

# Colorblind White Dominance

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The U.S. public and indeed many scholars are increasingly certain that the country is leaving race and racism behind. This reflects more than the modest belief that, at least if measured since 1954, race relations have improved. It is instead a belief that race and racism will soon disappear altogether—that they have little power in the lives of average Americans, and soon will have none. Some give credit to *Brown v. Board of Education* and the civil rights era, when activists, lawyers, and laws helped a broad social movement turn the nation away from segregation and toward equality. Others point to changing demographics, emphasizing the rising number of mixed-race marriages and the increasing Asian and Hispanic populations that are eroding the historic black-white divide. My sense of our racial future differs. Not only do I fear that race will continue fundamentally to skew U.S. society over the coming decades, I worry that the belief in the diminished salience of race makes this more rather than less likely; relatedly, I suspect that law no longer contributes to racial justice but instead legitimates continued inequality.

Race as it is understood and practiced in the United States will change rapidly over the next few decades. Partly, this reflects the simple historical fact that racial ideas constantly mutate. Settler colonialism in North America gave rise to racial beliefs that justified the expropriation of land and the exploitation of humans, but while race since then has served consistently to rationalize hierarchy, racial beliefs themselves have been

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<sup>1</sup> Forthcoming in IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (revised ed., 2006).

grounded variously in religion, color, nation, physical biology, eugenics, ethnicity and, most recently, culture.<sup>2</sup> Only those who still understand race as primarily a natural phenomenon continue to suppose that notions of race remain relatively fixed. We should expect, however, particularly rapid change in today's regnant racial ideas. The United States is once again in the midst of a period of dramatic racial ferment. The current dynamism is sparked primarily by two racial dislocations directly rooted in the civil rights era: (1) the substantial decrease in the public acceptability of supremacist ideologies, and (2) the new demographics produced by altered immigration as well as intermarriage patterns.

Broad social support for explicit claims of racial superiority has all but ended, with large swaths of U.S. society now espousing a commitment to racial equality. This shift in the racial zeitgeist since the civil rights movement marks an important step toward a racially egalitarian society—but not its actual achievement, as racial hierarchy has continued. The persistence of racial subordination partly stems from the inertia of past patterns of systematic harm. But to avoid breaking down, racial hierarchy must also be newly produced and reproduced.<sup>3</sup> For those committed to preserving the racial status quo, the new spirit of widespread anti-racism raises practical and ideological problems. On the former level, new methods of maintaining racial hierarchy that are not patently designed to foster subordination must be devised. The greater task, however, is ideational: new justifications must be elaborated to explain the otherwise striking contrast

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<sup>2</sup> THOMAS F. GOSSETT, *RACE: THE HISTORY OF AN IDEA IN AMERICA* (1963); AUDREY SMEDLEY, *RACE IN NORTH AMERICA: ORIGINS AND EVOLUTION OF A WORLDVIEW* (2d ed. 1999). See also Ian F. Haney López, *The Social Construction of Race*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

<sup>3</sup> Barbara Jeanne Fields, *Slavery, Race and Ideology in the United States of America*, 181 NEW LEFT REV. 95 (1990).

between our public commitments and our lived realities. The elaboration of practices and rationales that at once comport with the ideals of non-racialism but preserve and deepen racial inequality, I suggest, form one of the hallmarks of our current racial era.

Simultaneously, a demographic revolution is underway. The racial ethos of the civil rights era chipped away at the social prejudices regarding inter-group marriage, while civil rights reforms reopened immigration to groups previously excluded on racial grounds. Today, a mixed-race population that accounts for one out of every forty Americans has given rise to a multiracial movement that strongly—indeed, disproportionately, given its size—influences the U.S. racial imagination.<sup>4</sup> Meanwhile, Asian Americans represent the fastest growing immigrant group today, with a population that increased by over seventy percent during the 1990s.<sup>5</sup> The greatest source of demographic change, however, comes in the burgeoning Hispanic population. Latin Americans for several decades have composed the largest immigrant group in the United States, and this trend will continue, if not accelerate. The U.S. Latino population increased 58 percent between 1990 and 2000, and this group, the largest minority in the country, now accounts for more than one of every eight Americans.<sup>6</sup> A recent *Newsweek* estimate predicts that by 2100, one in three Americans will be Latino.<sup>7</sup>

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<sup>4</sup> Elizabeth M. Grieco & Rachel C. Cassidy, *US Bureau of the Census: Overview of Race and Hispanic Origin, Census Brief 2000*, at 3 (March 2001); Kim M. Williams, *Multiracialism and the Civil Rights Future*, 134 DAEDALUS 53 (2005); KIM WILLIAMS, RACE COUNTS: AMERICAN MULTIRACIALISM AND THE CIVIL RIGHTS MOVEMENT (forthcoming 2006).

<sup>5</sup> Jessica Barnes & Claudette Bennett, *The Asian Population: 2000: CENSUS 2000 BRIEF*, at 3 (Feb. 2002).

<sup>6</sup> Betsy Guzmán, *US Bureau of the Census: The Hispanic Population, Census Brief 2000*, at 2 (May 2001).

<sup>7</sup> *New Latino Nation*, NEWSWEEK, May 30, 2005, at 28-29.

## Racial Futures

Given these ideological and demographic changes, how will race evolve? Four options are commonly put forth: *white exceptionalism*, which foretells whites remaining a racial overclass even as they become a numerical minority; *black exceptionalism*, wherein blacks continue as the primordial racial minority while other groups increasingly integrate; *multiracialism*, projecting that race will lose all salience as a form of hierarchy and will come to stand only for cultural differences; and *Latin Americanization*, which envisions continued but softened racial hierarchy engendered by a move away from the black-white dichotomy and strict bio-racial notions of difference and towards a racial continuum policed along socio-racial lines.<sup>8</sup>

*White exceptionalism* sees whiteness continuing as the most powerful racial fault line. Under this vision of our racial future, racial hierarchy continues unabated and perhaps intensifies. Some attribute continued racial conflict to efforts by dominant groups to maintain racial privilege. Michael Lind, for instance, sees the emergence of a dominant white class that maintains its privileged position vis-à-vis non-whites (and less well-off whites) through its “near-monopoly of the private-sector and political branches of the American institutional elite” as well as by the creation and cooptation, through racial preferences, of minority elites.<sup>9</sup> Others see racial conflict continuing not because of efforts to retain privilege but because whites will respond to perceived assaults by

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<sup>8</sup> In a helpful discussion, Jennifer Hochschild sees six possible racial futures in the United States: white exceptionalism, black exceptionalism, a South African model, complex regional divides, skin-color hierarchy, and multiracial *mélange*. Jennifer Hochschild, *Looking Ahead: Racial Trends in the United States*, 134 DAEDALUS 70, 80-81 (2005) [hereinafter Hochschild, *Looking Ahead*].

<sup>9</sup> MICHAEL LIND, *THE NEXT AMERICAN NATION: THE NEW NATIONALISM AND THE FOURTH AMERICAN REVOLUTION* 151, 161 (1995).

culturally inassimilable groups, mainly Hispanics. Samuel Huntington's most recent book decrying the threat posed by Latino immigrants to our supposed "core Anglo-Protestant culture" fits this mold, as do many others, such as Victor Hanson's *Mexifornia*.<sup>10</sup> Setting aside the important differences in these various strains, white exceptionalism has been the norm as a historical matter: since the seventeenth century, a "white" identity has been the linchpin to racial dominance in what would become the United States.

*Black exceptionalism* has two component claims: that blacks are fundamentally different from other racial minorities, and that non-black groups will gradually integrate. Put another way, this model posits that there will soon be effectively only two races, blacks and non-blacks. Nathan Glazer's recent scholarship typifies this sentiment: "The two nations of our America are the black and the white, and increasingly, as Hispanics and Asians become less different from whites from the point of view of residence, income, occupation, and political attitudes, the two nations become the black and the others."<sup>11</sup> Rather than locating the distinctive position of African Americans in retrograde notions of biological difference, proponents of black exceptionalism often strike a tone of racially progressive concern, typically ruing the historic forces that so deeply subordinated blacks. This analysis sometimes leads proponents of black exceptionalism

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<sup>10</sup> VICTOR DAVIS HANSON, *MEXIFORNIA: A STATE OF BECOMING* (2003); SAMUEL P. HUNTINGTON, *WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY* (2004).

<sup>11</sup> NATHAN GLAZER, *WE ARE ALL MULTICULTURALISTS NOW* 149 (1998) [hereinafter GLAZER, *MULTICULTURALISTS*]. See also Nathan Glazer, *The Future of Race in the United States*, in *RACE IN 21<sup>ST</sup> CENTURY AMERICA* 73 (Curtis Stokes et al. eds., 2001) [hereinafter Glazer, *Future of Race*]; GEORGE YANCEY, *WHO IS WHITE? LATINOS, ASIANS, AND THE NEW BLACK/NONBLACK DIVIDE* 14 (2003) ("[I]nstead of 'whites' becoming a numerical minority group in the near future, we are heading toward a black/nonblack society wherein African Americans remain anchored to the bottom of the racial hierarchy in the United States.").

to support affirmative action and other remedies for past and on-going discrimination, at least for African Americans.<sup>12</sup> But it often seems that an equally—or sometimes more—central point for proponents of black exceptionalism is that Latinos and Asians should be excluded from civil rights benefits because these groups allegedly have not suffered mistreatment as non-whites on par with the subordination imposed on blacks.<sup>13</sup> In this way, black exceptionalism as often marks not concern for blacks but hostility toward claims of racial discrimination by Asians and Hispanics.

*Multiracialism* sees us rapidly evolving toward a postracial society in which race is unmoored from status and demarcates not so much innate groups as loosely defined communities bound together primarily by cultural affinities. The “racial” in multiracialism parallels the “cultural” in multiculturalism: both posit an ideal world in which race is supplanted by culture and in which racial hierarchy, racism, prejudice, xenophobia, bigotry, and bias have ceased to operate, at least insofar as these rely on notions of innate biological differences of the sort currently understood as racial. Race-mixing—the intermarriage of persons from ostensibly different races and the resultant blending that occurs—holds out great promise, according to proponents of multiracialism. David Hollinger, for instance, extols the virtues of amalgamation (a word he prefers over miscegenation), while Roberto Suro enthuses over what he terms mixed

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<sup>12</sup> GLAZER, *MULTICULTURALISTS*, *supra*, at 159.

<sup>13</sup> See HUGH DAVIS GRAHAM, *COLLISION COURSE: THE STRANGE CONVERGENCE OF AFFIRMATIVE ACTION AND IMMIGRATION POLICY IN AMERICA* (2002); David A. Hollinger, *Amalgamation and Hypodescent: The Question of Ethnoracial Mixture in the History of the United States*, 108 *AM. HIST. REV.* 1 (2003); John D. Skrentny, *Inventing Race*, 46 *PUB. INT.* 97 (Winter 2002).

doubles.<sup>14</sup> Many multiracialists also see favorable portents in Hispanic immigration, in the belief that in their racial heterogeneity Latinos already embody the postracial ideal, and will only push the United States in this direction more rapidly. Writing from Southern California and focusing on by far the largest Latino group, Gregory Rodriguez, for instance, claims that “[h]aving spent so long trying to fit into one side or the other of the binary system, Mexican Americans have become more numerous and confident enough to simply claim their brownness—their mixture. This is a harbinger of America’s future.”<sup>15</sup> Race as hierarchy, according to the basic claim advanced by multiracialists, will dissipate as the lines between putative racial groups are blurred.<sup>16</sup>

The *Latin Americanization* of race in the United States is a more likely short-term development, according to others. Race in Latin America purportedly differs from the U.S. version in two crucial respects: (1) rather than operating in terms of a sharp divide between white and black, race functions along a continuum with gradations of racial difference, often coded in terms of skin color; and (2) race depends not solely on ancestry or morphology (bio-race), but also often reflects socioeconomic factors such as wealth,

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<sup>14</sup> DAVID HOLLINGER, *POST-ETHNIC AMERICA: BEYOND MULTICULTURALISM* (1995); Roberto Suro, *Mixed Doubles*, AM. DEMOGRAPHICS, Nov. 1999, at 57, 58. As others note, however, relatively little racial mixing involves African Americans, suggesting that intermarriage is not breaking down all racial lines. See Matthijs Kalmijn, *Trends in Black/White Intermarriage*, 72 SOC. FORCES 119 (1993); Michael Lind, *The Beige and the Black*, N.Y. TIMES MAG., Aug. 16, 1998, at 38.

<sup>15</sup> Gregory Rodriguez, *Mongrel America*, ATLANTIC MONTHLY, Jan./Feb. 2003, at 95, 97. See also Gregory Rodriguez, *Dining at the Ethnicity Café*, L.A. TIMES, May 18, 2003, at M3, and the comments by Jorge Klor de Alva in *Our Next Race Question*, HARPER’S, Apr. 1996, at 55 (printing a conversation between Jorge Klor de Alva, Earl Shorris, and Cornel West).

<sup>16</sup> Not all who predict an erosion of putatively biologically defined racial lines also predict the decline of social conflict. George Fredrickson, for instance, sees “racism”—which he defines as group conflict justified in terms of differences believed to be “hereditary and unalterable”—declining, even as he predicts increasing culturally-based conflicts. GEORGE M. FREDRICKSON, *RACISM: A SHORT HISTORY* 141, 170 (2002).

professional attainment, educational level, and so forth (socio-race). Like those who foresee multiracialism, those who predict an increased Latin Americanization of race see the United States being pushed in this direction by Latino immigrants, who theoretically not only bring with them a supposedly enlightened Latin American racial sensibility but also—along with mixed-race persons and the growing Asian population—increasingly destabilize the white-black divide.<sup>17</sup>

Unlike the multiracialists, however, those who predict that the United States is moving toward a Latin American racial model do not anticipate the complete dissipation of race in the short to medium term. Race as hierarchy will continue, though along increasingly socio-racial lines, and with some softening. Even as they acknowledge continued inequality, Latin Americanists see a gradual amelioration in which socio-racial understandings operate to moderate the harsh stratification historically grounded in the United States along bio-racial lines. This easing, they expect, will extend as well to African Americans, facilitating their increased integration. Indeed, the racial status of many prominent blacks often emerges as supposed evidence that the United States is already moving from a bio-racial to a socio-racial system, one in which ever more minorities function in society as if they were effectively white. Some expect this trend to herald the strong emergence of color as a basis for social ordering: the coding of skin tone and physical features as racially light or dark may increasingly replace membership in ordinal races such as African American or Asian as the primary basis for

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<sup>17</sup> RICHARD RODRIGUEZ, BROWN, THE LAST DISCOVERY OF AMERICA (2002).

discriminatory treatment.<sup>18</sup> The Latin Americanization of race is not a phenomenon that pertains to Hispanics alone, but arguably will alter the categorical boundaries of all races, thereby gradually weakening racial subordination in the United States.

### Colorblind White Dominance

In contrast to these four visions of future racial dynamics, I believe instead that we are headed toward a hierarchy of *colorblind white dominance*. This looming racial paradigm has three central elements, which I discuss in turn: (1) continued racial dominance by whites; (2) an expansion of who counts as white along socio-racial rather than bio-racial lines; and (3) a colorblind ideology that simultaneously proclaims a robust commitment to anti-racism yet works assiduously to prevent effective racial remediation. To be sure, there will be significant regional differences in the evolution of race in the United States, but racial politics is now sufficiently national that I expect colorblind white dominance to provide the basic framework for race relations throughout the country.<sup>19</sup>

*White racial dominance*. I use the term “dominance” in contradistinction to “supremacy.” “White supremacy,” if understood to mean racial domination explicitly grounded in a theory of racial superiority, is largely over, though of course there remain pockets of white supremacist agitation as well as the possibility of recrudescence.<sup>20</sup> The

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<sup>18</sup> Jennifer Hochschild, *From Nominal to Ordinal to Interval: Reconceiving Racial and Ethnic Hierarchy in the United States*, paper delivered as Wesson Lectures, Stanford University, May 5 and 6, 2003.

<sup>19</sup> See William H. Frey, *Immigration, Domestic Migration, and Demographic Balkanization in America: New Evidence from the 1990s*, 22 POPULATION & DEVELOPMENT REV. 741 (1996). See also Hochschild, *Looking Ahead*, *supra*.

<sup>20</sup> George Fredrickson defines white supremacy as “the attitudes, ideologies, and policies associated with the rise of blatant forms of white or European dominance over ‘nonwhite’ populations.” Thus defined, the term “applies with particular force to the historical

rejection of white supremacy as rhetoric, however, has not been accompanied by an end to the dominant social, political, and financial position of whites. The materiality of continued white privilege can be measured across many indices. In 2003, the real median income for non-Hispanic whites was \$48,000, but only \$30,000 for African Americans.<sup>21</sup> The total poverty rate among African Americans was 24 percent and it was 22 percent for Hispanics, compared to 8 percent for whites.<sup>22</sup> That same year, 20 percent of African Americans and 33 percent of Hispanics had no health insurance, while 11 percent of whites were uninsured.<sup>23</sup> Discrepancies in incarceration rates are particularly staggering. There is currently a 28.5 percent chance an African-American man will spend some time in a state or federal prison during his lifetime, while the comparable figure for whites is 2.5 percent. There are twelve states in which between 10 percent and 15 percent of African American adult men are incarcerated, while in ten states Latino men are thrown behind bars at rates five to nine times greater than white men.<sup>24</sup>

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experience of two nations—South Africa and the United States.” GEORGE FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY* xi (1981) [hereinafter FREDERICKSON, *WHITE SUPREMACY*]. On the resurgence of white supremacist groups in the United States, see MICHAEL BARKUN, *RELIGION AND THE RACIST RIGHT: THE ORIGINS OF THE CHRISTIAN IDENTITY MOVEMENT* (1997 ed.); HOWARD BUSHART ET AL., *SOLDIERS OF GOD: WHITE SUPREMACISTS AND THEIR HOLY WAR FOR AMERICA* (1998); BETTY DOBRATZ & STEPHANIE SHANKS-MEILE, *THE WHITE SEPARATIST MOVEMENT IN THE UNITED STATES* (1997).

<sup>21</sup> Robert Cleveland, *US Bureau of the Census: Alternative Income Estimates in the United States: 2003: Current Population Reports*, 6 (June 2005).

<sup>22</sup> Joe Dalaker, *US Bureau of the Census: Alternative Poverty Estimates in the United States: 2003: Current Population Reports*, 7 (June 2005).

<sup>23</sup> Carmen DeNavas-Walt et al., *US Bureau of the Census: Income, Poverty, and Health Insurance Coverage in the United States: 2003: Current Population Reports*, 18 (August 2004).

<sup>24</sup> Human Rights Watch, *Race and Incarceration in the United States*, <http://www.hrw.org/backgroundunder/usa/race>. See generally, HUMAN RIGHTS WATCH, *PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS* (2000); MARC MAUER, *RACE TO INCARCERATE* (1999).

In presenting these statistics, I do not claim that all whites are equally privileged by racism and racial hierarchy. While whites as a group have long arrogated the resources of this country to themselves, from land to jobs to control over the government, industry, and military, deep class schisms divide white society.<sup>25</sup> Rather than belying the power of race, however, these internal rifts more likely reflect race's utility in palliating intra-group conflict among whites. Racial ideology does not guarantee equality among whites; it serves rather to mask and distract from gross inequalities that divide that group. That said, it remains the case that whites as a race (though not all whites individually) have maintained their position at the social and material apogee for centuries—and the numbers above demonstrate the profound role race and white dominance continue to play in the organization of U.S. society. Despite predictions of race's demise, the great weight of social statistics point to continued white dominance.

The claim that white dominance is evaporating in the face of shifting demographics and the public espousal of civil rights platitudes ignores not only contemporary statistics but historical patterns as well. It's true that our population looks far different today than it did in 1965, let alone 1865. But demographic change has historically led only to shifts in where, not whether, racial lines are drawn. Today we may use "white" as shorthand for "racially dominant," but this requires that we recognize the inclusion of Germans as white in the 1840s through 1860s, the Irish in the 1850s through 1880s, and eastern and southern Europeans in the 1900s to 1920s.<sup>26</sup> It's also true that a

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<sup>25</sup> See, e.g., RICHARD L. ZWEIGENHAFT & G. WILLIAM DOMHOFF, *DIVERSITY IN THE POWER ELITE: HAVE WOMEN AND MINORITIES REACHED THE TOP?* (1998).

<sup>26</sup> See MATTHEW FRYE JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* (1998). Of course, the anthropological notion of a "Caucasian" race was sometimes rejected, as by the Supreme Court, when it proved

leading rationale for racial inequality, the self-evident nature of white superiority, weakened dramatically over the twentieth century, especially during the civil rights era. But defeating a justification for hierarchy is not the same as toppling that hierarchy. Again, ideologies rationalizing white dominance have often undergone dramatic mutations, from religious doctrines contrasting Christians and heathens to Manifest Destiny to eugenics to, most recently, notions of cultural difference. The justificatory rhetoric of race, like the composition of the population, constantly changes, even as racial inequality consistently endures.

White dominance continues partly as a vestige of the past, but also because race and racism remain useful to powerful segments of U.S. society. The nation did not embrace the civil rights movement until the mid-1960s, and then grudgingly, only to see the country's mood turn firmly against substantive racial equality with President Richard Nixon's election in 1968. As a country, we enjoyed a very few years of civil rights reforms but continue to stagger under three decades and more of backlash aimed at preserving the basic parameters of a racial status quo itself built on the edifice of three centuries of white supremacy.<sup>27</sup> This backlash is testament to the fact that racial hierarchy remains profoundly in the material and status interests of those who can claim the mantle of whiteness (whether as previously understood or as reconfigured). In access to country clubs and gated communities, in preferences for jobs and housing, in the moral certainty regarding one's civic belonging and fundamental goodness, in all of these ways and many more, being white affords advantages across the range of material and status divisions

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too capacious. *See* IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE*, 86-92 (1996). **[Note to editor: internal reference]**

<sup>27</sup> STEPHEN STEINBERG, *TURNING BACK: THE RETREAT FROM RACIAL JUSTICE IN AMERICAN THOUGHT AND POLICY* (2001) [hereinafter STEINBERG, *TURNING BACK*].

that mar our society. In seeking to disestablish race and racism, Fredrick Douglass's words are no less true today than when uttered against slavery: "Power concedes nothing without a demand. It never did and it never will."<sup>28</sup> Be assured: racial hierarchy continues as a measure of white power in our society. To change racial dynamics for the better will require, as it has in the past, concerted efforts between broad social movements and national elites, and probably in addition propitious historical circumstances conducive to change, such as war or economic boom times.<sup>29</sup> Neither demographics nor anti-racist bromides by themselves will defeat the power race wields in our society.

*White redefined.* Though white dominance will continue, what will likely change is how whiteness—or, better, membership in the racially dominant group—is defined. The term "white" has a far more complicated history in the United States than people commonly recognize. For most of this country's history, whiteness stood in contradistinction to the non-white identities imposed upon Africans, Native Americans, the Mexican peoples of the Southwest, and Asian immigrants. On this level, from the earliest years of this country whiteness marked one pole in the racial hierarchy. Simultaneously, however, white served more as a marker of color than as indicia of a shared race among European groups, where until recently putatively "racial" divisions among Europeans were supremely important in marking social positions in U.S. society. Only in the first half of the twentieth century was "white" transformed into a relatively monolithic and undifferentiated group encompassing all persons of European descent in

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<sup>28</sup> Frederick Douglass, *West India Emancipation*, Speech Delivered at Canandaigua, New York (Aug. 4, 1857), in FREDERICK DOUGLASS, *SELECTED SPEECHES AND WRITINGS* 358, 367 (Philip S. Foner ed., 1999).

<sup>29</sup> DAVID R. ROEDIGER, *COLORED WHITE: TRANSCENDING THE RACIAL PAST* (2003).

the United States.<sup>30</sup> As with justifications for racial hierarchy, the ideas surrounding racial categories—and the boundaries of whiteness in particular—have shown a remarkable fluidity that seems likely to continue in the immediate future.

It seems increasingly that some Hispanics, Asians, Native Americans, and African Americans are migrating into the white category, in a trend that may mark a radical disjuncture in racial logic. While the melding of various European groups into the racially dominant category “white” effectuated tremendous changes in prevailing racial ideologies, these shifts nevertheless comported with the underlying belief that the most basic racial divisions exist between continental populations. For however unsupportable, the continental theory of races—whites from Europe, blacks from Africa, and Asians from Asia—has long served as one of the most enduring and popular understandings of race. This conception, however, cannot accommodate the incorporation of reds, yellows, and blacks identified with America, Asia, and Africa into the white category linked to Europe. In this sense, the expansion of a white identity to include members of these groups may portend not just a broadening of whiteness, but a change in its basic conceptualization. Whether this change is more fundamental than previous ones is not clear, though. The social certainty regarding the racial distinctiveness of southern and eastern European immigrants at the turn of the twentieth century, “beaten men from beaten races, representing the worst failures in the struggle for existence” in the words of the times, may have been no less great than the current (eroding) conviction that, for

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<sup>30</sup> See JACOBSON, *supra*. See also Richard Alba, *Assimilation's Quite Tide*, 119 PUB. INT. 1, 3 (1995).

instance, Asians aren't white.<sup>31</sup> In any event, who counts as racially dominant has long been an evolving construct—and seems poised to shift anew.

Perhaps we should distinguish here between three sorts of white identity. Consider first those “passing as white.” There have always been persons who racially pass—persons who, because their physical appearance allows them to, hold themselves out as members of a group to which by social custom they would not be assigned on the basis of their ancestry.<sup>32</sup> In contrast to this liminal group, we might think of some persons as “fully white,” in the sense that, with all of the racially relevant facts about them widely known, they would generally be considered white by the community at large (consistent with a social constructionist understanding, racial identity turns not on particular criteria per se, but on the establishment of and the significance given such elements by community norms). Of persons of Irish and Jewish descent in the United States, for example, one might say that while initially some were able to pass as white, now they are fully white.<sup>33</sup>

Unlike both those passing as white and those fully white, however, a new group is emerging, persons perhaps best described as “honorary whites.” Apartheid South Africa first formally crafted this identity: seeking to engage in trade and commerce with nations cast as inferior by apartheid logic, particularly Japan, South Africa extended to individuals from such countries the status of honorary whites, allowing them to travel,

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<sup>31</sup> So opined Francis Walker, head of the American Economic Association, in an essay in the *Atlantic Monthly*. Francis A. Walker, *Restriction of Immigration*, ATLANTIC MONTHLY, June 1896, at 828 (quoted in GOSSETT, *supra*, at 303).

<sup>32</sup> On the intricacies of passing, see PASSING AND THE FICTIONS OF IDENTITY (Elaine K. Ginsberg ed., 1996), especially Adrian Piper's chapter, *Passing for White, Passing for Black*.

<sup>33</sup> KAREN BRODKIN, HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA (1999); NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1996).

reside, relax, and conduct business in South African venues otherwise strictly “whites only.”<sup>34</sup> Persons who pass as white hide racially relevant parts of their identity; honorary whites are extended the status of whiteness despite the public recognition that, from a bio-racial perspective, they are not fully white.

In the United States, an honorary white status seems increasingly to exist for certain persons and groups whose minority identity seems unequivocal under current racial schemas, but who are nevertheless extended a functional presumption of whiteness.<sup>35</sup> The quintessential example would be certain Asian-American individuals and communities, particularly East Asians. Asians have long been racialized as non-white in the United States as a matter of law and social practice; given high levels of immigration, this negative racialization, tied as ever to xenophobia, continues. Moreover, the continental theory places Asians securely among non-whites. But despite these clear indicia of non-whiteness, the model minority myth and professional success have combined to free some Asian Americans from the most pernicious negative beliefs regarding their racial character. This trend reveals in part a shift toward a more socio-racial system. Individuals and communities with the highest levels of acculturation, achievement, and wealth increasingly find themselves functioning as white, at least as measured by professional integration, residential patterns, and intermarriage rates. Focusing on this near-white status, George Yancey argues that “if Asian Americans overcome the perceptions that they are biologically different from the majority group

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<sup>34</sup> MASAKO OSADA, *SANCTIONS AND HONORARY WHITES: DIPLOMATIC POLICIES AND ECONOMIC REALITIES IN RELATIONS BETWEEN JAPAN AND SOUTH AFRICA* (2002).

<sup>35</sup> For the argument that the boundaries of whiteness are expanding, see Jonathan Warren & France Winddance Twine, *White Americans, the New Minority?* 28 *J. BLACK STUD.* 200 (1997).

members, then it can be argued that Asians Americans will eventually assimilate into the dominant group in society in the same way that southern/eastern European ethnic groups have become ‘white.’”<sup>36</sup> I posit instead that they need not overcome a biological presumption of difference: today, some Asians can function as honorary whites, an identity that contemplates both white status and a biologically non-white identity.<sup>37</sup>

Latinos also have access to honorary white identity, though their situation differs from that of Asians. Unlike the latter, and also unlike African Americans, Hispanics have long been on the cusp between white and non-white in the United States. Despite pervasive and often violent racial prejudice against Mexicans in the Southwest and against Puerto Ricans and other Latino groups in the Caribbean during the nineteenth century and enduring until today, the most elite Latin Americans in the United States have historically been accepted as fully white. This pattern reflects the relatively greater influence of socio-racial rather than strictly bio-racial parameters in Hispanic racialization. With no clear identity under the continental theory of race, and with a tremendous range of somatic features marking this heterogeneous population, there has long been relatively more room for the use of social rather than strictly bio-racial factors in the imputation of race to particular Latino individuals and groups. Seeking to take advantage of their liminal position, elite Hispanics have traditionally claimed for themselves and their communities white identities. From the 1930s through the 1950s, for instance, Mexican community leaders in the United States challenged segregation not on

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<sup>36</sup> YANCEY, *supra*, at 42.

<sup>37</sup> Of course, one cannot talk of Asian Americans as a whole, for the experience of Asian-American sub-groups differs dramatically. For a discussion of the extent to which honorary white status does and does not apply to Asian Americans, see MIA TUAN, *FOREVER FOREIGNERS OR HONORARY WHITES? THE ASIAN ETHNIC EXPERIENCE TODAY* (2001).

the grounds that it was wrong per se, but by arguing that they were white, thereby initiating a persistent trend in which certain Latinos seek assimilation through claims of whiteness.<sup>38</sup> The racial pride movements of the late 1960s saw segments of the Mexican and Puerto Rican communities reject this racial politics in favor of pride in a non-white identity—indeed, the Chicano and Young Lord movements deserve extended study as among the few historical episodes during which large groups rejected a white identity and instead embraced non-whiteness.<sup>39</sup>

The racial divide among Latinos continues: by the census count, almost half consider themselves white (though this number has declined over the last three censuses and by another major survey the number is closer to one in five; in addition, a steady three percent of Hispanics consider themselves black).<sup>40</sup> It seems likely that an increasing number of Hispanics—those who have fair features, material wealth, and high social status, aided also by Anglo surnames—will both claim and be accorded a position in society as fully white. Simultaneously, many more Latinos—similarly situated in terms of material and status position, but perhaps with slightly darker features or a surname or

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<sup>38</sup> Neil Foley, *Becoming Hispanic: Mexican Americans and the Faustian Pact with Whiteness*, in REFLEXIONES 1997, at 57 (Neil Foley ed., 1998); Ian Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CALIF. L. REV. 1143 (1997).

<sup>39</sup> For an extended discussion of the racial politics of the Chicano movement, see IAN HANEY LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* (2003). For background on the Young Lords, see MIGUEL MELENDEZ, *WE TOOK THE STREETS: FIGHTING FOR LATINOS WITH THE YOUNG LORDS* (2003); PALANTE: *THE YOUNG LORDS PARTY* (1971).

<sup>40</sup> John R. Logan, *How Race Counts for Hispanic Americans* (Albany, NY: Lewis Mumford Center for Comparative Urban and Regional Research, University at Albany), Jul. 14, 2003 (analyzing census numbers); Pew Hispanic Center/Kaiser Family Foundation, *2002 National Survey of Latinos, Summary of Findings* (December 2002), 31 (concluding that only twenty percent of Latinos accept a white racial identity).

accent suggesting Latin American origins—will become honorary whites.<sup>41</sup> Meanwhile, the preponderance of Latinos as well as most others traditionally constructed as racial minorities will continue to be relegated to nonwhite categories. The advent of an honorary white identity for some does not portend the elimination of race for all, a point to which I return below.

Even so, the future of race in the United States will be profoundly shaped in the coming decades by how Asians and to an even greater extent Latinos come to see themselves and in turn come to be seen racially. While the population as whole grew by 13 percent in the last decade of the twentieth century, the Asian population jumped by 72 percent and the Latino population boomed by almost 60 percent.<sup>42</sup> Beyond the sheer rates of increase, the absolute numbers are striking. According to the census bureau, people counted as other than black or white increased from less than 1 percent of the population in 1970 to over 12.5 percent in 2000.<sup>43</sup> This last figure is conservative, for it does not include the nearly half of Latinos the census bureau counts as white. And consider another striking fact: births to Latina mothers now outnumber all other deliveries combined in bellwether California.<sup>44</sup> The racial future of the United States is inexorably bound up with Latino and Asian racial identity.

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<sup>41</sup> For further discussion of Latino racial identity, see Ian Haney López, *Race on the 2010 Census: Hispanics and the Shrinking White Majority*, 134 DAEDALUS 42 (2005); Haney López, *Race, Ethnicity, Erasure, supra*; HANEY LÓPEZ, RACISM ON TRIAL, *supra*.

<sup>42</sup> Jessica Barnes & Claudette Bennett, *The Asian Population: 2000: Census 2000 Brief*, at 3 (Feb. 2002); Betsy Guzmán, *US Bureau of the Census: The Hispanic Population, Census Brief 2000*, at 2 (May 2001).

<sup>43</sup> Frank Hobbs & Nicole Stoops, *US Bureau of the Census: Demographic Trends in the 20<sup>th</sup> Century: Census 2000 Special Reports*, 74 (November 2002).

<sup>44</sup> Lisa Richardson & Robin Fields, *Latinos Account for Majority of Births in California*, L.A. TIMES, Feb. 6, 2003, at A1.

In the context of U.S. race relations, why so many should seek the privileges and positive presumptions of whiteness is obvious (though also politically and morally troubling, insofar as seeking to be white inevitably contributes to the perpetuation and legitimation of white dominance). But why do many whites appear willing to extend—or, at least, not actively to resist the extension of—whiteness? For some, the answer surely lies in the positive accomplishments of the civil rights era, including not only the defeat of notions of white supremacy but also the partial integration of many social institutions, including labor environments, higher learning, athletics and entertainment. We must be careful not to discount the willingness of significant sectors within the white community to extend a presumption of full human worth to racial minorities—nor should we be surprised that this presumption of full humanity often translates into treating non-whites as if they were white.

But for other whites, the willingness to extend a presumption of whiteness reflects strategic thinking about the numbers. The census bureau predicts, for instance, that whites will comprise seventy-eight percent of the nation's population in 2020—but only if its projections regarding the number of Hispanics who will identify as white are correct. If no Latinos are included, the white population will amount to only sixty-one of every hundred Americans and by 2050, if not sooner, whites will comprise a numerical minority in this country.<sup>45</sup> There are many—I have in mind here the corporations that supported affirmative action in the Michigan cases, the military brass who did the same, and the Republican Party with its cynical version of right-wing affirmative action that

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<sup>45</sup> US Bureau of the Census, 2004, *US Interim Projections by Age, Sex, Race, and Hispanic Origin*, <http://www.census.gov/ipc/www/usinterimproj/>, March 18, 2004. See generally Antonio McDaniel, *The Dynamic Racial Composition of the United States*, 124 *DAEDALUS* 179 (1995).

promotes a few minorities into highly visible positions—who see these numbers and understand that future power depends on at least the symbolic inclusion of some minorities today.<sup>46</sup>

So whiteness is expanding, and changing. This is not a particularly dramatic or felicitous development (except, to some extent, for the newly white). First, the move in the socio-racial direction, in which racial significance attaches to wealth, professional attainment, and so forth, is a much less profound change than is often suggested, because race in the United States has always had a socio-racial dimension. A developing scholarship now impressively demonstrates that even during and immediately after slavery, at a time when racial identity in the United States was presumably most rigidly fixed in terms of biological difference and descent, and even in the formal legal setting of the courtroom, determinations of racial identity often took place on the basis of social indicia such as the nature of one's employment or one's choice of sexual partners.<sup>47</sup> This "performance" of race, as some scholars term it, has a long pedigree in the United States.<sup>48</sup>

Second, despite the increased salience of social indicia to the achievement of a privileged racial identity, physical features will remain foundational in racial

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<sup>46</sup> THOMAS HOLT, *THE PROBLEM OF RACE IN THE 21<sup>ST</sup> CENTURY* 107 (2000).

<sup>47</sup> *See, e.g.*, Adrienne Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. U. L. REV. 695 (1996); Michael Elliot, *Telling the Difference: Nineteenth Century Legal Narratives of Racial Taxonomy*, 24 LAW & SOC. INQUIRY 611 (1999); Ariella Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South*, 108 YALE L.J. 109 (1998); Daniel Sharfstein, *The Secret History of Race in the United States*, 112 YALE L.J. 1473 (2003); Teresa Zackodnik, *Fixing the Color Line: The Mulatto, Southern Courts, and Racial Identity*, 53 AM. Q. 420 (2001).

<sup>48</sup> Devon Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); Ariella Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640 (2001); John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817 (2000).

categorization. To be sure, individuals and groups who would have been clearly non-white under the racial regime in place just a few decades ago now function more and more as white. But rather than fully supplanting the role of physical features in racial determinations, socio-racial factors more accurately mainly supplement them. It is not just any community or individual who can become honorary whites; instead, it is those whose physical characteristics most closely resemble the morphology associated with whites. In this context, color—meaning those somatic details such as skin tone, facial features, hair shade and texture, and so upon which racial classifications were erected in the United States—will continue to have tremendous significance, as those minorities with the lightest features will have the greatest access to white identity. Those who are darker, be they Latinos or South Asians or African Americans, will rarely be accorded white status despite their individual or group achievements precisely because their phenotype positions them too far toward the putatively inferior end of the color spectrum.<sup>49</sup> Race will remain, as it long has been, supremely color-coded. Under antebellum racial logic those blacks with the fairest features were sometimes described as “light, bright, and damn near white.”<sup>50</sup> If today we switch out “damn near” for “honorary,” how much has really changed?

Race will not cease to have a major physical component, nor will ordinal categories like black, brown, white, yellow, and red soon disappear. The basic belief in

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<sup>49</sup> On the need to overhaul civil rights laws in order to respond more effectively to color discrimination, see Taunya Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705 (2000); Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487 (2000).

<sup>50</sup> Reginald Robinson, *The Shifting Race-Consciousness Matrix and the Multiracial Category Movement: A Critical Reply to Professor Hernandez*, 20 B.C. THIRD WORLD L.J. 231, 276 (2000).

continental racial divisions will persist, insuring a sense that those with almost exclusively European ancestry are fully white while others remain honorary whites—white as a form of social courtesy, but not unquestionably white. Indeed, most likely one attribute of whiteness as social courtesy is the extent to which it can be easily withdrawn. The belief in continental races will likely also ensure a continued special stigma for those with African ancestry, where this ostensible stain has been so central to the elaboration of race in the United States. A few African Americans have achieved a functional white identity, but it will remain significantly more difficult for blacks than for many Asians and Latinos to function as whites. Honorary white status will be available to the most exceptional—and the most light-skinned—blacks, but to few other African Americans, and on terms far more restrictive than those on which whiteness will be extended to many Latinos and Asians.<sup>51</sup>

Finally, in contrast to the expectations of those who herald the Latin Americanization of race in the United States, the redefinition of whiteness does not portend a positive movement toward racial democracy. Under a redefined white category, racial hierarchy will continue unabated. The strongest evidence in this regard is Latin America itself. Most Latin American countries are marked by extreme racial hierarchies that distinguish between whites, mixed-race persons, blacks, and indigenous populations. Those who predict a felicitous Latin American racial future in the United States do so only by ignoring the history of race in the very region they extol as a model. To give even cursory attention to the reality of racial stratification in Latin America (as opposed to

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<sup>51</sup> Those persons of African descent who can claim a “foreign” identity, for instance as recent immigrants from Africa or from the Caribbean, or as Latinos, may find that this assists them in distancing themselves in socio-racial terms from blackness, and so makes an honorary white identity more accessible.

simply accepting the rhetoric of racial egalitarianism that dominates much of elite Latin American discourse about domestic race relations) is to recognize that the shift toward a socio-racial system is not in any way tantamount to the end of racial hierarchy.<sup>52</sup>

But on another account, perhaps the United States *is* moving in a Latin American direction. Latin American societies often proclaim that they have transcended race even as they remain riven by racial subordination, and boast of robust civil rights laws that in fact are remarkably ineffective at ameliorating inequality.<sup>53</sup> These celebratory claims have long served in many Latin American countries as a form of propaganda that masks the much bleaker reality of not just persistent racial subordination but of steadfast resistance by racial elites to any reform programs likely to succeed. In this sense, we are becoming like Latin America: we are developing a public discourse that assures us that we have indeed transcended race and need take no further efforts, as well as a legal regime that at once presents itself as aggressively committed to rooting out racism but that in fact excels only at forestalling state and private efforts to disestablish racial hierarchy. In the United States, these new elements take the name of colorblindness.

*Colorblindness.* Continued white dominance will be rationalized and protected through the ascendant racial ideology of colorblindness. The specific command of colorblindness—that the state should not take race into account—is not new, nor

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<sup>52</sup> See, e.g., Thomas Skidmore, *Biracial USA vs. Multiracial Brazil: Is the Contrast Still Valid?*, 25 J. LATIN AM. STUD. 373 (1993) (exploring evidence of systematic and pervasive racial discrimination in Brazil and repudiating earlier studies lauding a supposed commitment to “racial democracy,” including his own *Toward a Comparative Analysis of Race Relations Since Abolition in Brazil and the United States*, 4 J. LATIN AM. STUD. 1 (1972)).

<sup>53</sup> Tanya Katerí Hernández, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, A United States-Latin America Comparison*, 87 CORNELL L. REV. 1093 (2002).

particularly contentious in its own right. Indeed, after bearing witness to several centuries of racial hierarchy, there is an intuitive appeal to the admonition that as a society we simply stop and eschew race once and for all. But the colorblindness proselytized by the racial right today (and widely accepted by most whites) is altogether different from a considered response to racial inequality. It propounds, even as it occludes, a powerful set of understandings about the dynamics of racial subordination as well as about the nature of racial groups. Colorblindness is in this sense not a prescription but an ideology, a set of understandings that delimits how people comprehend, rationalize, and act in the world.<sup>54</sup> Though colorblindness now dominates the country's racial imagination its origins are in race law, making a genealogy of legal colorblindness indispensable to fathoming its constituent claims.

Colorblindness is frequently traced back to the Supreme Court's decision in *Plessy v. Ferguson*, which upheld Jim Crow segregation in the South and prompted Justice John Marshall Harlan's famous dissent that "our constitution is colorblind, and neither knows nor tolerates classes among citizens."<sup>55</sup> Harlan's dissent is today widely invoked for the proposition that the state should never take race into account; his

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<sup>54</sup> EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* (2003). Bonilla-Silva understands colorblindness as a new form of racism. George Fredrickson, in contrast, objects when scholars and others use "racism" to describe social practices not predicated on beliefs associated more or less directly with white supremacy. FREDRICKSON, *WHITE SUPREMACY*, *supra*, at xii. I would argue that white supremacy is but one form of racism, where, as Fredrickson himself emphasizes, "race relations are not so much a fixed pattern as a changing set of relationships that can only be understood within a broader historical context that is itself constantly evolving and thus altering the terms under which whites and non-whites interact." *Id.* at xvii. Without fully engaging the debate about whether colorblindness constitutes racism, my claim is that, at a minimum, colorblindness now encapsulates the most powerful rationalizations for a continued racial hierarchy that places whites at the top.

<sup>55</sup> *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

felicitous turn of phrase has now entered the legal and cultural cannon. But, of course, colorblindness did not take hold during Jim Crow's reign, and, indeed, Harlan was hardly committed to the proposition attributed to him, for in *Plessy* itself he extolled the superiority of the white race and denigrated the Chinese, and just a few years later he wrote an opinion upholding segregated schools.<sup>56</sup>

For the first half of the twentieth century, colorblindness represented a radical and wholly unrealized aspiration, the hope that *de jure* racial subordination might be suddenly and thoroughly dismantled. It was in this vein that, as counsel for the NAACP in the late 1940s and early 1950s, Thurgood Marshall encouraged his colleagues to cite to Harlan's invocation of colorblindness to make the argument that, as Marshall put it in a 1947 brief to the Supreme Court, "classifications and distinctions based on race or color have no moral or legal validity in our society. They are contrary to our constitution and laws."<sup>57</sup> But neither society nor the courts embraced colorblindness when doing so might have sped the demise of white supremacy. Even during the civil rights era, colorblindness as a strategy for racial emancipation did not take hold. Instead, the courts and Congress

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<sup>56</sup> The full quote from which the "colorblindness" excerpt is taken reads as follows:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in 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.

163 U.S. at 559. Given his invocation of perpetual white dominance, it's no surprise that Harlan's reference to colorblindness is often presented in highly excerpted form. Harlan also wrote the opinion for a unanimous Court in *Cumming v. Board of Education*, 175 U.S. 528 (1899), which upheld racial segregation in public high schools.

<sup>57</sup> Brief for Petitioner at 27, *Sipuel v. Bd. of Regents of the Univ. of Okla.*, 332 U.S. 814 (1947) (No. 369).

dismantled Jim Crow segregation and proscribed egregious forms of private discrimination in a piece-meal manner that banned only the most noxious misuses of race, not any reference to race whatsoever.

In the wake of the civil rights movement's limited but significant triumphs, the relationship between colorblindness and racial reform changed remarkably. Whereas colorblindness in the context of Jim Crow was heavy with emancipatory promise, in the civil rights era and since, its greatest potency instead lies in preserving the racial status quo. As explicitly race-based subordination came to an end but racial inequality stubbornly persisted, racial progressives increasingly recognized the need for state and private actors to intervene aggressively along racial lines to dismantle entrenched inequality. Rather than call for colorblindness, they began to insist on the need for affirmative, race-conscious remedies. In this new context, colorblindness appealed instead to those *opposing* racial integration. Enshrouded with the moral raiment of the civil rights movement, this rhetoric provided cover for reactionary opposition to racial reform. Within a year of *Brown*, southern school districts and courts had recognized that they could forestall integration by insisting that the Constitution allowed them to use only "race-neutral" means to end segregation—for instance, school choice plans, which predictably produced virtually no integration whatsoever.<sup>58</sup> By the late 1970s and early 1980s, defenders of de facto segregation had adopted colorblindness as their strongest rhetorical weapon in the battle against race-conscious remedies. When the Supreme Court

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<sup>58</sup> *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955) ("The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation."); *but see* *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 876 (5th Cir. 1966) (rejecting the school board's interpretation of the Fourteenth Amendment as forbidding any consideration of race).

split on affirmative action in 1978, Thurgood Marshall, now as a Justice, spoke out against the colorblind rhetoric newly adopted by conservatives: “It is because of a legacy of unequal treatment,” he inveighed, “that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America.”<sup>59</sup> With the change in racial context from Jim Crow to civil rights, colorblindness as an approach to race jumped political valence, from radical to reactionary.

Wielding the ideal of colorblindness as a sword, racial conservatives on the Supreme Court have refought the battles lost during the civil rights era, cutting back on protections from racial discrimination as well as severely limiting race-conscious remedies. *McCleskey v. Kemp* insists that, even accepting as uncontroverted the fact that Georgia sentences to death blacks who murder whites at *twenty-two times* the rate it orders death for blacks who kill blacks, the Constitution perceives no discrimination in Georgia’s death penalty machinery.<sup>60</sup> Meanwhile, *City of Richmond v. Croson* tells us that when the former capital of the Confederacy adopts an affirmative action program to steer some of its construction dollars to minority owned firms it impermissibly discriminates—even when, without the program, less than seventy cents of each one-hundred dollars went to minorities in a city over fifty percent African-American.<sup>61</sup> The embrace of colorblindness by the conservative Court has converted our vaunted constitutional commitment to racial equality into a tool for preserving a racial status quo of continued white dominance.

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<sup>59</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 402 (Marshall, J., concurring in part and dissenting in part).

<sup>60</sup> *McCleskey v. Kemp*, 481 U.S. 279, 327 (1986).

<sup>61</sup> *City of Richmond v. Croson*, 488 U.S. 469, 534 (1989).

But perhaps the greatest power of reactionary colorblindness lies not in its immediate judicial impact but in the story it tells about race and racism. Justice Clarence Thomas has emphatically stated:

[T]here is a “moral and constitutional equivalence” between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. . . . In each instance, it is racial discrimination pure and simple.<sup>62</sup>

What understanding of racism, and of race itself, could justify this strict moral and constitutional equation of Jim Crow and affirmative action?

Colorblind partisans have supplied answers widely appealing to whites. To begin with racism, they define it as any direct invocation or use of race. Under this conception, most racism (and in particular the virulent racism of white supremacy) was defeated by the early, pre-affirmative action civil rights movement, which drove racist discourse out of the public arena. As a result, colorblind advocates present the contemporary United States as free from deep racial division. We are, instead, now “a nation of minorities,” comprised no longer of dominant and subordinate races, but instead of a shifting mosaic of ethnic groups in equal competition with each other. As Justice Lewis Powell averred in 1978, “the United States had become a Nation of minorities. Each had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic majority, but of a ‘majority’ composed of various minority groups.”<sup>63</sup> This view insists that racial domination belongs to the increasingly distant past and claims that whites no longer

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<sup>62</sup> *Adarand Constructors, Inc., v. Peña*, 515 U.S. 200, 240-41 n.1 (1995) (Thomas, J., concurring) (citations omitted).

<sup>63</sup> *Bakke*, 438 U.S. at 292 (Powell, J.). Powell made this claim about the United States as it stood at the end of World War II, though most proponents of colorblindness tie the defeat of white racism to the triumphs of the early civil rights movement. See DINESH D’SOUZA, *THE END OF RACISM* (1995); STEPHEN & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION INDIVISIBLE* (1997).

operate in society as a dominant race, but now exist only as a welter of European ethnicities.<sup>64</sup> “The white ‘majority’ itself,” Powell insisted, “is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals.”<sup>65</sup> Under this theory, preferences for “minorities” threaten to extend to almost every group. As Powell explained, “Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only ‘majority’ left would be a new minority of white Anglo–Saxon Protestants.”<sup>66</sup> With its triumphal claims about overcoming racism and its fragmentation of the white overclass into myriad ethnic minorities, colorblindness has erased whites as a dominant group and instead conjures them as the true victims of racism in the brave new world of civil rights and racial remediation.

Regarding race, colorblind partisans justify the moral equation of affirmative action and Jim Crow racism by depicting race as unmoored from social practices. In the most common version of this claim, race is equated to skin color or ancestry, nothing more. In more sophisticated conceptions, race lacks meaning because it is a fiction, an incoherent social construction. Whether it is physical or fictional matters little; the

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<sup>64</sup> One of the first efforts to harness race-as-ethnicity to colorblindness can be found in NATHAN GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* (1975). Alan Freeman has criticized the Court for its “startling claim of ‘ethnic fungibility’—the notion that each of us bears an ‘ethnicity’ with an equivalent legal significance and with an identical claim to protection.” Alan Freeman, *Antidiscrimination Law: The View From 1989*, 64 *TUL. L. REV.* 1407, 1412 (1990). See also Reva Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 *CALIF. L. REV.* 77, 103-105 (2000); STEPHEN STEINBERG, *THE ETHNIC MYTH: RACE, ETHNICITY, AND CLASS IN AMERICA* (2001).

<sup>65</sup> *Bakke*, 438 U.S. at 296 (Powell, J.).

<sup>66</sup> *Id.* See also Cheryl Harris, *Equal Treatment and the Reproduction of Inequality*, 69 *FORDHAM L. REV.* 1753, 1771 (2001).

essential claim is that race has nothing to do with social practices of status competition and subordination. Consider the reasoning in *Hernandez v. New York*, a case involving a Hispanic defendant and the use of a Spanish-language translator, in which the prosecutor peremptorily struck from the jury every Latino. He did so, he said, because he did not believe that these potential jurors “could” set aside their familiarity with Spanish. The phrase “could,” rather than “would,” is telling, for while the latter term suggests concern about individual temperament, the former invokes a sense of group disability.<sup>67</sup> Also raising concern, the prosecutor questioned only Hispanic potential jurors but no others about their ability to speak Spanish. Nevertheless, the Court upheld the exclusion, finding no bias on the part of the prosecutor. Justice O’Connor’s rationale, offered in a concurring opinion, is especially revealing. She thought it irrelevant that the basis for exclusion correlated closely to Hispanic identity and operated to exclude all and only Latinos. Because the strikes were not explicitly justified in racial terms, O’Connor reasoned, no basis existed for constitutional intervention. The strikes “may have acted like strikes based on race,” O’Connor conceded, “but they were not based on race. *No matter how closely tied or significantly correlated to race* the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race.”<sup>68</sup> Ostensibly, social practices not tied directly and explicitly to skin color or ancestry by the use of some specifically racial term do not involve race. Race is empty—either purely physical, a matter of skin color or ancestry, or purely abstract, an erroneous fiction. It is not, as

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<sup>67</sup> *Hernandez v. New York*, 500 U.S. 352, 404 (1991) (The prosecutor testified: “I felt there was a great deal of uncertainty as to whether they could accept the interpreter as the final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses, and I didn’t feel, when I asked them whether or not they could accept the interpreter’s translation of it, I didn’t feel that they could.”).

<sup>68</sup> *Id.* at 375 (O’Connor, J., concurring) (emphasis added).

O'Connor and colorblindness partisans in general would have it, a function of how one is perceived and treated.

The colorblind conceptions of race and racism function similarly: both exist only when mentioned. Race and racism operate under this conception almost as magic words: speak them, and they suddenly spring into being, but not otherwise. This magic-word formalism strips race and racism of all social meaning and of any connection to social practices of group conflict and subordination. *Hernandez* and *McCleskey*, the Georgia death penalty case, are of a piece here: no matter how extreme the discrimination, nor how closely correlated to race, the Court insisted in both cases that race and racism were not involved because no one could be shown to have uttered a racial word. In *Crosby*, in contrast, racism obtained because Richmond said explicitly that some contracting dollars should go to "minorities." Under this understanding, white racism is a thing of the past because few white racists today tie their views or actions explicitly to race. In contrast, race exists and racism operates primarily among racial progressives, who constantly invoke race and demand race-conscious remedies. Colorblindness equates Jim Crow segregation and affirmative action by redefining racism as any mention of race, and race as something utterly empty of social content or history.

The claim that race and racism exist only when specifically mentioned, and not otherwise, also allows colorblindness to insulate from critique a new white racial politics in which racial proxies become politically and socially acceptable substitutes for explicit racism. The civil rights movement worked a major change in U.S. society in making open expressions of white supremacy culturally unacceptable. This was a far cry, however, from actually ending white racial mobilization. Instead, this mobilization, often

orchestrated by white politicians, has continued over the last several decades under the guise of interlinked panics about criminals, welfare cheats, illegal immigrants, and, most recently, terrorists.<sup>69</sup> More generally, culture and behavior have become the targets of racial reactionaries: one can understand Samuel Huntington's recent attack on Latino immigration in this way, as he at once rejects the old ideas of white racial superiority and at the same time aggressively promotes the notion of a superior Anglo Protestant culture.<sup>70</sup> Lawrence Bobo labels theories that lay minority failure at the feet of culture "laissez-faire racism" to highlight the way in which whites attribute their superior social position to a supposed special affinity for the values, orientations, and work ethic needed by the liberal individual in a capitalist society.<sup>71</sup> I agree with Bobo, but emphasize a different point: it's not just that culture and behavior provide coded language for old prejudices, but that colorblindness excuses and insulates this new white racism.

Consider how colorblindness protects current attacks on "illegal immigrants." This is not racism, we're told, because it is not about race at all, but simply about those who violate our laws. The animus is not racial, we're assured, because the targeted group is racially under- and over-inclusive: "illegals" doesn't sweep in all Latinos, but does supposedly include whites who cross the border without documents. Yet obviously current efforts to enflame passions about securing the border with guards, walls, and

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<sup>69</sup> STEINBERG, TURNING BACK, *supra*, at 214 ("Through . . . code words it is possible to play on racial stereotypes, appeal to racial fears, and heap blame on blacks without naming them. Thus, in this cryptic vernacular we have a new and insidious form of racebaiting.").

<sup>70</sup> HUNTINGTON, *supra*.

<sup>71</sup> Lawrence Bobo et al., *Laissez Faire Racism*, in RACIAL ATTITUDES IN THE 1990S 15 (Steven Tuch & Jack Martin eds., 1997). See also Lawrence Bobo & James Kluegel, *Status, Ideology, and Dimensions of Whites' Racial Beliefs and Attitudes: Progress and Stagnation*, in RACIAL ATTITUDES IN THE 1990S at 93.

helicopters shares deep similarities with the racial hysterias that accompanied the mass deportation of Mexican Americans during Operation Wetback in the 1950s, the internment of Japanese Americans during World War II, and the initiation of the Asiatic Barred Zone that prohibited all Asian immigration through the first half of the twentieth century. Race and racism have long been used to patrol the nation's literal and figurative borders; racial politics are just as much at work today, notwithstanding the public foregrounding of seemingly non-racial concerns or the general absence of crude racial slurs. By insisting that race operates only if someone uses one among a narrowly drawn band of racial terms, reactionary colorblindness protects the new racism's efforts to locate minority inferiority in cultural deficiencies and pathological behaviors. It cannot be racial, colorblind partisans tell us, for race has nothing to do with social practices, and white racism is a thing of the past.

## Conclusion

Our faces and our racial ideology maybe changing, but the fundamental racial dynamic of white dominance in our country will not end anytime soon. Instead, it will continue, even as the definition of who counts as white expands, in large part because the material interests of so many demand it, but also because the ideology of contemporary colorblindness protects and perpetuates white dominance. Proponents of reactionary colorblindness wear their anti-racist pretensions boldly, professing their deep commitment to ending racial inequality. But this is a sham, for colorblindness promises to curtail race-conscious efforts to promote racial justice, even as it refuses to acknowledge ongoing racial subordination. Worse, colorblindness redefines race and racism in a manner that excuses contemporary manifestations of racial scapegoating as

legitimate concerns over inferior cultures and behavioral delinquency. For the next several decades, at least, we will suffer this racial future of colorblind white dominance.