. *Id.*

54. Noah Zatz has already drawn out some of the work affirmative action performs in the employment discrimination context. See Noah Zatz, *Special Treatment Everywhere, Special Treatment Nowhere*, 95 B.U. L. REV. 1155 (2015).

55. *Parents Involved in Cmt. Sch. Dist. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

2019]

## STATES OF CONTINUITY

15

action because they view the policy largely the way conservatives do. I do so as well as a push back against those on the left who have sometimes been too quick to give up on affirmative action on the view that the policy is too modest. This latter group of liberals have failed to realize that it precisely because of the radicalizing potential of affirmative action—both the policy itself and what its constitutional status portends for other sites of racial remediation—that conservatives on and off the Court view affirmative action, and the rationales that underlie it, as an ideological target of opportunity. On this view, one can expect Trump and his supporters to trade on discursive frames conservatives deploy to challenge affirmative action (for example, the language of “merit”) to advance and legitimize various conservative policy and legal initiatives (for example, “merit-based immigration”).<sup>56</sup>

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My aim is this Essay was somewhat narrow: to suggest that we exercise care with respect to when and how we frame Trump/Trumpism as a state of exception. I introduced the concept of states of continuity as another way of making sense of our current political movement and the constitutional regimes it may effectuate. To illustrate a state of continuity at work, I employed the example of affirmative action and argued that, by and large, both the right and the left conceptualize the policy as a preference. I explained why the preference framing of affirmative action is normatively and empirically contingent and suggested the policy should be understood as a countermeasure to offset particular racial disadvantages admissions practices generally do not engage. My hope is that the reframing of affirmative action I have offered will help to disrupt the state of continuity between liberals and conservatives on the policy. That disruption, in turn, could help to make affirmative action and other racial remediation projects less vulnerable to attack.

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56. See Deena Flinchum, *A Merit-Based Immigration System Would Help Americans—and Skilled Foreigners*, HILL (Nov. 29, 2017 8:15 AM), <https://thehill.com/blogs/congress-blog/homeland-security/362227-a-merit-based-immigration-system-would-help-americans>; William A. Galston, *The Case for Merit-Based Immigration*, WALL ST. J. (Feb. 6, 2018 7:29 PM), <https://www.wsj.com/articles/the-case-for-merit-based-immigration-1517963380>.