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## Playing Cowboys and Iranians: Selective Colorblindness and the Legal Construction of White Geographies

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**PLAYING COWBOYS AND IRANIANS:  
SELECTIVE COLORBLINDNESS AND THE  
LEGAL CONSTRUCTION OF WHITE  
GEOGRAPHIES**

BY JOHN TEHRANIAN\*

*This Article examines the selective invocation of colorblindness in legal and political discourse and argues that the trope has served as a powerful vehicle for the creation, perpetuation, and patrolling of white geographies—spaces characterized by an implicit hierarchy privileging white racial identity. After assessing the new rhetoric of race in the Age of Obama, the Article focuses on identifying and deconstructing the modern paradox of colorblindness jurisprudence. On the one hand, the courts have increasingly hewed to a colorblind vision of the Constitution when weighing the permissibility of race-based admissions and hiring programs for traditionally disadvantaged minorities. And, yet, on the other hand, when confronted with invidious racial targeting—in the name of patrolling our borders, keeping our streets safe from crime, or protecting the homeland from acts of terrorism—the obstreperous advocates of the categorically colorblind Constitution go strikingly silent. Drawing upon the examples of S.B. 1070 (Arizona’s “show-me-your-papers” immigration law), H.B. 2281 (Arizona’s legislation outlawing ethnic studies programs in*

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public schools), and a series of racial profiling cases interpreting the Supreme Court's *Brignoni-Ponce* decision, this Article argues that the discriminate entreaty for post-racialism has, in fact, helped consolidate subordination practices in critical social, economic, and political spaces. In the end, therefore, while we are colorblind in theory, we are color bound in fact. Government regularly uses race in a variety of troubling contexts. Indeed, the very same courts that tell us that we have a colorblind Constitution have also held that one's Latino appearance is a relevant factor in determining reasonable suspicion for an immigration sweep, one's Middle Eastern heritage is a perfectly suitable consideration when ascertaining whether transportation of a passenger is 'inimical to safety,' and one's African-American descent can serve as an acceptable indicia of criminality without running afoul of the Fourth Amendment. At a minimum, these practices call into question our fealty to notions of colorblindness that have dominated legal and political discourse in recent years. More perniciously, however, the resulting uneasy gestalt perpetuates long-standing inequities (and forges new ones) by empowering a racialized social geography that continues to privilege white identity.

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#### INTRODUCTION: PLAYING COWBOYS AND IRANIANS



In the city of Katy, Texas, on a nondescript commercial strip running through the heart of town, one can find John Nonmacher's eponymous barbeque joint.<sup>1</sup> For several decades, this otherwise unremarkable diner catering to patrons from the Houston metropolitan area has served up ribs. But, in 2011, the restaurant became known for dishing out something else entirely: a grisly photograph of a group of white Texan cowboys, armed with shotguns, proudly gathering around the body of a lynched man whose limp neck is still tethered to a

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1. See Candice Smith, *Let's Play Cowboys and Iranians: Lynching Poster Sparks Protest*, ABC NEWS (Nov. 5, 2011), <http://abcnews.go.com/blogs/headlines/2011/11/lets-play-cowboys-and-iranians-poster-sparks-protest/>, archived at <http://perma.cc/S5XF-4WCE>.

rope hanging from a tree.<sup>2</sup> Though evocative of the standard lynching narrative from the Deep South of yore, this grotesque celebratory depiction differs in a significant way. Instead of an African-American man, the victim of this lynching is a swarthy, bearded Caucasian dressed in Middle Eastern garb.<sup>3</sup> Rather than donning a Ku Klux Klan robe, the man beside the slumped body wears a T-shirt that reads “Iranians suck.”<sup>4</sup> And instead of using the N-word, the caption to the entire sepiatoned photograph reads: “Let’s Play Cowboys and IRANIANS!”

According to Nonmacher, the image went up in his restaurant after a photographer staged the scene at the height of the Iranian Hostage Crisis in 1979.<sup>5</sup> And for the next three decades, claims Nonmacher, “Nobody[] ever found it offensive.”<sup>6</sup> But after generating some attention on the Internet, protestors began decrying the sign as racist and demanding its removal.<sup>7</sup> Nonmacher refused.<sup>8</sup> And despite the brief public focus on the issue, there were no rallies or impassioned marches against Nonmacher and his restaurant. There was no sustained mass indignation. And the President did not host a “Beer Summit” to initiate a dialogue about the issue.<sup>9</sup> Though merely a superficial gesture, the Beer Summit signaled that traditional notions of racial profiling by white law enforcement against African-Americans are no longer explicitly

2. See Lydia Warren, ‘Let’s Play Cowboys and Iranians’: Poster Showing Hanging Iranian Sparks Outrage at Texas BBQ Restaurant, DAILY MAIL (Nov. 4, 2011), <http://www.dailymail.co.uk/news/article-2057599/Iran-Poster-showing-hanging-Iranian-sparks-outrage-Texas-BBQ-restaurant.html>, archived at <http://perma.cc/7ANM-9B7G>.

3. *Id.*

4. *Id.*

5. *Id.*

6. Smith, *supra* note 1.

7. See Warren, *supra* note 2.

8. Nonmacher responded not with an apology or any remedial action, but with a sophistic appeal to freedom of choice and a love-it-or-leave-it bravado. “This is still America. If they’re not happy here, then they should go back to Iran. It’s my choice to have it up,” he rejoined, and “It’s your choice to go where you want to go. But I’m not going to take it down.” *Id.*

9. When Henry Louis Gates became embroiled in a racial profiling controversy with the Cambridge police in 2009, President Obama famously invited Gates and the arresting officer to the White House for a face-to-face sit down to discuss the incident. See Ben Feller, *Beer Summit Begins: Obama Sits Down with Crowley, Gates*, HUFFINGTON POST (July 30, 2009), [http://www.huffingtonpost.com/2009/07/30/beer-summit-begins-obama-\\_n\\_248254.html](http://www.huffingtonpost.com/2009/07/30/beer-summit-begins-obama-_n_248254.html), archived at <http://perma.cc/U5WZ-F2JK>. The meeting became known as the “Beer Summit”. *Id.*

endorsed or tolerated. The public attack on a Middle Eastern target (albeit not nearly as high profile for a variety of reasons), though, engendered no similar response or media attention. Instead, the controversy over the sign simply went away.<sup>10</sup> And, until the day he died in 2013, Nonmacher proudly continued to display the photograph in his restaurant.<sup>11</sup>

If we do indeed live in a post-racial world, this little barbeque joint in Katy, Texas has a funny way of showing it.<sup>12</sup> After all, the ominous image that hangs in Nonmacher's reminds all who enter that this is a distinctly racialized space featuring insiders and outsiders, the privileged and the Other. It therefore constitutes not just an affront to individuals of Iranian, or even Middle Eastern, descent, but to all marginalized groups. It invokes and evokes the terror of the South's centuries-long lynching campaign in a way that is eerily permissible.<sup>13</sup> It intimidates all minorities—whether racial, religious, or sexual—without the kind of political fallout that would occur if it were explicitly directed at just African-Americans. In short, it serves as a coded means of establishing the restaurant as a white geography, thereby serving as the semiotic equivalent of the thinly-veiled racial discourse of political campaigns of the recent past—campaigns which euphemistically railed against “welfare queens”<sup>14</sup> and “forced

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10. See *Nonmacher's Bar-B-Que*, YELP, [http://www.yelp.com/biz/nonmachers-bar-b-que-katy#hrid:gdP3e\\_8nAIW09EklNe\\_d7Q](http://www.yelp.com/biz/nonmachers-bar-b-que-katy#hrid:gdP3e_8nAIW09EklNe_d7Q) (last visited Feb. 22, 2013), archived at <http://perma.cc/LG28-EV7Z> (review dated July 12, 2012 by Rebecca S. Stating, “Glad to see they didn't give in to the pressure of taking it down.”).

11. *Id.*

12. To be sure, some restaurants display “kitschy” racist antiquities from bygone eras. Tongue firmly in cheek, a Boston pub might hang up a mock nineteenth-century sign stating that “No Irish Need Apply.” But it is a joke with a hard edge that is readily dispelled. There is universal condemnation of the rash of anti-Irish sentiment that permeated the early years of our Republic—to the point that it seems remarkably silly to us today. Indeed, there are few social statements that one can make with a fair degree of certainty, but this is one: there is no serious problem of racism against white individuals of Irish descent in twenty-first century America. By contrast, one does not see kitschy signs announcing “No Blacks Need Apply,” or framed photographs of African-American lynchings in restaurants because, quite rightfully, the celebration of such blatant bigotry is not acceptable. But, for whatever reason, even if we are not keen on putting up our own Iranian lynching poster, our society appears (at least so far) to accept the idea of letting others play cowboys and Iranians.

13. See, e.g., JAMES ALLEN, *WITHOUT SANCTUARY: PHOTOGRAPHS AND POSTCARDS OF LYNCHING IN AMERICA* (2000) (documenting the powerful visual narrative of lynching photography).

14. Gene Demby, *The Truth Behind the Lies of the Original “Welfare Queen”*, NPR (Dec. 20, 2013), <http://www.npr.org/blogs/codeswitch/2013/12/20/255819681/>

busing” and fetishized “states’ rights” and the fight against “voting fraud.”<sup>15</sup>

Since the election of Barack Obama to the presidency in 2008, trumpets of post-racialism have sounded throughout the land. An editorial in *Forbes* epitomized this wave of enthusiasm when it proudly proclaimed, “Racism in America is over.”<sup>16</sup> The author of the editorial, John McWhorter, a senior fellow at the Manhattan Institute, noted that “our proper concern is not whether racism still exists, but whether it remains a serious problem. The election of Obama proved, as nothing else could have, that it no longer does.”<sup>17</sup> Yet despite these wildly optimistic projections, color consciousness remains alive and well, and not just for ostensibly rogue outliers like John Nonmacher.

This Article compares this race-conscious reality with the trope of colorblindness<sup>18</sup> that has permeated political and legal discourse in recent years. In particular, the Article examines how the discriminate entreaty for post-racialism has, in fact,

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the-truth-behind-the-lies-of-the-original-welfare-queen, archived at <http://perma.cc/FDD7-W7K2> (discussing the origins of the term “welfare queen” and its use by Ronald Reagan).

15. As Lee Atwater, former Chairman of the Republican National Committee once noted,

You start out in 1954 by saying, “N——, n——, n——.” By 1968 you can’t say “n——”—that hurts you. Backfires. So you say stuff like forced busing, states’ rights, and all these things that you’re talking about are totally economic things and a by-product of them is [that] blacks get hurt worse than whites. And subconsciously maybe that is part of it . . . because obviously sitting around saying, “We want to cut this,” is much more abstract than even the busing thing and a hell of a lot more abstract than “N——, n——.”

Quoted in Alexander P. Lamis, *The Future of Southern Politics: New Directions for Dixie*, in *THE FUTURE SOUTH: A HISTORICAL PERSPECTIVE FOR THE TWENTY-FIRST CENTURY* 49, 62 (Joe P. Dunn & Howard L. Preston eds., 1991).

16. John McWhorter, *Racism in America Is Over*, *FORBES* (Dec. 30, 2008), [http://www.forbes.com/2008/12/30/end-of-racism-oped-cx\\_jm\\_1230mcwhorter.html](http://www.forbes.com/2008/12/30/end-of-racism-oped-cx_jm_1230mcwhorter.html), archived at <http://perma.cc/V3DJ-WKWP>.

17. *Id.*

18. A critical point regarding terminology bears mentioning at the outset. This Article uses the terms “race neutrality” and “post-racialism” in conjunction with the notion of colorblindness. When using the term “post-racialism,” this Article intends to refer to the view that our country is now past prior issues of racial strife and that colorblindness is the only appropriate view of Equal Protection in light of this apparent reality. When using the term “race neutrality,” this Article means one particular species of race neutrality—the view that the Constitution dictates colorblindness. Of course, both race neutrality and post-racialism can have other meanings in other contexts.

helped consolidate subordination practices in critical social, economic, and political spaces, thereby exacerbating racial inequalities and revitalizing the controlled white geographies of the past.

When colorblindness has been invoked, it has frequently helped preserve, if not strengthen, existing racial hierarchies. For example, courts have shown increasing hostility towards remedial race-conscious policies on the grounds that our Constitution requires race-blindness by the government.<sup>19</sup> Thus, in the educational system, affirmative action policies teeter on the brink of constitutional extinction.<sup>20</sup> At the same time, new waves of legislation, epitomized by the recent passage of Arizona's H.B. 2281,<sup>21</sup> threaten the existence of ethnic studies programs that offer alternative historical, cultural, philosophical, and economic narratives to the dominant Western model.<sup>22</sup> The need for post-racial "neutrality" drives these policies,<sup>23</sup> even as evidence of continued discrimination in the private sector and racial disparities in socioeconomic status and educational

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19. See *infra* Part III.A.

20. See, e.g., *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014) (affirming the ability of states to prohibit preferential treatment based on race in public education, government contracting and public employment); *Fisher v. Univ. of Texas*, , 133 S. Ct. 2411 (2013) (vacating a Fifth Circuit ruling upholding the legality of the University of Texas's race-conscious admission policies and remanding the case for review under strict scrutiny); see also Adam Liptak, *Court Backs Michigan on Affirmative Action*, N.Y. TIMES (Apr. 22, 2014), [http://www.nytimes.com/2014/04/23/us/supreme-court-michigan-affirmative-action-ban.html?\\_r=0](http://www.nytimes.com/2014/04/23/us/supreme-court-michigan-affirmative-action-ban.html?_r=0), archived at <http://perma.cc/4F43-FKME> (reviewing the recent Supreme Court decisions and the disagreement between the Justices).

21. H.B. 2281, signed into law by Governor Jan Brewer, bans Arizona schools from teaching classes that "promote the overthrow of the U.S. government, foster racial resentment, are designed for students of a particular ethnic group or that advocate ethnic solidarity." Roque Planas, *Arizona's Law Banning Mexican-American Studies Curriculum is Constitutional, Judge Rules*, HUFFINGTON POST (Mar. 11, 2013, 8:18 AM), [http://www.huffingtonpost.com/2013/03/11/arizona-mexican-american-studies-curriculum-constitutional\\_n\\_2851034.html](http://www.huffingtonpost.com/2013/03/11/arizona-mexican-american-studies-curriculum-constitutional_n_2851034.html), archived at <http://perma.cc/BKC2-2DX9>; see also *infra*, Part V.

22. See, e.g., Gary Y. Okihiro, *The Future of Ethnic Studies*, CHRON. HIGHER EDUC. (July 4, 2010), <http://chronicle.com/article/The-Future-of-Ethnic-Studies/66092/>, archived at <http://perma.cc/NZM5-4NPR> (discussing the threat that H.B. 2281 poses to ethnic studies programs).

23. As Chief Justice John Roberts famously announced in *Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1*, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." (*Parents Involved II*), 551 U.S. 701, 748 (2007). With these words, the Supreme Court struck as unconstitutional the use of race as an admissions tiebreaker for the purpose of promoting diversity in secondary schools.



opportunities mounts.<sup>24</sup>

In contrast, the obstreperous advocates of categorical colorblindness<sup>25</sup> go strikingly silent when it comes to invoking the concept to protect minorities from invidious targeting on the basis of skin color and ethnicity.<sup>26</sup> Instead, as exemplified by Arizona's controversial "show me your papers" immigration enforcement legislation,<sup>27</sup> post-racialism conveniently and systematically yields to the need to patrol our borders, keep our streets safe from crime, or protect the homeland from acts of terrorism. Thus, through the proverbial instrumentalities and channels of interstate—highways, railroads, airplanes, and at the border—we see the courts repeatedly allowing government's use of race-conscious policies in dealing with criminal, immigration, and national security matters.<sup>28</sup> In these spaces, the law has frequently betrayed any fealty to the dictates of our purportedly colorblind Constitution. Thus, we are told, the border patrol can certainly consider one's Latino appearance in determining whether reasonable suspicion exists for an immigration sweep;<sup>29</sup> an airline can weigh a passenger's

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24. See *infra* Part III.B.

25. With thanks to Spiro Agnew and his "naysayers and nattering nabobs of negativity." See Lance Morrow, *Naysayer to the Nattering Nabobs*, TIME MAG. (Sept. 30, 1996), <http://www.time.com/time/magazine/article/0,9171,985217,00.html>, archived at <http://perma.cc/W9ZH-6YBB>.

26. See Roger Clegg, Hans A. von Spakovsky & Elizabeth H. Slattery, *Congress Can Help End Racial Discrimination*, NAT'L REV. (Apr. 15, 2014), available at <http://www.nationalreview.com/article/375770/congress-can-help-end-racial-discrimination-roger-clegg-hans-von-spakovsky-elizabeth>, archived at <http://perma.cc/FGW3-MH9K>. A recent, widely-publicized editorial in the *National Review* appears to epitomize this posture. *Id.* In the piece, Roger Clegg (president and general counsel of Center for Equal Opportunity), Hans von Spakovsky (manager of Election Law Reform Initiative), and Elizabeth Slattery (senior legal policy analyst at the Edwin Meese III Center for Legal and Judicial Studies at the Heritage Foundation) call for the end of racial preferences in hiring of minorities in federal government and the elimination of federal anti-discrimination statutes that enable causes of action to proceed on the basis of showing of disparate impact. *Id.* As they write, "Discrimination on the basis of race and ethnicity is unconstitutional, unlawful, and morally repugnant, yet the practice is rife throughout federal law and government programs." *Id.* Yet, for all the vociferousness of their screed, there is nary a word about the continued use of racial profiling and other (government-blessed) race-conscious policies that target minority groups.

27. See *infra* Part V. See also Support Our Law Enforcement and Safe Neighborhoods Act of 2010, Ariz. Rev. Stat. Ann. § 11-1051 (2012) (West).

28. See *infra* Part IV.A–D.

29. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 887 (1975) (permitting Border Patrol to consider physical characteristics as one of many factors in determining whether to stop and question the occupants of a vehicle).

Middle Eastern heritage when ascertaining whether his or her transport would be “inimical to safety;”<sup>30</sup> and the police can profile African-Americans at traffic stops without running afoul of the Fourth Amendment.<sup>31</sup>

The results of this selective appeal to colorblindness are far-reaching: individuals who do not bear the hallmarks of white racial identity are subjected to heightened attention, inquiry, and scrutiny from both the state and those deputized with the state’s monopoly on the use of force. In the process, our equivocating jurisprudence on race—which dictates rigid adherence to formalistic colorblindness when regulating educational admissions or classroom activities<sup>32</sup> and yet flouts the ideals of colorblindness in certain spaces of state interest, such as the airport, the traffic stop, and the immigration sweep—directly enables and perpetuates racial hierarchy. Uneven application of race neutrality has undergirded a lattice of white geographies where subordination practices continue to persist in both subtle and overt ways.

This Article begins in Part II by exploring the endurance of race’s mediating power in our society. As Part II asserts, the importance of race has not diminished; rather, racial politics have simply transformed. Without a doubt, certain discourses—such as direct, overt attacks based on race—have grown increasingly verboten. However, subordination practices aimed at African-Americans, Latinos, Asians, Middle Easterners, and other minority groups have continued unabated through alternative narratives, including a powerful xenophobic discourse that, like Nonmacher’s BBQ joint, has found fertile ground in leveling attacks against the specter of

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30. See *Cerqueria v. Am. Airlines, Inc.*, 520 F.3d 1, 18–20 (1st Cir. 2008).

31. See *Whren v. United States*, 517 U.S. 806, 812 (1996) (deeming that the use of race by an officer in deciding whether to conduct a traffic stop is irrelevant for determining whether the action violated the reasonableness standard of the Fourth Amendment’s Search and Seizure Clause: “[W]e [have] never held, outside the context of inventory search or administrative inspection (discussed above), that an officer’s motive invalidates objectively justifiable behavior under the Fourth Amendment”). See also *Terry v. Ohio*, 392 U.S. 1, 13–14 (1968) (setting the stage for *Whren* by noting, *inter alia*, that the police can initiate encounters with civilians “for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime”); Devon W. Carbado, (*E*)*racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1033 (2002) (“In *Whren*, the Supreme Court makes it clear that, at least under the Fourth Amendment, racial profiling claims are not constitutionally cognizable. In other words, for purposes of Fourth Amendment law, race does not matter.”).

32. See *infra* Part III.

Middle Eastern, Islamic, and foreign influence—especially post-9/11.<sup>33</sup> The use of race in the 2008 and 2012 presidential elections provides a powerful illustration of this new rhetoric—one that eschews the more overt appeals to the racist tropes of the past but is nonetheless still grounded in racial baiting.<sup>34</sup> And although observers have rightfully hailed the historic strides made by minority groups in recent years, we continue to witness social and political discourse suffused with troubling subtexts.

With this in mind, Part III attempts to reconcile this extant discourse on race with one of its most prevalent concepts: the idea that our Constitution mandates colorblindness. To that end, this Article charts the concept's roots in Justice Harlan's famous dissent in *Plessy v. Ferguson*<sup>35</sup> and its recent resurrection in the Supreme Court's jurisprudence on remedial race consciousness.<sup>36</sup> Part IV then turns to identifying and deconstructing a troubling paradox in race-related jurisprudence: while the Supreme Court may have embraced grandiloquent and absolutist language about the dictates of our colorblind Constitution when dealing with such issues as affirmative action, our legal system has continued to bless the government's invidious, rather than remedial, use of race in numerous contexts, including immigration, criminal, and national security matters.<sup>37</sup> As Part IV illustrates, colorblindness is adopted and applied selectively.<sup>38</sup>

The consequences of this vacillating commitment to post-racialism form the basis for our key inquiry. As Part V concludes, by blessing the reactionary use of color and its insidious twin—the cynical use of colorblindness—our legal regime creates, perpetuates, and patrols white geographies—spaces characterized by an implicit racial hierarchy privileging the majority over minorities. Drawing upon the examples of S.B. 1070 (Arizona's "show-me-your-papers" immigration law) and H.B. 2281 (Arizona's legislation outlawing ethnic studies programs in public schools), Part V uses recent legal and

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33. See *infra* Part II.

34. See *infra* note 41 and accompanying text.

35. *Plessy v. Ferguson*, 163 U.S. 537, 552, 559 (1896) (Harlan, J., dissenting).

36. See *infra* Part III.A (exploring the modern trend of using the trope of colorblindness as a basis to resist remedial, rather than invidious, race-conscious government programs).

37. See *infra* Part IV.

38. *Id.*

political events in the State of Arizona as an example of how the measured application of post-racialism plays a critical role in sustaining white domination at loci where we perform some of our most significant political, economic, and civil activities, including in our schools, along the instrumentalities and channels of interstate commerce, at the polling booths, and near our borders. Selective colorblindness perpetuates long-standing inequities (and forges new ones) by empowering a racialized social geography that continues to privilege white identity.

#### I. THE NEW WILLIE HORTON: THE POLITICS OF RACE IN THE AGE OF OBAMA

Before examining the rise of colorblindness as both a descriptive and normative concept and assessing its role in formulating the new geographies of race, we consider the continued force of race as an organizing concept in our society. To do so, we evaluate the role of race in recent American politics and what it suggests about the transforming nature of color in both discourse and praxis. The election of Barack Obama to the highest office in the land in 2008 (and re-election in 2012) represented, by many measures, a watershed moment.<sup>39</sup> It provided stark proof that America's image as the land of opportunity was not merely apocryphal. And, it evidenced the great strides we have made in the centuries-long struggle against bigotry, especially in the course of a single generation since the end of segregation.

Yet for all the momentousness of Obama's election, the rise of the first African-American<sup>40</sup> to the presidency did not mark the beginning of a new post-racial era. Indeed, Obama's own path to the presidency, and the politics at play during the

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39. See, e.g., Adam Nagourney, *Obama Wins Election; McCain Loses as Bush Legacy Is Rejected*, N.Y. TIMES (Nov. 4, 2008), [http://www.nytimes.com/2008/11/05/us/politics/05campaign.html?pagewanted=all&\\_r=2&](http://www.nytimes.com/2008/11/05/us/politics/05campaign.html?pagewanted=all&_r=2&), archived at <http://perma.cc/WVR4-QJFY> (hailing Obama's "sweeping away the last racial barrier in American politics with ease as the country chose him as its first black chief executive").

40. Of course, Obama is racialized as an African-American even though his descent is half Caucasian and half African. See Sam Roberts & Peter Baker, *Asked to Declare His Race, Obama Checks 'Black'*, N.Y. TIMES (Apr. 2, 2010), [http://www.nytimes.com/2010/04/03/us/politics/03census.html?\\_r=0](http://www.nytimes.com/2010/04/03/us/politics/03census.html?_r=0), archived at <http://perma.cc/3GYH-3UX4>.

election, provided clear evidence of that.<sup>41</sup> While erstwhile racist narratives and canards lost their vitality, acceptability, and significance, a new racial gaze took their place. Loyalty and fealty to America and its values remained a permissible and even regular subject of scrutiny, and the targets of this discourse were inevitably individuals falling outside of the racial majority.<sup>42</sup> Though the particular fault lines may have changed, race continues to play a powerful role in framing narratives of legitimacy and loyalty, character and conviction, and allegiance and ascription. The discourse surrounding both Obama's candidacy and presidency provides a salient illustration of this dynamic, as old racial tropes have given way to new ones that still privilege particular epistemologies of identity.

As early as the primaries, the 2008 presidential campaign exemplified the transitioning discourse on race. Although not all attacks against Obama had a racial subtext, many of the more salient narratives did.<sup>43</sup> Indeed, while his opponents

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41. Suggestions of Obama as the quintessential "Other" permeated the 2008 (and even 2012) campaign. For example, Republican John Hinderaker stated, "We're not sure who he is, exactly, but he certainly isn't one of us. Given the currents that swirl through world events these days, being a Muslim is one interpretation of Obama's exoticism." *Behind Obama Muslim Myth Stands the Right Wing*, MEDIA MATTERS (Aug. 19, 2010), <http://mediamatters.org/research/2010/08/19/behind-obama-muslim-myth-stands-the-right-wing/169536>, archived at <http://perma.cc/9BXT-FACV>. John Sununu famously lamented that he wished Obama would just "learn how to be an American. He has no idea how the American system functions, and we shouldn't be surprised about that, because he spent his early years in Hawaii smoking something, spent the next set of years in Indonesia." Kristen Lee & John Lauinger, *Top Romney Surrogate John Sununu, the Former N.H. Gov., Apologizes After Charging that Obama Needs to "Learn How to be an American,"* N.Y. DAILY NEWS (July 17, 2012), available at <http://www.nydailynews.com/news/election-2012/sununu-obama-learn-american-article-1.1116296>, archived at <http://perma.cc/CD8N-USC6>.

42. See *infra* notes 43–93 and accompanying text and the racialized narratives surrounding candidate and President Barack Obama.

43. Not everyone avoided attacking Obama's blackness, of course. Mulligans, a bar in Marietta, Georgia, posted a road sign that read, "I heard the White House smells like collard greens and fried chicken." Nick Wing, *Georgia Bar Mulligan's Faces Backlash From Civil Rights Group After Posting Racist Obama Sign*, HUFFINGTON POST (Sept. 19, 2012), [http://www.huffingtonpost.com/2012/09/19/georgia-bar-mulligans-racist-sign\\_n\\_1897226.html](http://www.huffingtonpost.com/2012/09/19/georgia-bar-mulligans-racist-sign_n_1897226.html), archived at <http://perma.cc/7C5U-VSYS>. Most explicit attacks, however, focused not on his race but on questions of Obama's religion. Rush Limbaugh famously said, "If it was OK, and even laudatory, to call Bill Clinton America's first black president, why can't we call Imam Obama America's first Muslim president?" *Behind Obama Muslim Myth Stands the Right Wing*, MEDIA MATTERS (Aug. 19, 2010), available at

(usually) took pains to avoid overt and obvious strikes against his blackness, they nevertheless emphasized his Otherness by using a more acceptable, coded target—his ties to the Middle East and Islam.<sup>44</sup> Thus, while the stage performance had moved beyond blatant theatrics of the Willie Horton kind,<sup>45</sup> questions of race and ancestry still suffused the public dialogue.<sup>46</sup>

At the outset, it is important to acknowledge the ways in which old narratives had grown passé and unviable, largely because of the widespread moral opprobrium that would result from explicitly racial attacks. For example, certain aspects of Obama's past never made it into the mainstream discussion over his presidential candidacy, even though they likely would have in prior decades.<sup>47</sup> Obama deflected questions about his troubled adolescence and history of drug abuse (much like

the-right-wing/169536, archived at <http://perma.cc/9BXT-FACV>.

44. For example, on his nationally syndicated program, radio talk show host Michael Savage has repeatedly asserted that Obama is Muslim. See, e.g., Trevor Zimmer, *Savage on Obama: "We Have a Right to Know if He's a So-Called Friendly Muslim or One Who Aspires to More Radical Teachings"*, MEDIA MATTERS (Feb. 22, 2008), <http://mediamatters.org/research/2008/02/22/savage-on-obama-we-have-a-right-to-know-if-hes/142654>, archived at <http://perma.cc/DVD9-NBGW>; Trevor Zimmer, *Savage on Obama: "Now We Have an Unknown Stealth Candidate Who Went to a Madrassas in Indonesia and in Fact Was a Muslim"*, MEDIA MATTERS (Apr. 7, 2008) <http://mediamatters.org/research/2008/04/07/savage-on-obama-now-we-have-an-unknown-stealth/143128>, archived at <http://perma.cc/6WYN-EX24> ("Look who we inherited in this country, from Dwight D. Eisenhower to Barack Hussein Obama, in one generation. A war hero to—a war hero who commanded the Allied operations against Nazi Germany was running for the presidency then. Now we have an unknown stealth candidate who went to a madrassas in Indonesia and, in fact, was a Muslim."); Evan McMurray, *Michael Savage Questions Terror Alert: 'First Muslim President' Trying to 'Justify Spying on Americans'*, MEDATE (Aug. 14, 2013), <http://www.mediaite.com/online/michael-savage-questions-terror-alert-first-muslim-president-trying-to-justify-spying-on-americans/>, archived at <http://perma.cc/8F59-7F47> ("He's the first Muslim president, everybody knows that. Why are we even mincing words about it? His first father was an African Muslim. His second father was an Indonesian Muslim. Isn't it true that most boys are impressed by their father's religion, practice their father's religion?").

45. As we discuss, *infra*, notes 51–53 and accompanying text, George H.W. Bush's political team famously used an advertising spot featuring Willie Horton to scuttle Michael Dukakis's presidential campaign in 1988. See Martin Schram, *The Making of Willie Horton*, NEW REPUBLIC, May 28, 1990, at 17.

46. See *infra* notes 61–72 and accompanying text.

47. In part, Obama helped preclude such lines of inquiry by conducting his adult and family life in a manner that is beyond anyone's reasonable reproach. But his teenage years might have provided fodder for scrutiny, especially in bygone eras.

George W. Bush did before him with alcohol)<sup>48</sup> by neutralizing the issue with open admissions about his past prior to announcing candidacy.<sup>49</sup> Yet in bygone eras, white privilege could easily have whitewashed the issue for Bush while keeping it in play for Obama, particularly by drawing on traditional racist tropes about African-American men.<sup>50</sup>

Two decades earlier, George H.W. Bush's political campaign unapologetically made such a move by appealing to the white public's most base racial anxieties.<sup>51</sup> In the process, Bush seized a key opportunity to reverse his petering campaign with an appeal to voters laced with racial subtext.<sup>52</sup> The campaign ran a now-infamous commercial featuring Willie Horton, a convicted African-American serving a life sentence without the possibility of parole for murder who had enjoyed a weekend furlough under a program supported by Dukakis while he served as Massachusetts Governor.<sup>53</sup> During the furlough, Horton committed armed robbery and raped a woman.<sup>54</sup> The advertisement, featuring Horton's dark visage, prominent afro, and unkempt beard, seized on Horton's menacing image—described by the advertisement's producer as “every suburban mother's greatest fear”—to dramatically turn the electoral tide.<sup>55</sup> The 2008 election provided an opportunity to revisit the Willie Horton strategy, albeit in tempered form;

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48. Nicholas D. Kristof, *How Bush Came to Tame His Inner Scamp*, N.Y. TIMES (July 29, 2000), <http://www.nytimes.com/2000/07/29/us/how-bush-came-to-tame-his-inner-scamp.html?pagewanted=all&src=pm>, archived at <http://perma.cc/375Q-ETXU>.

49. See generally BARACK OBAMA, JR., *DREAMS OF MY FATHER: A STORY OF RACE AND INHERITANCE* (1995) (acknowledging Obama's early experimentation with drugs).

50. This is not to suggest that such stereotyping did not impact some individuals, but it did not appear to resonate heavily with the majority of voters. See *infra* note 60 and accompanying text.

51. Morgan Whitaker, *The Legacy of the Willie Horton Ad Lives On, 25 Years Later*, MSNBC (Aug. 28, 2013), <http://www.msnbc.com/msnbc/the-legacy-the-willie-horton-ad-lives>, archived at <http://perma.cc/4VHX-B65R>.

52. As Democratic strategist Jimmy Williams notes, the Willie Horton advertisement “absolutely changed the course [of the 1988 election], and it made white Americans . . . raise and [sic] eyebrow and think, ‘We can't have a man from Massachusetts releasing . . . black criminals all across the country and letting them rape our white women and children.’ That was the point of that ad.” *Id.*

53. *Top 10 Campaign Ads: Willie Horton*, TIME (Sept. 22, 2008), [http://www.time.com/time/specials/packages/article/0,28804,1842516\\_1842514\\_1842557,00.html](http://www.time.com/time/specials/packages/article/0,28804,1842516_1842514_1842557,00.html), archived at <http://perma.cc/6GEP-94VM>.

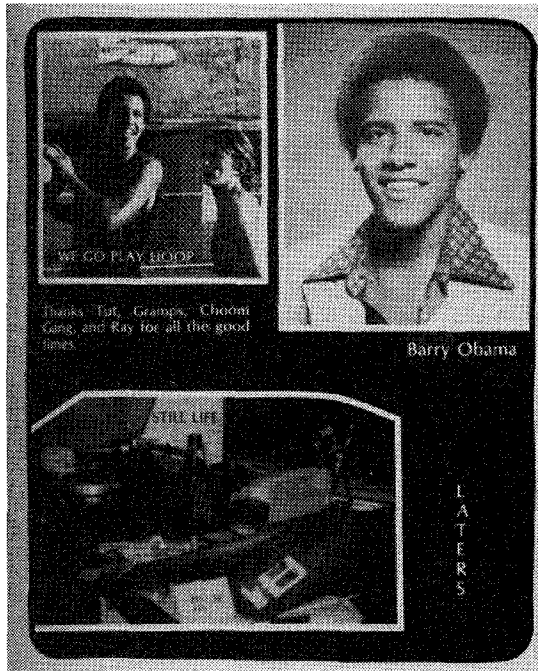
54. Schram, *supra* note 45, at 17.

55. *Id.*

but it did not happen, at least in the most obvious way.

To be sure, Obama possessed a background that, in the recent past, could easily have played against racial anxieties. His quarter-page graduation profile from the *Oahuan*, the yearbook of his Hawaiian high school,<sup>56</sup> Punahou,<sup>57</sup> provides a telling example.

On the one hand, the yearbook profile represents a typical teenage self-portrait, significant for its ordinariness. With the assimilatory adoption of the moniker Barry and the extensive



use of Hawaiian Pidgin (“we go play hoop” and the breezy, local parting term, “Laters”), the profile immediately conveyed Obama’s struggle to fit in as a half-white, half-black student at an elite *haole* (i.e., white) private school on a predominantly Asian island in the hinterlands of the American empire.

On the other hand, the *Oahuan* page could have provided fodder for those who might have

chosen to attack Obama by appealing to bigoted archetypes. Like the Willie Horton advertisement of yore, the yearbook portrait could have been (misguidedly) manipulated in an attempt to instill fear in the white public that, lurking under the civilized veneer, the real Obama resides as a character straight out of central casting from the Blaxploitation movies of the 1970’s. After all, the page featured Obama with a

56. See *Barack Obama '79*, PUNAHOU SCHOOL, <http://www.punahou.edu/alumni/community-groups/alumni-profiles/barack-obama/index.aspx> (last visited Sept. 1, 2014), archived at <http://perma.cc/GB7N-XJD2>.

57. The Academy is the name for Punahou’s secondary (i.e., ninth through twelfth grade) school. See PUNAHOU SCHOOL, <http://www.punahou.edu/academics/academy/index.aspx>, archived at <http://perma.cc/9DLP-5YJP>.



prominent Afro, a butterfly collar about to take flight, and a dreamy quasi-smirk lining his face as his eyes lilt upwards. To the left of his portrait was a self-styled still life featuring an empty beer bottle and what appeared to be rolling papers; above the still life, he sent an expressly drug-related shout-out to his “Choom Gang.”<sup>58</sup>

But the cynical use was not to be. Obama’s yearbook page and the Choom Gang remained outside of the attention of the mainstream media and never entered popular discourse in 2008. There was no *Time* magazine cover story featuring a blown-up copy of the *Oahuan* portrait. And although there were some efforts in 2012 to draw attention to the matter, it just did not resonate with enough mainstream voters.<sup>59</sup> Efforts to run with this explicitly racialized story failed and it generated relatively little heat.

But sharp racial subtexts—albeit in different forms and from different sources—nevertheless characterized the campaign. While mainstream actors generally averted direct references to Obama’s blackness,<sup>60</sup> the attacks on his candidacy were anything but colorblind. Instead of explicitly focusing on Obama’s African-American identity, however, his Otherness became an issue by linking his identity to Islam, the Middle East, radicalism, and terrorism.<sup>61</sup> As early as the primaries, the subtext of racialized religion emerged. When asked about Obama’s religion, candidate Hillary Clinton—involved in a heated battle with Obama for the democratic nomination—famously responded that he was not a closet Muslim; but then, with a long pregnant pause, she added forebodingly, “[a]s far as I know.”<sup>62</sup> Clinton’s tacit act of subterfuge was no outlier.

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58. Chooming is Hawaiian slang for smoking marijuana. See Gene Healy, *President Obama’s War on His Own ‘Youthful Irresponsibility’*, WASH. EXAMINER (May 25, 2010), <http://washingtonexaminer.com/gene-healy-president-obamas-war-on-his-own-youthful-irresponsibility/article/32229>, archived at <http://perma.cc/S6HW-HLSG>.

59. Much of the news coverage on this issue emerged in the middle of 2012, hot on the heels of the release of David Maraniss’s biography entitled *Barack Obama: The Story*, which discussed the Choom Gang. DAVID MARANISS, *BARACK OBAMA: THE STORY* (2012).

60. Of course, this is not to suggest that Obama’s blackness was entirely ignored or not a part of the discourse. See, e.g., *supra* note 43.

61. See *supra*, notes 57–60 and accompanying text.

62. Jake Tapper, *Clinton Says Obama Muslim Rumor Not True “As Far As I Know,”* ABC NEWS (Mar. 2, 2008), <http://abcnews.go.com/blogs/politics/2008/03/clinton-says-obl/>, archived at <http://perma.cc/MZ9K-APXX>.

During both the nomination battle and general election, political operatives attacked Barack Obama's candidacy by linking him to Islam, the Middle East, and terrorism.<sup>63</sup> Advertisements tied Obama's support of driver's licenses for illegal immigrants to a desire to empower jihadists such as the 9/11 attackers.<sup>64</sup> Emcees at political rallies often stressed Obama's middle name of Hussein when speaking negatively about him.<sup>65</sup> Sarah Palin infamously charged Obama with "palling around" with terrorists,<sup>66</sup> an accusation repeated in Robocalls placed to voters on the eve of the 2008 election.<sup>67</sup> More subtly, John McCain made a Freudian slip when he responded to an elderly woman's exhortation that she did not trust Obama because he was an Arab.<sup>68</sup> "No, ma'am, he's a decent family man, citizen," responded McCain,<sup>69</sup> clumsily implying that Arab descent and the concept of decency and citizenship were mutually exclusive. Partisan reporters questioned Obama's early education at an allegedly radical madrassa,<sup>70</sup> and they highlighted photographs of Obama

63. See, e.g., Daniel Burke, *1 in 10 Think Obama is Muslim*, USA TODAY (Apr. 1, 2008), [http://usatoday30.usatoday.com/news/religion/2008-04-01-obama-muslim\\_N.htm](http://usatoday30.usatoday.com/news/religion/2008-04-01-obama-muslim_N.htm), archived at <http://perma.cc/H2ET-UD4U>; Michael Dobbs, *Was Obama Ever a Muslim?*, WASH. POST (June 13, 2008), [http://voices.washingtonpost.com/fact-checker/2008/06/was\\_obama\\_a\\_muslim.html](http://voices.washingtonpost.com/fact-checker/2008/06/was_obama_a_muslim.html), archived at <http://perma.cc/JAF6-CR5A>; Christina Bellantoni, *Obama's Verbal Slip Fuels His Critics*, WASH. TIMES (Sept. 7, 2008), <http://www.washingtontimes.com/news/2008/sep/7/obama-verbal-slip-fuels-his-critics/?page=all>, archived at <http://perma.cc/8LSY-8G9V>.

64. Joe Miller, *A License to Kill*, FACTCHECK.ORG (Oct. 28, 2008), <http://www.factcheck.org/2008/10/a-license-to-kill/>, archived at <http://perma.cc/Q5BJ-2M3E> (noting the National Republican Trust's running of advertisements, on both the Internet and television in battleground state Ohio, that attempted to link Obama to the 9/11 hijackers).

65. Mary Lu Carnevale, *Obama's Name Again is Used in Attack*, WALL ST. J. (Oct. 8, 2008), <http://blogs.wsj.com/washwire/2008/10/08/obamas-name-again-is-used-in-attack/>, archived at <http://perma.cc/3KWK-D3AD>.

66. Kate Phillips, *Palin: Obama is "Palling Around With Terrorists"*, N.Y. TIMES (Oct. 4, 2008), <http://thecaucus.blogs.nytimes.com/2008/10/04/palin-obama-is-palling-around-with-terrorists/>, archived at <http://perma.cc/CFK2-NQR6>.

67. Lanae, *Robocalls About Obama Being Terrorist Backfiring in Indiana*, DAILY KOS (Oct. 17, 2008), <http://www.dailykos.com/story/2008/10/18/634258/-Robocalls-about-Obama-being-terrorist-backfiring-in-Indiana>, archived at <http://perma.cc/AU87-RYEW>.

68. Jonathan Martin & Amie Parnes, *McCain: Obama Not an Arab, Crowd Boos*, POLITICO (Oct. 10, 2008), <http://www.politico.com/news/stories/1008/14479.html>, archived at <http://perma.cc/7U6G-XAPU>.

69. *Id.*

70. Jeremy Schulman, *Coulter Brings Madrassa Lie Back to Fox News*, MEDIA MATTERS (Dec. 31, 2009), <http://mediamatters.org/blog/2009/12/31/coulter-brings-madrassa-lie-back-to-fox-news/158521>, archived at <http://perma.cc/FUJ6-G675>.

donning a turban—a visual entreaty to oppose the foreign menace.<sup>71</sup> The underlying message in these attacks was consistent: ties to Islam and the Middle East are inherently suspect. The inevitable innuendoes of terrorism, religious extremism, and barbarism that closely followed pandered to popular prejudices.

The troubling, racialized discourse carried into the Presidency. Consider the fact that Obama still cannot shake the widespread belief that he is not eligible for the Office—a peculiar phenomenon intricately tied to racial subtext around his candidacy and his portrayal as the Other.<sup>72</sup> Even after the release of his birth certificate, questions about his birth continue to resonate with large segments of the American public.<sup>73</sup> According to the most prevalent version of the conspiracy surrounding his nativity, Obama was born in Kenya, not Hawai'i.<sup>74</sup> Yet such a theory necessarily requires

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71. Right-of-center blogger Matt Drudge famously featured the photograph on his popular website, The Drudge Report. See Ewen MacAskill, *Clinton Aids Claim Obama Photo Wasn't Intended as a Smear*, GUARDIAN (Feb. 25, 2008), <http://www.guardian.co.uk/world/2008/feb/25/barackobama.hillaryclinton>, archived at <http://perma.cc/G77R-W5GH>.

72. See, e.g., John Celock, *Arizona Electors Question Barack Obama Birth Certificate*, HUFFINGTON POST (Dec. 17, 2012), [http://www.huffingtonpost.com/2012/12/17/arizona-electors-barack-obama-birth-certificate\\_n\\_2318228.html](http://www.huffingtonpost.com/2012/12/17/arizona-electors-barack-obama-birth-certificate_n_2318228.html), archived at <http://perma.cc/3GYB-WSTY>; Paul J. Watson, *Obama Birth Certificate "Raises As Many Questions As It Answers"*, INFOWARS.COM (Apr. 27, 2011), <http://www.infowars.com/obama-birth-certificate-raises-as-many-questions-as-it-answers/>, archived at <http://perma.cc/WDY7-XL6B>; Stephen Dinan, *Sheriff Arpaio: Obama Birth Certificate a 'Forgery.'* WASH. TIMES (Mar. 1, 2012), <http://www.washingtontimes.com/news/2012/mar/1/sheriff-arpaio-obama-birth-certificate-forgery/?page=all>, archived at <http://perma.cc/6DAM-PF5F>; Ben Forer, *Obama Birth Certificate Maybe Forged, Sheriff Joe Arpaio Says*, ABC NEWS (Mar. 1, 2012), <http://abcnews.go.com/Politics/obamas-birth-certificate-forgery-arizona-sheriff-joe-arpaio/story?id=15825342>, archived at <http://perma.cc/6UXK-43M9>; Alan Jones, *Hawaii State Registrar Does Not Verify Authenticity of President Obama's Birth Certificate*, WASH. TIMES (May 24, 2012), <http://communities.washingtontimes.com/neighborhood/freedom-press-not-free/2012/may/24/hawaii-state-registrar-onaka-birth-certificate-/>, archived at <http://perma.cc/HH7G-GEDL>; Peter Hamby, *Despite a Frustrated GOP, Anti-Obama 'Birthers' Still Persist*, CNN (May 23, 2012), <http://www.cnn.com/2012/05/23/politics/birthers-arizona-iowa>, archived at <http://perma.cc/ME9U-KPR7>.

73. Michael Lazzaro, *A Year After Obama's Birth Certificate Was Released, Birtherism Still With Us*, DAILY KOS (July 13, 2012), <http://www.dailykos.com/story/2012/07/13/1109158/-A-year-after-Obama-s-birth-certificate-was-released-birtherism-still-with-us>, archived at <http://perma.cc/UMX3-U5VE>.

74. See Andy Barr, *Birther Debate Alive Across U.S.*, POLITICO (Feb. 14, 2011), <http://www.politico.com/news/stories/0211/49444.html>, archived at <http://perma.cc/8UVR-7E66>.

that Obama's family anticipated his future as a presidential candidate and, in a remarkable act of foresight, lied in his birth announcement that was published in Honolulu's two major dailies at the time—the *Advertiser* and the *Star-Bulletin*—on successive days in August of 1961.<sup>75</sup>

The wild implausibility of such a move appears irrelevant to a large segment of the population, however—a telling sign of the implicit racial judgments at play. In April 2011, on the eve of the release of Obama's birth certificate, a *USA Today/Gallup* poll found that only 38 percent of Americans surveyed thought he was definitely born in the United States; a stunning 24 percent thought he probably or definitely was not born in the United States.<sup>76</sup> Although the release of Obama's birth certificate impacted these numbers, the effect was temporary.<sup>77</sup> A year after the release, the number of Americans believing that Obama was born outside of the United States was back to pre-release levels.<sup>78</sup>

Political operatives, from Donald Trump to Sheriff Joe Arpaio, continued to stoke the fires of racial ferment,<sup>79</sup> and during the 2012 election, mainstream Republicans refused to denounce such queries into his birth for fear of upsetting their (apparently not quite post-racial) constituents. 2012 Republican presidential nominee Mitt Romney even played into this narrative when, during the heat of the campaign, he reminded voters that “no one's ever asked to see my birth certificate.”<sup>80</sup> There was particular irony to this suggestion.

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75. Dan Nakaso, *Hawaii Officials Confirm Obama's Original Birth Certificate Still Exists*, HONOLULU ADVERTISER (July 28, 2009), <http://the.honoluluadvertiser.com/article/2009/Jul/28/ln/hawaii907280345.html>, archived at <http://perma.cc/SK7B-B7TZ> (explaining that the same birth announcement appeared on successive days in two different newspapers: August 13, 1961 for the *Advertiser*; August 14, 1961 for the *Star-Bulletin*).

76. Susan Page, *Poll: What Kind of President Would Donald Trump Make?*, USA TODAY (Apr. 26, 2011), <http://www.usatoday.com/news/politics/2011-04-25-trump-president-poll.htm>, archived at <http://perma.cc/H2VM-Y485> (citing poll taken from April 20–23, 2011 by USA Today/Gallup Poll).

77. Lymari Morales, *Obama's Birth Certificate Convinces Some, But Not All, Skeptics*, GALLUP (May 13, 2011), <http://www.gallup.com/poll/147530/obama-birth-certificate-convinces-not-skeptics.aspx>, archived at <http://perma.cc/83ZQ-LX3S>.

78. See Lazzaro, *supra* note 73.

79. See David Eldridge, *Trump Rides Issue of Obama's Birth Certificate*, WASH. TIMES (Apr. 10, 2011), <http://www.washingtontimes.com/news/2011/apr/10/trump-rides-issue-of-presidents-birth/?page=all>, archived at <http://perma.cc/5BUG-WXC3>; Forer, *supra* note 72.

80. Sam Youngman, *Romney Birth Certificate Remark Rekindles Obama Controversy*, REUTERS (Aug. 24, 2012), <http://www.reuters.com/article/2012/08/24/>

After all, though Romney's father was born and grew up abroad (much like Obama's),<sup>81</sup> he had entirely escaped questions about his birth and allegiance. And although Obama's previous presidential opponent, John McCain, had been born in the Panama Canal Zone,<sup>82</sup> he had similarly eschewed such queries. Given these facts, it is not much of a stretch to suggest that Caucasians of European descent need not answer questions about American nativity or loyalty because their skin color entitles them to a presumption of both. Race continues to have meaning in American society, as this was a white privilege to which Obama could not lay claim.

Meanwhile, a large portion of the electorate continues to view Obama as Muslim, not Christian.<sup>83</sup> Of course, such a characterization should not matter for the purposes of viewing his legitimacy as President. But, such a characterization does, in fact, matter. It associates him with the Other and it suggests that he is deceiving the public with his claim of being Christian. And those who take an unfavorable view of Obama in general are far more likely to view him as Muslim.<sup>84</sup> A Pew Research Center poll taken just months before the 2012 election found that only 49 percent of Americans correctly identified Obama's religion and a full 17 percent misidentified him as Muslim.<sup>85</sup> Surprisingly, despite his time in the national spotlight, the confusion about Obama's religious identity has gotten worse, not better. In 2008, a similar study found that 55 percent of Americans correctly identified him as Christian and 12 percent thought he was Muslim.<sup>86</sup> Of course, these figures

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us-usa-campaign-romney-idUSBRE87N0TR20120824, archived at <http://perma.cc/RS77-GFXK>.

81. George Romney was born in Colonia Dublán in Galeana in the state of Chihuahua, Mexico to American parents living in the Mormon colonies there. RAPH A HOLDING, GOVERNORS OF THE UNITED STATES: POWERS AND LIMITATIONS 85–86 (2010).

82. ELAINE S. POVICH, JOHN MCCAIN: A BIOGRAPHY 7 (2009).

83. "Mitt is his middle name. I wish I could use my middle name." The Daily Conversation, *Obama Jokes About Middle Name "Hussein"*, YOUTUBE (Oct. 19, 2012), <http://www.youtube.com/watch?v=5-y4vxs5hxY>, archived at <http://perma.cc/QQA5-FK8V> (speaking at the Alfred E. Smith Memorial Foundation Dinner, New York, New York, Oct. 19, 2012).

84. *Little Voter Discomfort With Romney's Mormon Religion*, PEW RES. CTR. (July 26, 2012), [www.pewforum.org/2012/07/26/new-poll-finds-little-voter-discomfort-with-romneys-mormon-religion/](http://www.pewforum.org/2012/07/26/new-poll-finds-little-voter-discomfort-with-romneys-mormon-religion/), archived at <http://perma.cc/64NC-PA7U>.

85. *Id.*

86. *Id.*

would be less meaningful if many of the people who harbored positive feelings for Barack Obama also happened to think he were Muslim. After all, one's religious beliefs should be irrelevant to one's qualifications for political office. But there is a remarkable comorbidity between those who think that Obama is Muslim and those who view him with enmity. In 2008, 16 percent of registered Republicans identified Obama as Muslim.<sup>87</sup> By 2012, the figure had leapt to a whopping 30 percent.<sup>88</sup> Meanwhile, two-thirds of those who thought we had an Islamic president admitted they were uncomfortable with Obama's religion.<sup>89</sup> Apparently, the chimera of Obama as some kind of Islamic Manchurian Candidate continues to resonate with a sizeable swath of the electorate, evidence be damned. So, as it turns out, Willie Horton still lives—except he's now Muslim and Middle Eastern.

Electoral politics suggest that colorblindness is, at best, a distant aspiration—and, all the while, Obama (understandably, from a political viewpoint) distances himself from these issues. He denies being Muslim,<sup>90</sup> but he never emphasizes that it should not matter if he were. He acknowledges the political liability of his middle name,<sup>91</sup> but does not actively condemn the intolerance that the liability reflects. And his Administration has joined Congress in taking steps to heighten race-based profiling against individuals of Middle Eastern descent in the name of national security. Not long ago, for example, Secretary of Homeland Security, Janet Napolitano, announced that individuals traveling from or through a list of fourteen countries, predominantly in the Middle East and Northern Africa, would hereafter be automatically subject to enhanced screening.<sup>92</sup> Just as pointedly, candidate Obama's 2008 promise to ban the practice of racial profiling by law enforcement—a principle he had strongly supported as both an

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87. *Id.*

88. *Id.*

89. *Id.*

90. Daniel Pipes, *PIPES: Obama: 'I Have Never Been a Muslim'*, WASH. TIMES (Sept. 7, 2012), <http://www.washingtontimes.com/news/2012/sep/7/obama-i-have-never-been-a-muslim/?page=all>, archived at <http://perma.cc/JT8N-MLK2>.

91. See *supra* note 83.

92. Pipes, *supra* note 90. Meanwhile, South Carolina Congressman Gresham Barrett took matters a step further, introducing legislation before the House that would permanently ban all individuals from Iran, Sudan, Syria, Cuba, or Yemen from obtaining visas to enter the United States. See Stop Terrorists Entry Program (STEP) Act of 2003, H.R. 3075, 108th Cong. (2003).

Illinois state senator and United States Senator—fell by the wayside.<sup>93</sup> In other words, President Obama has exploited, for political gain, the exact same selective colorblindness that Candidate Obama endured. Not surprisingly, colorblindness continues to serve as an appealing, organizing first principle that resonates with the body politic—albeit in selective ways. Its origins and proliferation therefore necessitate investigation.

## II. COLORBLINDNESS IN THEORY AND PRACTICE

No understanding of the lure and operation of the trope of colorblindness is complete without an examination of the trope's genesis. To that end, this Part of the Article first contextualizes the relationship between colorblindness and the text and intent of the Fourteenth Amendment in Section A. It then analyzes the way in which Supreme Court jurisprudence has invented, defined, and ultimately refined the idea of colorblindness. Section B proceeds to explore how the seductive sway of the colorblindness trope has been legitimated with a narrative that historicizes racism and appeals to the rising belief, at least among the majority, that discrimination is a thing of the past.<sup>94</sup> Yet as Section C argues, contrary to the assumptions of the champions of colorblindness, American society is still rife with racial divides.<sup>95</sup> Race continues to matter in political, economic, and social life. If anything, this reality calls into question the appropriateness of an unwavering commitment to colorblindness, at least at the present time. However, when combined with the selective application of colorblindness explored in Part IV of this

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93. See Becky Bowers, TAMPA BAY TIMES (Nov. 12, 2012), <http://www.politifact.com/truth-o-meter/promises/obameter/promise/303/ban-racial-profiling-by-federal-law-enforcement-ag/>, archived at <http://perma.cc/A5JP-B64J> (rating, as a “broken promise,” the Obama/Biden campaign pledge that it “will sign legislation that will ban the practice of racial profiling by federal law enforcement agencies and provide federal funding to state and local police departments if they adopt policies to prohibit the practice.”); see also Conor Friedersdorf, *Prominent Democrats Are Now Comfortable with Racial and Ethnic Profiling*, ATLANTIC (July 18, 2013), <http://www.theatlantic.com/politics/archive/2013/07/prominent-democrats-are-now-comfortable-with-racial-and-ethnic-profiling/277900/>, archived at <http://perma.cc/PR6C-P5FT>.

94. See, e.g., Sheryll Cashin, *Why Whites Don't See Racism: Reagan Democrats Are Stephen Colbert Democrats Now*, SALON (May 3, 2014), [http://www.salon.com/2014/05/03/why\\_whites\\_dont\\_see\\_racism\\_reagan\\_democrats\\_are\\_stephen\\_colbert\\_democrats\\_now/](http://www.salon.com/2014/05/03/why_whites_dont_see_racism_reagan_democrats_are_stephen_colbert_democrats_now/), archived at <http://perma.cc/XKP5-8S4A>.

95. See *infra* Parts III.B, IV.

Article,<sup>96</sup> the disparity between rhetoric and legal reality raises even more troubling questions about the trope of colorblindness and highlights its power in reaffirming, rather than remedying, racial subordination.

A. *The Roots and Modern Application of the Colorblindness Trope*

Appeals to constitutional colorblindness begin with the Fourteenth Amendment and its facial commitment to equal protection under the law. Yet there is nothing explicit in the text of the Fourteenth Amendment that, per se, outlaws government consideration of race. Indeed, the language simply reads: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>97</sup> As this Section will demonstrate, there is no manifest edict in the Equal Protection Clause calling for fealty to a notion of colorblindness. Indeed, a rigidly colorblind interpretation of equal protection is very likely at odds with the original meaning and intent of the framers. Instead, the notion of colorblindness has come to us from a particular epistemological narrative that has developed over time to define what constitutes “equal protection.” This narrative has fetishized government blindness to race (at least in certain circumstances) rather than a competing theory of equal protection, which might argue that equal treatment under the law requires recognition and accounting of the continued existence of racial disparities and discrimination in order to foster equal opportunity.

Notably, the drafters of the Fourteenth Amendment did not view the Equal Protection Clause as an outright ban on race consciousness by the government.<sup>98</sup> As scholar Melissa Saunders has observed, the Thirty-Ninth Congress, which

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96. *See infra* Part IV.

97. U.S. CONST. amend. XIV.

98. For example, the framers saw no inconsistency between the clause and miscegenation laws that accounted for race, because the laws were, in their (misguided) view, applied equally to all races. *See* Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 275 (1997) (citing CONG. GLOBE, 39th Cong., 1st Sess. 420 (1866) (statement of Sen. Lyman Trumbull (R-Ill.)); CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866) (statement of Sen. Lyman Trumbull); CONG. GLOBE, 39th Cong., 1st Sess. 632 (1866) (statement of Rep. Samuel W. Moulton (D-Ill.)); CONG. GLOBE, 39th Cong., 1st Sess. 505 (1866) (statement of Sen. William P. Fessenden (R-Me.)).



ultimately passed the Fourteenth Amendment, rejected several draft amendments that expressly forbade distinctions or discrimination on the basis of race.<sup>99</sup> Instead, the framers of the Fourteenth Amendment adopted language that made no mention of racial categorizations, race consciousness, or even the concept of race. Consequently, argues Saunders, “the strong inference is that [the framers] intended the clause to aim at some evil other than the bare consideration of race.”<sup>100</sup>

Nevertheless, despite its lack of clear textual support and its likely inconsistency with the original intent of the framers,<sup>101</sup> the concept of the colorblind Constitution has enjoyed remarkable resonance in the political and legal rhetoric of our time. Even since its earliest conception, the idea of colorblindness has been used to reinforce racial hierarchies while lauding the ideals of individual rights. The notion of a colorblind Constitution gained its most notable expression in 1896 with Justice John Marshall Harlan’s prescient dissent in *Plessy v. Ferguson*.<sup>102</sup> Harlan famously rejected the seven-justice majority’s adoption of the infamous “separate but equal” doctrine to uphold the constitutionality of racial segregation.<sup>103</sup> In language much celebrated and oft-quoted over the past century, Harlan deemed the forcible segregation of the races by state and local laws a violation of the Equal Protection Clause and reasoned that,

[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is colorblind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal

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99. *Id.* at 275–76. As Saunders concludes, “[t]he Joint Committee’s consistent rejection of proposals explicitly forbidding racial distinctions and racial discrimination—even in access to basic civil rights—casts considerable doubt on the assertion that the framers intended the language of the Equal Protection Clause to strike at all race-based or race-conscious state action.” *Id.* at 280.

100. *Id.* at 280–81.

101. I do not intend to suggest that both an absence of express textual support and an inconsistency with original intent are necessarily fatal to a given constitutional interpretation (see, for example, the issue of segregation), but it certainly makes such an interpretation more difficult to justify.

102. 163 U.S. 537, 552, 559 (1896).

103. *Id.* at 558–59.

before the law.<sup>104</sup>

But Justice Harlan's eloquent embrace of formal colorblindness did not represent a ringing endorsement of racial equality. Though progressive for its time, Justice Harlan's dissent still advocated the superiority of the "white" race, "in prestige, in achievements, in education, in wealth and in power," and expressed the belief that this dominance would "continue . . . for all time."<sup>105</sup> As scholar Molly Townes O'Brien has argued, Justice Harlan's vision of colorblindness rejected any notion of social or economic equality for members of non-white races and, instead, constituted a matter of "white paternalism and Republican federalism."<sup>106</sup> Indeed, while he looked askance at discrimination at the state level, Justice Harlan often blessed it elsewhere. For example, he joined a unanimous Supreme Court in upholding the constitutionality of the Chinese Exclusion Act—the federal government's wholesale prohibition of Chinese immigration to the United States.<sup>107</sup> In that case, he agreed that Congress had the unilateral power to exclude "foreigners of a different race" from our country.<sup>108</sup> He also supported the federal government's explicit use of color-based distinctions in citizenship determinations.<sup>109</sup> And, even his state-related jurisprudence was not entirely consistent. Just three years after *Plessy*, Justice Harlan had no compunction about refusing to stop an all-white school board in Richmond, Georgia from closing, under the guise of fiscal economy, the only publicly-supported high school for black children in the county.<sup>110</sup>

Harlan's theory of colorblindness has achieved particular

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104. *Id.* at 559.

105. *Id.*

106. Molly Townes O'Brien, *Justice John Marshall Harlan as Prophet: The Plessy Dissenter's Color-Blind Constitution*, 6 WM. & MARY BILL RTS. J. 753, 755 (1998). Harlan viewed the Fourteenth Amendment as only applying the requirements of equal protection to government action by the States, not the federal government.

107. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

108. *Id.* at 606.

109. See *United States v. Wong Kim Ark*, 169 U.S. 649, 705–32 (1897) (Fuller, C.J., dissenting, with whom Harlan, J., joined) (rejecting the idea of birthright citizenship and advocating for the federal government's use of race-based distinctions in citizenship determinations).

110. See *Cumming v. Richmond Cnty. Bd. of Educ.*, 175 U.S. 528 (1899); see also O'Brien, *supra* note 106, at 767–72 (discussing the background of *Cumming* and the basis for Justice Harlan's opinion in the case).

popularity in recent years and, somewhat unusually, has enjoyed its most salient expression in the affirmative action jurisprudence of the past two decades—an area of remedial, rather than invidious, race consciousness. In particular, critics of remedial, race-conscious policies in education and employment have seized upon the moral heft and elegant simplicity of Harlan's words to paint such programs as outmoded and regressive. To those critics, affirmative action unnecessarily preserves racial differentiation in an otherwise colorblind New America.<sup>111</sup> To them, the regrettable majority decision in *Plessy*, which was only reversed a half century later when society had finally learned its lesson,<sup>112</sup> provides a cautionary tale for the ills of pernicious race-conscious interventions by the government.

In *Grutter v. Bollinger*, a constitutional challenge to race-conscious admissions policies at the University of Michigan Law School, Justice Clarence Thomas dissented from the majority's allowance of the limited use of race to promote classroom diversity, citing the mandate of governmental colorblindness.<sup>113</sup> Thomas argued that any consideration of race in the admissions process would clearly run afoul of the Equal Protection Clause.<sup>114</sup> To support his position, he quoted Justice Harlan's dissent to *Plessy v. Ferguson*: "Our constitution is color-blind, and neither knows nor tolerates classes among citizens."<sup>115</sup> Thomas's reasoning was entirely consistent with the absolute position he had previously taken on any use of race, whether benign or malevolent, by the government: "[U]nder our Constitution, the government may not make distinctions on the basis of race."<sup>116</sup>

Thomas's embrace of Harlan's vision of a colorblind

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111. See, e.g., President George W. Bush, Remarks by the President on the Michigan Affirmative Action Case (Jan. 15, 2003), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/01/20030115-7.html>, archived at <http://perma.cc/W8HN-CD9H>.

112. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (striking racial segregation in public schools as a violation of the Constitution's Equal Protection Clause and repudiating *Plessy*'s "separate but equal" doctrine).

113. 539 U.S. 306, 349–78 (2003) (Thomas, J., concurring in part and dissenting in part).

114. *Id.* at 354–58.

115. *Id.* at 378 (citing *Plessy v. Ferguson* 163 U.S. 537, 559 (Harlan, J., dissenting)).

116. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 240–41 (1995) (Thomas, J., concurring in part and concurring in the judgment).

Constitution echoes the position of several of his colleagues. In *Adarand Constructors v. Pena*,<sup>117</sup> the Supreme Court evaluated the constitutionality of a subcontracting incentive bonus implemented by the federal government to assist businesses owned by socially and economically disadvantaged individuals, including those from minority groups, to win contract bids.<sup>118</sup> In remanding the case back to the district court, the Court expressly held, for the first time, that strict scrutiny would apply to both invidious *and* remedial uses of race by the government.<sup>119</sup> In his concurring opinion in the decision, Justice Antonin Scalia urged the Court to go a step further and strike the challenged program out of hand.<sup>120</sup> In his view, the government could never meet the required compelling interest to rationalize the program.<sup>121</sup> In the process, Justice Scalia firmly adopted a colorblind constitutional vision: “Under our Constitution,” he wrote, “there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution’s focus upon the individual . . . .”<sup>122</sup> Justice Scalia then boldly proclaimed that, “[i]n the eyes of government, we are just one race here. It is American.”<sup>123</sup> In *Grutter*, Scalia once again advocated a categorical rejection of color-consciousness: “The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.”<sup>124</sup>

Most recently, Chief Justice John Roberts has also contended that the Constitution mandates colorblindness by the government.<sup>125</sup> In *Parents Involved in Community Schools v. Seattle School District No. 1*, the Supreme Court struck as unconstitutional the use of race as an admissions tiebreaker for the purpose of promoting diversity in secondary schools.<sup>126</sup> Writing for the majority, John Roberts evoked and cited to

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117. *Id.* at 200.

118. *Id.* at 204.

119. *See id.* at 227.

120. *Id.* at 239.

121. *Id.*

122. *Id.*

123. *Id.*

124. 539 U.S. 306,349 (2003) (Scalia, J., concurring in part and dissenting in part) (declaring that race-conscious admissions policies in state education institutions are unconstitutional).

125. *Parents Involved in Cmty. Schools v. Seattle School District No. 1* (*Parents Involved II*), 551 U.S. 701 (2007).

126. *Id.* at 724–27.

Harlan's *Plessy* dissent and its famous appeal to constitutional colorblindness.<sup>127</sup> He then rationalized the Court's decision in verbiage that seemingly rebuked Justice Harry Blackmun's opinion in *Regents of the University of California v. Bakke*.<sup>128</sup> In that suit, the Supreme Court voided a race-conscious admissions policy at the University of California at Davis School of Medicine, holding that it represented a racial quota system that could not withstand constitutional scrutiny.<sup>129</sup> But, the Court provided a template for future affirmative action policies by permitting the use of race as a "plus" factor in the holistic review of a candidate's application for admission to institutions of higher learning.<sup>130</sup> As Justice Blackmun reflected, "In order to get beyond racism, we must first take account of race. There is no other way."<sup>131</sup> To Justice Roberts, however, the Constitution simply would not allow the consideration of race, even for remedial purposes. Thus, in *Parents Involved*, he closed his opinion with sweeping, absolutist language.<sup>132</sup> "The way to stop discrimination on the basis of race," he announced tautologically, "is to stop discriminating on the basis of race."<sup>133</sup> With these words, Justice Roberts cast the continued viability of any future forms of affirmative action in thorough doubt.

### B. Colorblindness and the Historicization of Racism

Thus, the colorblindness mandate has firmly taken hold of the jurisprudential imagination in recent years as a key philosophical basis for opposing remedial, race-based government policies. And, ironically, it has done so with jurists who gravitate towards strict construction, even though the notion of rigid colorblindness lacks firm support in either a textualist or originalist understanding of the Equal Protection Clause. Colorblindness certainly has an intuitive appeal, with

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127. *Id.* at 731 n.14.

128. 438 U.S. 265 (1978).

129. *Id.* at 319-20.

130. *Id.* at 317-18.

131. *Id.* at 407.

132. *Parents Involved II*, 551 U.S. at 747-48.

133. *Id.* Roberts's language mimicked the dissenting language of Judge Carlos Bea in the lower court decision that upheld the Seattle School District policy. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (Parents Involved I)*, 426 F.3d 1162, 1222 (9th Cir. 2005) (Bea, J., dissenting) ("The way to end racial discrimination is to stop discriminating by race.").

its ability to create a bright-line rule on racial consideration by government. But it has also gained legitimacy through a particular narrative about race: the story that, although racism was an unfortunate and regrettable part of our past, it has been almost entirely extinguished in the present. This historicization of racism has therefore played a central role in rationalizing a constitutional mandate for colorblindness. Indeed, even jurists who have supported the survival of affirmative action have signaled reservations over its inconsistency with the ideals of colorblindness and their vision of the new reality of race relations in our country.<sup>134</sup> Writing on behalf of the Court's majority in *Grutter*, Justice Sandra Day O'Connor declared, with unusual certainty, that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."<sup>135</sup> While Justice O'Connor may have understandably hoped that, in an ideal world, "all governmental use of race must have a logical end point,"<sup>136</sup> her edict reflected several problematic suppositions.<sup>137</sup> Besides the arbitrariness of the time limit, there was little basis for the unwarranted optimism that centuries of pervasive institutional racism could be undone with a few decades of carefully circumscribed government intervention of dubious efficacy.<sup>138</sup> Notably, Justice O'Connor's

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134. Affirmative action, as it is currently practiced in educational admissions and job hiring, can be a frustrating and often imprecise tool to achieve the goal of racial equality.

135. *Grutter*, 539 U.S. 306, 343 (2003).

136. *Id.* at 342.

137. Kevin R. Johnson, *The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171, 172 (2004) ("At first blush, the Court's pronouncement seemed overly optimistic, if not woefully out of place in a judicial opinion.")

138. See, e.g., Dan Slater, *Does Affirmative Action Do What It Should?* N.Y. TIMES (Mar. 16, 2013), <http://www.nytimes.com/2013/03/17/opinion/sunday/does-affirmative-action-do-what-it-should.html>, archived at <http://perma.cc/KVV8-FESE> (discussing the scholarship of "mismatch theory," which argues that "affirmative action can harm those it's supposed to help by placing them at schools in which they fall below the median level of ability and therefore have a tough time[.]" ultimately hurting them in the long term); Richard Kahlenberg, *Affirmative Action Fail: The Achievement Gap by Income is Twice the Gap by Race*, NEW REPUBLIC (Apr. 27, 2014), <http://www.newrepublic.com/article/117529/affirmative-action-fail-achievement-gap-income-twice-gap-r>, archived at <http://perma.cc/DJU5-2QRJ> (considering the value of replacing affirmative action by race with affirmative action based on income); and Tanner Colby, *The Massive Liberal Failure on Race*, SLATE (Feb. 10, 2014), [http://www.slate.com/articles/life/history/features/2014/the\\_liberal\\_failure\\_on\\_race/affirmative\\_action\\_it\\_s\\_time\\_for\\_liberals\\_to\\_admit\\_it\\_isn\\_t\\_working.html](http://www.slate.com/articles/life/history/features/2014/the_liberal_failure_on_race/affirmative_action_it_s_time_for_liberals_to_admit_it_isn_t_working.html), archived at <http://perma.cc/X7SB-TWM7> (critiquing the failure of affirmative action and

declaration assumes that, while government may need to undertake remedial race-based policies in limited forms to attack the vestiges of past discrimination, racism does not exist in the present and is unlikely to spur further inequities in the future.

In some ways, however, Justice O'Connor's statement is not altogether surprising. It unfortunately (and unwittingly, one can only imagine) harkens back to the language of Justice Joseph Bradley's majority opinion in striking the Civil Rights Act of 1875 as unconstitutional.<sup>139</sup> Just twenty years after the end of slavery, Justice Bradley castigated the supporters of the legislation, suggesting that it made "special favorites" of African-Americans:

When 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.<sup>140</sup>

Just a few short years after the Civil War, Justice Bradley had no compunction about historicizing racism and asserting that, far from being necessary to protect the basic rights of African-Americans, civil rights legislation actually granted special favoritism to them.<sup>141</sup> Today's popular discourse on race often takes a similar tack. Despite the fact that we are only a generation or two removed from Jim Crow and the widespread

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positing that, *inter alia*, "[a]ffirmative action's real purpose was to neutralize black demands for equality, not fulfill them.")

139. *The Civil Rights Cases*, 109 U.S. 3, 25 (1883).

140. *Id.* at 31. The "special favorites" rhetoric has also found its way into discourse surrounding gay rights, as evidenced by its adoption by supporters of Colorado's Amendment 2, which was struck as unconstitutional in *Romer v. Evans*, 517 U.S. 620 (1996). In this case, the State of Colorado argued that Amendment 2—which precluded any state or local government action from protecting the status of persons based on their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships"—merely blocked gay people from enjoying "special rights" from the state. *Id.* The Supreme Court disagreed, finding that it actually imposed a special legal disability on homosexuals by preventing them from seeking certain legal safeguards "without constraint." *Id.*

141. *Civil Rights Cases*, 109 U.S. at 25 (1883).

*de jure* segregation of our country, we are quick to portray unabashed racism as a distinctly historical phenomenon. Rosa Parks, the standoff at Central High in Little Rock, and the bigotry of Governor Wallace of Alabama are viewed as ugly relics of our past, not cautionary tales for the present or future.<sup>142</sup>

The historicization of racism has pushed the rhetoric of colorblindness to new heights for two reasons. First, as polls show, most European-Americans characterize racial discrimination against minorities as a historical phenomenon.<sup>143</sup> Justice O'Connor's call for the end of affirmative action (and the adoption of colorblindness, at least with respect to remedial legislation) within 25 years reflects this view of the world. If, as the vast majority of Euro-Americans believe, whites and blacks are treated equally in American life, there is no need for race-conscious, remedial government interventions.

Second, in a world where racial equality already exists, the continued use of race-conscious, remedial policies would constitute affirmative discrimination against whites. As such, the concept of colorblindness has gained further traction because it appears to undo the assault that many white Americans feel against their own rights.<sup>144</sup> Indeed, it appears that many white Americans believe that the remaining battle against discrimination involves combatting *anti-white* bias.<sup>145</sup> A 2011 study by Michael Norton and Samuel Sommers seems to confirm this supposition: on average, white Americans now view anti-white bias as *more prevalent* in our country than anti-black bias.<sup>146</sup> As such, the seductive power of the concept of colorblindness—at least when invoked against remedial,

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142. George Wallace, the longtime Governor of Alabama and a serial presidential candidate, became the face of resistance to the civil rights movement. See Richard Pearson, *Former Ala. Gov. George C. Wallace Dies*, WASH. POST (Sept. 14, 1998), <http://www.washingtonpost.com/wp-srv/politics/daily/sept98/wallace.htm>, archived at <http://perma.cc/CQ74-64RR>.

143. For example, a 2011 Gallup poll found that 78 percent of white Americans feel that blacks are now treated equally with whites in their local community (and only 39 percent of blacks felt similarly). See Race Relations, GALLUP, <http://www.gallup.com/poll/1687/Race-Relations.aspx> (last visited Oct. 4, 2012), archived at <http://perma.cc/B3SM-6SZK>.

144. Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 PERSP. ON PSYCHOL. SCI. 215 (2011).

145. *Id.* at 217.

146. *Id.* at 216.



race-conscious policies by the government—has grown increasingly powerful even though the reality is that we remain color bound.

### C. *The Continued Relevance of Race*

For all our rhetorical solicitude to the trope of colorblindness, we cannot ignore that race still matters—a lot. Our examination of the racial politics of recent presidential elections<sup>147</sup> merely illustrates the broader trends. As far as private conduct is concerned, the idea of colorblindness indisputably remains more aspirational than descriptive.

On an anecdotal level, race consciousness (rather than the promised colorblindness of the Age of Obama<sup>148</sup>) has continued to dominate the news.<sup>149</sup> For the Panglossian purveyors of post-racialism, recent headlines may be difficult to explain. Consider the incendiary racial remarks made in the spring of 2014 by Donald Sterling, a billionaire real-estate magnate, one of the largest landlords in Southern California, and owner of the NBA's Los Angeles Clippers.<sup>150</sup> Sterling's invective made public the deeply bigoted worldviews of a prominent individual exercising tremendous power and economic influence. Perhaps even more disturbingly, the ensuing maelstrom revealed that the NBA—a sports league with an ownership that is almost exclusively white male<sup>151</sup> and a player pool that is more than

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147. See *supra* Part II.

148. The reference to the Age of Obama is not intended to define a distinct historical epoch, but rather, to casually refer to the time period around the Presidency of Barack Obama and the questions of colorblindness raised by the election of the first individual of African ancestry to the American Presidency.

149. Take, for example, the recent remarks of the headline-grabbing rancher Cliven Bundy, who said in a recent interview that “the Negro people” were better off as slaves. Nick Wang & Shaddee Ashtari, *If the Supreme Court Says Racism is Over, Why Are People Still Being So Racist?* HUFFINGTON POST (Apr. 29, 2014), [http://www.huffingtonpost.com/2014/04/29/racism-isnt-dead\\_n\\_5232080.html](http://www.huffingtonpost.com/2014/04/29/racism-isnt-dead_n_5232080.html), archived at <http://perma.cc/6E4G-YCTA>.

150. A leaked audio recording revealed Sterling berating his “archivist” and alleged mistress, V. Stiviano, and exhorting her, among other things, not to associate publicly with African-Americans and not to bring them to his team's games. John Branch, *N.B.A. Bars Clippers Owner Donald Sterling for Life*, N.Y. TIMES (Apr. 29, 2014), <http://www.nytimes.com/2014/04/30/sports/basketball/nba-donald-sterling-los-angeles-clippers.html>, archived at <http://perma.cc/T4ET-6Y67>.

151. Michael Jordan, owner of the Charlotte Hornets (formerly Bobcats), represents the sole exception. See Mona Chalabi, *Three Leagues, 92 Teams and One Black Principal Owner*, FIVETHIRTYEIGHT (Apr. 28, 2014), <http://fivethirtyeight.com/datalab/diversity-in-the-nba-the-nfl-and-mlb/>, archived at

75 percent African-American<sup>152</sup>—had blithely tolerated Sterling’s “plantation mentality”<sup>153</sup> and discriminatory conduct (as evidenced by numerous suits including one filed by the United States Department of Justice for housing discrimination)<sup>154</sup> and let it go unpunished for over three decades.<sup>155</sup>

Only a few months earlier, the controversial not-guilty verdict rendered by six female jurors (five white and one Hispanic) in the Florida trial of George Zimmerman for the killing of Trayvon Martin sparked protests throughout the country.<sup>156</sup> While civil rights leaders denounced the verdict’s troubling message and its implicit devaluation of black lives,<sup>157</sup>

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<http://perma.cc/BH37-GJK4> (noting that Major League Baseball and the National Football League have no black principal owners).

152. See Ralph Richard Banks, *The NBA Should Be Selling Basketball and an Education*, L.A. TIMES (May 5, 2014), <http://www.latimes.com/opinion/commentary/la-oe-banks-nba-black-boys-20140506-story.html>, archived at <http://perma.cc/V4AZ-NDQG>.

153. In a suit against his employer, former Clippers general manager Elgin Baylor, an African-American who claimed that he had suffered discrimination at the hands of the Clippers owners, described Sterling as having a “plantation mentality.” Lisa Dillman, *Clippers Legal Update: Elgin Baylor on Donald Sterling*, L.A. TIMES (Nov. 8, 2010), [http://latimesblogs.latimes.com/sports\\_blog/2010/11/nba-clippers-elgin-baylor-donald-sterling-danny-manning-alvin-gentry.html](http://latimesblogs.latimes.com/sports_blog/2010/11/nba-clippers-elgin-baylor-donald-sterling-danny-manning-alvin-gentry.html), archived at <http://perma.cc/6H4F-BZZV>.

154. See Press Release, Office Pub. Affairs, U.S. Dep’t of Justice, Justice Department Obtains Record \$2.725 Million Settlement of Housing Discrimination Lawsuit (Nov. 3, 2009), available at <http://www.justice.gov/opa/pr/2009/November/09-crt-1187.html>, archived at <http://perma.cc/BYF2-2A8C> (noting settlement of the suit for a then-record \$2.725 million for allegations of discriminatory rental practices on the basis of race, national origin, and familial status at various apartment buildings in Los Angeles).

155. See, e.g., Mark Berman, *Why the World Finally Noticed Donald Sterling’s Appalling Racism*, WASH. POST (Apr. 28, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/04/28/why-the-world-finally-noticed-donald-sterlings-appalling-history/>, archived at <http://perma.cc/KF7R-VVXD> (noting Sterling’s long history of racist, unethical and illegal conduct); accord Susan Milligan, *A Not So Sterling Record on Race*, U.S. NEWS & WORLD REP. (Apr. 28, 2014), <http://www.usnews.com/opinion/blogs/susan-milligan/2014/04/28/los-angeles-clippers-owner-don-sterlings-racist-past>, archived at <http://perma.cc/T8J9-RDUS>.

156. Although law enforcement had braced for the types of riots that erupted after the Rodney King verdict, Zimmerman’s acquittal stirred largely peaceful protests, which died down in a matter of days. See Ben Wolfgang, *Violence, Riots Don’t Materialize After George Zimmerman’s Verdict, but Some in Media Cry Foul*, WASH. TIMES (July 14, 2013), <http://www.washingtontimes.com/news/2013/jul/14/violence-riots-dont-materialize-after-zimmerman-ve/?page=all>, archived at <http://perma.cc/5ENW-2VEP>.

157. See, e.g., Molly Hennessy-Fiske & Matt Pearce, *Acquittal in Trayvon Martin Slaying Called ‘Wake-Up Call’*, L.A. TIMES (July 17, 2013) (citing speeches

many commentators defended Zimmerman's actions by justifying the use of race as a relevant factor in judging the reasonableness of Zimmerman's claims of self-defense against the hooded, unarmed African-American teenager.<sup>158</sup> Indeed, Zimmerman's supporters spoke of racial profiling as merely a form of "common sense" and deemed law enforcement officials who would ignore race as "fools [who] ought to go into another line of work."<sup>159</sup> For both sides of the debate over the verdict, race played a central role in the discourse.

All the while, as millions of Americans sought to make sense of the tragic Boston Marathon bombings, many others engaged in a peculiar debate over the race of the apparent perpetrators.<sup>160</sup> The Caucasian origins of Dzhohar "Jahar" Tsarnaev and Tamerlan Tsarnaev seemed to flummox some, who claimed it was inconsistent with the Tsarnaevs' religious affiliation with Islam.<sup>161</sup> To such observers, the term "white Muslim" appeared oxymoronic,<sup>162</sup> revealing, in the process, the

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and statements by Martin Luther King III, Jesse Jackson, and Al Sharpton decrying the verdict).

158. See, e.g., Kathleen Parker, *Why Was Zimmerman Allowed to Walk Around Armed and Loaded?*, WASH. POST (July 16, 2013), [http://www.washingtonpost.com/opinions/kathleen-parker-unanswered-questions-in-trayvon-martin-case/2013/07/16/b154e1b0-ee44-11e2-af9-ea873b7e0424\\_story.html](http://www.washingtonpost.com/opinions/kathleen-parker-unanswered-questions-in-trayvon-martin-case/2013/07/16/b154e1b0-ee44-11e2-af9-ea873b7e0424_story.html), archived at <http://perma.cc/A6BA-5JLR> ("[I]f we are honest, we know that human nature includes the accumulation of evolved biases based on experience and survival. In the courtroom, it's called profiling. In the real world, it's called common sense."); Richard Cohen, *Racism vs. Reality*, WASH. POST (July 15, 2013), [http://www.washingtonpost.com/opinions/richard-cohen-racism-vs-reality/2013/07/15/4f419eb6-ed7a-11e2-a1f9-ea873b7e0424\\_story.html](http://www.washingtonpost.com/opinions/richard-cohen-racism-vs-reality/2013/07/15/4f419eb6-ed7a-11e2-a1f9-ea873b7e0424_story.html), archived at <http://perma.cc/QVF5-SA75> ("[I]f young black males are your shooters, then it ought to be young black males whom the police stop and frisk . . . . If the police are abusing their authority and using race as the only reason, that has got to stop. But if they ignore race, then they are fools and ought to go into another line of work.").

159. Cohen, *supra* note 158.

160. For example, in acknowledging and responding to this debate, Salon.com ran an article simply entitled *Are the Tsarnaev Brothers White?* See Joan Walsh, *Are the Tsarnaev Brothers White?*, SALON (Apr. 22, 2013), [http://www.salon.com/2013/04/22/are\\_the\\_tsarnaev\\_brothers\\_white/](http://www.salon.com/2013/04/22/are_the_tsarnaev_brothers_white/), archived at <http://perma.cc/Q7FS-6DJ2>.

161. Obviously, many individuals of Caucasian descent are Muslim and there is no inextricable link between religion and ethnicity, though they are often conflated in the social construction of race. See, e.g., John Tehranian, *Performing Whiteness: Naturalization Litigation and Construction of Racial Identity in America*, 109 YALE L.J. 817 (2000) (detailing the history of religious affiliation being used as a proxy for racial identification).

162. See, e.g., Palash R. Ghosh, *What on Earth is a White Muslim?* INT'L BUS. TIMES (May 21, 2014), available at <http://www.ibtimes.com/what-earth-white-muslim-722565>, archived at <http://perma.cc/S694-P3MS>.

troubling conflation of race and religion and the continued importance of both forms of identification to the national dialogue on terrorism.<sup>163</sup>

Beyond anecdotal evidence from the headlines, however, deep and structural racial fault lines—often the work of subconscious discrimination and the cumulative impact of decades of explicit discrimination—continue to divide our country. Admittedly, overt acts of racism may have grown less acceptable in society over the past few decades. Nevertheless, unconscious racism remains a powerful, determinative force. The Implicit Association Test (IAT),<sup>164</sup> a widely-used and accepted gauge of unconscious racism,<sup>165</sup> has demonstrated that “most of us have implicit biases in the form of negative beliefs (stereotypes) and attitudes (prejudice) against racial minorities.”<sup>166</sup> Indeed, research drawing on the IAT and other similar models has repeatedly highlighted how race-based judgments that take place in our subconscious minds can inadvertently impact our choices and actions.<sup>167</sup> For example, a 2007 study revealed a surprising application of implicit bias by analyzing a vast data pool of split-second decisions—thirteen years’ worth of foul calls in the National Basketball Association.<sup>168</sup> This analysis of whistle blowing found that

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163. See, e.g., JOHN TEHRANIAN, *WHITEWASHED* (2008) (discussing the conflation of race and religion in the popular epistemological understanding of the war on terrorism).

164. The IAT was developed in 1998 by social psychologists Anthony Greenwald, Debbie McGee, and Jordan Schwartz. Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464 (1998).

165. See L. Song Richardson, *Cognitive Bias, Police Characters, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267, 298 (2012) (“[T]he IAT is the most widely used mechanism for revealing the existence of implicit biases.”) (citation omitted); Justin D. Levinson, *Superbias: The Collision of Behavioral Economics and Implicit Social Cognition*, 45 AKRON L. REV. 591, 613 (2011) (“The development of the Implicit Association Test revolutionized the way the world looked at and understood implicit bias.”).

166. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1494 (2005).

167. *Id.* at 1490–94.

168. Joseph Price & Justin Wolfers, *Race Discrimination Among NBA Referees* (Nat’l Bureau of Econ. Research, Working Paper No. 13206, 2007), available at <http://graphics.nytimes.com/packages/pdf/sports/20070501-wolfers-NBA-race-study.pdf>, archived at <http://perma.cc/BS8F-6EBF>. See also Alan Schwarz, *Study of N.B.A. Sees Racial Bias in Calling Fouls*, N.Y. TIMES (May 2, 2007), <http://www.nytimes.com/2007/05/02/sports/basketball/02refs.html?pagewanted=1&r=2&ex=117876960>, archived at <http://perma.cc/7MYM-HKWH>; Lester Munson, *Even NBA Study Might Confirm Racial Bias in Officiating*, ESPN (May 14, 2007), <http://sports.espn.go.com/nba/news/story?id=2870260>, archived at

white referees called fouls at a greater rate against black players than against white players.<sup>169</sup> The unconscious factoring of race by referees was significant enough for the authors of the study to conclude that its impact “is large enough that the probability of a team winning is noticeably affected by the racial composition of the refereeing crew.”<sup>170</sup>

Of course, implicit bias rears its ugly head at more than just sporting events. Recent empirical work demonstrates that, despite excessively optimistic assertions about its unimportance, color continues to play a critical role in the ability of individuals to succeed in the United States. While our nation has enjoyed great progress in civil rights and race relations over the past half-century, our trajectory is not entirely positive. Studies have captured the resilience of unconscious discrimination<sup>171</sup> against minority groups in all manners of economic, social, and legal life—from home purchasing and leasing<sup>172</sup> and employment<sup>173</sup> to retailing<sup>174</sup>

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<http://perma.cc/7F66-SPY9>.

169. The study also found that, while black officials called fouls more frequently against white than black players, the overall effect of this bias was less pronounced. Price & Wolfers, *supra* note 168, at 28.

170. *Id.* at 1.

171. Of course, it is certainly possible that some of this discrimination might be conscious.

172. See, e.g., MARGERY AUSTIN TURNER ET AL., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE I HDS2000, iii (2002) (Report prepared for the United States Department of Housing and Urban Development, URB. INST. Metropolitan Housing and Communities Policy Center), (noting persistent (albeit improved over time) discrimination against African-Americans in both rentals and sales of homes and worsening treatment of Hispanics; *inter alia*, Hispanics were more likely in 2000 than in 1989 to receive a higher rent-rate quotation than white counterparts).

173. In a groundbreaking study of the relationship between pigmentation and socioeconomic achievement among legal immigrants to the United States, Joni Hersch, a law and economics professor at Vanderbilt University, found that the average “light” skinned immigrant out-earned her “dark” skinned equivalent by approximately ten percent, even when controlling for race, country of origin, English ability, education, and occupation. Joni Hersch, *Profiling the New Immigrant Worker: The Effects of Skin Color and Height* (Vanderbilt Law and Economics Research Paper No. 07-02, Jan. 19, 2007), available at <http://ssrn.com/abstract=927038>. Perhaps most disturbingly of all, Hersch found that the detriment of a dark complexion was so significant that it sometimes wiped out any benefits accrued from educational attainment. As Hersch noted, “I thought that once we controlled for race and nationality, I expected the difference to go away, but even with people from the same country, the same race—skin color really matters . . .” Associated Press, *Study: Skin Tone Affects Earnings*, NBC NEWS (Jan. 26, 2007), <http://www.msnbc.msn.com/id/16831909/>, archived at <http://perma.cc/9YXW-28VM>. Similarly, a 2006 study published in the *American*

and criminal sentencing.<sup>175</sup> At the end of the day, this empirical evidence should alone dull any irrational exuberance hailing the achievement of colorblindness in our society.<sup>176</sup>

Indeed, by some measures, racial disparities are not just failing to get better; they are affirmatively getting worse. Studies have long recognized a substantial race gap in annual income.<sup>177</sup> African-Americans, for example, earn a per-capita income that is just 57.9 percent of the average enjoyed by whites.<sup>178</sup> This is a disappointing number, to be sure. As it turns out, however, the racial *income* gap pales in comparison to the racial *wealth* (i.e., asset) gap. The latter captures, at least in part, the cumulative impact of past and present discrimination on the economic power of minority groups. According to 2010 data from the Census Bureau, the average household wealth of a white family was \$110,729.<sup>179</sup> The

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*Economic Review* found that, even among blacks, skin color had a substantial impact on wages. With all things being equal, lighter skinned black men significantly out-earned their medium and darker skinned counterparts. Arthur H. Goldsmith, Darrick Hamilton & William Darity, Jr., *Shades of Discrimination: Skin Tone and Wages*, 96 AM. ECON. REV. 242 (2006).

174. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 819 (1991) (finding that black males pay almost double the mark-up enjoyed by white males when adopting identical negotiating techniques in the purchase of cars).

175. A 2012 study by M. Marit Rehavi and Sonja B. Starr examined 58,000 federal criminal cases and found that black men were on average almost twice as likely to face a mandatory minimum charge as white men were, holding arrest offense, age, and location constant. Prosecutors are about twice as likely to impose mandatory minimums on black defendants as on white defendants. Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences 2* (U. Mich. L. & Econ., Empirical Legal Studies Ctr. Paper No. 12-002, May 7, 2012) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1985377](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1985377). Notably, the study surveyed only sentencing data available after the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), which granted federal judges greater leeway in sentencing decisions. As such, one cannot dismiss the results of the study by suggesting they may reflect the vestiges of sentencing discrimination from prior generations.

176. Keith E. Sealing, *The Myth of a Color-Blind Constitution*, 54 WASH. U. J. URB. & CONTEMP. L. 157, 190 n.203 (1998) ("It seems beyond the need for debate that our society is not yet color-blind. However, Justice Scalia claims, at the very least, that we have a color-blind government. . . . Society clearly is not color-blind, despite Justice Scalia's assertions to the contrary.") (citations omitted).

177. Les Christie, *Pay Gap Persists for African-Americans*, CNN MONEY (July 30, 2010), [http://money.cnn.com/2010/07/30/news/economy/black\\_pay\\_gap\\_persists/index.htm](http://money.cnn.com/2010/07/30/news/economy/black_pay_gap_persists/index.htm), archived at <http://perma.cc/6UQ7-CC39> (citing data from the U.S. Census Bureau).

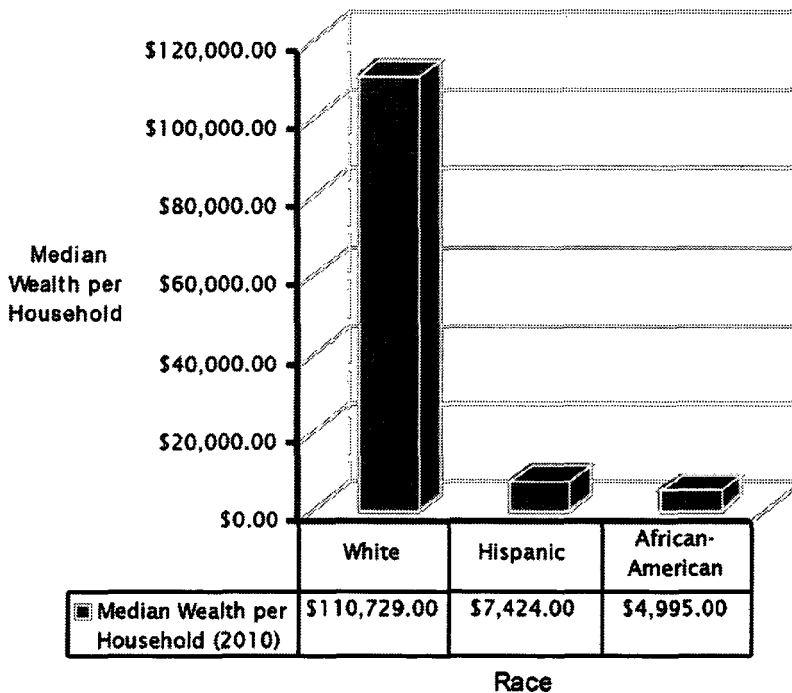
178. *Id.*

179. Tami Luhby, *Worsening Wealth Inequality by Race*, CNN MONEY (June

average household wealth of an African-American family was just \$4,995.<sup>180</sup> In short, the average white family possesses a stunning *twenty-two times more wealth* than the average African-American family.<sup>181</sup>

The news is not much better for other minority groups. Hispanic households have combined assets worth an average of \$7,424 each, meaning that the average white family controls fifteen times more wealth.<sup>182</sup> Moreover, contrary to the mainstream narrative of racial progress, disparities in wealth

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21, 2012), <http://money.cnn.com/2012/06/21/news/economy/wealth-gap-race/index.htm>, archived at <http://perma.cc/6UQ7-CC39>.

180. *Id.*

181. *Id.*

182. *Id.* With average assets worth \$69,590, Asian households also enjoy a fraction of the wealth of white households. *Id.*

are growing, not shrinking, among different ethnic groups.<sup>183</sup> According to the nonpartisan Pew Research Center, the racial wealth gap is now at its *largest* point since the government began recording such statistics a quarter century ago.<sup>184</sup> Thus, past and present discrimination have combined to provide a remarkable statistic—one that epitomizes the tragic racial divisions that continue to plague our country. If anything, these realities render unflagging adherence to the trope of colorblindness quixotic at best. Yet, when one considers the trope's selective application, its more pernicious consequences become clear.

### III. SPACE, RACE, AND THE LAW: SELECTIVE COLORBLINDNESS AND WHITE GEOGRAPHIES

To be sure, there is a sizeable disconnect between the anecdotal and statistical evidence discussed in Part III and the discrimination-free America imagined by many colorblindness advocates. Without more, however, one might legitimately ascribe the ideology of colorblindness to an innocent disagreement between the ways in which different individuals view the world. But many of the most ardent supporters of colorblindness only selectively invoke the trope. This fact frames the remainder of this Article. While the rhetoric of colorblindness has played a central role in delegitimizing and outlawing remedial programs meant to address centuries of systematic discrimination against minorities, the notion of post-racialism has remained elusive as courts (and purported colorblindness advocates) have shown little compunction in allowing explicit government consideration of race in a wide variety of other contexts—contexts that, not coincidentally, disadvantage racial minorities.<sup>185</sup> This Part explores this antinomy of colorblindness in the context of immigration policy, national security, and criminal law enforcement. This Part also

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183. See Rakesh Kochhar, Richard Fry & Paul Taylor, *Wealth Gaps Rise to Record Highs Between Whites, Blacks and Hispanics*, PEW RES. CTR. (July 26, 2011), <http://pewresearch.org/pubs/2069/housing-bubble-subprime-mortgages-hispanics-blacks-household-wealth-disparity>, archived at <http://perma.cc/NAA3-SW5W> (explaining that income gap increased between whites, Hispanics, and blacks between 2005 and 2009).

184. *Id.* (“These lopsided wealth ratios are the largest since the government began publishing such data a quarter century ago . . .”).

185. See, e.g., *infra* Part IV.0.



examines how the selective use of colorblindness has served as a powerful means to preserve and perpetrate racialized social geographies that privilege white identity.

### A. *The Geographies of Racialization*

This Article is by no means the first to critique and unmask the concept of colorblindness. Previous theorists have done an admirable job of that already.<sup>186</sup> For example, Neil Gotanda's seminal refutation of the colorblind Constitution denounced the trope as "a collection of legal themes functioning as racial ideology [and] foster[ing] white racial domination."<sup>187</sup> Meanwhile, Cheryl Harris's groundbreaking work conceptualized the trope as intricately linking racial identity and property interests.<sup>188</sup> Thus, as she argued, colorblindness serves as a doctrinal vehicle for protecting property interests in whiteness by limiting remediation for past subjugation and therefore enshrining and institutionalizing centuries of white privilege.<sup>189</sup>

With Parts IV and V, this Article builds on this existing body of work in at least two specific ways. First, Part IV highlights the paradox of colorblindness jurisprudence, particularly in regard to emerging issues related to immigration and the war on terrorism. Specifically, despite its repeated invocation and the absolutist language that typically accompanies it, the concept is selectively applied. Thus, while courts bristle at remedial programs in education and the workplace meant to offset centuries of racial oppression because they infringe the Constitution's apparently inviolate colorblindness, they have no problem legitimating the explicit and implicit use of race in a variety of contexts—colorblindness be damned.<sup>190</sup> As such, the vacillating adherence to colorblindness, grounded so often in spatial terms (*i.e.*, in the classroom, at or near the border, at a traffic stop, on airplanes, or in the workplace), has played an instrumental role in revitalizing white geographies—zones of racial exclusion and

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186. *E.g.*, Sealing, *supra* note 176.

187. Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 2 (1991).

188. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1766–69 (1993).

189. *Id.*

190. *See, e.g., infra* Part IV B.

hierarchy where rights continue to be differentiated on the basis of color.

“Space in itself may be primordially given,” geographer Edward Soja reminds us, “but the organization, and meaning of space is a product of social translation, transformation, and experience.”<sup>191</sup> Law serves as a principal vehicle through which society defines, and gives order to, space, and it is the legal construction of racially identified spaces that helps legitimate geographic zones that perpetuate segregation and other hegemonic practices targeting subaltern groups.<sup>192</sup> The selective colorblindness that legislatures and courts have adopted in recent years has therefore organized and given meaning to the new white geographies. As Audrey Kobayashi and Linda Peake cautioned, “no geography is complete, no understanding of place or landscape comprehensive, without recognizing that American geography, both as discipline and as the spatial expression of American life, is racialized.”<sup>193</sup> With the selective application of the trope of colorblindness, the law plays a central role in regulating spaces and giving real-world consequences and meaning to the social constitution of race.

In other words, the law both spatializes race and racializes space. In particular, selective colorblindness empowers the inscrutability of whiteness—“the ability to survey and navigate social space from a position of authority” and avert any critical gaze.<sup>194</sup> Thus, there is nothing “suspicious” about a white person waiting between stops at a railroad station in Havre, Montana, or a white person flying alone and sitting by two men who use the bathroom for a prolonged period of time while en route to Detroit. But, as we shall see, when the color of the individuals situated in these racialized spaces changes, the

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191. EDWARD W. SOJA, *POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY* 79–80 (1989).

192. See Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 *HARV. L. REV.* 1841, 1849 (1994) (arguing that “racial segregation is embedded in and perpetuated by the social and political construction of racially identified political space”).

193. Audrey Kobayashi & Linda Peake, *Racism Out of Place: Thoughts on Whiteness and an Antiracist Geography in the New Millennium*, 90 *ANNALS ASS’N AM. GEOGRAPHERS* 392, 392 (2000). See also Patricia L. Price, *At the Crossroads: Critical Race Theory and Critical Geographies of Race*, 34 *PROGRESS HUM. GEOGRAPHY* 147, 147 (2010) (“[R]acialized processes are always and thoroughly spatialized ones.”).

194. Owen J. Dwyer & John Paul Jones III, *White Socio-Spatial Epistemology*, 1 *SOC. & CULTURAL GEOGRAPHY* 209, 210 (2000).

outcomes differ radically.<sup>195</sup> Reasonable suspicion now raises its ugly head and the law has blessed the use of personal appearance in the decision-making of officials acting with the imprimatur of the state.<sup>196</sup>

In the end, therefore, while we are colorblind in theory, we are color bound in fact. Government regularly uses race in a variety of troubling contexts. At a minimum, these practices call into question our fealty to notions of colorblindness that have dominated political and legal discourse in recent years. More perniciously, however, the resulting uneasy gestalt perpetuates long-standing inequities (and forges new ones) by empowering a racialized social geography that continues to privilege white identity.

*B. Racializing Border Spaces: Immigration Law, Colorblindness, and the Geographies of Race*

The recent controversy over the 2010 passage of Arizona's Support Our Law Enforcement and Safe Neighborhoods Act ("SOLESNA")<sup>197</sup> provides a salient and powerful example to illustrate the way in which colorblindness, spatial racialization, and white privilege can interact. And far from being an outlier, the statute actually epitomizes the courts' broader treatment of race in the enforcement of immigration policy in ways that perpetuate, and even exacerbate, white geographies.

Also known as S.B. 1070, SOLESNA sought to "discourage and deter the unlawful entry and presence of aliens and economic activity of persons unlawfully present in the United States"<sup>198</sup> by, among other things, making it a violation of state law to run afoul of certain federal immigration statutes and

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195. *See, e.g.*, *United States v. Brignoni-Ponce*, 422 U.S. 873, 885–87 (1975) (finding that border patrol consideration of apparent ancestry in combination with other factors was permissible to meet the requirement of reasonable suspicion for searches and seizures under the Fourth Amendment).

196. *Habeeb v. Castloo*, 434 F. Supp. 2d 899, 910 (D. Mont. 2006). It is worth noting that the *Habeeb* decision was subsequently vacated by a Joint Motion to Vacate Judgment. *Habeeb v. Castloo*, 2007 WL 2122452 (D. Mont. July 16, 2007). The court vacated the decision in response to the United States government's acknowledgement that the arrest and detention of Abdul Ameer Yousef Habeeb was a mistake in the first place. *See* Joint Motion to Vacate Judgment, *Habeeb v. Castloo*, CV-05-24-GF-SEH, filed July 12, 2007, Docket No. 96.

197. Support Our Law Enforcement and Safe Neighborhoods Act of 2010, ARIZ. REV. STAT. ANN. § 11-1051 (2012) (West).

198. *Id.*

regulations. The federal government challenged the constitutionality of SOLESNA and, ultimately, the Supreme Court struck down most of it for violating the Supremacy Clause.<sup>199</sup> Specifically, the Court found federal law conflicted with, and therefore pre-empted, SOLESNA's alien registration,<sup>200</sup> employment,<sup>201</sup> and warrantless arrest<sup>202</sup> provisions. However, SOLESNA's most controversial section—the so-called “show me your papers” provision<sup>203</sup>—withstood a facial equal protection challenge, although the Court reserved the right to reconsider the equal protection implications of the statute upon its implementation.<sup>204</sup>

Embodied in Section 2(B), the “papers” provision requires state and local law enforcement officials to make reasonable efforts to determine the immigration status of any person lawfully stopped, detained, or arrested when reasonable suspicion exists that the person is an alien who is unlawfully present in the United States.<sup>205</sup> After initial protests decried the law's potential for the targeting of Latinos and other minority groups through discriminatory enforcement, the Arizona legislature amended the bill<sup>206</sup> to dictate that officials “may not consider race, color, or national origin in implementing the requirements of [the law] except to the

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199. *Arizona v. United States*, 132 S. Ct. 2492, 2500, (2012).

200. Section 3 made “failure to comply with federal alien-registration requirements a state misdemeanor.” *Id.* at 2497 (citing ARIZ. REV. STAT. ANN. § 13-1509 (2011) (West)).

201. Section 5(c) made “it a misdemeanor for an unauthorized alien to seek or engage in work in the State . . . .” *Id.* at 2497-98 (citing ARIZ. REV. STAT. ANN. § 13-2928(C) (2011) (West)).

202. Section 6 allowed “officers to arrest without a warrant a person ‘the officer has probable cause to believe . . . has committed any public offense that makes the person removable from the United States.’” *Id.* at 2498 (citing ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (2011) (West)).

203. See, e.g., Mark Sherman, *Supreme Court Issues Ruling on S.B. 1070*, HUFFINGTON POST (June 25, 2012), [http://www.huffingtonpost.com/2012/06/25/supreme-court-sb1070\\_n\\_1614121.html](http://www.huffingtonpost.com/2012/06/25/supreme-court-sb1070_n_1614121.html), archived at <http://perma.cc/HJU7-HMB6> (referring to the relevant section of S.B. 1070 as the “show me your papers” provision).

204. *Arizona*, 132 S. Ct. at 2510 (rejecting a facial constitutional challenge to section 2(b) but noting that “[t]his opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect.”).

205. S.B. 1070 § 2(B) (codified in ARIZ. REV. STAT. ANN. § 11-1051(B) (2012)) (West).

206. *Arizona's Immigration Enforcement Laws*, NAT'L CONF. ST. LEGISLATURES (last updated July 28, 2011), <http://www.ncsl.org/issues-research/immig/analysis-of-arizonas-immigration-law.aspx>, archived at <http://perma.cc/QF9-A9BD>.

extent permitted by the United States or Arizona Constitution.”<sup>207</sup> Yet race plays an intricate, if not inextricable, role in SOLESNA.

First, as a predicate matter, one wonders what possible non-racial indicia could provide “suspicion” (let alone *reasonable* suspicion) that an individual is unlawfully present in the United States. Immigration status is not visible, manifest, or easily knowable. State Senator Steve Lathrop raised this very point during a hearing before the Nebraska legislature, where a bill similar to S.B. 1070 was introduced<sup>208</sup> at the state level in 2011. To Charlie Janssen, one of the bill’s supporters, Lathrop queried, “Can you think of anything besides skin color and a command of the English language that would provide a reasonable suspicion?”<sup>209</sup> Janssen’s meandering and tortured response did little to allay Lathrop’s concerns:

If you . . . You know, one scenario would be perhaps if you pulled somebody over in an unlicensed vehicle. Nobody knew exactly where they were going. There were way too many people in the vehicle as far as . . . There are ten people in a vehicle; that could be [interruption by the gallery in the capital building]. . . reasonable suspicion.<sup>210</sup>

As Janssen’s answer reveals, proponents of such legislation face huge challenges in articulating the viability of non-racial bases for suspicion.

More damningly, the racial foundations of SOLESNA are readily apparent upon a close reading of its text. In defending SOLESNA, its supporters have parried charges of race discrimination by pointing to this purported “saving” clause that appears to require colorblindness in the enforcement of Section 2(B).<sup>211</sup> As they have argued, the legislation forces race

207. *Id.*

208. Kevin O’Hanlon, *Janssen Introduces Arizona-Style Immigration Bill*, J. STAR (Jan. 6, 2011), [http://journalstar.com/news/unicameral/janssen-introduces-arizona-style-immigration-bill/article\\_d920820a-5455-57ed-92b2-0a815ad0220f.html](http://journalstar.com/news/unicameral/janssen-introduces-arizona-style-immigration-bill/article_d920820a-5455-57ed-92b2-0a815ad0220f.html), archived at <http://perma.cc/6HNW-DWEC>.

209. Ted Genoways, *This Land Is Not Your Land: Deciding Who Belongs in America*, HARPER’S MAG., Feb. 2013, at 33, 39–40, available at <http://harpers.org/archive/2013/02/this-land-is-not-your-land/>, archived at <http://perma.cc/C727-HPLA>.

210. *Id.*

211. S.B. 1070, 49th Leg., 2d Reg. Sess. § 2(B) (Ariz. 2010) (codified at ARIZ.

neutrality by prohibiting officials from considering race, color, or national origin.<sup>212</sup> Thus, at first blush, nothing appears problematic about the legislation. For example, Arizona Governor Jan Brewer has contended that the bill's language "specifically answer[s] legal questions raised by some who expressed fears that the original law would somehow allow or lead to racial profiling . . . [and] make[s] it crystal clear and undeniable that racial profiling is illegal, and will not be tolerated in Arizona."<sup>213</sup> Kris Kobach, a law professor who helped draft SOLESNA, has made similar assertions, claiming that "S.B. 1070 expressly prohibits racial profiling. In four different sections, the law reiterates that a law enforcement official 'may not consider race, color, or national origin' in making any stops or determining an alien's immigration status."<sup>214</sup> However, the representations of Governor Brewer and Professor Kobach do not withstand logical scrutiny. The so-called "saving" clause in Section 2(B) simply does not do away with the use of race in the enforcement of the "papers" provisions. Even the most cursory examination of the language of the legislation makes this point clear.

As every first-year law student knows, the starting point for analyzing any statute is its plain meaning.<sup>215</sup> In reality, the "saving" clause just states a mere truism: that officers "may not consider race, color, or national origin in implementing the requirements of [the law] *except to the extent permitted by the United States or Arizona Constitution.*"<sup>216</sup> As a basic matter of equal protection jurisprudence, government may not consider race, color, or national origin in anything it does except to the extent permitted by the constitutions of the United States and applicable states, regardless of whether or not there is explicit

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REV. STAT. ANN. § 11-1051(B) (2012) (West)).

212. See *Arizona's Immigration Enforcement Laws*, *supra* note 206.

213. Louis Jacobson, *Arizona Immigration Law Rewrite 'Lays to Rest' Worries About Racial Profiling, Brewer Says*, TAMPA BAY TIMES (May 4, 2010) <http://www.politifact.com/truth-o-meter/statements/2010/may/04/jan-brewer/arizona-immigration-law-rewrite-lays-rest-worries-/, archived at http://perma.cc/6D75-5DA9>.

214. Kris W. Kobach, *Arizona's S.B. 1070 Explained*, 79 UMKC L. REV. 815, 818 (2011).

215. "As in all cases involving statutory construction, 'our starting point must be the language employed by Congress[.]'" *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979)).

216. S.B. 1070, 49th Leg., 2d Reg. Sess. § 2(B) (Ariz. 2010) (emphasis added) (codified at ARIZ. REV. STAT. ANN. § 11-1051(B) (2012) (West)).

language in any statute that speaks to the issue.<sup>217</sup> If the drafters of Section 2(B) actually cared to endorse race blindness in the implementation of the statute, they could have—and *should have*—drafted the bill in a fundamentally different way: without equivocation and with a bright-line requirement that officers may not consider race, color, or national origin, period.<sup>218</sup> But the drafters did no such thing. And while the first part of the “saving” provision seems to strike a triumphant note for race blindness by prohibiting government officials from considering “race, color, or national origin,” the second part of the sentence creates an exception that swallows the rule. In the end, in fact, the statute actively *endorses* the use of race-based criteria. And it does so because, contrary to Governor Brewer’s statements (and the wishes of many others), racial profiling remains perfectly legal.

Indeed, despite the Supreme Court’s rhetoric of colorblindness in striking remedial programs meant to address centuries of systematic discrimination against minorities, the Court has repeatedly blessed the use of race as a factor in the enforcement of numerous laws. The most overt example of the Court’s approval of color-conscious law enforcement came in *United States v. Brignoni-Ponce*.<sup>219</sup> In the suit, the Supreme Court unanimously found that a roving border patrol could not stop a vehicle based solely on the apparent Mexican ancestry of the occupants.<sup>220</sup> To do so, the Court reasoned, would violate the Fourth Amendment’s prohibition against unreasonable

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217. U.S. CONST. amend. XIV.

218. As Jack Chin, Carissa Hessick, Toni Massro, and Marc Miller have pointed out: “If the purpose of amending the original text of S.B. 1070 in HB 2162 was to prohibit the consideration of race as part of determinations whether to stop or inquire about nationality or immigration status, then the revised language should have eliminated the final clause, which suggests that race may be considered ‘to the extent permitted by the United States or Arizona Constitution.’ . . . There’s the rub. According to the 1975 United States Supreme Court decision *United States v. Brignoni-Ponce*, the United States Constitution allows race to be considered in immigration enforcement . . . [and] [t]he Arizona Supreme Court agrees that ‘enforcement of immigration laws often involves a relevant consideration of ethnic factors.’” Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47, 66–67 (2010) (quoting *State v. Graciano*, 653 P.2d 683, 687 n.7 (Ariz. 1982)).

219. 422 U.S. 873 (1975).

220. *Id.* at 886. It turned out that the driver of the vehicle, Brignoni-Ponce, was born in Puerto Rico, not Mexico, and was an American citizen. Bill Ritter, *Alien Smuggling Figure Held Again*, L.A. TIMES, Aug. 17, 1984, at A1. His two passengers, on the other hand, were “aliens who had entered the country illegally.” *Brignoni-Ponce*, 422 U.S. at 875.

searches and seizures.<sup>221</sup> But the Court's decision was no victory for race blindness.<sup>222</sup> As the Court proceeded to opine, it was entirely reasonable for officials to consider apparent ancestry in combination with other factors to meet the requirement of reasonable suspicion: "The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor[.]"<sup>223</sup> Notably, the Court saw no equal protection problem with such an assertion. In fact, the opinion does not discuss or cite the Equal Protection Clause a single time.<sup>224</sup> With such a move, the Court effectively blessed the use of racial profiling in a broad range of activities, including government enforcement of criminal laws. And, contrary to Scalia's exhortation that the Constitution views us all as one race—"American"<sup>225</sup>—law enforcement certainly did not view *Brignoni-Ponce* in that way, even though he was a United States citizen.

*Brignoni-Ponce* continues to be binding precedent,<sup>226</sup> though lower courts have attempted to narrow its breadth in a

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221. *Brignoni-Ponce*, 422 U.S. at 885–86.

In this case the officers relied on a single factor to justify stopping respondent's car: the apparent Mexican ancestry of the occupants. We cannot conclude that this furnished reasonable grounds to believe that the three occupants were aliens. At best the officers had only a fleeting glimpse of the persons in the moving car, illuminated by headlights. Even if they saw enough to think that the occupants were of Mexican descent, this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country. Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens.

*Id.*

222. There is also little solace in the Court's holding that Latino heritage, by itself, cannot constitute reasonable suspicion. The case represented the rare instance where the officers openly admitted that "their *only reason* [for pursuing and stopping *Brignoni-Ponce's* car] was that its three occupants appeared to be of Mexican descent." *Id.* at 875 (emphasis added). In a world where all but the most hardened bigot recognizes that blatant racial attributions are publicly verboten, such a fact pattern is increasingly unlikely to occur. Given the ruling, which blessed the use of race in combination with other factors, officers can almost always point to some race-neutral basis for the stop as well.

223. *Id.* at 886–87.

224. *Id.* at 873–87.

225. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment).

226. See *Brignoni-Ponce*, 422 U.S. 873.



few isolated cases.<sup>227</sup> However, even these machinations in the lower courts have given rise to their own set of troubling racial implications. For example, in *United States v. Montero-Camargo*, the Ninth Circuit expressly disavowed the use of race in formulating grounds for reasonable suspicion in a case where border agents conducted an immigration stop based, *inter alia*, on the defendants' Hispanic appearance.<sup>228</sup> In the process, the majority faced the challenge of somehow distinguishing *Brignoni-Ponce* to arrive at its ruling. It did so by seizing on demographic changes in the quarter century since the Supreme Court handed down *Brignoni-Ponce*.<sup>229</sup> With Latinos now constituting a large portion of border-state populations, the majority reasoned that "Hispanic appearance is of little or no use in determining which particular individuals among the vast Hispanic populace should be stopped by law enforcement officials on the lookout for illegal aliens."<sup>230</sup> The majority's valiant, albeit transparent, attempt to distinguish *Brignoni-Ponce* seemed to ignore the fact that, even in 1975, when *Brignoni-Ponce* was decided, Latinos constituted a large portion of the population in border states,<sup>231</sup> making the use of race at that time equally anemic as a basis for reasonable suspicion.

More disturbingly, a cynical gloss on *Montero-Camargo* might view the case as enabling, however unwittingly, state enforcement of racialized geographies by distinguishing between colored/mixed and white-only spaces. Notably, the ruling assiduously avoided announcing a categorical disallowance of racial considerations in the reasonable

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227. See, e.g., *United States v. Orona-Sanchez*, 648 F.2d 1039, 1042 (5th Cir. 1981) (finding that border patrol officers lacked reasonable suspicion to properly stop a three-quarter-ton pick-up truck occupied by three individuals of Latino descent hauling a camper shell with California plates because, *inter alia*, there is nothing "vaguely suspicious about the presence of persons who appear to be of Latin origin in New Mexico where over one-third of the population is Hispanic.").

228. 208 F.3d 1122, 1127 (9th Cir. 2000).

229. *Id.* at 1133 ("Current demographic data demonstrate that the statistical premises on which its dictum relies are no longer applicable. The Hispanic population of this nation, and of the Southwest and Far West in particular, has grown enormously—at least five-fold in the four states referred to in the Supreme Court's decision.").

230. *Id.* at 1134.

231. For example, Hispanics comprised at least twenty-one percent of the Texas's population by 1980. U.S. CENSUS BUREAU, tbl. 58 (2002), available at <http://www.census.gov/population/www/documentation/twps0056/tab58.pdf>, archived at <http://perma.cc/ARP8-4EUA>.

suspicion calculus.<sup>232</sup> Instead, the ruling only limited color consciousness in immigration stops where the targeted group constituted a majority, or at least a substantial portion, of the population.<sup>233</sup> Thus, while it might not be okay to stop individuals for being Hispanic in Santa Ana, California, it may be perfectly reasonable to do so just up the coast in Malibu, where they are transgressing informal color lines and the de facto segregation of our cities. Similarly, the act of being Middle Eastern in metropolitan Michigan may not create reasonable suspicion, but it certainly might in Montana.

Though perhaps not intended by the author of the decision, precisely such a reading of *Montero-Camargo* has prevailed,<sup>234</sup> and courts have effectively created different rules for the use of racial considerations in immigration enforcement depending on whether the profiling takes place in a racially mixed or white community. Consider *United States v. Manzo-Jurado*,<sup>235</sup> a Ninth Circuit case decided after *Montero-Camargo*. In finding that an individual's apparent Hispanic ethnicity could serve as a factor in establishing reasonable suspicion,<sup>236</sup> the court distinguished the binding precedent of *Montero-Camargo* with a simple, one sentence argument: the *Montero-Camargo* holding "is inapplicable here because Havre, Montana is sparsely populated with Hispanics."<sup>237</sup> In so doing, the Ninth Circuit (unintentionally, one hopes) created a perverse, geographically-bound hierarchy of rights for members of minority groups. When minorities remain amongst their own, law enforcement cannot use their race against them to target them for differential treatment. But, if minorities should stray outside of their traditional geographical confines, law enforcement officials can (and will) consider their race as a factor in deciding whether to subject them to investigation.<sup>238</sup> Such a position transforms law into an epistemological vehicle

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232. To be fair, the court had to deal with the binding precedent of *Brignoni-Ponce*, 422 U.S. 873.

233. *Montero-Camargo*, 208 F.3d at 1132 ("The likelihood that in an area in which the majority—or even a substantial part—of the population is Hispanic, any given person of Hispanic ancestry is in fact an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus.")

234. See, e.g., *United States v. Manzo-Jurado*, 457 F.3d 928 (9th Cir. 2006).

235. *Id.*

236. *Id.* at 935–36.

237. *Id.* at 935 n.6.

238. *Id.* at 935–36.

for patrolling informal color lines and regulating the racial landscape.

Thus, in another post-*Montero-Camargo* case, *Habeeb v. Castloo*,<sup>239</sup> racial profiling withstood judicial scrutiny, thereby reaffirming that, for minorities operating in white spaces, the Constitution is apparently not colorblind. In this 2006 case, a Montana federal district court granted summary judgment to the United States Customs and Border Protection agency (the CBP) in a *Bivens*<sup>240</sup> claim against its agents for their actions against an Iraqi refugee, Abdul Ameer Yousef Habeeb.<sup>241</sup> Habeeb was aboard a train heading from his home in the state of Washington to the nation's capitol when he made the apparent mistake of disembarking during a stop in Havre, Montana, with a population of 9,310.<sup>242</sup> There, two agents from the CBP approached him and demanded that he state where he was from and produce his immigration papers.<sup>243</sup> While Habeeb had his proper I-94 paperwork, he had failed to submit himself to the Special Registration ordered by the federal government against nationals of certain Middle Eastern countries in the wake of 9/11.<sup>244</sup> As a result, the agents immediately detained him, placed him in jail, and initiated removal proceedings.<sup>245</sup> Habeeb sued, claiming that the agents infringed his Fourth Amendment rights and acted in violation

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239. 434 F. Supp. 2d 899 (D. Mont. 2006).

240. At a broad level, a *Bivens* claim provides an implied cause of action (where no explicit one exists) to allow citizens to seek monetary damages from the federal government when their constitutional rights have been violated. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 423 (1971).

241. *Habeeb*, 434 F. Supp. 2d at 903, 912.

242. *Id.* at 903; *Havre, MT, Population: Census 2010 and 2000 Interactive Map, Demographics, Statistics, Quick Facts*, CENSUS VIEWER, <http://censusviewer.com/city/MT/Havre>, archived at <http://perma.cc/Y7N2-GP47>.

243. *Habeeb*, 434 F. Supp. 2d at 903.

244. On June 6, 2002, the Attorney General formally announced the National Security Entry-Exit Registration System (NSEERS), which subjected visitors to the United States from certain countries—predominantly Arab or Muslim—to increased scrutiny, including fingerprinting, periodic registration, and exit controls. John Ashcroft, U.S. Att'y Gen., Attorney General Prepared Remarks on the National Security Entry-Exit Registration System (June 5, 2002) [www.justice.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm](http://www.justice.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm), archived at <http://perma.cc/TXE9-D7SK>. In November 2002, NSEERS was amended to include special “call-in” registration. Known as “Special Registration,” the policy singled out a limited class of noncitizens—male, nonimmigrant visa holders over the age of sixteen who are from one of twenty-five Muslim and Middle Eastern countries—for special registration requirements with the government. See *Habeeb*, 434 F. Supp. 2d at 903.

245. *Habeeb*, 434 F. Supp. 2d at 903.

of the Equal Protection Clause by targeting him on the basis of his race.<sup>246</sup>

However, the targeting of Habeeb because of his ethnicity did not trouble the court. The court characterized the agents as merely performing “routine law enforcement work by exercising their liberty to address questions to other persons,”<sup>247</sup> though there was no evidence that the agents stopped anyone else to ask for their papers.<sup>248</sup> Citing to *Brignoni-Ponce*, the court noted that “an officer conducting an investigatory stop, may, in light of his training and experience, make use of a person’s appearance.”<sup>249</sup> To hold otherwise, the court sternly warned, would be “absurd.”<sup>250</sup> Despite its bold, dismissive language employed to refute Habeeb’s legal position, the court’s euphemistic use of the phrase “person’s appearance”<sup>251</sup> (instead of race) when addressing the equal protection issue betrays at least some tacit discomfort. Indeed, there is no indication in the opinion that anything about Habeeb’s “appearance” other than his race gave the agents grounds for any suspicion.<sup>252</sup> So, in the end, the court held that blatantly racial considerations can and necessarily do play a role in the enforcement of immigration law:

To find constitutional merit in Habeeb’s claim would blatantly disregard the reality that law enforcement officers must, and are entitled to, rely upon the observed behavior, personal characteristics and appearances of others every day in meeting their responsibilities. *It would be absurd* for this Court to declare that law enforcement personnel, and border protection officers in particular, were acting unconstitutionally if they availed themselves of their ability to distinguish between people based on appearance.<sup>253</sup>

With these bold words, the *Habeeb* court firmly reiterated that the type of racial profiling condoned in *Brignoni-Ponce* remains

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246. *Id.* at 904.

247. *Id.* at 905.

248. *See id.* at 903.

249. *Id.* at 910 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 885–87 (1975)).

250. *Id.* at 911.

251. *Id.* at 910.

252. *See id.* at 902–12.

253. *Id.* at 911 (emphasis added).

constitutionally permissible.

The logical implications of this jurisprudence are particularly notable when considered in the context of public rhetoric on colorblindness. A man of presumably Middle Eastern or Hispanic physiognomy might look out of place in the northern reaches of Montana. But, if that is the case and the court is right that “it would be absurd” not to allow law enforcement officials to consider personal “appearance” when deciding whom to scrutinize,<sup>254</sup> then we must also accept another uncomfortable proposition as true: the colorblind America of Justices Roberts, Scalia, and Thomas’s collective imagination does not exist. Using the logic and language of *Brignoni-Ponce*, *Habeb*, and other cases, it would apparently be “absurd” to suggest that it does.

Furthermore, selective colorblindness vitiates the notion of equal protection by effectively giving legal backing to white privilege. Consider again the outpost of Havre, Montana and how jurisprudence on the consideration of racial appearance in the enforcement of immigration policy plays out on a practical level. Havre is located less than 50 miles from the Canadian border.<sup>255</sup> Given the proximity to our northern neighbors, most undocumented aliens in Havre are likely to be white Canadian nationals. Yet white privilege allows these undocumented white Canadian nationals to avert immigration enforcement efforts that target personal “appearance.” Meanwhile, it is Latinos, Middle Easterners, and other ethnic minorities who are targeted instead.<sup>256</sup> All told, *Brignoni-Ponce* and its progeny fly in the face of our purported commitment to colorblindness and, instead, establish a series of legally-endorsed practices that help secure the integrity of the

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254. *Id.*

255. See *Havre, Montana Real Estate*, NAT'L PARKS REALTY, <http://www.nationalparksrealty.com/articles/havre-montana-real-estate.php> (last visited July 13, 2014), archived at <http://perma.cc/54QB-SA7M>.

256. See, e.g., Elizabeth Llorente, *Immigration Enforcement Law Proposed in Montana*, FOX NEWS LATINO (Jan. 16, 2013), <http://latino.foxnews.com/latino/politics/2013/01/16/immigration-enforcement-law-proposed-in-montana/>, archived at <http://perma.cc/7944-W9B3> (quoting Montana State Representative David Howard, known for his tough stance on illegal immigration, as saying he wants to “send a message to undocumented immigrants that they are not welcome in Montana,” and quoting a conservative Latino leader as bemoaning, “It’s amazing that . . . after our terrible performance with Latino voters in the election, that you would still have some Republicans who would be willing to present this type of legislation.”).

American homeland as a distinctly white space. Thus, contrary to the rhetoric of colorblindness, government is not required to be colorblind when it deals with immigration enforcement matters. And, in fact, the law's selective colorblindness has enabled the perpetuation of segregation by creating differential rules depending on whether the geography in question is racially mixed or predominantly white.

*C. Color, the Law, and the Racialized Geographies of National Security*

Permissible color consciousness and its impact on creating and perpetuating racialized geographies apparently does not end with the patrolling of our borders. Indeed, courts have echoed *Brignoni-Ponce's* approval of race-based distinctions in a variety of other contexts, including national security.<sup>257</sup> For example, in *Cerqueria*,<sup>258</sup> a 2008 case having nothing whatsoever to do with immigration policy, a federal appellate court overturned a \$400,000 jury verdict in favor of an American citizen who had sued for violation of his civil rights when he was forcibly deplaned from a domestic American Airlines flight on account of "suspicious behavior," which may have included his apparent Middle Eastern appearance (in fact, the plaintiff was of Portuguese ancestry).<sup>259</sup> The landmark award had represented the first judgment to hold an airline accountable for acts of racial profiling post-9/11.<sup>260</sup> But the First Circuit quickly overturned the result and, in voiding the verdict, the court effectively immunized airlines from liability for considering the race or ethnicity of their passengers when making determinations as to whom they would provide transport.<sup>261</sup>

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257. See *Cerqueria v. Am. Airlines*, 520 F.3d 1 (1st Cir. 2008).

258. *Id.*

259. *Id.* at 8, 20; see also Greg Stohr, *Passenger Rejected by U.S. Supreme Court on Removal from Flight*, BLOOMBERG NEWS (Oct. 6, 2008), <http://www.businessweek.com/news/2008-10-06/passenger-rejected-by-u-dot-s-dot-supreme-court-on-removal-from-flight>, archived at <http://perma.cc/8ZKF-W5NJ>.

260. See *High-Flying Profiling: Portuguese-born US Citizen Wins First Legal Victory in Racial Profiling Case Since 9/11*, DEMOCRACY NOW (Jan. 18, 2007), [http://www.democracynow.org/2007/1/18/high\\_flying\\_profiling\\_portuguese\\_born\\_u\\_s](http://www.democracynow.org/2007/1/18/high_flying_profiling_portuguese_born_u_s), archived at <http://perma.cc/9K5B-ESEK>.

261. *Cerqueria*, 520 F.3d at 14 ("We . . . hold that an air carrier's decisions to refuse transport . . . are not subject to liability unless the decision is arbitrary or capricious.").

Although the First Circuit did not cite to *Brignoni-Ponce*, the language of the opinion and its holding were eerily similar in their enforcement of white geographies. The court first conceded that, “if the Captain had made a decision to remove the plaintiff from this flight based *only* on the Captain’s bias toward persons who appeared to be of Middle Eastern descent,” such a decision would be arbitrary and capricious and therefore unlawful and actionable.<sup>262</sup> But, the court then opined that it would be an incorrect statement of law to find that perception of race could not be considered as one of the reasons “actuating, driving, informing” the decision.<sup>263</sup> Thus, *Cerqueria* concluded that, like the border patrol with respect to suspicion of alienage, airlines can consider race in the mix of information when determining whether transportation of a particular passenger is “inimical to safety.”<sup>264</sup> Not surprisingly, subsequent cases denying liability on claims of racial profiling by airlines have cited favorably to *Cerqueria*.<sup>265</sup> The result is a veritable carte blanche for the targeting of individuals of Middle Eastern descent based upon their race under the guise of national security.

Consider the case of Shoshana Hebshi, who made the mistake of booking and boarding a flight on September 11, 2011, the tenth anniversary of the tragic terrorist attacks.<sup>266</sup> Of Saudi descent on her father’s side and Jewish descent on her mother’s, Hebshi is a married mother of two and a freelance journalist, born and raised in California and living in Ohio.<sup>267</sup> Over the weekend she visited her sister in San

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262. *Id.* at 18 (emphasis added).

263. *See id.* at 19 n.22. Footnote twenty-two of the decision states that it is not forbidden for one of the reasons “actuating, driving, [or] informing” the removal decision to be based on perception of the passenger’s race or ethnicity. *Id.*

264. *See id.* at 12 (explaining that a carrier has broad discretion to refuse transport if a passenger or property item might be inimical to safety, and captain may rely on any information from crew in making the decision to refuse transport).

265. *See, e.g.,* *Al-Watan v. American Airlines, Inc.*, 658 F. Supp. 2d 816, 825, 830 (E.D. Mich. 2009) (citing to *Cerqueria* as persuasive authority and ultimately holding that “[t]here is no evidence that Captain Plummer’s action was race-based. The fact that the individuals who engaged in the suspicious conduct were of Middle Eastern/Iraqi descent does not support the conclusion that the decision to return to the gate was race-based rather than fact-based.”).

266. *See The Curious Case of Shoshana Hebshi*, *ECONOMIST* (Sept. 17, 2011), <http://www.economist.com/blogs/gulliver/2011/09/suspicious-passengers>, archived at <http://perma.cc/K3J4-2CSA>.

267. Rym Momtaz, *Half-Jewish, Half-Arab Woman Sues FBI, TSA, Frontier*

Francisco.<sup>268</sup> For her return trip, she booked a September 11th flight on Frontier Airlines, innocently thinking it would be a good day to travel and she might score more elbow room and quicker security lines.<sup>269</sup> She received far more than she bargained for, however.

Flying alone, on the Denver to Detroit segment of the trip, she sat in a row of three, next to two other individuals who were also traveling solo—and happened to be of South Asian descent.<sup>270</sup> During the course of the flight, the two men went to the lavatory around the same time.<sup>271</sup> Apparently, the duration of the men's bathroom visits caught the crew's attention.<sup>272</sup> Flight attendants reported to the Captain that two men "possibly of Arab descent" had engaged in suspicious behavior.<sup>273</sup> The Captain, in turn, filed a report with officials on the ground, who identified Hebshi (who had never left her seat during the course of the flight) as an additional person of interest when they saw her Arabic last name and seat assignment.<sup>274</sup> When the plane landed in Detroit, officials from a panoply of local and federal agencies, including the Federal Bureau of Investigation (FBI), the Transportation Security Administration (TSA), Immigration and Customs Enforcement (ICE), Customs and Border Patrol (CBP), and Wayne County Airport Authority Policy (WCAAP), coordinated efforts to board the flight.<sup>275</sup> The officials handcuffed, arrested, and forcibly deplaned Hebshi and the two South Asian men at gunpoint.<sup>276</sup>

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*Airlines over 9/11 Strip Search*, ABC NEWS (Jan. 23, 2013), <http://abcnews.go.com/Blotter/half-jewish-half-arab-woman-sues-fbi-tsa/story?id=18292929>, archived at <http://perma.cc/4LHC-B7HW>.

268. See Rachel Goodman, *Making Flying While Brown Safe Again*, ACLU (July 18, 2014), <https://www.aclu.org/blog/racial-justice/making-flying-while-brown-safe-again>, archived at <http://perma.cc/B7ZE-CEQJ>.

269. Shoshana Hebshi, *Some Real Shock and Awe: Racially Profiled and Cuffed in Detroit*, STORIES FROM HEARTLAND (Sept. 12, 2011), <http://shebshi.wordpress.com/2011/09/12/some-real-shock-and-awe-racially-profiled-and-cuffed-in-detroit/>, archived at <http://perma.cc/9BEN-D84D>; see also *The Curious Case of Shoshana Hebshi*, *supra* note 266.

270. See Momtaz, *supra* note 267.

271. Niraj Warikoo, *Ohio Woman Sues FBI, Airline for Racial Profiling*, USA TODAY (Jan. 22, 2013), <http://www.usatoday.com/story/news/nation/2013/01/22/racial-profiling-lawsuit/1856619/>, archived at <http://perma.cc/W3EF-73MV>.

272. *Id.*

273. *Id.*

274. See Complaint at 1, 11–12, *Hebshi v. United States*, 2:13-cv-10253-MOB-LJM (E.D. Mich. Jan. 22, 2013).

275. See Momtaz, *supra* note 267.

276. Hebshi, *supra* note 269.



The FBI, TSA, ICE, CBP, and WCAAP then took Hebshi to a sixty-square-foot cell, where they held and interrogated her for more than four hours.<sup>277</sup> During this time, and without any reasonable suspicion that she had engaged in any wrongdoing, the officials subjected Hebshi to a strip search, which, among other things, required her to bend over, spread her buttocks and cough both in front of an officer and on videotape.<sup>278</sup> For the course of her detention, officials denied Hebshi the right to make any phone calls. Finally, officials unceremoniously released her.<sup>279</sup>

When Shoshana Hebshi embarked on Frontier Airlines flight 623 from San Francisco to Detroit on September 11, 2011, she boarded it as an American, no different than any other—or so she thought. The institutionalization of racist stereotypes (blessed by fear)<sup>280</sup> and our legal regime's convenient, selective disregard of colorblindness combine to racialize the space of our nation's skyways and cast them into a geography of white privilege. Hebshi left permanently altered, staring down the barrel of a gun, subjected to humiliation and degradation and an unwarranted assault on her basic civil rights.<sup>281</sup> The but-for cause of this treatment was singular: her ethnicity. She was no longer just an American. She was irremediably pinned with a badge of inferiority, subject to disparate treatment of the basis of her race, and forced to reconcile the colorblindness she had previously believed in with her very real suffering that day. As she would later reflect,

In the aftermath of my events on Sept. 11, 2011, I feel violated, humiliated and sure that I was taken from the plane simply because of my appearance. Though I never left my seat, spoke to anyone on the flight or tinkered with any "suspicious" device, I was forced into a situation where I

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277. Hebshi Complaint, *supra* note 274, at 1, 15.

278. *Id.* at 16–17.

279. *Id.* at 17–18.

280. Simon McCormack, *Shoshana Hebshi Lawsuit Claims She Was Strip-Searched, Detained at Airport Because of Ethnicity*, HUFFINGTON POST (Jan. 23, 2013), [http://www.huffingtonpost.com/2013/01/23/shoshana-hebshi-files-law\\_n\\_2534877.html](http://www.huffingtonpost.com/2013/01/23/shoshana-hebshi-files-law_n_2534877.html), archived at <http://perma.cc/YVR6-SBPB> (quoting Sarah Mehta of the American Civil Liberties Union as arguing that “[t]he illegal arrest and strip search of Ms. Hebshi is not simply a mistake made by an airline employee or government agency, but a predictable consequence of institutionalizing racial stereotypes and mass suspicion as law enforcement tactics.”).

281. See Hebshi Complaint, *supra* note 274.

was stripped of my freedom and liberty that so many of my fellow Americans purport are the foundations of this country and should be protected at any cost.<sup>282</sup>

Many Americans who happen to look Middle Eastern—whether they are actually Middle Eastern, Latino, Portuguese, South Asian, or of Mediterranean origin—fear such a day in their lives too. Of course, some might argue that is simply the price that needs to be paid for the 9/11 attacks, as all of the attackers were Middle Eastern. Besides the reductionist error in such logic,<sup>283</sup> even if such a point is taken at face value, it makes an important tacit admission. If those who appear Middle Eastern are to be more closely scrutinized for one reason alone—their racial phenotype—then we do not live in the race-blind world imagined by many proponents of the colorblind Constitution.

The lack of colorblindness does not just apply to activity in airports; it can easily attach to virtually every facet of life. On the eve of the ten-year observance of the tragic September 11, 2001 terrorist attacks, the Associated Press obtained hundreds of pages of leaked documents from the New York Police Department (NYPD).<sup>284</sup> The materials unveiled some of the ways in which local authorities have sought to prevent the recurrence of another terrorist attack.<sup>285</sup> And while there are many things to praise about the NYPD's efforts, the NYPD's maintenance of an explicit list of "ancestries of interest"<sup>286</sup> is not one of them. It appears that the NYPD has used such a list to guide its undercover operations, including those of its

282. Hebshi, *supra* note 269.

283. See John Tehranian, *The Last Minstrel Show? Racial Profiling, the War on Terrorism and the Mass Media*, 41 CONN. L. REV. 781, 787–94 (2009).

284. See *NYPD Has Labeled Mosques Terror Groups, Spied on Them*, CBS NEWS (Aug. 28, 2013), <http://www.cbsnews.com/news/nypd-has-labeled-mosques-terror-groups-spied-on-them-ap/>, archived at <http://perma.cc/V8UJ-6X9X>; *Justice Dept. to Review NYPD over Muslim Spying*, CBS NEWS (Feb. 28, 2012), <http://www.cbsnews.com/news/justice-dept-to-review-nypd-over-muslim-spying/>, archived at <http://perma.cc/W6VB-LXRG>.

285. Matt Apuzzo & Adam Goldman, *Documents Show N.Y. Police Watched Devout Muslims*, ASSOCIATED PRESS (Sept. 6, 2011), <http://www.ap.org/Content/AP-In-The-News/2011/Documents-show-NY-police-watched-devout-Muslims>, archived at <http://perma.cc/66JC-BJ6P>.

286. Matt Apuzzo & Adam Goldman, *Inside the Spy Unit that NYPD Says Doesn't Exist*, ASSOCIATED PRESS, (Aug. 31, 2011), <http://www.ap.org/content/ap-in-the-news/2011/inside-the-spy-unit-that-nypd-says-doesnt-exist>, archived at <http://perma.cc/XDM4-J5J5>.

clandestine Demographics Unit, which has targeted areas dubbed as “ethnic hotspots.”<sup>287</sup> The leaked documents also cast light upon the NYPD’s systematic surveillance efforts into what appears to be every aspect of Middle Eastern and Islamic life in the city. In closely monitoring activities at mosques, schools, businesses, student groups, and NGOs, the NYPD actively used “ethnic orientation,”<sup>288</sup> along with other indicia, to identify targets that would be subject to heightened scrutiny.<sup>289</sup> Wrote Leonard Levitt, a journalist who has covered the activities of the NYPD for over three decades, “[t]he breadth and scope of the surveillance described in the documents suggest that the police have been painting with a broad brush and may have targeted subjects without specific tips about wrongdoing.”<sup>290</sup> While no one can reasonably question the NYPD’s good faith and rightful commitment to preventing another 9/11, the leaked documents suggest a sharp disconnect between reality and the public announcements of Mayor Bloomberg and others, who have repeatedly insisted that the New York City government does not take religion or ethnicity into account in their policing efforts.<sup>291</sup> And, it is not just in terrorism-related cases where race continues to play an explicit and judicially-endorsed role in law enforcement efforts.

*D. Criminality and Color: The Racial Geographies of Law Enforcement*

Indeed, despite the irrational exuberance of post-racialism, classic cases of racial profiling—police use of race as a proxy for criminality—continue unabated. Admittedly, the courts have occasionally acknowledged the problems surrounding such practices.<sup>292</sup> For example, as the Ninth Circuit has conceded,

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287. Leonard Levitt, *The NYPD: Spies, Spooks and Lies*, NYPD CONFIDENTIAL (Sept. 5, 2011), <http://nypdconfidential.com/print/2011p/110905p.html>, archived at <http://perma.cc/RSY9-LELN>.

288. Apuzzo & Goldman, *supra* note 285.

289. And while Americans of Middle-Eastern ancestry are forcibly deemed “white” by federal and state laws, see JOHN TEHRANIAN, *WHITEWASHED: AMERICA’S INVISIBLE MIDDLE EASTERN MINORITY* 1–8 (2009), it is a safe bet that no one at the NYPD considered the subjects of their surveillance efforts to be “white.”

290. Levitt, *supra* note 287.

291. *Id.*

292. See, e.g., *Montero-Camargo*, 208 F.3d at 1135, 1135 n.24 (acknowledging that it “would be an anomalous result to hold that race may be considered when it

“A significant body of research shows that race is routinely and improperly used as a proxy for criminality, and is often the defining factor in a police officer’s decisions to arrest, stop, or frisk potential suspects.”<sup>293</sup> These policies are so ubiquitous they have developed a colloquial name: Driving while Black.<sup>294</sup>

In the end, courts have generally condoned the continued use of such profiling.<sup>295</sup> Most famously, the Supreme Court has immunized such racially-motivated conduct by law enforcement from Fourth Amendment scrutiny. In *Whren v. United States*,<sup>296</sup> two young African-American defendants challenged a search of their car that occurred when, after idling at a stop sign for some twenty seconds, they made a hasty right turn without signaling and sped off in front of undercover, plainclothes officers in an unmarked vehicle.<sup>297</sup> Based on the traffic violation, the officers stopped the car.<sup>298</sup> They observed drugs in the car and arrested the two young men.<sup>299</sup>

The defendants challenged the officers’ actions by claiming that a mere traffic violation cannot, by itself, provide reasonable grounds for a stop under the Fourth Amendment.<sup>300</sup> To hold otherwise would allow police to use the ubiquity of minor traffic violations to rationalize the instigation of

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harms people, but not when it helps them”).

293. *Id.* (citing Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 956–57 nn.1–3 (1999) (collecting sources detailing the role race plays in law enforcement decisions to stop and search)); see also Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 COLUM. HUM. RTS. L. REV. 551, 554–71 (1997) (summarizing studies of selective law enforcement practices and public perceptions of them); accord David A. Harris, *The Stories, The Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265 (1999); David A. Harris, *“Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 559–71 (1997) (discussing four cases of racial bias in traffic stops); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 431–32 nn.41–51 (1997) (summarizing empirical evidence on the role of race in decisions to stop and detain civilians).

294. See Neil Gotanda, *Beyond Supreme Court Anti-Discrimination: An Essay on Racial Subordinations, Racial Pleasures and Commodified Race*, 1 COLUM. J. RACE & L. 273, 282 (2012) (“The scenario of an African American driver being stopped on a pretext by a police officer is now well-known—‘driving while Black.’”).

295. See, e.g., *Whren v. United States*, 517 U.S. 806, 812 (1996).

296. *Id.*

297. *Id.* at 808.

298. *Id.* at 808–09.

299. *Id.* at 809.

300. *Id.* at 808.

searches and seizures against anyone, regardless of probable cause of criminal activity. The Supreme Court nevertheless rejected the defendants' constitutional challenge and held that, so long as the police had probable cause to believe that a traffic violation had occurred, the stop was per se reasonable under the Fourth Amendment, regardless of whether the officers expressly used race as a but-for reason for the stop.<sup>301</sup> As the Court stated, "we [have] never held, outside the context of inventory search or administrative inspection (discussed above), that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment."<sup>302</sup>

Significantly, the police in *Whren* had deviated substantially from both ordinary practice and the explicit regulations that governed their behavior.<sup>303</sup> The relevant D.C. Police Regulations allowed plainclothes officers in unmarked vehicle to enforce traffic laws "only in the case of a violation that is so grave as to pose an *immediate threat* to the safety of others."<sup>304</sup> Despite these facts, the Court determined that the motivations of the officers in deciding to enforce the traffic violation were irrelevant for determining the reasonableness of their actions under the Fourth Amendment.<sup>305</sup>

As a result of its ruling in *Whren*, the Supreme Court has eviscerated the ability of potential litigants to challenge pretextual police stops that might be driven by race.<sup>306</sup> As Devon Carbado has concluded, "In *Whren*, the Supreme Court makes it clear that, at least under the Fourth Amendment, racial profiling claims are not constitutionally cognizable. In other words, for purposes of Fourth Amendment law, race does

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301. *Id.* at 813.

302. *Id.* at 812; see also *Terry*, 392 U.S. at 13 (setting the stage for *Whren* by noting, *inter alia*, that the police can initiate encounters with civilians "for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime").

303. *Whren v. United States*, 517 U.S. 806, 815 (1996).

304. *Id.* (quoting Metropolitan Police Department, Washington, D.C., General Order 303.1, pt. 1, Objectives and Policies (A)(2)(4) (Apr. 30, 1992)) (emphasis added).

305. *Id.* at 813 (holding that the Court's precedent "foreclose[s] any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved . . .").

306. See M.K.B. Darmer, *Teaching Whren to White Kids*, 15 MICH. J. RACE & L. 109, 110 (2009); see also David A. Harris, *Addressing Racial Profiling in the States: A Case Study of the "New Federalism" in Constitutional Criminal Procedure*, 3 U. PA. J. CONST. L. 367, 370 (2001).

not matter.”<sup>307</sup> Of course, the *Whren* Court did acknowledge that racial profiling could conceivably violate the Equal Protection Clause of the Fourteenth Amendment.<sup>308</sup> But, to do so would require proof that the profiling was both intentional and resulted from racial animus—dual dictates firmly established by *Washington v. Davis*.<sup>309</sup> To say this requirement renders triumph in a racial profiling claim unlikely is an understatement.<sup>310</sup> As Devon Carbado points out, “Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that some outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decision maker’s beliefs, desires, and wishes.”<sup>311</sup>

All told, the courts continue to actively condone color consciousness in a wide variety of contexts, from immigration and criminal law enforcement to national security matters. Though we may think that racial profiling *should* be illegal,

307. Carbado, *supra* note 31, at 1033; see also I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 64 (2009) (“In so holding, the Court essentially sanctioned the police practice of singling out individuals for pretextual traffic stops in the hope of discovering contraband, a practice . . . known to some as driving while black or driving while brown—[that] disproportionately impacts law-abiding minorities.”).

308. *Whren*, 517 U.S. at 813 (“The Constitution prohibits selective enforcement of the law based on considerations such as race.”).

309. See 426 U.S. 299, 240 (1976) (requiring, for a viable Equal Protection claim, that “the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose”).

310. See, e.g., L. Darnell Weeden, *Johnnie Cochran Challenged America’s New Age Officially Unintentional Black Code; A Constitutionally Permissible Racial Profiling Policy*, 33 T. MARSHALL L. REV. 135, 138–39 (2007) (“Showing that you have been a constitutional victim of racial profiling is virtually a mission impossible, unless you can demonstrate discriminatory intent. . . . In the real world of contemporary African-American experience, statistics support the conclusion that a substantial disparity in racially motivated stops, searches, arrests, as well as the excessive use of force by law enforcement officers exist. These statistics, however, fail to establish actual intent to discriminate on the basis of race under relevant constitutional analysis.”) (citations omitted).

311. Carbado, *supra* note 31, at 1034 n.349. See also Weeden, *supra* note 310, at 138–39 (“Showing that you have been a constitutional victim of racial profiling is virtually a mission impossible, unless you can demonstrate discriminatory intent. . . . In the real world of contemporary African American experience, statistics support the conclusion that a substantial disparity in racially motivated stops, searches, arrests, as well as the excessive use of force by law enforcement officers exist. These statistics, however, fail to establish actual intent to discriminate on the basis of race under relevant constitutional analysis.”).

and some even believe that it is illegal, the courts have repeatedly held that it is not. As a result, government officials feel free to use race implicitly and expressly in promulgating policies and targeting certain groups for the heightened scrutiny of law enforcement.

All the while, attempts to outlaw racial profiling by statute have consistently and notably failed.<sup>312</sup> During his time in the Senate, Russell Feingold introduced the End Racial Profiling Act numerous times—in 2001, 2004, 2005, and 2007.<sup>313</sup> The Act would have outlawed the consideration of race, ethnicity, national origin, or religion in any law-enforcement decision to subject an individual to routine or spontaneous investigatory activities.<sup>314</sup> Yet the proposed legislation never got further than a subcommittee hearing.<sup>315</sup> And, the many champions of colorblindness when remedial race-based policies come before legislatures or the courts were conspicuously absent when given the opportunity to support this ban on the invidious use of race by the government.

The selective silence of colorblindness advocates appears to lend further credence to Derrick Bell's interest-convergence theory.<sup>316</sup> Explaining *Brown v. Board of Education* in terms of its symbolic impact in the waging of the Cold War, Bell famously posited that a majority race will generally support equality for minorities *only* when doing so advances its own interests.<sup>317</sup> Despite the problematic reductionism and seeming fatalism of his theory,<sup>318</sup> the twists and turns of race

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312. See End Racial Profiling Act (ERPA) of 2007, S. 2481, 110th Cong. (2007); ERPA of 2005, S. 2138, 109th Cong. (2005); ERPA of 2004, S. 2132, 108th Cong. (2004); ERPA of 2001, S. 989, 107th Cong. (2001).

313. S. 2481; S. 2138. See also Kirstin Connor, *Updating Brignoni-Ponce: A Critical Analysis of Race-Based Immigration Enforcement*, 11 N.Y.U. J. LEG. & PUB. POL'Y 567, 577 (2008).

314. S. 2481 § 3(6).

315. Connor, *supra* note 313, at 590.

316. See Derrick Bell, *Brown and the Interest-Convergence Dilemma*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 91–106 (Derrick Bell ed., 1980).

317. See *id.*

318. See, e.g., Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105, 156–57 NW. U. L. REV. 149 (2011) (arguing that Bell's interest-convergence thesis suffers from four analytical flaws, including its overbroad conceptualization of the respective interests of racial groups, its incorrect supposition that race relations throughout our nation's history are characterized more by continuity than change, its failure to grant sufficient agency to individuals shaping racial realities, and its tendency to ignore certain advances in racial equality).

jurisprudence in the past few years seem to render Bell's cynicism eerily prescient. Affirmative action remains legal by the thinnest of margins and the sole remaining rationale that courts will accept for its implementation rests on the promotion of diversity in the classroom—grounds that primarily benefit a white majority.<sup>319</sup> Meanwhile, when minorities challenge racial profiling conducted or condoned by the government, the supporters of categorical colorblindness lodge nary a whimper.

The burden of this startling allowance for race consciousness falls almost uniformly on non-white groups. As we have seen, courts have repeatedly upheld the use of race in enforcing immigration laws.<sup>320</sup> Yet that use of race typically involves the identification of persons of color, particularly Latinos.<sup>321</sup> Courts have upheld the use of race for identifying airline passengers who might be "inimical to safety."<sup>322</sup> Yet that use of race typically involves the identification of persons of color, particularly Middle Easterners.<sup>323</sup> And courts have upheld the use of race for traffic stops.<sup>324</sup> Yet that use of race typically involves the identification of persons of color, particularly African-Americans.<sup>325</sup> As Part V further explores, colorblindness is invoked when attacking policies that seem to disadvantage the racial majority, while it is wholly ignored when considering policies that disadvantage racial minorities. It appears that the selective application of colorblindness is, in itself, not colorblind.

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319. See, e.g., Joshua M. Levine, *Stigma's Opening: Grutter's Diversity Interest(s) and the New Calculus for Affirmative Action in Higher Education*, 94 CAL. L. REV. 457, 462 (2006) (arguing that "[t]he *Bakke* diversity rationale, with its emphasis on minorities' 'contribut[ion],' is about the use of people of color to advance the university's educational goals for its (mostly) white students.") (footnote omitted); Daria Roithmayr, *Tacking Left: A Radical Critique of Grutter*, 21 CONST. COMMENTARY 191, 213 (2004) ("In *Grutter*, the compelling government interest that the Court uses to justify race-conscious admissions preferences is neither remedying past discrimination nor reducing societal discrimination, nor even benefitting the small numbers of students who are admitted via diversity programs. Rather, the Court finds a compelling interest in diversifying the classroom for the benefit of white students.").

320. See *supra*, Part IV.B.

321. *Id.*

322. *Cerqueria v. Am. Airlines*, 520 F.3d 1, 19–20 (1st Cir. 2008).

323. *Id.*

324. See *Whren v. United States*, 517 U.S. 806 (1996).

325. *Id.*; see also sources cited *supra* note 293.



#### IV. RACIALIZATION REDUX: WHITE GEOGRAPHIES IN THE CLASSROOM

Even as courts continue to condone traditional forms of racial profiling and bless the express use of ethnicity in various domestic spaces such as our borders, streets, highways, railways, and air-routes, the rhetoric of colorblindness continues to animate numerous policy trends in other locales.<sup>326</sup> As inculcators of the next generation, educational institutions have served as a particularly important site in the debate over colorblindness. Besides the more prominent fight to do away with affirmative action in admissions, efforts are also underway to outlaw so-called ethnic studies programs within the public schools.<sup>327</sup> Thus, the advocates of colorblindness seek to enforce the veneer of race neutrality in determining both who gains admission to classrooms and what constitutes an acceptable curriculum within the classroom. Just like the colorblindness amnesia witnessed in immigration, national security, and criminal enforcement matters, the cynical use of colorblindness to control the educational process fuels the reification of white geographies characterized by hierarchy and racial subordination. To illustrate this point, we examine the passage of Arizona's H.B. 2281, a law that, among other things, put a swift end to the ethnic studies programs in the state's public schools.<sup>328</sup> As we shall see, the legislation has helped reestablish Arizona's academic spaces as distinctly white geographies where certain forms of dissent and alternatives to the dominant modalities of knowledge are no longer tolerated.

Despite its role in disempowering communities of color and reasserting a genteel, though deeply pernicious, form of white supremacy in the classroom, H.B. 2281 won praise from its supporters for its fealty to equal protection mandates.<sup>329</sup> Much

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326. See *infra*, Part IV.

327. See, e.g., Roque Planas, *Nora Espinoza, New Mexico Legislator: Keep Mexican-American Studies Books Out of Schools*, HUFFINGTON POST (Mar. 13, 2013, 8:26 AM), [http://www.huffingtonpost.com/2013/03/13/nora-espinoza-mexican-american-studies\\_n\\_2863540.html](http://www.huffingtonpost.com/2013/03/13/nora-espinoza-mexican-american-studies_n_2863540.html), archived at <http://perma.cc/BKC2-2DX9>.

328. H.B. 2281, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (amending Title 15, chapter 1, article 1 of the Arizona Revised Statutes). See also Nicole Santa Cruz, *Arizona Bill Targeting Ethnic Studies Signed into Law*, L.A. TIMES (May 12, 2010), <http://articles.latimes.com/2010/may/12/nation/la-na-ethnic-studies-20100512>, archived at <http://perma.cc/V697-2B9J>.

329. Indeed, Tom Horne told CNN that the aim of the legislation was to uphold "one of our important functions . . . to teach kids, kids from different backgrounds,

like the anti-affirmative action jurisprudence we discussed earlier, the colorblind rhetoric of both Harlan's dissent in *Plessy v. Ferguson* and the *Brown v. Board of Education* decision that it informed play a central, albeit disingenuous, role in the public legitimation of H.B. 2281. For example, Arizona Attorney General Tom Horne, the chief architect of the legislation, has both preempted (in lobbying for the law) and responded to (in defending the law) charges of racism by aligning himself and his allies with the true spirit of the civil rights movement and the fight for racial equality.<sup>330</sup> He told readers in a 2007 letter to the editor that kicked off the campaign that eventually led to H.B. 2281:<sup>331</sup>

I grew up in the civil rights era. In the summer of 1963, having just graduated from high school, I participated in the march on Washington, in which Martin Luther King gave his famous speech, that his son should be judged by the content of his character, not the color of his skin[.]<sup>332</sup>

Then, he proceeded to note, "I have held on to this ideal in the face of subsequent fads: political correctness, identity politics, racial preferences, and 'ethnic studies.'"<sup>333</sup> In an interview with the *New York Times* following the passage of H.B. 2281, Horne similarly rebuked allegations likening him to Eugene "Bull" Connor, Birmingham's notorious erstwhile commissioner for public safety who rose to prominence as the face of bigotry in the 1960s.<sup>334</sup> Once again, he invoked his attendance at the March on Washington and then said of his opponents: "They are the 'Bull Connors.' They are the ones resegregating."<sup>335</sup>

Horne's tack is eerily reminiscent of the words of President

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to treat each other as individuals, and not to . . . infuse them with ethnic chauvinism about a particular race." Julianne Hing, *Chicano Studies Teach Ethnic Chauvinism, Says AZ School Chief Tom Horne*, COLORLINES (May 13, 2012, 11:39 AM), [http://colorlines.com/archives/2010/05/az\\_superintendent\\_tom\\_horne\\_chicano\\_studies\\_teaches\\_ethnic\\_chauvinism\\_video.html](http://colorlines.com/archives/2010/05/az_superintendent_tom_horne_chicano_studies_teaches_ethnic_chauvinism_video.html), archived at <http://perma.cc/R36N-GBUK>.

330. Tom Horne, Letter to the Editor, *Racist Views Are Poor Use of School Funding*, ARIZ. REPUBLIC, Feb. 3, 2007, at B7.

331. *Id.*

332. *Id.*

333. *Id.*

334. Marc Lacey, *Rift in Arizona as Latin Class Is Found Illegal*, N.Y. TIMES, Jan. 8, 2011, at A1.

335. *Id.*

Andrew Johnson some century-and-a-half ago when he vetoed the 1866 Civil Rights Bill.<sup>336</sup> Johnson and his allies argued that the real racists were the ones who were forcing the government to be race-conscious—to provide “special protection” for black Americans over white ones.<sup>337</sup> Johnson wrote:

In all our experience as a people living under Federal and State law, no such system as that contemplated by the details of this bill has ever before been proposed or adopted. They establish for the security of the colored race safeguards which go indefinitely beyond any that the General Government has ever provided for the white race . . . the distinction of race and color is by the bill made to operate in favor of the colored against the white race.”<sup>338</sup>

Yet, just as Johnson’s “colorblind” sentiments ring disingenuous when one considers his active support for slavery, Horne and his supporters were notably absent in citing the dictates of the colorblind Constitution when contemplating the passage of SOLESNA, Arizona’s controversial immigration enforcement law.<sup>339</sup> At the core, however, SOLESNA and H.B. 2281 represent two sides of the same coin as the battle rages on to (re)establish Arizona as a distinctly white space.

On May 11, 2010, Governor Brewer of Arizona signed H.B. 2281 into law.<sup>340</sup> Not coincidentally, Arizona’s law banning “ethnic” education in all public schools came about two weeks after SOLESNA (Arizona’s controversial immigration enforcement law) passed through Brewer’s desk.<sup>341</sup> This

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336. Andrew Johnson, Presidential Statement on Vetoing the Civil Rights Bill of 1866, (Mar. 27, 1866), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=71978>, *archived at* <http://perma.cc/84DK-SEXP>; *see also* Jamelle Bouie, *How Not to End Racial Discrimination*, SLATE (Apr. 18, 2014, 3:14 AM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2014/04/national\\_review\\_is\\_wrong\\_on\\_racial\\_discrimination\\_conservatives\\_have\\_been.html](http://www.slate.com/articles/news_and_politics/politics/2014/04/national_review_is_wrong_on_racial_discrimination_conservatives_have_been.html), *archived at* <http://perma.cc/W4HD-D3LE> (citing and contextualizing Johnson’s veto statement).

337. Johnson, *supra* note 336.

338. *Id.*

339. *See* Horne, *supra* note 330.

340. Julianne Hing, *Arizona’s Gov. Brewer Signs Ethnic Studies Ban Into Law*, COLORLINES (May 12, 2010, 12:25 PM), [http://colorlines.com/archives/2010/05/arizonas\\_gov\\_brewer\\_signs\\_ethnic\\_studies\\_ban\\_into\\_law.html](http://colorlines.com/archives/2010/05/arizonas_gov_brewer_signs_ethnic_studies_ban_into_law.html), *archived at* <http://perma.cc/4PN7-HUJC>.

341. *See id.*

temporal convergence highlights the bills' common roots and results. As George Martinez has argued, "the creation of a white geographical space in Arizona through S.B. 1070 finds an analogous creation of whiteness in the educational curriculum through H.B. 2281."<sup>342</sup> In both cases, putative allegiance to colorblindness has, ironically, helped perfect Arizona's development as a zone of racial exclusion. Hailed as vindicating the idea that "public school pupils should be taught to treat and value each other as individuals and not be taught to resent or hate other races or classes of people,"<sup>343</sup> H.B. 2281 prohibited any public grade school in Arizona from offering courses that, among other things, "advocate ethnic solidarity" or "are designed primarily for pupils of a particular ethnic group."<sup>344</sup> Admittedly, the bill retained an exception for "the instruction of the Holocaust, any other instance of genocide, or the *historical* oppression of a particular group of people based on ethnicity, race, or class."<sup>345</sup>

Ironically, however, the careful wording of H.B. 2281's limiting language betrays its imposition of a distinctly racialized conception of knowledge in Arizona's educational spaces. First, the bill implicitly adopts a worldview that reflects the feelings of the average white American: oppression of the racial (or even class-based) variety is a distinctly *historical* phenomenon.<sup>346</sup> Second, the language establishing the exclusion is not stated in illustrative terms (*i.e.*, with an "including but not limited to" clause).<sup>347</sup> As a result, future interpreters of the statute might argue that ethnicity-related topics of instruction not expressly listed in the exclusion necessarily run afoul of the statute. Thus, the exemption allows for the teaching of *historical* oppression, but, potentially, not instruction pertaining to current inequities. Presumably, therefore, students could not learn about topics discussed in this very article, including the courts' inconsistent fealty to the colorblind Constitution. They could not discuss current events related to race, such as instances of police brutality based on

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342. George A. Martinez, *Arizona, Immigration, and Latinos: The Epistemology of Whiteness, the Geography of Race, Interest Convergence, and the View from the Perspective of Critical Theory*, 44 ARIZ. ST. L.J. 175, 193 (2012).

343. H.B. 2281, *supra* note 328.

344. *Id.*

345. *Id.* (emphasis added).

346. See *supra* notes 143–146 and accompanying text.

347. See H.B. 2281, *supra* note 328.

race, racial profiling by the government, and continued race discrimination in both the public and private sectors. Students could not learn about arguments against voter identification laws, which (whether justified or not) indisputably have a disproportionate impact on minorities, women, and the poor<sup>348</sup> and, according to critics, raise troubling questions about the intent behind the provisions.<sup>349</sup> Teachers could not discuss how funding grade-school education through local property taxes exacerbates racial inequalities because it irremediably connects the race-based economic disparities of the past and present with the opportunities of the future. Indeed, with the passage of H.B. 2281, it would appear that instruction pertaining to the very racial implications of SOLESNA and H.B. 2281 themselves would be verboten.

As a result, in the schools of Arizona, it is possible that racism can now only be spoken about in the past tense, if at all. This forced historicization serves as an Orwellian means to control the discourse of race and to preclude challenges to the narrative of the New Colorblind America—a narrative that stands in stark contrast to the realities of the continuing relevance of race that we discussed in Parts II and III, and to the allowance of color-consciousness by the legislatures and courts in the various contexts that we discussed in Part IV. Furthermore, H.B. 2281 suggests that programs meant to create cultural or ethnic balance—in the workplace, in the classroom, or in our children’s textbooks—could be deemed impermissible violations of the equal protection doctrine’s ostensible colorblindness mandate.

One might argue that ethnic studies programs can survive so long as they do not “advocate ethnicity solidarity” or are not “designed primarily for students of a particular ethnic group.”<sup>350</sup> But in practice, H.B. 2281’s interdiction on ethnic studies programs has been read broadly.<sup>351</sup> Consider the

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348. See Ari Berman, *Texas Voter ID. Law Discriminates Against Women, Students, and Minorities*, NATION (Oct. 23, 2013, 11:06 AM), <http://www.thenation.com/blog/176792/texas-voter-id-law-discriminates-against-women-students-and-minorities#>, archived at <http://perma.cc/GCR9-JNTU>.

349. See Christopher Ingraham, *Study Finds Strong Evidence for Discriminatory Intent Behind Voter ID Laws*, WASH. POST (June 3, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/06/03/study-finds-strong-evidence-for-discriminatory-intent-behind-voter-id-laws/>.

350. H.B. 2281, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (amending Title 15, chapter 1, article 1 of the Arizona Revised Statutes).

351. Santa Cruz, *supra* note 328.

immediate aftermath of the passage of H.B. 2281, when the legislation swiftly forced the dismantling of the Tucson School District's popular Chicano studies program, which provided courses in literature, history, and social justice with an emphasis on Latino authors and history.<sup>352</sup> Such a move might be more defensible—though certainly still problematic—if it had come with a comprehensive review of the curriculum in Arizona schools to ensure that it was not merely teaching a Eurocentric version of literature, history, philosophy, and social science. It might be more understandable if the cultural background of the authors required in the Tucson curriculum were not wildly unbalanced in relation to the composition of the Tucson student body, which is approximately 70 percent minority (62 percent Latino) and just 30 percent white.<sup>353</sup> Yet even the most optimistic proponent of colorblindness will at least admit that, even if we have now conquered the scourge of racism, bigotry and prejudice have played an unsettling role in American history. If that is the case, however, one should also recognize that teaching a history that is deemed *de jure* colorblind is necessarily tantamount to teaching a history that is *de facto* white. Simply, this so-called colorblind history came to us under conditions of extreme racial subordination. The “colorblind” history that is taught, therefore, appears to contain primarily white characters, white issues, and white perspectives with only a smattering of non-white players, dependent on what the majority has been good enough to consider adding to the curriculum (usually only in the past few years).

Ethnic studies programs such as the one in Tucson help counteract the still-prevalent bias in our schools' curricula—a bias accumulated over decades of systematic whitewashing of the classroom. With H.B. 2281, however, the majority reasserted white ownership over Arizona, both in a territorial sense (by reestablishing the Arizona public schools as a place of white domination) and in the minds of the state's rising generations (by limiting the dissemination of knowledge that might subvert traditional white narratives). Like Arizona's “show me” provisions, H.B. 2281's embrace of the “geography of

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352. *See id.*

353. Mari Herreras, *Separate but Equal?* TUCSON WEEKLY (Jan. 2, 2014), <http://www.tucsonweekly.com/tucson/separate-but-equal/Content?oid=3937819>.

exclusion”<sup>354</sup> left non-white residents of Arizona with a poignant reminder that, because of their skin color, they would continue to be treated as temporary guests, rather than full stakeholders, in the brave new “colorblind” Arizona. A paragon of ethno-normativity, H.B. 2281 took “the teachings of one culture—the colonizer’s—and [made] it the standard version of history while literally banning other accounts, turning the master narrative into the ‘normal’ one, and further denigrating marginalized perspectives.”<sup>355</sup> This use of the apparatus of the state to outlaw alternative views to the mainstream Euro-American curriculum constitutes a powerful reaction against multiculturalism and, ironically, the pluralistic values of equal protection—values that would dictate that the traditions and perspectives of all groups enjoy at least a modicum of respect and acknowledgement.

After all, the lack of ethnic and racial balance in traditional school curriculums is a continuing problem.<sup>356</sup> In 2011, the National Education Association issued a comprehensive report that sought to synthesize the wealth of research on grade-school curriculums and the impact of ethnic studies programs.<sup>357</sup> Noting the counterbalancing value of ethnic studies programs, the Report reluctantly concluded that, despite some improvements in recent years, “Euro-American experiences and worldviews” continue to dominate primary and secondary education—to such an extent that the Report did not hesitate to bill mainstream curricula as, effectively “Euro-American Studies.”<sup>358</sup> As the Report noted, “Numerous content analyses of textbooks have found an ongoing marginalization of scholarship by and about African Americans, Latino/as, Native Americans, and Asian Americans. In acknowledgement of the dominance of Euro-American perspectives in mainstream courses, such curricula can be viewed as ‘Euro-American’ ethnic studies.”<sup>359</sup> This is a particularly ironic state of affairs

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354. See Martinez, *supra* note 342, at 188.

355. Randall Amster, *Arizona Bans Ethnic Studies and, Along with It, Reason and Justice*, TRUTHOUT (Dec. 28, 2010), <http://archive.truthout.org/arizona-bans-ethnic-studies-and-along-with-it-reason-and-justice66340>, archived at <http://perma.cc/FQ6T-QFZN>.

356. See CHRISTINE E. SLEETER, *THE ACADEMIC AND SOCIAL VALUE OF ETHNIC STUDIES: A RESEARCH REVIEW 2* (2011).

357. *Id.*

358. *See id.*

359. *Id.* at vii. Notably, the report went on to state that “as students of color proceed through the school system, research finds that the overwhelming

given the increasingly large non-European-American population in our country and in the public schools especially.<sup>360</sup> For example, in Arizona, approximately 50 percent of the students in the public schools have Latino heritage.<sup>361</sup> Nevertheless, H.B. 2281 delivered a deliberate blow to the representation of their culture and perspectives in the state's educational apparatus. And H.B. 2281 represents a critical step in the reassertion of Arizona as a geographical space privileging white identity—in direct contravention of the claimed intent of colorblindness advocates.

## CONCLUSION

Without a doubt, Barack Obama's two-term presidency represents a watershed moment in the history of race relations in our country. But, contrary to the initial hopes of colorblindness advocates, Obama's successes do not mark the official end of racism; they do not equate to the signing of a national race-grievance settlement agreement, replete with mutual general releases and a section 1542 waiver;<sup>362</sup> and they do not relegate discrimination to the dustbin of history. Rather than reflecting our rapid evolution into a truly colorblind society, the electoral politics of the past two elections epitomized the emergence of a changing racial landscape. And though the trope of colorblindness has enjoyed tremendous popular appeal in recent years, it has also served as a dangerous heuristic—one that epitomizes the increasingly powerful backlash against the strides we have made towards achieving a more racially just society.

The paradox of colorblindness jurisprudence peels away the seemingly innocuous, and even appealing, veneer of

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dominance of Euro-American perspectives leads many such students to disengage from academic learning." *Id.*

360. See Richard Fry & Felisa Gonzales, *A Profile of Hispanic Public School Students*, PEW RES. CTR. (Aug. 6, 2008), <http://www.pewhispanic.org/2008/08/26/one-in-five-and-growing-fast-a-profile-of-hispanic-public-school-students/>, archived at <http://perma.cc/57D2-L2F9>.

361. *Id.*

362. See Interview with Peter Afrasiabi, Co-Director, Appellate Litigation Clinic, UCI Law School (Oct. 7, 2012). In California, virtually all settlement agreements arising out of legal disputes contain a section 1542 waiver, which expressly provides that the liability releases being granted by the settlement agreement also apply to claims that were either not known or suspected to exist at the time of the settlement. See CAL. CIV. CODE § 1542 (2005).



colorblindness discourse. On the one hand, the courts have increasingly hewed to a colorblind vision of the Constitution when weighing the permissibility of remedial race-based admissions and hiring programs for traditionally disadvantaged minorities or contemplating the continuing value of civil rights legislation meant to protect the fundamental liberties of minority groups. And, yet, on the other hand, when confronted with invidious racial targeting—in the name of patrolling our borders, keeping our streets safe from crime, or protecting the homeland from acts of terrorism—the proponents of the categorically colorblind Constitution go strikingly silent.<sup>363</sup> Indeed, the very same courts that tell us that we have a colorblind Constitution have also held that one's Latino appearance is a relevant factor in determining reasonable suspicion for an immigration sweep, one's Middle-Eastern heritage is a perfectly suitable consideration when ascertaining whether transportation of a passenger is "inimical to safety," and one's African-American descent can serve as an acceptable indicia of criminality without running afoul of the Fourth Amendment.<sup>364</sup> Though colorblind in theory, we remain color bound in fact.

These exceptions to the trope of colorblindness are not merely harmless "anomalies." Rather, they serve as powerful tools to create, re-establish, and perpetuate white geographies. As Gerald L. Neuman once cautioned in a different context,

The creation of geographical exceptions to policies otherwise regarded as fundamental is a dangerous enterprise. Anomalous zones may become, quite literally, sites of contestation of the polity's fundamental values. When an anomalous zone is defined so that mere presence in the zone results in suspension of the rule, its subversive potential is magnified. In a sense, any exception to a rule tests the firmness of the rule. Exceptions may multiply, and even if they do not, the rule is only as strong as the barriers to bringing oneself within the exception.<sup>365</sup>

The selective invocation of colorblindness in legal and political

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363. See *supra* notes 29–31 and accompanying text.

364. *Id.*

365. Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1233–34 (1996).

discourse has served as a powerful vehicle for the creation, perpetuation, and patrolling of white geographies—spaces characterized by an implicit hierarchy privileging white racial identity. Thus, drawing upon the examples of SOLESNA (Arizona’s “show-me-your-papers” immigration law), H.B. 2281 (Arizona’s legislation outlawing ethnic studies programs in public schools), and a series of racial profiling cases interpreting the Supreme Court’s *Brignoni-Ponce* decision, this Article has argued that the discriminate entreaty for post-racialism has, in fact, helped consolidate subordination practices in critical social, economic, and political spaces, thereby exacerbating racial inequalities and revitalizing the controlled white geographies of the past.

As the trope of colorblindness continues to dominate our jurisprudence on remedial legislation meant to counteract centuries of racial inequity, exceptions to colorblindness and disingenuous appeals to post-racialism consecrate white privilege at our nation’s schools, borders, highways, airways, and railways. It should not be surprising that, in the end, these contests over racialized spaces have everything to do with flexing political power and determining the future direction of our country.

And it is not just our nation’s educational institutions, borders, and instrumentalities of commerce that have become contested racialized spaces. That most sacred and democratic of place—the ballot box—has too.<sup>366</sup> In 2013, with its ruling in *Shelby County v. Holder*,<sup>367</sup> the Supreme Court held that the “coverage formula” of Section 4 of the Voting Rights Act of 1965, which had been reauthorized as recently as 2006 by Congress, violated the Constitution.<sup>368</sup> Steeped in triumphant revelry at the emergence of a bold New Colorblind America and the spirit of post-racialism, the Court found that the Act’s targeting of areas with the most egregious histories of minority-vote suppression was anachronistic and failed to recognize that the country “has changed.”<sup>369</sup> The provision had subjected certain states and municipalities with histories of voter suppression along racial lines (primarily those in the South and Southwest) to obtain federal preclearance to make

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366. See *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013).

367. *Id.*

368. *Id.* at 2615.

369. *Id.* at 2631.

changes to their voting laws.<sup>370</sup> Because of the preclearance requirement, courts had recently rejected new voter identification laws in Texas,<sup>371</sup> new district maps in Texas,<sup>372</sup> and reductions in voting hours in Florida.<sup>373</sup> Post-racialism was implicit in the Court's denunciation of the coverage formula, which the Court characterized as being "based on 40-year-old facts having no logical relationship to the present day."<sup>374</sup> Thus, with the preclearance requirements in those jurisdictions now deemed unconstitutional, a wave of new, ostensibly race-neutral legislation that purports to fight voter fraud, increase voting efficiencies, and save money will go into effect. Indeed, just days after the decision, several states reinstated efforts to implement voter identification and hours laws—provisions that courts have struck in recent years over their disproportionate impact on racial minorities.<sup>375</sup>

In other words, the showdown over identification laws takes the battle over racial geographies to the voting booth,<sup>376</sup> where the white monopoly on the electoral system was only broken in the last generation.<sup>377</sup> At stake are our fundamental commitments and priorities—either to the re-establishment of white supremacy in critical social, economic, and political spaces or, one hopes, to the final push towards an egalitarian

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370. Voting Rights Act of 1965, §§ 4, 5, 42 U.S.C. § 1973c (2000).

371. See *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012).

372. See *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012).

373. See *Florida v. Holder*, 820 F. Supp. 2d 85 (D.D.C. 2011).

374. *Shelby Cnty.*, 133 S. Ct. at 2629.

375. See, e.g., *Texas v. Holder*, 888 F. Supp. 2d 113 (using section 5 of the Voting Rights Act to strike new voter identification laws in Texas and South Carolina); *Texas v. U.S.*, 887 F. Supp. 2d 133 (using section 5 of the Voting Rights Act to strike new districting maps in Texas); *Florida v. Holder*, 820 F. Supp. 2d 85 (using section 5 of the Voting Rights Act to strike new voting hours laws in Florida).

376. See, e.g., *Shelby Cnty., Ala. v. Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011), *aff'd* 679 F.3d 848 (D.C. Cir. 2012), *rev'd* 133 S. Ct. 2612 (2013) (rejecting a challenge to the continued application of Section 5 of the Voting Rights Act of 1965, which, *inter alia*, requires that certain states and municipalities—primarily in the South and Southwest—obtain federal preclearance for any voting changes they seek to implement).

377. The century-long effort to suppress minority voting after the Civil War drew on a myriad of tactics, including poll taxes, literacy requirements, grandfather clauses, white primaries, racial gerrymandering, and polling booth intimidation. See *South Carolina v. Katzenbach*, 383 U.S. 301, 310–16 (1966). Notably, although none of these efforts mentioned race on their face, they were nonetheless "motivated entirely and exclusively by a desire to exclude [African-Americans] from voting." *Shelby Cnty., Ala. v. Holder*, 811 F. Supp. 2d 424, 428 (D.D.C. 2011) (quoting H.R. REP. No. 89-439, at 2443, 2451 (1965)).

and inclusive society where racial hierarchy no longer exists. Government-condoned race discrimination is a tragic part of our past; it should not serve as a template for our future.

