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LEGAL POST-RACIALISM AS AN INSTRUMENT OF RACIAL COMPROMISE IN SHELBY COUNTY V. HOLDER

PANTEA JAVIDAN*

The timeline of the Black civil rights movement in the United States reveals a long history of struggle for liberation, advancement, equality and full citizenship. Each gain has invariably met with either swift retaliation on the societal level or more subdued, gradual and systemic retrenchment. In each historical era, retaliation and reversal have caused profound losses—of bodily integrity and life, and legal and political rights. The 2013 decision by the Supreme Court in Shelby County v. Holder to eviscerate the Voting Rights Act of 1965[1] is but one of the most recent losses that can be recorded on the timeline of struggle for racial justice in the United States.[2]

I. Legal Post-Racialism

Professor Sumi Cho argued in 2009 that it was too early to judge whether the Supreme Court would take a "post-racial turn" in its jurisprudence.[3] Post-racialism "in its current iteration is a twenty-first century ideology that reflects a belief that due to racial progress the state need not engage in race-based decision-making or adopt race-based remedies, and that civil society should eschew race as a central organizing principle of social action."[4] Cho posits that the imminence of a post-racial philosophical and rhetorical shift in the Court's jurisprudence depends upon whether "cases dealing with racial remediation effectuate a retreat from race[5]." Four indicators in Court opinions of a post-racial retreat include: (1) a claim that "racial progress or transcendence" is sufficient to render race-based remedies

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[1] Shelby Cnty v. Holder, 133 S. Ct. 2612 (2013).
[2] 42 U.S.C. § 1973 (2012), hereinafter "VRA."
[3] Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1620-21 (2009).
[4] *Id.* at 1594.
[5] *Id.* at 1621.

unnecessary in the present day; (2) promotion of "race-neutral universalism" not only as a normative, aspirational ideal—as in the Doctrine of Colorblindness—but as a descriptive, operational reality; (3) the drawing of "moral equivalences" between racism and race-based civil rights remedies; and (4) any language that indicates a general "distancing from standard civil-rights approaches."[6] Based on these criteria the majority opinion in *Shelby County* strongly indicates a move toward post-racialism in the jurisprudence of the Court.

A. Racial Progress and Transcendence

The VRA, particularly Section 4, contains the memory of American racial injustice and its ongoing legacy.[7] It covers the Deep South—the original Confederate states that seceded from the Union and fought the Civil War over their ability to continue practicing slavery—as well as other states and jurisdictions.[8] During the post-Reconstruction period, Louisiana and Mississippi blazed the trail for other Southern states in disfranchising Black citizens through poll taxes and literacy tests, often exempting Whites through grandfather clauses.[9] By ruling such methods and devices constitutional in 1898, the Supreme Court laid the foundation for their proliferation throughout the South.[10] These laws would remain in effect until the enactment of the VRA in 1965. After decades of Jim Crow, when support for integration entered the political mainstream, elected representatives of these same Southern states drafted and signed the Southern Manifesto (1956) expressing their opposition to federal desegregation efforts.[11] Thus, Southern states were flashpoints in the American civil rights movement. Their often violent resistance to desegregation ushered in the Civil Rights era of formal equality at law, including voting rights and protections embodied in the VRA.[12]

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[6] *Id*.
[7] Section 5 of the VRA required states covered under Section 4 to seek federal preclearance for any changes to voting laws. 42 U.S.C. § 1973 (2012). *Shelby County* held that Section 4 was unconstitutional, effectively nullifying Section 5 as well. Shelby Cnty., 133 S. Ct. at 2615.
[8] With the exception of some jurisdictions, covered states include: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas and Virginia. Shelby Cnty., 133 S. Ct. at 2620.
[9] Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era, Part 3: Black Disfranchisement From the KKK to the Grandfather Clause*, 82 COLUMBIA L. REV. 835, 845 (1982).
[10] Williams v. Mississippi, 170 U.S. 213 (1898); *see also* Schmidt, *supra* note 9, at 848.
[11] *The Southern Manifesto*, 102 CONG. REC. 3948 (1956).
[12] Cho, *supra* note 3, at 1605.

An overwhelming amount of social scientific evidence demonstrates that current conditions in jurisdictions covered by Section 4 are consistent with past conditions. Not only do "elevated rates of voter discrimination remain a serious concern in the covered jurisdictions,"[13] which was verified by the Congressional Record supporting the 2006 reauthorization of the VRA, but the covered states continue to be among "the worst of the worst actors."[14] Since 2010,

> Six of the nine fully covered states have passed new voting restrictions…including voter ID laws (Alabama, Mississippi, South Carolina, Texas and Virginia), limits on early voting (Georgia) and restrictions on voter registration (Alabama and Texas). But only one-third of non-covered jurisdictions passed similar restrictions during the same period.[15]

Shelby County claims that there is sufficient racial progress or transcendence to warrant the elimination of Section 5 voter protections. In the two main arguments, Chief Justice Roberts' quotes his own opinion in *Northwest Austin Municipality Utility District Number One* (2009): (1) "things have changed in the South," and (2) the "evil that Section 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance."[16] In other words, Jim Crow is over; remedies meant to address systemic subordination and oppression are antiquated and unnecessarily burdensome. Even if this argument is unconvincing, Roberts claims that the South should not be specially scrutinized because voter discrimination does not exclusively occur in the South. But the premise of the VRA is not that voter discrimination occurs exclusively in the South, which is why the Fifteenth Amendment covers voter discrimination in the United States

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[13] David C. Kimball, *Judges Are Not Social Scientists (Yet)*, 12 ELECTION L. J. 324 (2013).

[14] Ari Berman, *Why Are Conservatives Trying to Destroy the Voting Rights Act?,* THE NATION, Feb. 5, 2013. Berman explains that, although the number of Black elected officials and voters have greatly increased since the VRA, voting restrictions and redistricting maps are contemporary methods of discriminatory disfranchisement utilized to dilute the power of a Black electorate. In a modern version of the Southern Strategy

> Republicans used their control of state legislatures following the 2010 election to pass redistricting maps that have led to a re-segregation of Southern politics, placing as many Democratic lawmakers into as few majority-minority districts as possible as a way to maximize the number of white Republican seats.

GOP-controlled Virginia recently redrew its maps "to reduce Democratic seats by diluting black voting strength in at least eight districts." *Id.*

[15] *Id.*

[16] Northwest Austin Municipal Utility District No. One v. Holder, 557 U.S. 193, 202-3 (2009).

generally. Rather, the VRA is needed because voter discrimination continues to be very disproportionately concentrated in covered states.

Nonetheless, the Supreme Court adopted Roberts' position and in a predictable 5-4 decision, ruled that Section 4 of the VRA is unconstitutional because its coverage formula is outdated, "based on decades-old data and eradicated practices."[17] Within two hours of the release of the decision in *Shelby County*, Texas rushed to redraw district lines and soon began to enforce strict photo identification rules. Both practices had previously been found to be discriminatory by a federal court.[18] Texas read *Shelby County* as license and impunity for discriminatory redistricting.[19]

B. Race-Neutral Universalism

Post-racial jurisprudence abandons the policy of race-based remedies for race-based wrongs "in favor of seemingly universal solutions."[20] The methods by which courts have traditionally reproduced racial hierarchy that can be seen in *Shelby County* include the utilization of seemingly neutral, but racially contingent, legal rationales, doctrines and principles.[21] These include the refusal of the federal government to hold "concurrent jurisdiction with states over civil rights," and the concession to "home rule" in Southern states, using the legal principle of federalism based on states' rights.[22]

Federalism based on states' rights, however, can only appear neutral when it is socially and historically de-contextualized.[23] In context, the racialized nature of its development and utilization is clear, particularly as a means of achieving what Critical Race Scholar Derrick Bell calls "racial compromise." Racial compromise is "a process whereby disparate groups of whites settle their political differences in a process that involves the

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[17] Shelby Cnty. at 3, 18, 20, 33.
[18] State v. Holder, 888 F. Supp.2d 113 (Dist. Ct. D.C. 2012), Vacated by, remanded by Texas v. Holder, 2013 U.S. Lexis 4937 (U.S., June 27, 2013), State of Texas v. United States of America, 887 F. Supp.2d 133 (Dist. Ct D.C.) (2013) vacated by, remanded by Texas v. United States, 2013 U.S. LEXIS 4927 (2013).
[19] Michael Cooper, *After Ruling, States Rush to Enact Voting Laws*, N.Y. TIMES, JULY 5, 2013.
[20] Cho, *supra* note 3, at 1601.
[21] *Id.* at 1606-1611.
[22] *Id.*
[23] Even the methods and devices of disfranchisement such as literacy tests and grandfather clauses that are now admitted to be discriminatory, including by conservatives, were once ruled Constitutional. These rulings were based on the rhetorically universal, but racially contingent, rationale of "equal application." A law shall be considered non-discriminatory when it appears to apply to all citizens, regardless of its impact or intent. Williams v. Mississippi, 170 U.S. 213 (1898); Schmidt 1982, *supra* note 11, at 846.

involuntary sacrifice of Blacks."[24] Bell finds that the "ultimate racial compromise" was the Hayes-Tilden Compromise of 1877, which formally and abruptly terminated Reconstruction and ushered in the Jim Crow era by conceding "home rule" to the South.[25] To achieve "national unity"—the consolidation of power among White citizenries of the North and South—disparate, conflicting groups of Whites resolved the problem of fractured governance and Democratic-Republican political strife by abandoning Reconstruction, and thus, the recently emancipated slaves to White-supremacist retribution. In exchange for support in electing President Hayes, Republicans agreed to give Democrats "home rule" under the auspices of "equal sovereignty of the states," the same limiting principle invoked by the majority opinion in *Shelby County*.[26] Using "neutral-sounding [but racially contingent] rationales such as 'no private constitutional rights,' 'no special rights,' and 'equal application'" the Supreme Court agreed that there should be no federal interference forcing Southern states to comply with civil rights.[27] Since then, invoking states' rights, home rule or respect for state and local processes in the South has become a "dog whistle" political code for obstruction of racial justice, to deny as much as possible the rights granted in the Reconstruction Amendments.[28]

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[24] Cho, *supra* note 3, at 1606 (discussing DERRICK A. BELL, RACE, RACISM AND AMERICAN LAW 40-47 (5TH ED. 2004).

[25] *Id.*

[26] The South was a stronghold of the Democratic Party prior to the electoral realignment that occurred after Democrats began to support civil rights legislation, especially after Congress passed the Civil Rights Act of 1964 and the VRA of 1965 under Democratic President Lyndon B. Johnson. The former Confederate states became Republican strongholds after Republicans adopted the "Southern Strategy" -- racist pandering through "dog whistle" coded messages about "states' rights" and then "law and order," the latter tapping into anxiety about prospective or emerging social change. Dog Whistle politics continues to figure prominently in the political ideology of the right and the most conservative part of the Republican Party. Michael J. Klarman, *Brown, Racial Change, and The Civil Rights Movement*, 80 VA.L. REV.7 (1994); *See generally*, IAN HANEY LOPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM & WRECKED THE MIDDLE CLASS (2014).

[27] Cho, *supra* note 3, at 1608.

[28] The Reconstruction Amendments include the Thirteenth, Fourteenth, and Fifteenth Amendments of the Constitution—respectively outlawing slavery, and guaranteeing equal protection and voting rights. U.S. Const. Amend. XIII; U.S. CONST. Amend. XIV.; U.S. CONST. Amend. XV. For a more thorough explanation of the origins and politics of *Shelby County*, *see* Berman, *supra* note 14. Berman explains Justice Roberts' advocacy against Section 2 of the VRA prior to his appointment to the Court and the interrelationship between his jurisprudence and the conservative advocacy of Ed Blum, founder of a legal defense fund organized to fight the VRA. See also Zack Beauchamp, *How Racism Caused the Shutdown*, THINK PROGRESS, October 9, 2013. Beauchamp explains that, like states' rights during de jure segregation, advocacy of a "minimalist federal government" during de facto segregation is dog whistle rhetorical device that appears racially neutral because it implies government non-intervention into the marketplace. However, it

Shelby County exemplifies the application of a racially contingent legal principle. It appears universal—federalism based on states' rights—but it is a form of racial compromise deployed to destroy or eliminate Section 5 voter protection for African Americans. *Shelby County* held that federal oversight of and intervention in the way in which the South chooses to handle matters related to the voting rights of minorities is a violation of the "equal sovereignty of the states."[29] The claim that "things have changed in the South" sufficient to warrant eradication of minority voter protections is an example of both descriptive and operational racial transcendence.

C. Moral Equivalence Between Racism and Race-based Civil Rights Remedies

During the *Shelby County* hearing, Justice Scalia, who later concurred in the majority opinion, commented that the VRA is a "perpetuation of racial entitlement."[30] Justice Sotomayor, who dissented, replied that, "Discrimination is discrimination. It's ongoing today. This is not racial entitlement; this is about a basic fundamental right that for so many years America ignored."[31] Racial entitlement has historically meant that Whiteness is treated as "a valuable form of property recognized and enshrined by law as a normative civic and legal ideal."[32] The absence of this property interest has meant a lack of the benefits of citizenship, including the right to vote.[33] Scalia's remark implies that protection of minority enfranchisement is morally equivalent to the racial entitlement of long-standing, historical White supremacy.

D. Distancing Move

Justice Souter has described the persistence of minority voter suppression tactics in the South into the new millennium as pouring "old poison into new bottles," precisely what Section 5 was meant to prevent the covered jurisdictions from doing or allowing.[34] Similarly, deploying race-neutral,

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is actually the product of an alliance between economic libertarians among Republican Party conservatives and racial conservatives of the old Democratic Party that forged today's more conservative Republican Party.

[29] Shelby Cnty., *supra* note 1, at 6.

[30] Debra Cassens Weiss, *Scalia: Reauthorized Voting Rights Act was 'perpetuation of racial entitlement*,' A.B.A. J., Feb. 28, 2013, http://www.abajournal.com/news/article/scalia_reauthorized_voting_rights_act_was_perpetuation_of_racial_entitlemen/ (Last visited September 1, 2013).

[31] *Id.*

[32] *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1701, 1713-14 (1993).

[33] *Id.*

[34] Debo P. Adegbile, *Voting Rights In Louisiana: 1982-2006*, 17 S. CAL. REV. L & SOC. JUST. 413, 436 (2008).

seemingly universal principles and the co-optation of civil rights discourse for racially regressive purposes is not a new form of racial compromise. Racial subordination is disguised in the conservative post-racial jurisprudence of *Shelby County* where claims of racial progress, transcendence and moral equivalence "do the ideological work of colorblindness without so much of its retro-regressive baggage." [35] Conservative post-racialist jurisprudence promotes a "general distancing from standard civil rights approaches"[36] by providing a veneer of newness to old politics.

II. Racial Compromise

> In the racial-dictatorship era, unreconstructed white normativity prevailed and legislatures passed laws that were clearly 'race-d' to disadvantage peoples of color under the auspice of 'states-rights'-based federalism. The courts in the racial-dictatorship era provided little relief. Indeed, courts eviscerated the meaning of the Reconstruction Amendments and civil-rights statutes by using seemingly neutral strategies to disenfranchise peoples of color in lockstep with sociopolitical forces that sought to restore the South's honor.[37]

From the Hayes-Tilden Compromise of 1877 to Jim Crow; from the Southern Manifesto to the Southern Strategy, the timeline recording the struggle for racial justice is replete with instances of racial compromise achieved by "race-neutral" means. Racial compromise denies full citizenship by reducing Black citizens to symbols deployed in the performance of political theater—a process of structural violence that interlocks with physical violence, to which governments on the local, state and federal levels have often been complicit.[38] During the post-Civil War era, in what sociologists Omi and Winant [39] identify as a *racial dictatorship*, the Reconstruction Amendments provided a "brief respite," a transient benefit granted because of "an interest convergence in maintaining Republican Party influence in the South."[40] Similarly, the decision in 1954 in *Brown v. Board of Education* that

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[35] Cho, *supra* note 3, at 1599.
[36] *Id.*
[37] *Id.* at 1606.
[38] Anthony Paul Farley, *Lacan & Voting Rights*, 13 YALE J. L & HUMAN. 283 (2001), hereinafter Farley 2001; Dwight L. Greene, *Justice Scalia And Tonto, Judicial Pluralistic Ignorance, And The Myth Of Colorless Individualism in Bostick v. Florida*, 67 TUL. L. REV. 1979, 2023 (1993).
[39] MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S, at 71 (2d ed. 1994), cited in Cho, *supra* note 3, at 1606.
[40] Cho, *supra* note 3, at 1606. Interest convergence theory postulates that civil rights gains are conditional, contingent and fleeting; that "…substantive legal gains for racial minorities seldom occur unless they converge or are at least perceived as converging with the interests of white elites…as advancing, or at least not hindering, the material interests of dominant groups."

held segregation of public schools unconstitutional, and the political victories of the Civil Rights Movement that followed during the 1950s-60s, including the VRA, resulted from an interest convergence with Cold War era politics "largely driven by geopolitical concerns."[41] To fulfill its aspiration of being perceived as a global symbol of democracy in light of Soviet propaganda to the contrary, the United States was compelled to rehabilitate its image when the international spotlight fell on Jim Crow segregation and racial violence in the South. The US government also needed to appease Black veterans aggrieved by the irony of returning to Jim Crow after contributing to a war effort against racist regimes in Europe.[42]

Shortly after passage of the Reconstruction Amendments, the Supreme Court deployed "limiting principles" to eviscerate them.[43] Terrorism against Black voters and the Black population in general burgeoned, particularly in the form of lynching conducted by "vigilantes." White supremacist paramilitary organizations such as the Klan generated a sense of solidarity and community among White participants through violent reassertion of the boundaries of racial identity and power.[44]

The current Republican agenda has its historical corollary, but its modus operandi has necessarily changed from the old conservatism of Southern Democrats in response to the racial consciousness of the Civil

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William M. Carter, *The Thirteenth Amendment, Interest Convergence, and the Badges and Incidents of Slavery*, 71 MD. L. REV. 21, 23 (2011).

[41] Carter, *supra* note 40, at 24 (discussing MARY L. DUDZIAK, COLD WAR, CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000) and her history describing the relationship between American foreign policy and the civil rights movement in the United States); *see also* Jennifer G. Correa, *The Targeting of the East Los Angeles Brown Berets by a Racial Patriarchal Capitalist State: Merging Intersectionality and Social Movement Research,* 37 CRIT. SOCIO. 83, 95 (2011).

[42] Correa, *supra* note 41, at 95.

[43] Cho, *supra* note 3, at 1611.

[44] Sherrilyn A. Ifill, "Creating A Truth And Reconciliation Commission For Lynching," 21 LAW & INEQ. 263, 294 (2003); Farley, *supra* note 38; *see also* Anthony Paul Farley, *The Black Body as Fetish Object*, 76 OREGON L. REV. 457 (1997). In a general sense, segregationist politicians, through racially charged official discourse and "law and order" actions, created the optimal political conditions for racial violence, and where politically expedient, governmental officials have been accessories to racial violence, particularly lynchings. Federal government complicity to racist violence did not stop at lynching. For decades the US Senate blocked anti-lynching legislation, finally apologizing for its obstructionism in 2005. "Nearly 200 anti-lynching bills were introduced, three of which made it past the lower House of Representatives between 1920 and 1940. But despite the support of seven US presidents, the Senate stopped any of them becoming law." "Senate apologizes over lynchings," BBC News, June 14, 2005, http://news.bbc.co.uk/2/hi/americas/4090732.stm (Last visited September 1, 2013). *See also* Beauchamp, *supra* note 28. Beauchamp explains that the refusal to pass an anti-lynching bill was due to a tacit political bargain struck during Franklin D. Roosevelt's presidency that in exchange for Southern Democrats' support for the New Deal, Northern Democrats would not vote for an anti-lynching bill.

Rights era, which was generated in the broader context of anti-colonial struggle following World War II. The reproduction of racial hierarchy has had to shift from *de jure* articulation to quieter, *de facto,* configurations. Restoring Southern honor and expunging "unfair stigma" from the South—without a comparable level of commitment to civil rights—has been a mainstay of Southern conservatism for the century and half since the Civil War. Restoring Southern honor is not about racial justice, but the management of public perception while maintaining racial hierarchy. Though the Reconstruction Amendments are unconditional in their guarantees, interest convergence theory explains the political contingency of their implementation[45] and the precarious social condition of those whom the statutes were intended to protect.

In the post-Cold War era of US-driven globalization and global economic governance, federal advocacy of civil rights has diminished in key ways, requiring examination of contemporary racial compromise. "Southern conservatives had long opposed the VRA, but until recently they were a minority within the GOP."[46] Commentators have recently observed that present day Conservatives have challenged the VRA for three reasons: (1) the makeup of the Republican party has become Whiter, more Southern and more conservative[47]; (2) there is substantial funding for conservative advocates who have been trying for a quarter century to destroy the VRA,[48] and (3) because the Republican Party has failed to attract a substantial portion of minority votes, it focuses efforts, instead, on suppressing the votes of an "increasingly diverse electorate" in order to maintain power.[49]

The Rehnquist and Roberts Courts (1986-2007) have been post-Civil Rights Courts[50] in which the Colorblindness Doctrine prevailed and civil rights claims of White men and women in employment discrimination and

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[45] Interest convergence theory "does not contend that individual whites perform a conscious calculus of whether certain advances in racial justice will work in their material self-interest. Rather [it] suggests that whites are likely to react adversely to civil rights measures that they perceive as solely benefiting racial minorities." Carter, *supra* note 40, at 25. It is also "not merely a variation on the theme that 'all law is politics,'" but with regard to judges, especially Supreme Court Justices, "given the narrow segment of the mostly white elite from which federal judges (and especially Supreme Court Justices) are drawn, interest convergence theory suggests their worldview and life experience will generally be such that remedies perceived as benefiting only people of color are unlikely to find their favor." *Id.*

[46] Ari Berman, *Destroying the Voting Rights Act,* THE NATION, Feb. 8, 2013.

[47] *Id.,* Beauchamp, *supra* note 28.

[48] Berman, *supra* note 14.

[49] *Id.*

[50] Prior to his appointment, Chief Justice Rehnquist was a vocal segregationist. Cho, *supra* note 3, at 1614-16. His successor, Chief Justice Roberts, delivered the majority opinion in *Shelby County*.

affirmative action cases gained favor.[51] Roberts' majority opinion in *Shelby County* selectively highlighted slight evidence to support claims of racial progress and transcendence. The conclusion that protection is no longer needed is unsupported by the social science record.[52] When viewed in social and historical context, demonstrably discriminatory (though updated) methods of disfranchisement of the sort and in the sites that Sections 4 and 5 of the VRA intended to remedy continue to exist.

By presuming racial transcendence, a Post-Civil Rights Court is transmuting the normative, aspirational race-neutral universalism of colorblind jurisprudence into a conservative jurisprudence of post racialism. As *Shelby County* demonstrates, the presumption of racial transcendence makes race-neutral universalism appear both descriptive and operational, and therefore "authorizes the retreat from race" and distancing from the civil rights remedies provided by the VRA.

[51] *Id.*; "Colorblindness recognizes racial discrimination as a private, individual, or episodic aberration detached from public or structural explanations. Hence, colorblindness promotes the reconciliation of the irreconcilable: racists exist as individuals apart from any systemic race problem," an ideology that "furthers racial inequality." Osagie K. Obasogie, *Anything but a Hypocrite: Interactional Musings on Race, Colorblindness, and the Redemption of Strom Thurmond*, 18 YALE J.L & FEMINISM 451, 491-2 (2006).
[52] Kimball, *supra* note 13, at 325.