Agenda for the Post-Civil Rights Era, An

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NOW IS A PERFECT TIME to consider the effect of what has become known as the civil rights movement. This year marks the thirtieth anniversary of the Voting Rights Act of 1965 and the forty-first anniversary of Brown v. Board of Education, both landmark products of the civil rights era. It is also appropriate, if not necessary, at this time to consider the movement’s successes and failures; to assess what has worked and what still needs to be done; and to articulate the primary goals, objectives, and strategies of this great movement.

This task could prove problematic. There is not complete agreement as to what the civil rights movement was supposed to have achieved, nor is there agreement as to what the civil rights movement, in fact, accomplished. This state of affairs may help explain why we have had some difficulty assessing its success, and why we have not even been able to agree whether we are still in the civil rights era or have moved into a post-civil rights period.

There is substantial agreement, however, on some aspects of the civil rights movement. It is beyond dispute that the civil rights movement directly challenged a large number of federal, state and local laws that explicitly discriminated against blacks and other racial minorities. There is also

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1. When I refer to the “civil rights movement,” I am referring primarily to the more mainstream African American organizations, such as the National Association for the Advancement of Colored People (“NAACP”) and the Southern Christian Leadership Conference (“SCLC”), that worked to end racial discrimination from the 1930s to the 1960s. The common thread among the organizations under the umbrella of the “civil rights movement” is that they worked in large part to desegregate and integrate institutions that either barred blacks or had subjected them to inferior treatment based on race. The black nationalist and black power organizations that became prominent in the late 1960s and early 1970s do not fall into my grouping for the sake of this Article.


agreement that the civil rights movement largely eradicated explicit, state-imposed racial inequality. Racially discriminatory laws once pervaded government at every level and comprised part of a racial caste system that controlled the lives of blacks and other minorities and subordinated them relative to whites.

Nevertheless, there are still important areas about which we do not necessarily agree. While these areas might seem subtle or nuanced, they are fundamental both to deciding what the civil rights movement meant and what it was, and to what the agenda for the post-civil rights period should be. Take, for example, the laws from the civil rights era that clearly discriminated. Many of these laws were ostensibly "neutral," not only as to statutory language, but arguably even in application. Laws barring blacks from riding with whites on passenger trains also barred whites from riding with blacks, and laws that prohibited blacks from marrying whites also prohibited whites from marrying blacks. As a purely logical matter, these laws appear to be neutral and symmetrical. Other discriminatory laws, on their face, more explicitly favored whites and subordinated blacks, such as those laws that barred blacks from serving as jurors and from voting.

There is broad consensus that the civil rights movement was designed to attack and repeal the more explicitly racist laws, but what about the other laws, those that were racial but that appeared to be "neutral" and "symmetrical"? Here the consensus begins to disintegrate. Some argue that so long as laws are logically neutral, racial classification per se is not problematic. Others argue that it is the effect of the law, examined contextually and historically, that determines its permissiveness, and that any ostensibly neutral law that has a discriminatory effect is problematic. Some argue that the

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6. See, e.g., Strauder v. West Virginia, 100 U.S. 303 (1879) (striking down as unconstitutional a West Virginia state law that declared blacks ineligible to serve on grand or petit juries).
civil rights movement only fought against formal inequality and governmental acts. Others argue that the civil rights movement focused not only on eradicating explicitly racist state laws, but also on private acts of discrimination against racial minorities.

These issues raise the question of the proper scope of the civil rights movement: Is it appropriate for the civil rights movement to move beyond fighting only state-imposed or explicit discrimination, and if so, what would be the limiting principle? Lawyers and scholars have confronted this question in the context of equal protection law when the public-private distinction is made in regard to the existence (liability) or nonexistence (no liability) of discriminatory state action. Furthermore, by focusing on discrimination as a logical issue instead of looking at the racial conditions and practices in our society, we are pulled into the neutral and symmetrical context that discrimination suggests. According to this neutral and symmetrical context, the major problem facing society is discrimination. Therefore, any discrimination is bad, including discrimination that burdens whites and benefits blacks and other minorities. This position can aptly be described as the ostensibly neutral "colorblind" position. The colorblind position has
become the dominant narrative associated with the civil rights movement. This narrative is one of the major impediments to developing a thickly textured civil rights movement. As a logical matter, it might have great appeal, but as a practical matter, in the context of our history, it is the narrative of continued racial hierarchy. It must be discarded.

I. The Colorblind Position

The colorblind position supports a legal skepticism of racial categories and racial classification. To the colorblind position, it matters not who benefits and who is burdened by a race-conscious act. The apparent goal is to treat everyone equally without reference to context, situation, history or culture. On its face, the position is ostensibly neutral, in keeping with the dictates of procedural fairness and formal equality. However, the colorblind position is anything but neutral in effect and, in practicality, treats differently situated persons similarly.15 As Neil Gotanda stated, “[a] colorblind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans.”16 A number of important assumptions inform the colorblind position. First, the colorblind position assumes that the law does not recognize groups, only individuals. Second, the colorblind position assumes that race is irrelevant and that law should avoid any recognition of race at all costs. Racial discrimination is therefore a subcategory of the colorblind position.17 Importantly, there is a twist in the focus of this assumption of the colorblind position: The major evil presented by discrimination is the

15. Colorblindness, with its formal approach to race, disconnects race from its history and social origins. Gotanda, supra note 9, at 37. It was this disembodied approach that allowed the Court in Plessy to argue that whites and blacks were being treated the same. Subordination was excluded from consideration. When the argument for formal equality was raised in Shelley v. Kraemer, the Court noted that both blacks and whites theoretically could use restrictive covenants to exclude the other race, however, it was only whites that used this practice to exclude blacks. 334 U.S. 1, 22 (1948). The Court looked at the actual practice in real life, found that the practice was used by whites to subordinate blacks and concluded: “The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten.” Id. at 23.


use of race as a category, not the eradication of racism or racial hierarchy. Within that assumption, the focus is on ending all racial discrimination. Third, the colorblind position assumes that the world is, for the most part, racially fair. One who challenges this position faces a heavy burden. Moreover, if challengers can prove that the world is not basically fair, the colorblind position allows only limited remedies to correct extraordinary injuries.

This colorblind, race-neutral position currently occupies center stage in the American debate on race, both in politics and in the law. It is against this background of colorblindness and neutrality that conservatives can plausibly attack race-conscious programs like affirmative action. It is the power of the colorblind position that makes it difficult for liberals to defend race-conscious strategies. Indeed, much of the rhetoric and many of the stated goals of the civil rights movement advocated moving toward the creation of a colorblind society. The concepts of neutrality and colorblindness, however, both as goals and as strategies, have always been extremely limited and problematic in terms of racial justice. Today, colorblindness is extremely pernicious and detrimental to the interests of the vast majority of persons of color in the United States.  

When society had a formal racial "dictatorship" that expressly denied services and opportunities to blacks and other persons of color, the concept of a colorblind law and the goal of formal equality played limited, but useful roles in the fight against racial subordination. But the scope of the colorblind concept was never intended to eradicate racial hierarchy and racial subordination. Indeed, the basic assumption that informed Justice Harlan's use of colorblindness is that colorblindness would comfortably co-exist

18. Colorblindness is based on both a false neutrality and a false symmetry that simultaneously hides and supports racial domination. The true lack of symmetry between races is implicit in how it is decided who is "white" and who is "black." See Harris, supra note 14, at 1737-45 (discussing white legal identity). The plaintiff in Plessy, remember, was white for all intents and purposes. See Plessy, 163 U.S. at 541. White is purity, black is contamination. The lack of symmetry is noted by the question posed by the rap group, Public Enemy, who ask: "Why is it that a white woman can have a black baby, but a black woman cannot have a white baby." The formal approach to ending equality does not disturb these asymmetrical assumptions. Indeed, the Court has often stated that race is immutable, ignoring the fact that race has and will continue to mutate as a function of its social construction. See, e.g., Thomas W. Simon, Suspect Class Democracy: A Social Theory, 45 U. MIAMI L. REV. 107, 147-49 (1990) (discussing immutable characteristics and strict scrutiny review). See also Gotanda, supra note 9, at 24-26 (discussing rule of hypodescent).

19. Howard Winant uses the term "dictatorship" to describe the racial condition in the United States prior to the civil rights movement. Howard Winant, Racial Condition: Politics, Theory, Comparisons (1994).
with racial subordination. This limitation, however, often eluded civil rights leaders who, during much of the early years of the movement, focused on challenging and destroying the vast structure of formal racial inequality that pervaded American society up until the late 1960s. To the extent that we have dismantled America's racial dictatorship and formal racial caste system, there is much for the civil rights movement to celebrate. Many brave people put their lives on the line to end formal manifestations of racism. As successful as it was, though, it failed to reach beyond formal racism.

For example, school desegregation, certainly the greatest victory of the civil rights movement, failed to eclipse formal racism. In 1954, the Supreme Court, in Brown v. Board of Education, struck down the doctrine of "separate but equal" and ordered an end to state-sponsored racial segregation in America's public schools. While this decision changed the landscape of American law, it did not achieve equality on a substantive level. This was not just a failure of application. In subsequent rulings, the Court limited Brown in ways that made it impossible to reach some of the most persistent and virulent forms of racial subordination. The Court, for example, has held that Brown did not stand for integration, but only against state-sponsored segregation. In one case, the Court held that even within a school district, Brown only applies to intentional, state-sponsored segregation. In another case, the Court held that suburban whites who separated themselves residentially from blacks could not be ordered to participate in desegregating inner-city school districts. Brown was an appeal to end formal inequality in education and to get segregation off the books, not to equalize educational resources or ensure that every child has an equal educational experience. Also, the remedy in Brown was in no way designed to disturb racial hierarchy.

20. See infra notes 29-35 and accompanying text (discussing Harlan's dissent in Plessy v. Ferguson).
26. Take for example, the Court's willingness to allow states to desegregate schools with "all deliberate speed" rather than immediately. See Brown v. Board of Educ., 349 U.S. 294 (1955). This allowed states violating the Constitution a grace period during which they could continue to deprive African-American children of access to white schools. The Court could have, but chose not to, declared all segregative law immediately unenforceable and void. In fact, this
Racism is not a single concept.  If the goal of the civil rights movement was to end all racism—not just one form of racism—then there is still much work to be done. In fact, if *eradicating* racism is the goal of the civil rights movement, a colorblind approach to ending discrimination, as well as any ostensibly neutral solution to racial injustice, is a substantial impediment to achieving substantive racial justice.

Some may find it strange that a colorblind approach actually hinders understanding and movement towards racial justice because the vision of a colorblind society has long been closely associated with racial justice. However, its transformative value was always limited to attacking the racial caste system, not to disturbing and dismantling racial hierarchy.  The concept of a colorblind law was first articulated by Justice Harlan in his dissent in *Plessy v. Ferguson*. In the late 1800s, Justice Harlan was the Supreme Court’s progressive on racial issues. At first blush, his views on racial justice seem more in keeping with views expressed today than with those held by most of his contemporaries. In fact, modern commen-

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27. See David T. Goldberg, *Racist Culture: Philosophy and the Politics of Meaning* 90-116 (1993). Goldberg warns us not to search for a universal, a historical, a contextual, simplistic definition of racism. Rather, he asserts that racism is always culturally and temporally specific. Indeed, he would even say that there are many “racisms.” Racisms are exploitations, but more importantly and more often they are exclusions. He notes that the concept of race is a social construct, and it has its genesis in the period of liberalism. In fact, as best as could be determined, the word “racism” itself is only about fifty years old. And, before there was race in the modern sense, there was not a notion of “white” in the modern sense. Universality then meant white substantively, but looked formally neutral. Because racism as such is coterminous with liberalism, it is dependent upon liberalism for its definition and survival. So in changing the terms of the racist discourse, we may need to change the very discourse of liberalism. In other words, racism might not be able to be fixed within the discourse of liberalism. Finally, as Goldberg states, racism continues to mutate based on changed conditions.

28. Kimberl6 Crenshaw notes that formal equality initially served a transformative purpose, though that is no longer true. See Crenshaw, supra note 9. Derrick Bell argues that we have not made any appreciable progress racially, and he concludes that equality is not a useful concept. See Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 373 (1992). For a response to Professor Bell, arguing that as the nature of the racism changes, the appropriate strategy to combat racism must also change, see John a. powell, *Racial Realism or Racial Despair?*, 24 CONN. L. REV. 533 (1992) (agreeing with Bell’s critique of formal equality, but arguing that his analysis is limited because he does not distinguish adequately between formal and informal equality).

29. 163 U.S. 537 (1896).

30. He is most famous for his dissenting opinions in two cases considered to be an embarrassment to American jurisprudence. See *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting); *The Civil Rights Cases*, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

tators, scholars and jurists frequently evoke the first Justice Harlan when espousing the concept of a colorblind Constitution,\textsuperscript{32} often cited as an enlightened position on racism and the law during a period when our country openly embraced racial domination. Although he was undoubtedly enlightened for his time, a closer reading of Justice Harlan’s dissent in \textit{Plessy} reveals that his concept of racial justice would hardly be considered enlightened today.\textsuperscript{33} In his dissent in \textit{Plessy} he states:

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 the view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is colorblind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful.\textsuperscript{34}

Justice Harlan’s concept of colorblindness challenged the renewed racial dictatorship, but at the same time embraced racial hierarchy and subordination.\textsuperscript{35} He was only concerned with challenging the \textit{explicit racial dictatorship} that existed during the Jim Crow era. Indeed, he assumed that


\textsuperscript{33} Justice Harlan’s view of colorblindness was complex and ambiguous. While he clearly recognized and accepted the private domination of whites over blacks, his views of governmental subordination were not merely formal. As Gotanda points out, Harlan used a historical racial analysis for government action and a formal racial analysis for private action. Gotanda, supra note 9, at 39. While Harlan’s use of colorblindness may have continued this distinction, modern jurists have unambiguously embraced colorblindness as the equivalent of formal equality. \textit{Id.} at 40. \textit{See infra} note 55 (listing use of term “colorblind” in Supreme Court opinions).

\textsuperscript{34} 163 U.S. at 559. The first part of this paragraph, if taken out of the context of this opinion, would sound to a modern-day reader like an excerpt from a white supremacy propaganda sheet. I think that even when read in context, Justice Harlan’s view of white structural and cultural power is instructional. Harlan is telling us that whites dominate—structurally, economically, and politically. He also tells us that under the best reading of the Constitution, when “hold[ing] fast to the principles of constitutional liberty,” white domination will remain undisturbed. \textit{Id.} This makes his subsequent advocacy for a “colorblind” Constitution seem very geared not only to a notion of formal inequality under the law, but of a notion of “equality” that will not and cannot change the structural inequities of racial hierarchy in the United States. This instructs us that we need not change who is “humble” and who is “powerful,” to use Harlan’s phrase, in order to achieve formal equality, only to achieve substantive equality.

\textsuperscript{35} Harlan’s language in \textit{Plessy} shows us something else that is instructive: it shows us that there has not always been exclusion and domination of African Americans only; exclusion and domination has historically affected groups other than simply African Americans. For instance, Justice Harlan notes that the Chinese are a “race so different from our own that we do not permit those belonging to it to become citizens of the United States. [Chinese] are, with few exceptions, absolutely excluded from our country.” \textit{Id.} at 561.
whites were at the time, and always would be, superior as a race. Colorblindness in this extreme form makes it difficult to identify and address substantive racism.\textsuperscript{36}

This is not to say that the colorblind position does not have a certain rhetorical force. It does. Those who embrace the colorblind doctrine, for instance, can point to the improvement of socio-economic status of African Americans and persons of color in the United States over the last one hundred years as proof that racial subordination in the United States has ended. They can argue that much of the change came about as a result of the efforts of the civil rights workers who pursued an ideal of a colorblind society. Indeed, we may have slain or seriously wounded the one form of racism that the civil rights movement explicitly attacked—formal racial inequality.

Furthermore, because race is closely associated with racism, there is the suggestion that those who insist on talking about race or thinking in racial terms are perpetuating racism.\textsuperscript{37} Take, for example, the direction that race consciousness took in the late 1960s. Largely integrationist and integrated organizations, such as the NAACP and the SCLC, dominated the civil rights movement into the mid-1960s. By the late 1960s, most of the vestiges of state-imposed, explicit racism—formal racial inequality—had been eradicated. For many blacks, however, life had not substantially improved, particularly in the urban centers. The more mainstream civil rights organizations were not equipped to speak to the complex needs of the urban racial poor, leaving a vacuum.

Into this vacuum stepped black nationalist groups who espoused more militant, race-specific language. These groups were extremely critical of the white power structure. Whites were expelled from many of the organizations, and the issue of inclusion of whites in the movement to improve the lives of blacks led to deep splits within the black political community.\textsuperscript{38} These groups often times reflected the very real anger and pain of the urban communities that would explode during the riots of 1968, following the

\textsuperscript{36} Justice Powell recognized this concept. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). Even in the recognition of the need to see race, he still embraced the goal of moving to a colorblind society. \textit{Id.} at 289-90. “The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.” \textit{Id.}

\textsuperscript{37} In other words, the colorblind position allows us to pretend to fight discrimination without having to bring up the uncomfortable topic of race. See John A. Powell, 31 \textit{Hungry Mind Rev.} 15 (1994).

\textsuperscript{38} Possibly the most notable of these were the rifts created within the Student Nonviolent Coordinating Committee (“SNCC”) and the Black Panther Party. See generally \textit{Black Protest Thought in the Twentieth Century} (A. Meier, et al. eds., 2d ed. 1971); Harold Cruse, \textit{The Crisis of the Negro Intellectual} (1967); Herbert H. Haines, \textit{Black Radicals and the Civil Rights Mainstream: 1954-1970} (1988).
deaths of Martin Luther King, Jr. and Robert F. Kennedy, Jr. Racial inte-
gation and the dream of a colorblind society became part of the dominant
cultural—white—rhetoric. The result of this schism was to place nega-
tive connotations on race consciousness, and to make more palpable, espe-
cially to liberal whites and integrationists, the rhetoric of colorblindness.

As Gary Peller has noted: "[t]he rageful rhetoric of hate against whites
adopted by many nationalist groups and leaders seemed to confirm to
whites the idea that black nationalism and white supremacy were identical
manifestations of irrational and indiscriminate hate." He continues,

But the equation of black nationalists and white supremacists as-
sumes a neutral standard from which to identify race consciousness as a
deviation, and from which to link race inherently to prejudice and domi-
nation. When viewed in terms of the actual context of history and power
relations between racial groups in America, however, white supremacy
and black nationalism embodied very different understandings of race.

Thus, black nationalism—and with it race consciousness or the anti-color-
blind position—represented a threat to racial justice, rather than serving a
"positive and liberating role."

Another concern is that the colorblind position effectively erases race
from the analysis. For instance, it allows for a black woman to be seen in
anti-discrimination terms as a woman only, or, a woman first and as an
African American second, if at all. Gender somehow seems fundamental,
and race indeterminate. The effective erasure of race has been pointed out
by Patricia Williams. This prompted two commentators to respond:

Williams's powerful description of racism as the phantom affecting eve-
everyone in society explains much about the [dynamic of the confirmation
hearings of Clarence Thomas]. The rendering invisible of Professor
Anita Hill's race, its exclusion from a discussion of her sexual harass-
ment charge, meant racism/white supremacy was not discussed. Profes-
sor Hill made her charge as an African-American woman in a society

39. The rhetoric of a colorblind law and the rhetoric of integration is universalist and conten-
tual, inclusive of both blacks and whites. This universalist positioning gives the rhetoric the en-
lightenment veneer of reason and equity. Race, then becomes subordinated to such issues as
gender and class. Race-conscious rhetoric is situational. Thus, it appears unenlightened and
exclusionary.

explains that "[t]hrough the ideological filters of integrationism, black nationalism and white
supremacy appear essentially the same because both are rooted in race consciousness, in the idea
that race matters to one's perception and experience of the world." Id. at 790.

41. Id. (emphasis added).
42. Id. at 761.
dominated by white male values. The erasure of her race allowed racism to act as a phantom once again.44

The colorblind position is given even more credence by the increasing acknowledgment that race is less a function of biology and more a function of social construction. In other words, it looks less like gender and more like class. Consequently, one could argue that if race is not scientifically grounded, why not simply stop organizing ourselves around it as if it is a necessary truth.45 Currently, there is talk of the United States Census Bureau effectively dropping racial categorization from the census count in the year 2000.46 This approach is misguided. Although race may be questionable as a scientific reality, it remains powerful as a social fact.

Race remains important despite the fact that it is to a great degree a social construction. For instance, Barbara Fields contends that race is an ideology, not an idea.47 To remain a part of the culture, it must be reaffirmed.48 She states, "[a]n ideology must be constantly created and verified in social life; if it is not, it dies, even though it may seem to be safely embodied in a form that can be handed down."49 One could argue that the law has played a role in "verifying" race.50 Racial classifications shape how we talk about race. While racial classifications in the law may constrain the ability of the law to effectively address the needs of certain communities, racial classifications at the same time work to give credence to certain historical narratives. Thus, the continuing use of the racial category of "black" may hamper our ability to effectively address the needs of those African-American communities caught at the intersection of race and poverty. Dropping the use of the racial category—erasing race as the colorblind position would advise—effectively erases the historical experience of African Americans from having any legal or moral force.

45. William Julius Wilson unfortunately legitimized this position. See generally WILLIAM J. WILSON, THE DECLINING SIGNIFICANCE OF RACE (1978) (arguing that while race historically had determined black life chances, since 1965 black life chances have been determined by class status, and arguing that non-racial economic and social policy correctives could remedy the woes of black America better than anti-discrimination measures). Wilson's position has been criticized by a number of commentators. See, e.g., John O. Calmore, Exploring the Significance of Race and Class in Representing the Black Poor, 61 OR. L. REV. 201, 210-15 (1982) (discussing the continued significance of race).
48. Id.
49. Id. at 112.
50. Thank you to Sara Gurwitch for helping me on this point.
The Supreme Court, all too eager to embrace a colorblind position in law and end the use of race as a legal category, is making it more difficult to identify and address the forms of racism. The Court has trivialized and delegitimated any discussion of race and racism, except when discussing the receded history of slavery. "Race," as it is imagined by the Court, has been stripped of its historical meaning and is now divorced from its economic, cultural and political contexts. It has, essentially, been individuated into impotence. What remains in the Court's new world are biological individuals who, alone or in occasional aggregates, are guided by their competitive desires or limitations, by their genetic or psychological urgings or limitations, or by their ability or inability to access political power. Their membership in a disempowered or marginalized group, such as a racial minority, is of little consequence. Most importantly, if race is a correlate of any of these capacities, it is through the work of nature and not via the constructions of the state. In rejecting the social constructions of race, the Supreme Court proffers a view that is contradicted by history and empirical data, refuted by virtually every social science and natural science theorist, and embarrassed by the experience of every American. Ultimately, the Court eludes the truth that race is a political reality in America.

These failings aside, what the Court offers is a defensible conception of "race." If one accepts this concept of race, unmoored from history and social reality, then the Court's colorblind claims seem reasonable and even necessary. Accordingly, the conservative members of the Court seem most concerned with protecting against the use of any race-conscious strategy, even if it would help blacks and other minorities. In 1989, Justice Mar-

52. If race were simply formal or a biological fact, then there would be no need for the Court to protect it with a review of strict scrutiny. The use of strict scrutiny can only be supported because of the historical use of race in our country. As Gotanda points out, there is a different racial history for blacks and whites. See Gotanda, supra note 9, at 32-34.
53. For instance, the Court has stated that "[r]acial and distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978). Consequently, the ideal of a neutral "equality" means that the law will no longer account for race in a historical or cultural sense. Anti-discrimination law then gets stripped of its normative underpinning. As Justice Blackmun later stated, "sadly . . . one wonders whether the . . . [Court] still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was." Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 662 (1989) (Blackmun, J., dissenting).
54. As Neil Gotanda contends, "colorblind constitutionalism supports the supremacy of white interests. . . . By fixating on formal race and ignoring the reality of racial subordination, the Court . . . risks establishing a new equivalent of Plessy v. Ferguson." Gotanda, supra note 9, at 67.
55. The word "colorblind" has appeared in twenty Supreme Court opinions since 1945 (based on Lexis and Westlaw searches). Three of these cases were procedural. In only two cases of the remaining seventeen in which the nonwhite party won was the word "colorblind" used on the winning side, and both of those cases were early civil rights decisions of the Warren Court. In
shall foreshadowed the implication of the colorblind doctrine by observing
that one would think from the majority's opinion that white men were the
racially oppressed group in the United States. Moreover, Congress and
the President, again apparently adhering to the colorblind doctrine of the
Court's conservative majority, have decided to call for a reexamination of
affirmative action.

There are continuing, and in some cases widening, disparities between
blacks and whites in the United States. The per capita wealth differential
between blacks and whites is 1 to 11. Along virtually every social and
economic indicator, blacks fair substantially worse than whites. Certainly
Justice Harlan's prediction and Professor Derrick Bell's claim that blacks
will never achieve equality with whites appears to be a reality that will
describe the rest of our lives.

While there is some focus on the subordinate position of blacks, there
is no mention of racism as a continuing and viable cause for that subordina-


dissenting).

57. See, e.g., Susan Page, A Turning Point: A Debate Heats Up, Affirmative Action's Future
is in Doubt, NEWSDAY, Mar. 12, 1995, at A20; Steven Roberts, et al., Affirmative Action on the

The recent decision by the Regents of the University of California to eliminate affirmative
action programs exemplifies the colorblind doctrine and the reexamination of affirmative action.
Susan Ferriss, UC Fears Fallout on Affirmative Action Vote: Officials Weigh Fed's Threat to
Funding, S.F. EXAMINER, July 24, 1995, at A1. Further, California's Governor, along with other
presidential candidates, has indicated that the elimination of affirmative action will be the center-
piece of his campaign for the presidential elections. Id.

59. Id. at 213-16.
60. Id.
tion. This ignorance remains despite repeated studies showing blacks and other minorities continue to experience wide-spread discrimination.\textsuperscript{61} Most black children continue to attend segregated schools.\textsuperscript{62} Blacks and whites continue to live in segregated neighborhoods.\textsuperscript{63} As a group, black schools are underfunded and students perform considerably worse.\textsuperscript{64} Black neighborhoods are isolated from jobs and adequate educational and vocational institutions.\textsuperscript{65} The best indicator that someone lives near a toxic waste site is the person’s race.\textsuperscript{66} Whether one looks at the employment rate,\textsuperscript{67} the infant mortality rate,\textsuperscript{68} or the administration of the death penalty,\textsuperscript{69} blacks consistently fare worse than whites. Thus, the colorblind doctrine does not square with the reality that race continues to be a dominant factor in distributing opportunities in the United States.

When the Supreme Court is confronted with these statistics, it often adopts the position that the statistical disparities and extreme inequality between blacks and whites do not suggest racism per se, but something else.\textsuperscript{70}

\begin{itemize}
  \item \textsuperscript{61} See, e.g., Douglas S. Massey & Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass (1993); The Urban Institute & Housing and Urban Dev., National Fair Housing Audit (1989); Ian Ayres, Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, 104 Harv. L. Rev. 817 (1991).
  \item \textsuperscript{63} See generally Massey & Denton, supra note 61.
  \item \textsuperscript{64} See generally Orfield, supra note 62.
  \item \textsuperscript{65} See generally Massey & Denton, supra note 61; William J. Wilson, The Truly Disadvantaged (1994).
  \item \textsuperscript{66} Race and the Incidence of Environmental Hazards: A Time for Discourse (B. Bryant & P. Mohai eds., 1992).
  \item \textsuperscript{67} National Urban League, supra note 58.
  \item \textsuperscript{68} Id. The overall mortality rate for blacks is also higher. Larry Schuster, Disparity in Health Widens Among Groups, UPI, June 20, 1994, available in LEXIS, Nexus Library, UPI File. In fact, black youths are eight times more likely to be a victim of homicide than are white youths. Id.
  \item \textsuperscript{69} See Erik Eckholm, Studies Find Death Penalty Tied to Race of the Victims, NY Times, Feb. 24, 1995, at B1.
  \item \textsuperscript{70} In Milliken v. Bradley, the Court found that the segregation suffered by students in the Detroit public school system was a result of the housing market. 418 U.S. 717 (1974). They also found that there was no indication that racial discrimination was at the root of the segregated housing pattern that caused the segregated school districts. Id. at 748. However, the plaintiffs in Milliken introduced evidence that the housing segregation in the Detroit metropolitan area was caused by discrimination. Id. at 728 n.7. Similarly, in McCleskey v. Kemp, the petitioner, a death row inmate in Georgia, presented one of the most extensive arrays of statistical evidence presented to the Court on race—the Baldus study—which demonstrated an overwhelming correlation between death sentences and the race of the victim. 481 U.S. 279 (1987). The study controlled over two hundred other non-racial variables, and concluded that a black person who killed a white person was far more likely to receive the death penalty for that crime in Georgia than would a black person killing another black or a white killing another white. The study also found that no
It is certainly true that a strong correlation with race or a significant statistical disparity does not mean that racism is at play. However, given the history of explicit racism in our society, the ostensibly neutral colorblind position adopted by the Court simply lacks credibility.\textsuperscript{71} If the Court finds that other non-racial factors contribute to such disparities, it is usually too willing to assume that the existence of these non-racial factors is proof positive that race plays no part. Yet in life, and even in law, events are created and maintained by multiple causation, and it is obvious, often painfully so to persons of color, that one aspect of these causations is certainly racism.

The colorblind doctrine suggests that, because the Government’s explicitly sponsored racism is largely a thing of the past, so must racism be a thing of the past. As previously stated, proponents of the colorblind position assume that things are basically fair and there is now a “level playing field” between the races. Therefore, colorblind proponents consider any initiative that benefits someone or some group based on race unconstitutional, even if such an initiative helps to close the disparity between the races.\textsuperscript{72} Not only does this viewpoint undermine efforts to address the true disparity between the races, it also invites new racially charged explanations justifying the disparity. These explanations include dismissing the disparity as a product of the culture of poverty,\textsuperscript{73} or asserting that blacks themselves are the principle cause of the disparity because they refuse to pull their own weight\textsuperscript{74} and are incapable of doing any better.\textsuperscript{75} These explanations create the perfect a backdrop for the writing of a book like \textit{The Bell Curve}.\textsuperscript{76}

Instead of assuming that racial inequality is natural or caused by a legitimate, “neutral force,” such as the market of personal initiative, we could assume that racial equality, in form and substance, is natural, and that racial inequality is caused by \textit{illegitimate} forces, such as institutional racism and personal bigotry. If one assumes the former, any effort to redistribute

\textsuperscript{71} For a discussion of how the Court could develop a more historically sensitive approach to statistics and race, see Lawrence, \textit{supra} note 9.


\textsuperscript{73} \textit{The Poor: A Culture of Poverty or a Poverty of Culture?} (J. Alan Winter ed., 1971).


\textsuperscript{75} \textit{Richard J. Hernstein \& Charles A. Murray, The Bell Curve: Intelligence and Class Structure in American Life} (1994).

\textsuperscript{76} \textit{Id.}
opportunity, resources, or goods and services is suspect and requires substantial justification. If one assumes the latter, the extreme inequality between the races requires an affirmative strategy to correct the disparities. Otherwise, the inequality must be justified by a demonstration that it is the result of some legitimate, non-racist scheme.

Which of these assumptions actually operates in society is not simply a question of logic. Further, neither assumption can be justified by the principle of neutrality. Regardless, we need not be limited by appeals to neutrality or logic. In fact, where race and racism have played such pivotal roles in the organization of our society, there is strong justification for assuming that racial inequality is suspect and the product of illegitimate forces. Yet the colorblind doctrine is used to support the position that the inequality existing today is racially neutral and that colorblind laws stand as barriers to anything that might change the existing racial order. Whichever position is assigned the burden of proof in court will be put on the defensive, and, as we have seen in civil rights law, especially after Washington v. Davis, will most often lose.

Furthermore, the Court has adopted the perspective that racial inequality is the result of natural or legitimate causes. Thus, any effort to remedy racial disparity raises serious questions of legitimacy as well as the burden it might have on the so-called “innocent whites” who are required to give up something in order to effectuate the change. But these whites are innocent only if the system is basically fair and whites have not benefited from structure at the expense of persons of color. One can obviously benefit without consciously or intentionally supporting a system of racial hierarchy.

The current state of black America is strong evidence that the old-school civil rights approach cannot effectively address the problems confronting the poor and persons of color now or in the future. Life has improved greatly for persons of color over the last one hundred years, especially over the last four decades. While this improvement is due in large part to the brave and innovative work of civil rights lawyers and activists, the doctrine of the classical civil rights community was and is inher-

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77. John Rawls argues that justice as fairness requires us to assume the equal distribution of goods and social opportunity. See John Rawls, A Theory of Justice (1971). He therefore would require a justification for any inequality. Rawls asserts that inequality can be justified if it operates to improve the lives of those disfavored by the inequality. He believes that this can be defended based on neutrality. At least one theorist has argued that Rawls’ equality principle is anything but neutral. See Robert Nozick, Anarchy, State, and Utopia (1974).

78. 426 U.S. 229 (1976).
ently limited: it focused on individuals and individual discrimination. Hence, its remedies were, and are, also individuated.

Kenneth Karst has pointed out that “[r]acial segregation not only stigmatizes its victims; it also excludes them from full participation as members of society, treating them as members of a subordinate caste.” Karst points out that the Supreme Court’s attack on caste employed the rhetoric of individualism, aiming to “treat each person as an individual, not on the basis of group membership.” The failing in this approach is that it underplayed the importance of group membership in shaping and directing the way that individuals act toward one another. As Karst concludes, “if much remains for America to do to end racial domination and its harmful effects in this country—and it does—then it is hard to see how that task will be made easier if government is constitutionally required to ignore that a black person is black.” In fact, Karst seems to argue that “equal citizenship” will be achieved only by converging the goals of formal equality, which may not challenge the racial structure, and substantive equality, which does.

The misguided goal of formal equality has led, in the current political climate, to pessimistic proclamations such as those made by Derrick Bell, who believes that

Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary “peaks of progress,” short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This is a hard-to-accept fact that all history verifies. We must acknowledge this and move on to adopt policies based on what I call: “Racial Realism.” This mind-set or philosophy requires us to acknowledge the permanence of our subordinate status. That acknowledgement enables us to avoid despair, and frees us to imagine and implement racial strategies that can bring fulfillment and even triumph.

According to Bell, despair is not caused by actual racial domination that blacks experience, but by the false belief that things can get better and that eventually equality will be achieved. This assessment wholly lacks a struc-

79. Just one example of how civil rights groups traditionally focus on race alone and the legal services community traditionally focuses solely on issues of poverty. These universalist approaches have largely failed to ameliorate the problems confronting poor, urban African Americans; specific needs are not met by a race approach that lacks a poverty focus or a poverty approach that fails to specifically target racial minorities. See generally John A. Powell, Race and Poverty: A New Focus for Legal Services, 27 Clearinghouse Rev. 299 (Special Issue 1993).
81. Id. at 324.
82. Id.
83. Id. at 327-29 (discussing achieving status goals and ameliorating status harms).
84. Bell, supra note 28, at 373.
tural critique. The same may be said of the civil rights movement generally—it largely lacked a structural critique. As such, the structure that causes the despair of so many persons of color, the structure of racism, goes unchallenged.

II. The Post-Civil Rights Agenda Must Focus on Anti-Subordination

If colorblindness is not an appropriate focus to achieve racial justice, then what is? Because of the changing and multiplying forms of racism, we must guard against a single solution for all times. It might be easier to state the goal than to settle on the solution or strategy. Our goal must be to end racial hierarchy and racial subordination. Our goal must be to achieve an inclusive racial democracy. Our efforts must be what Mari Matsuda calls normatively pragmatic.\textsuperscript{85} We minorities must take on the challenge of describing and naming and renaming our racial order. Formal equality and colorblindness support the existing racial domination and subordination by making it difficult to recognize them. They do this by denying the historical and functional role of race and racism. Any serious effort to address racial problems requires the recognition of both race and racial subordination, something that the modern colorblind doctrine fails to do, because it lacks an analysis of subordination.

The traditional civil rights focus on individual rights will not provide us with the best tools, either theoretically or practically, to tackle or understand the nature of the racial hierarchy as it exists today. Despite the serious crisis that minority communities in general and the black community in particular face, society's focus on race is expressed in terms of excess benefits that blacks and other minorities have received from race-conscious programs. Whites are perceived as being burdened by any benefit that would go to blacks. Yet, when talking about white racism, there is seldom a discussion about how whites benefit from the structure of racial hierarchy. Whites are seen as innocent and racial minorities as undeserving. For example, when a black gets an important position, she is stigmatized by the assumption that she only received it because of affirmative action. Guilty until proven innocent. Whereas when a white gets a desired position, it is assumed he deserved it. Innocent until proven guilty.

We must reconstruct a civil rights or post-civil rights agenda that is capable to addressing the real needs of blacks and other racial minorities. Because the conditions that are to be addressed are substantially the result

of a functioning racial hierarchy, the post-civil rights movement must continue to be race-conscious and race-sensitive. This reconstruction has already begun.

A number of scholars and jurists have called for a different paradigm that is not based on intentional discrimination or formal equality. Some have called for a substantive formulation of equality that would produce an equality of results or at least substantially change the structure that distributes opportunity in American society. Others have attempted to expand the narrow way in which we discuss discrimination by suggesting a model that is not wedded to discrimination. For example, a number of scholars have defined the goal of the post-civil rights era as anti-subordination, not anti-discrimination. One scholar usefully distinguishes between anti-differentiation and anti-subordination. Anti-differentiation is a function of the colorblind, they do not see racial differences. “It is equally invidious for white men to be treated differently from black women as for black women to be treated differently from white men under [the anti-differentiation] perspective, because both situations violate the preeminent norm of equal treatment.”

Anti-subordination, on the other hand, “seeks to eliminate the power disparities between men and women, and between whites and non-whites, through the development of laws and policies that directly address those disparities.” It is group based, in that it focuses on society’s role in creating subordination and the way in which subordination affects groups of people. Anti-subordination, then, necessitates race-specific policies intended

86. This does not mean that all the problems that minority individuals and communities face can be explained solely in terms of racism. What I am suggesting is that the disparity cannot be explained or addressed without an account of racism that is not limited to individual, intentional and purposeful discrimination.

87. See, e.g., Crenshaw, supra note 9; Lawrence, supra note 9; Peller, supra note 40; Simon, supra note 18.


89. See Lawrence, supra note 9.


92. Id. at 1005-06.

93. The author explains that anti-differentiation is an individual rights perspective, because it focuses on institutional or individual behavior without regard to social context, and it focuses on the specific effect of discrimination on a individual instead of on a group. Id. at 1005.

94. Id. at 1006.

95. Id. at 1007.

96. Id. at 1008-10.
to redress the subordination of racial minorities. Such a position obviously renders different results than the colorblind test in evaluating affirmative action or in deciding whether to apply a particular level of scrutiny for an equal protection violation.

In their book *Racial Formation in the United States From the 1960s to the 1990s*, Howard Winant and Michael Omi squarely face the question that is key to shaping a new civil rights agenda: What is racism? They point out that the civil rights movement had a limited definition of racism, and that this limited definition resulted in litigation aimed only at eradicating discrimination. They also point out that successive movements either focused entirely on structure, rendering a hopeless and pessimistic theory of racism, or defined race as ethnicity and declared it inconsequential. According to the authors, neither movement appreciates the problems faced today, nor is up to the task of confronting them.

Omi and Winant advocate instead that we employ a racial formation theory. They first differentiate between race and racism, contending that they are separate and separable and should not be used interchangeably. They recognize that racism, like race, has transformed over time. They argue that “there can be no timeless or absolute standard for what constitutes racism, for social structures change and discourses are subject to rearticulation.” To Omi and Winant, a “racial project can be defined as racist if and only if it creates or reproduces structures of domination based on essentialist categories of race. . . . Or definition . . . focuses . . . on the

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98. The authors state:

Since the ambiguous triumph of the civil rights movement in the mid-1960s, clarity about what racism means has been eroding. The concept entered the lexicon of "common sense" only in the 1960s. Before that, although the term had surfaced occasionally, the problem of racial injustice and inequality was generally understood in a more limited fashion, as a matter of prejudiced attitudes or bigotry on the one hand, and discriminatory practices on the other. Solutions, it was believed, would therefore involve the overcoming of such attitudes, the achievement of tolerance, the acceptance of "brotherhood," etc., and the passage of laws which prohibited discrimination with respect to access to public accommodations, jobs, education, etc. The early civil rights movement explicitly reflected such views. In its espousal of integration and its quest for a "beloved community" it sought to overcome racial prejudice. In its litigation activities and agitation for civil rights legislation it sought to challenge discriminatory practices.

Id. at 69 (footnotes omitted).
99. Id. at 69-70.
100. Id. at 70.
101. Id. at 71.
102. Id.
103. Id.
'work' essentialism does for domination, and the 'need' domination displays to essentialize the subordinated."\textsuperscript{104} They continue by stating:

In order to identify a social project as racist, one must in our view demonstrate a link between essentialist representations of race and social structures of domination. Such a link might be revealed in efforts to protect dominant interests, framed in racial terms, from democratizing racial initiatives. But it might also consist of efforts simply to reverse the roles of racially dominant and racially subordinate. . . .

Obviously a key problem with essentialism is its denial, or flattening, of differences with a particular racially defined group.\textsuperscript{105}

The authors also state that "[r]acial ideology and social structure . . . mutually shape the nature of racism in a complex, dialectical, and overdetermined manner."\textsuperscript{106} This characterization lends itself well to an anti-subordination approach to ending manifestations of racial domination and should be viewed as an essential element of understanding race for any post-civil rights agenda.

\textbf{Conclusion}

All of these models are a vast improvement over the dominant colorblind paradigm, however, there are additional steps that we can take to further this improvement. First, we must better articulate what we are for, not just what we are against. Second, we should also strive for an inclusive racial democracy.\textsuperscript{107} Third, whatever strategy we adopt to fight racism must be capable of mutating, because racism is not a single concept, and, in fact, mutates. Finally, in order to make room for an appropriate model, the colorblind model must be displaced. This model is not just inadequate, it also supports the existing racial hierarchy. Those who claim that racism and its effects have ceased to exist must be required to demonstrate when it ended and to justify the continuing and, in some cases, worsening racial disparities in American society.\textsuperscript{108} Colorblindness would only be an appropriate strategy if it could be effective in transforming the racial hierarchy. However, if, as conceived by the first Justice Harlan, it allows or even supports racial hierarchy, then it must be challenged.

\begin{footnotesize}
\textsuperscript{104} Id.
\hfill \textsuperscript{105} Id. at 72.
\hfill \textsuperscript{106} Id. at 72-73.
\hfill \textsuperscript{107} This concept is used by a number of scholars. See, e.g., Cornel West, Race Matters (1994).
\hfill \textsuperscript{108} Saying that minority communities live in despair or exist within a culture of poverty begs the question. Unless we can show that racism has been functionally eliminated and the effect is reflected in people's lives as opposed to laws written in books in a library, we can expect continued despair among African Americans and other people of color in the United States regarding the barriers they face.
\end{footnotesize}
We have already achieved many of the purported goals of the civil rights agenda; most importantly, we have achieved an end to formal inequality. However, to the extent that these goals have already been achieved, they were never bold enough in their reach to achieve substantive equality and structural change of racial hierarchy in the United States. The purported goals of the old civil rights agenda were inherently incapable of compelling structural reform. The post-civil rights agenda must focus on subordination and exclusion. The key to this focus is understanding that racial discrimination and economic deprivation are not only oppressive, but they are also structural and institutional. Without characterizing oppression as structural, and without developing an agenda that is oriented toward destabilizing and disturbing this structure, any formal or individual progress will be largely rendered impotent by the greater institutional mechanisms.