

BEYOND COLORBLINDNESS: NEO-RACIALISM AND THE FUTURE OF RACE AND LAW SCHOLARSHIP

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INTRODUCTION

Anniversaries are a time to reflect, to reexamine the present and look toward the future by taking account of the past. The 25th anniversary of the *Harvard BlackLetter Law Journal* is a momentous occasion. Generations of law students have worked, often late into the night, to produce a quality journal of race and law scholarship. Although in its early years the prospects for success may have seemed dim, *BlackLetter* has thrived.

The Journal's 25th anniversary coincides with a landmark in American history: The election of Barack Obama as the 44th President of the United States of America.¹ *BlackLetter* was founded in 1984, only a few years before Barack Obama entered Harvard Law School.²

In this Essay, I consider the role of racism in American society through the lens of Obama's victory, and, by extension, its implications for scholarship about race and law. The election of Barack Obama signifies a break with our racial past. It unsettles a longstanding cultural narrative—one oddly comforting in its familiarity—in which racism looms as the central and often unyielding impediment to black advancement. Obama's triumph does not, as some pundits have suggested, herald a post-racial era, if by that one means a society in which race is no longer meaningful. Race remains salient and racial inequalities are too entrenched and pervasive to ignore. But one need not indulge the fantasy that we have transcended race in order to acknowledge that the role of racism in American society has shifted.

My preferred term for the current state of our society is neo-racial. An understanding of American society as neo-racial recognizes the change

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1. See, e.g., Adam Nagourney, *Obama Elected President as Racial Barrier Falls*, N.Y. TIMES, Nov. 5, 2007, at A1 ("Barack Hussein Obama was elected the 44th president of the United States on Tuesday, sweeping away the last racial barrier in American politics with ease as the country chose him as its first black chief executive.").
2. Richard Adams, Barack Obama, THE GUARDIAN, May 9, 2007, <http://www.guardian.co.uk/world/2007/may/09/barackobama.uselections20081>.

that Obama's election marks, but eschews the misleading suggestion that we have moved beyond race. Racial inequalities not only remain, they are entrenched and pervasive. The persistence of inequality is partly what sustains the salience of race. At the same time, though, the role of racism has changed. The racism of the past has bequeathed to us many of the contemporary problems with which we struggle. But racism in the here and now is not as formidable a barrier to racial justice as it once was.

Race and law scholarship would profit from the neo-racial perspective. The idea of racism and the principle of colorblindness play similar roles in contemporary discourse. Just as racial injustice is commonly traced to contemporary racism, so too is colorblindness viewed as the central impediment to policies that would further substantive racial equality. Indeed, in the view of some race and law scholars, the invocation of colorblindness is tantamount to racism.³

The neo-racial approach suggests that we should no longer accord racism and colorblindness the primacy that they have long enjoyed in analyses of racial inequality. We should resist the reflexive tendency to simplistically depict contemporary controversies as yet further evidence of racism. Racial inequality persists as a consequence of a complicated interplay of historical and contemporary factors, and our analyses should reflect that complexity. Similarly, as pertains to colorblindness, we need to recognize that in the concrete settings where racial controversies arise, general principles like colorblindness are not helpful in crafting good policy. Rather than attempt to overcome colorblindness, scholars would work around it—limiting the principle, balancing it against other legitimate principles, and, when useful, invoking it. The neo-racial sensibility would prompt race and law scholars to approach race-related controversies in a pragmatic manner that both takes seriously competing views and interests and seeks resolutions that reflect widely shared values.⁴

In terms of structure, this Essay moves from the past, to the present, to the future. Part I describes the racism narrative generated by our past. I offer episodes of my own family's history that are emblematic of the stories that shape our understanding of the role of racism in American society. Part II shifts to the present; it considers the manner in which the election of Barack Obama as our nation's first African-American President dislodges the racism narrative. Finally, Part III looks to the future; it suggests how race and law scholarship might benefit from the neo-racial perspective.

PART I

The racism narrative is deeply rooted in American history, and is reflected in legal scholarship as well. Perhaps the most recognized race scholar in the legal academy is Derrick Bell. The author of numerous

3. E.g., EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* (2d ed. 2006).

4. This essay has benefitted from insights gleaned from Kim Forde Mazrui, *Learning Law through the Lens of Race*, 21 J.L. & POL. 1 (2005).

books and articles,⁵ including the groundbreaking casebook *Race, Racism and American Law*,⁶ Bell has influenced the field of race and law scholarship to an extent that is difficult to overstate. He has been a pivotal figure in critical race theory since its development more than two decades ago. In addition to his voluminous writings, he has mentored many students who have gone on to lead scholarly careers. For all of these reasons, Bell has been a figure to whom later scholars, myself included, have looked for guidance and inspiration.

Bell's influence has been apparent in the pages of the *BlackLetter Law Journal*. The third volume of *BlackLetter* featured the transcript of a forum on Bell's *Civil Rights Chronicles*,⁷ the first installment of which had recently been published in the *Harvard Law Review*.⁸ In this series of allegorical chronicles and his other works, Bell confronted what he termed the "permanence of racism,"⁹ and soon came to advocate for "racial realism"¹⁰—the view that ostensible progress toward racial justice is often fleeting, comprised of "short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance."¹¹

The racism narrative that serves as the basis for Bell's work has shaped many people's views regarding the inexorability of racism. As recently as three years ago, few people expected that Barack Obama could become our 44th President. Not only did his Muslim name recall the monikers of both a brutal terrorist and the most hated enemy of the United States, he was, after all, black. In the aftermath of 9/11 and during the Iraq War, few would have predicted that he would capture a United States Senate seat, much less the presidency.

His national campaign confronted an initially unyielding sense of skepticism, one that threatened to undermine his legitimacy as a candidate. African-Americans were among the most fervent doubters; many simply did not believe that a sizable portion of whites would vote for a black man for President,¹² and consequently dismissed as unrealistic the possibility that Barack Obama could prevail in a national election. Such

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5. E.g., DERRICK A. BELL, AND WE ARE NOT SAVED: THE ELUSIVE CASE FOR RACIAL JUSTICE (1987); DERRICK A. BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992) [hereinafter BELL, FACES AT THE BOTTOM OF THE WELL]; DERRICK A. BELL, CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTOR (1996); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893 (1995).
 6. DERRICK A. BELL, RACE, RACISM, AND AMERICAN LAW (Aspen Publishers 6th ed. 2008) (1973).
 7. Derrick Bell et al., *Forum on Professor Derrick Bell's Civil Rights Chronicles*, 3 HARV. BLACKLETTER L.J. 46 (1986). The forum included commentary by Regina Austin, Paul R. Dimond, Jane DeGidio, Linda Greene, Joel F. Handler, Henry W. McGee, Jr., Daniel J. Monti, and Patricia Williams.
 8. Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985).
 9. BELL, FACES AT THE BOTTOM OF THE WELL, *supra* note 5; Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. REV. 5, 28 (1976) (concluding the "probable permanence of racism in our society").
 10. E.g., Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 373-74 (1992).
 11. *Id.* at 373.
 12. See, e.g., John Harwood, *Level of White Support for Obama a Surprise*, N.Y. TIMES, Nov. 3, 2008, at A20.

pervasive cynicism reflected a historical narrative grounded in the potency of anti-black racism.

The racism narrative arises from the often painful history of our nation, and is embedded in particular in the stories that African-Americans tell ourselves about that past. Inasmuch as my family's own personal struggles are components of this narrative, let me offer some familial history.

My father's family left Georgia for Ohio around 1920. They departed not in pursuit of the forward-looking search for opportunity that we typically associate with great migrations, but rather, because my father's oldest brother, Rufus, made the mistake of wearing a new suit into town.

"Who's the nigger in the new suit?" taunted some white kids. Before long one of the white boys "accidentally" smashed an ice cream cone against my Uncle Rufus' new suit. The chain of events after that is vague, but my father remembered running behind his big brother, carrying the shells that Rufus loaded into and emptied from his shotgun to ward off the white boys who had pursued him back to their house.

"After that," my father explained, "Poppa knew we weren't safe. The sheriff provided no protection. So he put Rufus on a train north and soon we all followed." Uncle Rufus was about fifteen at the time; his youthful desire to show off his new suit violated the etiquette of the southern racial hierarchy and demanded the defection of his entire family from the only home that they had ever known. Whatever they couldn't carry, they left behind.

Such was the life of many blacks in the South. The law that required racial segregation across an ever-expanding range of places was only the most formal expression of a social system premised on the superiority of whites over blacks. Whites were dominant, blacks were subservient, and nearly every aspect of the social system reinforced that hierarchy.

Perhaps the most volatile threat to that hierarchy was the prospect of sex between black men and white women. It is the legacy of interracial sex that shapes the history of my mother's family in Alabama. My mother's father was born in rural Alabama in 1886. He was the child of a white woman and a black laborer who worked her farm, a man who was likely born a slave. As far as we know, their relationship was consensual, loving, perhaps even long-term.

The townsfolk, however, were horrified at this act of miscegenation within their community, and when they got word of the brown baby born to a white woman, they threatened to kill both father and son. The threat was credible enough, and legal protection was meager enough, that the baby's father left town, never to be heard from again. To this day, we do not know what became of him. The mother placed her newborn in a shoebox and smuggled him to her sister in Texas, where my grandfather stayed for several years until the furor died down.

Years later, my grandfather returned to Alabama and lived with his mother, who raised him along with his white half-siblings. She gave my grandfather the name of her white husband and left him land when she died in the 1930s.

Yet when my great-grandmother died, my grandfather did not attend the funeral. Although she was buried at the family cemetery, which sat on land she had willed to him, my grandfather was forced to watch her burial from the adjacent road. By law, the cemetery was for whites only.

I offer these stories as a glimpse into the southern world in which most blacks lived through the early decades of the twentieth century. When my parents came north, their lives improved, but that is faint praise—more a testament to the brutality and oppression of the South than the opportunities of the North. Even in the North, my family could not escape encounters with overt racism and discrimination.

Stories like these frame the experiences of many African-Americans; they recall a past that many white Americans would rather forget—or, better yet, never know—but that many African-Americans carry with them. The purpose of this story, and stories like it, is not simply to recount the virulence of white racism in our past, but to highlight the extent to which that past has informed understanding of our present. In the traditional narrative, white racism, backed by the force of law and state-sanctioned private violence, looms as the unyielding force that circumscribes black citizenship, a constant threat to blacks' lives and livelihoods. For many African-Americans in particular, these stories have provided a lens through which we view the world, a framework within which we assess our opportunities and prospects for advancement.

PART II

How does the racism narrative fare in light of the election of Barack Obama? Some people seem to view the election of Obama as a monumental turning point in the American story, as marking the moment at which the dragon of racism was slain. Others disagree, and regard his ascendance to the presidency as the exception that proves the rule of racist domination.

During the period surrounding the inauguration, the optimistic view prevailed, especially in Washington D.C., which I visited for the inauguration. Amid the countless vendors hawking all manner of souvenirs, one T-shirt caught my eye. The front was emblazoned with a picture of Martin Luther King giving a speech, the Lincoln Memorial in the background. Below King's image were the words "The Dream." On the back of the shirt, there appeared an image of Barack Obama, the White House behind him, and beneath his image the words "The Reality." This arresting imagery was rooted in facts, but the images were especially captivating, because they suggested that Barack Obama's ascension to the presidency represented the realization of the dream that King described nearly half a century ago.

Some commentators have been inclined to conclude that with Obama's victory, King's dream has been realized, as though we have finally moved beyond the shadow cast by slavery and Jim Crow. Those who believe that the dream has been realized may well view our society as post-racial; they might want to relegate racial conflicts and division to

the past. Now, they would counsel, is a time when we can and should get beyond race.¹³

Proponents of the post-racial view would likely draw some of their inspiration from the campaign of Barack Obama, who comported himself as a post-racial candidate.¹⁴ His campaign themes were universal: hope, change, opportunity. He spoke often of his white mother and grandparents, and only indirectly of his African father, when noting that in no other country on earth was a story like his even possible. He discussed race at length only when forced to, as he did in response to the controversy created by his incendiary Chicago pastor, the Reverend Jeremiah Wright. Consequently, for some, Obama embodies the post-racial sensibility that enabled his election.

Other commentators, in contrast, are not so quick to proclaim the dawning of a post-racial era. While acknowledging the monumental achievement of the election of our nation's first African-American president, the most pessimistic among this group would profess that not much has changed. In their view, the fact that a black man occupies the Oval Office neither reflects nor portends any meaningful shift with respect to race. Obama's victory, in their view, is the exception that proves the rule. He was an extraordinary candidate, they would note: brilliant, charismatic, handsome. Circumstances worked in his favor. He was able to run against Hillary Clinton on the issue of the Iraq War, and against John McCain in the midst of the worst economic downturn since the Great Depression. The issues in both the primary and general elections thus played to Obama's strengths. Obama confronted a Republican Party whose sitting president was so unpopular that he didn't even attend his party's convention. Given all these advantages, Obama should have won in a landslide. The election was only as close as it was, some would suggest, because of racism. For those who take this view, Obama's so-called post-racial campaign was not so much an admirable effort to get beyond race as it was a capitulation to the racist sentiments of the electorate, which would only support a black candidate who muted his race as much as possible.

However useful such an assessment of the dynamics of the campaign, the starkest and most visceral expression of the "nothing has changed" view came from my brother-in-law, a fiftyish black man, not long after the inauguration. He couldn't help but smile and laugh at the thought that we have a black president. When asked why, he said, without hesitation, "'cause you know white folks won't never"—he stretched the word out, emphasizing each syllable—"let this happen again." He paused, then went on: "That brother was near perfect. . . . Only let him have the job 'cause times are bad, better to blame us if things get worse later." My brother-in-law had enthusiastically voted for Obama, but what really made him smile was the irony of it all. Notwithstanding the election of Obama, he feels certain that nothing really has changed.

13. See, e.g., Matt Bai, *Is Obama the End of Black Politics?*, N.Y. TIMES, Aug. 6, 2008, at MM34.

14. E.g., Tim Rutten, *The Good Generation Gap*, L.A. TIMES, Feb. 6, 2008, at 31.

My own view is that it is premature to pronounce America a post-racial society. Obama did not get elected because we are post-racial, nor will his presidency make us so. American society continues to be racially segregated and fraught with racial disparities in health, employment, education, incarceration, and so forth. Such racial inequalities render race so salient that no one could plausibly claim that society has transcended race. Moreover, it is indisputable that current inequalities are a consequence of our history of racism and, in many cases, are themselves objectionable.

At the same time, though, the election of Barack Obama does unsettle a longstanding narrative in which racism looms as an implacable and unyielding impediment to African-American advancement. At the very least, Obama's triumph demonstrates the possibility of overcoming anti-black racism.

Obama's election may also change the way we talk about race. It will stand as a perpetual (even if unstated) counterpoint to accusations of racism. In the aftermath of his triumph, claims of racism may seem less credible. Although such skepticism may lead analysts to wrongly discount some legitimate claims of racism, it will also perform the useful function of spurring commentators to articulate more nuanced and more accurate accounts of the mechanisms of racial inequalities. Rather than fight this shift, we should embrace it.

We need to cultivate a sensibility that is attentive not only to continuing inequality, but also to the ways in which the racial dynamics of American society have changed. I have described this sensibility as neo-racial. The neo-racial perspective recognizes the persistence of racism, even as it resists any tendency to unthinkingly attribute any and all racial inequalities to contemporary racism.

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In the days leading up to the general election in November, I saw evidence of the continuity and change that the neo-racial perspective embraces. I had returned to my hometown, Cleveland, Ohio, to volunteer for the Obama campaign. I wanted, as I told anyone who asked, to help put my state of origin on the right side of history. Ohio had been pivotal in previous presidential elections, and I expected that it might be in this one too. I requested to be assigned on the east side of the city, hoping for the neighborhood where I grew up. I was told to report to the campaign office at Shaker Square, a commercial area that bordered the affluent suburb Shaker Heights and the much less affluent city of Cleveland.

When I showed up at the office, I could feel the energy and enthusiasm of the campaign volunteers. The building was festive: Christmas colors decorated the outside, snow spray painted around the edges of the windows; and every window was covered with Obama posters. A constant stream of people filtering in and out confirmed that this was the place to be. Volunteers had come from all over. Some were local, but others, like me, had traveled many miles, from "safe" Democratic-leaning states like New York and Massachusetts.

I was sent to the east side suburbs for the morning, to remind people to vote, to hang notices informing them of the nearest polling place. After

completing our first assignment, we returned to the office and were told that there were so many volunteers that all of the east side assignments had been completed; they then sent us to the other side of town, a suburb whose name I knew well, but across whose boundaries I don't know that I had ever ventured: Parma.

As I was growing up, Parma was a place in which I had never set foot. Not only was it clear on the other side of town, it was a place where black people were not welcome. Growing up, I heard stories of black families being terrorized—rocks thrown through their windows, crosses burned on their lawn—for *attempting* to move in. Even these many years later, I didn't know what to expect. I was paired with a white guy from New York, which eased my apprehension somewhat. I knew that if the residents weren't comfortable with me, they might find common ground with my colleague.

As we began to walk the streets of Parma, I could feel myself waiting for the racist incident. None came—nothing overt at least. I saw a lot of what could have been veiled racism. One woman explained her resistance to voting for Obama by saying “I just don't trust him.” I mentioned the weak economy in northeastern Ohio and the many jobs the region had lost. I asked who she thought would do more for the working people of Ohio. But she was having none of it. “With a name like that, don't you think he's really a Muslim?” After I explained that Obama had been a Christian for years, she said, “Even so, what about that minister? Why would he have stayed in that church all those years?” I began to realize that this wasn't someone I'd convince. Perhaps we should have taken note of the McCain sign in her yard, and kept moving.

We then went to her neighbor's house. Again, an old white woman answered the door. Prepared for a reprise of the resistance we had encountered next door, we introduced ourselves and began our pitch. She listened, and when we paused, she leaned out the door and said, almost in a whisper, “I'm voting for Obama.” As we surveyed the McCain signs in the surrounding yards, it became clear that she didn't want her neighbors to know. We nodded and left, both of us trying to suppress smiles. During the course of the day, other voters expressed the same sentiment. We found pockets of Obama supporters in the place where I would have least expected them.

My experience in Parma is emblematic of some of the ways in which race has changed in American society. What struck me was not the lack of racism—for I did see hints of it—but that racism did not overwhelm all the other reasons that these voters had to choose Obama rather than McCain. Their racism was not the sole determinant of their voting behavior. I suspect that many of the Parma residents who voted for Obama had to overcome some race-related discomfort to do so. In choosing to vote for Obama, they hadn't shed their racism. But they didn't allow themselves, their political choices, to be defined and limited by their racism. These elderly white voters realized that Barack Obama would likely do more for Clevelanders like them than would John McCain. Racism may have been one element in their political decision-making, but it was not necessarily the deciding one.

One need not believe that anti-black racism has been extirpated in order to recognize that its force has weakened. Barack Obama's racial identity did not prove an insurmountable barrier to his ascent to the highest office in the land. For most blacks of American history, however, it would have been.

My experience in Cleveland also highlights what has not changed. When I returned to the campaign headquarters the next morning, the coordinators wanted to send me to Parma again. Although my experience there was uplifting, I wanted to work the neighborhood where I grew up: Mount Pleasant. When I asked the young woman who ran the Obama office if they could assign me there, she wrinkled her face and said, "I've never heard of that area. I don't think it is our territory." We looked at the map identifying their territory. Sure enough, it wasn't. For some reason, she had trouble even finding out whether there was a Mount Pleasant office. After I waited for thirty minutes, all she managed to produce was an address for the office. She had no contact number, no contact person. She didn't even provide directions how to get there.

Fortunately, I could tell from the address that it was no more than a five minute drive from the Shaker Square office—a thirty minute walk, if that much. But it was a world apart from Shaker Square. Whereas Shaker Square, a bustling commercial area, divides city and suburb, Mount Pleasant is decidedly inner-city. The office was on Kinsman Road, located in an otherwise abandoned office building, sandwiched between storefronts that alternated between liquor stores and churches.

When I walked in, there was no bustle of activity. I saw only a man in army boots slouching on a couch in the front, hat pulled down over his head, covering his eyes. "Is the Obama office in here?" He nodded and then gestured with his head, toward the back of the building. I walked to the back, and found a big room, filled with piles of Obama material, and two volunteers. Only a few people had come by to pick up material to distribute. The Shaker Square office, a friend told me, had been sending people home. But this inner-city office, less than a mile away, had piles of literature waiting to be delivered.

When I spoke to residents in Mount Pleasant, they confirmed what the piles of undelivered literature suggested: No one had visited their homes, either to remind them to vote or to provide information about the location and hours of the polling place. The Shaker Square office had sent volunteers miles across town to a white suburb, unaware of the need for services in an impoverished black area no more than a dozen blocks from the office. Even for a campaign committed to overcoming societal divisions, the racial segregation of Cleveland seems to have been too much.

I offer this account not so much as a criticism of the Obama campaign, but rather as a testament to the enduring racial boundaries that structure social life in our segregated cities. The campaign staff did not intentionally overlook Mount Pleasant, but neither did they give it much attention. Few people would have volunteered to work Mount Pleasant, as there weren't many volunteers from that area. Nor would the Shaker Square staff have been likely to know anyone in the Mount Pleasant office. Some would-be volunteers might have viewed the Mount Pleasant area—cor-

rectly—as dangerous. For all these reasons, the highly-impooverished, exclusively African-American area could be underserved, even in the absence of any racial bias on the part of any campaign staffer.

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The neo-racial perspective takes account of the persistence of segregation and troubling racial inequalities even as it resists reflexive resort to the traditional racism narrative. In the neo-racial perspective, racism still exists, but it no longer constitutes the primary impediment to racial justice.

PART III

This Part considers how the race and law scholarship of the future might benefit from the neo-racial approach. The hallmark of the neo-racial perspective is that it recognizes the complexity of many contemporary controversies and takes seriously competing views about how best to reconcile conflicting interests. To illustrate the neo-racial approach, I consider the principle of colorblindness in the context of equal protection doctrine, about which race and law scholars have been writing for years.¹⁵ Much of the recent commentary has centered on the Supreme Court's decisions in the Seattle-Louisville cases¹⁶ and in the University of Michigan affirmative action cases.¹⁷ While these cases raise distinct issues and have yielded different results,¹⁸ the opinions in all of the cases have been read to express the Court's commitment to colorblindness as the polestar of its equal protection jurisprudence. Race and law scholars have relentlessly decried the notion of colorblindness; in the views of many of these scholars, the invocation of colorblindness is tantamount to racism.¹⁹

Why colorblindness should be so widely regarded by scholars as racist is not obvious. After all, the term might be meant as nothing more than a particularly forceful expression of a nondiscrimination mandate that is widely held in our society. Why then do race and law scholars so often regard as racist the invocation of colorblindness?

15. Race and law scholars have long criticized the notion of "colorblindness." E.g., Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 68 (1991); Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification,* 88 CAL. L. REV. 77, 78, 84-107 (2000).

16. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (invalidating the Seattle and Louisville school districts' voluntary integration plans).

17. *Gratz v. Bollinger*, 539 U.S. 244 (2003) (holding the University of Michigan's undergraduate admissions policy unconstitutional).

18. The Seattle-Louisville cases involved challenges to each public school district's use of race in the assignment of students to schools. Each school district had voluntarily implemented race conscious means of maintaining and promoting school integration. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2747, 2749. In some situations, a student's race would determine whether he was permitted to transfer out of or into a particular school. *Id.* at 2747-48, 2749-50. The Court held that both plans violated the equal protection clause of the Constitution. *Id.* at 2757-58. In the University of Michigan cases, the Court did not, as many feared, reject the diversity rationale as a predicate for race based admissions. *Gratz*, 539 U.S. at 275. However, the Court did apply strict scrutiny, rejecting claims that affirmative action policies are benign and therefore should be subject to a less stringent standard of review. *Id.* at 270.

19. See, e.g., BONILLA-SILVA, *supra* note 4.

I think part of the answer has to do with the belief that the application of colorblindness is selective. The prevailing perception among scholars is that courts are quick to strike down affirmative action policies in the name of colorblindness,²⁰ but they are reluctant to take aggressive measures to root out discrimination that burdens members of historically disadvantaged racial minority groups.²¹ Further, there is the suspicion that proponents of colorblindness embrace the principle strategically,²² at least partly because it can be used to prohibit policies such as affirmative action that benefit members of disadvantaged racial minority groups.²³ What makes the colorblindness discourse all the more pernicious, in the eyes of many race and law scholars, is that the insistent invocation of colorblindness can be taken to imply that we have already brought racial discrimination to an end.²⁴ Colorblindness thus seems to limit, if not altogether eliminate, affirmative action, at the same time that it rhetorically underwrites the belief that racial inequality need no longer be considered a problem in American society. In this view, colorblindness embodies a norm of formal equality that, in practice, permits a nearly willful blindness to ongoing discrimination and a callous disregard of persistent racial inequalities. The irony, then, is that colorblindness prohibits overt discrimination, even if intended to benefit historically disadvantaged racial minority groups, while it permits covert discrimination, even if it subordinates already disadvantaged groups. As one prominent scholar puts it, colorblindness “threatens to become the dominant manner by which Americans . . . excuse persistent racial inequality as simply life.”²⁵

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20. See, e.g., *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989); *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (subjecting to strict scrutiny a federal program designed to incentivize the hiring of minority contractors).
21. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976). The so-called “intent requirement” is commonly cited as evidence of judicial acquiescence to discrimination. See, e.g., Ian Haney López, *Introduction: On the Necessity and Challenges of Race Scholarship*, in *RACE, LAW AND SOCIETY* (Ian Haney López, ed. 2006), at xi-xii.
22. The states of mind of those who embrace colorblindness for such instrumental reasons may vary. At one extreme are the white supremacists who cynically wrap themselves in the banner of colorblindness to lend a patina of legitimacy to their racist policy preferences. At the other extreme are people who might genuinely view themselves as racially unbiased yet endorse colorblindness in part because it would preserve and maintain some of the privileges associated with whiteness, benefits they have come to expect.
23. See, e.g., López, *supra* note 25, at xii (stating that colorblindness “arose as a rhetoric of racial containment in response to the demands of the civil rights movement”).
24. When one invokes colorblindness, it is difficult to do so in a purely prescriptive sense without people inferring that American society already is colorblind. I’ve encountered this in my own work when I talk about the placement of children in adoptive families. My view is that social workers should not take into account the race of prospective adoptive parents when selecting a family for a child in need of adoption. My endorsement of colorblindness as a nondiscrimination mandate is often heard to imply that race no longer matters in society. Part of my response to such interpretations is that it is the salience of race in society that generates the need for the nondiscrimination mandate. R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents’ Racial Preferences through Discriminatory State Action*, 107 *YALE L.J.* 875, 882-83 (1998).
25. López, *supra* note 25, at xii.

Nonetheless, it is a mistake for race and law scholars to equate the invocation of colorblindness with racism. One reason for this is that colorblindness is associated with an antidiscrimination commitment that most Americans endorse. I don't doubt that there are some people for whom the embrace of colorblindness is largely strategic, a matter of justifying their opposition to policies that would benefit disadvantaged minorities. But there are other people, by any measure a substantial portion of the United States population, who would disfavor racial discrimination irrespective of which group it benefits. Colorblindness appeals to these people as well. We would do well to take seriously moral intuitions that are held by a large portion of the United States population.

One product of categorically rejecting colorblindness and likening it to racism is a debate that becomes polarized, with each side entrenched in its own position, unwilling to acknowledge the legitimacy of opposing arguments. The opposing camps do not talk to each other so much as they talk past each other. Lost is the opportunity for persuasion and the identification of common ground. What this means as a practical matter for race and law scholars is that our preaching may be well received by the choir, but will likely fail to convert the broader population. One is unlikely to persuade people whose positions one has vilified as racist.

Moreover, a preoccupation with colorblindness as racism could divert attention from the effort to formulate good policy. The belief that any assertion of colorblindness necessarily signifies racism undermines one's ability and inclination to sympathetically interpret policy positions associated with colorblindness. If one regards colorblindness as racism, one need not engage the positions with which it is associated. Instead, it is sufficient to condemn the principle and impugn the motives of those who advance it.

An underlying issue here is whether colorblindness is necessarily incompatible with substantive racial justice, so that a commitment to substantive racial justice unavoidably entails a rejection of colorblindness. In my view, it is more possible to accommodate colorblindness with substantive racial justice than is often thought.

It is important to note that the principle of colorblindness is always limited; few would advocate pushing it to its logical endpoint. At the extreme, a commitment to colorblindness could prohibit antidiscrimination law itself. After all, antidiscrimination law, both in operation and origin, is necessarily race conscious. Judges and administrative agencies could hardly enforce antidiscrimination law without being conscious of race; similarly, public and private institutions could not fully comply with the law without being conscious of race. The very existence of laws that prohibit racial discrimination reflects an awareness of the socially destructive consequences of racial discrimination. But, of course, few commentators advocate the abolition of antidiscrimination law in the name of colorblindness. Thus, there is acceptance of the fact that a commitment to colorblindness need not preclude all forms of race consciousness.

One way that I think about these issues is admittedly paradoxical: Debates about colorblindness always entail choosing among different varieties of race consciousness. Any purportedly colorblind standard can

always be understood in terms of the race consciousness that it permits. It is always the case that even ostensibly colorblind standards permit some race consciousness because few courts or commentators would want to push colorblindness to its conceptual limit. One example, about which I have written previously, concerns the use of race by law enforcement officers. Even as commentators assail racial profiling,²⁶ virtually no one contends that police officers should be precluded from investigating only members of a particular race when a crime victim has identified her assailant as a member of that racial group.²⁷ Selecting suspects in that manner is undeniably race conscious, yet the practice could not plausibly be prohibited, no matter how vehement one's commitment to colorblindness. As a practical matter, even the most stringent articulations of colorblindness will permit some forms of race consciousness.

This same interplay between colorblindness and race consciousness is apparent in the Supreme Court's equal protection jurisprudence. Equal protection doctrine—which is often condemned by commentators for its embrace of colorblindness—has for years pivoted on the distinction between affirmative action policies on the one hand and so-called race neutral alternatives on the other. It was in two of the cases typically thought to usher in the era of colorblind equal protection doctrine—*Adarand Constructors, Inc. v. Peña*²⁸ and *City of Richmond v. J.A. Croson*²⁹—that the Court incorporated consideration of race neutral alternatives into the narrow tailoring prong of the strict scrutiny test. In the Court's formulation, the permissibility of a race conscious affirmative action policy depends partly on the unavailability of efficacious race neutral alternatives.³⁰ As the Court noted in *Grutter v. Bollinger*, narrow tailoring “require[s] serious, good faith consideration of workable race neutral alternatives.”³¹ In the narrow tailoring analysis, a policy maker's failure to consider race neutral alternatives could imperil an otherwise permissible affirmative action policy. If this doctrinal structure embodies the principle of colorblindness, as many commentators have asserted, then its treatment of race neutral alternatives suggests that such policies are colorblind. Indeed, during the period leading up to the Court's decisions in the University of Michigan affirmative action cases, commentators vigorously debated the feasibility of race neutral policies such as the Ten Percent Plan³² enacted in

26. I have described this debate in R. Richard Banks, *Beyond Profiling: Race, Policing and the Drug War*, 56 STAN. L. REV. 571 (2003).

27. I discuss this issue in R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075 (2001).

28. 515 U.S. 200 (1995).

29. 488 U.S. 469 (1989).

30. Since *Croson*, lower federal courts have followed this formulation of the narrow tailoring test. *E.g.*, *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1570-71 (11th Cir. 1994); *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1557-58 (11th Cir. 1994); *Billish v. City of Chicago*, 989 F.2d 890, 893-94 (7th Cir. 1992); *Walker v. City of Mesquite*, 169 F.3d 973, 982-83 (5th Cir. 1999); *Podberesky v. Kirwan*, 38 F.3d 147, 161 (4th Cir.).

31. 539 U.S. 306, 339 (2003).

32. Texas instituted the Ten Percent Plan after the Fifth Circuit struck down the affirmative action admissions policy at the University of Texas in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). The Plan granted admission to the University of Texas to anyone

Texas and those in which admissions officers would consider applicants' socioeconomic status.³³ Unlike conventional affirmative action policies, such policies would not treat individual applicants differently on the basis of their race.

Yet so-called race neutral alternatives could readily be characterized as race conscious. They may not have differentiated among individual applicants on the basis of race, but what if they were enacted for race-related reasons? If the Ten Percent Plan, for example, were enacted in order to realize the same racial diversity goals as the invalidated affirmative action policy, then its characterization as colorblind becomes more contestable. Indeed, some prominent opponents of affirmative action recently have argued that race neutral policies such as the Texas Ten Percent plan are discriminatory and should be subject to strict scrutiny if challenged.³⁴

My point here is not that race neutral policies should be subject to strict scrutiny, much less invalidated. Rather, what it is important to see is that the idea of colorblindness is itself malleable, subject to alternative formulations. One might view a commitment to colorblindness as prohibiting only policies that differentiate among individuals on account of race in the distribution of burdens or benefits. Alternatively, one might extend the colorblindness principle to formally race neutral practices that are undertaken for a race-related purpose.

The same sort of issue about formally race neutral policies arises in the Court's decision in the Seattle-Louisville cases.³⁵ The Court viewed the challenged policies as subject to strict scrutiny because they took account of individual students' race in assigning them to schools. But what about the sorts of policies that Justice Kennedy endorsed in his concurring opinion?³⁶ Does a district violate the principle of colorblindness by intentionally deciding to construct a new school at a location where its student population would be the most racially diverse? What if the district draws attendance zones so as to increase racial diversity? Or decides to create

whose grade point average placed her in the top 10% of the graduating class at her high school. The plan substantially increased the admissions rates of African-Americans and Latinos, as well as those of whites from rural areas of the state.

33. R. Richard Banks, *Race-Conscious Affirmative Action and Race-Neutral Policies in the Aftermath of the Michigan Cases*, in CHARTING THE FUTURE OF COLLEGE AFFIRMATIVE ACTION 35, 50-51 (Gary Orfield et. al eds., 2007).

34. Roger Clegg, the general counsel of the Center for Equal Opportunity, testified to that effect before members of the Texas legislature regarding that state's Ten Percent Plan. *Hearing Before the Tx. S. Subcomm. on Higher Education Regarding the Ten Percent Plan* (HB 588) (Jun. 24, 2004) (statement of Roger Clegg, Vice President and General Counsel, Center for Equal Opportunity), available at http://www.ceousa.org/index.php?option=com_docman&task=doc_view&gid=189.

35. *Parents Involved in Cmty. Sch.*, 127 S. Ct. 2738.

36. According to Kennedy, although the school programs in these cases were invalid, he endorsed the use of certain "race conscious" mechanisms in the pursuit of diversity, including "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race." *Id.* at 2792 (Kennedy, J., concurring in part and in the judgment).

magnet schools or other special programs in order to further integration? Justice Roberts declined to express any opinion on the propriety of such “race neutral” policies. Justice Kennedy wrote a concurring opinion in defense of race neutral means of promoting integration, even as he voted to invalidate the race-based assignment plans used in Seattle and Louisville.³⁷

Most recently, the issue of race neutral measures undertaken for a race-related purpose has surfaced in the New Haven fire fighters case that is currently before the Supreme Court.³⁸ The case arose from the City’s decision not to certify the results of a promotions examination once it became clear that the African-American applicants performed so poorly on the test that not one of them could be promoted.³⁹ White candidates, some of whom would have been promoted, filed suit. There is some dispute about precisely why the City declined to certify the exam results—the plaintiffs allege that the City bowed to political pressure from a prominent black clergyman who supported the mayor, while the City attributes its decision to concern about liability in a disparate impact suit filed by the African-American candidates—but there is no doubt that the case raises the question of the permissibility of race neutral measures undertaken for a race related purpose.

A commitment to colorblindness does not dictate the outcomes of these cases. Colorblindness is always qualified in one way or another. It is always pitted against competing principles or goals. The resolution of particular cases should depend on considerations specific to that context. So, rather than vilify colorblindness, we should analyze the specific policy choices implicated by concrete controversies. We should redirect energy from espousing broad principles to conducting more focused inquiries. Just as racism need not be a focal point of discussion, so too could colorblindness be pushed to the margins of the analysis. We need not condemn colorblindness in toto. What we do need to do is to argue affirmatively on behalf of what we think are the best policies.

The same approach that applies with race neutral measures could be used with conventional affirmative action policies. If we are to convince people about the desirability of affirmative action, we need to make concrete arguments about why a particular policy is a good policy. Doing so would require honest assessment of its costs and benefits, compared to the costs and benefits of race neutral alternatives. My sense is that many reasonable people are uncomfortable with affirmative action in part because they do not see why the policy is needed, given the possibility of race neutral alternatives. A proper response to such concerns is not to dismiss them as racist, but instead to attempt to persuade by marshalling relevant facts and drawing on widely-held values.

The approach I have sketched could yield many benefits. Assessing the costs and benefits of concrete policy proposals is more likely to per-

37. *Id.* at 2788 (Kennedy, J., concurring in part and in the judgment).

38. *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008), *cert. granted*, 129 S.Ct. 894 (Jan. 9, 2009) (No. 08-328).

39. Adam Liptak, *Justices to Hear White Firefighters’ Bias Claims*, N.Y. TIMES, Apr. 10, 2009, at A1.

suade people about the policies we care about. Over time, I think that such an approach might also undermine the rhetorical appeal of colorblindness. Incremental shifts might alter attitudes toward colorblindness itself, making it seem less a self-evidently desirable objective. Alternative principles that are more context-specific might govern in domains where colorblindness now seems ascendant. In any case, my sense is that the process of change begins with concrete policies, which then may shape commitment to and understanding of general principles.

CONCLUSION

This brief Essay recognizes important milestones in the life of the *BlackLetter Law Journal*—its 25th anniversary—and in the life of our nation, the election of our first African-American president. Although these achievements unquestionably differ in magnitude, each is the culmination of years of struggle. We should all take pride in these accomplishments. We should also recognize, during this first term of our first black president, that the time has come for a new way of thinking about race that the neo-racial sensibility encapsulates. The neo-racial perspective examines contemporary racial inequalities without being captive to the racism narrative that seemed so compelling for so long. This perspective may offer to race and law scholarship what President Obama's election has offered our polity: in the wake of cynicism and failure, a fount of hope.